Luxembourg Newsflash

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Commercial cooperation amongst competitors: the Webtaxi decision of the Competition Council of 8 June 2018

On 8 June, the Luxembourg Competition Council exempted an agreement between Benelux Taxis, Inter-Taxis and other Taxi companies who jointly use the Webtaxi reservation centre for taking bookings from customers. It is the Competition Council's first decision exempting an agreement or practice restricting competition between competitors from the prohibition on anticompetitive agreements. It is all the more remarkable since the cooperation involved price fixing, which is a very serious per se restriction of competition law and can result in large fines. The Council cleared the cooperation because it considered that it was justified, creating more advantages than disadvantages for consumers and competition in general.

This decision is of interest to economic operators in all sectors, given the broad scope of the competition rules. The purpose of this newsflash is therefore to draw practical lessons to be learned from the decision (III) after a brief summary (I and II).

I. The services performed by Webtaxi

Customers can contact Webtaxi by phone, via the website or mobile application. Using a GPSR application, Webtaxi assigns the taxi closest to the customer's pick-up location. All drivers of the taxi companies using the Webtaxi reservation centre may be called upon, not just those driving under the Webtaxi name.

When booking a trip, the reservation centre determines the price via an algorithm. Based on pre-determined variables (price per kilometre, coverage, length of trip, traffic conditions), this price is non-negotiable and is binding on both the customer and the driver.

II. The Council Decision

Following a complaint by a competitor and an investigation concerning the services provided by ProCab, now Webtaxi, to taxi companies the Council first established the existence of a price-fixing agreement between competitors, which is normally presumed anticompetitive and prohibited by Article 3 of the Luxembourg Competition Act. Highlighting that there is no absolute prohibition on agreements between undertakings, the Council then examined whether or not the agreement in question qualified for an individual exemption under section 4 of the Act permitting agreements which are overall pro-competitive.

In this respect, the Council assessed whether the agreement satisfied the four conditions for the exemption to be met. Having considered that the agreement provided efficiency gains (reduction of empty runs, waiting time) and benefits for consumers (including price reductions due to the application of the algorithm), the Council regarded the price fixing as indispensable to achieving those efficiency gains, in the absence of a viable alternative. It also found that competition was not eliminated on the market, since the parties to the agreement had a 30% market share.

III. Lessons to be learned

Competitors, i.e. companies active on the same market, may cooperate with each other in pursuit of a legitimate purpose. This can include joint research and development, production, marketing etc. However, that cooperation must bring efficiency gains that the participants could not have achieved on their own and which, at least in part, benefit the customers. The companies involved must be able to prove the existence of those benefits.

In such a context, competitors may restrict competition, even seriously, by exchanging commercially sensitive information, fixing the prices charged to customers and dividing up markets so long as those restrictions are strictly necessary for and proportionate to the legitimate cooperation.

However, it must be borne in mind that the higher the market shares of the undertakings concerned, the more difficult it will be for them to justify their cooperation and the restrictions of competition attached to it. This is because the greater the market power, the higher the risk of anticompetitive effects arising is.

In particular, if the competitors do not exceed 15%, 20% or 25% combined market share, depending on the type of cooperation envisaged and in the absence of serious restrictions of competition, such as price fixing, in the agreement, their cooperation may benefit from a presumption of legality as described in the European Commission's block exemption regulations and guidelines on horizontal cooperation agreements. If those conditions are not satisfied, an in-depth and case-by-case analysis of the cooperation will need to be carried out (as was the case in the Council’s decision) to ensure that it is lawful.

As it is normally not possible to ask the European Commission or the Luxembourg Competition Council for clearance of these types of arrangements, it may be useful to have the cooperation analysed by an internal lawyer or by an external legal adviser. This is particularly the case given that fines are calculated on the basis of the gravity of the restrictions of competition concerned and the precise nature of the cooperation concerned (with each participant liable to a fine of up to 10% of its consolidated worldwide turnover).

These lessons apply to all sectors of the economy. This is particularly so for operators in sectors that are currently under the microscope of the European Commission and/or national authorities, such as the banking, financial and insurance sectors as well as the automotive, media, energy, transport, pharmaceutical sectors.

For more information, please contact our EU & Competition law experts:

Philippe-Emmanuel Partsch
Partner
philippe-emmanuel.partsch@arendt.com

Thomas Evans
Senior Associate
thomas.evans@arendt.com