Law Review ● vol. VI, issue 2, July-December 2016, p. 54-63

INTERNATIONAL LAW

LEGAL NATURE OF PRICE SIGNALLING IN THE EUROPEAN COMPETITION LAW

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Abstract

Within last few years, price signalling as a form of information exchange used for anti-competitive actions has gained importance in the EU Competition Law. However, there are no many cases on this area and legal nature of the price signalling as method use for forming a concerted practice remains unclear. This paper tries to review existing European regulation and case law to find answer to the question of what is the legal nature of price signalling as an anti-competitive act? And, how is it treated under European Competition Law?

In order to achieve its objectives, paper is divided into four main parts. After the introduction, second part will scrutinized the notion of information exchange and its possible anti-competitive nature under the European Law. Third part will review relevant European case law to price signalling and its role in infringing competition law. Finally, fourth part will provide conclusive remarks.

Keywords: *Public Law, European Competition Law, Collusion, Information Exchange, Price Signalling.*

1. Introduction

As a fundamental mechanism in apparatus of market economy, competition has a crucial role in economic growth and wealth creation. It motivates undertakings to follow consumer demands by providing them with preferred products. It also encourages businesses to be more innovative and stay away from monopolistic practices. The effectiveness of competition is therefore, ensured by application of sound competition policies. However, situation may rise under which suppliers decide to infringe competition policies and control the market by

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formation of cartels and other forms of collusive action for the purpose of increasing their profit in detriment of customer's welfare. Such situations are historically familiar in the context of market economy and national competition laws are in force to prevent their occurrence.

From the economic perspective, collusion will take place when prices offered by some undertakings in a particular market are higher than a certain benchmark market. [1] Collusion is also determined as situation under which undertakings set prices as if they are in monopolistic position[2] . However, from legal perspective collusion is defied differently. From the legal perspective, there is difference between the rule of reason and collusive act *per se.*, In qualifying and act as collusive , courts will require evidences showing cooperation of involved undertakings either in the format of agreement or a concerted practice which follow the purpose of restricting or preventing competition. Therefore, it is possible to mention, while economic view to collusion is mostly focused on the outcome, legal view is taking the observable behaviour into account.[3]

Economic recognition of anti-comparative practices has an age long history in human societies. However, emergence of competition law is not going back to very long ago. Data from the European Commission provides that during 1990s, less than 30 countries in the world were applying completion law. [4]This number rose to more than 100 counties by 2009 which is a good indicator of increasing national and international importance of customer welfare and global inclination towards fighting against corruption.[5] In the European Union, legal basis for prohibition of collusion is enshrined within article 101 (1) of the Treaty of the Functioning of the European Union:

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, in particular the direct or indirect fixing of purchase or selling prices or any other trading conditions, the limitation and control of production, markets, technical development, or investment and the allocation of markets or sources of supply are prohibited"[6]

Therefore, under European Law, undertakings show illegal collusive behaviour when they meet three following conditions: a legal component, an economic component and a jurisdictional component.[7] While economic component will be satisfied by existence of evidence proving prevention, restriction or

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[1] Massimo Motta, *"Competition policy: Theory and Practice"*, 2004 p. 138.

[2] *Ibid.*

[3] Massimo Motta, "*Cartels in the European Union: Economics, Law, Practice*", 2007 p. 2.

[4] Forwarded by Philip Lowe , Competition Law and Practice: A Review of Major Jurisdictions (Cameron, May , 2009).

[5] *Ibid*.

[6] Article 101(1) Treaty of the function of the European Union.

[7] Iversen, Bent et al. "*Regulating competition in the EU*", 2008 p. 29.

distortion of the competition, Legal component will be satisfied where some forms of cooperation (agreement or concerted practice) have taken place among involved undertakings.[8] Last but not the least; jurisdictional component refers to the fact that agreement should affect trade between the Member States. Further, article 101(3) defines situation in which an agreement or a concerted practice might be exempted from being considered anti-competitive despite of falling under article 101(1). Exemptions include: agreements beneficial to customers, agreements of minor importance and block exemptions.

