SLAUGHTER AND MAY/

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QUICK LINKS

Hong Kong's first privately litigated competition trial - no contravention found

The Hong Kong Competition Tribunal (Tribunal) has held that Shell Hong Kong Limited and industrial diesel reseller Taching Petroleum Company Limited did not enter into or engage in an agreement or concertation to fix, maintain or control their respective net prices for the supply of industrial diesel to aluminium manufacturer Meyer Aluminium Limited. The Tribunal found Meyer had "*failed to show even a prima facie case of agreement or concertation*" after the 4-year litigation. Nevertheless, as this is the first privately litigated competition trial in Hong Kong, the case provides some useful guidance on procedural and confidentiality issues.

BACKGROUND AND DECISION

The Competition Ordinance (CO) in Hong Kong does not allow for standalone damages claims. However, it permits proceedings where a competition breach is alleged as a defence (section 113(3) of the CO). This particular litigation started in 2017 with Taching's application for Meyer to be ordered to make payment for industrial diesel oil it had purchased from Taching. An equivalent action was brought by Shell in 2018. Meyer raised a common defence in both actions, claiming that Taching and Shell had colluded to fix their prices, in breach of the First Conduct Rule under the CO (the Hong Kong equivalent of Article 101 of the Treaty on the Functioning of the European Union (TFEU)). The element of both cases that related to Taching and Shell's alleged breach of the First Conduct Rule was transferred from the Court of First Instance (CFI) to the Tribunal to be heard together.

Meyer claimed that Taching and Shell made identical changes to their list prices for industrial diesel oil either on the same day or within a short time after a corresponding change was made by the other. Meyer alleged that these price changes were not public information, and the uniformity in the changes could not be explained by mere coincidence so the only plausible explanation was collusion between Taching and Shell, which would have been a contravention of the First Conduct Rule.

In its judgment on 12 October 2021, the Tribunal held that Meyer had not established that Taching and Shell had contravened the First Conduct Rule. Having reviewed the evidence put forward by the parties in detail, the Tribunal concluded that Meyer had *"failed to show even a prima facie case of agreement or concertation"* and criticised its approach as *"one of fishing through cross-examination"*. The judgment also pointed out that Taching and Shell had to engage in *"an expensive piece of litigation"* with *"the risk of leakage of their confidential business information"*. On the same day and following the Tribunal decision, the CFI issued a judgment concluding the original CFI actions.

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The CFI pointed out that, unlike in the UK and EU equivalent legislation, in Hong Kong an agreement that is in contravention of the First Conduct Rule is not automatically void. Instead, it is for the Tribunal to make an order declaring the agreement to be void. The CFI noted that how this discretion should be applied, and the respective roles of the Tribunal and CFI in such a case, would be left to be examined in a more appropriate case.

QUALITY OF DEFENCE ASSESSED

Section 113(3) of the CO states if *"a contravention, or involvement in a contravention, of a conduct rule is alleged as a defence, the Court must, in respect of the allegation, transfer to the Tribunal so much of those proceedings that are within the jurisdiction of the Tribunal"*. This suggests that a transfer from the CFI to the Tribunal is mandatory where a defence involving contravention of a conduct rule has been raised, without any materiality threshold or power by the CFI to first examine the quality of the defence.

The CFI judge suggested two ways this could be resolved. Firstly, if the defence is so clearly of no substance that it can be struck out or summary judgment can be entered, there is no defence remaining. This would mean the case would not have to be transferred to the Tribunal.

Secondly, section 114(3) of the CO allows the Tribunal to transfer a case back to the CFI *"in the interests of justice"*. As the CFI judge is also a member of the Tribunal, he said that, in an appropriate case, he saw nothing to prevent himself from constituting the Tribunal (with consent of the Tribunal President) and immediately exercising the Tribunal's power to transfer the case back to the CFI. For this reason, the CFI judge suggested that if a case involves an allegation of a contravention of a conduct rule, it would be effective case management for transfer applications to be listed either before the Tribunal President (as a CFI judge) or at least in consultation with the Tribunal President.

CONFIDENTIALITY PRESERVED

During the course of the litigation, applications were put before the Tribunal as to certain issues relating to confidentiality. Notably, Shell requested leave to redact the parts of its points of reply which related to its list price policy.

The Tribunal first noted a distinction between cases involving private litigants and those involving the regulator. With private litigants, to allow the parties to litigate on an equal footing with full knowledge of the materials, disclosure and inspection of documents is the standard procedure. A regulator, by contrast, would already have collected a lot of materials through the exercise of statutory powers, in which case there is no need for the court to put the parties on an equal footing. Therefore, the issue is how much confidential information provided by third parties to the regulator should be disclosed to the party seeking to challenge the regulator's decision.

The Tribunal granted Shell leave to redact as against Taching (its competitor), but refused this as against Meyer (its customer) - the disclosure of Shell's list price policy to Taching might undermine Shell's competitiveness in the market; on the other hand, Meyer is not a competitor of Shell and there was no evidence to suggest that Meyer would misuse the confidential information disclosed to it.

However, in recognition that confidential information may have leaked into the public domain during cross-examination, the Tribunal granted leave for one of Shell's witnesses to be heard confidentially rather than in public. This was justified on the basis that the evidence contained confidential and commercially sensitive information and it was not practical to delineate the witness's evidence into confidential and non-confidential portions.

