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Competing in a vacuum or not

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INTRODUCTION

In a modern day society, thanks to technological advancements, information is readily accessible to anyone at any time. No business can compete in an information vacuum as competition does not take place in a vacuum. In order to compete vigorously, one needs information. There are real benefits to legitimate information sharing. Information sharing can serve as a discovery mechanism to prevent trial and error decision making and enable companies to adapt to changing market conditions. It furthermore informs organisational learning and allows organisations to benefit from solutions that come about in research and development. No organisation can formulate a competitive strategy without understanding the market place within which it competes.

Sharing information amongst competitors may therefore yield several pro-competitive benefits. Notwithstanding the pro-competitive benefits that information sharing may provide, there is an inherent danger that information sharing amongst competitors may increase transparency in the market with the end result of facilitating collusion. Accordingly, it is important to understand the context in which information is exchanged and what information may be exchanged in order to avoid crossing the line of anti-competitive behaviour.

COMPETITION COMMISSION DRAFT GUIDELINES ON THE EXCHANGE OF INFORMATION

In order to shed light and provide guidance as to what information may be legitimately shared amongst competitors and what can't be shared amongst competitors, the Competition Commission ("**Commission**") has recently hosted a workshop to obtain input from market participants on draft guidelines on the exchange of information between competitors.

When considering the draft guidelines on information exchange, it is clear that the Commission recognises the importance of information exchange in our economy and the impact that information sharing may have on competition in the market.

THE THORNY BUSH CALLED INFORMATION EXCHANGE

In formulating guidelines, one should take into consideration and learn from the know-how developed by other regulators. A number of countries have indeed dealt with information exchange considerations over many years in terms of competition law enforcement. One such example that could be considered is the UK galvanised steel tanks case which presents a view that could enable businesses to manoeuver around competition law obstacles.

On 21 March 2016, the UK Competition and Markets Authority ("**CMA**") settled an information exchange case following a lengthy investigation and engagement with Franklin Hodge Industries, Galglass, KW Supplies ("**parties**") and Balmoral Tanks Ltd ("**Balmoral**"), who are competitors of each other.

At a single meeting held on 11 July 2012, the parties exchanged commercially sensitive information. The meeting was secretly recorded by the CMA. The information exchanged comprised both generic and contract specific information. The specific information that was shared was in the form of price bands and prices quoted for specific historic contracts. Interestingly, the purpose of the meeting was to invite Balmoral to join the parties' pre-existing cartel arrangement. The audio-video recording of the meeting revealed that Balmoral declined the invitation to join the cartel arrangement with the parties but actively participated in the meeting by exchanging commercially sensitive information in an attempt to be "social". The CMA noted that although Balmoral declined the invitation of joining the parties' cartel

arrangement, Balmoral did not publically distance itself from the cartel conduct of the cartel members. The CMA pointed out that when businesses become privy to cartel conduct, they must publicly distance themselves from the cartel conduct and express themselves firmly and unambiguously to avoid contravening competition law.

On an assessment of the case, the CMA found that the problem with the aforementioned meeting and the exchanged information lies in the fact that there was direct contact between parties who were already in an existing cartel arrangement. Balmoral was also liable for an infringement of competition law as it was made aware of the parties' cartel arrangement but nonetheless chose to stay at the meeting and actively participate by exchanging commercially sensitive information with the parties. It is within this thorny bush of information disclosure that Balmoral got caught.

Importantly, the CMA held that its finding of Balmoral and the parties' infringement is not based on the fact that the parties entered into a price-fixing agreement at the meeting held on 11 July 2012 but that the nature of the infringement is based on the fact that the exchanged information among the parties and Balmoral had the effect of reducing uncertainty as to future pricing in the market for water storage tanks. Consequently, the exchange of information distorted competition. This all resulted from one single meeting and the "innocent" conversation about the state of competition in the market.

CONCLUSION

Guidelines on information exchange will enable businesses to clearly understand how to deal with information exchange among competitors. However, there will always be significant room for interpretation. Businesses need to be vigilant and empowered as to what information may be shared and what information may not be shared among competitors. This can be achieved through education and training. It is paramount to empower employees with knowledge. Without the necessary knowledge, how can one expect staff not to fall foul of the Competition Act?

When it comes to information sharing, Werksmans assists clients in empowering themselves and thereby mitigating competition law risks.

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