# Recent Developments in Price Signalling in the EU

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**ABA Section of Antitrust Law Spring Meeting**
**April 2015**

**Price Signalling in the EU**

Price signalling as a form of anti-competitive information exchange has long been a concern under EU competition law. However, there have not been many cases and it's commonly seen as a grey area.

The issue has recently been given a much higher profile, with regulators having looked at it in at least three cases in three different sectors. Some commentators have suggested that these cases show a more aggressive regulatory approach to price signalling in the EU. While this is probably unlikely since the cases are essentially unrelated, it is undoubtedly the case that they hold important lessons in particular for companies operating in industries in which public price or output announcements are used. The messages from the cases are also of more general interest.

The three recent cases have been investigated by regulators in the UK (Competition Commission[1]) (CC), the Netherlands (Authority for Consumers & Markets) (ACM) and at EU level (the European Commission (EC)). The EC's case is currently open, its investigation having been announced with a press release on 22 November 2013[2]. This concerns the container liner shipping sector. The Dutch case from the ACM was a commitments (or "settlement") case concerning the mobile phone sector, which was closed with a decision on 7 January 2014[3]. The UK case from the CC (now replaced by the Competition and Markets Authority (CMA)) was a "market investigation" into the cement sector, which concluded on 14 January 2014[4].

These recent cases from the UK, the Netherlands and at EU level provide useful illustrations of how this issue might be analysed.

The background law

The basic outline of EU competition law as it applies to bilateral or multilateral relations is well known. Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) bans agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU member states and which have as their the object or effect the

[1] The UK Competition Commission was abolished and replaced by the UK Competition and Markets Authority (CMA) on 1 April 2014.
[2] European Commission press release IP/13/1144, "Antitrust: Commission opens proceedings against container liner shipping companies", available at http://europa.eu/rapid/press-release_IP-13-1144_en.htm.
[3] Authority for Consumers & Markets press release, "Investigation into mobile operators concluded", available at https://www.acm.nl/en/publications/publication/12311/Investigation-into-mobile-operators-concluded/. The decision is available only in Dutch.
[4] Competition Commission press release, "CC to create new cement producer", available at http://www.competition-commission.org.uk/media-centre/latest-news/2014/Jan/cc-to-create-new-cement-producer.

prevention, restriction or distortion of competition within the EU. Any such agreements or decision are void (Article 101(2) TFEU). Pursuant to Article 101(3), an exemption is possible if the pro-competitive aspects outweigh the anti-competitive impact of the agreement or decision.

Of course, fines can be imposed for an infringement of Article 101(1) and third parties can sue for damages in national courts. An infringement will also give rise to reputation risk for companies and, in some cases, under separate national provisions, individual criminal penalties for individuals (such as in the UK for the "cartel offence").

Beyond this basic position, any consideration of price signalling (or information exchange more generally) under EU competition law starts with a review of the EC's guidelines on horizontal co-operation agreements, which cover information exchange[5]. The guidelines recognise that information exchange may generate various types of efficiency gains but that it may also lead to restrictions of competition, in particular in situations in which it is liable to enable undertakings to be aware of market strategies of their competitors[6].

Concerted practice

As can be seen, for information exchange to give rise to a possible infringement of EU competition law, it must give rise to an "agreement", "decision by association of undertakings" or "concerted practice" (so involving more than one economic entity). In the context of signalling, the issue is invariably whether a concerted practice has arisen.

A concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition. This does not require an actual plan to have been worked out. The issue is that any company must determine independently the policy which it intends to adopt on the market and the conditions which it intends to offer to its customers. Where there is practical cooperation then this independent decision making no longer exists.

Traditionally, several specific factors have to be demonstrated in order to show a concerted practice. First, the parties engaged in concertation or

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[5] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 (14 January 2011), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN.

[6] For a general discussion of the policy issues around unilateral disclosure of information (including public announcements), see the OECD Policy Roundtable 2012 on Unilateral Disclosure of Information with Anticompetitive Effects, available at http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf.

cooperation, so that there was a plan to cause the others to react. Secondly, they behaved on the market pursuant to those collusive practices. Thirdly, there was a relationship of cause and effect between the concertation and the conduct on the market (but there is a rebuttable presumption that this was the case).

