Balmoral Tanks v CMA

A Moral Tale

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The Competition Appeal Tribunal's decision in *Balmoral Tanks v CMA*[1] could almost have been conceived as a case study. It contrasts an old fashioned cartel, involving organised price fixing and customer allocation, with "loose pricing talk" among competitors, and reminds us that modern competition law is well equipped to deal with both. The decision also takes a robust approach to the calculation of fines, declining to interfere with the CMA's calculations, despite some apparently anomalous results.

Background: the Tamworth meeting

On 11 July 2012 three men met in the Best Western Appleby Magna, in Tamworth. The meeting lasted only ninety minutes, but lead to a series of unexpected consequences.

All of the men represented suppliers of cylindrical galvanised steel tanks, used in fire suppression sprinkler systems. Two of the men represented longstanding suppliers, Franklin Hodge and Kondea, who had been involved for a number of years in a successful cartel. The other represented Balmoral, who had entered the market six months previously, disrupting the cartel and reducing prices by as much as 20%.

Unsurprisingly, the two cartelists were keen to persuade Balmoral of the benefits of joining their arrangements and restoring prices to the cartel levels. Indeed they had been pursuing this objective for some time. Balmoral had consistently refused to do so, and repeated its refusal at the 11 July meeting.

However, rather than ending the meeting, the men remained and held a more general discussion about pricing in the market.

They noted a recent contract for 135m^2 tanks won by a fourth competitor, Galglass, at a price of £14,650 per tank. All three considered this price to be unsustainable.

Balmoral's representative went on to give an indication of the prices it had

[1] [2017] CAT 23.

recently bid for this tank type: between £15,000 and £17,000. He also indicated that this would be the pricing range for bids going forward. All three men discussed a target range for such tanks, again £15,000 to £17,000, with a preference for the upper end of the range.[2]

The CMA's investigation

Little did the parties know, but another of the cartelists had blown the whistle, the cartel was under investigation, and the meeting was being covertly recorded by the CMA.

The CMA went on to take action against the main cartel, including both criminal and civil actions. It also opened an investigation into the discussions at the 11 July meeting, deciding in December 2016 that they had constituted an unlawful concerted practice and fining Balmoral £130,000.

Balmoral appealed to the Competition Appeal Tribunal.

The appeal on liability

Balmoral clearly felt a strong sense of injustice at the CMA's actions, describing its appeal as one of principle alone, the legal costs outstripping the £130,000 fine it was challenging.

There is indeed some poignancy in the story: Balmoral attended the meeting with the intention of refusing to join the main cartel, but ended up entangled in a separate infringement.

The case also highlights the development in the law over the past twenty years. The prohibition on anticompetitive agreements[3] now extends far beyond firm commitments to allocate customers and share prices, as found in the main cartel. It encompasses precisely the sort of exchange of future pricing intentions which took place at the 11 July meeting. Many of these developments are illustrated by Balmoral's arguments and the Tribunal's responses:

- Balmoral attended the meeting with the purpose of resisting a cartel, not joining one: Balmoral argued that the CMA failed to take into account the fact that it had gone to the meeting with the purpose of ending the unwelcome approaches from its competitors.

  It is correct that the CMA is required to assess agreements and concerted practices having regard to (among other things) the objectives of the

[2] Similar discussions took place in relation to school tanks.

[3] Article 101 TFEU, Competition Act 1998, s.2.

parties.[4] However the Tribunal had little difficulty in finding that: "*the relevant purpose is not the purpose which those attending the Meeting hoped to achieve when they started their discussion but the purpose of the arrangement that had been arrived at by the end of the Meeting*".[5] The latter was to achieve a stabilisation of prices towards the higher end of the bands discussed, and so supported an infringement finding.

- The disclosures did not represent Balmoral's actual pricing strategy: Balmoral also argued that its representative at the meeting, Mr Joyce, was not closely involved in pricing decisions, and was not in a position to disclose its strategy with any accuracy. The Tribunal was sceptical, but ruled that the point was irrelevant. Balmoral had disclosed a strategy, knowing it was likely to influence the conduct of its competitors. It did not matter if the disclosure was inaccurate or even deliberately misleading. To paraphrase the General Court in *Dole*,[6] a cheating cartellist is still a cartellist.

- A single meeting was insufficient to establish a concerted practice: Many concerted practices involve regular and ongoing discussions, but it is well established that a single meeting can in principle be enough. The question is a purely practical one: whether the parties have succeeded in reducing uncertainty about their future pricing.[7]

  The Tribunal concluded that this meeting was indeed successful. The specific pricing indications given were likely to remain valid for long enough to impact a material number of future bids, as there were few disruptive factors, such as unruly competitors or fluctuating costs. Moreover Balmoral had given broad indications of its long term strategy, namely not to push prices down further, which could influence the others' actions over a significant period.

