When talk isn't so cheap: information exchange and the Financial Sector in the EU/UK

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1 Financial sector firmly on the radar of the competition authorities

The financial sector is, arguably, the beating heart of the economy. Digital disruption has played a key role in its evolution and the advent of PSD2[1] has meant that the sector is now comprised of many new players and products, particularly within the payments space. Not least, underpinning the financial sector is a regulatory framework, which too is evolving.

The financial sector, therefore, poses a significant challenge to the competition authorities in the UK and EU, which is exacerbated by the global nature of financial markets and the advent of Big Tech. As a result, the competition authorities have the sector firmly within their radar. Investment banks, especially, have been at the sharp end of several European Commission decisions. Trader chat rooms have been held to be fora for information exchange and huge fines have been, and continue to be, levied for illicit 'chat'. The cases highlight the importance of training staff about the dangers of falling foul of the competition rules and what they need to look out for when talking to their competitors. In the financial sector the risk of (unintentionally) exchanging commercially sensitive information is high. This is also heightened by the many collaborations taking place. Businesses working in this sector, therefore, need to be aware of the red flags, exercise caution and train their staff appropriately.

This article focusses on information exchange within the financial sector. It will set out the law on information exchange, identify the main red flags that businesses should look out for and end with some practical tips on the sorts of procedures that can be put in place to help mitigate against illicit information exchange.

2 Information exchange

2.1 When information exchange may amount to an infringement of the competition rules

Information exchange falls within Chapter I of the Competition Act 1998 and Article 101(1) TFEU. The exchange of information between competitors is, by itself, liable to be unlawful if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between the businesses is restricted. More specifically, an exchange of information which is capable of reducing or removing the uncertainty between participants regarding their conduct on the market will be anti-competitive.

Conversely, exchanges of genuinely public information (i.e. information accessible to all competitors and customers) are unlikely to infringe the competition rules. However, gathering information (e.g. from customers), does not mean that such information constitutes market data readily accessible to competitors.[2] This is particularly the case if the information exchanged allowed the participants in the exchange to become aware of it *"more simply, rapidly and directly than they would via the market"*. As such, each case needs to be assessed on its own merits, taking into account the characteristics of the market.

The concept inherent in the competition rules is that each economic operator must determine independently the policy which it intends to adopt for the market, including the choice of persons to which it makes offers or sells. This therefore strictly precludes any direct or indirect contact between such operators, the purpose of which is to either influence the conduct on the market of an actual or potential competitor or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

Exchanges of information often take place within the auspices of a 'concerted practice'. Even a single meeting could give rise to a concerted practice. What matters is whether the meeting (or indeed meetings) afforded the participants the

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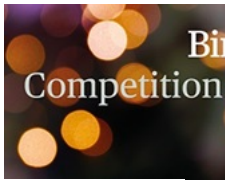

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opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question, and knowingly substitute practical co-operation between them for the risks of competition.

2.1.1 What is commercially sensitive information?

Commercially sensitive information covers any non-public, strategic information about a business's commercial policy.

Information could be commercially sensitive if it is:

- Not publicly available
- Strategic
- Confidential
- Concerns future conduct, e.g.:
  - Pricing, quantities, costs
  - Output/capacity
  - Investment/regulatory plans
  - New technology

Exchanging information between competitors is therefore rife with danger. At its most simplistic commercially sensitive information covers any non-public, strategic information about a business' commercial policy. If the information is commercially sensitive in so far as it is strategic, confidential, non-public, concerns future conduct regarding pricing or quantities, or is information that relates to costs, output or capacity, investment plans, new technology or research plans, then it is particularly problematic. Such information is liable to decrease the parties' incentive to compete and increase opportunities for coordinated activity.

The competition provisions also apply to unilateral disclosure of strategic information by one business to a competitor where the recipient requests the information or accepts it. It is irrelevant whether the exchange of information constituted the main purpose of the contact between them. Exchanges of information between competitors also includes between potential competitors, not least, information can be exchanged through a third party (a facilitator) or through an intermediary (hub and spoke agreements). More significantly, where a business participating in a concerted practice remains active on the market, there is a presumption that it will take account of information exchanged with its competitors when determining its own conduct on the market.

2.1.2 Public distancing

The law is clear that even passive modes of participation in an infringement, such as the presence in meetings at which anti-competitive agreements were concluded, are indicative of collusion capable of rendering the business liable for the infringement. It is therefore imperative that businesses are familiar with the concept of public distancing. If a business participates in a meeting of a manifestly anti-competitive nature, the burden is on it to provide evidence to establish that it clearly opposed the anti-competitive arrangement to its competitors. Without that evidence, the presumption will be that the business' participation in the meeting was unlawful. A business will tacitly approve an unlawful initiative unless it has publicly distanced itself from its content, i.e. it has clearly and unequivocally made its position clear to the other participants that it does not accept the information and wishes to be no part of it.

