



# PRICE SIGNALING: DECIPHERING THE SHIPPING FORECAST



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## I. INTRODUCTION

Price signaling, which broadly refers to the unilateral public announcement of future strategic information, is a “Golem” in the antitrust world with both positive and potentially less desirable traits. In a world of Big Data and increasing amounts of information being published online and elsewhere, it is increasingly important for undertakings to consider where the boundary for anti-competitive price signaling lies. Unfortunately, the law surrounding price signaling in the EU has historically been shrouded in uncertainty—with limited case-law, and limited guidance as to what could be considered anti-competitive conduct.

This article discusses the state of the law and the increased regulatory interest in price signaling, through consideration of: (i) the recent proposed “soft resolution” of alleged price signaling conduct in relation to container shipping (at EU level), as interpreted against general EU competition law principles; and (ii) the conclusions that can be drawn from recent price signaling investigations by the German Federal Cartel Office (“*Bundeskartellamt*”) and the UK Competition and Markets Authority (“CMA”).

The article argues that while these recent cases suggest that certain price signaling lines in the sand are becoming more “permanent”—in particular, as regards the acceptable content for, and timings of, pricing announcements—there are still a number of areas of uncertainty, which leave the area ripe for judicial challenge.

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## II. THE EU CONTAINER LINER SHIPPING INVESTIGATION

In November 2013 (and subsequently also on November 13, 2015), the European Commission (the “Commission”) opened formal antitrust proceedings against 15 container liner shipping companies offering freight services from and to Europe to investigate their practice of regularly publishing their intended price increases on their websites, via the press, or in other ways.<sup>2</sup>

In 2009, shortly after the repeal of block exemptions for liner shipping conferences by the Commission,<sup>3</sup> the carriers at issue had started to publish individually: (i) their intended price increases per transported container unit; (ii) details of the shipping route affected; and (iii) the intended date of implementation of the price increase. These price announcements, known as General Rate Increase (“GRI”) announcements, were usually made three to five weeks before the planned implementation date.

Most of the carriers at issue made announcements around the same time that reflected identical or similar price increase intentions. Moreover, the GRIs were sometimes postponed or modified by some carriers, possibly to align them with the GRIs announced by their competitors. This had the effect that by the planned date of implementation all or most of the carriers under investigation offered the same prices. In addition, the announcements as made did not seem to include the full information on the new prices relevant for the customers.

In order to address the Commission’s concerns that the carriers were primarily coordinating their price policies (by so-called “price signaling”) instead of providing useful information to their customers, the carriers have offered commitments to stop publishing general rate increase announcements.<sup>4</sup> Instead, the carriers have broadly<sup>5</sup> stated that they would, for a period of three years for all routes from and to the EEA, provide more detailed price figures that would be broken down according to base rates, bunker charges, security charges, terminal handling charges and peak season charges (if applicable). The proposed commitments were supposed to make the announcements more helpful to customers than publication of a generic price increase. Furthermore, the carriers stated that future price announcements would not be made more than 31 days before their implementation date and would be binding as a maximum price, with carriers being free to provide container shipping below that price should they wish to do so.

Under Article 9(1) of Regulation 1/2003, the Commission, in a Communication dated February 16, 2016, has indicated that—subject to market testing—it intends to declare the

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<sup>2</sup> Press release of the European Commission, publ. 22 Nov 2013, available at: [http://europa.eu/rapid/press-release\\_IP-13-1144\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1144_en.htm); Press release of the European Commission, publ. Feb. 16, 2016, available at: [http://europa.eu/rapid/press-release\\_IP-16-317\\_en.htm](http://europa.eu/rapid/press-release_IP-16-317_en.htm).

<sup>3</sup> For more information, see press release of the European Commission, publ. Sept. 25, 2006, available at: [http://europa.eu/rapid/press-release\\_MEMO-06-344\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-06-344_en.htm?locale=en).

<sup>4</sup> Press release of the European Commission, publ. Feb. 16, 2016, available at: [http://europa.eu/rapid/press-release\\_IP-16-317\\_en.htm](http://europa.eu/rapid/press-release_IP-16-317_en.htm).

