

Price signalling

The final frontier?

by *Johan Ysewyn and Jiwon Choi**

EU competition authorities have been boldly pushing the cartel concept into areas where no man has gone before. Companies are facing antitrust risks which go well beyond the traditional concept of concerted practices aimed at fixing prices, allocating markets or rigging bids. Examples include:

- Exchange of strategic information: In March 2015, in the *Bananas* judgment, the EU's highest jurisdiction upheld the European Commission's position that exchanges of strategic factors or trends that have an impact on price may constitute a punishable cartel.
- Hub-and-spoke cartels: A number of national authorities are eagerly pursuing hub-and-spoke theories, in which horizontal competitors have no contact with each other but use a third party as a hub in their exchange of information (eg a joint supplier or distributor).
- Trade practices morphing into competition concerns: The Spanish competition authority, for example, punished a number of lift companies for engaging in denigrating statements to independent lift repairers "making reference to their alleged lack of resources, lack of adequate training and lack of safety measures".

This creates significant compliance challenges for companies. Indeed, the behaviour in itself is often uncontroversial and constitutes part of the day-to-day commercial behaviour of a company. However, there are factors – sometimes outside the control of the business – that could potentially make this behaviour illegal under a certain interpretation of the competition law rules.

I am giving it all she's got, Captain

Competition authorities are now, once again, pushing the boundaries seeking to extend the cartel concept to yet another practice. Price signalling refers to a company's public and unilateral announcement of potentially strategic information such as future prices or outputs. Unlike traditional information exchange that often occurs within a restricted group, signalling takes place publicly (eg through newspapers, conferences and the internet).

The problem with this approach is that communicating prices to customers is an essential part of competition and a part of day-to-day business life. In today's information age, it is expected of suppliers to communicate clearly, swiftly and publicly the prices they will apply. Of course, that information is also picked up by rivals who can use it in their competitive decision-making process. The widespread use of internet and other communication means exposes consumers and competitors to information almost instantly, thus increasing the risk of signalling.

As in all cartel situations, price signalling is highly dependent on the facts. However, the case law is scarce at the moment as companies under investigation are reluctant to risk any fines and prefer to opt for behavioural commitment decisions. Therefore, the conditions under which signalling becomes illegal are far from clear.

Beam me up, Scotty

The 2011 horizontal guidelines provide some practical guidance on this issue:

- "Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a [cartel]."
- "However, depending on the facts underlying the case at hand, the possibility of finding a [cartel] 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 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 co-ordination."

The 2011 horizontal guidelines themselves show that it is extremely difficult to distinguish between harmful public price signalling and desirable public price competition.

Set phasers to stun

Some emblematic precedents are worth recalling.

The first time the Commission assessed a pattern of announcements was in the *Wood Pulp* decision where, on a quarterly basis, pulp producers communicated to their customers the prices which they wished to obtain in the next quarter, some days or weeks before the beginning of each quarter. In its decision, the Commission condemned such practices:

"[The] system of quarterly announcements, which the firms voluntarily chose, constituted in itself, at the very least, an indirect exchange of information on future market conduct. This applied particularly where prices were made known by the firms themselves, by being given to the trade press for immediate publication or by being passed on to agents who were also acting for other producers at the same time. [...] 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."

On appeal, the European Court of Justice overturned the Commission's decision and held that the communications arose from price announcements made to customers. The Court held that: "[They] constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others."

However, national competition authorities (and seemingly the Commission itself) seem to have forgotten the learning from *Wood Pulp*.

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Spain's National Competition Commission (the CNC) is, until now, the only EU competition authority that has fined a company on the basis of a signalling theory. During the 2011 Spanish international tourism fair, Joan Gaspart, at the time vice-president of the Spanish Confederation of Business Associations (the CEOE), president of its tourism board and also president of two hotel groups, publicly stated that Spanish hotel chains needed to increase their rates. A week later, he reiterated this statement in an interview, specifying that the price increase should be 6%-7%. The CNC construed these statements as a collective recommendation by the CEOE and Gaspart himself, and fined both.

