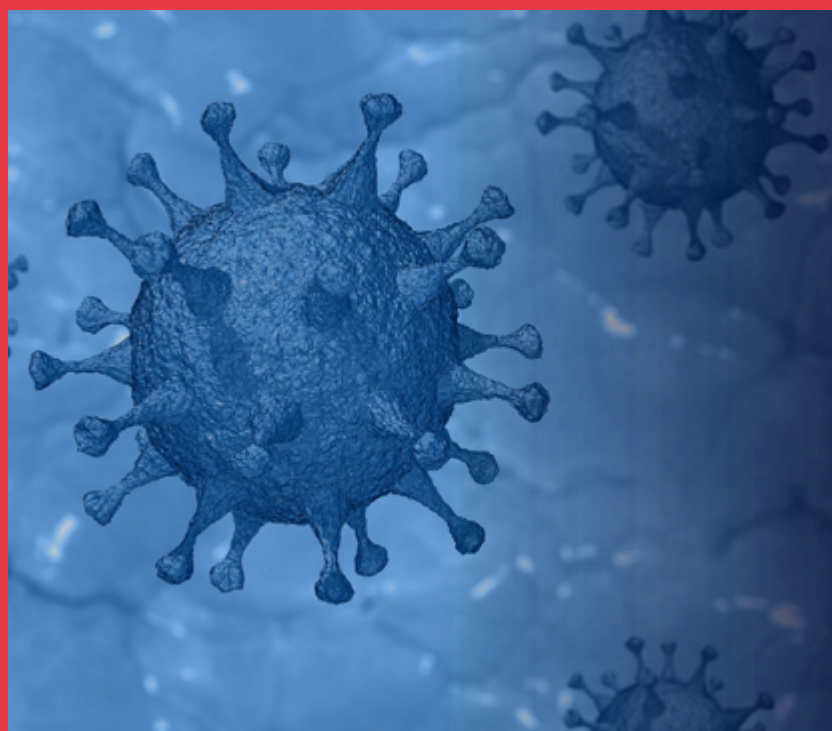


# COMPETITION POLICY IN TIMES OF CRISIS

Supplement to Competition Policy  
in Eastern Europe and Central Asia



OECD-GVH Regional Centre  
for Competition in Budapest (Hungary)  
July 2020



Gazdasági Versenyhivatal  
The Hungarian Competition Authority

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# Competition Policy in the Time of COVID-19



**Angel Gurría**  
OECD Secretary-General

Competition policy is one of the most important tools that governments have to build more resilient, inclusive, and sustainable economies. It is also a crucial tool to reduce inequalities and build public trust. The COVID-19 crisis has magnified its importance.

## *The OECD's response to the crisis*

The OECD has been actively supporting our members and partners throughout the COVID-19 crisis. As part of our response, we launched a Digital Hub on Tackling the Coronavirus, providing a single entry point to the OECD's analysis on the economic and social impacts of COVID-19. To date, we have published over 100 policy briefs in virtually all areas of our policy work.

We have also provided policy advice to global fora such as the G20; we have kept open lines of communication with other multilateral organisations to ensure a co-ordinated and coherent response; and we have organised a Ministerial Council roundtable, as well as targeted COVID-19 Ministerial briefings for a number of our Member countries.

Indeed, our competition team has also been particularly active. In addition to today's meeting, the team has published eight policy briefs and organised five webinars to assist the competition community respond to the crisis. We are also bringing the discussion to the regional level through our Regional Competition Centres in Budapest, Seoul and Lima.

## *Governments' response to the crisis*

Governments have also been quick to respond and provide much needed relief. We recently published a policy brief on "corporate sector vulnerabilities during the COVID-19 outbreak" on our Hub. The analysis estimates that without any state intervention, 20% of the firms surveyed – in a cross-sector sample of almost one million firms operating in 16 European countries – would run out of liquidity in one month of lockdown measures. This number goes up to 38% after three

months, which is almost how long the lockdown has lasted here in France. When unaddressed, significant liquidity issues can turn into a corporate solvency crisis.

Governments are also working together to do their best and cushion the negative impact of the crisis. For instance, the European Commission's recent "Next Generation EU" recovery instrument proposal provides for EUR 750 billion; and the US Cares Act will cost around USD 2 trillion. These interventions have to keep various key elements in mind, such as inclusion, sustainability, gender equality. Competition is one of these essential elements

## *How competition can help build the recovery*

Competition authorities have a paramount role to play in designing rescue packages and helping our economies and societies exit the COVID-19 crisis. Let me briefly outline actions that can be taken along several fronts:

First, we need to ensure that governments respect the principle of competitive neutrality. State support should be based on objective criteria and, when possible, applied to all businesses in an industry to maintain a level playing field. Where possible, selective support to firms that were inefficient or had structural issues before the crisis, should be avoided. When, as a last resort, governments acquire equity ownership, those shareholdings should be used to help restore trust in business and be managed at arms' length.

Second, competition authorities have an important role to play in informing governments' exit strategies. This can ensure that exiting from ongoing support measures is done in a way that promotes competition. These measures should be offered for a limited time: long enough to restore the competitiveness of aided companies, but short enough to avoid disincentivising those companies to compete and innovate.

And third, certain forms of co-operation between competitors are necessary at this time. This is important in order to maintain – or revive – the manufacturing and supply of essential products, severely disrupted by the crisis and the confinement measures; and to also create new products. For example, rival pharmaceutical companies have agreed R&D collaborations to develop vaccines. They have also developed co-operation agreements to supply the drugs that are urgently needed. These forms of co-operation may be very beneficial for consumers and should be allowed, as long as they do not spill-over into hard core restrictions of competition, such as price fixing.

Finally, one of the few winners from this crisis are digital platforms. With the increasing digitalisation of our societies, their market power may continue to grow, with potential knock-on effects across the economy. Competition authorities need to remain vigilant to ensure these platforms deliver benefits for consumers and economies and not just for themselves and their shareholders.

To ensure recovery, competition authorities will have to be a part of the whole of government approach, helping governments identify and choose the least competition distortive alternatives when pursuing important public policy goals, such as inclusive growth or fighting climate change.

Furthermore, competition authorities need to be part of the solution, taking a dynamic longer-term view and looking

at efficiencies in a broader sense, whenever possible and appropriate, including by considering resilience, social coherence and the environment in the analysis.

Competition policy will be crucial in building the recovery. Count on the OECD to continue working with competition authorities and governments to build the post-COVID-19 world in a fairer, more inclusive and sustainable manner, so that together we can “build back better”.

[Remarks made at the OECD Competition Committee Round table “Competition Policy in Times of COVID-19” of 15 June 2020]

# Economic Resilience, Globalisation and Market Governance

## Facing the Covid-19 Test



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### Introduction

The COVID-19 epidemic struck the world with exceptional speed, severity and breadth. Globalisation contributed to the rapid spread of this modern-day plague to all corners of the world. The international market mechanisms that we have relied on over the past three decades to promote economic growth and welfare, including their flexibility to weather exceptional and unexpected events, failed to deliver the hoped-for relief in a timely fashion, thereby slowing down many governments in their desperate attempt to fight the spread of the virus. The lack of anticipation of the possible occurrence of such an event, combined with the breakdown of market mechanisms for some of the most essential products needed to fight the disease, has left many governments unsure of how to react and often constrained their ability to make strategic choices. In some countries, the humanitarian goal of saving as many lives as possible came at the cost of confining the entire population, considered the only option available in the circumstances. The economic cost of this solution, which standstilled the economies of these countries and disrupted global value chains, is likely to be followed by several years of economic depression that will dwarf the cost of the 2008 financial and economic crisis.

The dramatic events of the first quarter of 2020 lead us to reconsider some of the implicit assumptions underlying the design of our economic systems and to think about some of the dilemmas and trade-offs that we are facing during this stressful period. The lessons learned could help us better anticipate or deal with future Black Swans.

### Science and politics

March 24, 2020 was a day of panic in the United States because for the second time Doctor Anthony Fauci (the director of the US National Institute of Allergy and Infectious Diseases) was not alongside President Trump during the president's daily press conference. In France, we are told that all decisions of the President or the Prime Minister are taken after consultation with a Scientific Council in charge of advising the government on the COVID-19 epidemic or are justified by the positions taken by this Scientific Council. Democratically elected politicians are considered to have a mandate from the people; scientists are considered legitimate authorities because they know more than the average citizen. Yet, it is clear that in a period of crisis the public puts more trust in scientists than in politicians to advise on the appropriate course of action to fight an epidemic. However, this raises many questions about the respective roles of scientists and politicians in public policy decision making in times of crisis. Can scientists raise issues on their own initiative to influence political decisions? Or should their role be limited to answering questions raised by political leaders? Do we expect that political leaders will always follow the advice of scientists and, if not, how will we be made aware of differences in their views?

There are related questions about the responsibility of doctors in the development and containment of the epidemic. Their work and their devotion to helping the population overcome this disease are admirable and doctors are paying a heavy tribute. They are our heroes, they have our respect and our admiration. But one thing that is very unsettling is the fact that specialists of virology are divided on the correct way to proceed. There are clearly very different views on the best strategy to fight a pandemic of this nature (confine the whole population? test everyone to try to identify all the individuals at risk?), different ideas about the usefulness of masks, different ideas about how medicines untested for COVID19 should be used, different ideas about whether China did the right thing or not, etc. So the disagreements among doctors are not limited to secondary issues. Even if it comes as no surprise that doctors can disagree, the question then is what is the legitimacy for governments of recommendations by advisory bodies made up of doctors who disagree?



## Human rights and the response to the health crisis

Countries (such as China, Viet Nam) where individual freedom is limited seem to be better able to take adequate measures (for example confinement in China or targeted action in Viet Nam) to limit the spread of the virus than elsewhere. Some advanced countries (such as the United States, the United Kingdom, France, etc...) seem to have shown, at least at the very beginning of the outbreak, more hesitation about confinement measures (or imposed less drastic confinement measures) and we have therefore witnessed a greater tendency for the virus to spread.

Another aspect of this interface, is the reticence expressed in a number of countries (based on an attachment to individual freedom and the respect of privacy) regarding the use of invasive modern technologies, such as facial recognition or geolocation, which could help public authorities to monitor the strict enforcement of confinement orders when a government has acknowledged they not being sufficiently respected by the public. The degree of resistance to the use of such technologies to track potential cases of COVID-19 varies from one country to another. For example, Slovakia (following in the steps of countries like Singapore, South Korea and Chinese Taipei, where aggressive contact tracing has crucially contributed to limiting the spread of the virus) passed a law on March 25th 2020 which allows the government to use data from telecom companies to track the movements of people who have tested positive to COVID-19 to ensure that they are abiding by quarantine rules. The adoption of this law was not easy but the Slovak Justice Minister insisted that in the face of this epidemic the right to privacy could not be absolute (see “Slovakia to track victims through telecoms data”, Financial Times, March 26, 2020). In Germany, however, the government was less successful and forced to abandon its proposal to use “technical means” to identify who had been in contact with people who have tested positive to COVID-19. In France, the government decided to use police to patrol people in public places to monitor whether confinement measures were being followed. In this instance, it seems obvious that the use of more advanced technology might have allowed us to save scarce human resources, which could have been better allocated to important alternative tasks such as the logistics of supplying hospitals and their security. This raises the question of how we should deal with the trade-off between public health and the protection of human rights.

## Scientific methodology and the precautionary principle

Third, there is a question about the respective merits of scientific methodology and the precautionary principle to in-

form public policy making. This question is not new in Europe but the crisis offers a new illustration of the dilemma we face. When it comes to hydro-chloroquine, the scientific community insists that the correct clinical methodology has not been followed and that more testing is necessary. However, the question that can be asked is whether, in a crisis, we have the time to follow the correct methodology.

What took place in Marseilles shows that the response of many citizens is, I do not care if the correct scientific methodology has been followed, I want to be tested and to have this drug prescribed if I have the virus because there is no alternative medicine and I risk dying. To a certain extent, governments (the French Government, President Trump) have felt an irrepressible urge to side with their citizens against scientists (hence the position of the French Government that this drug can be given to dying patients under some circumstances). The implicit questions then can be: Isn't the scientific (rational) approach a luxury that we cannot always afford? Isn't the precautionary principle (at least in some cases) a better alternative? Do we have a systematic method to propose for dealing with the dilemma?

Another aspect of this debate is the discussion about whether the French government should have kept larger stocks of masks, respirators, medicines etc. In 2009, the French government, worried about the development of the H1N1 virus bought massive quantities of vaccine to treat this disease and massive quantities of masks. H1N1 never became an epidemic in France and the government was rapidly accused of having wasted public money. After that, the government let France's stock of protective medical equipment diminish to such an extent that France is now unable to react when there is an epidemic. From a public policy standpoint, the question is: How should we deal with the risk of rare, but exceptionally destructive events (such as epidemics, major earthquakes, extreme weather events, nuclear accidents etc...)? To what extent should we provide for these risks (that have a small probability of occurring) when doing so will be costly but could save many lives? Or should we admit that we do not want to prepare for such events (both because of the cost involved and because of their unpredictability)? But in that case, what should we do to ensure that our economic systems remain sufficiently flexible to react in a timely manner when such catastrophes do occur?

## The economic costs of public health strategies

Fourth, there is a question as to whether there can be a trade-off between public health strategy and economic strategy used to overcome the crisis and if there is such a trade-off what policy prescription should be followed. The idea that there may be a trade-off comes from the fact that confinement policies (destined to minimise the number of deaths from COVID-19 and adopted in a number of countries) lessen the impact

of the epidemic in terms of the number of people infected but decrease economic output, and therefore increase the severity of the economic crisis because citizens are prevented either from going to work or for continuing to work if their jobs are not suitable for working from home. The sectors economically most affected by the current confinement measures are service sectors, such as air transport, hotel, restaurants, retail distribution and cinemas, because working from home is for the most part impossible. Thus the more extensive and the longer the confinement, the more severe will be the adverse effects in those sectors and the larger will be the decrease of GDP. There are two alternative health strategies. One is to let the epidemic run its course, which would imply many more deaths but a much lower decrease in GDP as the people not infected and the people infected with no or mild symptoms (which represent the large majority of cases) would continue to work. The other is to test the population widely and confine only people infected by the virus. In this second case (which is reminiscent of the strategy adopted in countries like Korea<sup>1</sup>), there would both be fewer deaths than if nothing were done and more people working than if a strategy of general confinement of the population were followed.

