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'Invitations To Collude' Targeted By US And EU Enforcement

Law360, New York (October 7, 2016, 9:59 AM EDT) --


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This year antitrust regulators in the U.S. and EU have demonstrated a continuing commitment to investigating business practices that may adversely affect competition, but that do not constitute the "hardcore" behavior that businesses traditionally focus on when formulating antitrust guidelines for their personnel. While these practices fall through the cracks of some antitrust laws, they do not escape the attention of others, like the Federal Trade Commission Act.[1] For businesses operating in the U.S. or EU, such attention can involve costly and resource draining governmental investigations and consent orders, and can inspire private lawsuits.[2] Because these types of regulator challenges extend to "invitations to collude," often involving unilateral pricing activity, businesses that publicly post price increases for products or services should tread carefully when formulating the language of their price announcements.

Slipping Into the Legal Gray Zone: Business Practices Involving Competitors That Do Not Result in Unlawful Cartels But May Precipitate Antitrust Regulator Action

Businesses know agreements between competitors that lessen competition for customers can be a very dangerous and risky strategy. The antitrust laws, with rare exception, frown on such competition diminishing behavior. The U.S. Department of Justice and the European Commission aggressively target "hardcore cartels" that engage in practices like price-fixing, customer allocation, market division and bid rigging.[3] On the other end of the spectrum, businesses can safely pursue purely competitive practices without fear of antitrust challenge. In a vibrantly competitive market, businesses compete for sales of products or services to consumers through attractive pricing and other strategies that benefit consumers (e.g., free product shipping).

Unfortunately, the line between lawful and unlawful competitive behavior is not always black and white. Such is the case with "invitations to collude." Invitations involve an "improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition."[4] They are "efforts by one competitor" to get a rival to enter into an "anti-competitive agreement"[5] that reduces competition on matters such as pricing, production, customers, bids, or territories. A primary concern with invitations is that they can blossom into unlawful agreements to restrain trade.[6] Yet even in the absence of agreement, an invitation can "nonetheless violate the spirit of the

antitrust laws insofar as it threatens harm to competition without countervailing benefits."[7]

An invitation can be as bold as one competitor asking another competitor to agree that both increase their prices or agree not to compete for each other's customers. For instance, in August 2016, the Federal Trade Commission filed a complaint against, and entered into a consent order with, a company that met with its competitor and communicated "dissatisfaction" with the competitor's lower pricing and "its preference that both" increase their pricing multipliers when bidding to contractors.[8]

On the other hand, an invitation can be subtle and indirect, such as when one competitor signals other competitors about its pricing intentions through press releases or other public channels. For example, in July 2016, the EC extracted "commitments" (in essence, a consent decree) from 14 container shipping carriers to revise the industry's practice of publicly announcing intended price increases.[9] The increases did not involve direct price communications between the carriers, though the carriers presumably learned of one another's increases because of the public nature of the announcements.

In these FTC and EC proceedings, neither regulator concluded that any competitor accepted any other competitor's invitation to collude or, consequently, that any competitors reached an agreement. Indeed, in both jurisdictions, regulators need not prove that competitors conspired before proceeding with an enforcement decision. The FTC has noted:

> The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.[10]

Similarly, the EC has stated it can:

> conclude an antitrust investigation by making commitments …. Such a decision does not conclude that there is an infringement of the EU antitrust rules.[11]

Antitrust Regulators Possess Broad Flexibility to Investigate Business Practices

The U.S. Supreme Court has long recognized the FTC has "broad powers to declare trade practices unfair … even though such practices may not actually violate" the Sherman or Clayton acts.[12] Last year, the FTC embraced the breadth of its powers, stating, "Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."[13] Accordingly, the FTC may "arrest trade restraints in their incipiency," before an actual violation has occurred.[14]

The FTC's statutory authority to arrest incipient behavior rests in Section 5 of the FTC Act.[15] Section 5(a)(1) reads: "Unfair methods of competition in or affecting commerce … are hereby declared unlawful."[16] This language begs the question: What does it mean for a trade practice to be an "unfair" method of competition? The Supreme Court has addressed this question only with broad brush strokes:

> The standard of "unfairness" [is] an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws … but also practices that the Commission determines are against public policy for other reasons."[17]

