

Agenda

Advancing economics in business

Competition law enforcement in times of crisis

Since the start of the current economic crisis, there have been calls on competition authorities to take a step back in their enforcement activity. How should authorities respond to these calls? Professor René Smits, Netherlands Competition Authority and University of Amsterdam, addresses this question and provides recent examples of how 'crisis cartels' have been dealt with in the Netherlands and elsewhere

In times of financial crisis, and certainly in a crisis as deep and unexpected as the current one, there can be an assumption that competition law would be one area of public law enforcement that should take a temporary step back. So, too, in this crisis. At the end of 2008, rumours were rife about 'the end of competition law', with practitioners pointing to the European Commission's acceptance of state aid on a wide scale as proof of this professed demise. However, the Commission proceeded to adopt a series of Communications as guidance for the finance industry and national governments on its approach to the provisioning of state aid to the banking sector, as shown in the box below. State aid for the real economy was also the subject of specific Commission guidance.¹ As I have described elsewhere,² the Commission and the European Central Bank worked together in the

background to uphold the internal market and the single monetary area as far as they could. In 2009 one senior Commission official, responsible at the time for processing state aid schemes over the weekend, notably used a 'car wash analogy' in a public speech in London.³ Defending the Commission's approach, she implied that Member States submitted schemes for state aid on Friday afternoons that contained anti-competitive elements and aspects that undermined the internal market. These schemes were put into operation on Monday mornings after having undergone a thorough cleansing through vetting by the Commission, much like a weekend wash for the family car. The competition authorities have rightly emphasised that enforcement should not be relaxed in times of crisis.⁴

Commission Communications on state aid provision to the banking sector

- The application of state aid rules to measures taken in relation to financial institutions in the context of the current financial crisis ('Banking Communication'), *Official Journal of the European Union* No. 270/8, 25.10.2008.
- The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ('Recapitalisation Communication'), *Official Journal of the European Union* No. C 10/03, 15.01.2009.
- Treatment of impaired assets in the EU banking sector ('Impaired Assets Communication'), *Official Journal of the European Union* No. C 72, 25.02.2009.
- The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the state aid rules ('Restructuring Communication'), *Official Journal of the European Union* No. C 195/9, 22.07.2009.

Later Communications set out the terms for state aid when the crisis began to last longer than initially expected.

- Communication from the Commission on the application, from January 1st 2012, of state aid rules to support measures in favour of banks in the context of the financial crisis ('Prolongation Communication'), *Official Journal of the European Union* No. C 356/7, 6.12.2011.
- The application of state aid rules to government guarantee schemes covering bank debt to be issued after June 30th 2010 ('Staff working paper'), 30.04.2010.

All these documents can be found at: http://ec.europa.eu/competition/state_aid/legislation/temporary.html.

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‘Programme states’: stronger competition laws and enforcement

The subject of competition law enforcement in times of crisis immediately brings to mind, at least to my mind, the elements in the conditionality for ‘programme states’ that concern competition law enforcement. Under the Ecofin Council decisions on Excessive Deficit Procedure,⁵ or under Council Implementing Decisions on the granting of assistance from the European Financial Stability Mechanism (EFSM), Greece, Ireland and Portugal have been obliged to increase the strength of their competition authorities and to widen the scope of competition law. In media parlance, this is known as ‘troika conditionality’—ie, attaching obligations to the credits granted to these Member States by the EU⁶ and the International Monetary Fund (IMF).⁷ These countries are also required to eradicate economic rigidities through structural reforms underpinned by strict cartel enforcement.

A few examples can help to clarify the extent of these requirements relating to competition law enforcement. During 2011, according to its Memorandum of Understanding with the IMF and the EU, Ireland was required to:

adopt legislative changes to remove restrictions to trade and competition in sheltered sectors including the legal profession, medical services and the pharmacy profession

and to:

[enhance] competition in open markets; legislation shall be reformed to generate more credible deterrence by providing for the possible imposition of fines and other sanctions in competition cases. In addition, the competition authorities will be required to identify sectors which are effectively outside the scope of competition law and identify processes to address those exclusions.⁸

Portugal was required to act as follows:

The competition and regulatory framework shall be improved. Portugal shall reinforce the independence and resources of the main national regulatory authorities; implement the Competition Law with a view to improving the speed and effectiveness of the enforcement of competition rules; and monitor the inflow of new cases and report on the functioning of the specialised court for competition, regulation and supervision.⁹

Greece was to adopt the following measure by the end of December 2010:

a modification of the institutional framework of the Hellenic competition authority (HCC) with a view to increasing its independence, establishing reasonable deadlines for the investigation and issue of decisions and entrusting it with the power to reject complaints.¹⁰

The crisis has brought new powers and specific objectives to the competition law enforcement agencies of these three Member States, where austerity might otherwise have meant a reduction in resources for competition law enforcement.