The strategy chosen in European countries may well worsen the economic crisis compared to that resulting from alternative strategies. From this standpoint, we can expect that the economic cost of the pandemic will be much worse than the cost of the 2008 financial crisis for the simple reason that people, for the most part, kept working during the financial crisis. It is said by some that this strategy could impose a GDP loss on advanced economies of up to 15% of GDP in the short run and require many years of effort to try to get back to where these economies were before the epidemic. What the tradeoff between health strategy and economic strategy actually is and how we should consider this tradeoff when determining public policy raise both empirical questions (requiring assumptions about the severity of the economic crisis in different policy configurations, the speed of recovery, etc.) and ethical questions (such as whether, when it comes to health policy, one can or should put an economic value on lives). President Trump's call to reopen the United States for business by Easter Sunday and argument that you cannot run a country by listening to doctors because the cure they would favour (confinement) could be worse than the disease was a particularly brutal way of raising the issue.

## Globalisation, global supply chains and national sovereignty

The benefits of economic globalisation have been much discussed over the past twenty years. One view is that the decline

in trade and foreign investment obstacles and the development of new communications technologies have allowed an international reallocation of resources through a restructuring of production processes which has benefited developed countries by allowing them to secure their consumption needs at a lower cost and allowed developing countries to benefit from economic opportunities thanks to the development of export-oriented activities. It is often pointed out that globalisation has lifted hundreds of millions of people in developing countries out of poverty.

However, the COVID-19 crisis could strengthen the hand of those who, in developed countries, see economic globalisation and trade and investment liberalisation as unacceptable threats to the sovereignty of their Nation State. In the eyes of those sceptical of the benefits of globalisation, there are several ways in which trade and investment liberalisation limits the ability of Nation States to pursue independent domestic policies.

First, the granting of trade concessions necessary to guarantee an effective access to the domestic market of goods or service from foreign trading partners usually implies giving up trade protection tools which could have been used to alleviate in the case of domestic crises.

Second, liberal trade policies allow firms operating in very different domestic regulatory environments to compete on world markets. Regarding competition, firms coming from countries with the highest domestic standards in terms of human or social rights or property rights or environmental protection or food security etc.... may be at a disadvantage with regard to firms coming from countries with less exacting standards. Thus, to a certain extent, opening up to international trade constrains the ability of countries to freely make the domestic societal choices that they would like to make.

Third, the development of international trade, together with a number of recent technological developments in the communications and transportation sectors, has led to an internationalisation of supply chains whereby domestic firms externalise a number of functions in countries where such functions can be fulfilled at a lower cost (such as accounting and finance in India and production in China, or more recently in Vietnam). But this internationalisation of the value chain, often combined with just in time policies of keeping stocks at the lowest possible level in order to reduce costs, make firms very much dependent on the smooth functioning of the international value chain. Such smooth functioning can break down when an external shock affects the economy of any of the countries where firms contributing to the value chain are located. In a world characterised by economic globalisation, disruptions due either to a natural catastrophe affecting another

1 Between the beginning of February 2020 and March 10, 2020, more than 200.000 people were tested in Korea in 600 testing centres and confinement was limited to infected people. As a comparison, during the same period there were 15.000 tests in France but starting on March 16, 2020 a general confinement of the population was implemented. During the month of February 2020, US authorities tested 472 people.

er country or to a political decision by a foreign government can hinder the ability of firms to serve their domestic markets.

Thus, whether through trade concessions or through the risk of seeing their domestic firms displaced in international competition or through the unavoidable consequences of foreign disruptions, trading nations may seem to have given up the ability to protect their firms or their citizens.

It is the latter mechanism, which has, so far, been a source of concern in advanced countries during the COVID-19 epidemic.

European and North American countries now depend to a large extent on foreign countries, such as China, for their supply of a number of essential medical products of which they did not have enough stocks to face the COVID-19 health crisis. This dependency became a major source of concern when some countries, such as China, where the sourcing firms are located, were hit by the epidemic and decided to follow a strict confinement policy which halted their production. European and North American countries were then unable to restock masks, respirators or active ingredients used for testing and this limited their options to fight the virus.

In France, for example, since the beginning of the COVID-19 epidemic, there has been an acute shortage of FFP2 masks, which are supposed to protect the wearers both against the aerial transmission of the virus and against the possibility of inhaling the virus. It has been even difficult to provide enough surgical masks (which offer a lesser level of protection) for the health professionals dealing with patients infected by the epidemic.

The reasons for this shortage of masks are twofold. First, in 2011 and 2012 the French authorities reversed the choice they had previously made to keep an important stock of masks on the basis of the idea that China, which produces about 70% of the world supply of masks, would be able to provide France with the necessary masks in case of an emergency. Second in late February, by the time it became clear that the epidemic was going to severely hit France and that France needed masks, the epidemic had hit China with full force and a large portion of the Chinese population had been confined.

As a result, while the theoretical Chinese production capacity of masks was estimated to be about 20 million masks per day, China was only producing 15 million masks due to confinement measures when the Chinese domestic demand for masks had shot to between 50 and 60 million masks per day. Not only was China not in a position to export its masks to France but it had become a large importer of masks from Indonesia and Vietnam. When the French firms whose employees need to use protective FFP2 masks (such as construction companies and other industrial firms whose workers are exposed to dust and small particles) became aware of the impending

difficulty to obtain such masks, they reacted by attempting to increase their own reserves of the most protective masks (FFP2). Then the lack of availability of masks in pharmacies created a panic, which led the French President on March 3, 2020 to requisition all FFP2 masks available.

With slight variations, the same story occurred in other European countries such as Italy and Germany.

On the day when the French President requisitioned all available FFP2 masks in France, Germany banned the export of masks. Chinese Taipei and India also took steps to stop exports of medical equipment.

The situation in the United States seems to have followed a similar path. In the early 2005 and 2006, the US Government advocated the stockpiling of protective gear in preparation for pandemic influenza and a strategic stockpile of 52 million surgical masks and 104 million N95 respirator masks was amassed. About 100 million of those masks were used in 2009 in the H1N1 pandemic and were never replaced in the stockpile. As the COVID-19 outbreak worsened in the US in the early days of March 2020 and as the demand for masks grew rapidly, the shortage of masks, particularly N95 masks, became a topic of controversy. The shortage was attributed to a combination of low strategic stocks, widespread buying of masks by anxious citizens and dwindling supply (either due to hoarding or to reduced production) from China<sup>2</sup>. Interestingly, on March 17, 2020 when the Center for Disease Control published an updated set of recommendations for optimising the use of protective gear by medical professionals and suggested that surgical masks were acceptable when examining or treating a COVID19 patient (a suggestion aligned with advice provided by the World Health Organization), this suggestion was considered with great suspicion by some medical professionals and in particular by the American Nurses Association which argued that the C.D.C.'s new recommendations were based "solely on supply chain and manufacturing challenges", thus suggesting that national sovereignty in the health sector was compromised by the economic forces of the global market<sup>3</sup>.

Besides the fact that the spread of the COVID-19 epidemic may have further eroded the faith of some in the benefits of economic globalisation (possibly unfairly because in most countries a better appraisal by national governments of the possible catastrophic risks which could disrupt the welfare of their citizens and the adoption of public precautionary measures against those risks could have significantly decreased the impact of the disruptions in markets for essential goods), it should be noted that the adoption of necessarily far reaching measures to alleviate the economic crisis which will follow the pandemic is also likely to lead to a retreat from the logic of globalisation. Indeed, as seen previously, it is clear that national governments will need to inject massive amounts of mon-

2 See in particular Farhad Manjoo opinion "The US runs out of face masks", New York Times March 26 2020.

3 Amelia Nierenberg, "Where Are All the Masks?", New York Times 22 March 2020.



ey into their economies in the hope that firms will, with this financial help, survive long enough to weather the disruption caused by the epidemic, confinement measures and the subsequent economic depression.

For the reasons we have analysed earlier the bailout of our economies will require financial measures many more times more important than those taken in the aftermath of the 2008 financial crisis. But one of the lessons we learned from that financial crisis is that when national governments use economic stimulus to shore up their economies following an exogenous shock, they should make sure that their stimulus does not end up shoring up other economies through a surge in imports. To ensure that there is no leakage they tend to resort to protectionist tools. As Simon Evenett and the Global Trade Alert have documented, a massive increase in protectionist measures followed the 2008 crisis. It is hard to believe that the same cause is not going to lead to the same effects, particularly in view of the importance of the financial commitments, which have already been announced.

## The need for industrial policy

Sixth, a concern related to the previously discussed question is the apparent inability of market-oriented countries to pursue an effective industrial policy which is both pro-competitive and allows countries to keep fundamental strength in strategic industries and resources which can be called on (or quickly activated) in a time of crisis. The issue is not new and has been actively discussed in France and Germany over the past few years. But whereas the discussion was largely a discussion among economists and bureaucrats, the difficulties experienced by a number of countries (including France) to have an adequate supply of simple things such as masks or active ingredients for tests are seen by the general public to result from a failure to follow an effective industrial policy. Furthermore, at a time when we would very much want to see domestic firms which still have production facilities in our countries switch their production to products or services that are urgently needed to face the crisis (say, for example the production of respirators for emergency rooms in hospitals), in France there is no one in charge of planning, organising, enforcing and supervising this move because France no longer has a ministry of industry. So what has been gained in efficiency by relying on markets to direct the economy has created a loss of ability to mount a coordinated response to an unanticipated economic disaster.

## Privacy, digital technologies and public health

Seventh, there are interesting questions about Data and digital policy. As the Financial Times reported on March 24, 2020: “The coronavirus crisis is forcing the EU to redraw its

digital strategy. The previous calls for EU data sovereignty shows its limitation at a time when to anticipate the expected path of the epidemic and to find a vaccine we are very dependent on getting the largest possible pooling of data and when, to get this pooling of data, we need the cooperation from non EU countries like China.

It was only a month ago that it was reported that EU Internal Market Commissioner Breton was flirting with the idea of forcing European companies to store and retain at least some of their data in Europe and told lawmakers that data produced in Europe: “should be processed in Europe”. We are clearly caught in a dilemma between the desire to protect our privacy and to prevent the GAFAM from becoming ever more economically dominant by feeding their artificial intelligence algorithms with our data and the fact that in the health sector as in other sectors, the best performances of the artificial intelligence algorithms that we count on to produce scientific advances, in particular in the health sector, depend on the quantity of data which can be gathered to train them.

## What future for competition law and policy?

Eighth, there are a number of questions concerning if and how the role of competition law and competition policy should be redefined in a time of deep economic crisis. A discussion on the goals, achievements and failures of competition law enforcement and competition policy was begun a few years ago. But, in Europe, this discussion was largely focused, first, on questions related to the unfairness of international competition from countries, such as China, where government intervention allowed subsidised, state owned enterprises to gain a substantial advantage over their Western competitors by means considered to be both unfair and anticompetitive and, second, on the question of whether the European focus on the protection of competition in Europe (for example, through merger control) had impaired the development of national or European champions and accelerated the deindustrialisation of Europe. In the US, there was also a concern with the unfairness of international competition among countries which had vastly different economic systems and a suspicion that the narrow focus of US antitrust authorities on the protection of consumer surplus in the short run coupled with a permissive attitude toward economic concentration and an excessive fear of type I errors (risk of misguided intervention by competition authorities leading, in fact, to a restriction in competition) had led to under-enforcement of antitrust laws, increased macro-economic concentration and profit margins and domination of the digital economy by the GAFAM.

The brutal economic crisis we are experiencing now requires different types of adjustments, depending on the time perspective we consider.

In the very short term, the main issue to be confronted is the brutal disruption in the value chain of a number of products, leading to shortages either because of insufficient level of production or because of difficulties in product distribution due to confinement measures. The issue for consumers is not, as it is in a normally functioning economy, to be able to choose the best price/quality ratio among products offered by competing suppliers but simply to be able find the product (even if in smaller quantity than what would be desirable). In such circumstances, first, cooperation between suppliers (and/or government intervention) to identify both the needs and the existing stocks may be necessary to permit an adequate supply of essential goods and services. For example, as the US Federal Trade Commission and the US Department of Justice have suggested, health care facilities may need to coordinate providing resources and services, and other businesses may temporarily need to combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies.

Second, consumers need to be protected against abuses resulting in price gouging of products in short supply. This requires two adjustments for competition authorities. First, to take a more nuanced approach with respect to cooperation among competitors than the approach they have taken in the past, and, second to focus on exploitative abuses of market power rather than on exclusionary practices (the creation of barriers to entry) on which they have focused in the past.

Competition authorities both in the context of the European Competition Network and outside the EU (for example, in Great Britain and in the United States) have already signalled their willingness to allow, at least temporarily, cooperation or coordination between competitors whenever such cooperation or coordination is necessary to avoid a shortage due to the COVID-19 crisis, or ensure security of supply<sup>4</sup>. They have also signalled their intention to fight price gouging.

In the medium run, say over next two to three years, our economies will be depressed, with the risk of a large number of bankruptcy of firms either directly hit hard by the COVID-19 epidemic (in the service sector) or affected by the disruption of their supply chain, rising unemployment and dwindling demand.

As is widely known, competition is a virtuous economic mechanism when economies are at full employment of their resources because it allows them, in a static perspective, to grow through a more efficient use of scarce resources. But with the aftermath of the COVID-19 pandemic, in the medium run, we face the risk of an economic depression and a high level of bankruptcies and unemployment for a number of years. In

such an environment, the important goals are to quickly stimulate economic growth, to engage in the kind of redistribution mechanisms which will alleviate the economic suffering of the poor and to ensure that the economic framework that we create will be more resilient in the future. It will thus be necessary to stimulate employment and to help firms in the sectors affected by the crisis, particularly SMEs but also a number of larger firms, from going bankrupt.

Massive amounts of state aid, tax deductions or deferments and subsidies of various kinds or even the nationalisation of entire sectors will be necessary on top of the initial financial packages already put together by the governments of many countries in Europe and in the US.

In this context, it is clear that there is a possibility of conflict between the necessity to artificially keep a large number of firms going in the short run in order to kick start the economy in the medium run and to allow it to retain its footing in the long run and a policy of competition law enforcement which assumes explicitly or implicitly that the economy is already in a stable equilibrium with full or near full employment of the factors of production and that the most important problem is to ensure that the competitive process in the short run guides the allocation of resources to maximise consumer welfare.

The promotion of competition may not be as central an economic preoccupation in the near future as it was during the first two decades of the 21st century. It will be useful, however, to review the lessons of the period which followed the Great Depression. To the extent that it is still useful, we will also have to think again about the trade-offs between static efficiencies, reallocation of resources through industrial policies, dynamic efficiencies and economic resilience.

At the very least, competition authorities will have to take a longer and more dynamic view of the process of competition than they have in the past and adapt their reasoning with respect to state aid, crisis cartels or mergers to circumstances of disequilibrium caused by an exogenous shock to the economic system.

Finally, in a longer-term perspective, the challenge raised by the COVID-19 crisis and the necessity to be better prepared to face future epidemics require a massive reallocation of resources toward the health sector. This is not the only notable reallocation of resources that must be implemented. We also must deal head on with climate change and redirect our resources toward clean energies. The development of the digital economy also requires a reallocation of resources to allow firms in traditional sectors to fully benefit from the new technologies at their disposal.

