Feature article: Signalling collusion: Global trends in combatting anticompetitive information disclosure

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Competition authorities have long grappled with the potential anti-competitive effects of pricing disclosures between competitors, or price signalling as it is commonly called. While some forms of pricing disclosures are legitimate and may be beneficial to consumers, other forms allow competitors to act collusively, leading to market inefficiencies that are ultimately borne by consumers.

Many jurisdictions, including the US, UK, EU and New Zealand, do not have specific price signalling provisions, and price signalling conduct is usually prosecuted under either generic prohibitions of anti-competitive agreements, or concerted practices prohibitions. In doing so, competition authorities worldwide have sought to stretch the cartel concept to regulate anti-competitive pricing disclosures.

Despite difficulties in accurately identifying and prosecuting anti-competitive price signalling, competition authorities continue to actively monitor and assess the impact of price disclosures; investigate and prosecute anticompetitive information disclosure and exchanges; and, where appropriate, seek undertakings from businesses to cease or alter their information sharing practices.¹

As competition authorities sharpen their focus on anti-competitive price signalling, it is increasingly important for businesses to understand how their conduct may be viewed under competition laws globally.

Australia

Australian price signalling jurisprudence over the past decade is a ready reckoner of the challenges associated with prosecuting price signalling. Responding to the recommendations of a detailed competition policy review conducted in 2015, Australia's framework is set to transition over the coming year.

The current law in transition

To date, price signalling has been primarily considered under Australia's cartel provisions and under the general prohibition of anti-competitive arrangements and understandings.

However, since 2012, Australia has also had legislation that is specifically directed at the anti-competitive disclosure of pricing and other information in the banking sector.² In particular, a division of the Australian Competition and Consumer Act 2010 prohibits (in general terms):
● private price disclosures to competitors that are not in the ordinary course of business and
● other forms of information disclosures (both public and private), such as disclosures about price, capacity or commercial strategy, where made for the purpose of substantially lessening competition in a market.

Australia's competition authority has published guidance regarding the kinds of conduct that would raise concerns under the price signalling division. For example, the guidance states that the division may apply where an employee of a bank discloses specific future pricing information to an employee of another bank at a social gathering, and may also cover instances where a banking executive announces to an industry event that the bank is prepared to follow rate or fee increases led by other banks.

Nonetheless, no cases have been brought under the specific price signalling provisions since their introduction and there is now a proposal to repeal the provisions. The 2015 competition policy review in Australia recommended that the price signalling provisions be repealed on the basis that they are not fit for purpose, including because the prohibition on public disclosure of prices may over-capture pro-competitive or benign conduct.

The review recommended, however, that a new prohibition on concerted practices that substantially lessen competition should instead be introduced (based on the concerted practices prohibition in Europe) to address concerns about anti-competitive price disclosure in Australia. This proposal is intended to address concerns voiced by Australia's competition authority about the ineffective regulation of price signalling conduct generally, based on difficulties the competition authority has faced in establishing that a practice of price information exchange amounts to a prohibited "understanding" under the current law.

The Australian government has signalled that it will draft legislation this year that incorporates the proposed new concerted practices prohibition and repeals the current price signalling provisions. Although the precise details of the proposed new law are not clear, the competition policy review indicated that a concerted practice would cover "a regular and deliberate activity undertaken by two or more firms", and noted that it would "include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange".

Cases

As outlined above, Australia's specific price signalling provisions only apply to the banking sector, and no cases have been brought under those provisions. Instead, the key price signalling cases in Australia have involved the petrol industry, and have been considered under Australia's cartel provisions or the general prohibition on anti-competitive arrangements and understandings. These cases demonstrate the difficulties that Australia's competition authority has faced in prosecuting price signalling conduct.

For example, the case of Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161 (Apco) shows that a practice of accepting competitors' pricing information may not amount to a prohibited understanding under Australia's anti-competitive agreements prohibition. In Apco, a petrol retailer successfully appealed a Federal Court decision which had held that the retailer was party to an illegal understanding to fix the retail price of petrol. The alleged price fixing conduct involved rival petrol stations making and/or receiving 'price-increase calls' in order to set the timing of price increases to petrol at the pump.

