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To Whom Are You Announcing? EU Authorities Focus on Price Signaling

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Price signaling has long been a concern under competition law in the EU, but there have not been many cases in the area.

This changed recently, with regulators looking at the issue in three high-profile cases in three different sectors. The cases come from the UK (Competition Commission) ("CC")[1], the Netherlands (Authority for Consumers & Markets) ("ACM") and the European Commission ("EC").

The EC's case is currently open and concerns the container liner shipping sector[2]. 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 Competition & Markets Authority ("CMA")) was a "market investigation" into the cement sector, which concluded on 14 January 2014[4].

EC container shipping case

This case was initiated in May 2011 with dawn raids by the EC at the premises of companies active in container liner shipping in several Member States. At that time, the EC simply indicated 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 signaling case (a first before the EC). The EC is concerned that the parties are signaling future price intentions to each other. If proven, this is likely to be seen and fined as a cartel.

1 The CC was abolished and replaced by the Competition & Markets Authority ("CMA") on 1 April 2014.

2 EC 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 ACM 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 CC 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.

Specifically, the EC is concerned about public announcements (as opposed to private letters to individual customers) with very similar timings, increases and dates of implementation. Of most difficulty for the parties will probably be the public nature of the announcements. Even if bunker fuel costs drive the increases, why do they need to be publicly-announced? Are they "testing" each other's prices and pushing each other to align?

The EC is not relying on the parties having reached an agreement as such, but on this being a "concerted practice". A concerted practice can give rise to an infringement of EU competition law in the same way as an agreement, but the EC will have to prove several specific factors if it wishes to proceed with its case.

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 stronger if there has been direct or indirect contact between the parties. If the case is purely based on uniform conduct, the parties could defeat it by showing a plausible alternative explanation.

Although every situation is different and these cases are highly fact-specific, the type of announcements allegedly used in this case is common. Companies in a range of industries should watch it closely.

ACM mobile phone case

The Dutch case appears, by comparison with the public facts of the EC's case, to be a clearer infringement. It concerns companies "dipping their toe in", in other words pre-announcing pricing or commercial plans without having committed to implementation.

In this case, the operators had made statements at conferences and in the trade press which, according to the ACM, created antitrust risk. 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 had not been an internal decision to do that; and
- a KPN employee announced price changes due to inflation in an interview for a trade magazine.

The ACM did not need to prove infringements of competition law, since the parties in effect settled the case (without admitting infringements). However, the ACM's concern was clear; it indicated that public statements about future market behaviour, which operators are aware would be seen by their competitors, and where no final decision had been taken, carry antitrust risks since they "reduce strategic uncertainty". These public statements led to a situation in which the parties might coordinate.

In the face of this evidence, the companies backed down and agreed to change their practices. Specifically, they 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, the companies promised to incorporate this commitment into their compliance programmes and to give it special attention in employee training workshops.

As with the EC investigation, this case holds lessons for other industries. Indeed, the ACM has expressly made this point. Other companies can therefore consider themselves warned; transparency can go too far.

UK cement case

The UK cement case is different, but nevertheless provides another example of regulatory concern about price signaling, and sets out how the regulator analysed the issues.

This was a general investigation into the Great Britain ("GB") 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 structure of these markets.

The CC found that the structure of and conduct in the cement sector restrict competition by aiding coordination between the three largest producers, which results 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.

In addition to structural remedies, the CC put in place behavioural remedies. This includes 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 that the top 3 cement producers "appeared to be signalling that they would try to accommodate the others' price increases in many cases". 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[5].

Comment

Competition risk from signaling (principally signaling 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 good examples for compliance training sessions.

These cases reinforce some general messages about the use of price announcements. First, public announcements will be treated with suspicion. Second, announcements

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5 The cement sector may shortly produce another example of remedies to control the use of price increase letters. It has been reported by MLex (6 and 21 May 2014) that the EC is considering settling its investigation into certain cement companies in returning for them agreeing to shorten the time period between when prices are announced and when they go into effect. The EC opened its formal investigation in this case in December 2010, see http://europa.eu/rapid/press-release_IP-10-1696_en.htm?locale=en.

which are similar will be treated with suspicion; companies must take an independent view, but should also document their internal decision making (without referencing competitors). Third, companies should not pre-announce if a decision has not been made and should not pre-warn customers. Fourth, a significant gap between announcement and implementation is not helpful; the period should be commercially-justified and customer-driven. Fifth, generic price announcements referring to a figure will be treated with suspicion; it is better not to identify a figure at all.

This is not an exhaustive list of issues around price announcements. It provides a good starting point, but the individual industry and its particular situation must be analysed.