



Insurance sector under renewed scrutiny by UK competition regulator

The insurance sector has recently come under renewed scrutiny by the UK's competition regulator, the Office of Fair Trading (the "OFT"). First, the OFT is conducting a second public consultation on undertakings given by motor insurance companies to modify an information exchange programme in which they are involved following concerns raised by the OFT. A further consultation became necessary after an important change was made to the earlier undertakings.

Second, in an apparently unconnected move, the OFT announced in September that it is assessing competition in the motor insurance market more broadly. The OFT says that it seeks to understand the reasons for a reported 40% rise in UK motor insurance premiums in the last year and to assess whether the market could be functioning better. The investigation includes a look at the role of price comparison websites and insurance companies' use of panels of approved repairers.

While the focus of these investigations is motor insurance, they are likely to have implications for other insurance areas, and potentially other businesses that use information exchange programmes and where price comparison websites are active. Each of these developments is considered in turn below.

Whatif? motor insurance case

In January 2011, the OFT issued a "Notice of intention to accept binding commitments" in relation to an investigation it had been conducting into a data exchange tool used by motor insurers (the WhatIf? Private Motor scheme). A technology company offered a data exchange tool to motor insurers, based on pricing information the insurers provided to another technology company for purposes of providing an online quotation service to brokers. The data exchange tool provided to the motor insurers enabled them to view competitors' prices across risk profiles and therefore potentially to reverse engineer competitors' rating models by batch processing a sufficiently large number of quotations. Prices were accessible to competitors two weeks in advance of the prices going live with brokers.

The OFT considered that the WhatIf? scheme constituted an automatic and serious violation of UK and EU competition rules. While the OFT could have imposed fines, it treated the facts as novel and announced its willingness to accept undertakings from the insurance companies to modify the information exchange programme. The undertakings comprised two main elements: (1) insurers must not be able to access data relating to policies that would be available in the future; and (2) insurers must not be able to access data less than the 36 months old unless those data are anonymised and aggregated across at least five insurers.

However, following consultation, the OFT has reached the view that the commitments were more restrictive than necessary. At the end of September, the OFT initiated a second public consultation on a revised set of commitments

amending from 36 months to six months the time period before which the data exchanged must be anonymised and aggregated.

The exchange of market-related information – whether via trade associations or other third party providers – can often be legitimate and have pro-competitive effects. However, as is made clear in the European Commission’s 2010 Guidelines on Horizontal Cooperation (the “**Guidelines**”), the exchange of certain types of information among competitors can have a dampening effect on competition and can serve to facilitate collusion among market participants.¹ The Guidelines provide that the exchange of sufficiently historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of competitors’ future conduct or provide a common understanding of the market. The Guidelines do not determine a precise duration over which data become historic. However, the European Commission has previously considered as historic individualised data that were more than 12 months old.

The OFT’s reasoning for its shift to a six month period is that allowing the sharing of more recent data will improve competition by removing undue constraints on new market entrants and on competitors moving into new product areas.

OFT investigation into reported price rises in motor insurance premiums

Also in September, the OFT issued a call for evidence to motor insurance companies, insurance brokers, price comparison websites, credit hire providers, and vehicle repairers. The detailed questionnaires from the OFT cover the role of price comparison websites, the provision of replacement vehicles to drivers involved in accidents, insurance companies’ use of panels of approved repairers, and ancillary products that are sold by insurance companies in addition to standard private motor insurance cover.

The OFT’s call for evidence indicates that the OFT is conducting a broad-ranging investigation. The OFT’s nine-page questionnaire to insurance companies, for example, requests information on: (1) motor insurance premium levels, claims and expense ratios, costs information, revenue data; (2) the reasons for any changes in premium levels; (3) the reasons for different premium levels in different geographies and for different consumer groups; (4) the effect that price comparison websites have had on motor insurance premiums (including whether there are any barriers to the entry and expansion of such websites and whether there is a level playing field between different private motor insurance companies quoting on such websites); (5) developments in the credit hire market over the past five years; (6) how ancillary products and services are provided; (7) potential price discrimination depending on how products are sold (*e.g.*, via a broker or price comparison website); and (8) the pros and cons of operating an approved repairer scheme.

The OFT’s own investigation is in addition to action already being undertaken by the Financial Services Authority (examining whether consumers purchasing insurance on price comparison websites are being treated fairly) and the UK Government (considering the cost of personal injury claims to motor insurers, including the impact of referral fees). Moreover, on 13 September 2011, the Motor Insurance Regulation Bill 2010-11 received its first reading in the House of Commons. This is a private members’ Bill introduced by Labour MP Jack Straw and aimed at banning the payment of referral fees, as well as setting requirements relating to risk pricing for personal injury claims (with a view to standardising motor insurance premiums throughout the UK).

The OFT plans to publish its findings from the call for evidence in December 2011. If the findings highlight any concerns, options open to the OFT include launching a full market study into specific aspects of the market, undertaking consumer or competition enforcement action, seeking voluntary action from the industry, or undertaking further work to consider whether a referral to the Competition Commission is merited.

Commentary

The OFT indicated at the time of its first consultation on the WhatIf? commitments that it had evidence of anti-competitive information exchange in other insurance areas and gave a clear signal to all insurers operating in the UK to

¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, available at: http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf.

examine the legality of their information exchange programmes. At a time when many insurers and trade associations have therefore been assessing their various information exchange programmes by reference to the January 2011 commitments, the reduction in length of the period before which data must be anonymised and aggregated will be welcome. However, the OFT's detailed analysis of the value and impact of the exchange of historical data suggests that each individual information exchange programme will need to be assessed on its merits, particularly with regard to the age of the data at issue.

Given the wide-ranging nature of the OFT's call for evidence as regards the increase in motor insurance premiums, its investigation in this area has the potential to impact not only on motor insurance but also on other insurance lines and even other sectors. For example, if the OFT identifies potentially anti-competitive practices in relation to the role of price comparison websites, this may be relevant for other insurance lines offered on such websites, including life, home, and travel insurance. Accordingly, it will be important for stakeholders to engage with the OFT with a view to minimising the impact of this investigation.

If you have any questions regarding this Update, please contact the author of this Update or the regular Sidley lawyer with whom you work.

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