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COMPETITION LAW IN THE AGE OF COVID-19

The aim of this article is to provide a short overview and analysis of some competition authorities' responses to the COVID-19 emergency, by evaluating the state of play and, where relevant, making proposals for how competition law and its enforcement might develop worldwide. The article contributes to the existing international debate about the consequences of the current COVID-19 crisis on competition law. The analysis is limited to restrictive agreements, abuse of dominance and merger control.

The undertakings must primarily be aware of that current crisis is not an excuse to breach competition laws and that competition laws continue to apply, with no general crisis exemption, nor during the COVID-19 crisis. The competition authorities are accommodating their practice in addressing restrictive agreements (cooperation between competitors in times of economic crisis), abuse of dominance (measures to protect against exploitative pricing), and merger control (procedural and substantive aspects of control).

Key words: *Competition law. – Restrictive agreements. – Abuse of dominance. – Merger control. – COVID-19.*

1. INTRODUCTION

Coronavirus disease (COVID-19), which appeared in December 2019, has spread rapidly across the globe, bringing considerable human casualties and major economic disruption. On 11 March 2020, the World Health Organization (WHO) pronounced global outbreak of the disease,

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declaring COVID-19 a pandemic, which was previously announced as a public health emergency of international concern.¹ According to the WHO, as of 30 April 2020, the novel disease had caused 3,090,445 confirmed human infections, with 217,769 deaths, in 213 countries, areas or territories with confirmed cases, with a fast-rising share of these worldwide (WHO 2020a). The COVID-19 pandemic has become the most challenging health emergency of our time, causing at the same time devastating implications in economic, political, social and psychological spheres of lives.

Apart from being a global health concern, COVID-19 is having major consequences on the world economy. According to the Organisation for Economic Co-operation and Development (OECD), when assessing the economic impact of the COVID-19 pandemic, it is the third and greatest economic, financial and social shock of the 21st century, after 9/11 and the global financial crisis of 2008, which brought a halt in production in affected countries, hitting supply chains across the world, a steep drop in consumption together with a collapse in confidence and a sharp decline in services that reflects the consequences of lockdowns and social distancing, especially in urban settings (OECD 2020a, 3). Experts predict that if economic activity uninterruptedly freezes up due to restrictions, quarantine, and people staying at home, the consequences will be much more negative for economic growth, including turbulence in financial markets where the global spread of COVID-19 has heightened market risk aversion in ways not seen since the global financial crisis (OECD 2020b, 1).

According to the preliminary projections of the International Monetary Fund (IMF), it is very likely that in 2020 the global economy will experience its worst recession since the Great Depression, surpassing that seen during the 2008–09 global financial crisis. The COVID-19 crisis (also being called ‘the Great Lockdown’) is projected to shrink global growth dramatically (IMF 2020a, v). For example, as a result of the pandemic, global growth is projected at –3.0 per cent in 2020, an outcome far worse than during the previous global financial crisis, while growth in the European Union (EU) is projected at –7.1 per cent (IMF 2020a, 7).² However, it is disclaimed that there is extreme uncertainty surrounding the global growth forecast because the economic fallout

¹ Pneumonia of unknown cause detected in Wuhan (China) was first reported to the WHO Country Office in China on 31 December 2019. The Chinese authorities identified a new type of coronavirus, which was isolated on 7 January 2020. Previously known as “2019 novel coronavirus”, it was officially named on 11 February 2020 by the WHO, as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), responsible for coronavirus disease (COVID-19).

² The United Kingdom is excluded from the EU group, which comprises 27 countries.

depends on uncertain factors that interact in ways that are difficult to predict. These include, for example, the pathway of the pandemic, the progress in finding a vaccine and therapies, the intensity and efficacy of containment efforts, the extent of supply disruptions and productivity losses, the repercussions of the dramatic tightening in global financial market conditions, shifts in spending patterns, behavioural changes (such as people avoiding shopping malls and public transportation), confidence effects, and volatile commodity prices (IMF 2020a, 4).

The COVID-19 pandemic is hitting businesses and public authorities hard, including competition authorities. Application of the competition rules in the context of the health crisis, as well as economic crisis and declining markets, represents an additional challenge for the competition authorities. There is a need to maintain the level playing field as one of the tools to pave the way to economic recovery and, at the same time, to respond to rapidly evolving problems, while upholding the basic objectives of competition law, which also remain relevant in a period when undertakings and economies as a whole suffer from crisis conditions.

The fear of competition authorities is that undertakings may use such an unprecedented situation to violate competition law and exploit vulnerable consumers, through excessive pricing, improper collusion between competitors, exchanging commercially sensitive information, minimum resale price maintenance or other anticompetitive conducts. There is increasing pressure on competition authorities to keep markets functioning by allowing a degree of collaboration between undertakings, while aspiring to ensure that they do not exploit the COVID-19 pandemic to justify anticompetitive behaviours to the detriment of the consumers.

