

WILL TRADESMAN COLLECTIVE WAGE AGREEMENT BE EXEMPTED FROM THE HONG KONG COMPETITION ORDINANCE?

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Tradesman Collective Wage Agreement (TCWA) has been used for construction tradesmen for many years. This would ensure the daily wage for qualified tradesmen will not fall below the agreed level. On 14th December 2015, the Hong Kong first ever Competition Ordinance (HKCO) came into effect. Under the First Conduct Rule (Section 6 of the HKCO), an undertaking must not (a) make or give effect to an agreement; (b) engage in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong. Moreover, Section 15 of HKCO allows exemption for agreements that fulfil certain criteria such as economic efficiency and public policy. This study finds that TCWA will likely violate the First Conduct Rule due to its price fixing effect. Moreover, TCWA can apply for block exemption under Section 15 of the HKCO on the ground of engendering economic benefits. Reference is also made to the first application for exemption under the HKCO to illustrate the key arguments.

Keywords: First conduct rule, Wage agreement, Exemption, Competition law.

1 INTRODUCTION

Competition is considered to be a process of economic rivalry among market players. The effect of competition is efficiency whereby production cost can be lowered. As a result, it is believed that customers will be benefitted from competition (Chen and Lin 2002). Thus, when competition is distorted, resources will not be allocated as efficiently as they would otherwise (HKCC 2015). Consequently, the inefficiency will lead to a reduction in social welfare. More recently, it has been advocated that competition will drive innovation through creativity that is now considered as the most pivotal element of a successful venture (Audretsch *et al.* 2001, Amabile 2000, 2012). Against these concepts, competition legislations are common in many parts of the world and are used as a means to ensure sufficient competition.

The Hong Kong Competition Ordinance was enacted in 2012 and came into full force on 14 December 2015 (CAP 619). It has to be emphasized that the spirit of a competition law is not against big players nor to protect small and medium sized enterprises (Whilsh and Bailey 2012). Instead, competition law seeks to prohibit conducts that lessen competition. Thus agreements that have such effect will be prohibited. This study posits to examine if the collective tradesman wage agreement will contravene the HKCO. If yes, would exemption allowed under the HKCO be available. The relevant HKCO sections will firstly be introduced. That include the conduct rule and the provisos for exemption. The TCWA will then be analyzed in the light of these sections. A response strategy is proposed for the construction industry in response to the HKC.

2 ANTI-COMPETITIVE CONDUCT UNDER THE HONG KONG COMPETITION ORDINANCE (HKCC)

After the enactment in 2012, the Competition Commission developed six guidelines in 2015. These are guideline for 1) First Conduct Rules; 2) Second Conduct Rule; 3) Merger Rule; 4) Complaints; 5) Investigations; and 6) Applications for a decision under Section 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders. With these guidelines, the HKCO came into full force on 14 December 2015. The relevant sections that will put TCWA into scrutiny is Section 6 and 8.

Section 6:

- (1) An undertaking must not (a) make or give effect to an agreement; (b) engage in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.
- (2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).
- (3) The prohibition imposed by subsection (1) is referred to in the Ordinance as the ‘first conduct rule’.

Section 8:

The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if:

- (a) The agreement or decision is made or given effect to outside Hong Kong;
- (b) The concerted practice is engaged in outside Hong Kong;
- (c) Any party to the agreement or concerted practice is outside Hong Kong; or
- (d) Any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

Under TCWA, the associations of the key trades would review annually the daily wages for their members. The associations would come up with suggested wages for the respective trades. The contractors or subcontracts employing these tradesmen according to the agreed rates.

First, are trade associations undertakings as stated in section 6(1). The term undertaking is defined in section 2(1) of HKCO as any entity which is engaged in an economic activity. With reference to the item 2.2 of the guideline on the First Conduct Rule (HKCC 2015), examples of undertaking include individual companies, groups of companies, partnerships, individuals operating as sole traders or subcontractors, co-operatives, societies, business chambers, trade associations and non-profit organization. Furthermore, Section 2(1)(a) of the HKCO provides that an anti-competitive conduct is that is defined as any conduct that consists of fixing, maintaining, increasing or controlling the price for the supply of goods or services.

