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Analyst Calls and Price Signaling Under EU Law

Howard Rosenblatt and Tomas Nilsson

Information exchanges have become a hot topic in the European Union. The European Commission's recently updated Guidelines on horizontal arrangements give the subject prime space, and information exchanges increasingly are the basis of investigations and enforcement efforts. No one therefore should be surprised if U.S. companies with European operations find their U.S. investor analyst calls scrutinized by the Commission. The U.S. Federal Trade Commission has already brought two high-profile enforcement actions finding that senior executives used these calls to signal competitors in an effort to coordinate price and allocate customers.

Yet the theory for an infringement in Europe would need to be different than in the United States. Despite a decade of steady convergence between the two jurisdictions, the basis for the FTC's enforcement actions in the United States—unilateral invitations to collude—does not exist in Europe. There is no counterpart to Section 5 of the FTC Act in Europe. Unilateral conduct can infringe EU competition law only when it constitutes an abuse of an existing dominant position.

However, the European Commission has other enforcement tools at its disposal. In addition to anticompetitive agreements, the governing law separately prohibits so-called concerted practices, an often ambiguous concept but one the Commission describes as requiring something less than an express agreement. And the Commission's recent Guidelines show a willingness to stretch the concept still further to reach suspicious conduct.

No company wants to be a test case, particularly for entirely preventable conduct of its senior executives. Understanding the European Commission's current approach to information disclosures can help companies reduce unnecessary risk as they balance the interests of investors with the demands of EU competition law.

Information Exchange and Analyst Calls—The U.S. Experience

In the United States, information exchanges typically are analyzed as "agreements" under Section 1 of the Sherman Act because the parties at least implicitly agreed to exchange the information. Often, the exchanges also further an underlying cartel, as was the case most recently in the FTC's complaint this year against three suppliers of iron pipe fittings.[1] However, purely one-way disclosures, without any evidence of reciprocity, can constitute an invitation to collude under Section 5 of the FTC Act, for which there is no analog in Europe.[2]

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[1] Administrative Complaint, McWane, Inc., FTC Dkt. No. 9351 (Jan. 4, 2012), *available at* http://www.ftc.gov/os/adjpro/d9351/120104ccwanestaradmincmpt.pdf; Administrative Complaint, Sigma Corp., FTC File No. 101-0080 (Feb. 27, 2012), *available at* http://www.ftc.gov/os/caselist/1010080/120104sigmacmpt.pdf.

[2] See, for example, the *Stone Container* case, where the FTC challenged a unilateral initiative to increase linerboard prices through a scheme that included public statements and press releases allegedly addressed to competitors. The FTC's action was resolved through a consent decree. *See Stone Container Corp.*, FTC File No. 951 0006 (1998), *available at* http://www.ftc.gov/os/caselist/c3806.shtm.

Information disclosures made during analyst calls have been the subject of two recent enforcement actions in the United States. Though conceding that companies have an obligation to disclose a range of information to the investing public, the FTC has found that certain disclosures were nothing more than efforts to engage in price fixing and market allocations with competitors and were thus a unilateral invitation to collude under Section 5 of the FTC Act. The statements were a violation regardless of whether anyone was listening, let alone did anything in response.

The* Valassis *Case. The FTC's first case involved Valassis, which had a single competitor for newspaper advertising inserts.[3] Valassis's analyst call took place in the context of an ongoing pricing war between the companies, which Valassis had unsuccessfully tried to end by increasing its prices. It rolled the prices back when its competitor, News America, did not follow. The FTC alleged that Valassis "developed a new strategy," namely, to communicate with its competitor via its quarterly earnings call, which Valassis knew News America would be monitoring.[4]

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Valassis's President and CEO allegedly used the call to give highly detailed instructions on how News America could end the price war.[5] In particular, Valassis said that: it would abandon its 50 percent market share goal; it would defend its existing customers; it would submit bids for News America customers with expiring contracts at substantially higher prices; it was content to maintain its existing share for each customer who split its business between the two competitors; and if News America continued to compete for Valassis customers, the price war would resume. The executive's remarks included references to specific market share targets, dates, and prices.[6]

The FTC concluded these statements were made with an intent to facilitate collusion, lacked any legitimate business purpose, and thus violated Section 5 of the FTC Act. The FTC's action was resolved through a negotiated consent decree.

