

Hellenic Competition Commission

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Hallo, I am happy to be here to share with you the experiences gained during the covid-19 crisis as well as the lessons learned from it for the future implementation of the competition law.

Let me say a few words as to the actions taken from our authority. We decided to act proactively to monitor markets of essential goods and started several ex officio investigations in healthcare materials and foodstuff, where price rises and/or disruption of supply were observed. The analysis of the results is under way. At the same time we created a task force to address requests of guidance by companies with respect to horizontal and vertical agreements. We uploaded to our site about 40 relevant questions and answers to let them know what is allowed and what not, nevertheless emphasizing that we would intervene harshly in cases where anti-competitive practices are observed.

Now we are in the next phase, since the lockdown has been brought to an end and the real economy has to catch up. And in this race, the competition authorities have to adjust.

What are the lessons learned?

First, in the short term, during a crisis, authorities should have all the means at their disposal to act fast and efficiently to accommodate requests for temporary exemption of necessary cooperative agreements between competitors, in order to ensure steady supply of essential goods and avoid shortages. Authorities should also have the tools to tightly monitor such agreements during their implementation and also to ensure their termination after the crisis is over. Any such agreements and related procedures should be thoroughly transparent.

Second, what can be learned for the adjustment of the principles of competition law in the long term to accommodate emerging priorities? Should public interest issues such as health and environmental protection be incorporated and in which way in competition law assessment and competition case law?

The EU Charter of Fundamental Rights stipulates in its

Article 35 that

A high level of human health protection shall be ensured in the definition and **implementation** of all the Union's policies and activities.

Furthermore, Article 37 of the Charter of Fundamental Rights includes principles of Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be **integrated** into the policies of the Union and ensured in accordance with the principle of sustainable development.

These are individual rights as well as broader principles for guiding collective action at the EU level, but also at the level of member States.

We consider that the Charter gives competition authorities broader interpretative guidance to take into account these public interest principles in the interpretation of competition law and case law, more or less strictly according to the wording.

One way to go is through the granting of an exemption under article 101 (3) of the Treaty for the Functioning of the European Union (TFEU) and the conditions set thereby (improvements and progress, fair share of the resulting benefits to consumers, no more restrictive than necessary, no elimination of competition). This can only be used ad hoc.

Another way would be to explicitly refer to public interest issues in the Horizontal Block Exemption Regulations of the EU (technology transfer and specialisation agreements) and the corresponding Guidelines on horizontal cooperation which will be revised in 2021.

In any case we do have the tools to take into consideration public interest issues already, as some case law on Article 101(1) TFEU demonstrates. Depending on the wider context of the case and the public interest at hand three ways have been followed so far in case law.

When it comes to less tangible public interest issues, a rather intuitive balancing analysis has been employed. Consequently, public interest objectives have occasionally outweighed the finding of a restriction of competition in the context of Article 101 (1) when these are ancillary to regulatory objectives (see the Wouters and the Meca-Medina case law). In this case the means-end and proportionality test is intuitively applied.

When more tangible public interest issues are at stake, a cost-benefit analysis may be carried out under Article 101(3) TFEU. There are widely accepted economic tools to measure future trade-offs with discount values of environmental and health concerns. In this case, economic incentives are taken into account and economic efficiency is pursued (see, for instance the Dutch case of Chicken of Tomorrow).

Finally, one may take a more proactive perspective of these public interests and frame the interpretation of both Articles 101 and 102 TFEU, in order to go after restrictive to competition practices that also jeopardise the broader public interest aims pursued. An example of such an approach is the recent Facebook case of the Bundeskartellamt

which found that a restriction of data protection constitutes an abuse of a dominant position under the German Competition law Statute.

However, the fundamental issues that have to be dealt with the accommodation of public interest goals in competition law implementation are two in my opinion:

How broad are the public interest considerations to be taken into account?

The Charter of Human Rights refers to some general public interest goals, (such as the protection of personal data, health, environment). These broad goals can and are met by other legislation. Such legislation should be probably considered as an umbrella for all other policies.

Public interest concerns emerging from other regulations (licensing, certification for waste management, traceability of spare parts in medical equipment) may lead or contribute to economic concentration. In regulated markets, competition may be enhanced at a different level by setting the necessary conditions (allowing subcontracting, providing non-authorized service providers with the necessary technical information, etc like the block exemption regulation for vehicles had done).

To conclude, there are many facets of public interest, including competition, health, environment and broader sustainability issues and many institutions that need to interact for a single or multiple public interest goals. In both cases a polycentric analysis is needed to accommodate these various concerns and the decision procedure at hand, but the relevant balancing exercise, or something else, has to be decided beforehand.

In any case, competition authorities should never forget that economic incentives should not be distorted in the medium to long-term to pursue economic efficiency. So whatever the outcome of a case is, economic incentives for progress and innovation should be promoted in one or the other way.