

1. Introduction

- 1.1 This note provides guidance on communications between competitors during spectrum auctions to mitigate the risk of incurring antitrust liability.
- 1.2 Based on EU case law to date, exchanging competitively sensitive information between competitors will attract antitrust liability for all companies involved in the exchange, even if the exchange is unilateral and not reciprocal. This is because the EU antitrust agencies presume that even the unilateral disclosure of competitively sensitive information from one competitor to another is sufficient to remove the uncertainty of the operation of the market in question and to restrict competition.
- 1.3 Broadly, exchanging information regarding present and future confidential information, such as individualised intentions concerning future conduct regarding prices or quantities, is likely to give rise to a high risk of incurring antitrust liability. By contrast, exchanging information regarding past and non-confidential information, such as aggregated and historical prices and quantities, is likely to give rise to a low risk of incurring antitrust liability.

2. Prohibited Communications in the Context of Spectrum Auctions

- 2.1 Antitrust rules prohibit certain communications between applicants for an auction, regardless of whether the applicants seek permits or licences in the same geographic area or market. The rules also apply to communications by applicants with non-applicant nationwide providers of communications services and by nationwide applicants with non-applicant non-nationwide providers. The rules further prohibit “joint bidding arrangements”, including arrangements relating to the permits or licences being auctioned that address or communicate, directly or indirectly, bidding at the auction, bidding strategies, including arrangements regarding price or the specific permits or licences on which to bid, and any such arrangements relating to the post-auction market structure.
- 2.2 However, the rules allow for limited exceptions for communications within the scope of any arrangement consistent with the exclusion from the general rule prohibiting joint bidding, provided such arrangement is disclosed on the applicant’s auction application. Applicants may communicate pursuant to any pre-existing agreements, arrangements or understandings that are solely operational or that provide for the transfer or assignment of licences, provided that such agreements, arrangements or understandings are disclosed on their applications and do not both relate to the licences at auction and address or communicate bids (including amounts), bidding strategies, or the particular permits or licences on which to bid or the post-auction market structure.
- 2.3 In addition to express statements of bids and bidding strategies, the prohibition against communicating in any manner includes public disclosures, as well as private communications and indirect or implicit communications. Consequently, an applicant must take care to determine whether its auction-related communications may reach another applicant.
- 2.4 Competing bidders should take special care in circumstances where their officers, directors and employees may receive information directly or indirectly relating to any applicant’s bids or bidding strategies. Such information may be deemed to have been received by the applicant under certain circumstances. For example, antitrust agencies may find that, where an individual serves as an officer and director for two or more applicants, the bids and bidding strategies of one applicant are presumed to be conveyed to the other applicant through the shared officer, which creates an apparent violation of the rule.
- 2.5 Subject to the limited exceptions for communications within the scope of any arrangement consistent with the exclusion from antitrust rules prohibiting joint bidding, applicants are prohibited from communicating with specified other parties only with respect to their own, or each other’s, or any other applicant’s bids or bidding strategies.