In addition, reference is made to the fee scales offered by many professional bodies such as the architects, engineers and surveyors before the enforcement of the HKCO whereby. Notwithstanding that in reality, fee scale has been followed for quite a while, it is not until the

late 2015 that nearly all professional bodies in Hong Kong took out fee scale from their web sites. This is part of the compliance measures advised by the legal profession.

In sum, the tradesman associations are undertakings and TCWA can be interpreted as fixing price as the daily wages of tradesmen are price to those contracting employing the tradesmen. Moreover, in the event that TCWA is considered as just recommending a price, item 6.81 of the Guideline for FCR states that “Recommended or maximum resale price arrangements, when they are combined with measures that make them work in reality as fixed or minimum prices, will be assessed in the same manner as Resale Price Maintenance (RPM).” In other words, the competition effect will be assessed. As such, prima facie, TCWA will contravene the first conduct rule of the HKCO. As such, the next part of this study examines the applicability of exemption for TCWA.

3 EXCLUSIONS AND EXEMPTIONS UNDER THE HKCO

With due regard that certain anti-competitive conduct may also bring benefits to consumers and in view of the detriment if these conducts are prohibited, the HKCO allows for a limited regime of exclusions and exemptions. The Ordinance provides for the following exclusions and exemptions from the first conduct rule as summarized in Table 1. Out of the grounds for exemption listed in Table 1, only grounds for economic ground may be used by TCWA. For this reason, the discussion here follows will be directed to the relevant Sections.

Table 1. Summary of exemptions under the HKCO [Source: The Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and under Section 15 Block Exemption Orders (HKCC 2015)].

Relevant exclusion or exemption		Exclusion or exemption from the First Conduct Rule
General Exclusions under Schedule 1 of the HKCO	s1 of Schedule 1- Agreements enhancing overall economic efficiency	√
	s2(1) of Schedule 1 - Compliance with legal requirements	√
	s3 of Schedule 2 - Services of general economic interest	√
	s4 of Schedule 2 -Mergers	√
	s5 of Schedule 2 - Agreements of lesser significance	√
	s6 of Schedule 2 - Conduct of lesser significance	
Block Exemption Orders (s1 of Schedule 1)		√
Public Policy Exemption (S31)		√
International Obligations Exemption (S32)		√
Statutory Obligations Exemption (s2(1) of Schedule 1)		√

3.1 General Exclusion

Under Schedule 1 of the General Exclusions from Conduct Rules, agreements enhancing overall economic efficiency can enjoy general exclusion from the conduct rules. Thus, the first conduct rule does not apply to any agreement that:

- (a) Contributes to:
 - (i) Improving production or distribution; or
 - (ii) Protecting technical or economic progress, While allowing consumers a fair share of the resulting benefits;
- (b) Does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a); and
- (c) Does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Item 2.5 of the Guideline further adds that the efficiency exclusion applies when four separate conditions are met.

- *First condition: The agreement contributes to improving production or distribution or promoting technical or economic progress.*
- *Second condition: Consumers receive a fair share of the efficiencies.*
- *Third condition: The agreement does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the relevant efficiencies.*
- *Fourth condition: The agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.*

4 WILL TCWA QUALIFY FOR GENERAL EXCLUSION

This section discusses whether TCWA qualifies for general exclusion. As such the four conditions listed in the above section are discussed seriatim.

