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Competition policy in times of financial crisis: more or less?

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What does a competition lawyer expect during times of crisis? 1.

- crisis from the point of view of companies = unexpected drop in demand
- this is likely to break up many existing cartels
- however, empirical studies suggest the contrary: many cartels are formed during economic difficulties (e.g. French beef case, Sotheby's/Christie's case, carbonless paper case)



What does a competition lawyer expect during times of crisis? 2.

- cartels allow
 - to deal with overcapacity and
 - to reduce the risk of bankruptcy
- expected behaviour of dominant firms: danger of a financially strong company taking the opportunity to foreclose a rival
- private enforcement of anti-trust laws: on the edge of bankruptcy companies in the production chain are more likely to sue for damages against up-stream firms



What does a competition lawyer expect during times of crisis? 3.

- unfair manipulation of consumer choice: due to high turnover losses advertisements are likely to become less cautious
- also: crisis might also have an effect on the managers' normative perceptions towards cartel laws



Competition policy

1. Competition enforcement
2. Competition advocacy
3. Competition culture



COMPETITION ENFORCEMENT 1.

- A) agreements restricting competition (e.g. motorway-cartel)
- B) abuse of dominance (e.g. Microsoft)
- C) merger control
- D) unfair manipulation of consumer choice
- E) + State aid control (EC dimension)



Competition enforcement 2.

A) agreements restricting competition (e.g. motorway-cartel)

a) hard-core restrictions – for example: price-fixing

- market sharing
- quota allocation

- these are, by their substance, negative for consumer welfare
- thus, competition enforcement may not be lenient towards these infringements – not even in times of crisis!



Competition enforcement 3.

- b) certain forms of cooperation are, in general, permissible
- those, which fall under the de minimis criteria (but: such an agreement may not include a price-fixing or market sharing clause)
 - those which may be exempted (e.g. the agreement is advantageous for competitiveness, beneficial for consumers, etc.)
 - those, which fall under the scope the scope of application of a (European) block exemption regulation



Competition enforcement 4.

- a few examples
 - recommendations of trade associations (e.g.: calculation models, cost estimates may be beneficial)
 - exchange of information (e.g.: unproblematic if data from the past is being circulated)
 - general terms and conditions (e.g.: models may be positive, but they should not be obligatory)



Competition enforcement 5.

B) abuse of dominance (more effect-based approach)

C) merger control

- concentrations have an effect on the structure of the market for a long time
- therefore, a too lenient approach towards mergers may be an ease for the current economic problems on the short run, but, on the long run, competition on the market will suffer;
- however, the failing firm defence may still be applicable!
- the speed of the procedures may be increased in cases which do not seem to be problematic at first sight



Competition enforcement 6.

D) unfair manipulation of consumer choice

- allocative efficiency
- examples: Tesco, OTP Bank, etc.
- justification „we had to do it because of growing competitive pressure in the crisis” not acceptable
- however: mitigating factors in setting the fine by the Competition Authority



Competition enforcement 7.

E) State aid control

- State aid is granted by the individual Member States, which is controlled by the European Commission) –
- measures, for ex.:
 - state guarantees for loans at a reduced premium; subsidised loans; risk capital aid for SMEs extended
 - speedy assessment



COMPETITION ADVOCACY 1.

- Competition-friendly legal environment must be created
- the State should not impede competition by, for ex., introducing anti-competitive laws
 - artificial barriers of entry and exit should not be created
 - legal monopolies should not be established
 - negative example: prohibition of „sales below cost”

COMPETITION ADVOCACY 2.

- the State should carry out deregulation in order to introduce more competition on certain markets
 - examples (railways, postal services, telecommunications, etc.)
 - competition advocacy of the GVH (for ex.: medicines)
 - the Australian example – results



COMPETITION ADVOCACY 3.

- suppressing competition during crisis is counter-productive on the long run
- historical (negative) example: suspension of competition policy by President Roosevelt during the 1930s New Deal
- results: increase in unemployment by 24%, market concentrations, Great Depression extended

COMPETITION CULTURE



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- the GVH's role in spreading competition culture
- make companies and consumers aware of their rights (for ex.: complaints – everybody may submit it to the GVH)



Further implications for the enforcer

- driving the firm out of the market must NOT be the aim of competition enforcement
- economic difficulty taken into account
 - when setting the fine (GVH's level)
 - when deciding about the suspension of the execution of the fine (court level)

Thank you for your attention!

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