

**Case summary**

14 February 2018

No more general price increase circulars in the cement industry

Sector:	Cement
Ref:	B1-240/17

The Bundeskartellamt has taken up the issue of general price increase circulars in the cement industry and motivated the companies operating in the industry to refrain from such practice.

In its final report on the "Sector inquiry into cement and ready-mix concrete", which was published in July 2017, the Bundeskartellamt critically reviewed the practice of issuing general price increase circulars¹. The basis of the inquiry was that the cement industry is prone to collusion due to the particular product properties and market structures. Collusion refers to both implicit parallel behaviour and agreements or concerted practices intended to limit competition between the parties involved. Certain practices of companies promote collusive behaviour on the part of the suppliers or a collusive market result (so-called "facilitating practices"). A sufficient degree of market transparency enabling the prompt identification of competitive actions is required to ensure the success and stability of collusive parallel behaviour. "Facilitating practices" therefore include in particular measures to promote transparency, which facilitate "communication" between the market participants and the possibility to mutually identify past or intended market behaviour.

Price increase circulars generally informing customers of intended cement price adjustments were common in the cement industry. Due to the company structures specific to the cement industry, such circulars facilitate a flow of information between competitors. In the cement markets, important customers (especially suppliers of ready-mix concrete or precast concrete parts) produce cement either themselves or via other companies which are part of the same group of companies (vertical integration). While these customers mostly procure cement from within their own group, they also purchase cement from external suppliers and thus receive the price increase circulars from their competitors on the cement market.

¹ Available (in German) online at http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Zement%20und%20Transportbeton.pdf?__blob=publicationFile&v=4, here p. 240-246.

As these circulars generally inform all customers about an increase of list prices by a certain amount per tonne, cement manufacturers thus receive indications of their competitors' pricing behaviour and can react accordingly by announcing price increases in corresponding circulars themselves.

In the past this led cement customers to file complaints with the Bundeskartellamt about cement producers announcing almost identical list price adjustments in circulars one after the other on a regular basis. When asked in investigations carried out by the EU Commission in the Holcim-Cemex West² case, customers said they also noticed that as soon as the market leader sent out price increase circulars, other cement suppliers followed suit. The Bundeskartellamt's sector inquiry showed that 15 suppliers, among them the ten major cement producers, sent price increase circulars to their customers in 2014. These companies covered 93 % of cement sales in Germany.

In accordance with the assessment practice of other competition authorities (CMA³ in the UK, EU Commission⁴), the Bundeskartellamt considers the issue of general price increase circulars as critical under competition law, at least as far as the cement industry is concerned.

According to Section 1 of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB) and Article 101 of the Treaty on the Functioning of the European Union (TFEU), concerted practices aimed at preventing, restricting or distorting competition or having that effect, are prohibited. The term "concerted practices" can comprise any form of communication between competitors as the initial element of an offence. The ECJ argues that the concerted practices are a form of coordination between companies which deliberately replaces risk-prone competition with practical coordination⁵.

General price increase circulars to customers mostly also facilitate an exchange of information between competitors due to the vertical integration of many suppliers. However, the exchange of information between competitors on planned price increases reduces strategic uncertainty about future market behaviour and makes a collusive outcome very likely. The practice of issuing general circulars about price increases can in this case be interpreted as an attempt to induce parallel conduct among competitors and to restrict competition. However, any direct or indirect contact between companies,

² COMP/M.7009 Holcim/Cemex West, paras 222 ff.

³ As of 23 January 2016 the Competition & Market Authority (CMA) prohibited general price increase circulars of cement producers, arguing that these are a focal point for possible coordination or a signal for the expected outcome from coordination. The term used by the CMA for these circulars was "generic price announcement letters". https://assets.digital.cabinet-office.gov.uk/media/56a206e0ed915d474700003d/Price_Announcement_Order_2016.pdf

⁴ Container liner shipping companies had publicly announced planned freight price increases on a regular basis. The EU Commission's view is that this practice led to a restriction of competition and higher prices and was likely to infringe Article 101 TFEU. The proceedings were ended as commitments under Article 9 of EC Directive 1/2003 were made: http://europa.eu/rapid/press-release_IP-13-1144_de.htm; http://europa.eu/rapid/press-release_IP-16-2446_de.htm.

⁵ ECJ, judgment of 4.6.2009, case C-8/08 "T-Mobile Netherlands", joined cases 2009, I-4529, para. 26 with further references.

the object or effect of which is either to influence the conduct on the market of a competitor or to disclose to such a competitor the course of conduct which a company had decided to adopt or contemplates adopting on the market, is prohibited.⁶

The price increase circulars are not only capable of removing uncertainties about the intended conduct of the companies concerned (price adjustments). The circulars' low informative value for the cement customers also indicates that the aim of this practice is to restrict competition. In view of the further market circumstances it can at least be assumed that this practice has the effect of restricting competition.⁷

It was therefore to be assumed from the preliminary assessment that the issue of price increase circulars in this case violates the general prohibition of cartels under Section 1 GWB and, respectively, Article 101 TFEU because it did not fulfil the requirements for exemption under Section 2 GWB or Art. 101(3) TFEU.

The only possible efficiency defence which could be considered in this case would be that the announcement of price increases could reduce uncertainty among recipients about how prices will be calculated for future projects. However, the issue of general price increase circulars is neither appropriate nor essential to achieve such positive effects. The circulars are only general indications of intended adjustments to list prices which are later subject to annual negotiations. Such advantages could be better achieved without restricting competition by informing the customers individually about the price adjustments and taking account of price-relevant parameters in individual cases (e.g. the types of cement required, the demand volume or the competitive situation in the customer's region).

In December 2017 the Bundeskartellamt informed the cement producers of its legal assessment on the matter and asked them to stop sending out general price increase circulars. It pointed out that customer-specific price increase circulars announcing price adjustments for individual customers or for products already sold which contain the new prices and the date of amendment are admissible. Circulars which are not customer-specific and simply announce that contact will be made with a view to price negotiations or inform customers about newly introduced products and their prices are unproblematic under competition law.

Twelve companies stated either that they did not send out any general price increase circulars or had stopped this practice in the meantime and would comply with the legal requirements in future. The

⁶ Established case-law of the ECJ, judgment of 16.12.1975, case 40/73 among others "Suiker Unie", joined cases 1975, 1663, para. 174; ECJ, judgment of 4.6.2009, case C-8/08 "T-Mobile Netherlands", joined cases 2009, I-4529, para. 33.

⁷ Empirically proven for the United Kingdom: Competition Commission, *Aggregates, cement and ready-mix concrete market investigation: Final Report*, January 14, 2014. Available online at: https://assets.publishing.service.gov.uk/media/552ce1d5ed915d15db000001/Aggregates_final_report.pdf, paras 7.189ff, 8.69f.

other companies undertook to immediately refrain from sending out general price increase circulars. This made the initiation of official proceedings unnecessary.