

Client Alert

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The Dutch Competition Agency Focuses on Anticompetitive Signaling

By Svajune Sakalyte

The Netherlands Authority for Consumers and Markets (ACM) – the Dutch competition agency – has indicated that public statements about future market behavior could infringe competition law. This is the first time an EU antitrust agency has translated the written law into practice and warned companies to avoid publicly informing their competitors about their planned future commercial behavior.

DUTCH INVESTIGATION

In December 2011, the ACM carried out dawn raids at a number of mobile network carriers in the Netherlands based on the suspicion of illegal cartel activity. On November 21, 2013, after almost two years of investigation, the Dutch agency has found no evidence of price-fixing agreements in the mobile-telecommunications market.

However, the ACM did establish that public statements about company's future market behavior could infringe competition law. The ACM focused on statements made, for example, at conferences or in trade journals, by mobile providers about their planned changes to their commercial terms (without such changes having yet been finalized). If competitors act upon such publicly made statements, it could lead to collusive behavior.

In light of the ACM's findings, the three main mobile-telecommunications providers in the Netherlands, KPN, T-Mobile and Vodafone, made a commitment to the ACM that they will refrain from making such statements in public to avoid any risk of illegal collusive behavior in the future. The mobile operators agreed to incorporate the commitment into their compliance programs and to educate their employees during internal training workshops.

The ACM plans to accept the proposed commitment and monitor the mobile operators' compliance. The commitment will bring the ACM's investigation to an end and no fines will be imposed.

APPLICABLE LAW

Unilateral announcements can function as signaling tools by which companies can indirectly communicate their future market intentions and they may also help to implement already existing anticompetitive agreements.

Some jurisdictions will only punish this behavior if it amounts to an illegal agreement; whereas, other jurisdictions (e.g., the EU Commission and the EU member states' national competition authorities) could rely on the concept of "concerted practice," which allows them to fine anticompetitive practices that do not amount to an agreement.

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The Horizontal Guidelines¹ stipulate that “*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 within the meaning of Article 101(1)*”.² 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.”

The degree of antitrust risk of such public announcement depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity, etc.) as well as on the type of information announced, which may modify the relevant market environment towards becoming one liable to coordination. Announcing information relating to companies’ individualized intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome.

PRACTICAL CONSIDERATIONS

When making public announcements, companies may consider taking into account the following guidance:

- Do not invite or encourage competitors to take specific competitive actions.
- Do not suggest that specific competitive initiatives by your company are dependent on how competitors react to those initiatives.
- Discuss how company’s business plans relate to the overall competitive landscape rather than to a specific competitor’s conduct.

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¹ 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), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

² This would not cover situations where such announcements involve invitations to collude.

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