SLAUGHTER AND MAY

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CMA launches consultation on leniency applications in regulated sectors

On 30 June 2017 the Competition and Markets Authority (CMA) **published** a consultation document and draft information note inviting comments on proposed arrangements for the handling of leniency applications in the regulated sectors in the UK. In particular, the CMA proposes that it should act as the single port of call for all leniency applications in these sectors.

Concurrent competition powers and the leniency regime

Certain sectoral regulators[1] have concurrent powers to enforce competition law in their respective markets alongside the CMA. This includes the power to impose financial penalties for conduct that infringes competition rules.[2] Under the CMA's **guidance as to the appropriate amount of a penalty**, the first cartel participant that comes forward with information on the illegal activity can apply for leniency and receive complete immunity from fines, with successive applicants eligible for up to a 50 per cent reduction. Individuals may also receive immunity from criminal prosecution and protection from disqualification orders.

Handling of leniency applications: current position

The general process for applying to the CMA for leniency and its approach to handling such applications is set out in its **leniency guidance**. However, the CMA notes that, to date, it has not published any specific guidance on the handling of leniency applications in the regulated sectors and that as a result there may be a risk of unpredictability for applicants and inconsistency between cases. Leniency applications in these sectors have operated on the basis of a 'single queue system'. An applicant may make an application to any authority and, provided that the conditions for leniency are met, that application will secure its place in the leniency queue regardless of which authority then takes enforcement action.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] The Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Utility Regulator (Northern Ireland), the Water Services Regulation Authority (Ofwat), the Financial Conduct Authority (FCA), the Office of Rail and Road (ORR), the Civil Aviation Authority (CAA) and the Payment Systems Regulator (PSR).

[2] Namely the prohibitions set out in Chapters I and II of the Competition Act 1988 and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Proposed changes to leniency concurrency arrangements

In order to streamline the process and provide certainty and consistency for businesses, the CMA proposes that all initial leniency enquiries and applications begin with the CMA. That is, whistleblowing companies – regardless of the sector they operate in – will have to approach the CMA in the first instance in order to secure their leniency marker and place in the queue. In the event that such an enquiry or application is made to a sectoral regulator, the regulator will immediately direct the applicant to the CMA. This process would cover both civil and criminal immunity.[3]

Whilst the CMA (in consultation with the relevant sectoral regulators) will be responsible for checking the availability of leniency and granting any provisional marker, the ultimate decision to grant (or withdraw) leniency will be made by the authority to which the case has been allocated in accordance with the **Concurrency Regulations**. The proposed single point of contact approach will therefore rely on close communication and cooperation between the CMA and the sectoral regulators. In particular, the CMA will need to liaise with the relevant regulators before granting particular types of leniency marker that require the applicant to be 'first-in' and/or for there to be no pre-existing investigation into the conduct concerned, in order to determine whether an investigation has already commenced. In addition, the CMA will maintain a single, central leniency register, whilst each sectoral regulator will also keep its own leniency register.

Next steps

The deadline for responses to the consultation is 28 July 2017. Subject to the responses received, the CMA will subsequently publish a final version of the information note on the leniency concurrency arrangements.

Other developments

Merger control

DG Comp wishes shipping joint venture fair winds

On 29 June 2017 the European Commission **unconditionally approved** under the EU Merger Regulation the proposed creation of a joint venture (JV) between three Japanese shipping carriers – Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines and Kawasaki Kisen Kaisha Ltd – active in the field of international maritime transport. The Ocean Network Express (ONE) JV will integrate the global container liner shipping activities and container terminal businesses of its parent companies (excluding their terminals in Japan) so as to create the world's sixth-largest container line.

[3] The CMA is the only concurrent regulator with jurisdiction over the criminal cartel offence contained in the Enterprise Act 2002, and only the CMA can grant immunity from criminal prosecution. A single queue system in which the CMA is the first point of contact would therefore support the operation of this regime.

The Commission concluded that the proposed concentration raised no competition concerns as: (i) the transaction would have limited impact on the routes to and from Europe, and (ii) there would continue to be effective alternative competitors present on the market post-transaction. This decision comes one week after South Africa's Competition Commission **blocked** the JV on grounds that the shipping market is structured in a manner "*conducive to coordination*". Other competition authorities, including those of Brazil, Singapore and China, have recently approved the proposed JV.

The proposed JV comes at a time of increasing market consolidation in the shipping liner industry that has attracted global antitrust scrutiny. In the last year, the European Commission has approved with conditions **Maersk Line's acquisition of Hamburg Sud** and the **purchase of United Arab Shipping Company by Hapag-Lloyd**. In addition, the industry is under probe by various competition authorities worldwide. Last month, the Mexican competition authority Cofece imposed a **fine** of 582 million pesos (c. €28.5 million) on seven shipping companies (including the JV parents) for agreeing to divide the market for maritime transportation of motor vehicles.

CMA clears first merger in line with new *de minimis* guidance

On 7 July 2017 the CMA **published** the full text of its decision not to refer the merger between IBA and Mallinckrodt's global nuclear imaging businesses for an in-depth Phase II investigation. This is the first case in which the CMA has exercised its statutory discretion not to make a reference since the publication on 16 June 2017 of its **revised guidance** on the exception to the CMA's duty to refer a merger in markets of insufficient importance (the *de minimis* exception).

The main objective of the revised guidance is to avoid investigations where the cost would be disproportionate to the size and importance of the market concerned, thereby reducing the number of probes in smaller markets. The *de minimis* threshold for markets generally considered not to be sufficiently important to warrant a reference was increased from £3 million to £5 million. In addition, the threshold for markets generally presumed to be of sufficient importance to require a reference was raised from £10 million to £15 million. No presumption applies for markets with a value of between £5 million and £15 million.

In the present case, both companies supply single photon emission computed tomography (SPECT) radiopharmaceuticals in the UK. SPECT products are used in the diagnosis of disease in several different tissues and organs including bones, the brain, heart, kidneys, liver and lungs. Although the merger would have reduced the number of suppliers of one category of SPECT products from three to two, which may have resulted in a substantial lessening of competition, the CMA exercised its discretion not to refer the case for a Phase II investigation. The size of the relevant market is below £5 million and the CMA did not find reasons to justify a reference.

General competition

CMA introduces changes to market investigations procedures

On 5 July 2017 the CMA published changes to the conduct of market investigations in an **updated guidance note**. The updated guidance, which responds to the CMA's consultation carried out between March and May 2017, sets out a series of changes aimed at streamlining the market investigation process. These include: (i) earlier interaction with stakeholders during the investigation (including earlier hearings); (ii) earlier assessments of potential remedies that may improve the market; and (iii) a reduction in the number of formal publication and consultation stages (e.g. by combining provisional findings and provisional remedies into a single report). The CMA has **noted** that these changes have been driven in part by the shorter statutory timescale now allowed for market investigations (18 months instead of two years).

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