SLAUGHTER AND MAY

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Judge stops CMA from using undisclosed evidence to defend Concordia warrant

On 16 November 2017 the UK High Court **ruled** that the Competition and Markets Authority (CMA) cannot rely on redacted or withheld evidence when defending an application to discharge or vary search warrants. The judgment results from Concordia's challenge to a search warrant that had been granted as part of the CMA's investigation into alleged collusion in the market for hydrocortisone.

Background

The hydrocortisone investigation is focussed on agreements under which Concordia was allegedly incentivised not to sell hydrocortisone tablets (a steroid treatment). In March 2017 the CMA issued a statement of objections to the effect that such agreements enabled another party, Actavis UK, to remain the sole supplier of hydrocortisone tablets, prolonging high prices in the market and depriving the NHS of significant price reductions.

The CMA's powers of search

When conducting investigations, the CMA has the power to apply to court for a 'section 28 warrant' to enter and search a business premises for evidence if there are reasonable grounds to suspect that such evidence would be concealed, tampered with or destroyed if it was requested through normal procedures.[1] In this case, such an application was made on 5 October 2017 and the warrant granted the following day.[2] The warrant was executed on 10 October 2017 and on the same day Concordia applied to the High Court to partially discharge or vary the warrant.

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

[1] The CMA can also enter a business premises without a warrant. This procedure is less favoured as it carries no search powers, no powers to use force and greater limits on what can be seized.

[2] It is standard practice that an application for a warrant is heard in private without the presence of the other party. A warrant granted via this process is valid only for one month from the date on which it is issued.

The judgment

The pivotal issue in this case was deciding which pieces of evidence the court should consider when assessing a challenge to the validity of the warrant. More specifically, how material potentially protected by public interest immunity (PII)[3] is to be treated when there is an application to vary or revoke a warrant issued pursuant to section 28, based in part on such material.

This is the first time that a section 28 warrant has been challenged and therefore this issue had never been tested before and there is no specific statutory guidance. The CMA argued that the court should consider all evidence submitted in the original warrant application. This included evidence that the CMA had withheld from Concordia on the grounds of PII. Under PII, the CMA may withhold evidence where disclosure would jeopardise further investigations (such as investigations into collusion in other markets). However the court found that by relying on PII to withhold evidence from Concordia while simultaneously trying to rely on such evidence to justify the search warrant, the CMA was proposing a process that was intrinsically unfair and one which could not be adopted without legislative endorsement.[4]

The court also found that while it is appropriate that the CMA can obtain a warrant *ex parte* without notice, if and when there is a challenge to the warrant and an *inter partes* hearing is held, the court should approach the matter afresh and the application to vary or discharge the warrant issued under section 28 should be by way of a complete rehearing. In such a rehearing the CMA can only rely on evidence that both parties can access and scrutinise.

The procedure recommended by the court

The court, being alive to the risk of hindering the effectiveness of the CMA's investigating powers, held that going forward the approach to be adopted should balance both the public interest in the effective investigation of infringements of competition law and in protecting the rights of a business from infringement and invasion.

Accordingly, the court stated that all evidence, including that allegedly protected by PII, should be submitted to the court when the CMA originally applies for a section 28 warrant at an *ex parte* hearing. The CMA should highlight to the court any evidence that it wishes to protect from the other party under PII. If the warrant is then challenged, the application for the warrant will be reheard with both parties present and able to submit arguments.

If, at this *inter partes* hearing, the CMA still wishes to withhold information on the basis of PII, this information will not be directly considered by the court. Instead the CMA and the court will discuss the withheld evidence to ascertain whether the "gist" of the redacted information could be provided to the

[3] Public interest immunity allows a party to withhold otherwise disclosable evidence where there is a risk of serious prejudice to an important public interest.

[4] The court also rejected Concordia's proposal to allow only Concordia's lawyers to view the PII evidence in a confidentiality ring as it was doubtful that such a scenario was practically viable given the need for the lawyers to consult with their client.

other party without revealing the sensitive material. Such communication could be made by the CMA in an affidavit.

Press reports suggest that the CMA intends to appeal this decision.

Other developments

Merger control

CMA clears Just Eat/Hungryhouse merger and provisionally approves Tesco/Booker deal

On 16 November 2017 the CMA **approved** the acquisition by Just Eat plc of Hungryhouse Holdings Limited, having completed its Phase II investigation. Just Eat and Hungryhouse are both web-based food ordering platforms operating in the UK, allowing customers to choose from a wide range of takeaway options in a single place and enabling restaurants to reach a larger pool of customers. The clearance confirms the CMA's **provisional findings** of 12 October 2017 that the transaction does not raise competition concerns.