Crisis cartels in the Netherlands

An economic crisis of the severity of that which began in 2007/08 also leads to calls for crisis cartels. The Commission set out its approach in an *amicus curiae* brief in an Irish restructuring case that came before the courts in Ireland, and in a submission to the OECD.¹¹ The approach to restructuring excess structural capacity also features in an overview by the OECD.¹² The premise is that crisis cartels cannot be used to take excess capacity from the market in an economic downturn:

As a general rule, in a free market economy, market forces should remove unnecessary capacity from the market.¹³

Only in the case of structural (ie, not cyclical) overcapacity might there be a case for joint action by firms in the industry to remove excess capacity. Such a move would have to meet the four conditions for exemption from the cartel prohibition set out in Article 101 (3) TFEU.¹⁴

In the Netherlands, during the crisis there have been two separate instances of organised reduction of excess capacity.

- In the **inland waterways transport sector** in 2010, freighters considered agreeing to remove capacity from the market on a temporary basis, with a view to keeping prices at a level at which the ships’ operators could continue to operate. The NMa gave a negative short-form opinion (or ‘informal guidance letter’)¹⁵ on the proposed arrangements, as there were no grounds to accept a temporary laying-off of capacity with price increases as a result. The Inland Waterways Transport Crisis Committee did not wish to take structural overcapacity out of the market, but sought to limit capacity on a temporary basis ‘to mitigate the crisis for the inland water transport business’. The NMa considered the arrangement to be deliberately anti-competitive and was unconvinced by the economic analysis proffered by the Crisis Committee that prices would fall instead of rise. The NMa’s Chief Economist’s Office produced

its own analysis criticising the parties' approach. More recently, media reports have indicated that there are new plans for crisis measures in this industry.¹⁶

- A more interesting case came to light in 2012. Media questions to the NMa made us realise that public authorities, commercial real estate owners and the office space rental business, commercial banks, and other interested parties had entered into **an agreement to reduce the commercial office space** available in the market. The agreement sought to have 'excess' commercial office space demolished. Its stated intentions included raising prices for real estate renting, and removing offices from the market so that room could be made available for new office space construction. The demolition funds and office space vacancy plans had even been agreed to by the Minister of Economic Affairs and were announced in a press release by the Ministry of Infrastructure and Environment, whose Minister signed the agreement on June 27th 2012.¹⁷ Earlier that month, media questions to the NMa had led to discussions in the media on aspects of competition law, which resulted in the plan being adapted.

The parties to the agreement defined a 'properly functioning office space market' as one in which the stock of office space is more closely aligned with the different demands of users in terms of quality, location, functionality and size. Regional planning was to be agreed on for the office space market in 'sub-regions' of the Netherlands. In these sub-regions, funds for the demolition of office space could be created, to be financed by levies on office space held. One of the requirements for these funds would be their compliance with EU and national competition rules, and with EMU budgetary rules.¹⁸ Where possible, banks agreed to avoid financing office space projects that would lead to more rather than less office space. Individual undertakings would be put under pressure from their trade organisations, which had signed the agreement, to act accordingly. In another bow to competition law, it was specified that this pressure on members, or actions by public authorities, should conform to EU and national competition law. The covenant would be published in the *Staatscourant*, the Bulletin of Acts, Orders and Decrees of the Netherlands, to underline its official status.

Meanwhile, the consensus achieved in summer 2012 is unravelling. Municipal authorities are retracting from their intentions to sign up. In particular, the

self-serving plans have been undermined by highly critical analysis, promoted by a professor of real estate development who is also connected to a construction business, and a counsellor of the GreenLeft party in Amsterdam, who apparently considers demolition that provides room for new construction to be a sustainable activity.¹⁹ Our press officer, Barbara van der Rest, was also highly critical when she heard about the plans.²⁰ The NMa's official line is that we will look at any demolition fund in the context of the sub-regional markets, and approach it accordingly.