<sup>5</sup> Two exceptions are included in the commitments. The commitments shall not apply to: “(i) communications with purchasers who on that date have an existing rate agreement in force on the route to which the communication refers and (ii) communications during bilateral negotiations or communications tailored to the needs of specific identified purchasers.” The carriers consider these situations as unlikely to raise competition concerns.



commitments legally binding on the carriers and close its investigation.<sup>6</sup> At this time, the results of the market testing have not been announced. However, the potential “soft resolution” of this case, without any formal decision (and with the parties not accepting that there has been an infringement), has not settled the question as to where the boundary for anti-competitive price signaling under EU law lies, which has also been exacerbated *inter alia*, by the German and UK cases discussed below.

### III. PRICE SIGNALING—ANTI-COMPETITIVE UNDER EU COMPETITION LAW

#### A. General rules

Price signaling under European law does not amount to a distinct form of antitrust infringement<sup>7</sup>, nor is there a clear test that has been espoused in case law—and the *Container Liner* case does not change that. In each case when assessing whether the publication of pricing data amounts to an infringement, it is therefore necessary to look to the general principles of European antitrust law.

Both Article 101(1) TFEU and Article 53(1) EEA prohibit agreements and concerted practices that may affect trade and prevent or restrict competition. While agreements between competitors can be demonstrated by the existence of any direct or indirect contact, concerted practices—the basis on which price signaling is typically caught—are often far less easy to identify. The Court of Justice of the European Union (“CJEU”) has held that a concerted practice is a “form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.”<sup>8</sup> By having the same collusive nature as agreements, concerted practices are distinguishable from agreements only by their intensity and the form in which they manifest themselves.<sup>9</sup> A unilateral information disclosure can also constitute a concerted practice under Article 101(1) when there is reciprocity or acceptance.<sup>10</sup> Both agreements and concerted practices fall under the prohibition in Article 101(1) TFEU and Article 53(1) EEA if they have either as their object or effect the prevention, restriction or distortion of competition.

Advance pricing announcements and general announcements on pricing can have both beneficial and negative objects and effects. Pricing announcements can have positive effects on competition by reducing information asymmetries—for example, by reducing search

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<sup>6</sup> Communication of the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39850—*Container Shipping*, Feb. 16, 2016, para. 16, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2016.060.01.0007.01.ENG&toc=OJ:C:2016:060:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.060.01.0007.01.ENG&toc=OJ:C:2016:060:TOC).

<sup>7</sup> As compared to jurisdictions such as Australia (see the Competition and Consumer Amendment Act (No 1) 2011, No. 185, 2011 that came into force on June 6, 2012).

<sup>8</sup> CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 26; CJEU (Wood pulp), Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v. Commission* [1993] ECR I-1307, para. 63.

<sup>9</sup> CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 23.

<sup>10</sup> OECD Unilateral Disclosure of Information with Anticompetitive Effects [2012], para. 12-13, available at: [http://ec.europa.eu/competition/international/multilateral/2012\\_feb\\_disclosure.pdf](http://ec.europa.eu/competition/international/multilateral/2012_feb_disclosure.pdf).



costs and improving consumer choice.<sup>11</sup> However, pricing announcements can also facilitate collusive behavior and thus restrict competition.

The guidance in case law and legislation as to what is and is not beneficial for competition is vague and often depends on a contextual assessment. Some general rules do however apply. Genuinely public unilateral announcements, e.g. through newspapers or company websites, do not “generally” constitute a concerted practice (although they may in certain circumstances, especially when followed by announcements by competitors).<sup>12</sup> Similarly, intelligent responses to a competitor’s behavior or announcement do not amount to a concerted practice *per se*.