The CMA found that Hungryhouse provides limited competition to Just Eat because its smaller size and limited choice of unique restaurants impact its ability to attract and retain customers. In addition, the CMA concluded that the entry and expansion of platforms such as Deliveroo, UberEATS and Amazon, which also manage or facilitate delivery services on behalf of restaurants, generally provide a greater competitive challenge to Just Eat than Hungryhouse. It was also noted that some customers may prefer to place orders directly with takeaway restaurants, either online, by telephone or in person.

The decision comes two days after the CMA published its **initial findings** provisionally approving the acquisition of Booker Group plc by Tesco plc, the UK's largest grocery wholesaler[5] and the UK's largest grocery retailer respectively. The CMA's preliminary conclusion is that this 'bricks and mortar' merger does not present competition concerns as Tesco and Booker do not compete head-to-head in most of their activities. The CMA also considered the impact of the merger in all local areas where a Tesco and a Booker-supplied shop compete (over 12,000 shops) and provisionally found that the presence of other nearby retail competitors as well as generally strong competition in wholesale services would be sufficient to prevent the merged entity from raising prices or reducing service levels. The CMA has until 26 December 2017 to come to its final decision.

[5] Booker supplies caterers and independent and symbol group retailers, including Premier, Londis and Budgens.

Antitrust

European Commission fines five car safety equipment suppliers €34 million in cartel settlement

On 22 November 2017 the European Commission **announced** fines amounting to a total of €34 million on five car safety equipment suppliers as part of a settlement in a cartel case. The Commission found that the conduct constituted four separate infringements. Tokai Rika, Takata, Autoliv, Toyoda Gosei and Marutaka acknowledged their involvement in one or more of four cartels pertaining to the supply of car seatbelts, airbags and steering wheels to Japanese car manufacturers Toyota, Suzuki and Honda in the European Economic Area (EEA). The five suppliers exchanged sensitive information and coordinated prices or markets relating to the supply of car components. This conduct took place outside the EEA, notably in Japan, but the cartel may have had a significant impact on European customers given the number of cars sold in Europe produced by Japanese companies and that Toyota, Suzuki and Honda all have manufacturing plants in the EEA.

Takata received full immunity for revealing three of the cartels, thereby avoiding an aggregate fine of approximately €74 million. Similarly, Tokai Rika received full immunity for bringing one of the cartels to the Commission's attention, avoiding an aggregate fine of approximately €15 million. Tokai Rika, Takata, Autoliv and Toyoda Gosei benefited from fine reductions under the leniency notice for cooperating with the investigation and to reflect the extent to which the evidence they submitted helped to prove the existence of the cartels. Marutaka was found to be a facilitator in one of the cartels and was not granted a leniency reduction. All of the parties were granted a further standard 10 per cent settlement reduction.

This decision – the 25th cartel settlement since the introduction of the settlement procedure in 2008 – is part of a series of cartel investigations in the automotive parts sector and brings the total amount of Commission cartel fines in this sector to €1.6 billion.

General competition

Vestager explains the role of competition in making globalisation work

In a **speech** delivered on 23 November 2017 at KU Leuven (Belgium), EU Competition Commissioner Margrethe Vestager spoke of the role of competition in making globalisation work for European citizens and companies. She first discussed the role of competition enforcement in giving individuals the confidence that global markets work for them, in particular looking at enforcement of the rules against cartels, abuse of dominance and illegal State aid. Recognising that "*people know they depend on big, global businesses for their everyday needs*", which "*can sometimes feel unsettling*", she explained that competition gives individuals the power to make companies listen to customers and, for example, cut prices or offer innovative products.

Vestager also explained that the EU's merger control rules were not designed to stop companies from "getting big" but to ensure that mergers do not remove the competition that makes markets work for consumers. She recognised the desire of Europe's businesses to grow to compete in increasingly-competitive world markets. She points out that there are many ways for companies to grow without harming competition, such as by divesting parts of a merged business if there are anticompetitive overlaps, or by merging with a company that has strengths in a different part of the world. She does not believe that merger control rules are holding European companies back "*from succeeding in the world*". To illustrate the point, she discussed recent clearance decisions in merger cases involving "European champions". She then went on to say that, rather than hindering European businesses, competition rules help these businesses to succeed by remaining competitive, noting that: "*Competition means that the companies that succeed are the ones that serve customers the best. That produce innovative products… And that's just what our companies need, to face global competition*".

With these statements in mind it remains to be seen how the European Commission will approach the recently announced plan of Siemens AG and Alstom SA to combine their transport businesses, which would create a "*European champion in the rail industry*" (in the **words** of the companies themselves), in a deal that requires EU clearance. The proposed merger has received the **support of Bruno Le Maire**, France's Minister of the Economy and Finance, who indicated that it would better allow the European companies to compete on the world stage.

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