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CMA accepts commitments from P&O and DFDS over capacity sharing agreement

On 5 August 2022, the Competition and Markets Authority (CMA) accepted commitments from P&O Ferries Holdings Limited and DFDS A/S to address competition concerns regarding a capacity sharing agreement for freight customers on the Dover to Calais sea route (the CSA).

BACKGROUND

P&O and DFDS entered into the CSA on 21 May 2021. The purpose of the CSA was to provide a "turn up and go" function for certain freight customers at the Dover and Calais ports, allowing customers to take the next available ferry, regardless of which of the two operators they booked with. To that end, the CSA provided for the parties to align their respective vessel schedules to create a single consolidated sailing schedule. The CSA enabled each of the parties to use part of the other party's freight capacity on each applicable sailing (whether operated by P&O or DFDS), in proportion to its respective share of the parties' total freight capacity.

On 11 November 2021, the CMA launched an investigation into the CSA and joint sailing schedule on the basis that the CMA had reasonable grounds for suspecting that these arrangements contravened Chapter I of the Competition Act 1998 (the Chapter I Prohibition).

On 5 August 2022, following a consultation with interested third parties, the CMA published its decision to accept the commitments proposed by P&O and DFDS (the Commitments).

THE CMA'S COMPETITION CONCERNS

The CMA had identified three competition concerns in relation to the CSA.

JOINT REMOVAL OF SAILINGS

The CMA was concerned that the parties' joint removal of certain sailings when making the consolidated sailing schedule might constitute an anti-competitive output restriction. The CMA noted that only a few, underutilised sailings had been jointly removed by the parties to date. However, the CMA was concerned that if the parties were to continue jointly delisting sailings, this would distort an important parameter of competition: sailing frequency. This could then result in increased prices and reduced customer choice.

FIXING OF CAPACITY

The CMA was concerned that the CSA could be interpreted as fixing the parties' shares of freight capacity and could result in a form of market sharing between competitors. This was because one clause in the CSA stated that each party will have access to the same total freight capacity that they had when they entered into the CSA in May 2021.

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INCENTIVES TO CANCEL SAILINGS

The CMA was also concerned that the agreement could reduce the parties' incentives to avoid *ad hoc* cancellations of sailings. This was because, if a sailing is cancelled, freight customers are able to travel on the next available sailing even if it is operated by the other party – with the cancelling party incurring no loss of freight customers or associated revenue. The CMA's view was that this could lead to reduced customer choice and increased prices.

THE COMMITMENTS

To address the CMA's concerns, P&O and DFDS offered to commit to:

- each unilaterally determine the capacity that each of them makes available on the Dover-Calais route (including the frequency of sailings and vessels used);
- amend the agreement to make clear that it does not fix the amount of freight customers that either company may carry; and
- put strict limits on the circumstances in which sailings may be cancelled (e.g. for reasons outside the control of the parties or low utilisation, with cancellations for low utilisation to be subject to a cap). At the CMA's request, P&O and DFDS also agreed to an additional obligation in respect of this Commitment, namely the appointment of a monitoring trustee to verify the parties' compliance.

The CMA was satisfied that the Commitments address its competition concerns regarding the joint removal of sailings, the fixing of freight capacity, and the parties' incentives to cancel sailings.

CONCLUSION

Formal acceptance of the Commitments brings an end to the CMA's investigation into the CSA and associated joint sailing schedule, with no decision being made as to whether or not the arrangements infringed the Chapter I Prohibition.

In reaching its decision, the CMA recognised that the CSA was 'likely' to 'deliver benefits for competition, customers, and the economy' – of particular salience at a time when there are concerns about supply shortages and delays on shipping freight between the UK and continental Europe (including, in particular, on routes to and from Dover).

On the other side of the Channel, the French Competition Authority opened a separate investigation into the CSA in November 2021. The French investigation is still ongoing, and it remains to be seen whether both competition regulators will see eye-to-eye on the impact and potential benefits of the CSA for freight customers on the Dover-Calais sea route.

OTHER DEVELOPMENTS

ANTITRUST

EUROPEAN COMMISSION AND CMA CONDUCT REVIEW OF LINER SHIPPING CONSORTIA BLOCK EXEMPTION RULES

The European Commission (Commission) and the UK Competition and Markets Authority (CMA) have respectively launched reviews of the liner shipping consortia block exemption rules.

