

Newsletter, 27 March 2020

No pandemic can rule out competition law

Key takeaways for proceedings before the European Commission and in Germany in times of COVID-19

It has now been two weeks since the WHO officially announced the Coronavirus pandemic. Not only employees of private enterprises but also members of the decision divisions of the German Federal Cartel Office, judges and state attorneys are to a large extent working remotely from home. This has an effect on the duration of proceedings. In addition, the economic effects of the worldwide shutdowns result in competing companies seeking for cooperations and the creation of “new” market dominant companies simply following the shortage of their products (such as e.g. face masks or sanitizing gel). Authorities worldwide have already issued warnings that they will closely monitor the behavior of companies knowing that in crisis situations the boundaries of competition law are often tested. In the following, we will summarize the competition law key takeaways to bear in mind by companies for the duration of the pandemic.

Merger Control

With the exception of simplified filings the European Commission (“EC”) is encouraging merging parties to delay notification until further notice.¹ The EC has justified this on the grounds that proper market testing cannot be usefully carried out in the current situation. Parties are asked to submit the filings electronically rather than in paper form.

The EC has also announced that it will issue guidelines to help member states screen foreign direct investment (FDI) to prevent foreign entities from taking over European companies in certain key sectors such as health, medical research and strategic infrastructure. The president of the EC has made clear that the EC needs to know “*who invests from abroad in these companies and for which purpose*”.²

¹ See statement on [DG COMP's website](#).

² @vonderLeyen, [video of 25/3/2020](#).

With the German Federal Cartel Office (“FCO”), filings can be made as usual. Updated contact details for each decision division have been published on the FCO’s website.³ However, face to face meetings have been suspended and parties are asked to consider whether a transaction can be submitted at a later date. Similar rules apply for almost all competition authorities worldwide.

For example in Austria, merger notifications can now be submitted electronically.⁴ Review periods for deals notified between 23 March and 30 April 2020 will only start running as of 1 May 2020. Review deadlines for deals notified before 20 March are not impacted.

Key takeaways:

- Take the timing issues into account when drafting the SPA, in particular the time line for the submission of filings, the duration of the merger control proceedings and the Long Stop Date. Supplements to already signed SPA’s might become necessary.
- Merging parties still need to comply with the rules for gun-jumping.⁵ In exceptional cases, an application for a derogation of the standstill obligation might be an option.

Cooperations between competitors

Companies in crisis have a tendency to start moving closely together, being it through benchmarking in order to detect how competitors respond to the challenges or through cooperations. The European Competition Network (“ECN”) has reacted by publishing a very clear statement on the application of competition law during the Corona crisis.⁶ It

³ FCO, [Communication in times of Corona](#).

⁴ See website of [Austrian Federal Competition Authority](#).

⁵ See [Commeo Newsletter on Gun-Jumping](#) of 27/4/2018.

⁶ ECN, [Joint Statement](#) on application of competition law during the Corona crisis, 23/3/2020.

clearly says that competition rules ensure a level playing field between companies. This remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions. However, several national authorities have already shown their willingness to grant temporary exemptions from antitrust laws and to allow certain industry sectors to cooperate.⁷ Also the **president of the FCO** has made clear that competition law allows for cooperations between companies, „as long as [!] there are sound reasons, as in the current situation“.⁸

Key takeaways:

- Cooperations in order to ensure the supply and fair distribution of scarce products to all consumers are unlikely to be problematic. In case of doubt, check them prior to implementation.
- Benchmarking and information exchange must be closely monitored and should have a pro-competitive reason.
- Document the background and reasoning for any cooperation or information exchange in order to be able to prove its lawfulness later.
- Remind employees of the competition law rules and ensure regular (virtual) trainings.

Abuse of market dominance

Companies selling scarce products might have an incentive to profit from the current crisis. Not only the ECN but competition authorities worldwide are worried about companies taking advantage of the current situation by abusing their dominant position.⁹ The ECN has explicitly stated that it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitizing gel) remain available at competitive prices.

Key takeaways:

- Companies should analyze whether due to the current shortage of their products they could be considered as market dominant. In that case be careful with respect to pricing, rebates or bundling practices.

⁷ Press Releases of the Norwegian Competition Authority, the UK Government and of the [British CMA](#) of 19/3/2020.

⁸ Lebensmittel Zeitung, „Kartellamt offen für Ausnahmeregelungen“, 20/3/2020.

⁹ The Romanian and Turkish authorities are currently investigating price increases for food and antiseptics.

- The existing rules allow manufactures to set maximum prices for their product. The ECN considers this as a useful tool to limit unjustified price increase at the distribution level.

Court proceedings

The **European Court of Justice** has postponed all judgements and hearings until the end of March and the General Court until 4 April 2020. The courts and the public prosecutor offices in **Germany** have been asked to reduce their activities to the urgent and pressing cases. It remains at the judges discretion to decide on the cancellation or suspension of a proceeding. One can expect that this will cause delays for the numerous ongoing antitrust litigation proceedings. For criminal proceedings the legislator is currently bringing forward an amendment of the procedural rules which would allow the court to suspend the main hearing for a period of three months and 10 days. This would also apply to ongoing cartel proceedings before the appeal court, i.e. the Higher Regional Court of Düsseldorf.

Comment

Stay healthy and compliant.



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