Statements like this have left lower courts, and the FTC itself, uncertain as to the types of conduct that justify condemnation under Section 5(a)(1). The Second Circuit has opined that "doubt" exists "as to the types of otherwise legitimate conduct that are lawful and those that are not."[18] This doubt extends to

conduct falling under the umbrella of an invitation to collude: "the type of communications that will prove an unlawful 'invitation to collude' is unclear."[19]

In an effort to provide further guidance, the FTC issued a "statement of enforcement" in August 2015. The FTC approaches Section 5 investigations on a "flexible case-by-case basis," guided by three principles in "deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis."[20] Antitrust practitioners generally, including some within the FTC, have found the statement and its principles to be too vague to be of substantial value to businesses operating in the U.S. FTC Commissioner Maureen Ohlhausen has opined that the statement "raises many more questions than it answers," and may "ultimately lead to more, not less, uncertainty and burdens for the business community."[21] And, FTC Chairwoman Edith Ramirez has recognized that "our policy statement prescribes no detailed code of regulations for the business community at large."[22] The chairwoman herself favors a "common-law approach" to assessing conduct's affect on competition "rather than a prescriptive codification of precisely what conduct is prohibited."[23]

In the EU, the EC can initiate investigations, including on its own initiative,[24] into practices that may be anti-competitive. The EC can complete investigations by reaching, under Article 9 of Regulation 1/2003, a commitment decision.[25] The commitment "instrument is novel and the conditions for its use are flexible."[26] The EC will decide to use a commitment when:

- it placates the "Commission's initial competition concerns,"
- conduct does not rise to the level of a "hardcore cartel," and
- resolution is justified by "efficiency reasons."[27]

In both the U.S. and EU then, antitrust regulators apply a "flexible" approach to assessing whether competitive behavior should be subject to enforcement action. This flexibility allows regulators the ability to initiate investigations into virtually any conduct that raises competitive concerns in a market, even when the conduct is unlikely to have contravened an antitrust rule. For businesses, the sweeping breadth of this flexibility, in the absence of further guidance from regulators, should impact their decision-making on two primary factors that play into whether a market is acting competitively — price and output.[28] If a company's practices, on either score, may be perceived as inviting competitors to collude, those practices can spark antitrust regulator inquiry.

Invitations to Collude Are a Continuing Target of U.S. and EU Enforcement Activity

U.S. Enforcement

FTC Chairwoman Ramirez noted last year that the FTC has, for several years, brought cases targeting invitations to collude.[29] While she remarked that the FTC's pursuit of invitations to collude "was controversial at first," she emphasized cases in this area are "now an accepted fixture of our standalone [FTC Act] Section 5 enforcement activity."[30] In FTC invitation cases, price often is the driving force behind Section 5 enforcement actions.[31]

For Section 5 invitation actions, predicated on pricing conduct, the FTC's practice is to allege a defendant solicited a competitor, through public, and in some instances private statements, to enter into a price fixing agreement that, if consummated, would violate the Sherman or Clayton Act.[32] In In re McWane, for example, the FTC alleged McWane violated Section 5(a)(1) by "inviting [its competitors] to participate in a per se illegal price fixing conspiracy" through pricing letters it sent to customers.[33]

EU Enforcement

In the EU, the closest counterpart to Section 5 of the FTC Act is Article 101 of the Treaty on the Functioning of the European Union (the provision prohibiting anti-competitive agreements). While, importantly, Article 101 does not apply to purely unilateral conduct, it catches "concerted practices" — a somewhat ambiguous concept referring to a form of coordination falling short of a full agreement but exceeding purely unilateral conduct. The EC has shown a willingness to stretch this concept to catch even the most informal arrangements, and the EC's horizontal guidelines make clear that, in the right circumstances, unilateral announcements can lead to a finding of a concerted practice that breaches Article 101:

> Where a company makes a unilateral announcement that is also genuinely public … this generally does not constitute a concerted practice …. However, depending on the facts … 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 … [it] could prove to be a strategy for reaching a common understanding.[34]

Even though this EC statement stretches Article 101 to its limits to cover seemingly unilateral behavior, the EC has displayed a continuing interest in invitations to collude, as demonstrated by its previously referenced July, 2016 commitment decision.[35] In that case, the EC, "on its own initiative," instituted an investigation into a noted method of inviting collusion: price signaling — the use of public price announcements to communicate pricing intentions to competitors. Specifically, the EC examined a dozen-plus carriers' practice of issuing general rate increases ("GRI") through the press or other public channels. These price announcements did not state a fixed final price or bind the carriers to implement the proposed increase, and pre-dated the intended (but not locked) date of increase by three to five weeks. During the pre-increase period, while a carrier's GRI was pending, other carriers tended to publicly announce their pricing intentions.