As it is already mentioned, legal component of collusion under the EU competition law will be satisfied in presence of an agreement or a concerted practice. However, it should be kept in mind that above mentioned notions are not the same. Concerted practice is in need of implementation or practice of anti-competitive act by undertakings in the market to be illegal ;but any form of anti-competitive agreement including informal , failed agreement or even the ones which have not been acted upon will infringe article 101.[9] Therefore, in order to be able to take a coercive measure, it is necessary for competition authorities to prove existence of coordination in commercial activities or intention for it among suspected undertakings. Information exchange is one of the most well-known methods used by enterprises in formation of a concerted practice .it can be achieved via direct and indirect contacts or parallel conduct. Within last few years, price signalling as a form of information exchange used for anti-competitive actions has gained importance in the EU Competition Law. However, there are no many cases on this particular area to clarify the legal nature of price signalling as an anti-completive act. In this paper, author tries to review existing European case law to find answer to the question of what is the legal nature of price signalling in the framework of EU Competition Law.

In order to achieve its objectives, paper is divided into four main parts. After the introduction, second part will scrutinized the notion of information exchange and its possible anti-competitive nature under the European Law. Third part will review relevant European case law to price signalling and its role in infringing competition law. Finally, fourth part will provide conclusive remarks.

2. Information Exchange and Concerted Practice the EU Competition Law

European law is concerned with negative effect of information exchange among undertakings to be anti-competitive where it is a result of an "agreement",

[8] Article 101(1) does not define the term undertaking and instead it has been developed through a number of cases before the ECJ. In *Höfner and Elser v. Macotron*, the ECJ established that "*the concept of an undertaking, encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.*" See Case C-41/90, *Höfner and Elser v. Macotron GmbH,* para 21.

[9] A. Jones and B. Sufrin, "*EC Competition law: Text, Cases, and Materials*", 2008, p. 174.

"a decision by association of undertakings" or a "concerted practice" whereby, price signalling is invariably referenced to be a form of concerted practice. [10]

A concerted practice is known as type of coordination among undertakings where in absence of an explicit agreement, they show practical cooperation to reduce risks of competition with each other. In a free and competitive market, each undertaking may determine its business policy and price offers to customers individually. However, under concerted practice such individual approaches towards setting a go to market strategy does not exist and competing parties form a collaboration to further increase their profit , protect their interests in the expense of violating customers interests. European Competition law considers a situation as concerted practice where particular preconditions are met including : Undertakings must be involved in some sort of cooperation or concertation; they show elements of collusive practice in their market behaviour; There is high possibility to find cause and effect relation between concerted practice and market conduct of undertakings.

Meanwhile, many companies use communication methods to share attributes of their business including existing and future pricing policy with public. European Competition authorities constantly show more sensitivity to such practice as a form of concerted practice towards violation of European Competition Law. They believe that price signalling is a way used to form a collusion, harmonise prices among competitors and obtain close to monopoly prices in internal market .Within the framework of the European Competition Law, any information exchange among competitors which results in price signalling is covered under European Commission's Guidelines on Applicability of Article 101 of the TFEU.[11] In terms of information exchange, guidelines provide:

"[A concerted practice arises out of] any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete."[12]

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[10] Hall. M ,Recent Developments in Price Signalling in the EU, ABA Section of Antitrust Law Spring Meeting (April 2015),P 3.

[11] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 (14 January 2011), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN.

[12] OJ C 11/1 (14 January 2011) paragraph 61.

Guidelines also clarify key distinctive issues regarding cases that conduct of information exchange among undertakings would be illegal. It is provided that: "A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it [or requests it] can … constitute a concerted practice"[13]. This means a practice can be illegal information exchange where there is no reciprocity and even all acts happen out of business environment. Additionally, an information exchange may be result of attending a meeting and public announcements even in absence of invitation to collude:

"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…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 strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination."[14]

The above mentioned position has direct link to phenomenon known as price signalling. As it was mentioned earlier, many companies regularly communicated their intended prices together with other relevant business information to the public. Here comes the risk whether the unilateral public announcement of future prices by one undertaking would be followed by the same act of other competing firms in the same market. The notion follows logic under which statement made by one company may increase the possibility for imposition of same price change by competitors and result in formation of a concerted practice. As a result, in order not be found guilty, all suspected parties should prove that they are not been involved in any anti-competition practice. However, it should be kept in mind that existing case law on relevant decisions of European Court of Justice do not support the position of European Commission taken in the guidelines.

