Companies frequently make public announcements relevant to their business. It is common to publish price lists on websites, announce a proposed price increase or make comments to trade press about how they see their industry developing and their future plans.

In general, public announcements – unlike the private sharing of competitively sensitive information among competitors – will not violate antitrust laws.

However, the recent investigation of liner shipping companies in the EU, and the resulting commitments\(^2\) (which brought the investigation to an end), show that unilateral announcements can in certain circumstances be treated as problematic "price signalling" by antitrust regulators.

The EU is not alone in taking an interest in seemingly unilateral signalling cases. In addition to the EU and the antitrust agencies...
of many European Member States, agencies in Australia, South Africa, Taiwan and the US have all shown an interest in this type of conduct.

It is, however, striking that, with very few exceptions, agencies have not adopted any “hard” infringement decisions which identify an anticompetitive agreement and impose a fine. Instead, antitrust agencies have resorted to enforcement tools which do not require proof of an agreement and which can bring an investigation to a close with “commitments” (promises to change commercial behaviour) without going as far as to say there was any violation of the law. There are also examples of antitrust agencies imposing outright bans on announcements in certain sectors, such as banking.

Nevertheless, it is clear that signalling is a concern of antitrust agencies globally – and this is unlikely to change in times of political flux where currency fluctuations and other factors can lead suppliers to make public announcements about price increases. In any event, companies will want to avoid lengthy investigations and the sometimes far-reaching restrictions that can be imposed on them in order to bring an investigation to an end quickly.

We consider the various investigations below and then provide some practical tips on how to avoid uninvited attention from antitrust agencies in relation to unilateral price announcements.

**Signalling cases in Europe**

**European Union**

The European Commission investigated fourteen container liner shipping companies that regularly announced their intended future increases of freight prices on their websites, via the press, or in other ways. These price announcements, known as General Rate Increase (GRI) announcements, did not indicate the fixed
final price for the service concerned, but only the amount of the increase in US dollars per transported container unit, the affected trade route and the planned date of implementation.

The GRI announcements were typically made three to five weeks before their intended implementation date and, during that period, some or all of the other carriers announced similar intended rate increases for the same or similar route and same or similar implementation dates. Carriers were not bound by the announced increases, and some carriers postponed or modified them, possibly aligning them with those announced by other carriers.

The Commission was concerned that these practices would allow the carriers to “explore” each other’s pricing intentions and “coordinate their behaviour,” and this might enable the carriers to “test,” without incurring the risk of losing customers, whether they could reasonably have implemented a price increase.³

The Commission accepted the following commitments from the parties in order to address its concerns:

- The carriers would stop publishing changes to prices expressed solely as an amount or percentage of the change. Instead, to ensure future price announcements were useful for customers, the carriers would announce figures that included at least the five main elements of the total price.⁴

- Future price announcements would be binding on the carriers as maximum prices for the announced period of validity (but carriers would remain free to offer prices below these ceilings).⁵

- Price announcements would not be made more than 31 days before their entry into force, which corresponded to the period when customers usually started booking in significant volumes.⁶
UK

The UK Competition Commission – in the context of a market investigation (not an investigation into alleged illegal conduct by a business) - assessed letters sent by cement suppliers which suppliers informed customers about their intentions to increase the price of products in the near future.

The announcements were not specific (and therefore, in the eyes of the authority, lacked objective justification). Many of the customers were also competitors.

The authority required the companies involved in the market study to ensure that communications to customers were tailored to individual customers’ needs. This meant that price announcement letters had to be specific to the customer and include details of the current or last unit price charged to the customer as well as the new unit price proposed and any other changes that affect the total amount payable.

Netherlands

In 2014, the Netherlands competition authority investigated public statements relating to future price intentions and commercial plans, made by mobile telecommunications service providers at conferences and in trade press. At the time of making the statements, there had been no commitment regarding implementation. According to the competition authority, these statements were purely made to “test the water.”

The authority was also concerned because the firms operated in a highly concentrated market; the statements were made at a very early stage (even before strategy had been properly discussed internally); and no efficiencies/customer benefits were identified.

The competition authority accepted commitments from the
parties to alter their conduct which were set to run for three years from January 2014.9. They require senior management to refrain from verbal or written statements in the public domain on pricing and other commercial conditions if consumers would be worse off under these conditions; internal decision-making has not yet been finalized and laid down in writing; and the provider’s individual behavior becomes dependent on competitors’ reactions.