4 See, for example, the CMA approach to business cooperation in response to COVID-19 Published 25 March 2020 or the “Joint statement” issued by the European Competition Network on the ‘application of competition law during the Corona crisis’, on 23 March 2020 which states that ‘necessary and temporary measures put in place in order to avoid a shortage of supply... are unlikely to be problematic, since they would either not amount to a restriction of competition under Article 101 TFEU... or generate efficiencies that would most likely outweigh any such restriction’.

A number of economists have convincingly argued that market forces are by themselves insufficient to reallocate resources at the level and the speed required to face those challenges. This means that if competition remains necessary it is not sufficient to meet the challenges we face in the 21st century.

Competition policy must be better integrated in a wider context of complementary economic policies.

## Conclusion

Black Swan events and major humanitarian crises do occur and they can durably affect both advanced and developing economies. One of the policy questions we have to think about is if and what amount of our resources we want to devote

to achieving more resilient and agile economic systems better able to withstand rare but potentially catastrophic events. There is no easy answer to this question because we do not know the probability of such events or, in some cases, their nature and potential for destruction.

Yet, as Jean Tirole argued recently (Le Monde, March 25, 2020) and as the COVID-19 crisis is showing us, the alternatives for the future are to make reasoned choices which may allow us to maintain some degree of control, even in dire situations, or to let future events run their course, decide for us, and possibly destroy us all. It is time to move to a longer-term perspective and to better integrate risk factors in our economic analysis and policy decisions.

# Competition Policy Responses to the Crisis in Eastern Europe and Central Asia

## Key findings from the Virtual Seminar of the OECD-GVH Regional Centre for Competition



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The OECD-GVH RCC Seminar on 1-2 July 2020 provided competition authorities from Eastern Europe and Central Asia with a unique opportunity not only to discuss the general challenges for competition policy stemming from the COVID-19 pandemic, but also to assess the specific issues that they face as a result of the distinctive features of the region.

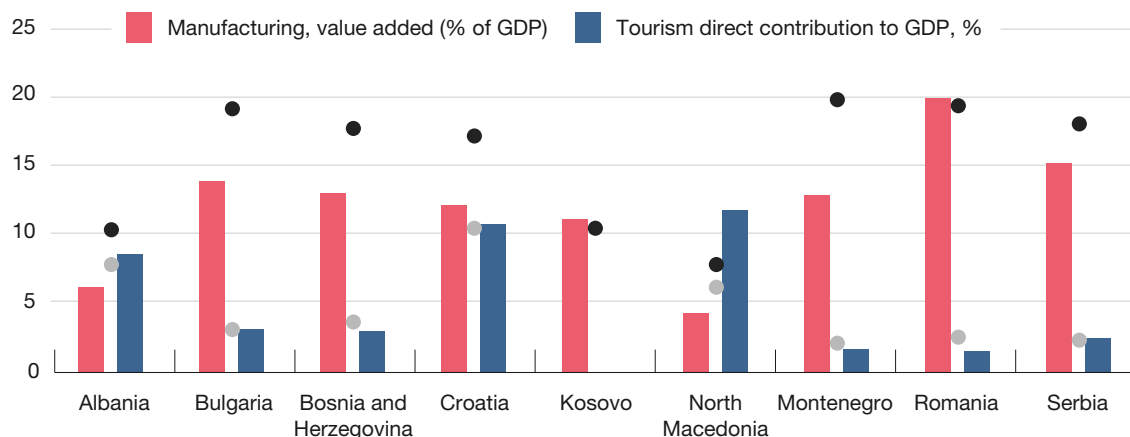
### THE ECONOMIC IMPACT OF COVID-19 IN THE REGION

#### Eastern Europe

While the coronavirus pandemic is leading to a notable slowdown worldwide, there are a number of specific factors

that might have a particularly strong impact on Eastern European economies<sup>5</sup>. Exports across the region will fall due to depressed demand, as well as disruptions in value chains. Romania and Serbia are likely to be hit the hardest, as their manufacturing sectors are more highly integrated into global supply chains and contribute the most to their economies in terms of value-added and employment. Tourism is also collapsing due to the sanitary crisis. Albania and Montenegro will be hit particularly hard in this respect, given that tourism revenues exceed 20% of GDP in both economies.

#### Contribution of tourism and manufacturing sector in South East Europe (2018)



Note: Albania's manufacturing employment data is for 2017. There is no available tourism data for Kosovo.  
Source: World Bank Data and ILOSTAT.

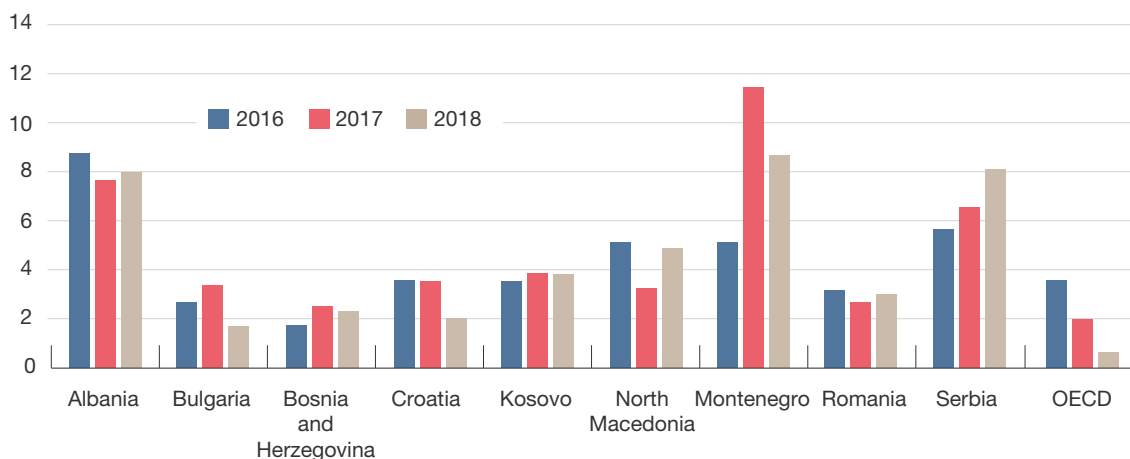
<sup>5</sup> Data and analysis are taken from OECD, COVID-19 crisis response in South East European economies, April 2020, <http://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-south-east-european-economies-claabc5a/>



At the same time, there is likely to be a collapse in two of the region's crucial financial resources: foreign direct investment (FDI), which has contributed considerably to the economies of Western Balkan countries in recent years (see Figure

below), and remittances, which account for 15% of overall GDP in Kosovo and approximately 10% in Bosnia and Herzegovina, Montenegro, Albania and Serbia.

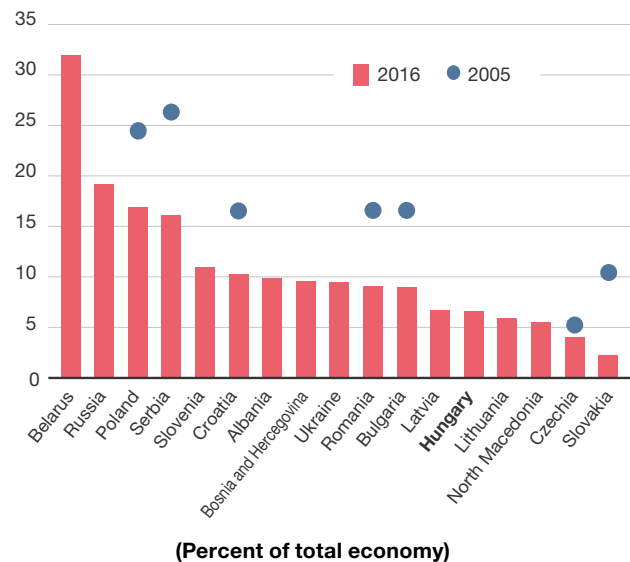
**Foreign direct investment, net inflows (% of GDP)**



The vast majority of firms in the Western Balkans are small-medium enterprises (SMEs). They generate around 65% of total business sector value added and account for 73% of total business sector employment. The COVID-19 pandemic will put labour markets in the Western Balkans under enormous pressure, adding to existing constraints such as high unemployment levels (especially youth unemployment), high shares of informality and sustained outflows of skilled labour. In 2018, the average unemployment rate of the six Western Balkan economies stood at approximately 17%, while informal employment stood at 37% for Albania, 19% for North Macedonia and 20% for Serbia.

Despite a drop of between 5–10 percentage points in most countries in a ten-year period (see Figure below), the relevance of state-owned enterprises (SOEs) is still high: the share of SOEs in total value-added in 2016 was still significantly higher than 10% in Belarus, Russia and Serbia and reached approximately 10% in Croatia, Albania, Bosnia Herzegovina, Ukraine, Romania and Bulgaria. In Russia and Ukraine, SOEs account for approximately 15% of the overall national employment, while in Belarus the share is around 30%.

**SOE Value Added, 2005 and 2016**



(Percent of total economy)

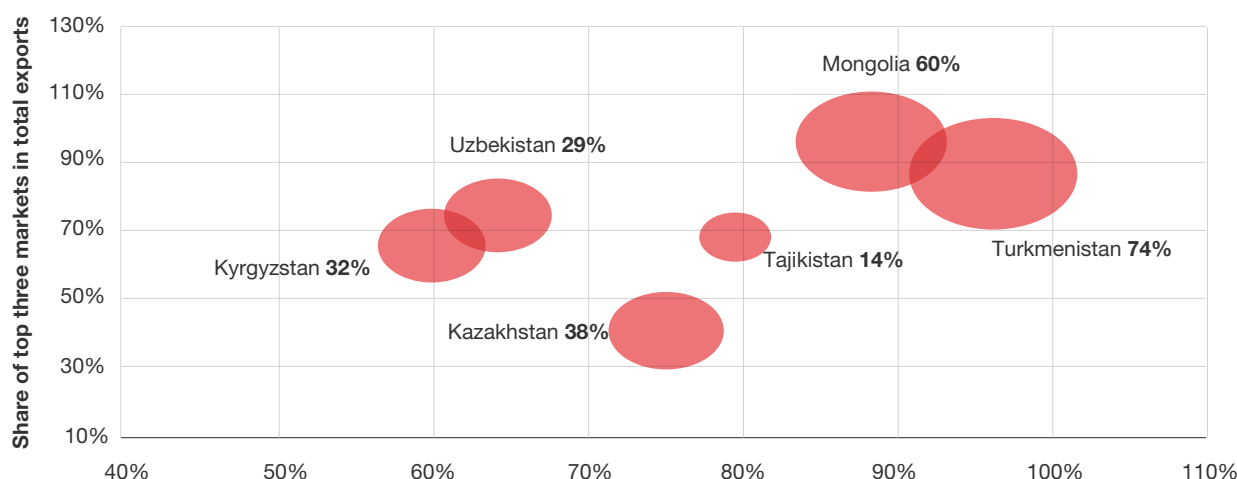
Source: IMF, *Reassessing the Role of State-Owned Enterprises in Central, Eastern, and Southeastern Europe* (2019)

## Central Asia

The COVID-19 crisis is affecting key drivers of growth in Central Asia, which include oil and mineral exports, the service sector and migrant remittances<sup>6</sup>. Many economies in Central Asia are characterised by highly concentrated and un-diversified production and export profiles, relying heavily on the export of raw extractive goods.

In the Central Asian economies, exports constitute over a third of GDP. The top three products account for over two-thirds of all exports, while exports, with the exception of Kazakhstan, are concentrated in a very narrow range of markets (see Figure below). Falling levels of demand have led to significant price decreases in a number of Central Asia's key export products.

**Concentration of export baskets in some Central Asian economies**



*Note: The size of the bubble and the percentage next to the country name indicate the share of exports in GDP*

The private sector in most Central Asian countries remains weak, with economies primarily reliant on large state-owned enterprises. A longstanding issue in Central Asia is that most employment is in low-productivity activities, both formal and informal, with the most productive sectors – often capital-intensive extractive industries – employing comparatively few people. More broadly, only 45.5% of Central Asian workers are employed in service sectors, compared with 73% in OECD countries (ILO, 2020).

A high level of economic informality across Central Asia has a further economic impact, insofar as the measures taken to contain the sanitary crisis – namely restrictions on the movement of people – limit the informal sector's traditional role as a source of resilience for many low-income people. At the same time, informal workers and businesses have hardly any access to safety nets or direct state support.

## THE KEY COMPETITION POLICY CHALLENGES

Introducing the seminar, **László Bak**, Vice-President of the Hungarian Competition Authority (the GVH), warned that

economies shocked by the crisis would face a number of exceptional challenges, such as market failures, supply shortages and disrupted supply chains. He emphasised the importance of competition enforcers remaining focused and of being guided by a compass that points towards the policy goals that have characterised competition law ever since its birth – and also in times of economic crisis. Furthermore, he also referred to the responsibility that law makers and policy makers have when it comes to assessing the different ways in which competition restrictions and distortions can be minimised, as well as the important role that competition authorities must play in advising governments about how they should effectively deal with market failures, in light of established competition law principles.

## Industrial policy, global markets and economic resilience

In his keynote speech, **Professor Frédéric Jenny**, the Chairman of the OECD Competition Committee, illustrated the key challenges to competition policy posed by the COVID-19 crisis. He remarked that the present crisis has exposed a number of weaknesses in the current economic system, thereby pos-

<sup>6</sup> Data and analysis are taken from OECD, COVID-19 crisis response in Central Asia, June 2020, <http://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-central-asia-5305f172/#section-d1e41>

sibly indicating that a number of basic principles ought to be rethought. In the short-term, the typical (competitive) adjustment between demand and supply has often resulted slow or, in some cases, unsuccessful, thus driving to shortages of goods and services. The crisis has also brought into question the real benefit of globalisation, insofar as it has clearly revealed how international specialisation has led many countries to give up some of their industrial capacities. The corresponding interdependence between economies and a lack of flexibility has resulted in significant disruptions in value chains.

In this turbulent context, Professor Jenny observed that the crisis raises the question whether competition in a time of depression is as important as in a time of economic growth, in the face of a paramount position of industrial policy due to the granting of huge amounts of State aid to alleviate the impact of the crisis. Nevertheless, he conveyed the message that competition policy can play a key role, by combining competition enforcement with effective competition advocacy.

Competition enforcement will need to be more pragmatic, even though the objectives and usefulness of competition remain unchanged. Competition authorities in Eastern Europe and Central Asia may take inspiration from authorities in OECD countries, which have stepped up their enforcement against abusive prices, undertaken not to prioritise some problematic horizontal agreements, taken into consideration public interest or delayed decisions on mergers, or even modified their views on the relationship between competition and innovation.