On appeal, the Full Court considered that although the retailer knew that the purpose of the calls was to persuade or induce price conformity, the retailer did not always respond by increasing prices in the same uniform and timely manner as other petrol retailers. The Full Court went on to conclude that the retailer had never committed to the understanding and was therefore not a party to it.

This requisite level of "commitment", necessary to prove an anti-competitive agreement or "understanding" under Australian law, means that some forms of anti-competitive price signalling may not be caught by the current provisions.

More recently, another matter involving an alleged form of price signalling among petrol retailers conducted through a subscription to a web-based information service was settled by Australia's competition authority without formal prosecution. In this matter, most of the retailers involved settled on a basis that allowed them to continue using the information service in the same way, provided the information received through the service is made available to consumers and third-party organisations at the same time. However, two of the retailers settled on more restrictive terms, agreeing that they would not subscribe to the service or any similar services for five years.
The cases in Australia highlight the difficulties associated with prosecuting price signalling conduct, but also show that Australia’s competition authority is prepared to investigate and prosecute information exchanges where it considers there may be an anti-competitive effect.

The European Union

A competition problem could arise with regard to the unilateral public announcement of future prices or of conceivably sensitive information. Communicating such factors as prices or volumes to customers also forms an essential part of competition and is day-to-day practice for many companies. However, since competition authorities are stretching the boundaries of competition law, these unilateral price communications could potentially amount to a concerted practice, since the communicated information may also be noted by competitors, who take it into account when determining their own commercial conduct.

Nonetheless, the EU’s 2011 Horizontal Guidelines show that in a case of price signalling, finding a competition law infringement is highly dependent on the facts. The guidelines state: “Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because of strategic responses of competitors to each other’s public announcements.”

Unfortunately, due to the scarcity of case law on price signalling, the conditions under which price signalling becomes a punishable anti-competitive practice are still unclear. This scarcity can be explained, since most companies subject to a price signalling investigation have opted for behavioural commitment decisions, rather than risking an often significant fine.

A recent example is the container liner shipping investigation by the European Commission. The 15 container liner shipping companies under investigation offered commitments in order to address the European Commission’s concerns relating to concerted practices through price signalling. The European Commission has concerns that the container liner shipping companies’ practice of publishing their future intentions to increase their prices may harm competition. Although the container liner shipping companies have not admitted to any anti-competitive behaviour, they agreed to offer binding commitments to settle the European Commission’s investigation.

These announcements, known as General Rate Increases or GRI announcements only indicated the increase in US dollars per transported container unit (as an amount or percentage of the change), the affected trade route and the planned date of implementation. The GRI announcements were generally made three to five weeks before their implementation, and during that period other container liner shipping companies would announce similar increases.

The European Commission’s concern was that the GRI announcements might not provide full information on the new prices to customers, but merely allowed them to explore each other’s pricing intentions and subsequently coordinate their behaviour.

To address the European Commission’s concerns, the container liner shipping companies offered to stop publishing the GRI announcements in their then-current form. In order for customers to be able to understand and rely on their price announcements, the announcements will become more transparent and will include at least the five main elements of the total price (i.e. the base rate, bunker charges, security charges, terminal handling charges and peak season charges, if applicable). Furthermore any future announcement shall be binding on the carriers as a maximum price and will not be made more than 31 days before its entry into force.

The commitments will be made legally binding by the European Commission and would apply for three years. However, there are two exceptions. The commitments would not apply to communications with purchasers who on that date have an existing rate agreement in force on the route to which the communication refers, and to communications made during bilateral negotiations or communications tailored to the needs of a specifically identified purchaser.

If a company breaks one of the agreed commitments, the European Commission can impose a fine of up to 10 percent of the company’s worldwide turnover, without having to find a competition law infringement.

Italy
The Italian Competition Authority (ICA) has dealt with price signalling a few times.