On 9 August 2022, the Commission launched a call for evidence seeking feedback on the Consortia Block Exemption Regulation (CBER) ahead of it expiring on 25 April 2024, to assess the impact of consortia between liner shipping companies and the application of the CBER. Alongside this, the Commission sent targeted

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questionnaires to industry stakeholders including shippers, freight forwarders, carriers and terminal and port operators. Interested parties have until the 3 October 2022 to submit their feedback to the Commission. A summary of the results of the evaluation will be published in the last quarter of this year. The evaluation will help the Commission decide whether the CBER should expire or be extended again (with or without amendments).The CMA followed suit on 24 August 2022, announcing its own review into the retained CBER seeking to assess and make a recommendation to government as to whether to vary or replace the legislation prior to its expiry in 2024. The current CMA review does not involve a public consultation. The CMA's review will assess whether the retained CBER is fit for purpose in light of the challenges facing the shipping sector and the specific features of the UK economy. The CMA expects to open a public consultation on its proposed recommendations in 2023.

The CBER was first adopted in 2009 and extended in 2014 and 2020 and provides legal certainty for liner shipping that their cooperation agreement do not infringe EU or UK competition laws. The CBER allows for cooperation between shipping operators for the provision of joint services under certain circumstances. Exempt activities include the joint operation of liner shipping services which may entail coordinating timetables, pooling vessels and slot exchanges; joint operation or use of port terminals; and capacity adjustments required due to fluctuations in supply and demand. Agreements on price fixing, the limiting of capacity or sales, or allocate markets or customers are not permitted under the CBER. To benefit from the safe harbour of the CBER the liner shipping services' combined market share must be below 30% in the market in which they operate.

STATE AID

EUROPEAN COMMISSION LAUNCHES CONSULTATION ON THE NOTICE ON STATE AID IN THE FORM OF GUARANTEES

On 29 August 2022, the Commission launched a call for evidence and consultation on its evaluation of the State aid rules for assessing State guarantees on loans (Guarantee Notice).

The Commission will use the consultation to evaluate how the Guarantee Notice has functioned since it was first applied in 2000 and last reviewed in 2008. The Commission believes that since then, there have been significant changes to capital requirements, market conditions and risk management. Also, Member States have further developed several methodologies for granting State guarantees. All these factors are considered relevant to whether the Guarantee Notice remains fit for purpose.

The purpose of the Guarantee Notice is to provide guidance for assessing State guarantees in the context of EU State aid rules. The Guarantee Notice sets out how to calculate the aid amount in a State guarantee; rules pertaining to small and medium-sized businesses, including predefined "safeharbour" premiums; and guidance for designing aid-free guarantee schemes for companies of all sizes.

The review will consist of four separate elements assessing the effectiveness, efficiency, relevance, coherence and EU added-value of the Guarantee Notice. These include a public consultation to gather views from all interested parties; an expert consultation; a request for information from Member States about the practical use of the Guarantee Notice; and an open call for evidence on the aims of the review, its scope and context.

Interested parties have until 21 November to submit their views. The results of the evaluation are expected to be released by the Commission in the first half of 2024.

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GENERAL COMPETITION

HONG KONG COMPETITION COMMISSION ISSUES GUIDANCE ON EMPLOYER'S JOINT NEGOTIATIONS WITH EMPLOYEES

On 29 August 2022, the Hong Kong Competition Commission (**HKCC**) announced its publication of an advisory bulletin (**Guidance**) on its intention not to pursue enforcement action against employers for conduct as part of joint negotiations with employees, provided certain conditions are met.

Where more than one employer jointly negotiates with employee bodies to determine employment conditions, competition concerns may arise as employers should ordinarily be competing on compensation and employment conditions but joint negotiations may lead to employers sharing information about their intentions on employment conditions or announcing recommended compensation.

The HKCC said it acknowledges that joint negotiations may bring about improved employment conditions for employees, such as better wages and benefits, which may only be possible through such joint negotiations. In light of this, it does not intend to bring enforcement action for joint negotiations if:

1. employers jointly negotiating with employee bodies is justified in light of the characteristics of the industry;
2. the purpose of the join negotiation is to improve (or maintain) employment conditions; and
3. an employee body is a genuine participant in the negotiation.

The HKCC notes that these conditions would apply to two types of conduct in particular. These are (1) compensation recommendations that incorporate the results of joint negotiation with employee bodies (but do not fix the levels of salaries) and (2) where necessary, employers sharing expectations regarding future compensation during, or to prepare for, joint negotiations.

TWO DEALS BY CHINESE COMPANIES BLOCKED UNDER THE UK'S NATIONAL SECURITY AND INVESTMENT ACT

Since the introduction of the National Security and Investment Act in January 2022, the UK government has only twice exercised its powers to block a transaction on national security grounds. Both of these have involved companies with links to Mainland China and concern the use of intellectual property or technology – for further detail, please see our client briefing.

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