

March, 24, 2014

## Beware of Public Announcements! Recent European Competition Developments on Price Signalling

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Forward public announcements of prices and outputs are common in many industries. The effect of such announcements on competition has traditionally been considered ambiguous.<sup>1</sup> Partly for that reason, simple price announcements have been difficult for the agencies to attack under the antitrust rules in the absence of evidence of actual collusion. While there have been a few challenges in the US over the years, there is little precedent. However, recent action by the European Commission and some Member States appears designed to send a clear signal: agencies are prepared to be more aggressive about future pricing announcements. Hence, it may be wise to revisit the traditional compliance approach to public price statements on either side of the Atlantic.

### Information Exchanges in EU Competition Law

A key feature of the European Commission's (the "Commission") 2010 reform of its rules for the assessment of cooperation agreements between competitors<sup>2</sup> was a new chapter devoted to exchanges of information.<sup>3</sup> While this new section had some merit in setting out the principles developed by the Commission and the European Courts over the years, it did not provide a safe harbour to the application of EU antitrust law to information exchanges and in some ways laid the foundations for a more interventionist approach.

- <sup>1</sup> Public price announcements may benefit customers by helping them to choose the offering which best corresponds to their needs whilst at the same time lowering their search costs. They may however also serve as a focal point for coordination.
- <sup>2</sup> This reform led to the publication of the Guidelines on the applicability of Article 101 [TFEU] to horizontal cooperation agreements [2011] OJ C 11/1 (the "Horizontal Guidelines").
- <sup>3</sup> When public price announcements are customary in an industry they will need to be characterised as an "exchange" of information in order for the antitrust rules to bite as discussed below.

In Europe, in order for information exchange alone to fall under the antitrust rules, it must amount to a “concerted practice.” In the jargon, this means that “practical co-operation has knowingly replaced the usual risks of competition.” In the Guidelines this is given further elaboration, whereby information that is exchanged and reduces the strategic uncertainty around future commercial policy (such as price) that a competitor would otherwise face, may amount to a concerted practice. This raises two questions. The first is whether information disclosure amounts to “exchange” at all. The second is about the type of information needed to reduce strategic uncertainty. Taking the first question, most firms making public announcements of strategic information would not consider themselves involved in information “exchange.” They will usually consider the information has simply been disclosed to and for the benefit of customers and not “exchanged” in any meaningful sense with competitors. The Horizontal Guidelines, however, list three scenarios that amount to an exchange – each shows that the barrier is not high to show an “exchange” of information:

- One party disclosing its future intentions to another when the latter requests it or, at the very least, accepts it;<sup>4</sup>
- Mere attendance at a meeting where a company discloses strategic data;<sup>5</sup>
- A meeting between competitors on a single occasion where they discuss commercially sensitive information.<sup>6</sup>

A scenario not listed however is a unilateral (i.e., individual) public announcement of future intentions. Can this amount to an exchange of information?

### Can Public Unilateral Announcements Amount to an Exchange of Information?

The traditional view (repeated in the Horizontal Guidelines) is that where a company makes a unilateral announcement that is genuinely public,<sup>7</sup> for example, through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101 TFEU. There are two quite narrow exceptions to this in the Horizontal Guidelines.<sup>8</sup> Until recently neither of which was meaningfully exploited by the Commission.

#### Situations Where Unilateral Public Announcements Involve Invitations to Collude

Where a public statement involves an invitation to collude, the unilateral disclosure could amount to a concerted practice. While the Commission has yet to bring an enforcement action against a public invitation to collude, the facts in a challenge by the US Federal Trade Commission (“FTC”) of certain public announcements by Valassis Communications illustrate the type of situation that it may cover.<sup>9</sup> Several years ago, Valassis’ CEO, who allegedly expected the company’s major competitor to monitor his announcements, opened an earnings conference call by detailing the company’s new

<sup>4</sup> Joined cases C-204/00 P and others, *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, para. 81-86.

