Technical cooperations between competitors after the "emission cartel" decision

Digitalisation, changing markets and disruptive business models are forcing many companies to reposition themselves. In view of the associated challenges, (loose) cooperations in particular between competitors seem attractive because they offer flexibility and because the companies involved often face similar problems.

Traditionally, cooperations between competitors in the technical field were considered less critical from an antitrust point of view. However, the so-called "emission cartel" decision of the EU Commission might have shed a new light on such cooperations.

Who is actually a competitor?

There are higher antitrust hurdles for cooperations between competitors than for those between companies active on different market levels or even markets. Therefore, the starting point of any analysis should be to clarify whether the potential cooperation partners are actual or potential competitors. A potential competitive relationship can be particularly difficult to assess. One has to examine whether – from a customer/-supplier perspective – the potential partner can offer the same products in the same geographic market in the foreseeable future with a reasonable effort.

Legitimacy of cooperations - lessons learned from the "emission cartel"

In case competitors intend to cooperate, two key questions need to be answered:

- Is the cooperation as such permissible under antitrust law?
- How can the cooperation be structured in a way that complies with antitrust law?

Permissibility

In addition to the Block Exemption Regulations, in particular the EU Commission's Horizontal Guidelines provide guidance on cooperations and under which circumstances they do not constitute a restriction of competition or can be justified.

However, the "emission cartel" decision raises the question under which circumstances technical cooperations between competitors are still legitimate.

The EU Commission seeks to address this question via a "Guidance Letter", which it has published in parallel to its decision. Even though the letter refers to the specifics of the case, the following principles can, inter alia, be drawn from it:

- The development of a common **technical basis** for a product or service is in principle permissible if each individual company remains free in how to use this basis. Additionally, the joint development of a basic version must not in itself have a restrictive effect on competition, for example because the individual companies do not retain sufficient individual design options.
- Focussing on a certain **technical solution** in the framework of an (otherwise permissible) cooperation is permissible, as long as the cooperation partners are, at all times, free to develop or use a different technical solution.
- The **standardisation of interfaces** may be permissible, provided that it leads to efficiency gains and cost savings and does not necessarily prescribe a specific technical solution.
- The **definition of quality standards** may be permissible as long as the companies involved remain free to go beyond these quality standards. Moreover, the standards must not in themselves have a restrictive effect on competition, for example by referring to an essential product feature.
- The **standardisation of signal sounds or warning signs is permissible** as long as they do not serve as a differentiating factor in competition and as long as the standardisation makes it easier for consumers to switch between the actual products, e.g., the stipulation that a warning light should always be red and positioned in a specific location.
- The **development and articulation of a common position on future legislation** is permissible if the discussion is limited to future legislation and does not have the object or effect of coordinating future market behaviour.

Structuring of the cooperation in compliance with antitrust law

In case a cooperation between competitors is permissible, only such data and information may be exchanged between the cooperation partners which are absolutely necessary for the implementation of the respective cooperation. If the cooperation requires the exchange of competitively sensitive information, Chinese walls, so-called clean teams or external consultants may be established/used for the information exchange.

The need of structuring the cooperation in a way that complies with antitrust law was

once again emphasised by the EU Commission. According to the "emission cartel" decision, an exchange of information which serves a legitimate purpose is also a restriction of competition if:

- the exchange goes beyond what is necessary to achieve the legitimate purpose; and/or
- the data exchanged is not sufficiently anonymised or aggregated.

Outlook

The EU Commission states that the "emissions cartel" is an example of "*what can happen when an actually legitimate technical cooperation goes wrong*". Companies should therefore also carefully review technical cooperations under antitrust law and closely monitor them. In particular, it should always be examined whether (i) the potential cooperation partner is an actual or potential competitor; (ii) the cooperation as such is permissible under antitrust law; and, if these two questions can be answered with "yes", (iii) how the cooperation can be structured in line with antitrust law.

Depending on the individual case, it may also be an option to reach out to the Federal Cartel Office or the EU Commission to confirm the permissibility of a cooperation. Recently, both authorities have often stressed that they are generally open to this.

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