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## "Hot Topics" in International Antitrust Law

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## UK Office of Fair Trading looks at Information Exchanges

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A topic which often surprises non-EU competition lawyers is the treatment of information exchanges under EU and national competition laws in the EU. More specifically, the surprise arises from the ease with which exchanges of confidential information between companies (or by one to another, even if unrequested) can give rise to an infringement of competition law and therefore potential fines for the companies involved.

There have been two recent high-profile information exchange cases in the UK. In one case, the UK Office of Fair Trading (OFT) investigated the indirect exchange of commercially sensitive price information by competing insurance companies through third party IT software providers. The OFT is currently considering the settlement of this case through the acceptance of commitments. In the other case, following a leniency application from Barclays, the OFT investigated disclosures of commercially sensitive price information by Royal Bank of Scotland (RBS) to Barclays and fined RBS an "agreed" GBP28.5 million.

### Background

It is long-established law in the EU that information exchanges can constitute an infringement of competition law under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (and equivalent national laws), which prohibits anti-competitive agreements and concerted practices. The leading precedent on information exchanges between competitors at the EU level is the T-Mobile case from 2009, in which the European Court of Justice (ECJ) held that:

- Any information exchange between competitors which is capable of removing uncertainties between the participants as regards the timing, extent and details of any modifications to market conduct by a participant must be regarded as having an anti-competitive object (and therefore automatically infringing Article 101(1) TFEU, subject to the possibility - unlikely in object cases - of an exemption under Article 101(3)). The question of whether a concerted practice or agreement has an anti-competitive object is important because if this is shown, actual anti-competitive effects do not need to be proved for that arrangement under Article 101(1).

- Article 101(1) TFEU requires a causal connection between the collusion and the market conduct of the parties. However, in the context of an information exchange, the ECJ confirmed that, in the absence of evidence to the contrary, the parties can be presumed to take account of the information exchanged in their ongoing market activities.
- Regular contact between parties to a concerted practice would make the presumption of a connection between the practice and their market conduct more compelling. Nevertheless, depending on the circumstances, a single meeting may be sufficient to infringe Article 101(1).

The most recent European Commission (EC) guidance on horizontal agreements between competitors includes a section on information exchange. It is known that the EC considers that the T-Mobile case went too far, and this is reflected in the guidance, which limits the "object box" as follows:

"Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome . . . Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object . . .".

There was never much doubt about the illegality of this type of information exchange (which is likely to be treated as a cartel anyway). As ever, the position is less clear where the exchange is not so blatantly anti-competitive.

### The UK Cases

It is at first sight surprising that the OFT chose to use its limited resources to investigate two information exchange cases at the same time. However, the RBS/Barclays case was presented to it as a result of a request for leniency by Barclays, and it appears (although the position is not clear) that the same was true for the motor insurance case. The OFT is most likely to investigate a cartel or similar case where it has information from a leniency applicant (indeed, in practice it essentially only proceeds following the receipt of information).

The motor insurance cases involved seven insurance companies and two IT software and service providers. The OFT's investigation identified an increased risk of price coordination among motor insurers using a specialist market analysis tool called "Whatif? Private Motor". The tool allowed insurers to access not only the pricing information they themselves provided to brokers but also pricing information supplied by other competing insurers. The nine companies under investigation are proposing to address the OFT's concerns by giving formal commitments that will result in the insurers no longer being able to access each other's individual pricing information through "Whatif? Private Motor". Instead, they propose to exchange pricing information through the analysis tool only if that information meets certain principles agreed with the OFT. These would require the pricing information to be anonymised, aggregated across at least five insurers and already 'live' in broker-sold policies.

There is by contrast little information available in public as yet about the RBS/Barclays cases. The key points of interest from the case however are:

- the disclosures of information were one way, yet still gave rise to an infringement of competition law due to a concerted practice;
- the disclosures took place in the context of informal contacts ("on the fringes of social, client or industry events or through telephone conversations"); and

- the size of the fine on RBS, even after it obtained a reduction for admitting to certain breaches.

### Practical Implications

Although the EC doesn't bring many pure information exchange cases, these two UK cases (and a recent case from Germany) demonstrate the dangers inherent in inappropriate information exchanges in the EU. The OFT commented in relation to the motor insurance case that "the investigation potentially has [wide] implications [for the insurance industry in the UK] as the Experian tool is just one of a number of similar products used throughout the insurance industry." The same is obviously true where there is a parallel in other industries.

Competition compliance programmes must emphasise the dangers of information exchange in the UK/EU, including the following points:

- one meeting or other exchange can be sufficient to attract liability;
- similarly, unilateral disclosure by one party to another can be a basis for liability;
- the risk is greatest for individualised data regarding intended future prices or quantities, but the exchange of information about costs and demand (particularly if current or future) is often equally dangerous.

This being said, competition regulators have to prioritise cases and justify their existence through "wins". The OFT, at least, is unlikely to bring a case of this nature without a leniency applicant (to provide the evidence). Therefore, while these two high-profile cases are a salutary warning of the law in this area, and good technical advice should take them into account, the real world risks of the UK competition regulator taking action probably remain low.

### End Notes

1. See "Notice of intention to accept binding commitments to modify a data exchange tool used by Motor Insurers", 13 January 2011 (OFT1301).
2. See OFT press release 05/11, 20 January 2011. The text of the decision is not yet available.
3. See "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 14 January 2011 (OJEU C 11/1).
4. See Bundeskartellamt press release "Multi-million fines imposed on manufacturers of consumer goods on account of exchange of anti-competitive information", 17 March 2011. There was also a leniency applicant in this case.