HENGELER MUELLER

BRUSSELS À JOUR

Turn off the Light!

Markus Roehrig, Laura Stoicescu and Joachim Burger report on the latest developments from the European capital of competition law.

During the pandemic, the Commission gave additional leeway to companies' genuine efforts to cope with the crisis through appropriately tailored cooperation, and special State aid rules were put in place to allow Member States to support affected industries. Can companies expect the Commission and NCAs to take a similar approach in the current energy crisis and economic downturn…so the lights don't go out?

In light of the not-so-cheerful news nowadays concerning energy security, energy prices, and shortages of…pretty much everything, we thought we'd try and paint a brighter picture of tomorrow, with the help of EU competition law. It's not an easy time for companies struggling with market disruptions, especially under the watchful eye of Article 101(1) TFEU. But if the pandemic taught us something, it's that the Commission is sometimes willing to give leeway to its (in)famous cartel prohibition. And considering the current energy crisis, the war in Ukraine and the upcoming economic crisis, it might be a good moment for the Commission to concede again. Stay with us, as we'll look at the specifics of the cartel prohibition and crisis cartels, the legislative action the EU is brewing in order to broaden the scope of cooperation between undertakings as well as the State aid provisions companies can rely on.

The Notion of Crisis Cartels Revived?

Back in 2020, the Commission and its national counterparts explored to quite some extent if and how much leeway they can allow with respect to the enforcement of Article 101(1) TFEU where companies sought to cope with the economic challenges brought about by the pandemic through cooperation. If you will, a resurrection of the so-called "crisis cartels" – an economic concept previously employed, where a government (or the Commission, in our case) allows or fosters coordination or agreement between firms during an economic downturn. At the beginning of the pandemic, disruptions in the retail supply chain motivated the Commission to issue a comfort letter relaxing the conditions of cartel enforcement so that the cooperation between suppliers would

alleviate the difficulties of the market, in certain conditions and temporarily. The same mechanism was employed for the pharma industry in order to combat the pandemic. Can companies expect the Commission and NCAs to be equally pragmatic in the current energy crisis and the ensuing economic downturn in Europe?

Signalling an initial willingness to pursue a pragmatic approach to the enforcement of Article 101(1) in the current crisis, the ECN and the ICN both put out (fairly high-level) statements leaving room for cooperation between undertakings in order to ensure the purchase, supply and fair distribution of scarce products (on one hand), or to mitigate the economic consequences arising from sanctions imposed on Russia. However, in order to be acceptable to antitrust enforcers, any form of cooperation will likely need to meet two requirements. First, all measures will have to be temporary, strictly necessary and to specifically target the market disruptions. Second, there will need to be convincing evidence that the cooperation will generate clear efficiencies outweighing any restrictions. Generally speaking, cooperation on the supply-side is likely to receive more preferential treatment than cooperation on aspects which are customer-facing.

Where Cooperation May (or May not) be Permissible…

While the ECN's and ICN's statements send a clear message that agencies are willing to engage in a constructive discussion, they remain fairly generic and offer little specific guidance as to where to draw the line. However, some agencies have already ventured out and taken first decisions. Along with the experience from the pandemic, these can offer some useful insights where companies may be able to get "help" from antitrust regulators across the EU.

- In Germany, in order to mitigate the effects of possible gas shortages on sugar production (i.e., the rotting of sugar beets due to factory forced downtime), the *Bundeskartellamt* allowed four manufacturers to **make production capacities available to each other** in the event of gas supply cut-offs and ensuing production stoppages at the affected factories. The cooperation is temporary and limited to the upcoming sugar beet campaign and the subsequent settlement period until June 2023. The exchange of information between the companies will be limited to what is necessary by means of accompanying measures, and handled by an external party.
- In a similar move, two German gas importers and wholesalers were allowed to collaborate in the setup and operation of floating LNG terminals, in the North Sea ports of Wilhelmshaven and Brunsbüttel. The **joint operation of the LNG terminals** would tend to restrict competition, but any potential negative effects are "currently offset by obvious and substantial benefits for customers," the *Bundeskartellamt* said, approving the plan. In terms of efficiencies, the rapid commissioning can create urgently needed and price-reducing import capacities for gas in a relatively short period of time. The cooperation model is currently limited until the end of March 2024.

