

## Exchanging Commercial Information—A Risky Business

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This case provides a stark lesson in competition compliance training: the infringement decision of the Competition and Markets Authority (“CMA”) was upheld against a company that, while it refused to join a cartel, still exchanged strategic commercial information with its competitors (while being recorded by the CMA...)

The circumstances represent a timely reminder of the steps companies must take to properly distance themselves from anti-competitive behaviour with competitors. As the CMA puts it:

- The exchange of competitively sensitive confidential information (i.e. regarding prices or pricing strategy) with competitors, even at a single meeting, can amount to a breach of competition law with serious consequences;
- If approached to join a cartel, or to become involved in anti-competitive arrangements (i.e. co-ordination of pricing or market sharing) businesses must immediately, clearly and unequivocally reject the approach. It is not enough to refrain from the price-fixing or market-sharing: the business (through its representatives) must leave the meeting and clearly and explicitly refuse to take part; and
- Very importantly, the business must also decline to take part in any discussions involving the sharing of confidential and competitively-sensitive pricing information.

The CMA’s infringement decision fined Balmoral £130,000 in December 2016, for the sharing of strategic commercial information on galvanized steel tanks (used to store water for sprinkler systems in large buildings). The conduct of the members in the related cartel was addressed in a separate infringement decision of the same date, and Balmoral assisted the CMA in its related criminal investigation. However, Balmoral appealed the CMA’s decision to the Competition Appeal Tribunal (“CAT”), reflecting its ‘deeply held sense of grievance at how it had been treated by the CMA’, a desire to repair its ‘unfairly and wrongly’ tarnished reputation, and the ‘inconsistent’ way in which the CMA approached its ‘credibility as a witness’.

Ironically, Balmoral – a new entrant in the galvanized steel tanks market in the UK – had actually increased competition in the market outside a pre-existing cartel. Balmoral’s competitors were becoming increasingly frustrated by the competitive offers it was making, sometimes pushing prices

down by as much as 20%. This upset the market dynamic that had been operating for years, enabling the incumbents to divide the market between them and keep prices high. Inviting Balmoral to meet, the cartel members had hoped to persuade Balmoral to join them by disclosing their market sharing system. However, Balmoral steadfastly refused to get involved.

However, and unfortunately for Balmoral, there was a whistleblower at the meeting, as a result of which the CMA was making an audio-visual recording of the meeting and discussions. Consequently, despite Balmoral's absolute refusal to join the cartel, the CMA built a case around its decision to remain at the meeting for over an hour after learning of the cartel, and sharing commercially sensitive information about its current and future pricing intentions (both for specific contracts for which the competitors should have been competing and pricing strategies for certain types of tank). The CMA found that this amounted to a restriction of competition by object in and of itself.

Balmoral argued on appeal that the CMA was wrong to conclude that generic comments exchanged with competitors at a single meeting were capable of reducing uncertainty in an already transparent market, such that there was an insufficient degree of harm to competition for the purposes of an object infringement. However, the CAT upheld the CMA's infringement decision. It explicitly recognized that the purpose of the meeting for the other cartelists was to get Balmoral to join, which differed from Balmoral's own initial purpose. It found, however, that, by the end of the meeting, Balmoral's objective was to stabilise prices towards the higher end of the bands being discussed. It also found that a one-off exchange of future pricing information in a market with few customers and few competitors has the ability to affect a material number of bids, especially where the information involved Balmoral indicating that it was not seeking to push prices down (despite not actually joining the cartel).

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