*Compagnie Aeree - Fuel Charge*\(^5\), the ICA looked at an airline company’s publication on its website of two press releases. The first press release communicated the introduction of a new fuel surcharge and the second one communicated the raise of the surcharge. The ICA found that following the publication of these press releases, other competing airlines applied, and then increased, the identical surcharges. The ICA deemed this behavior to be a concerted practice in violation of competition law.

*Prezzi dei Carburanti in Rete*\(^6\) concerned price signalling practices regarding oil market prices. The case concluded with the ICA’s acceptance of the commitments proposed by the oil companies involved. In its decision to open the proceedings, the ICA deemed that an exchange of information between competitors regarding prices – carried out by publishing press releases and fuel price lists in industry magazines – likely facilitated price collusion between the competing companies. Among the commitment the involved oil companies made was to cease communicating price lists to the press.

In *Listino Prezzi della Pasta*\(^7\), the ICA sanctioned a cartel made up of the members of an association of pasta producers, who were coordinating their price increases via press releases, press conferences, newspapers and television interviews. The ICA ascertained that an association of small and medium sized companies active in the food sector was also following the same practice.

**The Netherlands**

In January 2014, the Netherlands Authority for Consumers and Markets (the ACM) ended an investigation into mobile telephony operators KPN, Vodafone and T-mobile with a commitment decision.\(^8\) During its investigation, the ACM had identified anti-competitive risks of public statements made by the operators about possible future changes to their commercial terms. These statements included media reports, speeches, presentations and contributions to panel discussions at conferences, as well as interviews through both traditional and digital media.

By way of example, the AMC mentioned a statement made by a representative of one of the mobile operators at a conference that is considered the most important telecom event in the Netherlands. This representative publicly announced that his company was considering to reintroduce separate connection fees (payable by customers who conclude a new contract). The ACM found internal documents of the other mobile operators, showing that they had taken note of the announcement. The ACM considers it a risk to competition if companies take note of (and may follow) public statements of their competitors about intended future changes to their commercial policies, as this can lead to a collusive market outcome which is harmful to consumers.

The three mobile operators therefore made a commitment to the ACM to refrain from making any statements in public about intended changes to their commercial polices that may be unbeneﬁcial to consumers, at a time when the internal decision to adopt the change has not yet been ﬁnally made. They also promised to incorporate this commitment into their compliance programs and to give the matter special attention in employee training workshops.

The ACM declared the commitments binding on the mobile operators, which risk being ﬁned if they do not act in accordance. Due to the nature of a commitment decision under Dutch competition law, the ACM did not have the opportunity to formally decide that the public announcements at issue did actually violate the cartel prohibition. However, the statement of reasons for the decision leaves little doubt about the ACM’s conviction that public announcements in circumstance such as those in the case at hand may well be within that prohibition’s scope.

**Romania**

The Romanian Competition Council (RCC) analysed price signalling practices in a decision issued in 2009, following an investigation of the market for driving school services in Bucharest. The RCC ﬁned 32 economic operators (31 driving schools and one individual driving instructor) for participating in a cartel aimed at ﬁxing prices for driving school services. The base level of the ﬁne was set at 6 percent of the turnover achieved by the undertakings in the year prior to the sanctioning decision.

The decision is relevant as it was the ﬁrst time that the RCC looked at price signalling practices, although no comprehensive assessment of the practices was performed.
Pursuant to the investigation, the RCC found that representatives of multiple driving schools participated in several meetings organised during June 2007 - January 2008 by the driving schools' trade association, whereby they repeatedly discussed the application of a uniform policy related to driving school fees, demonstrating a joint intent to coordinate price-related conduct.

In the RCC’s view, the cartel was in fact established at a meeting on January 31, 2008. On that occasion the participants agreed to increase driving school fees as of February 1, 2008 and to set a minimum fee for driving school services.

The establishment of the agreement was demonstrated by the RCC based on minutes of the meeting that took place at the offices of the trade association, corroborated with other documents seized during dawn raids performed by the RCC as well as with statements of the individuals involved.