In parallel, competition advocacy may help governments to ensure that new regulations do not unduly restrict competition. Competition authorities could also advocate for lifting existing regulatory obstacles when they prevent the smooth adjustment of supply and demand. At the same time, competition authorities should provide clear guidance to the business community on how the principles of competition law enforcement would apply in the context of the crisis, so as to ensure that firms have a clear understanding of what is allowed and prohibited.

Finally, the need for an active industrial policy, which had already been recognised by a number of commentators before the crisis, has become more prevalent in mainstream thinking in light of the catastrophic consequences of the market failures experienced during the crisis. It will be for competition authorities to show that an effective industrial policy is not an antagonist but a complement to competition policy.

## Structural challenges: Preserving open and competitive markets

**Antonio Capobianco**, Acting Head of the OECD Competition Division, warned participants that the structural challenges posed by the crisis would require competition au-

thorities to take active steps aimed at preserving open and competitive markets.

He stated that the crisis should not lead to a relaxation of the competition rules and standards, but should instead be used as an opportunity to reflect upon the current legal framework and to test the effectiveness of the system. At the same time, it is crucial to learn from previous experiences in times of crisis. This is why the set of documents drafted by the OECD Competition Division aimed at providing competition policy responses to COVID-19 also take into account past best practices. Sound competition policy is especially important in moments of crisis to ensure that the crisis is solved and the subsequent economic recovery is as fast and sustained as possible.

Furthermore, Antonio Capobianco added that in the absence of thorough merger control there is a serious risk that short-term benefits will result in long-term anti-competitive effects. The COVID-19 crisis will most likely force many firms to exit the market or merge. Competition authorities should use their merger control powers to preserve competitive market structures and prevent increased market concentration and market power in several sectors, which would result in price increases, harm innovation and productivity, and aggravate inequality.

An equally grave danger is that, if not carefully designed, state support may create competition distortions and result in an un-level playing field between companies that receive aid and competitors that do not. If certain companies are placed at an undue disadvantage, then the production of goods and services is no longer determined based on the efficiency of companies. The provision of general aid, however, that is based on objective criteria, clear rules and which is applicable to all businesses in a particular industry (e.g. deferring taxes, or subsidising short-time work across all sectors), should not raise any issues from a competitive neutrality perspective.

Finally, public procurement might become another sensitive area. In normal circumstances, public procurement bodies should opt for competitive tendering, which enables them to obtain the most appropriate goods, services and works at the optimal price versus quality ratio. Direct awards are normally strongly discouraged by procurement rules across OECD member countries, but they may be considered necessary in cases of emergency and *force majeure*. Nevertheless, direct awards should be used only to respond to current, urgent and unforeseeable needs, and only when the identified supplier is the only one able to provide the required goods, services and/or works on time. As soon as circumstances permit, public procurement entities should phase out direct award contracts and start planning competitive tendering.

## Operational challenges: Reacting effectively to anti-competitive practices

**Isolde Lueckenhausen**, Competition Expert of the OECD Competition Division seconded from the Australian Competition and Consumer Commission, illustrated how the leading competition authorities in the world responded to the operational challenges brought about by COVID-19.

She highlighted that most authorities were able to quickly arrange teleworking and secure IT arrangements. Some authorities, including the Australian ACCC and the British CMA, created special teams or task forces to coordinate practical and substantive issues. Many authorities also developed public guidelines and/or public communications, e.g. the Canadian Competition Bureau, the European Commission and the European Competition Network, which issued a joint statement<sup>7</sup>. She also observed that in a number of instances the crisis encouraged competition authorities to engage in greater cooperation and coordination with consumer authorities (where separate), regulatory authorities and government departments.

Isolde Lueckenhausen also argued that some lessons learned during the crisis might inform positive operational changes in the future. Examples in this respect might be:

- increased investments in IT and in secure remote working platforms
- changes in processes and procedures (such as a move towards more electronic court processes) improved organisational ability to respond to crises
- enhanced collaboration with other government bodies.

## COMPETITION ENFORCEMENT IN TIMES OF CRISIS

### Abuse of dominance: How to deal with price gouging and exploitative prices

The brutal disruption caused by the pandemic has led to difficulties in the production and distribution of a number of essential products. This, in turn, creates opportunities for companies to increase the prices of these products significantly. While rising prices can reflect increases in the costs of market participants and provide essential market signals to increase production and stimulate new entry, they can also reflect exploitative business practices that lack objective justification.

Some competition authorities are empowered to act directly against exploitative pricing abuses under competition law. However, bringing excessive pricing cases is challenging even in normal times. Before bringing such cases, competition

authorities should consider whether antitrust enforcement against high prices is needed, proportionate and effective. Authorities should also take into account whether alternatives such as consumer protection, price gouging rules or even price regulation are preferable.

**Pedro Caro de Sousa**, OECD Competition Expert, discussed whether and when competition authorities should consider pursuing excessive pricing cases during this crisis. Applying competition law to address exploitative pricing practices directly during a crisis may prove even more challenging than in normal circumstances – in particular, intervention may not be timely – and come with the risk of unintended consequences. For example, intervention against price increases can lead to products being diverted to places where prices are not regulated. Furthermore, prices act as signals and limiting price rises can reduce incentives to increase production, thereby delaying market entry or production increases that would lower prices faster in the medium-term. At the same time, bringing excessive pricing cases may not only be well justified, but also the best available alternative for addressing the challenges caused by significant price increases of essential goods during a crisis.

Even during a crisis, competition authorities must apply the analytical framework for excessive pricing, which poses two main challenges in this context.

First, the investigated company must have sufficient market power to trigger control over its unilateral conduct. Establishing market power is challenging in the best of times, and these challenges are exacerbated during a crisis, where market power may disappear as suddenly as it appears, and where evidence of matters such as market shares, entry barriers, buyer power, etc., may be difficult to come by. On the other hand, markets may be narrower than usual during a crisis – limitations in supply and stringent restrictions of circulation may prevent effective ‘chains of substitution’ within the relevant product markets; furthermore, confinement may severely limit the ability of consumers to move around to purchase goods and services. Another challenge relates to the temporary nature of market power. Competition authorities may identify ‘situational monopolies’, i.e. situations where a firm holds significant market power for a very limited amount of time. However, this concept is broadly untested under competition law, and competition authorities will likely face significant challenges in identifying evidence to support such a conclusion.

A further challenge concerns the identification of exploitative prices. Over time, competition authorities and courts have made use of different methods to determine whether a price is excessive. In the context of international products and a global crisis, international price comparisons may prove useful, although this is dependent on the use of comparators that are selected according to objective, appropriate, and verifiable cri-

7 Available at: [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).



teria. On the other hand, there are inherent weaknesses in all of the methods used to determine whether a price is excessive under competition law; consequently, a careful assessment should be undertaken to determine whether price increases are justified e.g. because they reflect the companies' response to increases in their own costs.

In short, excessive pricing cases are extremely data intensive and unavoidably fact-specific, operate ex-post, hard to build and often difficult to prosecute. This leads to delays and increases the risk that such cases will be unsuccessful at court. As such, it is important to find ways to ensure that enforcement is effective. One option that could preclude the need to start formal proceedings consists of competition authorities making it clear that they are closely monitoring the market and ready to intervene promptly. This could take a number of forms. Competition authorities could issue general warnings that they are monitoring the market, or issue individual informal warnings to specific companies. They could also consider issuing interim injunctions, but this would still require in-depth work to establish a *prima facie* exploitative practice and difficulties may arise when it comes to demonstrating that the conduct would in fact cause irreparable harm. Finally, consideration could be given to the role that other regulatory tools and regulators could play in addressing exploitative pricing practices – e.g. consumer protection, public tender rules or price gouging laws. In effect, this may be the only avenue available in those jurisdictions where exploitative abuses are not prohibited under competition law. Even where they are prohibited, an important preliminary question is whether it is competition authorities or regulatory authorities that have the most appropriate combination of tools and expertise at their disposal to address excessive prices.

The final topic concerns price regulation, which provides an alternative to competition law enforcement against exploitative abuses in certain cases. Both approaches seek to address the market's failure to deliver goods and services to consumers in an efficient manner at competitive prices and may be adopted where prices become too high and there is no timely prospect of the market self-correcting. In order to be fully effective, both price regulation and excessive pricing enforcement may need to be coupled with additional action to address the source of the market failure. Ultimately, both options can lead to similar pernicious outcomes: reducing incentives to increase production, delaying market entry or production increases that would lower prices, and causing products to end up in places where prices are not regulated. As a result, competition authorities should flag the risks of price regulation to governments and play an active role in ensuring that, where used, its scope is limited – both in terms of coverage and time.

## Crisis and excessive pricing in Eastern Europe and Central Asia

### Comments from the competition authorities

Almost every economy in Eastern Europe and Central Asia has faced sudden price increases during the COVID-19 pandemic, associated with the breakdown of supply chains for various products. This has been particularly evident in relation to certain sanitary goods that have been subject to high demand, such as gloves, facemasks and medicines. As a result of this situation, policy makers and the public have come to expect more from antitrust authorities when it comes to the initiation of initiatives aimed at regulating prices. Therefore, it is paramount that antitrust authorities have a set of clear criteria for promptly determining whether and when they should tackle practices that are potentially in breach of competition rules.

Given that in order to establish an abuse it is necessary to demonstrate that a firm is in a dominant position in a relevant market, a common problem is the identification of the relevant product market and, even more challenging, of the geographical boundaries of the market, in conditions of limited movement. While restrictions to movement may in fact drastically narrow down the geographical scope of the market, this may lead to paradoxical conclusions, e.g. qualifying each pharmacy in each district as a dominant firm. As regards the assessment of market power, the view of the representatives of the competition authorities was that it is already complicated in “normal” times and becomes even more challenging during the pandemic, when demand might sharply increase and businesses face operational and logistic problems.

After this step, the key issue is determining the “fair” prices as opposed to unreasonably high prices. In general, the competition authorities in the region base their assessment on two approaches: *i)* the comparison with prices of similar goods or of the same goods in other periods or places, *ii)* and the application of a reasonable mark-up.

Due to the disruption of normal market conditions, these methods might not be very telling in times of deep crisis. One delegate described a situation in which a firm purchased a stock of goods at a low price before the outbreak of COVID-19. Due to the pandemic, the demand for the purchased goods increased and prices rose consistently. The question arises: should the company be allowed to sell the stock of goods at the current high market prices, despite making extremely high profits? It should be noted that, in the negative, the company would not be able to purchase the next stock of goods without incurring losses.

In general, competition law might not be the best tool for responding quickly to price increases, given that it requires lengthy investigations and sometimes leads to inconclusive

results. That said, perhaps the mere opening of a case would have a deterrent effect on market participants and discourage them from applying excessive margins on crisis-related demand. An interesting example of an *ad hoc* mechanism to monitor pricing was implemented in Ukraine on a short list of consumer goods and medical items. Such monitoring was possible due to the unique organisational set up of the AMCU, which also has regional offices. This enabled the AMCU to gain a much faster overall view of the price changes that were occurring in regions than other state authorities.

Competition enforcement could be complemented by some of the measures that have already been adopted in a number of other countries, like consumer protection or price regulation for essential goods. Indeed, delegates from competition authorities whose mandate also prescribes consumer protection found it easier to react to price spikes. However, price regulation does not come without its downsides. For example, high prices may attract new companies to enter the market or incentivise incumbents to increase their output, as was the case for facemasks. Price regulation would remove this incentive and prevent supply from increasing to meet demand, thus leading to shortages and impeding price decreases.

*[Based on the report of the discussion at the seminar, by moderators Ms Dar'ya Cherednichenko, Deputy Chair of AMCU Ukraine, and Ms Shushan Sargsyan, Head of Legal Department of the Commission for Competition of Armenia]*

## Collusion: Distinguishing lawful and unlawful cooperation between competitors

In the extraordinary circumstances of the COVID-19 crisis, there are a number of reasons that may push competing companies to collaborate with one another and a number of ways in which consumers and the economy may benefit from these collaborations. For example, in the short term cooperation between private firms may help to address demand and supply shocks, while in the longer term joint investments in R&D projects in the health industry may foster the development of a new vaccine, or new treatment or medical equipment to treat severe and urgent cases.

An important question is how such cooperation arrangements should be treated given the applicable analytical framework. In effect, the traditional antitrust framework remains valid throughout the COVID-19 crisis. Many competition authorities have stated that cooperation involving coordination or discussion on future prices, costs and wages are unlikely to be lawful or justified by pro-competitive effects. On the other hand, many competition authorities have also suggested that temporary measures adopted to address specific short-term market failures arising from the current crisis are unlikely to

constitute a restriction of competition or, if they do, they are likely to generate efficiency gains capable of outweighing their potential harm.

**Paulo Burnier da Silveira**, OECD Competition Expert, illustrated some relevant examples of lawful cooperation during COVID-19. This includes the coordination of purchases by grocery retailers, of logistics services providers, of the cross-supply of active pharmaceutical ingredients, or of financial services to provide supplementary relief packages for individuals and businesses affected by COVID-19 and to assist smaller lenders to maintain liquidity and issue loans to consumers and small businesses.

These examples reflect a number of common criteria used to identify lawful cooperation agreements. One can identify some common elements in the initiatives already taken by competition authorities and governments to distinguish between lawful and unlawful cooperation during the current crisis. First, many competition authorities consider cooperation agreements to be lawful when they are needed to address a specific market disruption resulting from the COVID-19 crisis. All competition authorities insist that cooperation must be restricted to what is strictly necessary for achieving the goal in question. Furthermore, many competition regimes require an agreement to have a positive impact on consumers in order for it to be considered lawful. Finally, many competition authorities have also highlighted that any cooperation must be strictly limited in time and should usually only persist while the exceptional circumstances created by the crisis in the specific sector continue to exist.

Paulo Burnier da Silveira also addressed the challenges faced by competition authorities in determining the lawfulness of cooperation agreements during COVID-19. These include the need for prompt guidance to businesses and timely decision-making when determining the necessity of an agreement and its appropriate duration.

Regarding guidance and decision-making, competition authorities are expected to react extremely quickly to requests for guidance by businesses. This can be achieved, for instance, by way of general guidance to help companies determine *ex ante* whether a proposed collaboration may raise issues, or by adopting block exemptions to preclude the application of competition law to a given sector for a period of time. Another alternative is to allow or require private companies to notify the cooperation agreement to the competition authority, allowing the authority to verify the lawfulness of the cooperation *ex post* without creating an *ex ante* barrier to the implementation of the agreement. Finally, to ensure that their response is timely, many authorities have put in place mechanisms for speedy *ad hoc* guidance, in the form of comfort letters or similar means.