The EC's concern with the GRIs was twofold. It believed the GRIs (1) heightened the likelihood of price coordination by reducing uncertainty among competitors about competitive pricing strategies through a method that generated minimal risk for individual carriers, and (2) offered questionable benefit to customers because the nonbinding increases could not be relied on by customers in making purchase decisions.[36]

To alleviate the EC's concerns, the commitments required the carriers' price announcements, going forward, to be (1) binding, (2) definite as to foundational elements of total price, and (3) publicized no more than 31 days before implementation.[37] The EC believed these measures would provide pro-competitive "price transparency for customers" and "reduce the likelihood of concerted price signaling by binding the carriers to the prices announced."

Like the FTC's Section 5 actions, the EC's Article 9 commitment decision did not require a finding of a violation of established antitrust rules. At most, the EC concluded the carriers' use of the GRIs "may have" harmed competition and "may have" raised prices.[38]

EU Member State Enforcement

In Europe, beyond the EC, EU member state competition authorities also may target seemingly unilateral pricing activity. For instance, in 2014, the Dutch competition authority extracted

commitments from three mobile network operators that had made unilateral public announcements about future strategies and intended price increases at telecom conferences and in the media.[39] These statements were not binding or finalized when made. The Dutch competition authority found these unilateral announcements reduced strategic uncertainty in the markets and may have allowed for coordination on pricing and other strategy by competitors. To address these concerns, the operators agreed to refrain from making public statements about "nonfinalized" decisions and to set up compliance programs to ensure they did not make such announcements.

Factors to Consider When Publicly Communicating Price Information

Given the FTC and EC's attention to invitations to collude and the fact-specific, case-by-case flexibility they possess in investigating such purported conduct, companies using public communications to advise consumers of their pricing strategy should take seriously the reach of the antitrust regulators' authority and consider it when formulating price announcements. Unfortunately, that exercise is complicated by the fact that regulators have not thoroughly defined for the business community safe harbor practices that insulate conduct from allegations of impropriety. Moreover, the exercise is further complicated in the U.S. by the FTC's reliance, in evaluating company conduct, on the "rule of reason,"[40] an analytical approach U.S. federal judges admit can be difficult to apply.[41]

Despite these complications, regulator historical activity in the area, when observed against the backdrop of the antitrust laws generally, highlights some of the factors companies should weigh in drafting and disseminating pricing information.

1. Price Announcements Generally

Publicly releasing price information, by itself, is generally lawful; hiccups emerge when a company's unilateral act can be viewed as soliciting or responding to other competitors' conduct.[42] Always ask yourself, before making a public price announcement, whether it could be construed by competitors as an invitation to collude.

2. Direct Communications Between Competitors

Competitor contacts about price increase announcements or the implementation of price changes pursuant to those announcements — that occur prior to issuing the announcement or implementing the change — may well attract regulator attention.[43] Consistent with standard "do's and don'ts" promulgated as part of an antitrust compliance policy,[44] employees should not communicate with competitors in a manner that could be construed as seeking agreement on conduct that could violate the antitrust laws (e.g., price-fixing, customer allocation, market or territory division). Conversely, if an employee is approached with what she interprets to be a solicitation to collude, she should unambiguously tell the competitor that the company will not engage in anything illegal and thereafter report it to company counsel. Similarly, if a competitor does not make contact directly but mentions a company in a public announcement about future pricing, company employees should report the activity to counsel.