The RCC also established a connection with a TV announcement made by one of the cartelists during a popular newscast on January 15, 2008 (i.e., before the actual anti-competitive agreement was put into place). The announcement informed about the intention of one of the driving schools to increase fees as of February 1, 2008. This was interpreted by the RCC as representing a signal to the other driving schools to also increase fees, such media coverage actually facilitating the coverage of a substantial proportion of the market by the contemplated cartel.

According to the RCC, by ensuring media coverage of the contemplated increase in driving school fees, the cartelists succeeded in coordinating their competitive conduct on the market. The RCC took the view that the cartel had a significant dispersed effect, in that it was sufficiently influential as to induce in those economic operators active on the market that were not part of the agreement the tendency to similarly increasing their tariffs to at least the same level.

However, the RCC did not assess price signalling as such, but rather in correlation with other evidence. Although price signalling was not found to directly lead to the establishment of the cartel, it was nevertheless sanctioned as part of the elements defining the cartel. The company whose representative made the TV announcement was one of four sanctioned as ringleaders of the cartel. The RCC also included in the sanctioning decision a monitoring obligation, whereby the cartelists had to submit to the RCC any changes in their fee policies for a period of two years after the issuance of the decision.

The US

Section 1 of the Sherman Antitrust Act provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Contrary to the EU position, which prohibits concerted practices even in the absence of the parties’ commitment to act in concert, US jurisprudence in relation to section 1 of the Sherman Act requires “a conscious commitment to a common scheme designed to achieve an unlawful objective.”

The US position is therefore narrower than the EU's concerted practices prohibition; mere receipt of information from a competitor will not impugn the receiver under section 1 in the absence of a “meeting of minds” to conspire. Accordingly, US courts have held that signalling future prices is lawful as long as it serves a legitimate, procompetitive purpose, such as customer necessity. Additionally, participants in oligopolistic markets may engage in parallel pricing, so long as they do not collude. In 2015, two circuit courts found that the defendants' conscious parallelism in raising prices did not violate the antitrust laws. Indeed, in oligopolistic markets, “a single firm’s change in output or price ‘will have a noticeable impact on the market and on its rivals.’” Thus, “the theory of interdependence posits that ‘any rational decision [by an oligopolist] must take into account the anticipated reaction of the other firms.’” Such parallel pricing, in the absence of collusion, is legal because (1) conscious parallelism “is not an agreement[;] instead, it can be a necessary fact of life in oligopolies,” and (2) it is considered lawful “because courts have no effective remedy for the problem.” In other words, when participants in an oligopolistic market engage in conscious parallelism pricing, this “may be not because they’ve agreed not to compete but because all of them have determined independently that they may be better off with a higher price.”

However, as outlined in our previous edition of Antitrust Matters, regulators and courts may find evidence of unlawful behavior in regard to the publication of tentative prices. For example, in the early 1990s, the US Department of Justice
sued several airlines and an airline tariff publishing company in relation to the alleged exchange of proposed pricing changes through the tariff publishing company. The DOJ indicated that section 1 of the Sherman Act may be used as a basis to take action against certain price signalling conduct. In addition to viewing the publication of tentative prices as problematic, the courts seek to determine whether the information disclosed is useful to market participants. For instance, the Ninth Circuit found that the plaintiffs had presented permissible inferences of a "meeting of the minds" to coordinate pricing through press releases and postings of prices in a case involving oil companies allegedly sharing price information to raise or stabilize prices. The court indicated that the publication of prices lacked legitimate business reasons, were of significance only to the oil companies and their franchised dealers and to no other market participant, and contained details the disclosure of which might be considered against self-interest. Thus, US case law seems to push the boundaries delimiting when a "meeting of minds" will be found; the courts have shown a greater willingness to infer the presence of an agreement than, for instance, their Australian counterparts.

The FTC sought to use section 5 of the FTC Act prohibiting the use of unfair methods of competition in commerce to intervene in price signalling cases where the violations did not fall within the scope of the Sherman Act. In Ethyl Corp, the Second Circuit set aside an FTC final order, which had found that although the defendants had not colluded in the antiknock gasoline additives market, they had nonetheless violated section 5 of the FTC Act by adopting the same contractual standards, including price signalling and pre-signalling (where the contract requires a 30-day notice of a change in price but the parties give notice earlier than the required 30-days). Finding that "the FTC's rulings and order appear to represent uncertain guesswork rather than workable rules of law," the Second Circuit ruled that certain minimum requirements were necessary before finding a violation of section 5 of the FTC Act. Indeed, absent a tacit agreement, "at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct."