- A communication conveying bids or bidding strategies (including post-auction market structure) relating to the licences being auctioned is also prohibited. Thus, the prohibition is limited in scope and does not apply to all communications between or among the specified parties. The antitrust agencies consistently have made clear that the application of the rule prohibiting communications has never required total suspension of essential ongoing business. Entities subject to the prohibition may negotiate agreements during the prohibition period, provided that the communications involved do not relate to both (1) the licences being auctioned and (2) bids or bidding strategies or post-auction market structure.
- 2.6 Accordingly, business discussions and negotiations that are unrelated to bidding in the same auction and that do not convey information about the bids or bidding strategies, including the post-auction market structure, of an applicant are not prohibited by the antitrust rules. Moreover, not all auction-related information is covered by the prohibition. For example, communicating merely whether a party has or has not applied to participate in the auction will normally not violate the rule. In contrast, communicating, among other things, how a party will participate, including specific geographic areas selected, specific bid amounts and/or whether or not the party is placing bids, would convey bids or bidding strategies and would be prohibited.
- 2.7 While antitrust rules do not prohibit business discussions and negotiations among auction applicants that are unrelated to the auction, each applicant must remain vigilant not to communicate, directly or indirectly, information that affects, or could affect, bids or bidding strategies. Certain discussions might touch upon subject matters that could convey price or geographic information related to bidding strategies. Such subject areas include, but are not limited to, management, sales, local marketing agreements and other transactional agreements.
- 2.8 Antitrust agencies caution applicants that bids or bidding strategies may be communicated outside of situations that involve one party subject to the prohibition communicating privately and directly with another such party. For example, antitrust agencies warned that prohibited communications concerning bids and bidding strategies may include communications regarding capital calls or requests for additional funds in support of bids or bidding strategies to the extent such communications convey information concerning the bids and bidding strategies directly or indirectly. Moreover, antitrust agencies found a violation of the rule against prohibited communications when an applicant used the tendering authority's bidding system to disclose its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate in specific markets. The use of bidding systems by competing bidders to disclose market information to each other will not be tolerated and will likely subject bidders to a high risk of potential antitrust liability.
- 2.9 Applicants also should be mindful that communicating non-public application or bidding information publicly or privately to another applicant may violate antitrust rules even though that information subsequently may be made public during later periods of the application or bidding processes.
- 2.10 Antitrust rules do not prohibit an applicant from communicating bids or bidding strategies to a third party, such as a consultant or consulting firm, counsel or lender. The applicant should take appropriate steps, however, to ensure that any third party it employs for advice pertaining to its bids or bidding strategies does not become a conduit for prohibited communications to other specified parties, as that would violate the rule. For example, an applicant might require a third party, such as a lender, to sign a non-disclosure agreement before the applicant communicates any information regarding bids or bidding strategies to the third party. Within third-party firms, separate individual employees, such as lawyers or auction consultants, may advise individual applicants on bids or bidding strategies, as long as such firms implement firewalls and other compliance procedures that prevent such individuals from communicating the bids or bidding strategies of one applicant to other individuals representing separate applicants. Although firewalls and/or other procedures should be used, their existence is not an absolute defence to liability if a violation of the rule has occurred.
- 2.11 In some spectrum auctions, in the case of an individual, the objective precautionary measure of a firewall may not always be available. As a result, an individual that is privy to bids or bidding information of more than one applicant presents a greater risk of becoming a conduit for a prohibited communication. This situation calls for greater care and attention regarding who possessed what information, what information was conveyed to whom and the course of bidding in the auction.
- 2.12 Potential applicants may discuss the bids for specific licences or licence areas with the counsel, consultant or expert of their choice before the application deadline. Furthermore, the same third-party individual could continue to give advice after the deadline regarding the application, provided that no information pertaining to bids or bidding strategies is conveyed to that individual. To the extent potential applicants can develop bidding instructions prior to the application deadline that a third party could implement without changes during bidding, the third party could follow such instructions for multiple applicants, provided that those applicants do not communicate with the third party during the prohibition period.
- 2.13 Applicants also should use caution in their dealings with other parties, such as members of the press, financial analysts or others who might become conduits for the communication of prohibited bidding information. For example, even though communicating that it has applied to participate in the auction will not violate the rule, an applicant's statement to the press that it intends to stop bidding in an auction could give rise to a finding of an antitrust violation, if it is intended as a signal to competing bidders. Similarly, an applicant's public statement of intent not to place bids during bidding in an auction could also violate the rule for the same reason.

3. Antitrust Risk Matrix

3.1 The following table sets out the type of information giving rise to a higher and lesser risk of incurring antitrust liability, respectively, in the context of a spectrum auction.

Greater Risk	Lesser Risk
Discussing any other applicants' bids or bidding strategies (including post-auction market structure), or negotiating settlement agreements, before the down payment deadline	Discussing a joint bid as part of a partnership or joint venture (assuming that the partnership and joint venture itself is compliant with antitrust laws) or after the down payment has been made
Benchmarking between companies that are potential or actual competing bidders for the same spectrum lots	Benchmarking between companies that are not potential or actual competing bidders for the same spectrum lots or active in different relevant markets (e.g. in another member state)
Benchmarking with a company not participating in the auction but belonging to the same corporate group of a competing bidder	Benchmarking with a company not participating in the auction but belonging to the same corporate group of a competing bidder, provided that the company has put in place an internal Ethical Wall with the competing bidder, or has confirmed that there is no flow of competitively sensitive information intra-group regarding the auction
Joint lobbying to change the spectrum auction rules with the object or effect of favouring some operators or excluding others	Joint lobbying to change the spectrum auction rules by reference to general principles and not specific business conduct
Discussing current or future and Customer-specific intentions regarding price and quantities using the spectrum under auction or adjacent or substitutable (with regard to the use of the) spectrum	Discussing historical (one year old) and aggregated (non-customer-specific) price and quantities using the spectrum under auction or adjacent or substitutable (with regard to the use of the) spectrum
Having the same key personnel dealing with the spectrum auction and other cooperation agreements with competing bidders	Having separate teams and an Ethical Wall between key personnel dealing with the spectrum auction and other cooperation agreements with competing bidders
Discussing confidential information (e.g. information leaked only to a few bidders)	Discussing publicly available information (e.g. information disclosed to all bidders at the time of the public bid opening or when publishing the results of a tender)
Signalling price bids to competing bidders through code bids, reflexive bids, cover bids, retaliating bids or withdrawals	Unilateral decisions on price bids and ignoring any attempts to tacit collusion by others bidders
Participating in unsupervised scheduled or unscheduled pre-bid meetings with potential bidders to discuss competitively sensitive information, including technical and administrative specifications of the procurement opportunity	Limiting meetings with potential bidders to a multiparty dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity
Using the same industry consultant to channel and receive information to and from other bidders about competitively sensitive information, such as bid prices (so-called "hub and spokes" cartel)	Using the consultant's expertise to clearly describe the criteria/specification, and then conduct the procurement process in house
Using subcontractors to split the profits among bid riggers	Disclose upfront if you intend to use subcontractors

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