In 2013, the Appeals Court overturned and annulled the fines because: (1) the declarations could not be attributed to the CEOE as Gaspart attended the round table in his capacity as president of the hotel groups; (2) the statement was not a collective recommendation but a mere response to a question to forecast the evolution of rates in the hotel sector; and (3) it was ultimately an exercise of his legitimate right to freedom of expression. In response to the CNC's finding that the statement was a collective recommendation, the court noted that there was no concurrent conduct of two or more companies, given that a debate took place following his statement, the so-called recommendation did not seek to align any commercial conduct and the statement did not have sufficient strength to affect the market.

In the wake of the *T-Mobile* judgment, the Dutch Consumers and Market Authority (the ACM) found that public statements about intended price increases made by Dutch mobile network operators during a conference or in an interview with a trade journal could facilitate collusion. This was particularly the case because the strategies communicated were not finalised. Without explicit evidence of price-fixing, the ACM closed the case with a commitment decision precluding the companies from making such statements in public. In the commitment decision, the companies agreed to set up a compliance programme preventing senior managers from making such statements.

In its cement market investigation, the former UK Competition Commission (the CC) analysed several letters according to which suppliers told their customers about their intentions to increase prices in the near future. As these increases were "aspirational" and did not reflect actual price increases, the CC concluded that such conducts restricted competition. An order would be issued prohibiting suppliers from sending generic price announcement letters to their customers. In the future, price announcement letters will have to be specific and include the current price paid by the customer and the new proposed unit price.

At the European level, an investigation on price signalling is currently ongoing in the maritime sector. In 2013, the Commission opened a formal investigation into several container liner shipping companies. The Commission suspects that the companies may have been co-ordinating their conduct and prices through public announcements via press releases and statements to the trade press. Because the announcements are regular (several times a year and mostly at the same time) and specific (details on the level and timing of increases), the Commission is concerned that they may facilitate co-ordination between container lines. At the time of writing, it was rumoured that the probe is coming to an end, probably by way of a commitment decision whereby some of the companies will commit to refrain from making certain pricing communications.

Highly illogical

Competition authorities should only bring cases of price signalling within an extremely narrow fact set. Any other position would result in reduced competition and increased harm to consumers.

Straightforward announcements of future prices do not constitute signalling. The horizontal guidelines are clear on that point. Price announcements by rivals – even within quick succession and with a certain repeat pattern – do not constitute signalling. It is extremely common, especially in concentrated markets, for companies to react, often quickly, to price announcements of their key competitors. Ultimately, the competition authorities can only bring a case if there is clear evidence of contact between competitors during which the process, sequence, and timing of the price signals are agreed.

Yet, as legal uncertainty increases for companies, authorities have a duty to clarify the rules. They may choose to set further guidelines on what constitutes a lawful public statement. They could at the same time develop factors indicating when public announcements are likely to be harmful, such as (1) when the product or service is a commodity (ie because of its high substitutability and the fact that consumers can switch on the sole basis of price), and (2) when there are a few market players (because "uncertainty" is substantially lessened with the announcement). However, the fact pattern will continue to play a crucial role.

Public announcements present another challenge. Competition law is not the only area of law here. Other areas of law, such as corporate and finance law, may force companies to make announcements. For instance, public companies have a duty to disclose strategies and future plans/intentions to their shareholders and, in some cases, to the wider market.

Resistance is futile

This grey area is unfortunately here to stay, at least in Europe. The need for a fact-driven analysis, the fining risk attached to price signalling in Europe, and the willingness of both companies and authorities to close cases with a commitment decision prolongs this ambiguous situation. Bypassing judicial review through commitment decisions will also burden companies' compliance programmes, which will need to deal with the uncertainties, and sustain this unsatisfactory situation. While they may enhance legal certainty for the parties to the commitment decisions, these decisions do not necessarily provide a framework applicable to other companies and situations, as they are highly fact-specific.

Live long and prosper

As the legal theory around signalling is still unclear, the following guidelines are worth keeping in mind. "Ask why": when you make a disclosure of future intentions, doublecheck the purpose of your announcements, and consider potential alternatives. Do not communicate more information than is strictly necessary. Do not refer to competitors in your announcements – and do not make the announcement contingent on what your competitor will do. Do not use announcements to test the market: finalise your commercial decisions and then announce them. Ensure that your compliance programme encompasses public announcements by the company and by competitors.