

Crisis Cartels & Bird & Bird

Geoffroy van de Walle de Ghelcke

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Introduction: « Crisis Cartels »

Term can cover many types of collusion

Pure
Restructuring Agreement

Hardcore cartel

Capacity

Entry /Exit conditions

Output

Customers/Territory

Prices

Restructuring Agreement

Main Characteristics

- Agreement to reduce **capacity** and not
 - Output
 - Prices
 - ...
- Includes majority of the market
- Limited in time
- Solves a **structural** (and not **cyclical**) crisis

Structural Overcapacity

“over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium term”

Twelfth Report on Competition Policy, point 38

Why the Need for a Restructuring Agreement ?

Game Theory: War of Attrition

Firms induce each other into exiting the market to reap monopoly benefits, wait for the others to exit first.

More likely if:

- Stable, transparent and symmetric market structure
 - Firms only engage in a war of attrition if they have a reasonable prospect of winning it
- Costly exit (high fixed costs)

Article 101(1): Always a Restriction by Object?

Irish Beef (C-209/07)

- Restructuring agreement “*conflicts with the principle that each economic operator must determine independently the policy which it intends to adopt on the common market*” and it “*deliberately substitutes practical cooperation between undertakings for the risks of competition*” (§§33 - 34)
- §36: “*the means put in place to attain the objective of the BIDS arrangements include restrictions whose object is anti-competitive.*”
 - Production of stayers frozen
 - Obligation to dispose of processing plants
- Reply : “*an agreement with features such as those of the (...) contract (...) has as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC.*”

Article 101(3) – Chosen topics

First Condition - Which efficiencies?

- Removing *inefficient* capacity
- Increase efficiency of stayers
 - Economies of scale
 - More efficient use of fixed costs
 - What if restrictions on increase of output?
- Other efficiencies?
 - Effect on employment
 - Environmental benefits

Guidance

- Synthetic Fibres (1984)
- Dutch Bricks (1994)
- Reports on Competition Policy (up to 1993)
- EC *amicus curiae* in Irish Beef (2010)
- Irish NCA notice (2011)
- General Guidelines (2004)

Article 101(3) – Chosen topics

Third Condition – Indispensability

“Less Restrictive Means” (§75 of General Guidelines)

- Specialisation Agreements
 - Block Exemption
- Mergers and Acquisitions
 - Always less restrictive?
- State aid
 - Closure aid

Guidance / Advocacy

Legal uncertainty as to compliance of restructuring agreements

- Decisions date from notification era (outdated?)
- *Irish beef*: CJEU did not discuss Article 101§3
- General Guidelines sufficient?

Potential Guidance

- Article 10 Reg. 1/2003
- Guidelines
- Advocacy

Conclusions

- Restructuring agreements can be efficient ways of dealing with overcapacity
- *“It will be very difficult for the parties to succeed with a defence under Article 101(3)”*

EU Submission to OECD Roundtable on Crisis Cartels
- Limited guidance available

Thank you **& Bird & Bird**

Geoffroy van de Walle de Ghelcke

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