

117 – Competition aspects in stormy waters

Dr. Daniel Lucien Bühr – Schindler Management Ltd

Gabriella Porcelli – Philip Morris Italia SRL

Tom McQuail - Howrey LLP

Commissioner Kroes on the current crisis

“There have already been enough mistakes, enough lack of responsibility.”

“When things are tough, it is tempting to try to steal economic activity from your neighbours, either by protectionism, defensive state aid or devaluations of your currency.”

“If competition is replaced with government controlled 'zombie' banks, then we can be sure that the lost jobs are not going to return and that the bill to taxpayers will grow even higher in the future.”

Introduction

- Competition law is a dynamic area
- Basic competition rules in principle not affected by economic downturn
- But way in which rules interpreted and procedures carried out may be more flexible
- This panel will seek to give practical guidance
 - From corporate counsel perspective
 - In dealing with competition authorities

Antitrust compliance in the economic downturn

Dr. Daniel Lucien Bühr – Schindler Management Ltd

The economic environment

The global economic crisis hits corporations:

- demand has dropped significantly (era of “scarcity of demand”) and competition increased dramatically
- profits disappeared or even turned into losses
- cash is (still) king and credits are hard to get
- costs are now being reduced significantly (which has a pro-cyclic effect on the entire economy)
- in some industries major global competitors are at the brink of a collapse

Antitrust compliance in the crisis

The radical worsening of the financial health of corporations at the very same time bears additional legal compliance risks:

- cartel risks increase; vitamins cartel as historic example:
“The European producers state that prices for both vitamin A and E actually fell significantly during the late 1980s as a result of competition. ...”
(Case COMP/E-1/37.512 - Vitamins)

Antitrust compliance in the crisis

- In case distribution concepts shall be redesigned / ‘toughened’, close legal consultancy is key; example:

“The Court confirms, however, that DaimlerChrysler participated, through its Belgian subsidiary, in an “anti-price-slashing” agreement with the Belgian dealers. The agreement was intended to restrict price competition in Belgium by introducing detection and deterrent measures against discounts of more than 3% for the E-class.”

(Judgment of the Court of First Instance in Case T-325/01 – DaimlerChrysler v. Commission)

Antitrust compliance in the crisis

- If a company might be considered dominant in a specific market, it should increase its vigilance because competitors, consumers and authorities will certainly do so

...

“[the guidance paper on Article 82] will ensure that the Commission's intervention is effective, and should leave dominant undertakings in no doubt that they will find the Commission in their way wherever their conduct risks increasing prices, limiting consumer choice or dissuading innovation. Clear rules protecting consumers and promoting innovation are all the more important in times of economic difficulty such as these.”

(Competition Commissioner Neelie Kroes, Brussels, 3 December 2008; EC press release IP/08/1877)

Antitrust compliance in the crisis

Summary and guidance:

- The competition law risk profile of corporations has changed due to the crisis – legal compliance programs should be adapted
- In the crisis, legal compliance trainings and refresher courses are even more important
- In-house counsel should focus on risk areas, i.e. those parts of the business where sales / margins have dropped significantly and overcapacities have built up

Dr. Daniel Lucien Bühr, Schindler Management Ltd

Advising on agreements and practices in a period of crisis : how to strike the right balance

Gabriella Porcelli – Philip Morris Italia SRL

- Focus:
 - Introduction on the evolution (necessary? useful?) by the EU Commission and National Competition Authorities in judging industry's behaviour and initiatives
 - Impact of leniency in the last few years, heavy fines leading companies to go out of business or to cut jobs, etc.

- Practical impact of the EC Guidelines on abuse in relation to the risk assessment and competition compliance activities normally now done in-house.

- Relationships with consumers:
 - consider broader impact of rules on unfair commercial practices and regulators' action in this area
 - also actions by consumers are more frequent - how to deal with them.

- Conclusion:
 - despite the crisis affecting resources and business approach, the rules tend to remain the same
 - but enforcement still very strict.
- Increase awareness internally, without frightening the business
 - focus more on consumer impact of business initiatives, promote cross functional risk assessment.

Dealing with Competition Authorities

Tom McQuail - Howrey LLP

Partner – London and Brussels

mcquail@howrey.com

Kroes on competition policy in a recession

“Competition policy is essential to make sure that there is a level playing field and that all national markets are open for all competitors, whatever their size.

In case you had any doubt, let me insist that I do not intend to stop enforcing the rules.

I will not be intimidated by large Member States or large companies who use the pretext of the crisis to try and escape the rules of competition.”

Overall approach

- Is it simply business as usual?
- Or is there likely to be some concession to take into account the current crisis?
 - Strong competition enforcement is good for the economy
 - Concern about short term fixes
 - But competition authorities (particularly NCAs) are subject to national political pressure
 - How can this be exploited?



Kroes on cartels

“We are crystal clear that cartels are harmful no matter what current economic growth rates are.

They cause billions of dollars of direct harm in our economy, and by cracking down hard on one cartel we estimate that we stop another five.

So we can't go soft on them.

More than that, if we went easy on cartels, a culture of 'anything goes' would quickly develop... and that's the same sort of risky, complacent culture that fostered this wider crisis”

Cartels

- Reappearance of crisis cartels?
- Will rationalization of businesses impact on the ability to deal with investigations and give rise to other issues (e.g. document retention)?
- Parental liability doctrine
- Prospects for fines/penalties – pleas for clemency falling on deaf ears (Belgian removals, Flat glass cases)

Kroes on merger control

“We aren't about to let EU Member States create inefficient national champions so they can patch up their pride.

Nor do we want to see two struggling banks cripple each other through a botched merger, or create another bank that is 'too big to fail.'

So it is business as usual in merger control – for all our sakes.”



Merger control

- Fewer notifications so greater attention to those that are notified?
- Cases such as the UK Lloyds/HBOS case are unlikely to have strong “precedent value”
- Prospects for the “failing firm defence”?
- Efficiencies and the need to support with evidence.
- Remedies – can the authorities be more flexible?

Kroes on flexibility



“We have spent the last five years developing, updating and streamlining our competition systems.

Now we are cashing in on them as their efficiency and flexibility help us to cope with the current volatile market conditions.

These reforms cover subsidy controls, cartels, mergers, antitrust and all the tools we possess to make markets work better.

We cut down the red tape and favoured pragmatism over some of the ideas and processes that had put competition policy in a ghetto marked *'for lawyers only'*.”

More flexibility on non-cartel cooperation arrangements?

- State aid reforms
- The possibility of a more pragmatic (less formulistic) approach from competition authorities – particularly to co-operation and specialization agreements
- A focus on efficiencies and benefits to consumers
- But suspicion of spillover into illegal behaviour?

Conclusion

- Kroes: “we aren't going soft on competition”
- Compliance in troubled times is more important than ever
- Consideration of consumer effects of actions important
- Recognise constraints on competition authorities but seek to identify where they can be flexible