Closing remarks

There is much more to be said about competition law enforcement in times of crisis than I can cover in this article. There is the issue of inability to pay,²¹ which the Commission had to deal with early on during the crisis.²² And courts may take the crisis into consideration when assessing the fines that competition authorities should impose; an example being the French Competition Authority when it fined the steel cartel—in this case, the Paris Cour d'appel (appeal court) held that the fines did not sufficiently take the crisis into account.²³ This view was contradicted by the Cour de cassation (the supreme court in France) in a subsequent judgment in a different case, in which the court held that individual cases of inability to pay can be taken into consideration when assessing the appropriateness of a fine, but a general crisis for the sector concerned (in this case, temporary staff agencies) cannot.²⁴

With the crisis still not over, other cases will arise in which the crisis will be pleaded as grounds for taking a particular approach to a situation or for particular conduct. There are certainly valid reasons to assess the impact of the crisis on the conduct of parties in a given case. Moreover, the crisis may lead to a rethink of our assumptions about the economy and society. Reconsidering the dominant approach to economic growth may be warranted for reasons of sustainability, with economic actors being increasingly inclined to take the negative effects of their activities into account. But authorities and companies should be on the alert for false alarms, such as when the crisis, or public goals other than free and open markets²⁵ (eg, sustainability concerns), are invoked in order to gloss over infringements of competition law or to undermine the single market in Europe.

René Smits

¹ 'Temporary Union Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis', *Official Journal of the European Union*, C6/5, 11.1.2011.

² Smits, R. (2010), 'European Supervisors in the Credit Crisis: Issues of Competence and Competition', chapter 15 in M. Giovanoli and D. Devos (eds.), *International Monetary and Financial Law: the Global Crisis*, Oxford University Press, pp. 305–27.

³ Schwimann, I. (2009), 'Policy and Processes of the Commission in relation to Aid to Banks', 'Competition Law in the Financial Services Sector', London, June 23rd.

⁴ See, notably, Fingleton, J. (2009), 'Competition Policy in Troubled Times', Office of Fair Trading, January 20th. See, more recently, the speech given by Competition Commissioner Joaquín Almunia at the same AmCham Conference on December 6th 2012, at which these remarks were made in a panel: Almunia, J. (2012), 'The Role of Competition Policy in Times of Crisis', SPEECH/12/197, December 6th.

⁵ This is the procedure under Article 126 of the TFEU, topped up by the Stability and Growth Pact and recently strengthened, to oversee compliance with budgetary discipline by EU Member States. It is a cornerstone of the economic governance of the eurozone under Economic and Monetary Union (EMU).

⁶ Actually, EU credits have been granted either by Member States acting in cooperation, or by the funds established for the granting of credit in times of need: the EU-based EFSM and the separate European Financial Stability Facility (EFSF), which operated as a joint special-purpose vehicle of the eurozone Member States. See http://ec.europa.eu/economy_finance/european_stabilisation_actions/index_en.htm and <http://www.efsf.europa.eu/about/index.htm>. The EFSM and the EFSF have been replaced by the permanent European Stability Mechanism (ESM; see <http://www.esm.europa.eu/index.htm>), on the legality of which the European Court of Justice (ECJ) gave a judgment in Case C-370/12 (*Pringle*) on November 27th 2012; see www.curia.europa.eu.

⁷ On the IMF's involvement with Europe, see <http://www.imf.org/external/region/eur/index.htm>.

⁸ Article 3 (7) (f) and (l) of 'Council Implementing Decision of 7 December 2010 on Granting Union Financial Assistance to Ireland (2011/771/EU)', *Official Journal of the European Union* L 30/34, 4.2.2011, amended several times subsequently.

⁹ Article 3 (r) of 'Council Implementing Decision of 10 July 2012 amending Implementing Decision 2011/344/EU on Granting Union Financial Assistance to Portugal (2012/409/EU)', *Official Journal of the European Union* L 192/12, 20.7.2012, subsequently amended.

¹⁰ Article 2 (3) (j) of 'Council Decision of 10 May 2010 addressed to Greece with a view to Reinforcing and Deepening Fiscal Surveillance and giving Notice to Greece to take Measures for the Deficit Reduction judged necessary to Remedy the Situation of Excessive Deficit (2010/320/EU)', *Official Journal of the European Union* L 145/6, 11.6.2010, amended several times subsequently, notably recast by 'Council Decision of 12 July 2011 addressed to Greece with a view to Reinforcing and Deepening Fiscal Surveillance and giving Notice to Greece to take Measures for the Deficit Reduction judged necessary to Remedy the Situation of Excessive Deficit (recast) (2011/734/EU)', *Official Journal of the European Union* L296/38, 15.11.2011, and by 'Council Decision of 13 March 2012 amending Decision 2011/734/EU addressed to Greece with a view to Reinforcing and Deepening Fiscal Surveillance and giving Notice to Greece to take Measures for the Deficit Reduction judged necessary to Remedy the Situation of Excessive Deficit', *Official Journal of the European Union* L 113/8, 25.4.2012.