**Italy**

The Italian competition authority has also investigated price signalling albeit as part of wider cartel conduct. In 2002, the authority found that one of the major players in the air transport sector had communicated its intention to increase fuel surcharges to rivals via a press release.10 The authority found that, after the publication of the press release, competitors adopted a similar increase. As a result, the authority considered that this conduct, combined with a direct exchange of information carried out before the initial introduction of the surcharge, resulted in a concerted practice between the companies involved. The authority took account of the fact that, at the time of the communication, the decision to increase the amount of the surcharge was still not final for the company making the announcement and that it could, as a consequence, adjust its prices on the basis of signals/decisions from competitors.

In a 2009 case concerning pasta price lists, price signalling through press releases, press conferences, newspapers and television interviews was one of the many ways in which a trade association coordinated price increases.11

Currently, the only Italian case based purely on price signalling concerned the roadside supply of fuel.12 According to the authority’s decision when opening the case, the parties to the proceedings had coordinated their prices through press releases.
and the publication of fuel price lists in specialized industry press.
The proceedings were closed with the acceptance of commitments proposed by the parties. Commitments included, among other things, ceasing the communication of price lists to the press.

Spain

In 2007, the Spanish competition authority, Comisión Nacional de la Competencia (CNC), investigated allegations of signalling and coordination in relation to press announcements made by mobile operators. The CNC subsequently concluded that no infringement had taken place because there were alternative (non-anticOMPETitive) explanations for the adjustments of competitors' business strategies following successive announcements.13

In 2011, unilateral disclosures came under investigation in Spain. During an international tourism fair, an individual who was simultaneously the vice-president of the Spanish Confederation of Business Associations, president of its tourism board and also president of two hotel groups publicly declared that Spanish hotel chains needed to increase their rates. A week later, the statement was repeated in an interview, specifying that the price increase should be 6%-7%. The CNC construed these statements as evidence of a collective recommendation to increase prices.14

This was, however, overturned on appeal:15 (1) the declaration could not be attributed to any association (because the individual was speaking in his capacity as president of the trade association); (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; (3) the statement was an exercise of freedom of speech/expression; and (4) there was no concurrent behaviour (i.e., evidence that the recommendation was followed). However, the case shows the preparedness of the...
Spanish competition authority, now known as the Comisión Nacional de los Mercados y la Competencia, to take on signalling conduct.

Ireland

In September 2016, the Irish Competition and Consumer Protection Commission issued witness summonses and information requests to major motor insurance providers and insurance industry groups in Ireland. The investigation relates to industry participants signalling up-coming increases in motor insurance premiums and whether there is any link between statements by senior industry players and subsequent price increases.16

Signalling cases outside Europe

United States

For more than twenty years, the Federal Trade Commission has taken the position that an invitation by one competitor to another to collude on prices violates Section 5 of the FTC Act, which declares “unfair methods of competition in or affecting commerce” to be unlawful. In applying this law, the FTC generally considers the following factors: the type of information disclosed; the specificity and context of the information disclosure; whether the disclosure is public or private; the industry and market involved; and whether there are procompetitive business justifications for the disclosure of information. Under US antitrust law, unilateral price announcements, often referred to as price signalling, do not violate Section 1 of the Sherman Act unless there is proof of an actual agreement to fix prices.

Generally speaking, invitations to collude on prices are considered harmful to competition because of the likelihood of collusion. Historically, the cases that have been brought by the FTC have
involved private information exchanges about pricing between competitors and have been settled by consent decree. However, in 2006, the FTC challenged invitations to collude on pricing that were communicated publicly. In this case, the CEO had offered to collude with its only competitor in a conference call with financial analysts. The CEO allegedly stated that it planned to raise its prices, and that, if its competitor did not raise its prices, the ongoing price war would continue. In the FTC’s view, the public statements went far beyond disclosure for legitimate business reasons and presented a substantial danger of competitive harm. Accordingly, in a consent agreement, it prohibited the company from inviting collusion going forward.

Similarly, in 2010, the CEO of a truck rental company allegedly instructed regional managers and dealers to reach out to their counterparts to ask them to match rates for one-way truck rentals. While the FTC did not distinguish between private and public communications, it claimed that the public statements could have encouraged competitors to raise rates. Accordingly, the FTC entered into a consent agreement to enjoin this conduct.

Although no criminal actions have been brought with respect to invitations to collude, multiple civil class action lawsuits were brought against airline companies in 2009 based in part on earnings calls in which two airlines allegedly colluded publicly on first-bag fees on checked bags.

Thus, price signalling is an area of concern in the US. The FTC’s past enforcement record shows that the FTC will not hesitate to initiate an investigation if it believes that the public communication was improper and likely to have an anticompetitive effect even if no agreement or effect on competition is shown. Similarly, private litigation can also be brought if the parties can show injury to competition and to themselves as a result of the conduct.
Australia

The key Australian cases considering price signalling have concerned the petrol industry and were brought under Australia's general prohibition of anticompetitive arrangements and understandings. In particular, the competition regulator, the Australian Competition and Consumer Commission (ACCC), has faced significant difficulties in proving price fixing in several cases brought against participants in the industry. The regulator alleged that following communications between competitors, the participants established a price-fixing understanding. However, the courts considered that without an element of commitment, or obligation, to observe and adhere to the arrangements, there was no contravention.