In the context of information exchange, the guidelines put the focus on "strategic uncertainty"[7]:

"[A concerted practice arises out of] any direct or indirect contact between competitors, the object or effect of which is to influence 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, thereby facilitating a collusive outcome on the market. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete."

Apart from the type of information involved (is it strategic?), the key issue in price signalling cases is whether there is indeed an "exchange" and what is needed to constitute this. The guidelines make it clear that the threshold is low at least in private information exchange cases. The EC states that "A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it [or requests it] can ... constitute a concerted practice"[8]. In other words, there does not need to be reciprocity.

Further, an exchange can arise from mere attendance at a meeting, even a single meeting.

Apart from this general discussion of exchange, the guidelines expressly consider the situation of public announcements in the following terms (where there is no invitation to collude, which is obviously problematic)[9]:

"Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice...However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses

[7] See paragraph 61.
[8] See paragraph 62.
[9] See paragraph 63.

of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination."

This is the nub of the matter in price signalling cases. Assuming the information will reduce strategic uncertainty, does the way in which the information is put into the market and competitors' responses go beyond a mere unilateral announcement so as to amount to a concerted practice? There is particular risk where a unilateral public announcement is followed by public announcements by competitors. This means in practice that a statement by one company may limit the ability of its competitors to respond since this may then give rise to a concerted practices allegation. The burden of proof may then shift to the parties to show that no common understanding existed.

This analysis needs to be read against the background of the existing case law, which does not entirely fit with the EC's position in the guidelines. In particular, the seminal Wood Pulp case is of relevance. This concerned the use of quarterly price announcements by pulp producers, which the EC condemned as an infringement of Article 101(1) TFEU[10]. On appeal, the European Court of Justice overturned this, finding as follows[11]:

"...parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although [Article 101(1) TFEU] prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors ... Accordingly, it is necessary in this case to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation."

Generally, therefore, according to this case law, the EC has to show a concerted practice through reliance on documentary evidence showing contacts between parties. In the absence of this, however, it remains open to the EC to infer a concerted practice where there is no plausible alternative explanation for the parallel behaviour. The EC will need to show in these

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[10] Commission Decision 85/202/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.725 - Wood pulp), OJ L 85/1 (26 March 1985), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985D0202&from=EN.

[11] A. Ahlström Osakeyhtiö and others v Commission of the European Communities, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85, C-129/85, available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93717&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=489879.

public announcement cases that the intended audience was competitors and that there was some sort of response.

Restriction of competition

Once it has been established that there is a concerted practice arising out of signalling, it is necessary to establish whether the signalling in question gives rise to an anti-competitive restriction of competition. This of course depends on the information in question and the characteristics of the markets, but the guidelines provide helpful guidance. In particular, they indicate which types of information exchange are likely to be seen as a restriction "by object" and therefore automatically to fall with Article 101(1) TFEU and (absent very special circumstances) not be open to exemption under Article 101(3) TFEU.

In this regard, the guidelines state as follows (emphasis added):

"Information exchanges between competitors of individualised data regarding intended future prices or quantities should ... be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities...".

This formulation was repeated more recently in the EC's guidance on restrictions of competition "by object"[12].

In other cases, the likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange (the counterfactual). For an information exchange to have restrictive effects on competition within the meaning of Article 101(1) TFEU, it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.

In considering these issues, it is important to note the phrase "intended future" price or quantity information[13]. Many industries (such as airline, auto

[12] Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, available at http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf.

and retail petrol) regularly announce prices and they are committed to sell at the time at those prices. However, this is different from the announcement of future pricing intentions.

It is also important to appreciate that, although these are the most risky, the provision of other types of information beyond price and quantity information can raise concerns. Companies should assume that forward-looking statements about any changes to commercial terms or about general strategy or market development will be looked at very carefully.