The* U-Haul *Case. Unlike the *Valassis* case, the FTC's case against U-Haul concerned answers to analysts' questions.[7] The FTC alleged that U-Haul had developed a strategy for increasing industry prices of one-way rentals by raising its own price and contacting regional managers of its main rival, Budget, to encourage them to do the same.[8]

U-Haul's CEO allegedly used the company's quarterly earnings calls to further this plan, knowing Budget would be monitoring them. He opened the call by describing U-Haul's effort to "show price leadership."[9] When asked for additional information about industry pricing, the CEO allegedly responded that: Budget should follow U-Haul's price leadership; Budget's refusal to match U-Haul's higher rates hurt the industry; U-Haul would wait a little longer for Budget to respond appropriately; and Budget could keep its prices slightly below U-Haul's so long as the differential was not significant.[10]

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[3] Administrative Complaint, Valassis Commc'ns, Inc., FTC Dkt. No. C-4160 (Mar. 14, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/060314cmp0510008.pdf.

[4] *Id.* ¶¶ 11–12.

[5] *Id.* ¶ 13.

[6] For example, the FTC alleged the executive stated that "Our net price after ancillary price discounts, rebates, et cetera, will not go below $6 [per thousand] for a full page and $3.90 [per thousand] for a half page." *Id.* ¶ 13(c).

[7] Administrative Complaint, U-Haul Int'l, Inc., FTC Dkt. No. C-4294 (June 9, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100609uhaulcmpt.pdf.

[8] For example, the FTC quoted the CEO as instructing in a memorandum to his own regional managers: "Budget continues in some markets to undercut us on One-Way rates. Either get below them or go up to a fair rate. Whatever you do, LET BUDGET KNOW." *Id.* ¶ 13.

[9] *Id.* ¶ 24.

[10] *Id.*

As in the *Valassis* case, the FTC found that U-Haul lacked a legitimate justification for these statements and that its intent instead was to facilitate collusion with Budget. And as with the *Valassis* case, the FTC resolved its concerns without litigation through a consent decree.

These cases raise some key points. First, although the cases make clear that earnings calls should be handled with antitrust issues in mind, nothing in them should preclude a company from providing information that is genuinely important to investors. The FTC acknowledged in *Valassis* that corporations "have many obvious and important reasons for discussing business strategies and financial results with shareholders, securities analysts, and others."[11] The FTC therefore "is extremely sensitive to the fact that antitrust intervention involving a corporation's public communications must take care not to unduly chill legitimate speech."[12] The FTC's orders expressly excluded from their prohibition information required to be disclosed by the securities laws. In both cases, however, the FTC concluded that the sole purpose and effect of the statements were to induce competitors to engage in collusion.

On the other hand, the FTC avoided any line-drawing to identify analyst call statements it will find suspicious. Although the facts in both *U-Haul* and *Valassis* appear relatively straightforward and egregious, the FTC warned in *U-Haul* that "it is possible less egregious conduct may result in Section 5 liability."[13] The FTC also said it has no obligation to "find repeated misconduct attributable to senior executives . . . or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision."[14]

Finally, companies making these sorts of public statements may run the additional risk that their competitor will respond in kind, creating suspicions that both are engaged in a cartel, albeit a highly public one. The Justice Department in 1992 famously accused eight major airlines of using their joint computerized reservation system to exchange and ultimately agree on future pricing, all in the open.[15] Exchanging sensitive information also can provide the needed "plus factor" that allows courts or juries to infer that parallel moves are the result of an agreement.

Information Exchanges in the European Union

Information exchanges and disclosures in Europe can be assessed as "concerted practices," a concept more loosely defined than agreements. Although concerted practices unquestionably require more than purely unilateral conduct, the European Commission has stated a willingness to stretch the concept beyond even the most informal agreements.[16] As the 2011 EC Horizontal Guidelines recently reaffirmed: "[T]he concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition."[17]

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11 Analysis of Agreement Containing Consent Order to Aid Public Comment, Valassis Commc'ns, Inc., 71 Fed. Reg. 13,976, 13,979 (Mar. 20, 2006).

12 *Id.*

13 Analysis of Agreement Containing Consent Order to Aid Public Comment, U-Haul Int'l, Inc., 75 Fed. Reg. 35,033, 35,035 (June 21, 2010).

14 *Id.*

15 United States v. Airline Tariff Publ'g Co., 1994-2 Trade Cas. (CCH) ¶ 70,687 (D.D.C. 1994).

16 This can be significant in some cases, given that the Commission and the EU courts already define agreements broadly to include all situations where the parties share a common will and manifest it. *See* Case T-41/96—Bayer v. Comm'n, 2000 E.C.R. II-3383, ¶ 173.

17 European Comm'n, Dir. Gen. Competition, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 1, ch. 2, ¶ 60 [hereinafter Horizontal Guidelines], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

Although this definition, if taken literally, would be broad enough to cover even the sort of conscious parallelism that is common and lawful in oligopolistic markets, the Horizontal Guidelines acknowledge that companies have "the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors."[18] Unlawful concerted practices instead are limited to instances where there is some direct or indirect communication between competitors with the potential to harm competition. The doctrine "preclude[s] any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question. . . ."[19] Properly understood, concerted practices therefore require some sort of communication that leads to a common understanding among the players even if the specific goal of, for example, price fixing remains unspoken.