In addition, parallel pricing behavior in an oligopolistic market will not amount to a concerted practice where it is explicable on other grounds than collusion, such as “barometric price leadership”,<sup>13</sup> for example where an increase in price of a raw material forces one party to increase its prices, with other parties (also suffering from the raw material price increase) following suit. Parallel pricing after unilateral price announcements can also in many cases be explained not by collusion, but by the oligopolistic market structure.<sup>14</sup> The *Wood Pulp* case established in this context that “parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.”<sup>15</sup> It is widely acknowledged that parallel pricing behavior is a typical feature of oligopolistic markets, or markets which have characteristics akin to oligopoly, namely: (i) transparency (allowing easy monitoring of competitors); (ii) sustainability (*i.e.* ability to maintain discipline among competitors); and (iii) absence of competitive constraints (competitive action does not undermine collusive behavior).<sup>16</sup>

In considering whether price announcements are anti-competitive, it is also necessary to give thought to the broader law (and related uncertainties) regarding anti-competitive

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<sup>11</sup> Dewenter & Löw, *Kommunikation zwischen Unternehmen als kollusives Instrument: Eine ökonomische Betrachtung*, NZKart 2015, 458, 458; European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, para. 57. In its most recent joint report on “Competition Law and Data” together with the French *Autorité de la concurrence*, the *Bundeskartellamt* also underlined again that greater transparency may benefit consumers and in some cases can also facilitate market entry of new competitors. See *Bundeskartellamt* and *Autorité de la concurrence*, joint report on “Competition Law and Data”, published on May 10, 2016, available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2), p 14.

<sup>12</sup> European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, footnote 4 to para. 63.

<sup>13</sup> European Commission, Zinc producers group, [decision, 1984] 84/405/EEC L 220/27, paras. 75—76.

<sup>14</sup> In the case *Bertelsmann and Sony Corp. of America v. Impala* (C-413/06 P), the Court implicitly even indicated that tacit collusion may not even fall under Article 101(1) TFEU: “Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article [101 TFEU] in order to be able to adopt a common policy on the market.” Para. 122—123. This seems to indicate that if there is another explanation for it than only collusion, there is no infringement.

<sup>15</sup> CJEU (*Wood pulp*), Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v. Commission* [1993] ECR I-1307, para. 71.

<sup>16</sup> Parties therefore often run an “oligopoly defense” when confronted with allegations of being involved in a concerted practice in breach of Article 101, see CJEU, Cases T-202/98 etc., *Tate & Lyle v. Commission* [2001] ECR II-2035, para. 46; for the characteristics of oligopolistic markets see OECD Policy Roundtable: Information Exchanges Between Competitors under Competition Law, Background Paper, pp. 28—29.



information exchange. According to the CJEU, the decisive factor as to whether an exchange of information is anti-competitive in this context, is whether each undertaking still determines independently the policy which it intends to adopt on the common market.<sup>17</sup> Therefore, exchange of information “which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object.”<sup>18</sup>

Whether information exchange is capable of removing uncertainties will, according to the Horizontal Guidelines,<sup>19</sup> include consideration *inter alia* of: (i) whether the information is strategic; (ii) the market coverage of the companies publishing the data; (iii) the age of the data (historic data less likely to give rise to concerns); and (iv) the frequency of the publication of the data (in more unstable markets, more frequent exchanges of information may be necessary to sustain collusion). In each case, it is also necessary to consider the relevant market context.<sup>20</sup>

### B. Considerations in Container Shipping Case Applying EU Law Principles

There is some uncertainty, applying the above principles, whether the commitments offered in the *Container Shipping* case are sufficient.

The commitments offered by the container shipping companies would result in a series of public future pricing announcements—albeit with steps taken to give consumers more information, and reduce the ability for competitors to adapt to unilateral price increases.

It is not clear that the shipping market is an oligopoly of the type envisaged in *Wood Pulp* and therefore whether concertation must be the only plausible explanation for the unilateral announcements. A key first question is whether the revised unilateral price increase announcements can be explained on other grounds than having as their object the coordination of behavior among competitors. The rationale in the shipping containers commitments seems to be that the price announcements, in providing more detail, would benefit consumers.

However, benefitting consumers may not be in itself sufficient to address any antitrust concerns. The announcements, in providing more information for customers (and competitors), also contain strategic information relating to future prices published with a relatively high frequency. Frequent exchanges of individualized data regarding intended future prices or quantities can amount to an object restriction, according to the Horizontal

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<sup>17</sup> CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 32; CJEU, Case 172/80, *Zuchner v. Bayerische Vereinsbank AG* [1981] ECR 2021, para. 13.

<sup>18</sup> CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 41.

<sup>19</sup> European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, paras. 58, 86—94; *Pischel/Hausner, Informationsaustausch zwischen Wettbewerbern—Zum Stand der kartellrechtlichen Entwicklung*, *EuZW* 2013, 498, 500—502.

