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Client Alert Commentary

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CAT Upholds Fine for Unlawful Information Exchange at Single Meeting

Case sends "a strong signal to companies about … critical compliance obligations" according to the CMA's Executive Director of Enforcement.

Key Points:

- The case marks the first time in the UK that a fine was imposed and upheld for unlawfully exchanging information at a single meeting.
- The judgment offers practical guidance on how to avoid participating in an unlawful information exchange.

The United Kingdom's Competition Appeal Tribunal (CAT) has unanimously upheld the fine of £130,000 imposed by the Competition & Markets Authority (CMA) on Balmoral Tanks Limited and Balmoral Group Holdings Limited (together, Balmoral) for exchanging competitively-sensitive information with competitors in the UK galvanised steel tanks sector at a single meeting in July 2012. This is the first time in the UK that a company has been fined for participation in a single meeting at which competitively-sensitive information was discussed. As the CMA's Executive Director of Enforcement made clear, this case sends "a strong signal to companies about these critical compliance obligations, which are needed to protect customers from the higher prices which result when competing businesses collude on price or business strategy, including through the exchange of competitively-sensitive information."

Background: Competition Act

The Competition Act 1998 (Competition Act) prohibits agreements and conduct that prevent, restrict, or distort competition (Chapter I prohibition), and conduct that constitutes an abuse of a dominant position (Chapter II prohibition) in the UK. These prohibitions mirror those set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The Competition Act gives that CMA powers to apply, investigate, and enforce the Chapter I and Chapter II prohibitions, as well as Articles 101 and 102 of the TFEU.

The CMA often applies both the Competition Act and the TFEU in its competition law investigations, as it did in this case. The Competition Act also gives the CMA the power to fine an undertaking for infringing the Chapter I and Chapter II prohibitions, as well as Articles 101 and 102 of the TFEU, up to 10% of the undertaking's worldwide turnover.

CMA Investigation

On 19 December 2016, the CMA found that Balmoral, a supplier of galvanised steel water tanks, along with three other businesses, had breached competition law by exchanging competitively-sensitive information on prices and pricing intentions. The exchange took place at a single meeting in July 2012 (which the CMA secretly recorded), at which Balmoral was invited to join a long-running price-fixing cartel. Balmoral refused to take part in the price-fixing cartel, but exchanged competitively-sensitive information with its competitors. Balmoral was fined £130,000 for taking part in this unlawful information exchange. Balmoral was not a party to the main price-fixing cartel formed by other competitors, which was the subject of a separate CMA infringement decision.

CAT Judgment

The CAT's judgment analyses in detail both (i) the specific challenges brought by Balmoral in relation to particular steps in the CMA's calculation of the penalty (*e.g.*, relevant turnover, seriousness of infringement, duration, aggravating and mitigating factors) and (ii) the broader challenges made in relation to the overall fine (based on fairness and discriminatory treatment). In relation to each ground of appeal, the CAT found no reason to depart from the CMA's calculation. As a final step, the CAT considered the fairness and proportionality of the fine imposed in the round. The CAT concluded that the penalty reflected not only the nature of the infringement and the need clearly to signal to other undertakings the dangers of casual discussions about price, but also the positive effect of Balmoral's decision to compete vigorously on price and cooperate with the CMA.

Practical Guidance

The CAT's judgment offers several practical pointers for undertakings on how to avoid participating in an unlawful information exchange. In particular, undertakings should recognise that:

- The participants' intentions or purpose at the start of a meeting are irrelevant. What matters from a competition law perspective is the purpose of the actual discussion, the information discussed during the meeting, and any arrangement reached by the end of the meeting.

- If the discussion strays into competitively-sensitive areas (such as current and/or future pricing intentions), it is essential to clearly express objections in relation to the provision and receipt of such information. Remaining at a meeting that covers competitively-sensitive topics carries antitrust risk. Competition authorities will not consider an undertaking's desire to remain on amicable terms with the other participants to be a justification for failing to leave immediately.

- Providing inaccurate information about pricing intentions to competitors in the knowledge that they will likely rely on that information (regardless of the information's accuracy) does not constitute a sufficient justification for remaining at the meeting. Similarly, competing vigorously after discussing future pricing intentions with competitors will not negate liability on the basis of conduct at the meeting in question.

- Participation at a single meeting with competitors that covers competitively-sensitive information, such as current and future pricing, can infringe competition law.

- Discussing "price bands" with competitors is problematic if the "bands" are in effect target price ranges (rather than averaged prices across the industry at an aggregated level). Similarly, parties

should not discuss historic pricing information that they expect to use in future pricing decisions with competitors (who can be expected to use the same information in their future pricing decisions).

- Existing price transparency at the customers' behest is immaterial if competitors confirm current prices directly amongst themselves and gain a better understanding of competitors' future prices through information that would not otherwise be readily available.

Implications

The CAT's decision to uphold the fine imposed by the CMA is a reminder to companies that they must approach any meetings with competitors cautiously. The CMA has signalled its determination to enforce the provisions of the Competition Act and take action against those companies that exchange competitively-sensitive information — even if the exchanges occur at a single meeting and the company involved did not intend to join a cartel. Companies should ensure that their employees understand the consequences of attending any meetings at which competitors might be present, as well as how to respond if any competitively-sensitive information is discussed. This judgment will lend support to the CMA's increased focus on investigations of cartels and other infringements under the Competition Act.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Jonathan Parker
jonathan.parker@lw.com
+44.20.7710.4513
London

Alexandra Luchian
alexandra.luchian@lw.com
+44.20.7710.5849
London

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