¹¹ Pursuant to Article 15 (3) of Regulation 1/2003 (*Official Journal of the European Union* No. L 1/1, 04.01.2003), the Commission may submit written observations (*amicus curiae* briefs) to the courts of Member States '[w]here the coherent application of [Articles 101 and 102 TFEU] so requires'. An overview of the Commission's *amicus curiae* briefs and an explanation of their context can be found at: http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html. In this case, see European Commission (2003), 'The High Court 2003 No. 7764P between the Competition Authority and The Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited, observations of the Commission under Article 15, Paragraph 3, of Regulation no 1/2003'. OECD (2011), 'Global Forum on Competition: CRISIS CARTELS, Contribution from the European Union, Session III', DAF/COMP/GF/WD(2011)20, January 27th.

¹² See the overview of the Policy Roundtables in 2011 on this subject at: www.oecd.org/daf/competition/cartels/48948847.pdf. See also OECD (2011), 'Global Forum on Competition: Crisis Cartels, Background Note, Session III', DAF/COMP/GF(2011)6, January 26th.

¹³ Para 33 of the Commission's *amicus curiae* brief in the *Irish Beef* case.

¹⁴ See para 35, 36 and 13–16 of the Commission's *amicus curiae* brief in the *Irish Beef* case.

¹⁵ NMa, 'Informeel Zienswijze: Oplegging Crisisberaad Binnenvaart' (Short-form Opinion: Storage Arrangements Inland Waterways Transport Crisis Committee). Translations are by the author.

¹⁶ See the warning issued by the NMa on February 10th 2012 against anti-competitive approaches to the crisis, couched in positive terms in the pro-competitive measures taken alongside them, available at: www.nma.nl. More recently, on February 13th 2013, Melanie Schultz van Haegen-Maas Geesteranus, the Dutch Minister of Infrastructure and the Environment, sent a letter to the Second Chamber of Parliament on sea and river transport issues. In a passage relating to inland waterways transport, she reiterates that competition law, serving competition and the end-consumer, is as relevant in times of crisis as it is in better times, and notes that crisis cartels are acceptable only in cases of structural excess capacity; moreover, they must be necessary, proportional and beneficial to consumers. See Ministerie van Infrastructuur en Milieu (2013), 'Beantwoording resterende Vragen AO Zee- en Binnenvaart 6 februari 2013', letter to Parliament, February 13th.

¹⁷ See Ministry of Infrastructure and the Environment (2012), 'Kantorentop: Eensgezinde Aanpak Leegstand Kantoren', press release, June 27th. Note that NMa staff are employed by the Ministry of Economic Affairs, although they report solely to the NMa Board, an independent supervisory body.

¹⁸ This refers to the Excessive Deficit Procedure and the Stability and Growth Pact, part of the law on EMU. See footnote 5 above.

¹⁹ See 'Sloopfonds Kantoren op de Helling' (Demolition Fund for Office Space going Downhill), available at: <http://www.binnenlandsbestuur.nl/ruimte-en-milieu/nieuws/sloopfonds-kantoren-op-de-helling.8503006.lynkx>.

²⁰ See *Het Financieel Dagblad* (2012), 'NMa Kritisch over Sloopfonds Kantoren' (NMa Criticises Demolition of Offices), June 6th. For a critical overview of arguments against the demolition fund, see *Follow the Money* (2012), 'Sloop het Spilzieke Sloopfonds', July 9th.

²¹ See para 35 of the Commission's Fining Guidelines, *Official Journal of the European Union* No. C 210/2, 1.9.2006.

²² Kienapfel, P. and Wils, G. (2010), 'Inability to Pay – First Cases and Practical Experiences', *Competition Policy Newsletter*, 3, pp. 3–7.

²³ Decision of January 19th 2010, available at: http://www.autoritedelaconurrence.fr/doc/ca08d32_siderurgie.pdf.

²⁴ Decision of the Cour de cassation of March 29th 2011, available at: http://www.autoritedelaconurrence.fr/doc/cass_travail_temporaire.pdf.

²⁵ For an excellent recent overview of public goals in EU competition law, see Witt, A.C. (2012), 'Public Policy Goals under EU Competition Law – Now is the Time to Set the House in Order', *European Competition Journal*, 8:3, December, pp. 443–71. For an overview of sustainability-related competition cases and the NMa's broad approach towards sustainability initiatives, see: <http://www.nma.nl/mededinging/duurzaamheid/default.aspx>.

If you have any questions regarding the issues raised in this article, please contact the editor, Dr Leonardo Mautino: tel +44 (0) 1865 253 000 or email l_mautino@oxera.com

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