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COVID-19: Lawful cooperation or crisis cartel?

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As a result of the COVID-19 outbreak, undertakings all over the country are exposed to increasing pressure, and a shared wish to keep their businesses running may bring competitors closer to each other. However, such increased cooperation between competitors in times of economic downturn may lead to serious financial penalties for the participating undertakings. The distinction between lawful cooperation and unlawful formation of so-called crisis cartels is crucial, and the competition authorities have not previously hesitated to enforce the prohibition of such anti-competitive agreements − not even in times of economic crisis. So, there is reason to be cautious.

Limits to cooperation

The competition rules prohibit undertakings from entering into agreements that directly or indirectly have as their object or effect the restriction of competition, and the competition authorities take firm action against cartel activities. The cartel prohibition is enforced and may, depending on the circumstances, affect cartels other than sales cartels (coordination of prices and markets), for instance production

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cartels and, in certain circumstances, procurement cartels. The prohibition of anti-competitive agreements may also extend to the exchange of information between the parties.

When facing an economic downturn, it may be tempting to initiate cooperation with other operators to overcome shared challenges in order to survive in the market. Over the years, several undertakings have attempted this, including by referring to the need in times of crisis to reduce overcapacity in a particular sector, or by referring to an imminent economic crisis that may force virtually all undertakings in the sector out of the market. These arrangements may end up being so-called "crisis cartels", where a significant number of operators cooperate in order to find a common solution to their challenges in times of crisis, and do it in a way that goes beyond what is lawful. Such agreements may, for example, have as their object to reduce overcapacity or agree prices to prevent undertakings from going bankrupt or leaving the market − but they often prove to be in breach of the competition rules.

In light of the COVID-19 outbreak, the Israeli competition authorities have issued a short statement addressing the possibility of cooperation between competitors in this imminent "time of crisis". In this context, the competition authorities emphasize that such cooperation will remain subject to the competition rules. However, short-term collaborations, which allow such struggling competitors to survive will generally not be deemed restrictive of competition by object. However, the decision will depend on the specific circumstances of the case in question. It is still unclear whether similar guidance will be provided by the Danish authorities in this regard.

Early case law

In a judgment from 1984, the European Court of Justice held that an agreement of long duration between competitors concerning supply of products constituted a violation of the prohibition of anti-competitive agreements (Case C-29/83, Compagnie Royale Asturienne des Mines SA and Rheinzink GbmH v the Commisson). The Court held in this connection that competing producer undertakings were not allowed to enter into indefinite agreements on the reciprocal

supply of unlimited quantities of products, although this could be allowed in certain circumstances if the object was to avoid emer-gency situations in cases of *force majeure*. Hence, the judgment indicates that there may be a certain limited scope for action if the circumstances are so exceptional that it can be considered a real crisis.

There may also be certain situations where agreements on measures may be granted an exemption. In a decision from 1984, the Commission allowed that an agreement between synthetic-fibre producers concerning concerted reduction in capacity was exempted from the prohibition of anti-competitive agreements, because the agreed reduction was deemed to be covered by the exemption in Article 101(3) of the TFEU (Commission Decision of 4 July 1984 (IV/30.810 - Synthetic fibres)). The Commission took into account the overcapacity that existed in the synthetic-fibres sector, the limited duration of the agreement, and the fact that the purpose of the agreement was to reduce capacity so that the capacity that remained could be operated at a more economic level. The Commission further stated that the agreement must not be allowed to provide an opportunity for exchanging information which could give rise to concerted practices incompatible with the competition rules. Nevertheless, the decision opened up to the possibility of cooperation between competitors in case of extraordinary circumstances and financial challenges.

Conversely, in 1989 the Commission held that a number of welded steel mesh producers could not be granted exemption for various agreements and concerted practices fixing delivery quotas and prices in a period of economic downturn (Commission Decision of 2 August 1989 (IV/31.553 - Welded steel mesh)). However, the Commission stated in the decision that account had been taken of various circumstances that were the same in all of the undertakings, and that the fines had therefore been reduced considerably below the level which would normally be justified. Subsequently, in its judgment of 6 April 1995, the European Court of Justice upheld the Commission's decision (Case T-148/98, Tréfilunion SA v the Commission).

The "Irish Beef" case

In 2008, the European Court of Justice issued a so-called preliminary ruling in a case concerning the beef and veal sector in Ireland (Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrig-more) Meats Ltd.). The case concerned the ten principal beef and veal processors in Ireland who had agreed to reduce the processing capacity because of the significant overcapacity in the sector. They therefore signed a standard agreement that e.g. reduced the processing capacity by 25%. This target was to be achieved by some of the competitors withdrawing from the market, while the remaining competitors would pay a levy to compensate those withdrawing. Furthermore, it appeared from the agreement that land left by the withdrawing competitors and the associated processing plants could not be used for the purposes of beef and veal processing for a period of five years in order to prevent new competitors from entering the market. The European Court of Justice held that the agreement was in breach of the prohibition of anti-competitive agreements.

The European Court of Justice did not take into account the special economic context within which the agreement was made. On the contrary, the Court established that the competition rules prohibit *any* form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition. Overcapacity in the beef and veal sector could not justify an agreement between competitors, and the agreement was considered unlawful because it was deemed to have as its object the restriction of competition in the market. In this regard, the Court stated that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.

The case was subsequently heard nationally by the Irish High Court, which examined specifically whether the parties could obtain an exemption. During the proceedings, the Commission submitted a brief suggesting that agreements between competitors may be justified in exceptional situations if the agreements aim at "rationalising" production as a result of overcapacity in the sector. It is a requirement, however, that such agreements are necessary and indispensable to obtain the intended economic benefits. If the overcapacity is long-lasting and

structural rather than cyclical, and if it is expensive for the undertakings to surrender capacity, a joint capacity reduction may be considered indispensable and, therefore, ultimately be exempted from the prohibition of anti-competitive agreements. In addition, crisis situations may be a mitigating factor in determining a possible fine. In other words, the Commission indicated that, if the circumstances are sufficiently serious, they may to some extent warrant increased cooperation under times of crisis.

Crisis cartels are in principle illegal

It is still a clear principle that the competition authorities do not allow cooperation that takes the form of "crisis cartels", not even in the case of declining demand and economic downturn due to, for example, a global virus disease. At the same time, however, there may be an opening allowing undertakings to consider whether, in a sufficiently serious situation, more far-reaching joint measures will be deemed acceptable. At the current stage of the COVID-19 crisis, we have probably not reached that point yet, but it depends on the particular circumstances, and the possibility should be considered.