3. Communications Through Trade Associations

If a regulator is investigating an entity's price announcements, it likely will scrutinize trade association conduct relating to the pricing behavior.[45] A company, active in a trade association, should ensure the association conducts meetings and information exchanges on pricing and other benchmarking activities

consistent with antitrust best practices. To ensure consistency, associations should consult with their competition law counsel.[46]

4. Market Concentration

Markets with few competitors are considered susceptible to collusion, and while competitors in a concentrated (or oligopolistic) market may engage in interdependent activity that itself is not illegal, the FTC has pursued companies in these markets.[47] If a supplier in a concentrated market, a company should gauge whether its competitive activity is supported by facts showing it is acting consistent with its self interest and not because of contacts with competitors, such as exchanges of assurances (e.g., "If you cut output I will too").

5. Substance of Price Announcement — Does it Benefit Consumers or Competitors?

Announcements should not include unnecessary information, and should focus on facts that assist consumers in reaching purchase or other decisions pertinent to their personal or business needs rather than information that arguably does not serve such a legitimate purpose. For instance, disseminating price information about which consumers "do not care," but competitors do, can raise significant problems.[48] Accordingly, before issuing an announcement, a company should ask, for each statement in the announcement, "how does this statement benefit my customers or otherwise assist the industry?" If the statement primarily aids competitors, rather than consumers, the prudent course is to remove it from the announcement.

6. Timing of Announcements

Announcements should be timed to match the realities of the marketplace. For instance, in the building construction market, advanced notice of price increases by several weeks can serve a valuable function for builders who bid contracts well in advance of commencing work.[49]

7. Price Leaders and Followers

Industries in which competitors publicly announce price changes from time to time and lead or follow one another's announcements can draw scrutiny, particularly if increases seem inconsistent with market dynamics (e.g., increasing price during a time of decreasing demand). Whether a price leader or follower, a company should thoroughly weigh the benefits and risks of announcing a pricing action, including an assessment of whether a decision to increase is evidenced by a demonstrable unilateral, independent business judgment, supported by contemporaneous, internal company communications.

8. Announcement Method

The medium used to announce does not create a shield from investigation. Whether transmitted through a press release, social media, company website, blast emails, or an earnings call, an announcement likely will reach a competitor and, therefore, can still trigger an invitation to collude inquiry.[50]

9. Preserving Uncertainty[51]

Practices that reduce uncertainty on the pricing and associated strategies of competitors can be anti-competitive and attract antitrust regulator scrutiny.[52] Avoid price announcements that attempt,

explicitly or implicitly, to remove uncertainty for an announcing party's competitors, or as between that party and its competitors. For example, the FTC identifies as problematic public statements that encourage the termination of "price wars."[53] Instead, announcements should focus on the seller-buyer relationship, assisting customer knowledge while providing the seller flexibility as circumstances permit.[54] Announcements are for purchasers, not competitors, and, accordingly, prospective pricing actions should not be contingent on how a competitor will react.

While each of the above factors is relevant to an assessment of the risks and opportunities stemming from a price increase announcement and how it is articulated, the factors should be reviewed, with other relevant market criteria, collectively; not in isolation.[55] Moreover, a holistic assessment in the U.S. should be performed with due consideration to the dynamic rule of reason, the FTC's analytical tool of choice under Section 5. To artfully navigate the legal complexity of an assessment, company personnel with pricing responsibility may be best served by enlisting the assistance and guidance of company counsel.

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[1] See Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Address at the George Washington University Law School, Competition Law Center, at 5 (Aug. 13, 2015), available at https://www.ftc.gov/public-statements/2015/08/remarks-chairwoman-edith-ramirez-regarding-section-5-enforcement-0[Hereinafter Ramirez] (noting conduct, like a failed attempt to collude that does not raise a monopoly power issue, "generally falls through the cracks of Sections 1 and 2 of the Sherman Act."). See also 15 U.S.C. § 45 (2016) (Section 5 of the FTC Act, prohibiting "[u]nfair methods of competition"); 15 U.S.C. § 1 (2016) (Section 1 of the Sherman Act, prohibiting conspiracies "in restraint of trade or commerce"); 15 U.S.C. § 14 (2016) (Section 3 of the Clayton Act, prohibiting exclusionary contracts that may "substantially lessen competition"); Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Sept. 5, 2008, 2008 O.J. (C 115) 89 [hereinafter TFEU] (prohibiting "abuse of a dominant position").

