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European Authorities Crack Down on Price Signalling

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EU and national competition law authorities have recently shown an increased interest in the anticompetitive effects of public announcements relating to future prices and strategic plans. The Netherlands Authority for Consumers and Markets (“ACM”) has concluded that public statements on future market behaviour could lead to coordinated behaviour in the market. The Competition Commission (“CC”) in the UK has also confirmed that generic price announcements in letters to customers can be used as a means by which market players can coordinate their behaviour. Additionally, the European Commission (“Commission”) is currently investigating public statements made on price increase intentions in the container-liner shipping industry. In light of these developments, companies in concentrated markets should give serious thought about potential competition risks prior to making public statements on prices and strategic plans, in order to avoid potential antitrust investigations.

The Netherlands Decision

Following almost two years of investigation, the ACM announced on 21 November 2013, that it *did not* find any evidence of price-fixing agreements among the investigated mobile operators. However, the ACM determined that certain statements on future strategy made in public by individual operators (for example, at conferences and in interviews for specialised industry magazines) could be anticompetitive. This was confirmed by the ACM publishing an official commitments decision on 7 January 2014, under which the mobile operators undertook to avoid such conduct going forward.

In particular, the ACM highlighted that statements on price increases and changes in commercial conditions for consumers, which were not yet internally finalised, could lead to coordinated behaviour in the market. The ACM’s decision is based on the principle that public announcements can be used by companies as a way of communicating future market decisions to competitors, before an internal decision has been made, in order to limit “strategic uncertainty”. This type of conduct is potentially punishable under EU and Member States’ competition laws as a concerted practice: when undertakings knowingly collude to coordinate their behaviour in order to limit competition, without reaching an actual agreement.

In order to counter the ACM’s competition concerns, the mobile operators involved provided commitments to avoid such verbal and written public statements in return for the conclusion of the investigation without imposing fines. The companies have officially undertaken to refrain from making individual public statements about pricing and commercial strategies until they are internally finalised, in order to avoid any risk of illegal collusive behaviour in the future. This will form part of their compliance programme policy, and the ACM will monitor their future conduct in this area.

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The UK Decision

Also concluding a two-year long investigation in the UK¹ aggregates, cement and ready-mixed concrete market, the CC published its final report on 14 January 2014, imposing certain measures on the parties involved. This followed a referral for investigation from the UK Office of Fair Trading (“OFT”) in 2012 (on the basis of reasonable grounds that the OFT suspected competition in the market was not working effectively). In its report, the CC concluded that the structure and conduct of the three leading suppliers in the cement sector restricted competition. Among other remedies, it decided that cement suppliers should be prohibited from engaging in price-signalling conduct, and required the delay of the publication of certain market data, in order to avoid the risk of collusive behaviour.

The CC found that certain large UK cement producers were using generic price announcement letters to their customers in order to facilitate coordinating their behaviour together on the market. It concluded that these producers were signalling that they would even try to accommodate the price increases of their competitors. Consequently, the CC confirmed that UK cement producers must only send customer-specific and relevant price announcement letters. While leakage of information would still be possible (via the customer), price increases in relation to one customer were not considered “*sufficient to deduce accurately the gross price increase*” for that year.

The CC also confirmed measures in relation to the publishing of current data on cement sales and production by a trade association. It was considered that these publications contributed to coordination in the UK cement market and assisted the cement producers to determine their own shares of sales of UK cement production. This allowed them to assess their position on the market. The CC consequently imposed a time lag of at least three months before the relevant data may be published, in order to make such an assessment more difficult for the cement producers.

The CC concluded that these measures (among other structural requirements) would be able to bring about a substantial, swift and lasting increase in competition in such an economically vital market.

The EU investigation

The Commission is currently investigating whether regular public announcements of price increase intentions through press releases may have led to illegal price signalling in the container-liner shipping sector. The press release published by the Commission provides that the investigated companies have made these announcements several times a year, and included information on the amount of increase and the date of implementation. The Commission has concerns that these announcements may have harmed competition and customers by raising prices on the market for container-liner shipping transport services on routes to and from Europe.

Comments

As illustrated in the Commission’s Horizontal Guidelines, companies had been relatively safe to take the position that making genuine unilateral public statements was unproblematic in most cases, as it helped transparency. However, the above mentioned investigations and decisions illustrate how price signalling and public statements on commercial strategies can have anticompetitive effects, especially in markets with a low number of players.

¹ The CC expressly excluded Northern Ireland from the scope of its report.

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In view of the above developments, companies should give careful consideration to making public statements on future prices and commercial strategies, and in particular where the statements are not based on a final internal decision and are thereby being used “to test the market”. Companies should therefore take action to include warnings on price signalling in their compliance programmes, in order to educate their employees and prevent risks of an infringement arising.

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