<sup>5</sup> Joined cases T-202/98 and others, *Tate & Lyle and Others v Commission* [2001] ECR II-2035, para. 54-67.

<sup>6</sup> Case C-8/08, *T-Mobile Netherlands and Others* [2009] ECR I-4529, para. 58-62.

<sup>7</sup> An information exchange is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers (Horizontal Guidelines, para. 94).

<sup>8</sup> Horizontal Guidelines, para. 63.

<sup>9</sup> Valassis Commc'ns, FTC File No. 051 0008 (Apr. 19, 2006); see also Matter of U-Haul Int'l and AMERCO, FTC File No. 081 0157 (Jul. 20, 2010), which involved both private and public announcements by U-Haul, although in challenging the conduct, the FTC did not make this distinction.

strategy along the following lines: “*Valassis will submit bids at a level substantially above current prices,*” “*Valassis will seek to retain its current share [...] but not to encroach upon [its competitor]’s position,*” “*Valassis will monitor [its competitor]’s response to this overture,*” etc. The FTC challenged this unilateral, public conduct on the basis that it was intended to facilitate collusion and lacked any legitimate business justification.<sup>10</sup> To settle the challenge, Valassis agreed to refrain from this kind of public communications.

#### Situations Where Public Announcements by One Company are Followed by Public Announcements by Competitors

The pattern of announcements of one company being followed by competitors’ announcements was first assessed by the Commission in *Woodpulp*. The facts were as follows: under a system of quarterly announcements, pulp producers communicated to their customers, some weeks or some days before the beginning of each quarter, the prices which they wished to obtain in the quarter in question. In its decision, the Commission condemned such practices: “[T]he system of quarterly announcements [...] constituted in itself, at the very least, an indirect exchange of information on future market conduct. [...] The fact that prices were published well in advance of their entry into effect at the beginning of a new quarter guaranteed that other producers had sufficient time to announce their own – corresponding – new prices before that quarter and to apply them from the beginning of that quarter.”<sup>11</sup>

On appeal, the European Court of Justice overturned the Commission’s decision. The Court held that the communications arose from price announcements made to customers. Price announcements did not constitute in themselves market behaviour which lessened each company’s uncertainty as to the future attitude of its competitors because at the time each company engaged in these announcements, it could not be sure of the future conduct of the others.<sup>12</sup>

Despite the Court’s position in *Woodpulp*, the Horizontal Guidelines left open the possibility that a *Woodpulp* type scenario could still amount to a concerted practice where a unilateral public announcement is followed by public announcements by other competitors. Therefore, the Commission remains concerned that the strategic responses of competitors to each other’s public announcements could allow competitors to reach a common understanding about the terms of coordination. A recent case (see below) suggests that the Commission’s ambition to attach antitrust liability to such behaviour remains undimmed.

<sup>10</sup> Importantly, the FTC challenged the conduct under Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits “unfair methods of competition”, and which has no counterpart under EU law. Unlike Article 101 TFEU, Section 1 of the Sherman Act, 15 U.S.C. § 1, only reaches conduct that includes an agreement, and therefore does not reach invitations to collude.

<sup>11</sup> Commission decision of 19 December 1984 relating to a proceeding under Article [101 TFEU] (IV/29.725 – Wood Pulp) [1985] OJ L 85/1.

<sup>12</sup> Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A. Ahlström Osakeyhtiö and others v Commission [1993] ECR I-1307, para. 64.

## What Type of Information Needs to Be Exchanged and When to Amount to a Concerted Practice?

Exchanges of information – including in the form of public announcements – regarding *intended* future prices or quantities amount to a restriction of competition by object.<sup>13</sup> No actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object.<sup>14</sup> However, where companies announcing prices publicly are fully *committed* to sell in the future at the announced prices (that is to say that they cannot revise them), these announcements would be considered as simply prices – not pricing intentions – and hence would normally not be found to restrict competition by object.

