SLAUGHTER AND MAY

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Court of Appeal rules on public interest immunity material and confidentiality rings

In the context of a Competition and Markets Authority (CMA) investigation into whether or not drug companies were entering into anti-competitive agreements which prolonged high prices for a life-saving drug, on 7 August 2018 the UK Court of Appeal **ruled** on certain matters in respect of public interest immunity (PII) material and the use of confidentiality rings. The Court of Appeal held that:

- courts may consider PII material when determining whether or not to vary or revoke a warrant;
- PII and disclosure are not to be determined upon application for the warrant; and
- confidentiality rings are not a suitable tool to be used in respect of PII material.

Background

The CMA can apply to the High Court for the issue of a warrant to give the CMA the power to enter business or domestic premises without notice.[1]

At an *ex parte* hearing in October 2017 (i.e. a hearing where not all parties are present) the CMA was granted a warrant to enter the business premises of, amongst others, Concordia. The CMA's investigation focussed on agreements under which Concordia was allegedly incentivised by Actavis UK, a competitor, not to sell hydrocortisone tablets. In particular, the CMA contended that such agreements enabled Actavis UK to remain the sole supplier of such tablets.

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

[1] Under the Competition Act 1998, a warrant may be granted where: (i) the CMA has failed to obtain the evidence it seeks by way of information requests or the power to enter premises without a warrant; or (ii) the CMA has reasonable grounds to believe that there are documents in the premises which had not been disclosed by the party following an information request and, if the documents were required to be produced, they would instead be concealed, removed, tampered with or destroyed.

High Court Judgment

Concordia applied to the **High Court**[2] to vary the warrant to exclude two of the drugs subject to the warrant. Concordia argued that it had been cooperating with the CMA's investigations in respect of those drugs, as such there was no basis on which the CMA could suspect that it would conceal, remove, tamper with or destroy any evidence in respect of them.

The High Court considered whether the CMA was required to disclose to Concordia all the material which had been adduced at the *ex parte* hearing. The High Court accepted that the CMA could use material covered by PII in respect of its application for a warrant. However, in respect of subsequent challenges to that warrant, the High Court held that:

- a judge hearing an application to vary or discharge a warrant could not take into account any material protected by PII;
- PII and disclosure were issues to be determined at the *ex parte* hearing; and
- confidentiality rings were not suitable for issues of PII.

The High Court ordered that: (i) the CMA disclose to Concordia all evidence that it had relied on at the *ex parte* hearing (save for any PII material); and (ii) Concordia's application be determined without relying on any PII material.

The CMA appealed on the grounds that the High Court had erred in holding that: (i) an application to vary or revoke a warrant must be determined without the court relying on any PII material; and (ii) PII material and the scope of disclosure should be determined at the *ex parte* hearing. Concordia cross-appealed in respect of the ruling against the use a confidentiality ring as a means of protecting PII material.

Court of Appeal Judgment

The Court of Appeal allowed the CMA's appeal and dismissed Concordia's cross-appeal.

Reliance on PII

In the period between the High Court judgment and the hearing in the Court of Appeal, the Supreme Court handed down its judgment in ***Haralambous***[3] - a case concerning warrants in a criminal setting (but which was analogous to this case). In light of the decision in *Haralambous*, it was common ground between the parties that any judge considering an application to vary or revoke a warrant "*is entitled, and indeed is obliged, to consider all relevant material regardless of the fact that some of it may be subject to PII*". As such, the appeal against the judge's order on this point must be allowed.

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[2] *Competition and Markets Authority v Concordia International Rx (UK) Limited* [2017] EWHC 2911 (Ch).

[3] *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1.

Determination of what is protected by PII

The Court of Appeal held that the adjudication of what material is covered by PII and to whom it should be disclosed was not a matter to be determined at the *ex parte* hearing. The appropriate time for any such discussions was on the application by the subject of the warrant to have the warrant varied or set aside. Incorporating these discussions into the initial application for a warrant would be impractical and would require the CMA to make a pre-emptive assessment into what material should be redacted in the event of a challenge to a warrant.

Use of confidentiality rings

Concordia argued that confidentiality rings were routinely used in competition cases for commercially sensitive material and that a similar process could be used for PII material. On this basis it was submitted that PII material may be disclosed by the CMA into a tight confidentiality ring comprising Concordia's external lawyers.

The Court of Appeal rejected this cross-appeal on the basis that the fundamental principle with respect to PII material was that "*once a court has held that the material is protected by PII it cannot be disclosed, whether into a confidentiality ring or otherwise*". The extension of the use of confidentiality rings from their normal use in respect of commercially sensitive information to include PII material would be to "*stretch them to breaking point*". As such, upon any application to vary or revoke a warrant, PII material will be scrutinised by way of a closed material procedure.[4]

Other developments

Merger control

SAMR publishes its first penalty decisions for failure to notify since agency consolidation

The State Administration for Market Regulation (SAMR) recently published three penalty decisions for failure to notify. These are the first such decisions to be published since the consolidation of China's antitrust agencies, announced in March 2018, which saw the merger review functions of MOFCOM transferred to SAMR. In all three cases, SAMR noted that there was no anti-competitive impact.