The second challenge concerns the assessment of the necessity of the agreement, which may be difficult given the resource constraints and time pressure under which competition authorities will be operating. Authorities may want to analyse the necessity criterion by making a comparison with the ‘but for’ scenario, i.e. by considering the legal and economic context in which the business operates to determine what would have happened or what would happen in the absence of the cooperation. An important consideration in this regard is the need for companies to find solutions in the short timeframe imposed by the COVID19 crisis – i.e. when evaluating the counterfactual competition authorities need to consider the alternatives that were available at the specific time that the agreement was being entered into. In the event that sensitive information needs to be exchanged, and with a view to ensuring that any such exchange is limited to what is strictly necessary, competition authorities may consider adopting measures that are similar to those used in merger control for the exchange of information pre-merger, such as the use of clean teams, strict confidentiality clauses, “Chinese walls” for business activities that are not closely related to the cooperation, and independent monitoring trustees.

Lastly, regarding the duration of the cooperation arrangement, competition authorities should be vigilant and act promptly to limit or withdraw an authorisation or to initiate antitrust action when the negative impact of the crisis subsides and the collaboration is no longer strictly necessary. It should be borne in mind that innovative cooperation may require a completely different timeframe than cooperation aimed, for instance, at addressing the issues arising as a result of lockdown periods.

## Crisis and collusion in Eastern Europe and Central Asia

### Comments from the competition authorities

Most competition authorities in Eastern Europe and Central Asia follow European and international discussions about possible approaches for dealing with COVID-19. For instance, Hungary and Croatia followed the ECN joint approach, which also included some recommendations regarding cooperation agreements between competitors during the crisis. However, competition authorities in the region have received minimal requests to assess such agreements: the lack of notifications may be due to the limited size of the markets. The only exception is the Russian Federation, where the FAS Russia approved two applications from food retailers and from sellers of household/electronic equipment, which agreed to sell certain products at cost for three months. The validity of the moratorium has now expired and no exceptions currently exist for agreements between competitors.

Ex-post assessment of such agreements seems preferable to ex-ante. In particular, ex-ante assessment requires considerable resources, which would need to be diverted from new cases and hard-core restrictions of competition (within which such cooperation agreements do not necessarily fall). Nevertheless, a certain degree of flexibility should be ensured and parties should have the possibility of at least some preliminary informal consultations. This should not happen at the expense of legal rules and no ex-ante exemptions should be given to the agreements, albeit some other instruments such as interim measures or comfort letters could be explored.

When undertaking an assessment of the legality of these agreements, the two main criteria suggested by the OECD, i.e. the necessity and duration of the agreement, are considered to be a good starting point. Necessity should be scrutinised through objective criteria, after gathering information about the objectives of the agreement (for example, supply of food or joint research of vaccines), how important or indispensable it is, if the agreement is the only way in which the objective can be achieved, and the benefits that it will bring for consumers. While the duration of the agreement should be evaluated on a case-by-case basis, it should always be limited to the time when the extraordinary situation caused by the crisis comes to an end. Competition authorities are aware that temporary exchanges of information between competitors carry risks for the future. If competitors have been exchanging commercial information for several months then they may also be able to engage in tacit collusion in the future without having to negotiate prices, customers, or market volumes. Consequently, it may be advisable to monitor companies that have benefited from relief from cooperation restrictions during the pandemic.

There is a consensus that competition authorities should provide undertakings with general guidance about the type of cooperation that is exceptionally allowed, the sectors in which it is permissible, its possible duration and the conditions that must be fulfilled. Such guidance should clarify that price fixing is under no circumstances allowed and the exchange of sensitive information is equally prohibited.

Finally, competition authorities in Eastern Europe and Central Asia agree that international cooperation can help national competition authorities to find the best solutions when dealing with cooperation agreements between competitors in the time of crisis. Competition authorities should exchange information on best practices and their approach to promote a common ground and to jointly develop general principles.

*[Based on the report of the discussion at the seminar, by moderators Ms Mirta Kapural, Member of the Competition Council of Croatia, and Mr Mukhamed Khamukov, Deputy Head of the Cartel Department of FAS Russia]*



## Merger control in the face of uncertainty and State intervention

The disruptive impact of COVID-19 on the economy will likely force many firms to exit the market or merge, which may trigger increased merger activity for competition authorities. Without thorough merger review, there is a serious risk that the economic crisis will result in higher market concentration and market power in several sectors. At the same time, the unparalleled economic uncertainty we are living through means that competition authorities face a number of challenges in the exercise of their merger control powers.

**Renato Ferrandi**, OECD Competition Expert, addressed a number of challenges awaiting competition authorities, the resolution of which will require further research and discussion in the months and years to come.

A first challenge relates to how to conduct forward-looking competitive assessments in turbulent market conditions. Merger review assesses the effects of a transaction by comparison to the circumstances that would have prevailed without the transaction (i.e. a counterfactual). In most cases, the counterfactual starts from the competitive conditions prevailing at the time of the merger and takes into account reasonably predictable market changes in the future. In turbulent times, it becomes more difficult to identify the relevant counterfactual. Thus, competition authorities need to consider how various elements of their analytical arsenal – the relevant timeframe for analysis, the relevance of available historical data concerning more stable market conditions, or the assumptions adopted to establish the relevant counterfactual – may need to be tweaked.

This links to a second challenge, which concerns the criteria that is used to determine whether a merger poses competition issues. Some have argued that the concept of efficiencies traditionally used in merger control is too narrow and that resilience, environmental and social cohesion considerations should also be taken into account. Such arguments are closely linked to the role that public interest considerations may play in merger control. In particular, governments might implement or encourage mergers in order to pursue public policy objectives such as employment protection, to rescue strategic companies, or to increase the production and storage capacity of specific goods. Governments might also try to prevent companies of strategic importance that are facing liquidity shortages from being acquired by foreign firms. However, achieving these goals may have detrimental effects on market concentration and market power levels. Competition authorities should use their advocacy tools to highlight the dangers associated with the undermining of market processes and to ensure that mergers (even if anticompetitive) are proportionate and necessary to achieve the other policy objectives pursued by the State.

This may include the imposition of remedies that minimise the anticompetitive effects of mergers approved to support public policy goals.

In effect, another challenge for competition authorities is how to design merger remedies. The COVID-19 crisis might not only increase the importance of remedies – given the expected increase in the number of mergers, market concentration and exiting firms – but also raise issues regarding their design and implementation. In markets affected by the crisis, structural remedies may not always be a viable option due to (i) the deteriorating performance of merging assets, (ii) difficulties in identifying suitable buyers, and (iii) ineffective responses to the rapid evolution of market circumstances. Consequently, competition authorities may need to be creative to prevent structural remedies from becoming less effective due to the crisis' impact. Moreover, competition authorities will have to be more alert to the risks of such remedies not being as effective as during normal times. On the other hand, rapid changes in some markets may trigger parties to (legitimately) request – in jurisdictions where this is contemplated – the reconsideration of the scope of (both structural and behavioural) remedies that have already imposed due to a “change of circumstances”. Such requests often require an ex novo competition assessment, increasing the burden on competition authorities. In this regard, to make the clause review process more transparent and effective, it would be important to determine in advance the trigger events that would automatically modify the remedy provisions or fully release the parties from the obligations imposed by the remedy – but this may be difficult during a crisis.

In times of acute crisis, competition authorities may be called to scrutinise alleged rescue mergers, whereby the parties will put forward a so-called failing firm defence (FFD) to obtain merger clearance for transactions that should otherwise be prohibited. The rationale behind the failing firm defence is that it would be less harmful to competition to allow the proposed merger to proceed than it would be to allow the failing firm to exit the market. There is general consensus that this defence should only be accepted when three cumulative conditions are met: (i) in the absence of the merger the failing firm would exit the market in the near future as a result of its financial difficulties; (ii) there is no feasible alternative transaction or reorganisation that is less anti-competitive than the proposed merger; and (iii) in the absence of the merger the assets of the failing firm would inevitably exit the market. In the aftermath of the 2008 financial crisis, competition authorities found no justification for relaxing the standards applicable to this defence and held that there were other policy instruments available (e.g. bankruptcy law and State interventions such as subsidies) to help failing firms through the crisis. Nevertheless, they recognised that procedural changes might be justified to ensure speedier review. Similar considerations are likely to also apply now.



An important challenge for merger control during a crisis is to ensure that the merger review process is timely. As an immediate reaction to the COVID-19 outbreak, many competition authorities issued guidelines on practical aspects of merger notification and review. In the medium/long-term, the COVID-19 crisis may increase the pressure on competition authorities to speed up their merger review and to allocate sufficient resources to ensuring that the review process is timely. Furthermore, merging parties that are in financial distress may be more likely to engage in conduct that violates the standstill obligation. This may lead to sanctions, but competition authorities are also empowered to grant derogations from this obligation in exceptional circumstances. A derogation may prove a useful tool, especially where it is not possible to speed up the review process. While the requirements for granting a derogation remain quite strict, derogations from the standstill obligation may be limited in scope, insofar as they only allow for the partial implementation/acquisition of control prior to clearance, if sufficient to prevent irreparable damage to the viability of a merging party and, consequently, to the feasibility of the transaction.

## Crisis and merger control in Eastern Europe and Central Asia

### Comments from the competition authorities

Competition authorities from Eastern Europe and Central Asia have limited past experience dealing with rapidly changing markets that they can draw upon to help them address the current issues arising from COVID-19. Most authorities have experienced a sharp decrease in the number of notified mergers during the pandemic, probably due to high uncertainty for businesses.

While authorities have expressed no intention of adjusting their analytical tools and investigative approaches used to assess mergers in order to reduce uncertainty in the decision-making process, they have acknowledged that the current crisis might require a somewhat greater degree of flexibility. The need to assess each case on its own facts and merits stands out in particular. Two topical challenges, linked to digitalisation, are the identification of the relevant geographic markets and the use of digital tools, such as online polls, for investigation purposes. Nonetheless, the standards of review should not be lowered.

The competition authorities do not have any leeway under their national competition regimes to consider public policy considerations, e.g. employment, market resilience or environmental sustainability, in the assessment. Nevertheless, the authorities expressed awareness of the crucial role that these factors might play in times of crisis. Several delegates observed that the notion of efficiencies in merger review might be expanded to also consider other relevant

factors, but this would require amendments to the legal framework to include provisions which would be applicable in times of crises.

According to a number of participants, the advocacy activities of competition authorities in the region are especially important during these times of crisis. Most of them can issue legal opinions and engage in other initiatives to urge governments to consider policy alternatives to state sponsored mergers to attain public policy goals. There is consensus that, even in times of crisis, the principle of competitive neutrality should be upheld. Most jurisdictions have provisions in their national laws whereby competition rules also apply to state bodies and public enterprises (the latter under certain conditions), the application of which should not be altered in times of crisis.

The current tools and procedures of competition authorities in Eastern Europe and Central Asia appear appropriate to impose effective remedies even in times of crisis. Since structural remedies may result more problematic than usual, behavioural remedies might find broader application, despite the typical difficulties related to the design of proper behavioural remedies and the need for more resources to monitor compliance.

None of the participant competition authorities has applied the failing firm defence argument to past mergers so far. Even in cases where firms put forward this argument, the required conditions were not met. There is a common understanding that failing firm defence arguments might deserve careful scrutiny in the future, but also that the evaluation criteria should not be relaxed.

*[Based on the report of the discussion at the seminar, by moderators Ms Nina Vasić, Senior Adviser of the Serbian CPC, and Mr Ion Maxim, Vice-President of the Competition Council of Moldova]*

## FINAL REMARKS

The characteristics of competition authorities in Eastern Europe and Central Asia vary considerably. While some authorities have already acquired vast experience in competition enforcement and play an influential role in advocating for competition in their countries, others have only just taken their first steps and still lack visibility. A number of authorities belong to EU Member States and therefore participate in the European Competition Network.

It appears that each competition authority will face different challenges as a result of the COVID-19 crisis depending on the particular economic features of the country in which it operates. Eastern European economies focus more on manufacturing and tourism and see a preponderant role of SMEs, while some Central Asian economies rely on capital-intensive extractive industries and exports of raw goods. However, all

countries in the region face some similar crucial issues, such as the relevance of the informal economy and the major role still played by SOEs.

The majority of competition authorities in Eastern Europe and Central Asia have in place the basic building blocks of a well-functioning competition regime. In addition, they can significantly benefit from increased opportunities for international and regional cooperation, including those offered by the OECD-GVH Regional Centre for Competition. Experience

gained during previous crises and international best practices provides strong arguments to advocate that sound competition policy have proven to be especially important in moments of crisis and it remains crucial even in the face of an expanded role played by industrial policy. Then it will be for each of the competition authorities to find the most appropriate approach to embed competition principles in the road leading to fast and sustained economic recovery.

# OECD Competition Policy Responses to COVID-19

## Policy note



OECD  
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## INTRODUCTION

The coronavirus pandemic has generated a major health and economic crisis, with a very significant temporary demand and supply shock. The extent of the impact of COVID-19 will depend on the duration and seriousness of the outbreak, as well as on when the economic activity restarts and by how much it rebounds, both of which will largely depend on government interventions.

Indeed, the economic consequences of the COVID-19 pandemic require swift and strong government actions to keep markets and the economy functioning. These interventions are necessary and legitimate to overcome the crisis with measures needed in the short term to prop up the economy and then to stimulate the recovery in a way that guarantees a more resilient, inclusive and climate friendly economy. This may require reviewing some of the traditional analytical frameworks of competition policy, including increased consideration of dynamic efficiencies. Policy makers may have to consider the trade-off between efficiency and resilience so that economies are better prepared to face different types of crises, address supply chain challenges and promote social cohesion and environmental outcomes. To achieve these legitimate policy goals, policy makers should assess the different available alternatives, undertake cost-benefit analyses, and select policy options that minimise competition restrictions and distortions. A broad reflection on an intelligent industrial policy that can help reallocate resources to certain key sectors (e.g. health) in a way that does not distort competition between firms can also help to lay the ground for a resilient and sustainable economy in the long term. Restoring effective competition in the medium to long term is also key to ensuring that the recovery is rapid and consistent.

For markets to function well in the long term, competition authorities can play a role now in advising governments on the design and implementation of these policies to ensure that, wherever possible and appropriate, responses follow competition principles. This will limit distortions that may not be necessary to achieve the legitimate goals of addressing the market

failures that arise from this crisis, and preventing the implementation of policies that will slow the economic recovery.

This note is prepared based on the work of OECD Competition Committee which formulates and promotes best practices in the area of competition law and policy. Section A focuses on state interventions and the role for competition policy, Section B focuses on competition enforcement actions in the short and medium term.

## A. STATE INTERVENTIONS AND THE ROLE FOR COMPETITION POLICY

The extent of the impact of COVID-19 will depend on the duration and seriousness of the outbreak, as well as on when the economic activity restarts and by how much it rebounds, both of which will largely depend on government interventions. Indeed, in times of extraordinary and temporary demand and supply shocks, governments can support consumers, workers and firms to weather the storm, and ensure readiness to resume economic activity once the crisis passes. As during previous crises, this may mean significant and immediate interventions in several markets, from the most directly affected by the crisis (e.g. airlines, tourism or health) to other markets that may be affected later.

