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Costly conversations – a review of recent developments in competition law applying to information exchange

Date: 27 September 2023

Venue: Herbert Smith Freehills LLP

Speakers: Josh Holmes KC (Monckton Chambers), Matthew Byford (Ofcom) and Helen Fairhead (Norton Rose Fulbright)

Chair: Kim Dietzel (Herbert Smith Freehills)

Recent themes in information exchange cases (Matthew Byford, Josh Holmes KC and Helen Fairhead)

Mr Byford, Mr Holmes KC and Ms Fairhead each discussed information exchange themes arising from three respective recent UK cases, namely Ofcom's investigation (and subsequent infringement decision) into information exchange between Motorola and Sepura concerning the nature of information exchanged (*Motorola/Sepura*)¹, *Lexon v CMA (Lexon)*² and *Phones 4u Ltd (In Administration) v EE Ltd and others (Phones 4u)*³:

- Reduction of strategic uncertainty: Examining the facts in *Motorola/Sepura*, Mr Byford considered Ofcom's findings that the exchange of high-level information on pricing strategy could still be capable of reducing strategy uncertainty. Bid pricing remained highly relevant to the parties, even though bid prices could be subsequently amended post-award. It was possible for strategic uncertainty to be reduced, even if both parties were likely to be awarded places on the relevant framework agreement.
- Unilaterality: In both *Motorola/Sepura* and *Phones 4u*, the exchange of information occurred unilaterally. Changing the subject, body language or tone of voice to avoid reciprocity does not necessarily preclude anti-competitive information exchange and even a one-off exchange can constitute anti-competitive information exchange (as evidenced in *T-Mobile*).⁴
- Public availability of information exchanged: Examining *Lexon*, Mr Holmes KC noted that the exchange of public information does not preclude anti-competitive information exchange. Practitioners should be careful about drawing bright lines between publicly available information and confidential information; the categorisation of an information exchange as anti-competitive primarily concerns the context of the market in which the relevant parties operate.

¹ CW/01241/05/19.

² [2021] CAT 5

³ *Phones 4u Limited (In Administration) v EE Limited and others*. At the time of writing, the judgment in this case is pending. Any conduct described in this case is alleged.

⁴ Case C-8/08, *T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit*.

Public distancing in information exchange (Matthew Byford and Helen Fairhead)

Mr Byford discussed the high threshold of successfully evidencing publicly distancing from an alleged anti-competitive information exchange:

- Active, unequivocal steps need to be taken, and other participants to the exchange should be made aware of disapproval and the rejected use of information received.
- Examining the facts of *Motorola/Sapura*, the relevant Motorola employee did not sufficiently publicly distance by changing the subject via a text message. This action did not evidence that Motorola had clearly rejected the information or confirmed that it would not act on the information.

Ms Fairhead noted the difficulty for parties to determine the most appropriate course of action when receiving information from a competitor that could be anti-competitive:

- This is particularly difficult when information is exchanged unilaterally and is nebulous. The course of action here needs to be handled quite sensitively.
- Further guidance on effective public distancing would be welcomed.

Causal connection (Helen Fairhead and Matthew Byford)

Ms Fairhead examined the presumption of a causal connection between the information exchange and subsequent conduct of the parties involved:

- Strong evidence is required to rebut this presumption, with the main method being public distancing. Parties may otherwise seek to rebut the presumption by evidencing that subsequent actions taken are contrary to the information received.
- At trial, whether the defendants' decisions to exit arrangements with Phones 4u were made independently was an area of forensic assessment.

Examining *Motorola/Sapura*, Mr Byford noted Sapura's unsuccessful rebuttal of the presumption, particularly in light of Motorola's subsequent conduct:

- Motorola had not publicly distanced itself from the information received and had only applied for leniency once it submitted its bid for the relevant tender.
- Motorola's internal compliance steps were also determined to be insufficient, for example, there were delays in internal reporting, missing phone records and the employee involved was not fully ring-fenced from remaining bid team members.
- Motorola failed to inform the procuring authority.

European Commission and UK Competition and Markets Authority Horizontal Guidelines (Josh Holmes KC)

Mr Holmes KC considered key takeaways on information exchange in light of the Horizontal Guidelines that were published respectively by the European Commission and the CMA over the summer period (**Guidelines**). Whilst not identical, the two sets of Guidelines are closely aligned. When considering theories of harm, the Guidelines point to a number of key concerns:

- *The nature of the information exchanged*: what constitutes competitively sensitive information depends on the context of the relevant market. A good guide is whether the information is of a kind that the company needs to maintain or improve its competitive position in the market.

- *The purpose for which the information is shared:* exchange of information for which there is a legitimate justification (such as regulatory requirements, potential acquisitions, lobbying or management of supply shortages in capacity-constrained markets) is unlikely to be problematic.
- *Arrangements in place for limiting and handling information is likely to be important:* information sharing should be kept to a necessary minimum in view of the objectives. Collation of non-specific competitor information (such as by a third party) and the scope of availability of information in the market (i.e., whether information is available to all in the competitive market or confined to a particular subset) are also relevant points to consider.
- *The nature of the market:* It is important to understand how the relevant market functions before advising on how it will be affected by information sharing.

Pro-competitive information exchange is also recognised. The Guidelines confirm the legitimacy of lobbying and provide examples of pro-competitive information exchange. Yet, information exchange, which may be unproblematic in a fragmented and differentiated product market, could be more concerning in a commodity market with oligopolistic characteristics.

Providing final reflections on their involvement in recent cases, Mr Byford and Ms Fairhead emphasised the importance of internal compliance procedures to mitigate against the risk of anti-competitive information exchange.