



„კოვიდ-19 – ეკონომიკური, სამართლებრივი და პოლიტიკური გამოწვევები“

საერთაშორისო სამეცნიერო პრაქტიკული ონლაინ კონფერენციის
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ზოგიერთი კონკურენტული ორგანოს მიერ ჩატარებული COVID-19-ის გადაუდებელი ღახმარების ანალიზი

ვალენტინა ლუკიანეც

სამართლის დოქტორი, ასოცირებული პროფესორი,
რექტორის ასისტენტი გენდერულ საკითხებში,
კონსტიტუციური სამართლისა და ადამიანის
უფლებების დეპარტამენტის პროფესორი,
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აბსტრაქტი

ამ სტატიის მიზანია, წარმოადგინოს მოკლე მიმოხილვა და ანალიზი ზოგიერთი კონკურენტული ორგანოს რეაგირება COVID-19-ზე გადაუდებელ სიტუაციაში მდგომარეობის შეფასებით და, საჭიროების შემთხვევაში, წინადადებების შეთავაზებით; თუ როგორ შეიძლება განვითარდეს კონკურენციის კანონი და მისი აღსრულება მსოფლიოში.

სტატია ხელს უწყობს არსებულ საერთაშორისო დებატებს კონკურენციის სამართალზე მიმდინარე COVID-19-ის კრიზისის შედეგების შესახებ. ანალიზი შემოიფარგლება შემზღუდველი შეთანხმებებით, დომინირების ბოროტად გამოყენებისა და შერწყმის კონტროლით. საწარმოებმა, უპირველეს ყოვლისა, უნდა იცოდნენ, რომ მიმდინარე კრიზისი არ არის საბაზი კონკურენციის კანონების დარღვევისთვის და რომ კონკურენციის კანონები კვლავაც გამოიყენება COVID-19-ის კრიზისის დროს. კონკურენტული ორგანოები იცავენ თავიანთ პრაქტიკას შეზღუდული შეთანხმებების (კონკურენტები ეკონომიკური კრიზისის დროს), დომინირების ბოროტად გამოყენების (ექსპლუატაციური ფასების დაცვის ღონისძიებები) და შერწყმის კონტროლის (კონტროლის პროცედურული და არსებითი ასპექტები) მიმართებაში.

საკვანძო სიტყვები: კონკურენციის ორგანოები, COVID-19-ის საგანგებო მდგომარეობა, კონკურენციის კანონი, შემზღუდველი შეთანხმებები, დომინირების ბოროტად გამოყენება, შერწყმის კონტროლი.

ANALYSIS OF SOME COMPETITION AUTHORITIES' RESPONSES TO THE COVID-19 EMERGENCY

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Abstract

The aim of this article is to provide a short overview and analysis of some competition authorities' responses to the COVID-19 emergency, by evaluating the state of play and, where relevant, making proposals for how competition law and its enforcement might develop worldwide. The article contributes to the existing international debate about the consequences of the current COVID-19 crisis on competition law. The analysis is limited to restrictive agreements, abuse of dominance and merger control. The undertakings must primarily be aware of that current crisis is not an excuse to breach competition laws and that competition laws continue to apply, with no general crisis exemption, nor during the COVID-19 crisis. The competition authorities are accommodating their practice in addressing restrictive agreements (cooperation between competitors in times of economic crisis), abuse of dominance (measures to protect against exploitative pricing), and merger control (procedural and substantive aspects of control).

Key words: competition authorities, COVID-19 emergency, competition law, restrictive agreements, abuse of dominance, merger control

1. Introduction

The world is suffering a great deal in fighting against this pandemic of corona virus or covid-19 as the name given by World Health Organization (WHO). This pandemic has challenged the current health as well as economic structure across the globe. Countries are struggling to maintain the adequate supplies of food, health and sanitation requirements of the people. COVID-19 presents companies with many challenges and the consequent disruption is likely to affect the global economy significantly in the coming months and potentially years. Thus, this has triggered companies around the world to find solutions to deal with this crisis. Such solutions may involve scenarios of cooperation with competitors to deal with supply-chain challenges or with potential future overcapacity.¹

2. Presentation of the main research material

In addition to this, the businesses and the companies are also engaging in collaborative and creative practices to rise up at the hour of need. Certain examples of such collaborations are the pharmaceutical companies, like Pfizer and Bio-Ntech have joined forces to co-develop a vaccine on one hand and the technological companies such as Apple and Google have also joined hands in creating software to track the trace of infections in the carriers and other patients. The European Commission has published a framework for cooperation between enterprises in the healthcare sector to overcome critical supply shortages of medicines and medical equipment, subject to them being necessary and proportionate². To cope with the extraordinary and significant change in demand of masks, hand wash and sanitizers the businesses are also combining resources and ideas and meeting up this challenge [2]. This extraordinary situation has also triggered the companies to cooperate to ensure the supply and fair distribution of scarce products to all consumers.³

