SLAUGHTER AND MAY

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"Be safe not sorry": CMA launches new campaign targeting cartels and encouraging whistleblowing

On 19 February 2018 the Competition and Markets Authority (CMA) **announced** the launch of a new **campaign** to crack down on cartels and encourage more people to blow the whistle. The campaign, which leads with the tagline "*When it comes to cartels, be safe not sorry*", encourages anyone who has witnessed or been involved in a cartel to "*tell us about it and help us make markets fairer*". The CMA states that this is part of a ramping up of its enforcement activity, and comes after the government increased its funding for this work.

The "Safe not Sorry" campaign

The campaign page provides a series of videos, short guides and case studies explaining what cartels are and how people can report them. The CMA urges witnesses to report even minor information regarding suspected cartels using the dedicated telephone and email hotlines which were set up in 2017. The CMA encourages witnesses to come forward by pointing to its "specially trained officers" who can discuss any concerns, particularly anonymity, and by emphasising the availability of financial rewards of up to £100,000. The CMA also reminds people who have been involved in cartels themselves that if they come forward with information, they can receive significant reductions in fines and avoid being disqualified from running a company. If they are the first to come forward, they can receive total immunity from fines and criminal prosecution.

The campaign also features a short **quiz** intended to test whether businesses know enough about competition law to enable them to assess whether they might be at risk. The quiz includes the following questions:

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Question	Answer
It can be illegal to attend a meeting with employees from other businesses where price is discussed	✓
As a customer, it's ok to tell suppliers the prices that other suppliers are quoting you	✓
It's ok to agree prices with competitors in order to avoid losing money	✗
Businesses can agree not to sell to the same customers as each other	✗
Price fixing is a criminal offence and can lead to imprisonment	✓
It's ok to discuss commercially sensitive details of bids (such as price) with competing bidders	✗
Dominant businesses have a special responsibility not to behave in ways that unfairly squeeze out their rivals	✓
Admitting your involvement in a cartel can lead to immunity from penalties	✓
How much can businesses be fined for breaking competition law?	Up to 10 per cent of annual worldwide turnover, plus potentially damages payments to third parties

Three case studies are provided as real-life examples of cartels. These are (i) the **Somerset estate agents cartel**, where the estate agents were fined over £370,000 for fixing the minimum prices of their commission rates; (ii) the **water tanks cartel**, where firms were fined over £2.6 million for dividing up customers and fixing minimum prices for tanks used in large construction projects, such as schools and hospitals; and (iii) the cartel involving **online sellers fixing prices**, where a seller on Amazon marketplace was fined over £160,000 and a director was disqualified for agreeing to fix the prices of posters and frames with a competitor (who received immunity).

The campaign specifically targets sectors in which the CMA believes there is a greater risk of cartels. These sectors, including construction, manufacturing and business support services, are those which have either a history of cartels, or characteristics which make them vulnerable to cartel behaviour.

The campaign is backed by **Public Concern at Work**, an independent whistleblowing charity which provides confidential advice to workers who are unsure whether or how to raise a public interest concern.

Previous media campaign

This campaign follows a similar campaign, "Cracking down on Cartels", which was **launched** by the CMA in March 2017. In that first digital campaign, the CMA also offered whistleblowers a reward of up to £100,000 while also promising anonymity to any witnesses who came forward. It was launched following **research** which found that less than a quarter of businesses said that they properly understood competition law. The success of the first campaign spurred the CMA to launch the "Safe not Sorry" campaign. The CMA reports that 2017 saw a 30 per cent increase in tip offs on cartels, while over the past two years the CMA

has issued £151 million in fines following successful investigations into anti-competitive practices. The CMA is currently investigating 15 cases where competition law may have been infringed.

The 2017 Autumn Budget

Another driver of the "Safe not Sorry" campaign is the £2.8 million additional funding per year granted to the CMA in the **2017 Autumn Budget**. In the Budget, which was announced on 22 November 2017, the Chancellor of the Exchequer Philip Hammond held that driving stronger competition was a key part of the government's plan to "*build an economy fit for the future*". The Budget stated that the government "*backs the [CMA], the UK's internationally-respected competition authority, providing additional funding to stamp out anti-competitive practices*", and that the government was granting the extra funds so that the CMA can "*take on more cases against companies that are acting unfairly*" and "*use more of the fines it collects to meet the legal costs of defending its decisions*". As regards Brexit, the Budget stated that "*the government will ensure the UK has the robust and effective competition system it needs after the UK has left the EU*". The CMA reportedly said last week that it expects to receive extra government funding to deal with the likely significant rise in its workload after Brexit, including in relation to cartels.

Conclusion

It therefore seems that the CMA, buoyed by the apparent success of its previous media campaign and with the uncertainty surrounding the future competition law landscape in the UK in the run up to Brexit, is taking a particularly active enforcement approach towards cartels, and that this approach is backed financially by the government.

Other developments

Merger control

Vestager announces European Commission to look into effects of "common ownership" on competition

Speaking at the FIW Symposium in Innsbruck, Austria, on 16 February 2018 Competition Commissioner Vestager suggested that companies operating in the EU may be "*getting more closely linked*" and that "*it's becoming more common for the same investors to hold shares in different companies in the same industry*". Speculating that, in theory, such a development could lead to investors urging rival companies in which they hold interests not to "*compete too hard*", Vestager indicated that the European Commission is looking into how common this sort of common ownership might be.