[2] See, e.g., Liu v. Amerco, 677 F.3d 489, 497 (1st Cir. 2012) (class action arising from federal enforcement action permitted to proceed under state law). In the EU, customers that believe they have been aggrieved by the subject of a consent agreement can seek "private enforcement in national courts" of EU member countries. See Press Release, Eur. Comm'n, Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour) (Sept. 17, 2004), available at http://europa.eu/rapid/press-release_MEMO-04-217_en.htm[hereinafter EC Memo 2004].

[3] See, e.g., Neelie Kroes, Eur. Comm'r for Competition Policy, Tackling cartels – a never-ending task, Speech at the Anti-Cartel Enforcement Criminal and Administrative Policy Panel Session (Oct. 8, 2009),

available at http://europa.eu/rapid/press-release_SPEECH-09-454_en.htm ("I don't want to merely destabilise cartels. I want to tear the ground from under them."); Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Enforcement Of Antitrust Laws: The U.S. Model, Address at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy (Sept. 14, 2006), available at https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model ("Our Supreme Court has accurately labeled cartels 'the supreme evil of antitrust.' …. The fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification … antitrust authorities properly regard cartel behavior as … a 'hard core' violation of the competition laws.").

[4] Fortiline LLC Federal Register Notice Containing Analysis to Aid Public Comment, File No. 151-0000, 81 Fed. Reg. 54085-88 (Aug. 15, 2016), available at https://www.ftc.gov/enforcement/cases-proceedings/151-0000/fortiline-llc.

[5] See Ramirez, supra note 2, at 5 (stating invitations include "efforts by one competitor to reach an anticompetitive agreement with another competitor.").

[6] In re TFT-LCD Antitrust Litig., 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2009) ("Courts have held that a conspiracy to fix prices can be inferred from an invitation, followed by responsive assurances and conduct." (citing United States v. Foley, 598 F.2d 1323, 1331-32 (4th Cir. 1979), cert denied, 444 U.S. 1043 (1980))).

[7] See Ramirez, supra note 2, at 5.

[8] Compl., In re Fortiline, LLC, F.T.C. File No. 151 0000, ¶¶ 18-19 (Aug. 9, 2016), available athttps://www.ftc.gov/system/files/documents/cases/160809fortilinecmpt.pdf. See also Compl., In re Drug Testing Compliance Group, LLC, F.T.C. File No. 151 0048, ¶ 9 (Jan. 21, 2016), available at https://www.ftc.gov/system/files/documents/cases/160129drugtestingcmpt.pdf (stating that rival "proposed that the firms agree not to solicit or compete for one another's customers."); Compl., In re Step N Grip, LLC, F.T.C. File No. 1510181, ¶ 8 (Dec. 7, 2015), available at https://www.ftc.gov/system/files/documents/cases/151216stepngripcmpt.pdf (stating that the company emailed its competitor and, in response to a series of price decreases, asked, "We both sell at $12.95? Or, $11.95?").

[9] Press Release, Eur. Comm'n, Antitrust: Commission accepts commitments by container liner shipping companies on price transparency (July 7, 2016), available at http://europa.eu/rapid/press-release_IP-16-2446_en.htm [hereinafter EC Press Release].

[10] Analysis to Aid Public Comment, In re Drug Testing Compliance Group, LLC, F.T.C. File No. 151 0048 (Dec. 14, 2015), available athttps://www.ftc.gov/system/files/documents/cases/151214drugtestinganalysis.pdf.

[11] See EC Press Release, supra note 10. See also Eur. Comm'n, Competition: Procedures in anticompetitive agreements (Article 101 TFEU cases),http://ec.europa.eu/competition/antitrust/procedures_101_en.html (last visited Sept. 29, 2016) ("Under commitment decisions, the Commission does not have to [find]… an infringement of the antitrust rules"); EC Memo 2004, supra note 3 (explaining commitment "decisions are silent on whether there was or still is a breach of the EU competition rules.").

[12] FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966).

[13] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), available at https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition [hereinafter FTC Statement].

[14] Brown Shoe Co., supra note 13, at 322.