- The management of **supply-chain disruptions** may well be another area in which companies may be allowed to cooperate, the resulting efficiency being the provision of a more final product on the market. For instance, a company faced with disruptions in its raw materials' supply due the sanctions imposed to Russia could conclude a supply agreement with a competitor sourcing its raw materials from within Europe.
- Cooperation is less likely to be acceptable to **address structural overcapacity** in the market triggered, for instance, by an economic recession, or specifically as a result of export bans to Russia. Arguably, the reduction of overcapacity could lead to cost savings. However, the Commission has so far been reluctant to accept the coordinated reduction of production capacity given the potentially significant impact on competition and prices such agreements may have. According to the Commission, even in times of long-term structural overcapacity, the criteria for cartel exemptions under Article 101(3) TFEU will rarely be met, and that overcapacity should be rectified by market forces. The Brazilian competition authority, however, did authorize pioneering measures to reduce demand shocks during the pandemic, allowing large food suppliers to coordinate on special conditions, such as discounts for purchases required to be passed on to consumers to stimulate demand.
- Of course, the relaxation of the cartel prohibition is not an invitation for an "all-you-can-cartelize" buffet. For example, a **no-go** would be an agreement between undertakings aiming to **pass on to customers increased prices for raw materials**.

Joint Purchasing of Gas

The Commission has put forward an initiative for the joint procurement of gas in the EU, largely in view of spring 2023, when the winter gas storages will most likely be depleted. In order to avoid that Member States outbid each other, leading to a potential fragmentation and distortion of the Single Market, the Commission suggested setting up a mechanism for the joint procurement of gas. The idea is that the EU becomes a sort of buyers' cartel — a kind of reverse of OPEC, but for gas, as Politico put it. The Commission published draft legislation on 18 October under the Article 122 TFEU emergency measures procedure, whereby legislation can be passed with the agreement of the Commission and the Member States, excluding the European Parliament. The joint purchasing scheme is designed as a two-step mechanism based on demand pooling and joint purchasing:

- First, companies have to aggregate their demand through a service provider contracted by the Commission, which would then seek offers via a public tender process for volumes of natural gas sufficient to meet the aggregated demand. The Member States will request companies to participate in the aggregation of demand for at least 15% of the total volume needed to fill the underground storage facilities, while, at the same time, leaving the participating companies the freedom to go ahead or not with the purchase at the end of the aggregation process (depending on the volume of gas obtained, as well as the price and other conditions).

- In a second step, companies participating in the demand pooling, if they decide to go ahead with the purchase, can decide to either enter the contracts individually or to form a gas purchasing consortium coordinating their positions with respect to volumes, prices, delivery points and so on, and to enter into contracts with the suppliers that offered gas. Creating a single gas purchasing consortium would offer strong buying power and increase the likelihood of achieving better prices, but more than one consortium will be allowed to operate. The Commission has volunteered to provide informal guidance to companies which intend to jointly procure gas, according to the draft regulation. More specifically, the Commission indicated that it stands ready to support companies in the design of the gas purchasing consortium (most likely through informal guidance) and to issue a decision, pursuant to Article 10 of Regulation 1/2003, on the inapplicability of Articles 101, 102 TFEU if relevant safeguards are incorporated and respected. This is particularly the case since the companies might have to coordinate regarding the conditions of purchase, such as volumes, gas price, delivery points and time.

To facilitate the process, the draft foresees the creation of an IT platform, where gas purchasers can enter desired prices, volumes and delivery points. The purchasing process itself will be facilitated by a steering board composed of representatives of Member States and the Commission. The initiative will also receive the support of the newly-formed EU Energy Platform Industry Advisory Group – an informal expert group which will provide feedback on the options for demand aggregation and joint gas purchasing.

Going forward, the 25 October ordinary meeting of ministers acted as a first round of discussions on a formal draft document. According to the current schedule, an extraordinary meeting is likely to be needed to finalize legislation in November.