Explaining that European data on this issue lags behind that available in the US, the Commissioner indicated that the Commission's review would be essentially two-fold: first, establishing whether it is indeed common in Europe for companies in the same industry to have the same shareholders, and, secondly, if so, determining what effects such common ownership would have on competition. Vestager stressed that the Commission would not assume that an increase in common ownership invariably

diminished competition within an industry, but would instead seek "*to understand what effect common ownership really has*", noting that "*just because investors might benefit from less competition doesn't necessarily mean companies will oblige*." She also noted the difference between "*holding shares in a company" and "controlling its decisions*".

The Commissioner's observations on the topic come not long after the decision in ***Dow/DuPont*** of March 2017. In this decision the Commission looked at the agrochemical sector and held that "*a number of large agrochemical companies have a significant level of common shareholding*" and that "*in the context of innovation competition, such findings provide indications that innovation competition in crop protection should be less intense as compared with an industry with no common shareholding*". The Commission expressed the opinion that "*the presence of significant common shareholding is likely to negatively affect the benefits of innovation competition for firms subject to this common shareholding*".[1]

PCC voids transaction in first Philippines gun-jumping decision

On 19 February 2018 the Philippine Competition Commission (PCC) issued a **decision** fining Udenna Corporation, a Philippine holding company, and KGL Investment Cooperatief U.A. (KGLI Coop), domiciled in the Netherlands, for failing to notify Udenna's acquisition of KGLI Coop's wholly-owned subsidiary, KGL Investment B.V. (KGLI-BV). The PCC **press release** accompanying the decision notes that the Mergers and Acquisitions Office of the PCC commenced its investigation in December 2016, after receiving a third party complaint. The PCC has fined Udenna and KGLI Coop PHP 19.6 million (approximately €300,000), equivalent to 1 per cent of the value of the transaction, and declared the transaction to be void.

The parties sought to argue that notification was not required on the basis that the value of KGLI-BV's existing minority (39.71 per cent) shareholding in a separate Philippine company should be excluded from the jurisdictional test. The PCC rejected this argument, and found that the law only excludes the value of shares held by the acquired company in entities that it controls, to avoid double-counting. The value of the acquired company's shares in entities it does not control must be included to reflect the actual value of the acquired company's assets.

The PCC panel unanimously agreed that the fine should be equivalent to 1 per cent of the value of the transaction, the lowest in the statutory range of penalty, taking account of the parties' active cooperation during the investigation. However, one Commissioner dissented in relation to the decision to void the transaction, noting that it seemed unduly harsh.

The decision remains subject to appeal. Alternatively, the parties could comply with the decision by notifying the transaction to the PCC. Pending any successful challenge to the decision, this case sets an important precedent in the Philippines that any mergers completed in breach of the notification requirement are likely to be declared void. The majority of the Commissioners found that entirely voiding the acquisition was the best way to ensure the intended deterrent effect of the country's gun-jumping laws. One pertinent question is whether the PCC will take a similar approach with respect to foreign-to-foreign mergers, and whether this would be proportionate and reasonable in the circumstances of the case. At the same time, there are welcome signs that the PCC may adjust the PHP 1 billion notification threshold so that fewer transactions are caught, after its chairperson **noted** last week that a draft

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[1] Case M.7932 – *Dow/DuPont*, Commission Decision of 27 March 2017, paras. 2351 and 2352.

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proposal for the adjustment of the threshold is expected to be published by the PCC in the first half of 2018.

Antitrust

European Commission fines maritime car carriers and car parts suppliers €546 million

On 21 February 2018 the European Commission **announced** that it had adopted three cartel settlement decisions in which it fined four maritime car carriers, two companies active in the supply of spark plugs (which are used to ignite the petrol in a car engine) and two companies that supply braking systems for participating in cartels.

In the maritime car carriers decision, the Commission fined shipping groups CSAV, K-Line, WWL-EUKOR and NYK a total of €395 million. MOL avoided a fine as it had revealed the existence of the cartel to the Commission, therefore receiving immunity in respect of potential fines. The Commission's press release indicates that the carriers fined in this case were responsible for the transportation of almost half of the motor vehicles imported to and exported from the EU in 2016. The Commission found that the cartelists had coordinated prices, divided customers between them and exchanged commercially sensitive information that could help them to align their prices. Furthermore, the carriers agreed to maintain each other's traditional business, either by quoting artificially high prices or refraining from providing quotes at all in tender processes run by vehicle manufacturers.

In the spark plugs decision, the Commission imposed fines totalling €76 million on two companies, Bosch and NGK. A third, Denso, was granted full immunity. The cartel was aimed at avoiding competition and maintaining the status quo in the EEA through the exchange of sensitive information and in some cases agreement on prices to be quoted or shares of supply.

In its third decision, the Commission found two cartels relating to the supply of hydraulic braking systems (HBS) and electronic braking systems (EBS) respectively. Suppliers Bosch and Continental received fines totalling €56 million for participating in the HBS cartel together with TRW, which received full immunity for revealing the existence of the cartel. The EBS cartel involved Bosch and Continental: Bosch was fined an additional €19 million for its involvement in this cartel, with Continental receiving full immunity. Both cartels involved the exchange of sensitive information including information relating to price.

In all three decisions, the fined companies benefited from reductions to their fines of varying amounts under the 2006 Leniency Notice for cooperation with the Commission's investigation. Moreover, each of the decisions was taken under the cartel settlement procedure, for undertakings that admit participation in the cartel, leading to a further 10 per cent reduction in respect of all fines levied.

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