¹ Christopher Thomas and Christian Ritz, "COVID-19 and Competition Law – Companies Must Not Quarantine Competition Law Compliance", Apr. 2, 2020, available at: <https://www.competitionpolicyinternational.com/covid-19-and-competition-law-companies-must-not-quarantine-competition-law-compliance/>

² Anisha Chand and Soham Banerjee, "COVID-19 | Is the CCI a friend indeed?" Money Control, April 29, 2020 available at: <https://www.moneycontrol.com/news/india/covid-19-is-the-cci-a-friend-indeed-5201571.html>

³ EU, Competition, Trade And Regulatory, March 2020, "Antitrust: Joint statement by the European Competition Network (ECN)

This quick surge in coordination between the businesses has been largely prompted by a series of short-term reliefs granted by antitrust enforcement agencies worldwide. There have been temporary exemptions, which are being permitted, for such specified cooperation amongst businesses, which would earlier fall outside the purview of antitrust laws. Competition law will not be at the top of companies' agendas today. There have been increased chances of competition law infringements when the time of crisis happens [4]. For example companies who are facing economic difficulties may see cooperation with competitors as the only viable option to survive; some other dominant companies may view this as an opportunity to exploit vulnerabilities of the people by adopting abusive behavior, as in cases of the sale of hand sanitizer, which are being sold at extortionate prices in light of the high demand due to COVID-19 or even face mask supplies being diverted from the health sector to the public at much higher prices¹. Thus, the roles of the competition authorities are being once again called up in the time of pandemic to balance the need of the people with that of fair dealings in the business. There are also risks around competitors collaborating during the crisis, potentially leading to „crisis cartels“ or other antitrust infringements. Antitrust authorities will also see their resources stretched, with knock-on effects for investigation timetables and how authorities prioritize cases². In such times, the companies must be clear on how much leverage can be taken of such relaxations and what exactly can be done and what cannot be done to deal with the current crisis from the competition law point of view

The European Union is governed by the Treaty of Functioning of the European Union. Art 101, 102, etc. deals with the Competition concerns arising out of business transactions. COVID-19's impact on the functioning of the economy may prompt companies to collaborate with their competitors in hopes of overcoming the hardship, however, EU competition law does not look favorably at collaboration between competitors that restricts competition.

A statement was issued by EU on 23 March 2020 to clarify that the application of competition law remains applicable, but the COVID-19 crisis „may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers.“³ This statement gives relief to the companies that any action taken to fulfill the demand by the consumers and any other act done to provide for supply of products will not be considered a violation of antitrust laws. However, it should be kept in mind that EU has never suspended the operation of the competition regulations even in the extreme times of crisis be it health or financial [3]. The French government did not suspend or relax the working of the competition authority in the time of an economic downturn. There can be other examples such as Greece, Poland, Spain, etc. in the EU who have been similarly clear not to allow anti-competitive practices to be justified on the basis of economic turmoil. Certain countries which are governed under EU such as Germany are providing relaxations for example the German Federal Cartel Office has been flexible in the application of competition law in times of pandemic, at least regarding key economic areas such as food supply. Germany is considering allowing closer cooperation between food retailers to avoid shortage to the consumers. In Norway, the airlines SAS and Norwegian were granted a three-month exemption from Norway's competition laws. While collaboration between competitors will very likely be scrutinized by the European Commission and competition authorities in EU member states and elsewhere, it is conceivable that governments may establish exceptions, or authorities may take a lenient approach when considering fines.⁴

on application of competition law during the Corona crisis”, available at:

<https://ec.europa.eu/competition/ecn/202003-joint-statement-ecn-corona-crisis.pdf>

¹ Jacques Derenne, Dimitris Vallindas and et.al., „COVID-19 is Not a “Get Out of Jail Free Card” from EU Competition Law”, Mar. 24, 2020, available at: <https://www.antitrustlawblog.com/2020/03/articles/coronavirus/crisis-eu-competition-law>

² “COVID-19: Implications from an antitrust and competition law perspective”, March, 2020, available at: <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/bb6f3c5e/covid-19-implications-from-an-antitrust-and-competition-law-perspective>

³ Dechert LLP, “Impact of COVID-19 Coronavirus Pandemic on European Antitrust Enforcement” Apr. 3 2020, available at: <https://www.jdsupra.com/legalnews/impact-of-covid-19-coronavirus-pandemic-63598/>

⁴ EU Commission, “The EU Commission Vets Public Statements of Euro commerce for the Non-Food Retailers to take Measures

Governments in the EU have started to intervene in the economy (e.g., through explicit measures or obligations, such as limiting prices, agreeing on volumes, or by stimulating companies to cooperate in finding technical or commercial solutions for the challenges posed by the COVID-19 crisis). In certain cases where the collusion between the companies occurs due to the inducements by the Government, in such cases those collusions are accepted under TFEU and it ensures a valid defence to the companies against any antitrust complaints [1].