[15] 15 U.S.C. § 45 (2016). Section 5(b) authorizes the FTC, subject to review, to issue cease and desist orders. Id. at 15 U.S.C. § 45(b). A party violating an order can be fined up to $40,000 daily for noncompliance. Id. at 15 U.S.C. § 45(l). See also Kelly Signs, Inflation increases for maximum civil penalty amounts, Fed. Trade Comm'n (June 29, 2016, 3:17 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2016/06/inflation-increases-maximum-civil-penalty-amounts.

[16] Section 5(a)(1) also references "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1). This article does not address such practices.

[17] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (internal citations omitted). See also Fashion Originators' Guild v. FTC, 312 U.S. 457, 463 (1941) (when the "purpose and practice" of challenged conduct "runs counter to the public policy declared in the Sherman and Clayton Acts," the FTC has the "power to suppress it as an unfair method of competition."); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (explaining in assessing "fairness," the FTC acts "like a court of equity" and considers "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.").

[18] E. I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984).

[19] In re McWane, Inc., 2013 FTC LEXIS 76, *784 (F.T.C. May 8, 2013). The FTC ultimately dismissed all counts but one against McWane, finding it violated FTC Act, Section 5 by using an unlawful exclusive dealing policy to maintain monopoly power in the relevant market. McWane, Inc. v. FTC, 783 F3d 814, 819, 822-23 (11th Cir. 2015).

[20] FTC Statement, supra note 14, stating the FTC adheres to the following principles:

· the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;

· the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice … must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and

· the Commission is less likely to challenge an act … if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm ….

[21] Fed. Trade Comm'n, Dissenting Statement of Commissioner Maureen K. Ohlhausen, FTC Act Section 5 Policy Statement, at 2, 6 (Aug. 13, 2015), available at https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy.

[22] Ramirez, supra note 2, at 9.

[23] Id. at 2.

[24] See, e.g., EC Press Release, supra note 10 (noting investigation into carriers begun by EC).

[25] EC Memo 2004, supra note 3 (stating a party that violates a commitment can be subject to a fine of up to 10% of its worldwide "turnover" (i.e., revenue)).

[26] Id.

[27] Id.

[28] National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 107-108 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.").

[29] Ramirez, supra note 2, at 5.

[30] Id.

[31] See, e.g., Compl., In re U-Haul Int'l., Inc., F.T.C. File No. 0810157 (July 14, 2010) [hereinafter U-Haul Complaint], available athttps://www.ftc.gov/sites/default/files/documents/cases/2010/07/100720uhaulcmpt.pdf (claiming "U-Haul invited its competitor to collude" through public and private statements directed to its competitor with the "specific intent to facilitate collusion…"); Compl., In re Valassis Communications, Inc., F.T.C. File No. 051-0008 (Apr. 19, 2006) [hereinafter Valassis Complaint] (claiming Valassis "invited its competitor to collude" to allocate customers and fix prices through a public communication during an earnings call).

[32] Recall the FTC, in a Section 5 matter, need not prove an unlawful agreement, as required by the Sherman Act. See Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011) (describing the elements of a Sherman Act, Section 1 claim).

[33] In re McWane, Inc., supra note 20, at *783.

[34] Eur. Comm'n, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, ¶ 63 (Jan. 14, 2011) [hereinafter EC Horizontal Guidelines].

[35] EC Press Release, supra note 10.

[36] Id. Specifically, the EC stated:

Announcing future price increases may signal the intended market conduct of carriers and by reducing the level of uncertainty about their pricing behaviour, decrease their incentives to compete …. Because the announcements provide only partial information to customers, and may not be binding on the carriers, customers may not be able to rely on them and therefore carriers may be able to adjust prices without the risk of losing customers.

[37] Id. The 31 day advance notice commitment correlates to the period when customers begin to initiate orders. The commitments do not limit a carrier's ability to negotiate individual prices; the announced price is a ceiling.

[38] Id.

[39] Authority for Consumers & Markets decision of 7 January 2014, case no. 13.0612.53. See Press Release, Authority for Consumers & Markets, Commitment decision regarding mobile operators (Sept. 1, 2014), available at https://www.acm.nl/en/publications/publication/14326/Commitment-decision-regarding-mobile-operators/.

[40] See FTC Statement, supra note 14.