### *Role for clear and transparent competitive neutrality rules*

Countries may need to ensure that sufficient liquidity remains available to businesses and to prevent the twin shocks to demand and supply from resulting in the exit of efficient firms, thus preserving the continuity of economic activity during and after the COVID-19 outbreak. This may take the form of grants, subsidies, bank guarantees, and other state support. Nonetheless, there is a danger that, if not carefully designed, state support may create competition distortions and un-level the playing field between companies that receive aid and competitors that do not. Where certain companies are put at an undue disadvantage, goods and services are no longer produced by those who can do it most efficiently. This leads to higher prices as a result of suboptimal use of sometimes scarce resources, using inefficient production methods or the non-adoption of new and better technologies. Competitive neutrality principles thus enhance efficiency throughout the economy.

General aid based on objective criteria, clear rules and applicable to all businesses in an industry (e.g. deferring taxes, or subsidising short-time work across all sectors), should not raise any issues from the competitive neutrality perspective. Support for specific companies may prove more problematic

from the competition viewpoint and may require clearer rules to ensure that it does not affect the level playing field between those who receive public support and those who do not.

Competition policy can inform the development of exit strategies that will make it possible for the market mechanism to be restored after the crisis, while avoiding the damage to the market that might follow an unplanned exit. Support measures should be limited in time in a manner that is reasonable, transparent and foreseeable and Governments should stop providing support as soon as conditions allow. The timing of exit is critical. On the one hand, withdrawing too early may provoke failure of the aided firms and leave competition even weaker. On the other hand, protracted withdrawals could result in some firms becoming reliant on public support and thus reducing its incentives to compete and innovate.

Exit strategies may include introducing incentives for exit from state support as soon as market circumstances permit (e.g. high remuneration for the government recapitalisation or requiring a strict dividend remuneration policy) and to ease markets back toward normality in a manner that promotes competition. Governments should rely on the advice of competition authorities when designing exit strategies. This can be complex and requires careful consideration, particularly to balance flexibility with legal certainty.

#### *Example of guidance to ensure competitive neutrality in state interventions*

A recent example of guidance on criteria to ensure competitive neutrality adapted to the current emergency is the Temporary Framework to support the economy in the context of the coronavirus outbreak put in place by the European Commission 19 March 2020. This framework enables Member states to use the state aid rules to support the economy in the context of the COVID-19 outbreak, to ensure that sufficient liquidity remains available to businesses of all types, and to preserve the continuity of economic activity during and after the crisis. It provides for five types of aid, including schemes to grant up to €800,000 to a company to address its urgent liquidity needs, state guarantees for loans taken from banks and subsidised public loans to companies. It links the subsidised loans or guarantees to businesses to the scale of their economic activity, by reference to their wage bill or turnover, for example.

### **Industrial policy should not lead to protectionist measures**

As governments switch focus from urgent short-term measures to longer-term efforts to encourage an economic recovery, they will need to ensure competition in markets. More broadly, in the last few years as regards industrial policy, there has been an emphasis on selective policy tools focused on pol-

icies such as clustering, place-based and mission-oriented innovation policies. These policies, which focus on addressing specific market failures, should continue to be favoured over more traditional selective policies, such as more lenient merger control, for instance. Shielding companies from competition can reduce their efficiency and their contribution to the economic recovery. Markets should be kept open and respect competitive neutrality principles.

### **Recommendations**

Governments should:

- Request and be receptive to competition agency advice when planning market interventions to ascertain that support is necessary and proportionate to address a market failure identified in a particular market as a result of the crisis. They should ensure that any support measures adopted is transparent and temporary and that positive effects from state measures are not outweighed by the negative ones deriving from the distortion of competition. Carefully design any measures targeted at specific companies during this critical period, narrowly tailor support measures to solve the issue identified and on a temporary basis with monitoring. Avoid selective aid to firms that were failing or had significant structural issues before the crisis. Exit investments as soon as conditions permit and in a manner that promotes competition and rely on the advice of competition authorities when designing such exit strategies already in planning phase of the measures to be taken.
- Appropriately and transparently reimburse firms in cases where the crisis reveals the need to impose on firms new public service obligations.

Competition Authorities should:

- Help governments implement the state support measures by providing inputs and advice, or where have powers to approve such measures to prioritise such cases. Issue opinions/guidance to governments on how to ensure a level playing field and avoid market distortions by providing clear, general and objective rules applicable to all firms in the economy, sector or region. Step up advocacy with government explaining the competition principles that should be respected to ensure markets remain competitive following the crisis, which will be crucial for an economic recovery. They should advocate for industrial policies that focus on pro-competitive alternatives to any planned government interventions that may risk long-term harm to markets.

Co-operate with other jurisdictions to ensure a degree of international agreement in the approach that is taken to ensure a level playing field also amongst countries and continue to advocate against protectionist measures.



## B. ENFORCEMENT - SHORT TERM IMPACTS OF THE PANDEMIC ON FIRMS BEHAVIOUR

Competition enforcement actions during and after the crisis will be crucial to ensure that markets are functioning well in the short-term, even if the current circumstances raise a number of significant practical, theoretical and evidentiary challenges, including ways to tackle price abuses, cooperation agreements and crisis cartels, review rescue mergers and prioritise investigations and other procedural ways to ensure effective enforcement.

The supply and demand shocks provoked by the COVID-19 crisis may significantly affect how firms behave in markets for the supply of essential goods and services. In particular, COVID-19 has led to a sharp increase of the demand for certain products resulting in difficulties in the production or distribution of essential products as a direct consequence of the confinement measures applied to many workers, leading to shortages. While some changes in the commercial behaviour of firms can be explained by firms adjusting their commercial strategies to the new market circumstances, others might require close scrutiny by competition authorities. Two such behaviours that may eventually be problematic are exploitative pricing and cooperation arrangements with competitors.

### *Suspicious pricing behaviour*

During a crisis, there may be a sharp price increase of certain goods. While price spikes may be the legitimate consequence of a change in market circumstances due to the crisis, such as shortages of products in high demand or disruptions in international supply chains, there is a risk that firms might strategically exploit consumers in a distressed economy. Consumer exploitation through pricing policies (e.g. excessive pricing) is often referred to as price gouging when it involves significant and rapid price increase after some type of shock in the demand or supply (e.g. as a result of an earthquake or a pandemic). In these situations, firms may increase prices relative to costs, or reduce output to maximise gains related to prior stocks acquired at lower prices. In some jurisdictions, excessive pricing may be considered an exploitative abuse of dominance. These are complex cases, which require the existence of a dominant position in the first place. Authorities with a consumer protection mandate may equally address such price increases as infringements. In either case, the challenge for enforcers is to distinguish a behaviour that is abusive or unfair, respectively, from one that reflects a lawful response to a temporary shortage resulting from the emergency at issue. Another way to address the problem are price controls implemented by the government. While such policies may protect consumers from price gouging in the short-run, they risk distorting price signals that would otherwise encourage greater production and swift market entry to address shortages.

### *Examples of investigations related to consumer exploitation through pricing policies*

UK CMA “The Competition and Markets Authority (CMA) wants to ensure that traders do not exploit the current situation to take advantage of people. It will consider any evidence that companies may have broken competition or consumer protection law, for example by charging excessive prices or making misleading claims about the efficacy of protective equipment (...)” (COVID-19: sales and pricing practices during Coronavirus outbreak, from 5 March 2020).

### **Italian AGCM**

“Today the Autorità Garante della Concorrenza e del Mercato (the Italian Antitrust Authority) sent a request for information to the main online sales platforms and other sales sites about the marketing of hand sanitizers and disposable respiratory protection masks” (ICA: Coronavirus, the Authority intervenes in the sale of sanitizing products and masks, from 27 February 2020).

### *Co-operation agreements between competitors*

Collaboration between competitors is likely to rise during a crisis, as firms may engage in joint R&D projects (e.g. medical research) or in joint production/distribution of essential goods (e.g. food chain or products of first necessity). These arrangements may be necessary during crises to increase the production of a certain product or co-ordinate an essential service. They may even be promoted by governments. Co-operation between competitors may indeed increase consumer welfare by making more products available, and most competition laws allows for competitor co-operation when there are efficiencies and consumer benefits. However, competition authorities should ensure that such co-operation does not spill over into hard-core restrictions of competition, such as price fixing (see below “crisis cartels”). Moreover, competition authorities should ensure that any short-term co-operation does not extend any longer than necessary to address the crisis.

Similarly, competition authorities may wish to provide input to governments when they consider regulation of collective bargaining rights, as well as to analyse whether agreements between workers or grey area workers faced with monopsony power (such as in digital platforms) are effectively anti-competitive.

### *Examples of co-operation agreements between competitors*

### **European Competition Network (ECN)**

“The ECN understands that this extraordinary situation may trigger the need for companies to co-operate in order to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances,

the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. (...) such measures are unlikely to be problematic (...)” Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, from 23 March 2020).

### US Federal Trade Commission (FTC) and Department of Justice (DoJ)

“The Agencies are committed to providing individuals and businesses in any sector of the economy that are responding to this national emergency expeditious guidance about how to ensure their efforts comply with the federal antitrust laws. (...). Interested businesses should refer to the Agencies’ previous statements on how they analyze co-operation and collaboration between competitors. (...)” (Joint FTC-DOJ Antitrust Statement regarding COVID-19, from 24 March 2020). For info, the European Commission has also committed to speedy and informal guidance: Antitrust rules and coronavirus, March 2020).

### Norwegian Competition Authority

“Following the corona epidemic, the Norwegian government has as of today granted the transportation sector a three months temporary exception from the prohibition against anticompetitive agreements and practices in the Norwegian Competition Act. (...). The Authority must be notified if the exception is relied on” (Transportation sector is granted temporary exception from the Competition Act, from 19 March 2020).

### Australian Competition and Consumer Commission

The ACCC has granted conditional interim authorisation for Medicines Australia (MA), the Generic and Biosimilar Medicines Association (GBMA) and their members to work together to support the continued supply of essential medicines during the COVID-19 pandemic (...) to identify and mitigate any shortages or supply chain problems that could impact the availability of medicines in Australia. This may involve coordinating on and prioritising medicine orders and supply requests, working together on tenders, and sharing information about medicine stocks, supply channels and opportunities to increase the manufacture of medicines in Australia (Medicine manufacturers to coordinate on COVID-19 response, from 3 April 2020).

The ACCC has granted interim authorisation for members of the Australian Securitisation Forum (ASF) to work together to assist smaller lenders to maintain liquidity and issue loans to consumers and small businesses during the economic disruption caused by the COVID-19 pandemic. This follows the announcement of the federal government’s \$15 billion Structured Finance Support Fund (SFSF), which will allow smaller authorised deposit-taking institutions

(ADIs) and non-ADI lenders to access funding at competitive prices. The SFSF will be administered by the Australian Office of Financial Management (AOFM). The interim authorisation will allow ASF Members to coordinate their input about how the scheme will be administered. (Co-operation on funding to aid smaller lenders during COVID-19, from 8 April 2020).

### *Competition authorities should carefully assess crisis cartels*

In the face of a crisis, some firms may be tempted to reorganise the structure of an industry by entering into so-called “crisis cartels”, i.e. agreements among most or all competitors to restrict output and/or reduce capacity to increase profitability and prevent market exit in times of crisis. This may increase the likelihood of cartels during the crisis and also in its aftermath. In the past, similar agreements have been permitted or even fostered by governments themselves. This raises the question of whether competition authorities should take a more lenient view of potential anti-competitive practices in such circumstances. Evidence shows that arrangements that lead to price fixing, output restriction or capacity reduction are extremely harmful and should be actively cracked down.

### *Recommendations*

Competition authorities should:

- Monitor closely any significant and rapid price increases. In the short term, this may include enforcement actions to identify where and when prices increased in the supply chain, as well as the use of interim measures or warning letters to stop the conduct quickly when appropriate. Co-ordinate actions with consumer protection agencies, or rely on consumer protection powers (if available) to protect consumers from unfair pricing practices. Use advocacy powers to highlight the risks of price control measures implemented by governments, including those related to distorting price signals that may encourage production and undermine incentives for new entrants to address shortages. Clarify to business in a timely manner how they will consider efficiencies in arrangements between competitors (e.g. open fast-track channels to provide advice on specific cases of co-operation), in particular those dealing with priority sectors in the crisis, such as medical products and food supply chains. They should ensure that legitimate co-operation between competitors are necessary and limited in time. They should not include hard-core restrictions such as price fixing.
- Carefully assess justifications put forward in support of crisis cartels. Any exempted cartel should be granted a finite lifetime and be subject to review according to pre-specified criteria.

## C. ENFORCEMENT - MEDIUM-TERM IMPACT OF THE PANDEMIC ON MARKET STRUCTURES

A structural consequence of the economic crisis triggered by the COVID-19 pandemic will probably be an increased level of concentration in markets, insofar as some firms will undergo financial distress and exit the market. Next to market exit, concentration will be favoured by M&A activities driven by companies seeking to improve their condition by merging with healthier competitors. As a result, competition authorities will be called to scrutinise a number of urgent and critical mergers, including alleged “rescue mergers”, i.e. acquisitions of firms that may be facing bankruptcy. In this context, merger control may play a key role in preventing transactions that would result in long-lasting harm to market structures.

### *Competition authorities should scrutinise carefully failing firm defences*

Financial and economic difficulties will force some firms to exit the market in the aftermath of the crisis. Consequently, competition authorities will probably be called upon to scrutinise a number of urgent and critical mergers and to ensure that authorisations of anti-competitive mergers based on public interest considerations remain limited in scope.

Merger review might become particularly challenging for so-called rescue mergers in which the merging parties claim that the target firm would exit the market but for the merger (the “failing firm defence”) and request authorisation for transactions that would have otherwise restricted competition. If an asset would leave the market anyway, the merger may be more pro-competitive than just letting the firm go bankrupt, despite the increased market power of the resulting entity. Competition authorities will therefore need to continue to carefully analyse such mergers and ensure that the parties meet the standard of proof to demonstrate that the failing firm defence should indeed apply. Otherwise, the competition authorities run the risk of approving anti-competitive mergers with a long-lasting negative structural impact on the marketplace.

### *Competition authorities should continue to look carefully at public interest considerations*

Competition authorities will come under pressure to clear certain mergers for the sake of public policy objectives, including the preservation of national champions or to ensure the production of certain products in their territory. The crisis may further call into question some elements of the traditional

analytical framework of competition policy with an increased emphasis on the evaluation of dynamic efficiencies and leading to a reflection on the need to also take into account supply chain, social cohesion and environmental considerations.