<sup>20</sup> European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, paras. 77—85.





Guidelines.<sup>21</sup> However, the Commission has recognized that if it can be demonstrated that a company is fully committed to its announced future prices (that is to say, it cannot revise them), there would typically not be an object infringement.<sup>22</sup> Of note in this context is that the maximum price would be fixed, but not the price itself. There is, therefore, scope for debate.

#### IV. PRICE SIGNALING IN GERMANY

The uncertainties surrounding European competition law enforcement in relation to price signaling have not been much clarified by recent German case law. However, the *Bundeskartellamt* has taken quite a strict view on publicly accessible price data (in line with European case law).<sup>23</sup>

##### A. Mortar Industry Investigation

In 2009 and 2010, the *Bundeskartellamt* imposed fines totaling approximately EUR 53 million against several companies in the mortar industry for their announcement of sensitive price data in a case very similar to the *Container Shipping* case.<sup>24</sup>

Due to increases in costs of dry mortar silo constructions, the implementation of an extra “set-up fee” for erecting these silos was discussed internally within (not among) most of the main dry mortar producers for several months and some had already made unilateral price announcements in this respect. The costs for the silos had previously nearly always been included in the mortar price. Being well aware of the risks of entering into a “classic” price-fixing agreement, the producers finally met during a sector meeting in 2006 which had been organized by the opposite market side. In that meeting the dry mortar producers independently announced their individual plans to implement an extra set-up fee. Each mortar producer also gave further detailed information on its intended discount, bonus and early payment/cash discount program relating to the fee. The set-up fee was then implemented on exactly the same date across almost the entire German mortar sector.<sup>25</sup>

Upholding the decision by the *Bundeskartellamt*, the Higher Regional Court of Düsseldorf (“OLG Düsseldorf”) stated that it makes no difference to the antitrust assessment

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<sup>21</sup> European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, para. 74.

<sup>22</sup> European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, footnote 4 to para. 74.

<sup>23</sup> For more information see Zimmer, in: *Immenga/Mestmäcker, Wettbewerbsrecht*, 2014, GWB § 1, para. 92—93.

<sup>24</sup> Press release of the *Bundeskartellamt*, publ. Mar. 2, 2010, available at:

[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/02\\_03\\_2010\\_Baustoff-Fachhandel.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/02_03_2010_Baustoff-Fachhandel.html);

Press release of the *Bundeskartellamt*, publ. July 3, 2009, available at:

[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/03\\_07\\_2009\\_Silostellgeb%C3%BChr.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/03_07_2009_Silostellgeb%C3%BChr.html?nn=3591568); Upheld by Higher Regional Court of Düsseldorf (OLG Düsseldorf), Judgment of Oct. 29, 2012 („Silostellgebühren I“), V-1 Kart 1-6/12 (OWi).

<sup>25</sup> Heyers, *Systemkonformität der kartellrechtlichen Beurteilung sog. Informationsaustauschs*, NZKart 2013, 99, 99; Higher Regional Court of Düsseldorf (OLG Düsseldorf), Judgment of Oct. 29, 2012 („Silostellgebühren I“), V-1 Kart 1-6/12 (OWi), paras. 37—133.



if the direct customers agreed to the practice or even encouraged it.<sup>26</sup> In addition, the OLG Düsseldorf underlined that the fact that some dry mortar producers had already decided on how to proceed with regard to the set-up fee and had already announced this to their customers, did not prevent a concerted practice at the later sector meeting.<sup>27</sup> The announcements at the meeting had established a climate of certainty that facilitated the concerted behavior, leading to a uniform set-up fee in almost the entire mortar sector. Therefore, both *Bundeskartellamt* and OLG Düsseldorf held that Section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen* (“GWB”) had been violated (Section 1 GWB is the German equivalent to Article 101 TFEU and Article 53 EEA). Furthermore, the OLG Düsseldorf clearly stated that if unilateral announcements are made at a meeting with competitors present, this already crosses the line to a direct information exchange with competitors. Therefore, the standards applied in this case were stricter than the ones in the container liner shipping investigation should the commitments be accepted by the Commission.

