

Challenges faced by Competition Authorities in the Covid-19 Pandemic: An International Perspective

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Challenges Faced by Competition Authorities

Advocacy

- Exemptions from competition law,
- Advocacy toward government, advocacy toward business firms

Enforcement

- Operation of competition authority under lockdown conditions
- Pricing abuses (Price gouging, deceptive practices)
- Horizontal cooperation
- Mergers (including failing firm doctrine)

Other policies

- Industry rescue packages and other aspects of industry policy
- Foreign investment restrictions
- Government procurement measures
- Government intervention in competition agencies

After Covid

- Impact of increased concentration due to bankruptcies
- Competition law enforcement in a time of economic recession

Exemptions from or Suspension of Competition Law

Two different situations:

In some countries, the **Government passes a law suspending the application of competition law in part or in whole to some sectors**

Ex 1) South Africa The Covid-19 Block Exemption for the Healthcare Sector, exempts from the application of sections 4 and 5 of the Act (prohibiting anticompetitive horizontal and vertical agreements) agreements undertaken at the request of, and in coordination with, the Department of Health for the sole purpose of responding to the Covid-19 pandemic national disaster. Two other block exemptions were granted : The Banking Block Exemption and The Retail Block Exemption.

In other countries, the **Competition Authority may grant a temporary exemption from competition law**

Ex 2) Australia: The Australian Competition and Consumer Commission (ACCC) may grant authorisations which provide statutory protection from court action for conduct that might otherwise raise concerns under the competition provisions of the Competition and Consumer Act 2010. The authorization may be granted if the ACCC is satisfied that the public benefit from the conduct outweighs any public detriment.

Competition Advocacy

To Governments

Competition authorities would need to help governments **ensure that the new regulations they consider adopting do not unduly restrict competition**. These authorities could also advocate for lifting regulatory obstacles when such obstacles actually prevent the smooth adjustment of supply and demand.

Issue: Are competition authorities able to advocate? Are they listened to ?

To business firms

Above and beyond advice to governments on emergency regulations, competition authorities must send a clear message to the business community on **how the principles of competition law enforcement will apply in the context of the crisis** so that business firms can have a clear idea of what is allowed and prohibited.

Enforcement Excessive Prices and Price-Gouging

The **responses** of competition authorities to the risk of price-gouging have differed, **depending on four factors**:

- whether the competition law of their country had **public interest goals (ex UK)** or was strictly limited to the protection of consumer surplus (**ex Australia**),
- whether or not they believed that **intervening on price** abuses was **a legitimate use of competition law** enforcement (for ex difference between **US** and **Europe**) and, finally,
- whether or not their institution was a **multi-function competition institution** entrusted with a consumer protection function or not (ex difference between CMA in the UK and France).
- The **provisions of the law (standard of proof and definition of what is prohibited)** with respect to pricing abuse (ex **Ukraine, South Africa**)

- Different levels of intervention

- Monitoring

- Warnings

- Intervention

Differences Between Horizontal Agreements in a Pandemic and in Normal Times

Cooperation among competitors to alleviate the shortage of goods or services related to the pandemic or to remedy disruptions of supply chains **aim at increasing or restoring aggregate supply** rather than at reducing aggregate supply or maintaining prices (as horizontal agreements usually attempt to do in normal times).

In addition, **during the crisis, the increased supply of goods to prevent the spread of the pandemics could diminish the social cost of the pandemics** (cost of lost lives and/or the cost of confinement). Thus the horizontal agreement in a pandemic has a short run social benefit due to a positive externality which should be weighed against the cost of reducing competition.

Coordination Among Competitors: European Commission and US

On 8 April 2020, the **Commission** published a Communication on the establishment of a temporary framework for assessing antitrust issues related to **measures to be taken to adapt production, stock management and distribution which are in normal circumstances problematic under EU competition rules. They will not give rise to an enforcement priority for the Commission as long as:**

- (1) they would be designed **and objectively necessary to actually increase output in the most efficient way** to address or avoid a shortage of supply of essential products or services, such as those that are used to treat Covid-19 patients,
- (2) they would **be temporary** in nature (i.e. to be applied only as long there is a risk of shortage or in any event during the Covid-19 outbreak), and
- (3) they would **not exceed what is strictly necessary** to achieve the objective of addressing or avoiding the shortage of supply.

The joint FTC-DOJ statement published on 24 March 2020 makes clear that there are **many ways firms, including competitors, can engage in procompetitive collaboration** that do not violate the antitrust laws”. Furthermore, the agencies announce that they **will account for “exigent circumstances” in evaluating efforts to address the spread of Covid-19 and its aftermath.**

Merger Control : Failing Firm Defence

One of the questions much debated is that of whether the failing firm defence may need to be revisited in an economic crisis.

The failing firm defence is **rarely invoked, strictly applied and often unsuccessful.**

The reason for the lack of success of the failing firm defence is the **very exacting standard of proof required to meet the three elements that are required for the defence to be accepted :**

- **that the failing firm would be forced out;**
- **that there is no less anti-competitive alternative than the merger and**
- **that the assets of the merging firm would leave the market).**

Some commentators propose the **introduction of a truncated and simpler administrative procedure/test with respect to the application of the failing firm defence which would not require a change in the EU merger regulation but would simply require a lighter burden of proof on each of the three elements required for a successful defence.**

Other responses to the Crisis with Competition Implications

- 1) The commission has established the **Temporary Framework for State Aid (March 19 2020)** , allowing state aid to alleviate the **liquidity crisis** faced by firms victims of the confinement, to enable Member States to accelerate the **research, testing and production of coronavirus relevant products to fight the Corona- Virus**, to allow public support in the form of **equity and/or hybrid capital instruments to undertakings facing financial difficulties** and to allow **lossmaking small businesses** to receive Covid-19 support.
- 2) **Screening of Foreign Investments** “EU governments should start “informal” cooperation with the European Commission to screen foreign direct investment, or FDI, in a bid to prevent predatory takeovers of key European companies struggling due to the Covid-19 pandemic, the bloc's trade chief Phil Hogan has said. (ex Cure Vac in Germany)
- 3) **Revision of public procurement rules** : Calls for Europe to undertake a review of EU public procurement market rules to allow for a more thorough examination of the role of foreign bidders in critical markets – in particular when it comes to state- owned and/or supported companies.

Other responses to the Crisis with Competition Implications

4) Revival of industrial policy prompted by questions about whether we have given up too much of our national sovereignty in liberalizing trade and investment and whether we should build a more resilient industrial system.

(Ex: EU industry Commissioner **Thierry Breton** has argued that the, and that **the EU should be “self-sufficient” in terms of vital medical supplies including FFP2 masks. The crisis accelerates the need to relocate essential value chains and ventilators**).

Thank you for your attention

For more information on this topic visit

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<https://ssrn.com/abstract=3606214> or
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