YOU CAN BANK ON IT: ENFORCING AGAINST UNLAWFUL INFORMATION EXCHANGE REMAINS TOP OF ANTITRUST REGULATORS' AGENDA

The EU's highest court has ruled that "standalone" exchanges of commercially sensitive information between competitors can be regarded as a breach of the competition rules if they remove uncertainty in the market, regardless of any actual effects on competition.

The ruling comes in response to a request in relation to a decision by the Portuguese Competition Authority to impose fines totalling €225 million on the country's 14 largest banks for allegedly participating in unlawful exchanges of information between 2002 and 2013, contrary to EU and national competition rules.

This follows a series of high profile fines and changes to regulatory guidance on both sides of the Atlantic. It serves as the latest reminder that unlawful information exchange remains a clear enforcement priority for regulators (and not just in the EU) and therefore a key area of risk for businesses.

Given the severity of the potential consequences of a breach, now more than ever businesses – and their parent companies – should consider ways to minimize the heightened risks.

REMOVING UNCERTAINTY IN THE MARKET

In September 2019, the Portuguese Competition Authority fined Portugal's 14 largest banks, including Banco Santander and BBVA, for sharing commercially sensitive information about home loans, consumer credit and corporate lending. It found that they had exchanged information on current and future credit spreads and the volume of loans they had made in the preceding month, and decided that these practices amounted to a restriction of competition "by object" – i.e. conduct that is inherently harmful to competition without needing to examine any actual effects.

The majority of the defendant banks appealed the decision to the Portuguese competition court on the basis that the exchanges in question were not sufficiently harmful to constitute an object restriction. Upon request by the national court, the EU Court of Justice has clarified that for a market to operate "*under normal conditions*", each player must independently determine the policy it intends to adopt and be "*uncertain as to the timing, extent and details of any future changes in the conduct of its competitors on the market*". As such, the Court deemed that an exchange of information that removes this uncertainty must be regarded as having characteristics linking it to a form of coordination, which is harmful by its very nature.

Importantly, the Court rejected the banks' arguments that "*very sporadic*" exchanges of information (i.e. once or twice a year) cannot constitute a restriction by object. Indeed, in the Court's view, even a single instance of contact "*may suffice to remove uncertainty in the minds of the parties connected*". Therefore, the mere fact of a single, unilateral exchange of information can be sufficient to constitute a breach of the EU rules, regardless of whether it had any actual effects on competition.

It will now be for the national court to carry out the factual assessments necessary to determine whether the exchanges in question did in fact constitute an object restriction.

A BROADER ENFORCEMENT PRIORITY

Sharing information with competitors is often a prerequisite for many commercial arrangements including M&A negotiations, R&D collaborations, and joint bidding arrangements. While information sharing can be justified in some circumstances, exchanges of commercially sensitive information can present antitrust risk, potentially exposing businesses and individuals to serious sanctions including fines of up to 10% of annual global revenues, follow-on private damages claims, director disqualification and even allegations of criminal liability.

As we have discussed previously, ramping up enforcement against unlawful information exchanges has been on the cards, with regulators updating or even repealing guidance on when exchanges will be considered unlawful, as well as removing certain applicable safe harbours.

Meanwhile, a recent decision by the UK's telecoms regulator (Ofcom) shows the risks of even a single, unilateral exchange of commercially sensitive information, whereby Ofcom fined Sepura £1.5 million for disclosing its pricing intentions for an upcoming tender via text messages to its competitor Motorola.

Therefore, businesses should expect to see more standalone cases addressing allegedly improper information exchange and coordination, including in the M&A context.

HEIGHTENED RISKS FOR PARENT COMPANIES TOO

The risks involved are just as relevant to parent companies (including private equity investors) who can be held jointly and severally liable under EU and UK law for the anti-competitive conduct of subsidiaries over which it exercises "*decisive influence*". Crucially, this means that parent companies can be treated as having participated in the unlawful exchange, regardless of whether they were actually involved or even aware of it.

HOW TO MITIGATE THE HEIGHTENED RISKS

Given the enforcement focus on information exchange and the significant related risks, businesses should more than ever assess risk early and with a broad perspective, and consider ways to minimise it.

For example, businesses should consider:

- Refreshing compliance policies and training programmes for sales, M&A, and other teams on avoiding breaches in the first place, including refreshers on what constitutes commercially sensitive information;
- Limiting commercially sensitive information shared as part of M&A diligence;
- Implementing clean teams or other structural safeguards to limit information sharing internally with employees who may be able to use that information in their day-to-day roles; and
- Revisiting internal guidelines for employee participation in trade associations and industry groups, and the use of benchmarking and industry survey service providers.

FOR MORE INFORMATION

Our Antitrust team is available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:

NAFEES SAEED

+44 20 7903 1122
nafees.saeed@weil.com

BELLA SPRING

+44 20 7903 1753
bella.spring@weil.com

CHRIS THOMAS

+44 20 7903 1281
chris.thomas@weil.com

FURTHER MEMBERS OF THE EUROPEAN ANTITRUST TEAM

NICHOLAS BARNABO
nicholas.barnabo@weil.com

NUNA VAN BELLE
nuna.vanbelle@weil.com

EVA BARTHELMANN
eva.barthelmann@weil.com

HANNAH BERRY
hannah.berry@weil.com

CHRIS CHAPMAN
chris.chapman@weil.com

LUCY CHAMBERS
lucy.chambers@weil.com

GABRIEL CHARKI
gabriel.charki@weil.com

CLÉMENCE COPPIN
clemence.coppin@weil.com

JAKOB DEWISPELAERE
jakob.dewispelaere@weil.com

MARTIN ELLIE
martin.ellie@weil.com

ROBERT EYRES
robert.eyres@weil.com

STEFFEN FLORIAN GIOLDA
steffen.giolda@weil.com

ROMAIN FERLA
romain.ferla@weil.com

JAKE GILBEY
jake.gilbey@weil.com

MEGAN GRANGER
megan.granger@weil.com

JAYATI HANDA
jayati.handa@weil.com

GENEVA TORSILIERI HARDESTY
geneva.hardesty@weil.com

VENETIA HUDD
venetia.hudd@weil.com

JENINE HULSMANN
jenine.hulsmann@weil.com

PATRICK MAY
patrick.may@weil.com

NIKLAS MAYDELL
niklas.maydell@weil.com

MARIJA MOMIC
marija.momic@weil.com

LUCA MONTANI
luca.montani@weil.com

JENNY PATROCLOU
jenny.patroclou@weil.com

LUCY PECKHAM
lucy.peckham@weil.com

NEIL RIGBY
neil.rigby@weil.com

MARTIN WAGNER
martin.wagner@weil.com

ANNA ZANAZZO
annagiulia.zanazzo@weil.com

ALEXANDRA ZAYTSEVA
alexandra.zaytseva@weil.com

WEIL.COM

#97864250

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