Efficiency in this context refers to any improvement that may be obtained in production, distribution or promoting technical or economic progress. It has been argued that a healthy construction industry is vital in Hong Kong due to the voluminous of construction activities currently undertaken. This will continue up to 2020 at least. TCWA is of great economic value as it gives an invaluable reference on the cost of production. With such benchmarks, the daily wages of tradesmen can be kept under reasonable control. These will enable better cost estimation and also control. These benchmarks are then used for claim evaluation as well. These can be viewed as industry norms and can be used as reference/standard set by an undertaking independent of the contracting parties. This approach has been well recognized to serve as gap filling for contract adjustment (Macneil 1977). Furthermore, the use of TCWA has been proved successful in the last 20 years. TCWA can have a stabilizing effect on construction cost and ensure construction tradesmen would have a fair remuneration. The whole set up is definitely not for price fixing. Lastly, the daily wages are subject to market fluctuation. The 1st condition should be fulfilled.

The fulfilment of the 2nd condition is a natural flow as a result of accomplishment of the 1st condition. If construction cost is kept under control and dispute over wages are minimized, the

consumers, buyers of constructed facilities, would be benefitted. Moreover, it is also noted that the selling price of building flats is more market driven than cost driven. The overall impact may just be neutral which is still considered as meeting the 3rd condition.

The 4th condition addresses the concern over the possibility of competition being eliminated as a result of the agreement. As mentioned, TCWA is only setting a reference or benchmark. With limits, the users of these tradesmen can still negotiate with due regard to the market condition. The vice versa is also equally true. It can therefore be concluded that TCWA will not eliminate competition.

This part of the study concludes that TCWA for construction tradesmen satisfy the four conditions and are qualify as agreements that enhance overall economic efficiency.

5 CONSIDERATION FOR BLOCK EXEMPTION

Block exemption is dealt with under Section 15:

- 15(1) If the Commission is satisfied that a particular category of agreement is an excluded agreement, it may issue a block exemption order in respect of that category of agreement.
- 15(5) In this section “excluded agreement” means an agreement that is excluded from the application of the first conduct rule or as a result of section 1 (Agreements enhancing overall economic efficiency) of Schedule 1.

As concluded in Section 4 of this paper, TCWA is a type of excluded agreement under Section 15 of HKCO, it is suggested that the trade associations should apply for block exemption for TCWA accordingly. Reference can be made to an application of block exemption under the HKCO. The Hong Kong Liner Shipping Association (HKLSA) on behalf of the carriers in Hong Kong submitted an application for block exemption for two types of liner shipping agreements. The application was made on 17th December 2015, three days after the HKCO came into full force.

The two types of liner shipping agreements are 1) voluntary discussion agreements and 2) vessel sharing agreements. Voluntary discussion agreements are agreements under which the carriers exchange and review market data, trade flows, supply and demand forecast and business trends (ONC 2016). Parties may agree to recommend voluntary guidelines for rates, charges, service contract or tariff terms. These activities are likely be viewed as price-fixing and thus fall foul of first conduct rule. Vessel sharing agreements concern the technical and operational aspects of the provisos of liner shipping services. As such, coordination or joint operation of vessel services may be resulted. These actions may prevent, restrict or distort competition that first conduct rule seeks to control.

The main argument presented by the HKLSA is on the adverse effect on the shipping industry should a lot of transshipment cargo may choose to be transshipped in other nearby ports, particularly in the pearl delta region. In addition, these agreements do not restrict competition as there are other competitive constraints such as the overwhelming market power of the buyers. The low barrier of entry and wide and fragmented market. There is no decision by the HKCC yet but the arguments for TCWA would be quite similar. ONC (2015) commented that similar exemption has been granted in Singapore and European Commission. Since the HKCO has been modelled on the European and Singaporean counterparts, similar exemption grant is expected for the liner agreements and so does TCWA should an application for block exemption is made.

6 CONCLUSIONS

TCWA has been used in the Hong Kong construction industry and proved to serve well as a stabilizing platform for cost estimation and control. Akin to the minimum hourly rates for workers, TCWA serves ensure the contributors of the construction industry are rewarded with competitive wages so that the industry will continue to prosper. This study finds that TWCA will likely contravene the first conduct rule of the HKCO. However, the characterizing features of TWCA would satisfy the four conditions that qualify them as excluded agreements. S such it is suggested that the trade associations should apply for block exemption for TWCA like the HKLSA for the liners in Hong Kong.

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