EU Member States get energetic

But the EU is not alone in taking on the energy crisis: Member States have already announced first steps and far-reaching measures in parallel. In a nutshell (and as per the 7th edition of the State of the Energy Union report), all Member States have implemented measures to tackle higher energy prices, by 18 October 2022. And according to the 20 October Council, Member States shall not only rely on the measures about to come on an EU level, but that "all relevant tools at national and EU level should be mobilised".

Germany, for example, announced in late September that it planned to distribute up to EUR 200 bn into its economy via a national emergency fund. To ease the financial burden, it *inter alia* plans to introduce a gas price cap for consumers and companies (whereby the State will absorb exceeding costs), tax cuts and more public support for companies affected by the war in Ukraine and the sanctions. The plan sparked an unprecedented backlash by the Commission and other Member States (only to name France, Italy, Hungary and Poland). In a widely syndicated article, commissioners Thierry Breton (Internal Market) and Paolo Gentiloni (Economy) condemned the package as a beginning "race for subsidies" underpinning the European idea of solidarity and unity. That was echoed in the Council's meeting on 20 October 2022, pointing out

the need for "common European level solutions [...] in a united manner". But so far, Germany seems intent to pull through, however it remains to be seen if the Commission might intervene and demand alterations – to maintain a level playing field – in case the package potentially involves State aid elements and requires EU approval.

State Aid to the Rescue

A big part of crisis response burden lies on the shoulders of governments, undoubtedly more so in the rampant energy crisis. But as we are all aware, public support falls within the ambit of the EU's rigid State aid control system. Therefore, in particular the hefty criticism that Germany's envisaged EUR 200bn support scheme has provoked begs the question what role the EU's State Aid rules will play to alleviate the crisis. Will Brussels be a roadblock rather than the promised rescue? While there are certainly cases in which the former is true – a topic for another day–, the latter seems to prevail now.

As in the pandemic, the Commission was fairly quick to hand out a Temporary Crisis Framework ("**TCF**"), setting out State aid-compliant conditions for public support. And after Vice President Vestager assured us in late September that the Commission will not stand in the way of support in line with the principles of Article 107 TFEU, a second TCF amendment is just around the corner. After a short consultation with the Member States and taking into account the recent and planned emergency measures to address high energy prices described above, the revised TCF to be published in the next days is set to allow for more support to mitigate the crisis, *inter alia* with the following:

- The TCF will be amended until 31 December 2023.
- Increased maximum aid ceilings (reportedly EUR 750k instead of EUR 500k) for direct grants to companies suffering from the crisis.
- Facilitated liquidity support (reportedly EUR 2m loan guarantee now "per calendar year" instead of "at any given point in time", so possible in 2022 and 2023).
- Reportedly larger enterprises can receive higher *loan guarantees to collateralise their trading activities on energy markets, provided there is "appropriate justification".*
- Criteria to be included for the assessment of equity interventions and recapitalisations (but, contrary to the Covid Temporary Framework, not a section of its own).

Rumours have it that the Commission is willing to give the Member States as much flexibility as possible to support companies facing significant cost increases, while at the same time trying – following the mentioned concerns regarding Germany's intended EUR 200 bn package – to avoid a harmful subsidy race between European economies. So, by and large, rescue rather than roadblock it is. And the Member States seem to accept this offer gladly, with the Commission having approved already over 85 aid schemes under the TCF since April 2022. In addition to the TCF, Member States may also support companies by compensating them for damages caused by the energy crisis under Article 107 (2) (b) TFEU, for which however a detailed account of the incurred damages and a direct link to the energy crisis needs to be proven.

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We didn't start the Fire…

…but we will certainly keep a close eye on the how's, why's and when's of the draft legislation due to keep European homes and industry going for the next few years and its engagement with the competition legislation framework. Never a dull moment up here in the north!

We hope you enjoyed our "enlightening" October issue. Stay warm and don't forget to follow us on LinkedIn for more on your favourite EU Competition Law topics!

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