EC container shipping case

This case was initiated several years ago (May 2011) with dawn raids by the EC at the premises of various companies active in container liner shipping in several EU Member States. At that time, it was not clear what the EC's concerns related to, the EC simply indicating that it had reason to believe that the companies had violated the EU antitrust rules.

The EC's 22 November 2013 press release made it clear that this is a signalling case. The EC is concerned that the parties are, in practice, signalling future price intentions to each other.

Specifically, the EC is concerned about the following alleged facts:

- the making of regular public announcements of price increase intentions through press releases on websites and in the specialised trade press;
- the announcements being made several times a year;
- the announcements containing the amount of the increase and the date of implementation, which is generally similar for all announcing companies;
- the announcements usually being made successively by the companies a few weeks before the announced implementation date.

In summary, therefore, the EC is concerned about public announcements of future price intentions (as opposed to private letters to individual customers) with very similar timings, increases and dates of implementation. It seems likely that the most difficult issue for the parties will be the public nature of the announcements and their advance nature. They will need to explain why it is necessary to do it this way, including the need for the gap between announcement and implementation, and explain that they are not "testing" each other's prices and pushing each other to align.

[13] This should be taken to include at least information on future sales, market shares, territories and sales to particular groups of customers.

The EC is expressly relying on this practice giving rise to a "concerted practice". The parties will be hoping that, in addition to the simple coincidence of timing and amounts, there are no contacts which might assist the EC in proving an infringement. Although the EC could rely purely on uniform or parallel conduct, its case will be much stronger if there has been direct or indirect contact between the parties. If the case is purely based on uniform conduct, the parties might be able to defeat it by showing a plausible alternative explanation (per Wood Pulp; such as the legitimate purpose of providing customers with relevant information).

It can be seen that the information allegedly exchanged in this case is of the type that would give rise to a restriction by object. The EC may not treat this as a cartel in the strict sense and the case is most likely to be closed via a settlement[14]. This is because, given in particular the novel nature of the case, the EC is unlikely to want to impose fines. Nevertheless, the case could end up serving as a precedent for similar unilateral public pricing announcement and be a clear warning for other companies as to the risks of using these. Future fines for any similar conduct could not be ruled out.

ACM mobile phone case

The Dutch case did not result in a finding of an infringement, but the ACM used its powers to accept commitments where no formal infringement is found. Broadly, it identified in this case a risk that public statements about future behaviour could potentially raise competition concerns, which needed to be neutralised.

The case essentially concerned companies "testing the water" by pre-announcing pricing or commercial plans without having already committed to implementation. Put another way, the announcements being made did not reflect decisions already made and were thus seen as altering competitors' expectations and risking a competitive reaction.

The details of the case were that mobile operators had made various statements at conferences and in the trade press. Specifically, the following took place:

- a KPN employee announced at a conference in 2008 that the company was planning to reintroduce connection fees, even though there hadn't been an internal decision to do that. This was followed on the same day by T-Mobile announcing it would reduce its connection fee

[14] It has been reported (MLex, 13 November 2014; "Liner shippers edge toward settlement in price-signalling case") that the EC may agree a settlement with the parties under which they would agree to certain restrictions on how they communicate price changes. This may be formalised under the Article 9 procedure contained in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

for iPhone subscriptions by 50%. KPN in fact phased in connection fees from 1 January 2009, with Vodafone and T-Mobile also reintroducing the charges, in part, from early April; and

- a KPN employee announced price changes due to inflation in an interview for a trade magazine.

This is a very interesting analysis, showing that informal public statements of this nature are just as risky as regular and uniform public price increase or similar announcements.

The ACM explained its concern in detail in its press release. Public statements such as these about future market behaviour, which operators are aware would be seen by their competitors, and where no final decision had been taken, carry competition law risks since they "reduce strategic uncertainty". These public statements had led to a situation in which the parties might coordinate; "If competitors took note and followed such publicly-made statements, it could lead to collusive behavior, which is harmful to consumers".

There are further important background facts to this bald analysis. First, it was clear that the statements had not been properly discussed at board level. Secondly, the information had been floated in a very concentrated market (three major players) so the ACM was worried that competitors could easily react to the statements and the originator could then change its position depending on the reaction. Thirdly, there had been a long discussion in the industry as to which operator would be the first to raise connection fees, since it was clear that the first to do so would be at a competitive disadvantage.