In seminal case of *Wood Pulp*[15], the European Commission (EC) accused forty producers of wood pulp and three trade associations formed by them with collusion act towards harmonising prices. In absence of evidence proving express agreement, EC rested its claim on two issues. First, the Commission traced direct and indirect information exchange among competitor undertakings which resulted in artificial transparency of market via: establishment of a system for price announcements done in quality basis, conducting price exchanges by

[13] *Ibid,* Paragraph 62.

[14] *Ibid* Paragraph 63.

[15] *Wood Pulp*, 27 O.J. (L 85) 1 (1984) [1982–85 Transfer Binder] Common Mkt. Rep. (CCH) 10,654 (1985).

telecommunication devices or during meetings, and finally price exchange with American producers which were considered by commission as a separate infringement.[16]

Second, the EC found parallel pricing resulted from above mentioned information exchange as anti-competitive. However, the European Court of Justice changed the judgement on appeal:

"…parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although [Article 101(1) TFEU] prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors … Accordingly, it is necessary in this case to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation"[17]

As a result, in proving the existence of concerted agreement, the EC should rely on documents evidencing the contacts among involved undertakings. In this regard, the EC must prove that in public announcements of undertakings, competitors were in fact intended audience and they responded in similar way.

After providing sufficient evidence about an existing concerted practice , next step would be defining whether or not signalling act in question is an infringement to European Competition Law. In this regard, guidelines provide:

"Information exchanges between competitors of individualised data regarding intended future prices or quantities should … be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities…".[18]

Recent EC's Guidance on restrictions of competition by object reiterated the same position.[19] In cases which do not fall under above mentioned categories, effects of exchanging information on competition must be assessed on the facts of each particular case. In conclusion, an act of information exchange will have restrictive effect on competition in the framework of article 101(1) of TFEU where it impacts

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[16] *Ibid,* 118.

[17] *A. Ahlström Osakeyhtiö and others v Commission of the European Communities,* Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85, C-129/85, available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93717&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=489879.

[18] OJ C 11/1 (14 January 2011).

[19] Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, available at http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf.

any of pro-competition parameters negatively. Parameters include: price, product quality, output, innovation or product variety[20]. Economic effects on relevant market and characteristics of exchanged information are considered by EC to determine whether or not an exchange of information has anti-competitive effects. [21]

3. Relevant European Case Law

Unfortunately, price signalling is still a grey area in European Competition Law. As a result of scarcity in number of available case law, it is still not clear where and under which condition it can be considered punishable act and subjected to fines. However, boundaries of competition law in the EU are expanding constantly and there are legal cases available (although in very small number) which show attitude of competition authorities at the Union level and also Member States towards price communication among commercial undertakings.

3.1. Italy

The Italian Competition Authority (ICA) has some experience with cases of price signalling. In *Compagnie Aeree - Fuel Charge*[22], ICA authorities while investigating website of an airline discovered two press releases which first one was introducing a fuel surcharge and the latter was giving out the amount of surcharge. As competitors in the same market introduced identical surcharges subsequently, ICA considered the price signalling committed by the airline as a concerted practice in violation of competition law. Next case was *Prezzi dei Carburanti in Rete*[23], with involvement of oil companies; ICA considered exchange of price information among involved undertakings via press releases and fuel price list in industry magazines as violation of competition law. Instead of going to court, case was settled by commitment of oil companies to stop communicating price lists to media. In *Listino Prezzi della Pasta*[24],investigating of information exchange done by pasta producing companies convinced ICA that competitors violate competition law by being involved in a concerted practice of price signalling via press conference , press releases , television interviews and newspaper.

