

23.03.2020

COMPETITION / ANTITRUST

COMPETITION LAW IN THE TIME OF THE CORONAVIRUS PANDEMIC

Not a single area of public and economic life that is not dominated by the coronavirus pandemic, which is also having a heavy impact on the cartel authorities and the options open to companies to cooperate in dealing with the crisis:

Business (almost) as usual at the cartel authorities

In spite of the many and various measures the governments are taking to contain the spread of the virus, the cartel authorities are still going about their normal business, as emphasised last week by the [European Commission](#) and many national cartel authorities (see, e.g., [Federal Cartel Office in Germany](#), [Federal Competition Authority in Austria](#)).

There are certain restrictions, however, as a result of the current situation: Face-to-face meetings are off the agenda for the time being. Companies are being asked to reconsider their timetables for transactions and to put off notifying concentrations where possible. Delays are to be expected. There are unlikely to be any searches in the foreseeable future, if only because of the travel restrictions and lockdowns; nevertheless, questionnaires will continue to be an effective investigative tool for the authorities. And one Austrian anachronism is now being resolved: In [Austria](#) too, the Competition Authority is making efforts to enable notifications to be filed by electronic means.

Antitrust law and the coronavirus crisis

Antitrust law is not being suspended because of the coronavirus pandemic. Companies' responses to the crisis must remain within the bounds set by antitrust law, even if they are seeking to act in the best interests of the general public.

Antitrust law is flexible enough, however, to respond to the current challenges and give companies the necessary room to manoeuvre. Most notably, this will not be the first time that, under certain circumstances, the cartel authorities have factored non-competition elements into their antitrust assessment as justification for restraints of competition. In the past, for instance, environmental protection (cf. [CECED](#)), energy supply security (cf. the Netherlands "[Energieakkoord](#)") and [animal welfare](#) have served as justification.

The cartel authorities have already indicated that they will make allowances for the coronavirus pandemic – they are open to discussion. But they have also made it known that they will not accept anticompetitive behaviour under the cover of the coronavirus. The UK Competition and Markets Authority has already set up a [COVID-19 taskforce](#) to deal, among other things, with the exorbitant prices being charged online for sanitizer sprays and face masks. The [statement](#) by the European Competition Network also shows that, in this crisis situation too, the cartel authorities will interpret antitrust law in such a way that it does not stand in the way of cooperations aimed at benefiting consumers. The pandemic is generally lending new relevance to the "classic" antitrust topics.

Cooperations between competitors – supply security

The supply of food needs to be guaranteed in times of crisis too. Federal Minister of Economics Altmaier therefore welcomes cooperations within the food industry and the retail trade in order to secure the supply of food to the public. Altmaier therefore plans to "raise antitrust issues with the cartel authorities and reach a solution". Federal

Cartel Office president Andreas Mundt has also been cited as saying that the authorities already have the ability to respond flexibly to the coronavirus crisis at the current time. Antitrust legislation permits far-reaching cooperations between companies, he says, where there are good grounds for this – which is the case at the current time. This sends a positive signal to the business community.

In the UK, the food retail industry wasted no time in urging that antitrust law be relaxed in order to guarantee uninterrupted food supplies. There are therefore ideas afoot to make use of an existing exemption from antitrust law to allow retailers to exchange information about stocks and to work together in the areas of warehouse management, staffing and goods logistics (cf. [here](#)). The European competition authorities have issued the above-mentioned joint [statement](#) indicating that they will not actively intervene against necessary and temporary measures put in place to deal with supply shortages.

But even absent an explicit exemption from the ban on cartels, cooperations between competitors, as currently planned in the food retail industry, among others, are possible. Where supplies are short, for instance, it can be effective and justified from the antitrust perspective to resolve the problem by allowing companies to cooperate or exchange information with competitors. For that reason, under the law as it stands, companies are already permitted to temporarily supply goods to competitors to make up for shortages. And they are allowed to request, and provide, the information necessary for this purpose, concerning, e.g., quantities in stock, prices and delivery conditions. Further coordination of prices charged by suppliers or retail prices charged to final customers is not necessary, however, and therefore not permitted. Fines have actually been imposed on companies in the past for the spillover effects of well-meant, e.g. environmental, initiatives (cf., e.g., [environmental initiative regarding washing powder](#)).