[41] Jeff Zalesin, Antitrust Rule of Reason Cases Tough to Try, Judges Say, Law360 (Apr. 6, 2016, 6:06 PM),http://www.law360.com/articles/781389/antitrust-rule-of-reason-cases-tough-to-try-judges-say (quoting Judge Wilken: "Any rule of reason case almost is a tabula rasa, because you're weighing apples against oranges").

[42] See United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113 (1975) ("[T]he dissemination of price information is not itself a per se violation of the Sherman Act."); EC Horizontal Guidelines, supra note 35, ¶ 63.

[43] See, e.g., U-Haul Complaint, supra note 32, ¶¶ 11-19 (noting various communications by U-Haul to Budget concerning price increases).

[44] The DOJ believes a "truly well-run compliance program should prevent a company from conspiring to fix prices, rig bids, or allocate markets." Brent Snyder, Dep. Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Compliance is a Culture, Not Just a Policy, Remarks as Prepared for the Int'l Chamber of Comm. (Sept. 9, 2014), available at https://www.justice.gov/atr/file/517796/download.

[45] See, e.g., In re McWane, Inc., supra note 20, at *4 (alleging industry trade association was used to facilitate coordinated action among members); see also Geoffrey Green, Antitrust by association(s), Fed. Trade Comm'n (May 1, 2014, 8:34 AM), available at https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/antitrust-associations ("Trade association rules, codes, or bylaws that seek to override the normal give-and-take among competing members may interfere with the competitive process and risk antitrust review.").

[46] The FTC has provided guidance on this topic as has the DOJ. See Fed. Trade Comm'n, Spotlight on Trade Associations, available athttps://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (last visited Sept. 28, 2016). See also Fed. Trade Comm'n and U.S. Depart. of Justice, Statements of Antitrust Enforcement Policy in Health Care (Aug. 1996) (providing guidance on exchanging price and cost data), available at https://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care.

[47] See E. I. Du Pont, supra note 19; see also In re McWane, Inc., supra note 20.

[48] See In re Petroleum Prods. Antitrust Litig., 906 F.2d 432, 448 (9th Cir. 1990).

[49] Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 54 (7th Cir. 1992) (stating industry use of advanced price announcements was a necessary component of doing business because purchasers of insulation "bid on building contracts well in advance of starting construction and, therefore, required sixty days or more advance notice of price increases.").

[50] See U-Haul Complaint, supra note 32, ¶¶ 23-24 (describing earnings call); Valassis Complaint, supra note 32, ¶¶ 12-13 (describing earnings call). See also In re Petroleum Prods. Antitrust Litig., supra note 49, at 447 (rejecting argument that "publicly available" price information cannot be used to support a conspiracy allegation).

[51] Markets generally are viewed as more competitive than not when competitors are uncertain as to the competition's business strategy. See, e.g.,Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 894-95 (9th Cir. 2008) (stating "post and hold" product pricing results in a "less uncertain market," and therefore a "market more conducive to collusive … pricing, and hence a less competitive market.").

[52] See, e.g., Compl., United States v. Airline Tariff Publ'g Co., No. 92-2854 (D.D.C. Dec. 21, 1992), available at https://www.justice.gov/atr/case-document/complaint-2 (defendant airlines' shared use of software system alleged to violate antitrust laws because system, inter alia, allowed defendants to "lessen uncertainty concerning each other's pricing intentions.").

[53] Fed. Trade Comm'n, Price Fixing, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited Sept. 28, 2016) ("Invitations to coordinate prices also can raise concerns, as when one competitor announces publicly that it is willing to end a price war if its rival is willing to do the same, and the terms are so specific that competitors may view this as an offer to set prices jointly.").

[54] In the EC's July decision, it committed carriers to binding price ceilings, which helped consumers, while allowing the carriers to negotiate lower prices, which aided competitive uncertainty. In the U.S., depending on circumstances, such an approach could be effective, if pricing is consistent with the Robinson-Patman Act. See 15 U.S.C. § 13 (2016) (prohibiting price discrimination). In other situations, depending on market facts and dynamics, a supplier may only need to retain the independent ability to withdraw an increase. See In re McWane, Inc., supra note 20, at *634 (where pricing flexibility is preserved, "it is not irrational to proceed without advance assurances of competitor compliance.").

[55] Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) (anticompetitive conduct should not be "judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.").