3.2. The Netherland

Investigations of the Netherlands Authority for Customers and Markets (the ACM) into activities of three mobile telephone operators KPN, Vodafone and

[20] Hall , M (2015) , P6.

[21] *Ibid.*

[22] Decision n. 11038 dated 1 August 2002, Case I446 - *Compagnie Aeree - Fuel Charge.*

[23] Decision n. 17754 dated 20 December 2007, I681 - *Prezzi dei Carburanti in Rete.*

[24] Decision n. 19562 dated 25 February 2009, Case I694 - Listino Prezzi della Pasta.

T-Mobile settled with commitment of involved undertakings.[25] In the course of investigations, it became clear that public statements of operators changing commercial terms of respective companies contain anti-competitive risks. Statements were covering range of speeches, presentations, media reports, panel discussions at conferences and interviews with media. ACM referenced to statements of a telecom company representative in a conference where he clearly discussed intention of his company to introduce separate connection fees. Tracing notes made by other operators based on statements of above mentioned representative resulted in conclusion of ACP that taking notes from public statements of competitors about their intention to change future terms of trade might result in a collusion act and imposition of harm to customers.

In January 2014, three telecom operators committed to ACM not to make statements relevant to their trade policy changes in public before finalizing such changes internally. They also committed to upgrade their compliance policies and provide special employee training workshops on the subject matter.[26]

3.3. The European Container Shipping Case

Apart from the *Wood Pulp*[27]case, EU container shipping case is another measure taken by the EC against price signalling conduct of shipping companies at the Union level .In November 2013, the EC issued a press release and considered investigations on activities of 15 liner shipping companies in different Member States started in 2011 as reflect of concerns about existence of concerted practice where undertakings signalled their future prices to each other.[28] In conclusion, main concerns of EC were summarized under four main categories: First, frequent public announcement regarding price increase intentions on the website of particular trade press. Second, constantly announcing price changes. Third, all companies followed the same format of announcement including amount of increase in price and date for implementation of new prices. Fourth, undertakings were making announcements successively some weeks before implementation date announced in the same press release.[29]

The case settled in July 2016 with decision of the EC to impose certain legally binding commitments on undertakings including:

- Refraining to publish and communicate price changes on sole format of amount or percentage of change.

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[25] ACM decision of January 7, 2014, case number 13.0612.53. See also the press release at https://www.acm.nl/en/publications/publication/14326/Commitment-decision-regarding-mobile-operators/.

[26] *Ibid.*

[27] *Wood Pulp*, 27 O.J. (L 85) 1 (1984) [1982–85 Transfer Binder] Common Mkt. Rep. (CCH) 10,654 (1985).

[28] Case AT.39850 Container Shipping.

[29] *Ibid.*

- Including total price elements in future price announcement
- Prices announced in future would be the celling price; however, undertakings are free to offer lower prices.
- In accordance with market practice for booking large volumes, new prices will not enter into force more than 31 day after their announcement. [30]

In Container Shipping Case, the EC did not conclude that infringement to the EU Competition law has taken place. However, involved undertakings will face with fine equal to 10% of their annual global turnover in case of breaking their commitments.

4. Conclusion

In its endeavour to answer questions around legal nature of price signalling in European Competition Law ,this paper explained concept of concerted practice and condition under which information exchange among competitors can result in infringement of article 101(1) of TFEU. Further, relevant case law were studied to shed more light on the subject matter. However, it is clear that price signalling is still a grey area in European Competition Law. It is necessary to remember that relevant legal issues to prices are not only covered by competition law. There are other area of law which also play role in this game like corporate law and financial law which make companies to go for public announcement of their financial matters. Public companies are good example which should constantly disclose their financial plans to public. Therefore, defining a clear position for price signalling in the EU is in need of fact based analysis and willingness of parties and authorities to settle cases with commitment decision. However, commitment decisions suffer from lack of a general applicable legal framework which can be used to all cases as each decision is extremely dependant on facts of a particular case.

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Case AT.39850 Container Shipping

Case C-41/90, *Höfner and Elser v. Macotron GmbH,* para 21

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[30] *Ibid.*

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