With their intensified focus on information exchanges, we can expect the European Commission to be highly motivated to find a theory of enforcement against the sort of conduct described in U-Haul and Valassis.

The Guidelines underscore the authority's keen focus in this area by devoting many pages to information exchanges. While observing that information exchanges are often pro-competitive, the Guidelines say the practice can facilitate coordination by "artificially increasing transparency in the market," at least if the information is strategic enough and the market is otherwise conducive to coordination.[20]

But the headline-grabbing feature of the Guidelines' discussion on information exchanges is the creation of a new restriction by object. While the lawfulness of most agreements turns on their likely competitive effects in the circumstances of each case, agreements whose "object" is to restrict competition are presumed anticompetitive without the need to prove their actual likely effect. In this sense, restrictions by object are similar to per se violations in the United States. Unlike in the United States, however, restrictions by object can be defended by showing sufficient efficiencies that meet the stringent requirements of Article 101(3), although the showing is particularly difficult and rarely successful.

At a time when advancements in economic analysis typically favor more nuanced competitive assessments over bright line tests, the Guidelines contend that one kind of information exchange is "by its very nature" likely to restrict competition: "Information exchanges between competitors of individualized data regarding intended future prices or quantities should therefore be considered a restriction of competition by object."[21]

Ultimately, the EU courts will decide whether an agreement is a restriction by object. But the stated approach of one of the world's most active antitrust enforcers is highly instructive. For many companies, this new standard will not make much difference, as they already have been counseled to avoid sharing this sort of highly sensitive information. But the change, if confirmed by the courts, can free the Commission from the burden of proving likely anticompetitive effects and thus give it a potentially powerful enforcement tool.

Analyst Calls In the EU

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[18] *Id.* ¶ 61.

[19] *Id.*

[20] *Id.* ¶ 65.

[21] *Id.* ¶ 74. The Commission does not cite any judicial support for this proposition but Case C-8/08—*T-Mobile*, 2009 E.C.R. I-4529, touches upon the topic.

U-Haul and *Valassis*. But the key court case involving public disclosures, the *Wood Pulp* case, is over two decades old and more of a hindrance than a help for the Commission. The Commission's recent Guidelines, in contrast, suggest a willingness to expand liability for public statements with the use of presumptions that, at the very least, could subject companies to burdensome and risky investigations.

The* Wood Pulp *Case. In the *Wood Pulp* case, the European Commission charged forty producers of bleached sulfate wood pulp used in paper manufacturing and three of their trade associations with colluding on prices.[22] While there was no evidence of expressed agreements, the Commission's case rested on a concerted practice to fix prices, based on two key factors. First, the Commission found direct and indirect exchanges of information between the competitors that made the market artificially transparent. The exchanges were:

- A system of quarterly public price announcements to the trade press or sales agents where "the producer could expect that the prices he announced would immediately reach his competitors, just as he himself would expect to be given details in the way of his competitor's prices."[23] The fact that prices were published well in advance gave other producers sufficient lead time to announce their own corresponding new prices and apply them from the start of the quarter.
- Prices exchanged at meetings and through fax messages between some of the producers.[24]
- Prices exchanged between U.S. producers within two trade associations, which the Commission also considered an independent infringement.[25]

Second, the Commission found that these exchanges had an anticompetitive effect by resulting in parallel pricing. This parallelism could not be explained by the market's structure since it was not particularly concentrated, nor was there a market leader setting the price for others to follow.[26]

But the Commission was reversed on appeal.[27] The European Court of Justice held that the public announcements of future pricing, standing alone, did not infringe the competition rules because the players could not be "sure" that others would follow. While the same might be true of even the most organized cartels, the allegations in this instance were "market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors."[28] The Commission had failed to present enough evidence to rule out other plausible explanations for the parallel pricing. Instead, the price announcements could have had the legitimate purpose of giving customers relevant information for upcoming dealings in the wood pulp market.

Nor did the parallel timing of the announcements help the Commission's case. The announcements could just as easily have resulted from natural transparency in the market, one characterized by free-flowing information, as buyers informed each other of prices and some agents acted for several producers. Finally, the Court found the market to be more oligopolistic than the Commission believed, providing a further explanation for the parallel prices and trends.[29]

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

[23] *Id.* ¶ 108.

[24] *Id.* ¶ 110.

[25] *Id.* ¶ 109.

[26] *Id.* ¶¶ 82, 87–89.