In the healthcare sector, the DOJ and the Federal Trade Commission issued a joint statement creating safety zones for price or personnel-related cost surveys, according to which those agencies would not challenge the exchange of such information absent extraordinary circumstances. To fall within the ambit of the safety zones, the following requirements must be met: (i) "the survey is managed by a third-party (e.g. a purchaser, government agency, health care consultant, academic institution, or trade association)"; (ii) "the information provided by survey participants is based on data more than three months old"; and (iii) "there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider." Similar safety zones have been applied in other industries as well.

Conclusion

International best practice

In order to avoid the scrutiny of competition authorities around the world, caution is advisable when making both public and private disclosures regarding your company's future prices or strategy.

Although many forms of information disclosure may be legitimate, and can be beneficial to consumers and competition, businesses should be mindful of the relevant laws in their jurisdiction and the risks that certain information disclosure may be viewed as anti-competitive. General best practice tips that may help to reduce such risks are:

- Do not directly share information about matters such as price, quantities or business strategy with competitors. Seek legal advice if you think there may be legitimate reasons for any disclosures to competitors (e.g. in the context of a joint venture or vertical supply arrangement).
- If making public announcements regarding future prices:
  - make sure that they are genuinely public, in the interests of customers and are unequivocal (not tentative or subject to what your competitors do)
  - consider whether the announcement could be construed as an "invitation to collude" and
  - only disclose information that is necessary to be communicated to customers and do not direct the announcement...
to (or include references to) specific competitors.27

- Be mindful that your business may breach competition laws without expressly committing to exchange information, or to use information that has been disclosed to you by your competitors.
- If a competitor discloses information to you about matters such as future pricing or strategy, publicly distance yourself from the discussion (and quarantine any written information). Seek urgent legal advice to further guide your response.

1 For example, the European Commission opened formal proceedings to investigate 15 container liner shipping companies in November 2013 in relation to the carriers’ practice of publicising their future proposed freight price increases on websites and via the press. In February this year, the Commission sought feedback on commitments offered by the carriers to address concerns that the public disclosures may allow competitors to assess each other’s pricing plans and to coordinate their behaviour in breach of Article 101 of the TFEU.

2 Division 1A of Part IV, Australian Competition and Consumer Act 2010.


4 Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, point 63.

5 Decision n. 11038 dated 1 August 2002, Case I/446 - Compagnie Aerees - Fuel Charge.

6 Decision n. 17754 dated 20 December 2007, Case I/681 - Prezzi dei Carburanti in Rete.


11 See e.g., Reserve Supply Corp. v. Owens-Corning Fiberglass Corp., 971 F.2d 37, 54 (7th Cir. 1992).

12 In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 397 (3rd Cir. 2015) (quoting In re Flat Glass Antitrust Litig., 385 F.3d 350, 359 (3rd Cir. 2004)).

13 Id.

14 Id. (internal quotation marks omitted).

15 Id. at 397-98.


20 Id.


22 E.I. duPont de Nemours & Co. v. FTC, 729 F.2d 128 (2nd Cir. 1984). 23 Id., at 139. “[W]hen a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is ‘unfair’ within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition.” Id., at 138.

24 Id., at 139.


26 For ground transportation, see DOJ Bus. Review Letter to Am. Trucking Ass’n, 2002 DOJBR LEXIS 11 (Nov. 15, 2002) (allowing for a national trucking association to circulate a model contract to its members to be used on a voluntary basis, either in whole or in part, and lacking any reference to price, rates or charges). For consumer telecommunications, see DOJ Bus. Review Letter to National Consumer Telecommunications Data Exchange, 2002 DOJBR LEXIS 1 (Mar. 12, 2002) (allowing for an expansion of credit information exchange to other utility industries).