### B. Milk Sector Inquiry and Investigation

Regarding the publication of price related data, the *Bundeskartellamt* further examined so-called “Market Transparency Systems” in their Milk Sector Inquiry of 2012.<sup>28</sup> In contrast to the abovementioned cases, the data is here collected and processed by organizations/institutions and private companies which publish reports on the supply volume of raw milk and the milk prices paid to producers by dairies, in addition to the already existing official reports on raw milk procurement and other data published by governmental institutions. In its inquiry, the *Bundeskartellamt* came to the general conclusion that market transparency in the milk sector due to publication of up-to-date, individualized company data is not encouraging competition but rather restricting it, and that it will continue to emphasize this point in both German and European legislation and regulation by providing input to the German and European legislative process.<sup>29</sup>

Concerned by the *Bundeskartellamt*’s interim report on the inquiry,<sup>30</sup> the company AMI asked the *Bundeskartellamt* to assess whether its planned information system for the procurement of raw milk was compatible with competition law.<sup>31</sup> The *Bundeskartellamt* found that the company’s plan to publish individualized milk prices (which is the price a dairy pays

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<sup>26</sup> The CJEU also held in the past that Article 81 EC (now Article 101 TFEU) “is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such”, see CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 38.

<sup>27</sup> Higher Regional Court of Düsseldorf (OLG Düsseldorf), Judgment of Oct. 29, 2012 („Silostellgebühren I“), V-1 Kart 1-6/12 (OWi), para. 139.

<sup>28</sup> *Bundeskartellamt*, Milk Sector Inquiry, Final Report Jan. 2012, available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Milk%20Sector%20Inquiry%20-%20Final%20Report.pdf?\\_\\_blob=publicationFile&v=7](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Milk%20Sector%20Inquiry%20-%20Final%20Report.pdf?__blob=publicationFile&v=7).

<sup>29</sup> *Bundeskartellamt*, *Sektoruntersuchung Milch* (B2-19/08), Endbericht Jan. 2012, p. 11.

<sup>30</sup> *Bundeskartellamt*, Market Power in the Milk Sector—Interim Results of a Sector Inquiry by the *Bundeskartellamt*, Jan. 11, 2010, available at:

[http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Milk%20Sector%20Inquiry%20-%20Interim%20Results.pdf?\\_\\_blob=publicationFile&v=5](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Milk%20Sector%20Inquiry%20-%20Interim%20Results.pdf?__blob=publicationFile&v=5).

<sup>31</sup> *Bundeskartellamt*, Case Summary of Sept. 26, 2011, Competition law friendly design of market information systems for the procurement of raw milk, B2-118/10.



its farmers/producers for their raw milk) is prohibited by Section 1 GWB, unless the data is “historic” (which is in this case defined by the *Bundeskartellamt* as older than six months). It further raised significant concerns towards the publication of individualized milk prices in the form of a basic price with separate identification of surcharges and discounts, as the separate amounts might reveal details of the contracts with the dairies or cooperatives. As surcharges and discounts are valid for a longer period, the information would not therefore be considered as historic. The *Bundeskartellamt* further stated that the publication of current milk prices would only be compatible with antitrust law if the data was published via a non-identifying (aggregated) market information system, where the data cannot be attributed to any individual dairy and it made detailed specifications on the number and size of the dairies which have to be included in each sample to fulfil this criteria.<sup>32</sup> AMI adjusted its systems accordingly.

In contrast to the EU *Container Liner Shipping* case, this investigation did not concern unilateral announcements *per se* but a market transparency system run by a third party—potentially leading to the stricter approach adopted by the *Bundeskartellamt*, including greater restrictions on the data published.