### *Example of failing firm defence in the European Union*

In its Guidelines on the assessment of horizontal mergers, the European Commission points out that an otherwise problematic merger may be authorised if one of the companies is a failing firm. For that to happen, evidentiary thresholds are high. Three cumulative conditions should be met: i) absent the merger, the failing firm would exit the market in the near future as a result of its financial difficulties; ii) there is no feasible alternative transaction or reorganisation that is less anti-competitive than the proposed merger; iii) absent the merger, the assets of the failing firm would inevitably exit the market.

### Recommendations

Competition authorities should:

Closely review claims of rescue mergers and only accept failing firm defences following scrutiny of the evidence, to avoid achieving short-term benefits at the cost of longer-term and higher costs.

Competition authorities and governments should:

- Authorise anti-competitive mergers based on other public policy considerations only in exceptional circumstances and in a transparent manner.

### Related OECD work

Competitive Neutrality (2015)  
Competition Policy, Industrial Policy and National Champions (2009)  
Competition, State Aids and Subsidies (2010)  
Exit Strategies (2010)  
Industrial Policy and the Promotion of Domestic Industry (2018)  
OECD Recommendation on Hard-Core Cartels (2019)  
OECD Competition Assessment Toolkit (2019)  
Crisis Cartels (2011)  
Excessive Prices (2011)  
Excessive Prices in Pharmaceutical Markets (2018)  
Information Exchanges between Competitors under Competition Law (2010)  
Interface between Competition and Consumer Policies (2008)  
Public Interest Considerations in Merger Control (2016)  
Failing Firm Defence (2009)



## ICN/OECD Webinar on ‘Competition Investigations during the COVID-19 Crisis’



**Isolde Lueckenhausen**

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Secondee from the Australian  
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On 5 May 2020, the OECD and ICN hosted a joint webinar on ‘Competition Investigations during the COVID-19 Crisis’. The webinar was designed to allow authorities to share information that was timely and relevant to the operational decisions they were making in early May. The webinar was restricted to competition authorities in order to allow for frank and open discussion. The event was introduced by Professor Frédéric Jenny (Chair of the Competition Committee) and Mr. Andreas Mundt (Steering Group Chair of the ICN and President of the Bundeskartellamt). A global perspective on the issues was provided by interveners from Australia, Brazil, the Caribbean, Canada, Chinese Taipei, the European Commission, Lithuania, South Africa, US and the UK.

A short questionnaire to the attendees provided some useful insights into the issues being faced by authorities regarding key practical and technical issues, as well as substantive issues. From both the questionnaire and the issues raised by speakers, it was clear that developing efficient and effective international organisation and communication systems while working remotely had been a top priority for authorities. In addition, so had having the means to work collaboratively and securely, with a number of agencies noting that they had initially faced challenges with technology but that teleworking was now generally working well. Authorities were cognisant of the need to manage their practical limitations (such as court closures and limitations on the ability to conduct physical investigations), while ensuring stakeholders understood they would

still enforce the law and maintain standards. Many authorities created special teams or task forces to coordinate the various practical and substantive issues they were facing, including the Australian Competition and Consumer Commission and Competition and Markets Authority (UK).

Many authorities had also developed public guidelines and/or public communications so that their stakeholders understood both the practical and policy approaches being taken by the authority. Examples of this include announcements by the Canadian Competition Bureau, European Commission and a joint statement by the European Competition Network. The key substantive issues facing authorities related to developing an approach to co-operation between competitors in a time of crisis; considering the risks to market structure and how good competition policy can intervene to help manage those risks; and providing advice and advocacy on competition policy and specific proposed forms of intervention. A number of authorities had been adopted new roles (such as in monitoring prices or the supply of certain essential goods) and were also providing policy advice to government on regulatory approaches to COVID-19. For example, in South Africa, the government issued regulations that prohibit an excessive price under the Competition Act for certain essential goods and services, ranging from foodstuff and medical supplies to face masks and surgical gloves, which the South African Competition Authority has enforced. A number of authorities noted the importance of ensuring short-term government measures could be effectively wound back when no longer needed and did not go further than necessary to resolve the problems being encountered. The questionnaire also asked authorities what key actions they would like to be undertaken by the OECD and ICN to support authorities. The OECD is responding to these needs by hosting webinars on key practical and technical topics (both in global webinars and within the regional centres) and providing competition policy advice to both authorities and governments.



## The EU Commission's antitrust response to the COVID-19 crisis



**Maria Jaspers**

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The COVID-19 pandemic has challenged societies and business communities throughout the world.<sup>8</sup> The responses given by competition enforcers will have an important impact on our markets and must, despite the urgency, be based on sound and informed choices in order to mitigate short and long-term consequences of the crisis. As other competition authorities around the globe, the European Commission (the Commission), has taken swift action to ensure business continuity also during the confinement period and has provided guidance and directions to help the business navigate through these exceptional times. Although this short overview will focus on antitrust aspects, it should be mentioned upfront that the Directorate-General for Competition of the European Commission (DG Competition) is not only responsible for antitrust and merger enforcement, but also controls that state-aid granted by the Member States of the European Union do not distort competition within the single European market. This quite unique role has obviously been a high-priority since the early days of the crisis in order to ensure that national support measures can be put in place as quickly and effectively as possible, whilst guaranteeing that the support does not lead to undue distortions of competition and harmful subsidy races between Member States. It has resulted in an impressive number of very swift actions, including the adoption of general temporary assessment frameworks and hundreds of individual decisions. On the merger side, the Commission has managed to deal with all notifications within the foreseen legal deadlines, while taking steps to fully implement contactless and paperless work spaces and procedures. The absence of similar legal deadlines in the antitrust framework allowed DG Competition to recognise the constraints and challenges faced by business, notably in the early days of the crisis. Every investigative step

that triggered reactions from external stakeholders was therefore subject to balanced judgment calls concerning the necessity and proportionality of the foreseen action at that moment in time. Although no pending investigation was terminated due to the crisis, requests for information to businesses particularly affected by the crisis were for example either put on hold or submitted with considerably longer response periods. In order to secure business continuity and progress in our investigations, virtual alternatives to procedural steps that would usually require physical interactions also had to be developed. Since the early days of the crisis, the Commission has sent two parallel and interlinked messages that have guided our actions until today. The first is that antitrust would not stand in the way of an efficient and justified response to specific and exceptional business cooperation needs. The second is that vigorous enforcement remains the rule even during the crisis. The Commission shares the responsibility of enforcing the European competition rules with national competition authorities. One of the first priorities for the Commission was therefore to secure a common basic line on how these authorities intended to use the antitrust rules during the crisis. On 23 March 2020, the European Competition Network (ECN) issued a Joint Statement, clarifying that the ECN authorities do not intend to actively intervene against cooperation efforts steered towards addressing shortage of supply and ensuring fair distribution of scarce products, as long as these efforts are temporary, necessary and proportionate.<sup>9</sup> The Statement notes that such measures would not be problematic under the antitrust rules, either because they are not caught by the prohibition of Article 101 of the Treaty of the Functioning of the European Union (TFEU), or because efficiencies would outweigh any restriction. In case of doubts, the Statement invites companies to seek guidance from the competition authorities. The Statement also sent a warning message indicating that the ECN authorities would not hesitate to intervene against companies who use the crisis to their advantage. A similar Statement was adopted by the International Competition Network on 8 April.<sup>10</sup> Shortly after the joint ECN statement, DG Competition launched a website dedicated to “Antitrust rules and coronavirus”<sup>11</sup>. The website is a one-stop-shop for available guidance and information to business actors and also includes a dedicated mailbox through

<sup>8</sup> The views expressed are purely those of the author and may not in any circumstance be regarded as stating an official position of the European Commission.

<sup>9</sup> Joint Statement by the European Competition Network (ECN) on application of competition law during the Corona crisis of 23<sup>rd</sup> March 2020 ([https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf))

<sup>10</sup> ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic (<https://www.internationalcompetitionnetwork.org/featured/statement-competition-and-covid19>)

<sup>11</sup> <https://ec.europa.eu/competition/antitrust/coronavirus.html>

which companies can contact DG Competition with requests for guidance on specific cooperation projects<sup>12</sup>.

On 8 April the Commission adopted a “*Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*”<sup>13</sup>. The document lays down the main criteria that the Commission will use when assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the COVID-19 outbreak. The Temporary Framework is not sector specific, but refers to and builds on experience gained by the Commission in discussions with stakeholders in the health sector. The document provides concrete examples of practices that would generally not raise competition concerns (provided that well-established antitrust safeguards are put in place), such as coordination and information gathering needed to better match supply and demand. The document also covers initiatives that could under normal circumstances be more problematic, such as joint product optimization and coordinated efforts to scale up production. In addition to increasing transparency, the Temporary Framework also introduced a new and temporary tool – so called ad hoc ‘comfort letters’ – that would allow the Commission to swiftly give not only guidance but also adequate certainty and comfort to individual initiatives. On the same day as the Temporary Framework was adopted, the Commission issued the first (and at the time of drafting only) comfort letter, addressed to the European association of generic pharmaceutical manufacturers “Medicines for Europe”<sup>14</sup>. The letter concerns a specific cooperation among pharmaceutical producers, targeting the risk of shortage of critical hospital medicines for the treatment of coronavirus patients. The cooperation consists in modelling demand, identifying production capacity and existing stocks, adapting or reallocating production and stocks based on projected and actual demand and, potentially, addressing the distribution of COVID-19 medicines. The Commission concluded that this temporary cooperation did not raise competition concerns under Article 101 TFEU, provided that it satisfied a number of conditions stipulated in the letter. The letter has been published on DG Competition’s corona virus website. These actions illustrate the Commission’s willingness and

ability to take full account of the legal and economic context when assessing individual arrangements and making full use of the antitrust procedural flexibility in order to ensure a timely and effective intervention. Nothing that the Commission has done or said so far would however suggest that there would be a need to relax the antitrust rules or de-prioritise antitrust enforcement. In a context where the number of operators may shrink and concentration may rise as a result of the financial difficulties created by the absence of sales during lockdowns, it is more important than ever to maintain competition between remaining operators and ensure that companies do not take advantage of the current crisis by cartelising the market or abusing a dominant position. Competition enforcers must therefore remain vigilant about the likely reoccurrence of both traditional cartels and so-called ‘crisis’ cartels, that companies may be tempted to enter into in order to overcome overcapacity or a decline in demand. New sanitary rules may lead to new barriers to (re-)entry and potentially lead to new dominant positions in previously more competitive markets. The crisis may also trigger certain abusive conducts that would be prohibited under Article 102 TFEU, such as excessive pricing (or other exploitative practices) for products that are high in demand. By tilting further the balance between brick & mortar and online as well as the balance between different online actors, the crisis might also be an opportunity to foster transition to online. This will require that smaller players and new entrants are protected against possible anticompetitive behaviour by large online players. Experience from previous crisis, including the Great Depression in the US in the 1930’s, has shown that suspending or relaxing antitrust rules as a short-term solution to support companies in distress will most likely delay recovery and create market conditions and harm that would be difficult to reverse. Competition enforcers therefore have an important role to play to promote competition as a guiding principle for economic recovery from the current crisis when regulatory solutions are being shaped. The Commission will continue to ensure a sound, effective and transparent enforcement of its antitrust rules also during the turbulent times ahead; providing timely guidance when needed and taking firm actions to protect the competitive process and consumers.

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13 [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408\(04\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=en)

14 [https://ec.europa.eu/competition/antitrust/medicines\\_for\\_europe\\_comfort\\_letter.pdf](https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf)

# The US DOJ's Antitrust Response to the COVID-19 Crisis



**Caldwell Harrop**

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These are challenging times for antitrust enforcement.<sup>15</sup> At the height of the COVID-19 pandemic, we are all working from home, and day-to-day tasks and decisions are more complex. At work, obtaining information from parties and third parties, appearing before courts, and communicating within and among teams all require additional steps. To address the crisis, the U.S. Department of Justice's Antitrust Division (Division) is working closely with a range of federal agencies to ensure that critical products, such as personal protective equipment (PPE) and medical supplies, are rapidly deployed where they are needed most, including to healthcare workers on the front-line. At the same time, the Division is vigilant as ever to ensure that unscrupulous actors do not take advantage of the crisis to harm consumers through anticompetitive conduct.

To ensure greater clarity during these uncertain times, the Division released a joint statement with the Federal Trade Commission (FTC) detailing several types of collaborative activities among competitors that would be consistent with the antitrust laws, and outlined an accelerated business review process for companies that need it.<sup>16</sup> The statement noted that the agencies recognize the need for procompetitive collaboration today with respect to research and development, sharing of technical know-how, joint purchasing behavior, and other conduct related to production and distribution of essential materials. Only eleven days later, the Division issued the first business review letter pursuant to this expedited process.<sup>17</sup> The letter explained that the Division would not challenge the collaborative efforts of medical supplies distributors to work with federal authorities to expedite and increase manufacturing, sourcing, and distribution of PPE and certain medications necessary to treat COVID-19 patients.

In a second joint statement with the FTC, the Division reaffirmed the importance of competition for American workers, particularly providers of essential services such as health

care workers, as well as employees of key businesses such as grocery stores and pharmacies.<sup>18</sup> The agencies expressed their commitment to enforcing the antitrust laws against those who exploit the pandemic to engage in anticompetitive conduct in labor markets, such as by entering into unlawful wage-fixing and no-poach agreements.

The Division has also prioritized the criminal investigation and prosecution of competition cases related to COVID-19. The Division's Procurement Collusion Strike Force (PCSF) strives to hold accountable individuals and companies that use the pandemic as an opportunity to engage in criminal antitrust violations, including bid rigging, price fixing, and market allocation.<sup>19</sup> Created in November 2019, the PCSF is an inter-agency partnership of law enforcement personnel and prosecutors across the Department, which aims to combat criminal antitrust violations affecting public procurement. Given its focus, the PCSF is on high alert for collusive practices in the sale of important healthcare products to federal, state, and local agencies.

What the Division is doing today is in line with learning regarding appropriate antitrust enforcement in prior times of financial hardship. In times of economic crisis, competitors facing collapsing demand feel increased pressure to stabilize prices so as to maintain profits, and the temptation to collude can be irresistible. Firms will rationalize this behavior as merely preserving existing "normal" market structure, and not price-gouging. In times of economic difficulty, when suppliers have substantial excess capacity, incentives for colluders to defect from price-fixing agreements are likely to diminish.

In the United States, however, cartels are illegal at any time and are subject to criminal prosecution, regardless of the economic climate. There are no special provisions related to economic downturns for changes in the legal standard, for exemptions or other derogations from the law, for legal defenses to cartel conduct, or for special sector-specific treatment. Nor are there special provisions for sanctions and penalties related to economic downturns.