The first two decisions were published by SAMR on 3 August 2018. The **first decision** imposed a penalty of RMB 150,000 (approximately £17,000) on each of Tianjin Haiguang Advanced Technology Investment and US semiconductor company Advanced Micro Devices, for failure to notify two Chengdu-based joint

[4] A closed material procedure is one whereby all or part of a claim can be heard in closed proceedings in order for the court to consider material which is protected by PII.

ventures. The case came to SAMR's attention by way of a voluntary report from the companies. In the **second case**, SAMR fined Yunnan Metropolitan Real Estate Development RMB 150,000 for failure to notify its acquisition of a partial or entire stake in eight real estate companies (the aggregate turnover of which met the relevant notification threshold). In both cases, the penalty decisions were made by MOFCOM on 26 April 2018, prior to the agency consolidation.

The most recent case was **published** by SAMR on 10 August 2018. SAMR imposed a penalty of RMB 300,000 (approximately £34,000) on pulp mill operator Paper Excellence, for failing to notify its acquisition of competing pulpmaker Eldorado Brasil Celulose. SAMR began its probe on 28 March 2018 and made its penalty decision on 30 July 2018, making it the first penalty decision to be imposed since the agency consolidation (although there is no notable change in the style, format or content of the penalty decision).

The decisions continue MOFCOM's focus on sanctioning cases of failure to notify. As reported in this previous **edition** of our newsletter, MOFCOM published three failure to notify decisions at the beginning of the year. To date, 23 such decisions have now been published.

Antitrust

CCCS issues proposed infringement decision against the owners/operators of four hotels

On 2 August 2018 the Competition and Consumer Commission of Singapore (CCCS) published a **proposed infringement decision** against the owners/operators of four hotels in Singapore. The proposed conclusion of the CCCS is that the owners/operators infringed the prohibition on anti-competitive agreements by discussing and exchanging confidential, customer-specific, commercially sensitive information in connection with the provision of hotel room accommodation in Singapore to corporate customers. The information shared was between the sales representatives of competing hotels and included: (i) non-public bid prices in response to corporate customer requests; (ii) percentages of price reduction requested by customers; and (iii) the corresponding responses by each hotel sales representative during confidential price negotiations.

The investigation was triggered by the CCCS' own detection efforts, but some of the parties subsequently applied for leniency. They have six weeks to make their representations to the CCCS, after which it will make its final decision based on the submissions and all available information and evidence.

General competition

UK expert panel will scrutinise competition in the rapidly growing digital economy

HM Treasury has **announced** that Professor Jason Furman (Harvard Professor and former chief economic advisor to President Barack Obama) will head up an expert panel tasked with examining digital

competition in the UK. The panel will consider, amongst other issues, how to ensure the UK's leading place in the digital economy.

According to Philip Hammond, the Chancellor of the Exchequer, the UK tech sector is now worth over £116 billion. The government has also recently published a **paper** on the economic value of data which revealed that data-driven technology could contribute over £60 billion a year to the UK economy by 2020.

Advances in this sector have raised critical questions of how to support a competitive economy and consumer choice, while encouraging innovation and protecting privacy of individuals. According to Professor Furman, "*while digital markets have produced significant consumer benefits, including in the UK, we need to fully understand how competition policy needs to adapt going forward*". The panel will look carefully at these issues, and how to maintain the UK's leading place in the digital economy.

The expert panel has been formed in the midst of the government's ongoing effort to re-examine competition policy. Earlier this year, the government also announced a **Modernising Consumer Markets Green Paper** which will provide proposals to ensure consumers are continuously protected in the rapidly developing digital market. The panel will run from September 2018 to early 2019 and will produce a final report of recommendations at the end of its study.

Regulatory

UK High Court dismisses application for judicial review of Ofcom decision on 'fit and proper' test in Fox/Sky merger

Activist group Avaaz Foundation **challenged** Ofcom's **decision** that, following its acquisition by 21st Century Fox Inc, Sky plc would continue to be 'fit and proper' to hold its broadcasting licences. However, Ofcom found there was insufficient evidence for it to conclude that post-merger Sky would not be fit and proper.

The High Court found that Ofcom was correct to apply a high threshold to finding a broadcaster unfit and improper. The high threshold was appropriate as any interference with rights to freedom of speech (in the form of a licence revocation) would need to be "*necessary and proportionate*", and "*any adverse decision would be likely to have had a very significant effect on the businesses of Sky and Fox*".

The Court also dismissed various claims that Ofcom had taken an irrational approach in making its assessment. The Court agreed that Ofcom was entitled to consider Sky's record of ongoing compliance. As Sky and Fox had both demonstrated that they were fit and proper for many years, there was no reason to believe that there would be a fundamental shift in Sky's approach to broadcast compliance. Further, the Court rejected claims that Ofcom had failed to take adequate account of historic failures of Fox's corporate governance, and the concerns raised by Ofcom itself in 2012 about James Murdoch's actions while chairman of Sky (Murdoch was re-appointed in April 2016). Overall, Ofcom conducted a fair assessment in light of all the relevant evidence at the time it made its decision. Such an assessment was all that was required of Ofcom.

This decision emphasises the reluctance of the Court to interfere with Ofcom's regulatory judgments due to the regulator's extensive experience and expertise in its field. This seems especially so when the decision in question may threaten the right to freedom of speech.

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