### C. Fuel Investigation

Despite its position in the above two cases, it was the *Bundeskartellamt* who supported the implementation of the “German Market Transparency Unit for Fuels” (*Markttransparenzstelle für Kraftstoffe*) in 2013.<sup>33</sup> Companies that operate public petrol stations or have the power to set their own prices are now obliged to report price changes for the most commonly used types of petrol in real time to the Market Transparency Unit for Fuels. The Transparency Unit then passes on the incoming price data to consumer information service providers. Accordingly, motorists are now able to view information on current fuel prices online and find the cheapest petrol station in their surrounding area. However, while intended to increase competition, the work of the Transparency Unit has had little to no effect on petrol prices so far. In fact, the Transparency Unit has been much criticized for having had no effect at all, apart from imposing onerous disclosure obligations on market participants and facilitating the supervision of the market by the *Bundeskartellamt*.<sup>34</sup> In this context, it is important to highlight that the *Bundeskartellamt* tried for years, unsuccessfully, to prove that high fuel prices in Germany were the result of anti-competitive agreements in the sector.<sup>35</sup> In addition, in contrast to the milk investigation, the transparency in this case is actually relevant for the

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<sup>32</sup> In detail, the *Bundeskartellamt* stated that there need to be a “collective representation of at least five dairies, of which the largest should not receive more than 33% of the total volume of milk supplied to the dairies represented in the random sample and the two largest dairies should collectively receive less than 60% of the total volume of milk supplied to the dairies represented in the random sample”; *Bundeskartellamt*, Case Summary of 26 Sept. 2011, Competition law friendly design of market information systems for the procurement of raw milk, B2-118/10, p. 4.

<sup>33</sup> See press release of the *Bundeskartellamt*, publ. Dec 1, 2013, available at: [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/01\\_12\\_2013\\_MT\\_S.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/01_12_2013_MT_S.html); Knauff, *Staatliche Benzinpreiskontrolle*, NJW 2012, 2408. See also the Austrian surveillance system ‘The Fuel Price Database’, an example of regulatory intervention, where prices are submitted each day by noon to the e-control, so that they can then be made available to motorists, see for further information: [http://www.init.at/en/case\\_study/open-source-as-fuel-the-fuel-price-database/](http://www.init.at/en/case_study/open-source-as-fuel-the-fuel-price-database/).

<sup>34</sup> Knauff, *Staatliche Benzinpreiskontrolle*, NJW 2012, 2408, 2408.

<sup>35</sup> See *Bundeskartellamt*, Fuel Sector Inquiry, final report, May 2011—summary.





direct end consumer.

#### D. *Joint Report on “Competition Law and Data”*

In its most recent joint report on “Competition Law and Data” together with the French *Autorité de la concurrence*, the *Bundeskartellamt* emphasized again that data on competitors’ pricing could limit competition, especially in the context of the unprecedented level of transparency in online markets.<sup>36</sup> This seems to underline that the *Bundeskartellamt* will look closely at multiple unilateral announcements that can lead to a very high level of transparency and where parallel behavior can be observed. The *Bundeskartellamt* again indicated that it will check whether the transparency actually benefits consumers and, if parallel behavior is a consequence of the transparency, whether there can be another explanation for it than coordination:<sup>37</sup>

[F]irst, market transparency is generally said to benefit consumers when they have – at least in theory – the same information as the companies and second, no coordination may be necessary to achieve such supra competitive results.

### V. PRICE SIGNALING IN THE UNITED KINGDOM

As set out below, recent UK cases demonstrate both a strict and slightly more lenient approach, while providing only limited guidance as to the boundaries for anti-competitive price signaling.

#### A. *Cement Investigation*

The CMA in January 2016 published its final order prohibiting British 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, setting out the last unit price paid, the new unit price, and the specific details of other changes that apply to the customer.

This CMA order gave effect to one of the measures ordered by the Competition Commission (“CC”) following its two-year investigation into the supply or acquisition of aggregates, cement and ready-mix concrete in Great Britain (“GB”). The CC found that features of the British aggregates, cement and ready-mix concrete market had an adverse effect on competition (not strictly an application of Article 101, but parallels can be drawn). In particular, the CC was concerned that the general characteristics of the cement market (high concentration, high transparency, high barriers to entry, product homogeneity, customer behavior and vertical integration) facilitated collusive behavior among suppliers and softened

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<sup>36</sup> See *Bundeskartellamt* and *Autorité de la concurrence*, joint report on “Competition Law and Data”, published on May 10, 2016, available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2), p. 14.