Public distancing must be public so that the other participants are in no doubt whatsoever as to the fact the business has distanced itself. The ultimate form of distancing is to inform the competition authorities.

2.2 Information exchange in the financial sector

Many decisions by competition authorities in both the EU and UK concerning information exchange have, in the last few years, involved the financial sector. Overall, the severity of fines levied on financial institutions demonstrate just how seriously illegal information exchange is taken.

Several decisions have resulted in determinations of traders sharing sensitive information, coordinating on prices, and aligning their trading strategies via trader chatrooms, often being in regular contact with each other. More particularly, conduct has been held to involve traders informing and updating each other on their prices and volumes (e.g. the volumes of shares they wished to acquire), the prices shown to their customers or to the market in general, as well as recurring updates on or disclosure of bidding strategy and intentions, as well as trading plans and co-ordinating strategies. The EU and UK competition authorities have found that this type of conduct has amounted to a breach of Article 101 TFEU and/or Chapter I of the Competition Act 1998.

2.3 Mitigating risk

Perhaps surprisingly, information exchange appears to be increasingly prevalent, despite the competition authorities coming down so hard on such practices. Experience shows how easy it is for conversations with competitors to 'spill' over into anti-competitive realms without the participants even realising or intending to do so. Certainly, this is a key concern in respect of collaborations and partnerships between competitors, including within the many networks, forums or industry events and initiatives (as well as 'after hours' in the bar). From the authorities' perspective, information sharing can lead to a tendency for businesses to cooperate rather than to compete.

The law on information exchange is, however, clear, and far-reaching. It has been firmly established that even a single information exchange is sufficient to infringe the competition rules. In addition, intent is irrelevant – the presumption is that the business receiving the information cannot help but take it into account. All that is needed is acceptance and a lack of distancing from the information. Businesses therefore need adequate procedures in place, particularly where partnerships and collaborations are taking place between competitors or potential competitors, to guard against such 'spill over'. A simple list of 'do's and don'ts' is often the most effective tool in addition to competition compliance training.

Identifying staff who deal with competitors and arming them with competition law knowledge is the first step to ensure businesses aren't caught off guard. Often financial incentives or bonuses can encourage what is in fact illegal activity. Recognizing areas where businesses have been caught out, such as trader chat rooms, and putting proper, robust procedures in place is the best and safest way to mitigate risk.

3 Red flags and practical tips/safeguards when dealing with competitors

Staff must not discuss or disclose sensitive information relating to:

- prices/discounts
- forecasts
- future strategy/marketing plans
- key cost items or product launches
- investments
- boycotting customers, competitors, or suppliers
- how a business might adapt in response to an anticipated legal or regulatory change

without taking legal advice…

The key questions are:

- Who am I speaking to, partnering, or collaborating with?
  - Are they an actual or potential competitor?
  - Are they a non-competitor/ or are we in a vertical arrangement?

Types of procedures businesses should have in place to protect against illegal information exchange:

- Do you have a robust top-down competition compliance policy and training programme?
- Do you have regular audits of policies and agreements as the business grows: which is all part of self-assessment
  - Do you know your business? Do you know where your competition law risks lie?
- When dealing with competitors, are staff (particularly board-level, sales, marketing) aware of the competition risks, do they know where the red flags are so that they can identify issues, know how to respond/ what to do and how to escalate a potential situation?
- Encourage a culture where staff are comfortable informing the legal team immediately of any issues that may crop up during discussions with competitors. Often, it's what you don't hear that becomes the problem
- Commercial negotiations should only cover topics which are necessary to establish a successful partnership e.g. logistics of the arrangement, joint promotion of the partnership
  - Consider putting a clean team in place to deal with information exchanged as a result of the collaboration and for the duration of the collaboration
- Internal documents are of increasing importance to the authorities: document the pro-competitive rationale of any collaborative initiatives and record any concerning behaviour and how it was dealt with
- Create a crib sheet for staff to check-off key points as they enter discussions, including over 'drinks', at industry forums (e.g. 'do's and don'ts' and 'what to do if' scenarios etc)

Contacts

The Bird & Bird team of Competition & EU lawyers offers practical and commercial advice to support your strategic objectives. Feel free to reach out with any questions to Saskia King or one of our other Competition & EU lawyers from your jurisdiction.

[1] Payment services (PSD2) – Directive (EU) 2015/2366.

[2] E.g., even if there is public availability of data, the existence of an additional information exchange by competitors may give rise to anti-competitive conduct if doing so further reduces the strategic uncertainty in the market: Commission's Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements, OJ C 11/1, 14 January 2011, paragraphs 92 – 94.