LK SHIELDS
YOUR LEGAL COUNSEL

EU, COMPETITION AND REGULATED MARKETS

Price Signalling in Competition Law

by **Marco Hickey**

Price Signalling in Competition Law

16th September 2016 | by Marco Hickey

The Competition and Consumer Protection Commission (CCPC) recently issued witness summonses and information requests to major motor insurance providers and insurance industry groups in Ireland.

This comes as the CCPC is investigating suspected breaches of competition law in relation to industry participants openly signalling upcoming increases in motor insurance premiums in the State.

This article sketches out the main competition law issues in relation to pricing disclosures between competitors, or price signalling as it is commonly called.

Background to Price Signalling

Competition authorities across Europe, including in the UK (cement) and Netherlands (mobile telecommunications), have recently shown an increased interest in the anticompetitive effects of public announcements relating to future prices and strategic plans. The risk here is that public statements on future market behaviour could lead to coordinated behaviour on a given market because they reduce each player's uncertainty about the activities of its rivals.

Of course, some forms of pricing disclosures are beneficial to consumers and communicating prices or special offers to customers forms an essential part of day-to-day competition. Indeed, in Woodpulp, the European Court of Justice held that price announcements did not constitute, in themselves, market behaviour which lessened uncertainty on the market because, at the time each company engaged in these announcements, it could not be sure of the future conduct of the others.

Anti-competitive Price Signalling

Other forms of disclosures, however, do allow competitors to collude and lead to market inefficiencies and a decrease in value for consumers. Under Irish and EU competition law, in order for a disclosure alone to be prosecuted under competition rules, it must be shown to amount to an information exchange within the framework of a broader "concerted practice". In essence, this requires conduct whereby "practical co-operation has knowingly replaced the usual risks of competition."

The European Commission's Guidelines state that where a business makes a unilateral announcement that is genuinely public, for example, through a media interview or press release, this generally does not constitute a concerted practice within the meaning of the prohibition in Article 101 of the Treaty on the Functioning of the European Union. An information exchange is genuinely public if it makes the exchanged data equally accessible (in terms of cost of access) to all competitors and customers.

However, depending on the facts, a concerted practice could be found 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 could be a strategy for reaching a common understanding on pricing.

Recent Approach in Container Shipping Case

In July 2016, the European Commission adopted a decision that renders legally binding certain commitments offered by 14 major container shipping carriers, including Hapag Lloyd and Maersk. The commitments address the Commission's concerns that the carriers' practice of publishing their intentions on future price increases may have harmed competition and customers.

Container liner shipping is the transport of containers by ship according to a fixed time schedule on a specific route between a range of ports at one end (e.g. Shanghai - Hong Kong - Singapore) and another range of ports at the other end (e.g. Rotterdam – Hamburg - Southampton). Container carriers had developed a practice of regularly announcing their intended future price increases on their websites, via the press, or in other ways. The Commission was concerned that those announcements did not provide full information to customers but merely allowed the carriers to be aware of each other's pricing intentions – potentially making it possible for them to coordinate their behaviour.

In order to address the Commission's concerns, the carriers offered a series of commitments, including:

- to stop publishing and communicating changes to prices expressed solely as an amount or percentage of the change;
- future price announcements will include the main elements of the total price (base rate, bunker charges, security charges, terminal handling charges and peak season charges);
- price announcements will be binding as maximum prices but carriers remain free to offer prices below these ceilings;
- price announcements will not be made more than 31 days before their entry into force, which corresponds to the period when customers usually start booking in significant volumes.

The Commission market tested the commitments and was satisfied that, by binding the carriers to the prices announced, they will increase price transparency for customers and reduce the likelihood of concerted price signalling.

The Commission's decision does not conclude that there was an infringement of the EU competition rules but legally binds the companies concerned to respect the commitments offered. If a company breaks such commitments, the Commission can impose a fine of up to 10% of the company's worldwide turnover, without having to find an infringement of the EU antitrust rules.

Future Lessons

The Commission's use of the commitments procedure, rather than a full prosecution, in the Container Shipping case means that it is less helpful in reducing the uncertainty following the Woodpulp judgment. However, the Commission's approach to the Container Shipping case shows that concerns may exist in particular where non-binding announcements are given far in advance on a market with relatively few players.

Pending more details coming to light regarding the CCPC's investigation into the motor insurance industry, it is clear that businesses should exercise caution when announcing strategic moves in public because such public statements can be found to have anticompetitive effects in certain circumstances.

For more information, please feel free to contact Marco Hickey, Partner and Head of the EU, Competition and Regulated Markets team at mhickey@lkshields.ie. Marco is the author of Merger Control in Ireland published by Thomson Reuters.

About the Authors

Marco Hickey
Partner

Marco is a highly experienced competition and M&A/corporate lawyer having practiced in both areas for many years.
T: + 353 1 637 1522 **E:** mhickey@lkshields.ie