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News Alert

EU and Competition Law Department

Coronavirus and Crisis Cartels

Competitors are usually strictly prohibited from creating cartels or even agreements on capacity, but businesses across Europe have indicated they may seek waivers to allow them to deliver services amid major economic disruption. The Norwegian government has decided to give SAS and Norwegian a three-month exemption from Norway's antitrust laws. Thus, Airlines SAS and Norwegian can coordinate their schedules to maintain minimum services for citizens during the COVID-19 crisis. This raises the question of whether it would be possible to reach a similar solution in other countries and industries throughout the COVID-19 crisis.

I. Crisis Cartels: the traditional approach.

Although an agreement must be made always in the light of its "*economic context*", the existence of an industry-wide crisis does not mean that competition rules do not apply[1]. Moreover, a restriction by its object can be found even if the agreement does not have the restriction of competition as its sole aim.

The European Commission rejected the possibility of forming crisis cartels, in its XIIth Report on Competition, but it accepted that it could be a solution to situations of structural overcapacity in prolonged periods of time marked by economic recession and crisis-struck industries.

The Commission concluded that certain agreements in restriction of competition could be authorized provided that the conditions of Art. 101(3) TFEU conditions are met, namely:

(i) Production can be improved if the reductions in capacity would increase profitability and restore competitiveness in the long run, and when such coordination contributes to mitigate, spread and stagger their impact on employment.

(ii) Consumers will enjoy a fair share of the benefits of the agreement if, by the end of it, they can rely on a competitive and healthy structure of supply in economic terms, without depriving them of the freedom of choice or continued competition between competitors.

[1]Judgement of the Court of Justice of the European Union of 20th November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643.

(iii) The restriction are indispensable to the objective of planned restructuration (if the agreement is concerned only with restructuring the surplus capacity and it's limited in time to the period necessary to do so). However, such agreement cannot contribute to coordinate policies or to reach agreements on conditions of sale.

(iv) The agreement does not give the possibility to eventually eliminate competition in the market (given the nature of the agreement and temporal limitations of the cooperation

Therefore, it is possible to rely on Art. 101(3) TFEU in connection to a crisis Cartel. Nevertheless, it is worth noting that those conditions should be strictly met by any industry or sector considering this possibility.

II. Crisis cartels in the coronavirus context

The Coronavirus is not a structural crisis of capacity. Therefore, there could be doubts on whether the case law and past precedents on crisis cartels are applicable. Further, the case law of the Court of Justice of the European Union ("CJEU") has made it clear that cyclical overcapacity in principle cannot justify the formation of cartels[2], although a structural crisis may. As a general rule, it can be expected that competition would correct the overcapacity problems by itself and would bring the market back to an equilibrium within a reasonable period of time, without any need for coordination between the undertakings on the market.

Nevertheless, it cannot be expected that market forces alone can deal with the COVID-19 crisis, and the resulting problems of overcapacity and supply within a reasonable period of time in such a sudden crisis[3].

The solution of the Norwegian authorities in connection to SAS and Norwegian could be regarded as the right path to follow in the context of this crisis. Any industry or sector wishing to reduce capacity during the crisis may rely on Art. 101(3) TFEU to do so if the conditions are met. Although the formal notification of agreements to Competition authorities is no longer a possibility, extraordinary times call for extraordinary measures. Industries or sectors that are specially harmed by the crisis should contact the competition authorities; if they need to:

- Arrange temporary reductions of capacity and/or
- To ensure a minimum level of provision of services during the crisis, including supplies between competitors.

An informal dialogue should be open with the competition authorities in order to adopt any necessary measure to protect employment and the economy in the EU. A careful assessment on whether the

[2] Judgement of the Cout of Justice of the European Union of 20th March 2002, *Lögstör Rör/Commission*, T-16/99, EU:T:2002:72, para. 319-320; and Judgement of 29th April 2004, *Tokai Carbon e.a./Commission*, in joined Cases T-236/01, T-239/01, T-244/01 à T-246/01, T-251/01 and T-252/01, EU:T:2004:118, para. 345; and Judgement of 12th September 2007, *Prym and Prym Consumer/Commission*, T-30/05, EU:T:2007:267, para. 207-208.

[3] "*Crisis Cartels*", contribution by the European Union to the Organization for Economic Co-operation and Development (OCDE) III Session of the Global Forum on Competition, para. 40.

conditions laid down in Article 101(3) TFEU should be made in each specific case (see *supra*). Some principles should be taken into account in this analysis:

(i) The undertakings concerned should submit a memo to the competition authorities on why the conditions of Article 101(3) TFEU are met in the case at issue, with especial consideration of the circumstances at hand.

(ii) Transparency should be the guiding principle. The competition authorities should be informed about the agreement, its scope and duration, so they could inform the affected companies if they find that this should not comply with competition law.

(iii) The agreement should be focused on a temporal reduction on capacity, strictly limited to the duration of the health crisis.

(iv) The agreement should be deemed indispensable in the current economic context in light of the situation of the specific industry or sector;

(v) The agreement should not concern price-fixing, quotas, selling terms; or market sharing agreements.

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