<sup>37</sup> See *Bundeskartellamt* and *Autorité de la concurrence*, joint report on “Competition Law and Data”, published on May 10, 2016, available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2), p. 15.



customer resistance to price increases.<sup>38</sup>

The CC indicated in its report that “Price increase letters could serve as a focal point for coordination (if it were occurring), or they could be used by the GB cement producers to signal to each other the expected outcome from coordination (i.e. the level of price or of price increase which is sought in the coordinated outcome, thereby facilitating price parallelism)”.<sup>39</sup> The price announcement letters were sent by individual suppliers to their customers to notify them of intended increases in prices for cement. These letters were typically sent out at least once a year. While there was not strictly any public announcement or publication of these letters, most of the GB cement producers were customers of each other and would therefore receive these price announcement letters directly.<sup>40</sup>

Prior to imposing this remedy the CC conducted four separate sets of pricing analysis: (i) an analysis focused on possible coordination regarding the timing, amount and identity of which supplier announced prices first—the CC found “clear parallelism” with suppliers appearing to signal that “they will try to accommodate the other GB producers’ price increases in many cases”; (ii) whether the announced prices were achieved on average—the CC found *inter alia* that “in many cases” an average price increase of more than half of the announced price increase was achieved; (iii) the extent to which there was parallelism between the price announcements and price increases for individual customers—the CC found that, broadly, increases did not cluster around an announcement; and (iv) whether there was correlation in average prices—the CC found a “very high” level of correlation between the three main cement producers.

In imposing the remedy, the CMA recognized that the CC was trying to ensure that any future announcements were beneficial to customers, rather than merely benefiting competitors. In its report, the CC stated:

By being permitted only to produce customer-specific price announcement letters, it will be more difficult for the GB cement producers to appreciate the level of price increase their competitors are seeking to apply. Whilst some leakage of information is always possible (eg customers may provide their letters to another GB cement producer), having knowledge of one customer’s specific price increase would not be sufficient to deduce accurately the gross price increase being sought that year by that cement producer. It is also possible that suppliers and customers may be less willing to allow price announcement letters to be circulated more widely within the market, if they were to contain customer-specific information about the prices to be charged.<sup>41</sup>

This case provides few hard lines in the sand. Nonetheless, similarities can be seen between the information which will now have to be included in the price announcement letters and the commitments offered by the carriers in the *Container Shipping* case. In both

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<sup>38</sup> Competition Commission, *Aggregates, cement and ready-mix concrete market investigation: Final Report*, January 14, 2014, available at: [https://assets.digital.cabinet-office.gov.uk/media/552ce1d5ed915d15db000001/Aggregates\\_final\\_report.pdf](https://assets.digital.cabinet-office.gov.uk/media/552ce1d5ed915d15db000001/Aggregates_final_report.pdf), chapter 12.

<sup>39</sup> *Ibid*, para. 7.189.

<sup>40</sup> *Ibid*, footnote 97 to para. 7.193.

<sup>41</sup> *Ibid*, para. 13.186.



cases there is an emphasis on presenting the information which is most helpful to the customer, while providing for very limited wriggle room between announced pricing intention and actual price.

### B. Energy Market Investigation

Prior to the CMA's Phase II energy market investigation, Ofgem<sup>42</sup> conducted a State of the Market Assessment in which it examined potential collusive behavior in the retail energy market. While concluding that there were no possible breaches of competition law,<sup>43</sup> Ofgem nonetheless found that the retail energy market was characterized by a high level of concentration, price transparency, stable demand and high barriers to entry and expansion. The conclusion was therefore that the conditions for collusion were prevalent.

Ofgem did not express a view as to whether there was any tacit collusion among the "Big Six" energy firms but did observe that price announcements tended to be aligned both in terms of timing and magnitude and that intensity of competition appeared to have diminished in recent years.<sup>44</sup> The Big Six announce their price changes broadly around the same time each year. While there may be different changes for different tariffs, the public statements which generate media attention usually refer to a single, average figure for each fuel and an implementation date. Ofgem therefore commented that these price announcements "are a particularly informative measure, because through them, energy suppliers condense complex tariff adjustments in a single figure for gas and electricity that can be monitored by customers and competitors, and to which both customers and competitors can react."<sup>45</sup>