This was not always the case. Ninety years ago, at the time of the Great Depression, U.S. antitrust enforcement policy took a different approach to cartels. At the onset of the Great Depression, instead of reinvigorating antitrust enforcement, the federal government took the opposite tack. Congress passed legislation in 1933 that effectively foreclosed competition. The

<sup>15</sup> The views expressed in this article reflect those of the author and do not necessarily represent those of the Department of Justice.

<sup>16</sup> See <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-announce-expedited-antitrust-procedure-and>.

<sup>17</sup> See <https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting>. A second letter was issued just two weeks later concerning collaborative efforts relating to medications and medical supplies; see <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-amerisourcebergen-supporting-distribution>.

<sup>18</sup> See <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and>.

<sup>19</sup> See <https://www.justice.gov/procurement-collusion-strike-force>.



National Industrial Recovery Act (NIRA), which created the National Recovery Administration (NRA), allowed industries to create a set of industrial codes. These “codes of fair competition” set prices and wages for individual industrial sectors, established production quotas, and imposed restrictions on investment and even work hours.<sup>20</sup>

At the core of the NIRA was the idea that low profits in these industrial sectors contributed to the economic instability of those times. The purpose of the industrial codes was to create “stability” – i.e., higher profits – by fostering coordinated action in the markets.

The codes developed following the passage of the NIRA governed many major industrial sectors: lumber, steel, oil, mining, and automobiles. Under this legislation, the federal government – including the Division itself – assisted in the enforcement of the codes if firms contributed to a coordinated effort by permitting unionization and engaging in collective bargaining. The theory was that higher profits resulting from the codes would be shared with labor unions.

As a result of these industrial codes, competition was relegated to the sidelines, as the welfare of firms took priority over the welfare of consumers. It is not surprising that the industrial codes resulted in restricted output, higher prices, and reduced consumer purchasing power.<sup>21</sup> Research has shown that the codes delayed the recovery of the economy, reducing GNP, consumption, investment, and hours worked.<sup>22</sup>

It was not until 1937, during the second Roosevelt Administration, that the United States saw a revival of antitrust enforcement. The lessons learned from this historical example are twofold. First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in a government’s response to economic crises to ensure that markets remain competitive.

As former Deputy Assistant Attorney General Carl Shapiro noted, “during general economic downturns, financial distress at the industry or company level is certainly *relevant* to antitrust analysis. This point should not be controversial; it is merely the application of the general principle that antitrust enforcement should take account of real-world economic conditions. ... Overall macroeconomic conditions are relevant only inasmuch as they affect current and expected future conditions at the industry or company levels.”<sup>23</sup>

Just as the same basic principles of antitrust economics apply to high-tech industries as to all other sectors of the economy, the same basic principles apply to an economic downturn as to an expansion. “Basic economics does not change during a recession, any more than it changes with the advent of new technologies. Nor do the ultimate goals of the antitrust laws – protecting competition and consumers – change during an economic downturn.”<sup>24</sup> Antitrust enforcers will be confronted with more cases involving financially distressed firms during a downturn, but antitrust analysis takes place at the industry and company level, and the issues raised are not unique to a recession and do not call for special rules. Even in times of expansion there will be firms suffering losses, because of financial mistakes or reduced demand from changing tastes or new technologies.<sup>25</sup>

Antitrust enforcers need to distinguish between transitory distress and longer-term decline, between short-term impact and long-term industry structure. “This is especially true regarding mergers, which can permanently eliminate competitors in concentrated markets. Recessions are temporary, but mergers are forever.”<sup>26</sup>

As noted above, antitrust enforcers must be particularly vigilant as suppliers face increasing temptation to collude, but they must also be wary of efforts to seek antitrust exemptions during economic downturns. “The evolutionary process, whereby some firms survive and others fail, can be especially intense, and especially valuable, during tough economic times,”<sup>27</sup> but government should be skeptical of claims of “ruinous competition” and wary of opportunistic failing firm claims for anticompetitive mergers. Recessions are also particularly challenging for smaller, newer competitors facing established dominant firms, and antitrust enforcers must be on the lookout for exclusionary tactics by dominant firms taking advantage of these conditions.

Despite the many challenges during these times, a critical feature of a vigorous economy will always be effective and efficient antitrust enforcement — enforcement that can adapt to rapidly changing and unpredictable conditions. The Division will continue to monitor closely pandemic developments and to provide timely guidance, and will pursue both civil and criminal violations of antitrust laws to protect competition and consumers.

20 See “Competition Policy in Distressed Industries,” Carl Shapiro, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice (May 13, 2009), Remarks before the ABA Antitrust Symposium: Competition as Public Policy, May 13, 2009, available at <https://www.justice.gov/atr/speech/competition-policy-distressed-industries-from-which-this-discussion-is-derived>.

21 “Vigorous Antitrust Enforcement in this Challenging Era,” Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the Center for American Progress, May 11, 2009, available at <http://www.justice.gov/atr/public/speeches/245711.htm>.

22 Shapiro, *supra* n. 6, at 9.

23 *Id.* at 12.

24 *Id.* at 13.

25 *Id.*

26 *Id.* at 15.

27 *Id.* at 18.



## The US FTC's Antitrust Response to the COVID-19 Crisis



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**May 15, 2020**

We find ourselves in a world where a public health crisis has led to the loss of millions of jobs, the closure of thousands of businesses, and a significant reduction in domestic and global commerce, not to mention human tragedy of epic proportions. The public demands a quick solution to both the economic and public health crises. The demands may lead to questions such as whether normal competition rules, such as those that affect competitor collaboration, be suspended, or what should be the role of the laws of supply and demand in setting prices. The implication is that in times of an emergency, the normal rules don't serve us well. While emergencies require a swift and well-informed response, it is critical not to respond in a way that exacerbates the problem.

While the coronavirus pandemic may be new, calls to turn a blind eye to competition policy and the role of markets are not. As then-Deputy Assistant Attorney General Carl Shapiro said during the 2008 economic crisis, "Keeping markets competitive is no less important during times of economic hardship than during normal times."<sup>28</sup> As with highway speed limits, it's not only important to drive safely on a sunny and dry day, the rules matter even more when it's icy, dark and raining, because that's when accidents are most likely to happen.

In good times and bad, competition authorities such as the Federal Trade Commission and the Department of Justice protect consumers by preventing anticompetitive conduct that prevents markets from responding to consumer needs. The FTC also protects consumer demand from being distorted by deceptive and unfair business practices. These roles are especially important in this uncertain time. Competitive forces are what creates incentives for businesses to provide what

consumers want and need. Competition is as important now as ever.

The coronavirus pandemic has led to critical shortages that have resulted in large price increases in certain sectors. Yet in competitive markets, high prices often provide the necessary incentive to attract new entrants, which ultimately helps to bring supply back in line with demand. Well-intentioned proponents of price regulation risk removing this incentive and prolonging the shortage.

The FTC has used its competition and consumer protection authority to address pandemic-related issues, for example by reminding businesses that the pandemic does not abrogate or diminish antitrust or consumer protection rules or enforcement, while providing guidance that would allow legitimate collaborations and joint ventures to address the health crisis created by the pandemic in an effective manner. For example, the FTC, in conjunction with the Department of Justice Antitrust Division, issued a statement detailing an expedited procedure for businesses to obtain antitrust guidance for collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic.<sup>30</sup> Most recently, the FTC and the Department of Justice issued a joint statement that they will seek to protect workers on the front lines of the coronavirus pandemic – including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers – against those who seek to exploit the current circumstances to engage in anticompetitive conduct in the labor market,<sup>31</sup> such as engaging in collusion to lower wages or to reduce salaries or hours worked.

When anticompetitive conduct results in supply shortages or price increases, competition law enforcement is an appropriate tool. Anticompetitive exclusionary conduct by a dominant firm may prevent new entrants from responding to shortages, thus suppressing price competition and violating Section 2 of the Sherman Act.<sup>32</sup> An example which pre-dated the COVID-19 outbreak, shows how anticompetitive behavior can harm consumers. In 1998, the FTC charged that Mylan Industries and other companies carried out a plan intended to give Mylan the power to raise the price of generic lorazepam tablets and generic clonazepam tablets by depriving its competitors of the active pharmaceutical ingredient (API)

28 The views expressed herein are my own, and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.

29 Carl Shapiro, Deputy Assistant Attorney General for Economics, U.S. Department of Justice, Competition Policy in Distressed Industries," Remarks Prepared for Delivery to American Bar Association Antitrust Symposium (May 13, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245857.htm>.

30 See <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure?utm>.

31 See <https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement>.

32 Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2. Violations of the Sherman Antitrust Act constitute unfair methods of competition in violation of the Federal Trade Commission Act, 15 U.S.C. §45.

necessary to manufacture each product. The firms had entered into exclusive licenses that allegedly deprived Mylan's competitors of the API for lorazepam and clorazepate. Without access to the API for lorazepam or clorazepate tablets, the FTC alleged that Mylan's competitors could not effectively compete for the sale of either product. Therefore, according to the FTC, Mylan could and did raise prices approximately 2000-3000% depending on the bottle size and strength. The FTC ultimately reached a \$100 million settlement with Mylan.<sup>33</sup> Thus, anticompetitive conduct that eliminates price competition and thereby results in high prices is within the reach of the U.S. competition agencies.

Tools beyond antitrust and consumer protection law may have a role to play to address market failures that may occur during a national crisis. When such tools are used, the challenge is to use them in way that will protect consumers without undermining incentives that ultimately will bring new supply into the market. Although there is no specific federal price gouging prohibition, the U.S. government can invoke specific provisions of the Defense Production Act to address excessive pricing or hoarding in exceptional cases, which may include natural disasters. The Defense Production Act, which dates back to the Korean War, authorizes the President to mandate contracts necessary for national defense and/or prevent hoarding or charging excessive prices. This statute has been invoked in the current situation with regard to designated health and medical resources. On March 23, the President issued Executive Order 13910, Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, pursuant to Section 102 of the Defense Production Act.<sup>34</sup> The Executive Order also authorizes the Secretary of Health and Human Services to protect scarce healthcare and medical items by designating particular items as protected under the statute. Once an item is so designated, the statute makes it a crime for any person to accumulate that item either (1) in excess of his or her reasonable needs or (2) for the purpose of selling it in excess of prevailing market prices.<sup>35</sup> The statute gives enforcement authority for these provisions to the U.S. Department of Justice. For their part, competition agencies can play a valuable role

as advocates within government, helping legislators and other regulators appreciate the value of competition and the longer-term competitive effects of particular proposals.

The international competition community has emphasized the importance of sound competition enforcement practices during the pandemic. The International Competition Network recently issued a statement reaffirming the relevance of competition to economies in crisis and urging member agencies to remain vigilant to prevent anticompetitive conduct during the crisis. The statement recognizes the ability of agencies to evaluate and consider good faith efforts and limited collaborations among competitors to provide needed goods and services in making enforcement decisions, in line with applicable laws. It also encourages transparency with respect to operational and policy changes during the crisis and supports agency advocacy to promote competition as a guiding principle for economic recovery from the pandemic.<sup>36</sup>

History has taught us that ignoring competition principles risks invoking a cure that can prolong the disease. FTC Chairman Joseph Simons recently pointed out that, "[a]s we saw during the 2008 financial downturn and other, earlier challenging times, 'emergency' exceptions to the antitrust laws are unnecessary and can be counterproductive. The National Industrial Recovery Act of 1933, adopted in response to the Great Depression, is an example of a reaction to an economic crisis that likely diminished competition among firms, with little-to-no benefit (and more likely harm) to the economy."<sup>37</sup>

The airline industry presents another good example. In its early days, the industry was dependent on airmail subsidies to survive. By the 1930s, new technology had led the industry to the point where airlines could begin to make a profit carrying passengers. Indeed, some innovative new carriers began to move into the market to compete with the holders of the airmail contracts, such as one that began unsubsidized hourly service between New York and Washington. A crisis resulted from a meeting in which airline officials allegedly met with the Postmaster General to allegedly divide routes. In response, the President cancelled all the airmail contracts and ordered the army to fly the mail. The army, used to flying in good weath-

33 See <https://www.ftc.gov/enforcement/cases-proceedings/9810146/mylan-laboratories-inc-cambrex-corporation-profarmaco-sri-gyma>.

34 See <https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19>.

35 In response to the Executive Order, the U.S. Department of Justice established a COVID-19 Hoarding and Price Gouging Task Force. See <https://www.justice.gov/file/1262776/download>. See also Executive Order 13909, Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19, <https://www.federalregister.gov/documents/2020/03/23/2020-06161/prioritizing-and-allocating-health-and-medical-resources-to-respond-to-the-spread-of-covid-19>, in which the Secretary of Health and Human Services (Secretary) is delegated the prioritization and allocation authority under section 101 of the Defense Production Act of 1950, with respect to health and medical resources needed to respond to the spread of COVID-19.

36 ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic, <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf>.

37 Joseph Simons, The Federal Trade Commission's Response to the COVID-19 Pandemic, forthcoming in J. ANTITRUST ENF. (2020), citing C. Shapiro, *supra* note 2, and A. J. Meese, Competition Policy and The Great Depression: Lessons Learned and a New Way Forward, 23 CORNELL J.L. & PUB. POL'Y 255 (2013). For an excellent discussion of lessons learned from the United States' experience with subordinating competition law to other goals in the 1907 financial panic and the Great Depression, see Marc Winerman, Antitrust and the United States Financial Crisis of '07, <http://www.abanet.org/antitrust/at-source/08/12/Dec08-FullSource12-22f.pdf>.

er, was unprepared and multiple fatal crashes ensued.<sup>38</sup> The resulting furor allowed the airline industry, which claimed to need protection from harmful competition from new entrants, to press Congress to enact a pervasive regulatory scheme in 1938 that regulated entry, price, and routes. For the next 40 years, airlines could compete on the basis of food service and schedules, but very little else, resulting in limited route options and high prices. The regulatory response intended to address a short-term economic crisis took decades to undo.

While regulating airline safety is important for protecting passengers, regulation can go too far when they harm competition, which is typically justified in the interest of promoting “stability,” “competitiveness,” or other industrial policy goals. The trick, of course, is to find the balance by weighing the cost of regulation against the benefits. The concern for 2020 is

that the crisis creates an opportunity for those who would exclude competition to claim that the emergency situation justifies brushing aside sound competition principles with only the slightest glance, as Congress did in the 1930s when it regulated the airline industry.

While some regulatory responses to the COVID-19 crisis response are necessary and well-justified, such responses should not undermine the salutary effects of market-based competition over the long run. An emergency certainly requires a swift and effective response. However, competition agencies should be vigilant in their roles as competition advocates to ensure that regulation does not go beyond its intended purpose and unnecessarily restrict the role of competition and the functioning of a market economy. Otherwise, one crisis can become the root of another.

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38 F. Van der Linden, *Airlines and Airmail* 271-91 (2002).

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