Two recent cases illustrate this point:

- The Dutch Authority for Consumers and Markets investigated into public announcements made by the three major mobile network operators (MNOs). The Authority held that the public statements, made by MNOs at conferences or in trade journals, about their future market behaviour, could create a risk of illegal coordination. This was particularly the case as the strategies communicated were not finalized. The authority argued that collusive behaviour could result from competitors taking note of these announcements and following such publicly-made statements. As a result, in order to avoid any risk of illegal collusive behaviour in the future, the three companies committed to refrain from making statements about “non-finalized” decisions.<sup>15</sup>
- In its cement market investigation (not an Article 101 case), the UK Competition Commission (the “CC”) analysed a number of letters by which suppliers informed their customers about their intentions to increase the price of products in the near future. Given that these increases were “aspirational” and did not reflect actual price increases, the CC concluded that such conducts restricted competition. An order will be issued, prohibiting suppliers from sending generic price announcement letters to their customers. In the future, price announcement letters would have to be specific and include, among others, the current price paid by the customer and the new unit price being proposed.<sup>16</sup>

The type of information therefore that can trigger a concerted practice allegation is most likely to relate to future price or output intentions.

## The Commission’s Ambition to Establish its Own Precedent

The Commission is currently pursuing a case where public announcements by one company were followed by public announcements by competitors. In November 2013, the Commission announced the opening of antitrust proceedings against a number of container shipping lines.<sup>17</sup> The Commission is investigating whether, by making regular public announcements of general rate increases through press releases on their websites and in the specialized trade press, shipping companies engaged in information exchange that amounted to an illegal concerted practice. Despite the established *Woodpulp* case law, the Commission apparently believes that these practices may have allowed shipping

<sup>13</sup> Horizontal Guidelines, para. 74. In other cases, the likely effects of an information exchange on competition must be analysed on a case-by-case basis, depending on both the economic conditions on the relevant markets and the characteristics of information exchanged (Horizontal Guidelines, para. 75).

<sup>14</sup> Guidelines on the application of Article [101(3) TFEU] [2004] OJ C 101/97, para. 20.

<sup>15</sup> Besluit ACM van 7 januari 2014, zaak 13.0612.53.

<sup>16</sup> Competition Commission, Aggregates, cement and ready-mix concrete market investigation, final report, 14 January 2014.

companies to signal future price intentions to each other. More specifically, it appears that the Commission “*expressed concerns about the length of time between the companies’ price announcements and their actual implementation*,”<sup>18</sup> on the basis presumably that the gap created an opportunity for competitors to adapt themselves to the announced intentions. The Commission is likely to use informal settlement possibly in order to side step the constraints *Woodpulp* would pose for a formal decision. Nevertheless, informal settlement can establish a sort of “precedent” about the Commission’s enforcement approach to “non-finalized” unilateral public pricing announcement. Were the Commission to settle this case in this way, it would signal yet further care is needed to re-assess such announcements to ensure that – ideally – they are above suspicion.

### Lessons to Be Drawn

As companies can suffer serious consequences for breaches of EU (and US) antitrust laws – and even distracting and debilitating consequences from being subject to investigation – regardless of the outcome, the following “dos and don’ts” will help structure thinking about public unilateral announcements about future prices or output (statements on your website, publications in the press, generic letters to customers, etc.):

- Don’t communicate more information than is strictly necessary, particularly regarding future pricing or strategic plans.
- Think whether your announcement could be construed as an invitation to collude.
- Avoid naming specific competitors in announcements.
- Consider carefully how far in advance of taking effect price and strategic announcements should be made.
- Don’t make announcements contingent on what competitors will do or how the industry or sector in general will react.
- Think carefully before making public statements particularly about price in order to “test the market.” Ideally finalize your decisions internally before announcing them.
- If a competitor mentions your company in a public announcement regarding future pricing or strategy plans, contact your counsel to carefully consider your response.

<sup>17</sup> “*Antitrust: Commission opens proceedings against container liner shipping companies*,” IP/13/1144, 22 November 2013.

<sup>18</sup> “*EU seeks settlement offers in liner-shipping price-signalling probe*,” MLex, 7 March 2014.

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