Similar agreements could also be made in other sectors, e.g. pharmaceutical wholesale, or generally if a manufacturer needs certain supplier parts that a competitor has in stock. In this respect too, supplying to competitors or setting up purchasing syndicates could be consistent with antitrust law, though these need to be checked on a case-by-case basis. At the beginning of the coronavirus crisis, for example, the US [Department of Justice](#) specifically warned against cartels, especially for the manufacture and sale of vital protective gear and medicines. The newly-founded procurement collusion strike force has been tasked with looking into this.

As mentioned, however, antitrust law does not stand in the way of beneficial cooperations, especially not in crisis situations. For instance, cooperation between local retailers with a view to setting up a joint ordering and delivery logistics system can be permissible under antitrust law. In this way, brick-and-mortar retailers would be able to remain open for their customers and make home deliveries. But here too, the general antitrust rules and regulations need to be observed and, in particular, businesses are not allowed to compare and align selling prices.

Exchange of information between competitors regarding the coronavirus crisis

The majority of companies are facing a host of uncertainties in the wake of the crisis. They may be tempted to exchange information with each other regarding their experiences in dealing with the crisis and to identify best practices, e.g. for measures to protect staff and customers or adapt business processes.

Generally speaking, uncertainty is an important and necessary element of competition. An exchange of information can take many different forms, however, some of which can promote competition. Information that is not competitively sensitive can therefore be exchanged, e.g. around regulatory measures to reduce the risk of infection for staff and customers or responses to recommendations issued by the Robert Koch Institute. Setting up a joint platform for businesses to post messages about local and regional rules and regulations would also be possible, for example, to make it easier for market operators to get an overview of the patchwork of regulatory requirements.

Exchanging competitively sensitive information is subject to the same strict requirements as ever, however, which means that competitors are not allowed to discuss payment extensions occasioned by the crisis, for example. Companies must take decisions of this kind autonomously unless and until the law provides otherwise. Exchanging information about non-pay-scale salary matters, such as continued payment of salary during absence from work, holiday and bonus arrangements, or staff furloughs (“What are you doing as regards continued wage payment/forced leave/leave bans/hiring freezes?”) would also be critical, though this would not be unusual in a crisis situation. This kind of information is competitively sensitive because it relates to the competition for employees. It is likely to be difficult to justify exchanging this kind of information.

The general rule is: Even in the coronavirus crisis, companies have to have good grounds for restricting competition. Antitrust law is not being suspended on account of the crisis. One example of this is the questions from the European Commission in response to reports from food retailers about wanting to coordinate their

operations more closely. The European Commission (naturally) also sees security of supply as one of the prime objectives in the coronavirus pandemic. At the same time, however, it wants to be sure that restrictive measures are kept to a necessary minimum.

That applies equally to the exchanging of information within the trade associations. Trade associations may protect the interests of their members, as always, but, even in a crisis, there are strict limits on the exchange of competitively sensitive information. The coronavirus crisis cannot be used to justify possible calls to boycott companies, e.g. certain large online retailers.

R&D cooperations between competitors, e.g. to develop vaccines

Pharmaceutical and medical research companies can expect the cartel authorities to avoid obstructing the development of a COVID-19 vaccine by imposing antitrust restrictions. Where rival pharmaceutical companies pool their findings and other relevant data around COVID-19 – all undoubtedly competition-relevant information – this can be consistent with antitrust law if, for example, it allows a vaccine to be brought to market more quickly or produced more efficiently. Even a prognosis of these positive consequences being more likely if the companies in question cooperate can be the critical factor for justification and authorisation of the cooperation by the cartel authorities. Public health has already been factored into decisions by cartel authorities in the past as a non-competition objective, specifically in the context of authorisation for a cooperation JV between competing European vaccine manufacturers (see [here](#)).

Cooperations between competitors: reducing overcapacities

Unlike in the food retail and drug sectors, the coronavirus pandemic is resulting in a sharp drop in demand in almost all industries, with the airline, as well as the tourism industry in general, being among the first to feel the impact.

The [Norwegian government](#) was quick to respond to the fall-off in demand in the airline industry: Given the (temporary) radical drop in demand, it is allowing rival airlines in Norway to coordinate their flight schedules and to this end is suspending antitrust law for three months. Water and road/rail transport companies are also set to benefit from this measure. The aim of this form of coordination is to maintain a minimum level of service, i.e. to make the most effective use of the reduced capacities in order to be able to transport goods. Similar arrangements are now conceivable between the various tour operators and consistent with antitrust law, e.g. to repatriate holidaymakers who are currently still abroad.