- The information exchanged was the wrong type of information: Balmoral also argued that the parties had not exchanged the kind of specific information that would be needed to reduce uncertainty in the market. In particular it claimed that the disclosed pricing:

  - Were generic and did not account for the variability of the product (Balmoral stated that no two tanks are sold for the same price);

  - Reflected aggregated market data and not targets; and

[4] Cases C-501/06P etc *GlaxoSmithKline v Commission* [EU:C:2009:610].

[5] Para. 82.

[6] Case T-588/08 *Dole v Commission* [EU:T:2013:130].

[7] See for example Case C-8/08 *T-Mobile Netherlands and others* [EU:C:2009:343].

- Were historic and did not reveal future intentions.

All of these arguments were rejected on the facts.

- There was no impact on Balmoral's conduct after the meeting: Balmoral also argued that it had not taken the discussions into account in setting prices after the meeting.

  On this issue the burden of proof is reversed: having received the sensitive commercial information, it was for Balmoral to establish that it had not taken it into account in its future market activity.[8] In seeking to do so, it relied on the fact that only two days after the meeting it had bid to supply a 135m^2 tank, quoting a price of £14,900, a price *below* the lower boundary of the range it had discussed with Franklin Hodge and Kondea.

  The Tribunal confirmed that this was not sufficient to rebut the presumption. An undertaking may take a discussion into account, even if it does not act in accordance with what was proposed in that discussion.[9]

- The information was available from customers in any event: It also argued that the information was already available because customers commonly passed on other providers' quotations as part of the negotiating process. The Tribunal found that the meeting had nevertheless provided the parties with an opportunity to confirm their understanding and gain a better insight into how their competitors might charge in the future.

The Tribunal therefore upheld the CMA's reasoning on liability in full.

The appeal on penalty

The calculation of the penalty in this case produced some apparently anomalous results.

- Differential amounts: Balmoral's fine in respect of the discussions at the 11 July meeting was £130,000, considerably higher than the £22,000 imposed on Kondea in respect of the main cartel, a more serious infringement which had run for seven years.

  The difference arose principally because of the difference in size between

[8] Case C-199/92 P *Hüls v Commission* [EU:C:1999:358]; Case C-49/92 P *Commission v Anic* [EU:C:1999:356].

[9] See for example Case T-655/11 FSL v Commission [EU:T:2015:383] (subsequently appealed but on separate grounds). In any event it was sufficient that Franklin Hodge had taken the discussions into account.

the companies. Kondea's fine was reduced by over 98% to reflect the size of its turnover, assets and profit.[10] Balmoral's would have been increased for similar reasons, but for its cooperation in the prosecution of the main cartel.

The Tribunal dealt very quickly with Balmoral's complaint that the relative levels of these fines was unfair and discriminatory, cautioning against comparing the outcomes of penalty calculations, and focussing instead of the individual steps, which had been applied to both companies without discrimination.

- No fines for Kondea or Franklin Hodge: The CMA decided not to impose a penalty on Kondea or Franklin Hodge in relation to the information exchange, reasoning that this infringement was closely linked to the main cartel, for which they had been penalised, and also that the penalties imposed in relation to the main cartel had been relatively high. The Tribunal stated that it has been "initially concerned" by this decision, but had concluded that the CMA had been entitled to conclude no additional fines were necessary in order to deter those parties (and others) from committing further infringements.

This final point raises an interesting question: is there really no deterrent effect to be achieved by fining firms for a second and subsequent infringement in the same market? The CMA and Tribunal appeared satisfied that there was not, but there is evidence that marginal deterrence of this kind can be effective. In a study of Italian kidnappings,[11] it was observed that: "*deaths associated with kidnappings increased in prevalence when the kidnapping sanction increased, causing a decrease in the marginal sanction for murder. Death rates reversed when marginal sanctions enhanced sanctions for murder were later introduced.*" In other words, Italian kidnappers were able to calculate that they may as well be hanged for a sheep as for a lamb. It remains to be seen whether price-fixers are as strategic. If so, there may be cause to revisit this aspect of the CMA's approach to penalties.

[10] Both through the operation of the CMA's penalty guidelines and as a result of the statutory cap, setting a maximum of 10% of worldwide turnover.

[11] Detotto, Claudio and McCannon, Bryan C. and Vannini, Marco, *Evidence of Marginal Deterrence: Kidnapping and Murder in Italy* (May 10, 2014). Available at SSRN: https://ssrn.com/abstract=2469642 or http://dx.doi.org/10.2139/ssrn.2469642 .

Rob Williams and James Bourke acted for the CMA.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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