In order to settle the case and therefore "to avoid any risk of illegal collusive behavior in the future" the companies agreed to refrain from making verbal or written public statements about pricing or commercial plans before there has been an internal decision on the move. In addition, they promised to incorporate this commitment into their compliance programmes and to give it special attention in employee training workshops.

The ACM expressly made the point that the lessons from the case could be transferred to other markets. Other companies can therefore consider themselves warned; transparency can go too far.

UK cement case

The UK case was a general investigation into the Great Britain markets for aggregates, cement and ready-mix concrete (RMX). The CC was not considering specific allegations about coordination or similar behaviour between companies, but had been asked to analyse the entire structure of these markets. The case does not therefore provide direct insight into the

analysis of concerted practices needed in a price signalling case, but it is nevertheless a very useful illustration of the general concerns and the attitude of a regulator.

The CC found that both the structure of and conduct in the cement sector restricted competition by aiding coordination between the three largest producers, which resulted in higher prices for all cement users. These three producers had refrained from competing vigorously with each other by focusing on maintaining market stability and their respective shares.

As part of its analysis, the CC considered letters by which suppliers informed their customers as to their intentions to raise prices in the near future. It identified concerns about such letters. Accordingly, as part of the required remedies, the CC imposed a prohibition on GB cement suppliers from sending generic price announcement letters to their customers. Instead, any future price announcement letters will have to be specific and relevant to the customers receiving them.

The CC did not propose a mandatory template for customer-specific price announcement letters, but stated that a customer-specific price announcement letter should specify: (a) the name of the customer and the effective date of any price change; (b) the current (or last) unit price paid by the customer; (c) the new unit price being proposed; and (d) details of any other changes that affect the overall price paid.

The intention behind this is to reduce market transparency. The CC had found, amongst other things, that the top three cement producers "appeared to be signalling that they would try to accommodate the others' price increases in many cases". The letters were "aspirational". Although there may be legitimate reasons, the CC found, for notifying customers of planned or intended price increases, e.g. recovery of forecast cost increases and recovery of actual cost increases previously not recovered (or under-recovered), this did not preclude price announcement letters from serving other, anti-competitive purposes at the same time.

The CC considered that a prohibition on generalized or generic price announcement letters would remove one means by which the GB cement producers were able to signal price increases to each other. In particular, it would bring about a change in the manner and possibly timing by which the GB cement producers communicated with their customers. Generic letters would not be sent to all customers at predefined times in the year. Further, by being permitted only to produce customer-specific price announcement letters, it would be more difficult for the GB cement producers to appreciate the level of price increase their competitors are seeking to apply.

Comment and guidance for companies

Competition risk from signalling (principally, but not only, price signalling in price announcement letters) is often seen as theoretical. These cases show that it is not and that compliance programmes need to treat it seriously. They also provide very good examples for compliance training sessions.

These cases reinforce some general messages about the use of price and similar announcements. These are as follows:

- public announcements of intended prices or other changes in key strategic matters will generally be treated with suspicion;
- announcements which are similar will be treated with suspicion. Companies must of course take an independent view, but should also document their internal decision making (without referencing competitors), including indicating why an announcement needs to be made in advance;
- companies should not pre-announce if a decision has not been made and should not pre-warn customers. Do not "test the water";
- a significant gap between announcement and implementation is not helpful; the period should be commercially-justified and customer-driven;
- generic price announcements referring to a figure will be treated with suspicion; it is better not to identify a figure at all;
- generally, do not provide more information than is strictly necessary, particularly concerning future prices or quantities;
- informal comments about prices or strategy (e.g. in a press conference) can be just as dangerous as more formal announcements.

Beyond this, clearly references to specific competitors or contingent announcements (contingent on third party reactions) are very dangerous, since these invite collusion.

This is not an exhaustive list of issues around price and similar announcements. It provides a good starting point, but as ever the individual industry and its particular situation (and the particular facts and any justification) must be analysed carefully.