These ideas can also be applied to other markets. While the general rule is that agreements around capacities can be inconsistent with antitrust law because they represent restrictions on production, a coordinated reduction of overcapacities in the market can be seen as enhancing (production) efficiency and therefore justify what would otherwise be a prohibited arrangement on production capacities – all the more so if capacities are only being closed down temporarily. Having as many providers as possible survive the crisis is beneficial to competition. However, the urgent advice is that each individual case needs to be examined on its own merits, and plans to cooperate in reducing overcapacities need to be submitted to the authorities in advance.

Abuse of market power and other unilateral measures

The cartel authorities were quick to apply the rules on the abuse of market power in the coronavirus crisis. There are reports from [Japan](#), for example, about investigations into unlawful product tying, namely face masks with other products. There are also reports from [Poland](#) about an investigation undertaken by the cartel authority against wholesalers who terminated contracts with hospitals in the wake of the crisis in order to be able to sell PPE to other customers for higher prices.

Some cartel authorities have already taken action to put a stop to excessive prices for products that are in short supply (see, e.g. [Great Britain](#), [Italy](#) and [Greece](#)). Cases of abusive pricing are rare in antitrust practice; the strict requirements mean that they are generally resource-intensive for the cartel authorities and often have an unsuccessful outcome. Price increases of more than 1,000% since the onset of the coronavirus crisis are, however, so significant as to make them hard to justify; injunctive measures by the authorities are a possibility here. Earlier crises, e.g. in the aviation industry, also prompted investigations by the [Federal Cartel Office](#) on the grounds of possible price gouging.

In order to avoid excessive prices and price hikes, the [Hellenic Competition Commission](#) has reminded manufacturers and wholesalers of the possibility of stipulating maximum prices in the event of high demand in times of crisis. At the same time it has made it clear that crises are no excuse for vertical price-fixing. For that reason too, unilateral measures need to be examined in advance.

The same goes for unilateral measures like terminations and failure to perform existing contracts. They are only relevant from the antitrust perspective if the company concerned has market power, either because it has a dominant position or because other companies are dependent on it. However, this dependence may have only come about as a result of the crisis.

On the one hand it is important in such situations to make decisions in such a way that they can be objectively verified – especially where contractually agreed purchase quantities cannot be met for all customers. The solution here is to design a strategy that meets the needs of all the contracting partners as far as is objectively possible, and it is particularly important to avoid discrimination in this allocation process. But sudden interruptions in supplies or the termination of existing contracts can be problematic from the antitrust perspective if they jeopardise the livelihood of other companies and, if possible, should be checked with the cartel authorities in advance.

Where, on the other hand, companies are affected by excessive price increases or sudden interruptions in the supply of health- or health service supply-related products, it can make sense to approach the Federal Cartel Office.

Delivering on commitments

Lastly, the current coronavirus crisis is also having an impact on the way in which companies are able to deliver on their commitments. For instance, where a company has given definite commitments in an administrative proceeding (e.g. re the opening up of a market), and if the company has agreed a list of measures with the Federal Cartel Office, including a time schedule, implementing said measures on time is hardly going to be possible, given the current situation. Here again, we advise that companies consult closely with the cartel authorities regarding the measures. The same applies in the case of commitments given in the context of merger control proceedings that can no longer be met, or only with some delay, on account of the new economic situation.

Summary

Antitrust law always applies, including in a crisis; but it is sufficiently flexible to help ailing companies. The cartel authorities will in particular use the latitude that exists in antitrust law to justify crisis-driven restrictions of competition for the good of the general public. At the same time the many cautions and warnings issued by the cartel authorities in relation to the coronavirus crisis show that the authorities are willing and able to follow up on antitrust violations even during the crisis. Companies are therefore advised to discuss restrictive measures with the cartel authorities before implementing them – they can expect a quick response. Generally speaking, it is to be expected that over the next weeks and months and the cartel authorities will be increasingly called upon to address enquiries about the scope of application of antitrust law in the crisis.

Given the precedence of other measures to deal with the coronavirus crisis, the Tenth Amendment to the German Act against Restraints of Competition is likely to be put on hold for the time being. One of those other measures will be the bill – expected to pass into law shortly – for the setting-up of an economic stabilisation fund that will enable the creation of an unincorporated special fund to buoy up the real economy. There are also likely to be special rules stipulating that antitrust law, first and foremost merger control, does not apply to the fund.

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