When is a price announcement not a price announcement?

Recent developments in European competition law on the fine line between transparent price announcements and anti-competitive information exchange

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It is well understood that sharing pricing information directly with your competitors is very likely to breach EU competition law. However, public price announcements - which are common in many industries - are more difficult to categorise.

Genuinely public and transparent pricing information is typically seen to be pro-competitive, as the greater transparency facilitates customer choice. However - and despite explicit recognition of the potential transparency benefits of public pricing information - European Commission (EC) guidelines provide that even unilateral price announcements could amount to a breach where competitor responses to those announcements are evidence of a strategy for coordinating their prices or behaviour. But where is the line drawn between pro-competitive price transparency on the one hand, and imperfect transparency, which could be used as a means for anti-competitive coordination, on the other?

The EC and national competition authorities have recently shown an increased interest in the competitive effects of price announcements - although as yet there has not been a formal decision at EU-level to set a consistent precedent across the EU Member States.

At the EU level: no formal prohibition - limited value for future cases?

In November 2013 the EC opened formal proceedings to investigate the conduct of 14 container liner shipping companies, which had made regular public announcements of their price increase intentions (known as General Rate Increase Announcements) through press releases on their websites and/or in the specialised trade press. The announcements were typically made three to five weeks before the intended implementation date with no indication of the fixed final price for the service, but only the amount of the increase, the affected route(s) and the implementation date.

The EC was concerned that the practice of publishing future price increases in this manner allowed the relevant companies to signal their future price intentions to each other and coordinate
their behaviour, allowing them to raise market prices. The EC took the preliminary view that the announcements allowed the companies to test whether they could reasonably implement a price increase, without risking losing customers. The EC also noted that the announcements appeared to be of little value for customers: the announcements stated only the amount of the intended increase rather than the new full price, and customers could not rely on the announced changes.

On 7 July 2016 the EC officially accepted binding commitments offered by the 14 companies to settle the investigation. For all routes to/from the EEA, the shipping companies have committed to:

- Stop publishing intended changes to prices expressed solely as a percentage;
- Ensure that any price announcements are transparent enough to enable purchasers to understand and rely on them. Any price announcements would therefore include the main elements of the total price (e.g. the base rate and other charges such as terminal handling charges, etc.), any other applicable charges, the services to which they apply, and the period to which they relate;
- Not make price announcements more than 31 days before the implementation of the price change (when customers usually started booking); and
- Treat any price announcements as a maximum price, but be free to offer a lower price.¹

The commitments are legally binding on the carriers for a period of three years starting from 7 December 2016.

In the UK: clear prohibition on generic price announcements which allow suppliers to signal desired pricing direction

In January 2012 the UK Competition Commission (CC), the precursor to the Competition and Markets Authority (CMA), opened a market investigation into the UK concrete industry, publishing its final report in January 2014. Cement suppliers regularly sent out letters to their customers to notify them of planned price increases. These announcements were aspirational only and did not reflect actual increases agreed with customers. The CC analysed a number of these letters and found a clear parallelism between the timing and content of the letters from different suppliers. It also found that in almost all cases, the cement suppliers were able to increase the average price paid by customers following one of these price increase announcements. The CC noted that cement suppliers quickly became aware of the content of each other’s price announcement letters, either directly as customers of each other or because customers informed suppliers about the

¹ There are two exceptions to the commitments: they will not apply to communications with purchasers who have a rate agreement in force for the relevant route; or to communications during bilateral negotiations or communications tailored to identified purchasers.

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letters they had received from other suppliers.

Although the CC ultimately did not find it likely that the suppliers had coordinated directly on price (as prices were individually negotiated), it considered that the price announcement letters allowed them to signal the desired direction of prices, facilitated price parallelism and softened customer resistance to price increases, making them more effective. The CC noted that even if there are legitimate reasons for notifying customers of planned or intended price increases that did not preclude that the letters also served other, anti-competitive purposes.

To remedy this adverse effect on competition, in January 2016 the CMA published an order prohibiting the UK’s cement suppliers from sending generic price announcement letters to their customers. Instead, any price announcement letter will have to be specific and relevant to the customer receiving it, including setting out the last unit price paid, the new unit price, and specific details of other charges that apply to the customer.

**In the Netherlands: informality of public statements does not affect the assessment**

In November 2013 the Netherlands Authority for Consumers and Markets (ACM) finalised its investigation into the price policies of the three major mobile network operators (MNOs) in the Netherlands. It did not ultimately find that there had been any violations of Dutch competition law. However, it found that public statements by representatives of the MNOs about planned price increases or changes to customers’ terms, could infringe competition rules.

The behaviour at issue was not price announcements, but rather statements made by senior management speaking at a conference and for industry media. In one example, a director of one of the MNOs had announced in a panel discussion at an industry conference that his company intended to reintroduce connection fee charges. As a result, the two other major MNOs also reintroduced connection fees, and directly referred to the first MNO’s announcement in their internal planning when doing so. In a second example, the same MNO director discussed his company’s price strategies in an interview with an industry journal, and commented that it would seek to raise prices in the following year and concentrate less on market share and more on value. The ACM found that with these two statements the MNO was able to create expectations among competitors and encourage them to take its signals into account in their own behaviour.

In January 2014 the three MNOs made commitments to the ACM, offering to refrain from making statements about pricing and commercial strategies in public until they are internally finalised, to avoid any risk of unlawful collusive behaviour in the future.

**Conclusion: still awaiting a consistent European approach**

The lack of a formal EU decision explaining when price announcements are anti-competitive gives rise to the possibility of conflicting approaches amongst the national competition authorities of the EU Member States. The UK has already issued a decision finding that price announcements by cement producers led to anti-competitive effects; while the Netherlands has found that public statements by MNOs had the potential to lead to anti-competitive effects.
A prime example of the dangers of differing approaches across the EU can be found in online hotel bookings which have been investigated by at least ten separate national competition authorities across Europe. While the French, Italian and Swedish authorities accepted identical commitments to settle their investigations, the German competition authority rejected the same commitments and prohibited the relevant behaviour. The German authority’s different approach has created significant uncertainty for the companies involved, as well as making it more difficult for companies to invest in pan-European and global online services. The EU Commissioner for Competition, Margrethe Vestager, commented that the case demonstrated the challenges that arise when “decisions are taken using the same rules but with different results”.

What does this mean for businesses?

In light of these recent cases, companies considering making unilateral price announcements should consider the following guidelines:

• Do not announce future price changes any earlier than required under customer contracts or before otherwise commercially necessary.
• Avoid announcements of aspirational price increases, or changes to prices or terms that are not yet final.
• Ensure that price increases are expressed in a way that is fully transparent to customers, and which customers can rely on.
• Consider the audience for the announcement and whether it could be construed as an invitation to collude.
• Do not make public statements which refer to other competitors or which are contingent on how they (or the industry more broadly) will react.

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