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COVID-19 Update

Antitrust

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COVID-19 crisis: Guidelines for dealing with antitrust risks

The COVID-19 crisis forces companies from a wide range of industries to cooperate and to change their market behavior. Antitrust rules, however, remain applicable. In the event of a violation of the antitrust law requirements, sanctions may be imposed – despite the COVID-19 crisis.

Background

Companies in a wide range of industries are facing major challenges due to the COVID-19 crisis. Such challenges include strongly increased or strongly decreased demand, possible supply bottlenecks or even possible supply shortages.

Although the situation is exceptional, antirust rules remain applicable. The only exceptions are if the government and authorities order measures to combat the COVID-19 crisis that restrict competition.

This means that companies must continue to comply with the antitrust law requirements regarding agreements between competitors, suppliers, dealers and customers.

At times of the COVID-19 crisis, when there is a need for companies to cooperate more closely with other market participants or to change their market behaviour, this can be a particular challenge.

In order to mitigate the risk under antitrust law, we recommend that the following guidelines for cooperations and for dominant companies be complied with.

Guidelines for Cooperations

In the COVID-19 crisis, various types of cooperations may raise antitrust concerns. This can especially be the case for the following cooperations:

- cooperation for the development of a vaccine;
- agreement among competitors to jointly coordinate supplies;
- joint capacity planning to meet increased demand; or
- exchange of internal communication regarding the management of the crisis.

Even though it must be assessed on a case-by-case basis whether a form of cooperation is permissible under antitrust law, the following basic guidelines apply:
Cooperations between **competitors** that lead to so-called "hardcore agreements" and cannot be

justified by economic efficiency reasons are still sanctionable. These include:

- price fixing agreements (direct or indirect);
- agreements on the allocation of markets (by territory or business partner); and
- agreements on the limitation of quantities (production, delivery or purchase).

Cooperations between **companies at different market levels**, for example between manufacturers and distributors, which lead to resale price maintenance or absolute territorial protection, are also sanctionable "hardcore agreements". This can, for example, be the case when manufacturers and their distribution partners control and coordinate supply for certain countries.

Other types of agreements concluded in conjunction with cooperation agreements can also be problematic from an antitrust law point of view if they "significantly restrict competition". A possible example is an agreement on the coordination of supplies.

In addition, the **exchange of non-public information** is problematic from an antitrust law perspective (although not necessarily sanctionable in every case):

- This applies in particular to information on prices, territories, products or quantities;
- The exchange of strategic data is more problematic than the exchange of other data. This includes, for example, prices (actual prices, discounts, increases, decreases, reductions and rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies or R&D programmes and their results;
- Individualised data are more sensitive than aggregated data, where the recognition of individualised company level information is sufficiently difficult;
- Further criteria that are taken into account in the assessment are the age of the data, the frequency of exchange and the market coverage of the companies involved.

These assessment criteria must be taken into account prior to any information exchange. If an exchange of strategic information is absolutely necessary to overcome the crisis, it must be clarified on a case-by-case basis whether such an exchange is exceptionally justified. For example, an exchange of information on capacities would be conceivable if the increased demand can no longer be met by the company alone. Justification is also conceivable in the case of an exchange of research results for the faster development of a vaccine.

Guidelines for Dominant Companies

Dominant companies have a special responsibility not to further weaken competition that is already weakened by their market position. This is especially true during the COVID-19 crisis.

Even if the extraordinary situation forces dominant companies to unilaterally change their market behaviour, they should first check the conformity of such changes with antitrust law.

This applies in particular in the following cases:

- enforcement of price increases;
- applying different prices or terms of business to comparable customers;
- refusal to supply; or
- extraordinary termination of existing supply contracts.

It should also be noted that the COVID-19 crisis could lead to a concentration of the markets, from which market dominance could result. Also in this case, the compliance of the market behaviour with antitrust law must be carefully examined.

If dominant companies do not comply with the rules of conduct imposed on them by the Cartel Act, they may be threatened with sanctions – despite the COVID-19 crisis.

Please do not hesitate to contact us in case of any questions.

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