The CMA went on to produce a working paper regarding tacit coordination between the Big Six via price announcements. While recognizing the initial view that the market had some characteristics conducive to collusive behavior, the CMA found no evidence of suppliers using price announcements to signal their future price intentions to rivals. The announcements of future prices were justified on the basis that price announcements are used to manage relationships and reputation with domestic customers and comply with regulatory disclosure requirements.<sup>46</sup>

The CMA also considered the fact that the period between the public announcement and notification of the price change to customers<sup>47</sup> and/or implementation had since mid-2011 been at most 10 days. This effectively meant that there was a very small window in which the announcing firm could modify or withdraw the price it had announced, especially given the media attention usually generated by price announcements. In fact, five of the Big Six confirmed that they had never modified the level or timing of a price change between announcement and implementation; the sixth, Scottish Power, could only identify one

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<sup>42</sup> The UK regulatory authority for gas and electricity.

<sup>43</sup> Ofgem, *State of the Market Assessment*, Mar. 27, 2014, available at: <https://www.ofgem.gov.uk/publications-and-updates/state-market-assessment>, paras 1.26-1.27.

<sup>44</sup> *Ibid*, paras. 4.11, 4.61—4.71.

<sup>45</sup> *Ibid*, para. 4.64.

<sup>46</sup> CMA, *European Market Investigation: Coordination in the retail market facilitated by price announcements*, March 5, 2015, available at: [https://assets.digital.cabinet-office.gov.uk/media/54f8765de5274a1414000001/Coordination\\_retail\\_pricing.pdf](https://assets.digital.cabinet-office.gov.uk/media/54f8765de5274a1414000001/Coordination_retail_pricing.pdf), para. 42.

<sup>47</sup> At which point the supplier is effectively bound to implement the change. *Ibid*, para. 49.



immaterial change that resulted from a slight error in a regulatory announcement which was withdrawn, an apology issued, and the corrected notice republished.<sup>48</sup> Had this period been longer, there would have been a greater opportunity for suppliers to use the public announcements to coordinate prices.<sup>49</sup> There is a clear parallel between this consideration and the commitment offered by the carriers in the *Container Shipping* case to make future announcements binding as maximum prices and to set a maximum time between announcement and implementation.

## VI. SIGNALING THE FUTURE

The cases discussed above demonstrate a continued regulatory interest in price signaling. However, the cases also show regulators, while often taking a “hardline” approach, in many cases reaching soft resolutions with entities—commitments, or orders to alter conduct, without the imposition of any fine—and without any appeal or test of the case law by affected parties. As Richard Whish has suggested “for a competition authority to go the whole way and to actually say there’s enough going on in this market [in terms of price signaling] to impose a fine, it seems to me that’s a really tall order.”<sup>50</sup>

As things stand, there are nevertheless some strands that can be drawn from the above cases and which those making price announcements should consider:

- The risk of an infringement seems lesser:
  - the closer to an implementation date a price announcement is made, the key consideration being from what time an announcement is actually useful for customers—*i.e.* when the customer generally starts ordering;
  - if the company is fully committed to the announced future price and will not react to the announcements by its competitors after it has announced its own intentions;
  - if companies do not publish generic price increases, but, where possible, provide additional details (such as base rates, additional charges) that are relevant to the customers so that it is clear that the companies are not publishing the information in order to collude with their competitors, but to inform their customers;
  - if, in case of generic price increase communications, a maximum price is published; *and*
  - if the price announcements are not regular and are not always made at around the same time as competitors’ announcements.

It is also clear from these cases that companies need to consider: the risk of indirect disclosure through customers (hub and spoke risk); the risk of unilateral disclosures in

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<sup>48</sup> Ibid, paras. 50—51.

<sup>49</sup> Ibid, paras. 44—48.

<sup>50</sup> In comments at the Global Competition Review Brussels Conference 2014, as reported. See <http://globalcompetitionreview.com/news/article/37260/demonstrating-price-signalling-will-tall-order-says-whish/>.



meetings with competitors and customers being assessed as direct information exchange between competitors; and the fact that information providing a benefit to direct customers may not be sufficient to avoid price signaling issues.

While the introduction of a clear separate price signaling offense does not seem necessary, further clear lines would certainly be welcome—a “brave” defendant hopefully, at some stage, rescuing this “damsel in distress.”