CONCLUSION

Despite the fact that standalone damages claims are not permitted in Hong Kong, this is the first privately-litigated competition case in Hong Kong. Unusually for a case which started as a simple debt collection claim, the Tribunal took four years to ultimately hold that Meyer did not even put forward a *prima facie* case for its defence. The case provided guidance on the operation of section 113 of the CO, which was invoked here for the first time since the CO came into full force and effect in 2015. It demonstrates that the Tribunal is well aware of the possible procedural issues that the

mandatory transfer mechanism can raise, as well as the importance of preserving parties' commercially sensitive information.

OTHER DEVELOPMENTS

MERGER CONTROL

GENERAL COURT RULING IN LOT V COMMISSION

On 20 October 2021 the General Court (GC) dismissed Polish airline Polskie Linie Lotnicze's (LOT) action against the European Commission's decisions to approve the acquisition of Air Berlin assets by Lufthansa and easyJet, respectively.

Following a filing for insolvency by Air Berlin in August 2017, the Commission cleared Lufthansa's acquisition of certain Air Berlin assets, including aircraft, crew and slots at a number of airports, in return for Lufthansa's giving up certain slots at Düsseldorf airport. In a separate transaction, easyJet secured unconditional clearance from the Commission for its €40 million acquisition of passenger transport operations at Berlin Tegel airport. Rival LOT subsequently challenged the Commission's decisions.

In dismissing this action the GC made, amongst others, the following findings:

- The Commission was justified in departing from its standard approach to cases concerning air passenger transport services by defining the relevant market not according to city pairs between a point of origin and a point of destination (O & D markets), but instead as air passenger transport services to and from certain airports. Such an approach was suitable where (i) Air Berlin's operations had ceased prior to, and independently of, the acquisitions in question, and (ii) Air Berlin's airport slots were not associated with any specific O & D markets and therefore could be used by Lufthansa and easyJet in O & D markets other than those in which Air Berlin operated.
- Taking into account the Commission's discretion on the one hand, and the low rate of congestion at the relevant airports and the limited effect of the acquisitions on the increase in the slot shares held by Lufthansa and easyJet on the other, there was no manifest error in the assessment of the effects of the two acquisitions.
- LOT was not justified in alleging that the commitments given in connection with the Lufthansa acquisition were insufficient, nor should the Commission have taken into account the rescue aid provided to Air Berlin by German authorities in reaching its decision on either of the Lufthansa or easyJet transactions.

CMA FINES FACEBOOK OVER ENFORCEMENT ORDER BREACH IN FACEBOOK/GIPHY

The Competition and Markets Authority (CMA) has fined Facebook £50 million for breaching the initial enforcement order (IEO) imposed on it by the CMA in relation to its 2020 completed takeover of video file search engine, Giphy. This penalty is many times larger than the previous record, a fine of £325,000 the CMA levied against ION Investment Group and ION Trading Technologies Limited in August of this year. (See a previous edition of this newsletter for further details on this and other recent fines imposed by the CMA for breach of an IEO.)

According to the CMA, Facebook had disobeyed the IEO imposed on it early on in the investigation. As part of the process, Facebook is required to provide the CMA with regular updates outlining its compliance with the IEO. The CMA claimed that the scope of these updates was "*significantly limited*". This is the first time that the CMA has held a company to have breached an IEO order for what it described as "*consciously refusing to report all the required information*".

Separately, the CMA has fined Facebook £500,000 for changing its Chief Compliance Officer on two separate occasions without first seeking the CMA's consent.

The penalty decision is the latest development in the life of the IEO. In May 2021 the UK Court of Appeal rejected Facebook's appeal of an earlier judgment issued by the Competition Appeal Tribunal (CAT), in which the CAT had upheld

a refusal by the CMA to allow specific derogations to the IEO. (For further detail of the UK Court of Appeal's judgment, see a previous edition of this newsletter.) The CMA's Phase 2 review of the transaction remains ongoing.

ANTITRUST

EUROPEAN COMMISSION CARRIES OUT TWO UNANNOUNCED INSPECTIONS

In a press release of 12 October 2021 the European Commission confirmed that it had earlier that day conducted unannounced inspections of companies active in the wood pulp sector at premises in several EU Member States. The Commission reported that the inspections were carried out in response to concerns that the companies in question may be in breach of Article 101 TFEU. The Commission carried out the inspections alongside its counterparts from the relevant national competition authorities.

Several companies have since confirmed that they were raided, including Mercer International, Metsä Fibree, Stora Enso and UPM-Kymmene.

Less than two weeks after these inspections and just days after Executive Vice-President Vestager announced that the Commission was planning a "*series of raids*" in the coming months, the Commission confirmed that it had carried out a further raid. In a press release of 25 October 2021 the Commission reported that it had carried out an unannounced inspection at the premises of a pharmaceutical company active in animal health in Belgium. The Commission explained that the inspection was carried out in response to concerns that the company in question may have infringed the EU antitrust rules that prohibit the abuse of a dominant position. It has been reported that Zoetis has since confirmed that it was the target of the inspection and that the Belgian competition authority was also present.

These inspections in the wood pulp and animal health sectors are only the second and third publicly announced inspections conducted by the Commission in almost two and a half years. The previous announcement was made on 22 June 2021 when the Commission confirmed that it had performed unannounced inspections at the German premises of a company active in the manufacture and distribution of clothing garments (see a previous edition of this newsletter). The inspections signal that the Commission is beginning to resume its pre-pandemic on-site unannounced inspections. Prior to the pandemic, the Commission conducted an average of four unannounced inspections each year dating back to 2011.

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