[27] A. Ahlström Osakeyhtiö v. Comm'n, 1993 E.C.R.-I 1307.

[28] *Id.* ¶ 64.

[29] *Id.* ¶¶ 126–127.

The EU Guidelines. The *Wood Pulp* case did not deter the Commission from staking out an aggressive stance in its recent Guidelines. The Commission first noted that "unilateral announcements" that are "genuinely public" generally do not constitute an unlawful concerted practice. However, the Guidelines say the Commission is willing to find a concerted practice when the announcement is followed by similar announcements by competitors that suggest an effort to coordinate:

> [F]or 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.[30]

The Commission needs to find "a strategy for reaching a common understanding," but it can be quick to do so when the public statements involve particularly sensitive information in the absence of a legitimate justification.

This is not terribly surprising, but reaffirms that an ill-advised public statement by one competitor, as a practical matter, can limit otherwise unilateral decision-making of its rivals lest they be accused of engaging in a highly public cartel or land the unwitting competitor in a concerted practices investigation even though its initial intentions may have been entirely innocent. The Commission needs to find "a strategy for reaching a common understanding," but it can be quick to do so when the public statements involve particularly sensitive information in the absence of a legitimate justification.

In other instances, the Guidelines condemn seemingly unilateral communications and shift the burden on the parties to prove their lawfulness. Passive listeners are deemed to have an obligation to reject the information somehow or else risk being charged with a concerted practice. The Guidelines say that "a situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice."[31] According to the Commission, "It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behavior, or whether all participating undertakings inform each other of the respective deliberations and intentions."[32] The Commission goes on to say that a purely passive listener can be fined under Article 101:

> [M]ere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.[33]

This language is broad and troublesome if applied to public statements. But in reality, it apparently is meant for private communications among competitors, where the particular facts might suggest a greater justification to infer that a listener's silence constituted consent.[34] In any event, the Guidelines show the Commission's willingness to shift the burden of proof when it comes to disclosures of competitively sensitive information, something to be kept firmly in mind in the context of investor analyst calls.

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[30] Horizontal Guidelines, *supra* note 17, ¶ 63.

[31] *Id.* ¶ 62.

[32] *Id.*

[33] *Id.*

[34] Both cases cited in the Horizontal Guidelines concern private conversations: Case C-199/92 P—Hüls, 1999 E.C.R. I-4287; Case C-49/92 P—Anic Partezipazioni, 1999 E.C.R. I-4125.

Managing the Risks

Although unilateral invitations to collude are not an infringement in Europe, the type of conduct found unlawful in the United States under that theory can certainly motivate the Commission and inspire a burdensome investigation. The Commission's position on presumptions and burdens of proof, combined with its stated view of concerted practices, should make companies alert to the legal consequences in Europe as well as the United States so that the risks can be managed.

European authorities can be suspicious of public disclosures of sensitive information and, although they do not have Section 5 of the FTC Act at their disposal, the authorities can try hard to find the additional elements of proof needed for a concerted practice. And in the Commission's view, the proof can come from events entirely outside the speaker's control, such as the public or private responses from the speaker's competitors. At the very least, these circumstances can shift the burden of proof to the parties to prove a negative—that no common understanding existed.

The Commission does recognize that public statements may require more evidence than private ones before being found unlawful. Private conversations between competitors can be viewed as inherently suspicious by the enforcers, in any country, and the enforcers can infer an infringement based on a limited amount of additional circumstantial evidence. But there is nothing inherently suspicious about analyst calls unless and until the topics move beyond what investors typically need to know and move closer to what cartelists need to know. The still controlling *Wood Pulp* case saddles the Commission with the burden of proving that the intended audience was indeed competitors and that the disclosures lack a legitimate business justification. This is true even in the face of parallel pricing behavior. And unlike in the United States, the Commission would have to show at least some sort of response from rivals, enough to make the practice "concerted," although the contours of this element will continue to be litigated.

Yet this uncertainty in Europe should not cause undue alarm. As in the United States, the risks can be managed with careful preparation of the executives conducting analyst calls. Nor should a company be precluded from providing information genuinely important to investors. Some basic precautions should reduce the risk in Europe as in the United States. First, speakers should use caution when discussing the company's pricing or output strategy. If these topics must be discussed, comments should be strictly limited to what investors need to know. Second, statements about the activities of competitors, or industry prices, also should be made with caution to avoid an appearance that the intended audience is competitors rather than investors. Finally, speakers should be aware that the authorities in the United States and European Union may monitor earnings calls and scrutinize transcripts.

In other words, the absence of precedent in the EU relating to analyst calls may not stop the authorities from investigating them. But neither should it inhibit companies from managing that risk with some basic measures informed by the Commission's general approach to public statements and concerted practices. ●