The United States of America has been the worst hit by the Covid-19 pandemic, with the highest number of fatalities across the globe. Thus, this requires massive amount of cooperation between the centre and the state, businesses, collaborators and local government. The Antitrust Division of the Department of Justice („the Division“) and the Bureau of Competition of the Federal Trade Commission (the „Bureau,“ and collectively the „Agencies“) made clear to the public that there are many ways firms, including competitors, can engage in pro-competitive collaboration that does not violate the antitrust laws.¹ The FTC and DOJ jointly issued a statement on a detailed antitrust procedure for expedient redressal and for collaborations of businesses working for the protection of health and safety of Americans during the COVID-19 pandemic. The statement recognizes that in these trying times the competitors of a business do need to collaborate in a response to this pandemic. These agencies identify certain types of collaborative activities such as research and development, sharing technical knowledge, development of suggested practice parameters by healthcare providers, joint purchasing agreements among healthcare providers, and private lobbying relating to the use of federal emergency authority that are typically considered procompetitive and consistent with the U.S. antitrust laws.²

3. Conclusions

The various Competition Authorities across the world have taken a well thought measure of relaxing certain competition regulations temporarily and partially in the interests of consumer protection due to the requirements of the current pandemic. Though the real assessment of these measures will only take place after a certain period of time, it is also imperative that certain steps may become permanent and fundamental in the purview of the post-pandemic world. Meanwhile, it is clear that the competition authorities will not permit businesses to exploit the crisis to take advantage of people, by charging vastly inflated prices or making misleading claims, or by engaging in collusion which is not essential to meet consumers' requirements in the current emergency. While the businesses and companies struggle with the new world and realities brought by COVID-19, it is almost impossible that competition law remain untouched, antitrust laws will have to be adapted and become flexible in order to maintain economic and survival balance during such a pandemic. The crisis is far from over, the lockdown was an easy part, living life post-lockdown period with economies struggling financially and businesses suffering from losses will lead to more regulations, enforcement actions and prevention of exploitation of the crisis. Although the challenges above will affect how authorities enforce, they will likely take the view that it's better to act decisively to prevent market harms.³ While the government is focused on reviving the economy of the state post lockdown period, they are facing with immense challenges with supply chains disruptions and remote working issues; there will be several economical implications from the perspective of global antitrust and competition enforcement in 2020 and will prevail potentially over a longer period of time. There were certain suspension of competition rules and regulations for the continuation of essential services during lockdown. Thus, it would require the states to support businesses as most of the cities were under lockdown recently or are still under restrictions.

against the Major Crisis Due to Covid-19”, Mar. 18, 2020, available at: <https://www.concurrences.com/en/bulletin/news-issues/preview/the-eu-commission-vets-public-statements-of-eurocommerce-for-the-non-food>

¹ Joint Antitrust Statement Regarding Covid-19, available at: <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>

² Reed Smith, “COVID-19 – Impact on Competition Landscape”, Mar. 25, 2020, available at: <https://www.reedsmith.com/en/perspectives/2020/03/covid19-impact-on-competition-landscape>

³ Nicole Kar and Emma Cochrane, “Covid-19 and Competition Law: Rapid Regulator Responses”, Mar. 13, 2020, available at: <https://www.lexology.com/library/detail.aspx?g=bae4500e-4522-4411-b882-153ac0f3e2d0>

Antitrust authorities have a potential role to play in protecting the company's interest during this pandemic, as many competitors will be forced to collaborate and form potential „crisis cartels“ and other antitrust infringements. There are several measures which the states have undertaken to support the business in financial distress. These measures or state aids can be in different methods, such as crisis loans, state guarantees and tax waivers or deferrals. It can distort markets, giving recipients of aid an unfair advantage when competing against other businesses – infringing state aid or anti-subsidy rules. But on the other hand, these state aids can be really helpful if they are given in proportionate basis and meet the criteria given for exemption. The European Commission has taken several measures to facilitate the same and grant support to the businesses.

