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## One-time information exchange sufficient – a recent reminder in the UK

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The UK's Competition and Markets Authority ("CMA") recently welcomed the Court of Appeal's dismissal of a challenge brought against a decision of the Competition Appeal Tribunal ("CAT") by Balmoral, a supplier of steel water tanks. The CMA had fined Balmoral £130,000 in December 2016 for a single exchange of pricing information which, in the particular context, was regarded as a 'by object' infringement of competition law. The judgment reiterates the stringent approach the CMA will take towards exchanges of commercially sensitive information, whilst also raising broader questions as to the most appropriate assessment of related infringements.

*Background*

In July 2012, Balmoral was invited to attend a meeting by competitors who were part of a long-standing cartel involving bid-rigging, customer allocation and price-fixing practices. Balmoral resisted attempts to have it join the main cartel, though it remained at the meeting to discuss the market, and current and future pricing intentions. Following an investigation, the CMA concluded that, although Balmoral had not been a party to the main cartel, it was liable for a separate instance of price fixing arising as a result of the pricing/sensitive information exchanged during the July 2012 meeting. The evidence did not support a finding of public distancing or opposition to the exchange of information by Balmoral. The CMA adopted two decisions in respect of: (i) the main cartel, imposing penalties on those involved (the "Main Cartel Decision"); and (ii) the exchange of pricing information at the July 2012 meeting (the "Information Exchange Decision"). Only Balmoral was fined in the second decision, but not the first. Balmoral appealed to the CAT, which subsequently upheld the CMA's findings, an approach now followed by the Court of Appeal.

*Drawing appropriate distinctions between information exchange and a related cartel*

The Court of Appeal's judgment here serves as a reminder that a single information exchange can be sufficient to result in an infringement of the Chapter 1 prohibition

under the Competition Act 1998 of anticompetitive agreements (essentially Article 101 TFEU). The pricing exchange enabled the parties to confirm their understanding of each other's current and future pricing, and the prices discussed went far beyond generic figures.

This type of exchange could of course in certain circumstances be regarded as part of one overall cartel infringement (as part of the main cartel). However, it was considered appropriate here to assess the discussion during the July 2012 meeting of the long-standing (cartel) arrangements – and the instance of information exchange at the same meeting – as two distinct "strands": (i) persistent (rebuffed) attempts by the main cartelists to recruit Balmoral; and (ii) pricing discussions which had the effect of reducing strategic uncertainty in the market.

Even though there was no clear point in time dividing the two strands, this was not enough to render the exchange on price a sub-set of the main cartel. Balmoral was not regarded as a passive recipient of information as part of the broader attempts to convince it to join the main cartel. Moreover, whilst it did not share the objectives of its competitors in the main cartel to eliminate all competition and divide the market equally, the pricing exchange took on a distinct character in view of Balmoral's active participation in pricing discussions, which included Balmoral noting down its competitors' prices and commenting on the potential benefits of a stabilisation in prices towards the higher end of the pricing bands discussed at the meeting.

*No inconsistency arising from distinguishing between the "two strands"*

Another of Balmoral's grounds of appeal was that the CMA's Information Exchange Decision could not sit coherently alongside the Main Cartel Decision. Specifically, Balmoral argued that its *"non-infringement"* in the Main Cartel Decision and *"ostensibly separate infringement"* in the Information Exchange Decision gave rise to an artificial distinction, which implied that Balmoral had in fact been engaged in the main cartel. In rejecting this line of argument, Lord Justice Newey emphasised that it would be a perverse outcome to hold Balmoral liable for a more serious participation in the main cartel rather than for the infringement it actually committed. Furthermore, in fining only Balmoral in the Information Exchange Decision, the CMA did not violate the principle of equal treatment. The CMA was entitled to have regard to its statutory duty for deterrence on the undertaking concerned – a duty which the CMA had fulfilled in respect of the main cartelists through its imposition of fines via the Main Cartel Decision.

*Purpose of the "single and continuous infringement" principle*

The principle of a "single and continuous infringement" results in all cartelists being jointly and severally liable regardless of their individual participation in a particular infringement, e.g., attending one meeting instead of several. The arguments raised by Balmoral in respect of perceived inconsistency between the two CMA Decisions pose an interesting question as to whether a competition authority is *required* to

characterise a single infringement as part of conduct as a whole or whether it has the *discretion* to attribute liability for a less extensive infringement.

The Court of Appeal did not express a decisive view on this point. However, the reasoning in the judgment does imply that the principle is most appropriately used as a means of facilitating a genuine and coherent relationship between the Chapter 1 prohibition (or Article 101 TFEU) and the fact pattern of cartel conduct. In this sense, the principle of a single and continuous infringement might be construed as a procedural rule to aid an authority in more efficient enforcement, rather than as a way to prevent the treatment of related but separate sets of conduct as distinct infringements. Indeed, a competition authority might otherwise risk too wide an application of the doctrine, opening the door to future challenge.

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