Since these judicial rulings, the ACCC has continued to monitor and investigate allegations of price signalling but has noted a critical gap in Australia's laws. Specific price signalling laws were introduced in June 2012, which applied only to the banking sector, including “per se” prohibitions which applied to “private” communications of pricing information not in the ordinary course of business. However, these rules were controversial, did not result in any enforcement and stand to be replaced in upcoming reforms with a more flexible notion of “concerted practices." In an amendment to the Competition and Consumer Act 2010 proposed by the ACCC, a concerted practice would be any “form of coordination between competing businesses by which, without them having entered a contract, arrangement or understanding, practical cooperation between them is substituted for the risks of competition.” This is a vague concept and looks to be based on the EU concept, perhaps suggesting that signalling cases could be brought more easily.

South Africa

The law prohibits concerted practices having an effect on the
South African market, and the competition authorities are alive to potential instances of price signalling. In a matter concerning price fixing by commercial bakeries, the Competition Tribunal found the existence of a cartel based, in part, upon the use by the parties of pre-agreed signals inviting other market participants to align their pricing. Meanwhile, obiter comments in another case indicated that the adjudicators would be willing to find the existence of a concerted practice where, for example, long-standing industry practice resulted in market participants following the market leader’s price announcements and such a practice had replaced independent conduct.

There is little doubt that a prosecution could be made out in the event that a case involving public price signalling were to come before the South African courts.

Taiwan

In 2004, the Taiwan Fair Trade Commission concluded that there had been a cartel in connection with petrol prices. The TFTC concluded that price signalling to the public in advance of a change in price enabled petrol prices to change by the same amount and at the same time. The decision was affirmed by the Supreme Administrative Court in 2009. In November 2016, the Taiwan Fair Trade Commission warned mobile companies against making public statements that could encourage other companies to take measures which could be deemed anticompetitive.

Conclusion

There is significant interest in price signalling from competition authorities around the world. Investigations can be long-running and typically result in the investigated companies signing up to a set of potentially wide-ranging behavioral promises which must then be respected (and monitored carefully for compliance so as to avoid further probes and sanctions).
While it is difficult to draw concrete conclusions from the wide variety of investigations brought by myriad antitrust authorities, the following tips on What, Why, When and How are likely to keep companies on the right side of the law.

- **What:** Think twice before announcing a price increase in the media or talking about a price increase to journalists or at industry conferences – especially in sectors where there are only a few large firms. Never talk about pricing intentions, never provide more information than is necessary for the particular audience, and never mention specific competitors. If prices are revealed, they should be prices at which the company is already bound to sell. If only a generic price increase is announced, then that level should be treated as the maximum price at which the company will sell.

- **Why:** Only make an announcement if there is a legitimate underlying reason for making them. For example, it should be justified by reference to a legitimate commercial need, e.g., to inform customers or investors. It needs to be tailored to that legitimate audience, e.g., aimed at reassuring investors about volatile markets.

- **When:** The announcement should be made at a time relevant to customers’ purchasing decisions, i.e., when the customer generally starts ordering, or when there are investor concerns or inquiries. Otherwise, an announcement could suggest an ulterior motive, such as signalling. In other words, the announcement and its timing should reflect the company’s legitimate business concerns. The timing must not be driven by how much time would be needed by competitors in order to align their prices.
**How:** Choose your words carefully. The announcement must be of one's own commercial position -- not an industry one -- and should avoid talking about future pricing intentions. There should be no appeal for collective action, industry discipline or “orderly pricing.” Mention of pricing should not be dependent upon or expect any competitor response.

Companies should seek legal counsel before making any public statements involving prices or other competitive terms. They should also seek legal counsel if they are mentioned in or if they appear to be the target of a competitor’s public statements.

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4 Id., ¶ 78.

5 Id., ¶ 79.

6 Id., ¶ 80.

Id., ¶¶ 84, 13.176.


13 See Teléfonos Móviles, CNC, No. 2759/07 (July 1, 2009),


24 Competition Comm’n and Pioneer Foods 15/CR/Feb07.

25 Netstar (Pty) Ltd and Competition Comm’n 97/CAC/May10, ¶ 25.

26 See TFTC Decision Gon Zu Zi No. 093102 (2004)

27 Supreme Administrative Court Judgments 98 Pan Zhi No. 91 (2009) and 98 Pan Zhi No. 92 (2009).

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