Another important area where the antitrust authority has the role to play is examining and inspecting the companies charging high, excessive and unjustified prices for the products which are essential. This practise was specially related to the products such as hand sanitizers, PPE kits, masks, gloves and other protective equipments. This exploited consumers and the companies abused their dominance and infringed the competition and consumer rules. Thus, this needs to be checked, even if lockdown restrictions are removed. The antitrust authorities across the world have issued warnings to the companies about this type of behaviour raising the possibilities of enforcement actions by these authorities. The possibilities of certain companies taking advantage of the pandemic may also increase due to the algorithm pricing happening automatically online. This will further complicate the situation, for example this can be seen from various online sellers increasing the prices of products which are in shortage in physical stores. The businesses which are in competing position with each other are also working in close collaboration with each other to overcome this crisis. There are certain sectors such as food, pharmaceuticals, etc. which have to be in continuous supply for ensuring that it reaches people in need. Such collaborations are also being encouraged in specific countries such as Norway, UK, Germany and US. The suspension of these rules is intended to allow production and supply of essential services during this pandemic.

But these businesses should not take this as a green signal to enter into any types of arrangements to fulfil their needs; rather they should asses any kind of competitive risk before collaborating and putting extra safeguards in place. The risks of collaboration must be undertaken by the companies after taking due permissions, approvals and sanctions. Under the European Union regime, there are certain existing guidelines which are available for joint purchasing agreements and other special collaborations. These can be utilized by the businesses and companies to mitigate the effect of the crisis while being compliant to the rules. Businesses should only take the risk up to the level of desired results, and restrict any other fatal activity such as exchanges competitively sensitive information unnecessarily. The banks are also working together in these times, and proposing changes in the loans and financing agreements to facilitate the restructuring of loans. If banks work together, particularly in the context of a distressed borrower, this could lead to unequal bargaining power or inappropriate exchanges of competitively sensitive information. The rising concern of „crisis cartels“ i.e., competitors deciding amongst themselves on how to limit the impact of pandemic on their businesses. This can be like competitors deciding not to charge excess prices or agreeing on how to reduce the supply demand gap. The antitrust authorities will have to look at these crisis cartels with the same lens as other cartels, and treating them in the same manner. Thus there are certain risks involved in these crisis cartels as well. The general position is that businesses must continue to act independently and compete even during a crisis: this creates a high hurdle to justify a crisis cartel.

The antitrust authorities have to prioritize the working of the commissions so that maximum output could be achieved in minimum contact. Merger filings, reviews, actions of the competitors and certain other transactions will be considered by the commission on the priority basis. Certain activities which may be prohibited earlier would be allowed in such pandemic situation. The filings which are not urgent will not be encouraged by the competition commissions. The resources in these situations are both limited and restricted thus to manage them well, it will be required to take up only those cases forward which has some potential.

The important reforms which were to be expected to be applied in this year are being pushed to the next

year to presently focus on the current pandemic situation. There are certain things which businesses should keep in mind for their conduct during and after this crisis. These include first and foremost not neglecting the antitrust compliance, even though with the pandemic in place. It should also be remembered by the companies that antitrust investigations will be conducted for the acts done by them once this situation is taken control of. Companies should not engage in prohibited conduct and anticompetitive practises. These practises may be exploitative or predatory in nature, but they cannot be hidden on the pretext of dealing with pandemic. The competition law authorities will encourage the companies taking essential steps for dealing with the post pandemic situation and economy however they should not be misused by them.

The companies should keep in mind that even though the health sector and essential sectors have been provided with the exemptions but competition law is applicable to everyone irrespective of the sector. The competition authorities may also look into the problems faced by non-essential commodities markets and their companies which was closed or are closed for a long period of time due to the outbreak. These sectors are fighting to survive after the pandemic lockdown and need revival to regain their position in the market. These exemptions should not include competitors forming cartels and abuse of dominance. The documentation of the companies dealing with any arrangement, contract or any changes should be according to due compliance with the competition law and within its boundaries. Therefore, the take is that in the present situation when the market is not productive and the financial situation is not favourable the companies should not be tempted to make any violations like dealing with or trading confidential information, sharing of data, business strategies, price fixations, future plans, etc. The companies which are facing economic crisis should not enter into collaborations, or enter into agreements which are not compliant to competition law. Their conduct should be legally approved and in the garb of dealing with the pandemic, they should not disregard the competition law regime. The companies should not forget their perpetual existence and should weigh their actions before taking any step post-pandemic also. The competition authority's role across the world has been augmented and they should allow a breathing space for companies to revive and at the same time hold a tight grip on the activities of the businesses to curtail anti-competitive deeds.

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 3. Comfort letter to Medicines for Europe, 8 April 2020, available at: https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf.
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