The aim of this paper is to provide a short overview and analysis of the responses of selected competition authorities to the COVID-19 emergency, by evaluating the state of play and, where relevant, making proposals for how competition law and its enforcement might be developed worldwide. The paper contributes to the existing international debate about the consequences of the current COVID-19 emergency on competition law. The analysis is limited to the traditional ‘three pillars’ of competition law (restrictive agreements, abuse of dominance and merger control), but does not encompass competition advocacy or state aid. The enforcement of competition law is a ‘traditional’ tool for promotion of a competitive market and thereby protection of competition and consumer welfare, even though it is not the only way and not always the most effective tool to encourage greater competition. This is the primary duty of the competition authorities during the COVID-19. The article does not consider advocacy activities, since simple enforcement of competition law is the only requirement.

2. CONTINUOUS APPLICATION OF COMPETITION LAW WITH NO GENERAL CRISIS EXEMPTION

The question arises as to whether competition policy and its requirements should possibly be relaxed since the COVID-19 crisis may place a large number of undertakings in financial distress, them being unable to avoid the legal risk of competition law infringement during times of economic volatility. Such a risk may be an efficient way to respond to some of those difficulties, but undertakings must be aware of the competition law criteria for such behaviour.

From the standpoint of competition authorities, it is indisputable that there are no general exemptions to competition rules, even in times of crises. Competition authorities apply competition rules strictly, independently of short or long-term fluctuations in market conditions: there is no automatic 'public interest', 'emergency' or 'crisis' exemption to competition law. In response to the COVID-19 crisis, competition authorities announced that competition would still apply to undertakings during COVID-19 outbreak, regardless of numerous calls for the 'suspension' of competition law during the pandemic.

The message of the competition authorities is clear and unambiguous: undertakings must take care to avoid anticompetitive conduct as they manage this pressing global health threat; they are still forbidden from restricting competition by agreement or other forms of coordinated behaviour, as well as by abuse of dominance or anticompetitive mergers. These efforts of the competition authorities are moreover confirmed by warnings that they will be increasingly vigilant against possible harmful undertakings' anticompetitive practices during the COVID-19 crisis. These authorities also publicly stressed that they would not hesitate to enforce their laws aggressively and would not allow anticompetitive practices to be justified on the basis of economic downturn.³

In the short term, it is expected that competition authorities accommodate the needs that arise from the COVID-19 crisis, in that they will choose to enforce competition law more selectively. Their activities should serve as a tool to both facilitate the healthcare response to the pandemic and protect consumers from exploitation, in order to preserve public health and accelerate economic recovery. In this context, it is extremely important to ensure that essential public health products and

³ For example in Brazil, Bulgaria, Canada, the Czech Republic, the EU, France, Hungary, Greece, Ireland, Israel, Italy, Latvia, Luxembourg, Mexico, Poland, Portugal, the Republic of South Africa, Romania, Spain, Turkey, the United Kingdom, the USA, as well as the European Competition Network (ECN), the International Competition Network (ICN), the OECD and the United Nations Conference on Trade and Development (UNCTAD).

services (like medical supplies and equipment) remain available on the market at competitive prices and their supply will not be impeded. This also applies to the pharmaceutical, food and commerce markets.

Consequently, the competition authorities have enhanced monitoring and prioritised competition law enforcement against practices that exploit the current COVID-19 situation to the detriment of consumers and breach competition law.⁴ They considered that was more important than ever that competition, businesses and consumers receive protection under competition law. Therefore, they announced that they would be closely monitoring the prices of certain types of goods, particularly on online sales and delivery platforms (courier/transport services), especially those in high demand due to COVID-19.⁵ Furthermore, for instance, the US Federal Trade Commission and Justice Department announced an expedited COVID-19 antitrust procedure. In such circumstances, competition law should ensure that national and global support measures are effective in combating COVID-19 and help affected undertakings deal with this unprecedented crisis, but keeping in mind the importance of meeting competition policy objectives.

In order to achieve these goals, several competition authorities have established dedicated COVID-19 task forces to address specific issues and challenges affecting competition due to the COVID-19 pandemic, with a priority of monitoring market developments and prices of food and hygiene products, to maintain a sound competitive market structure, as well as to provide information about the application of competition rules, the investigations carried out during the current emergency and procedural matters (e.g. Greece, Poland, the UK, the USA). Moreover, some authorities have launched dedicated websites to provide guidance to undertakings on the compatibility with competition law of concrete conducts, in a way that it serves as information hub where such information may be found (e.g. Australia, the EU, Ireland, the UK, the USA). These websites are updated on a regular basis. Furthermore, competition authorities have also set up mailboxes where undertakings may seek informal guidance on specific issues and their rights and obligations in relation to the COVID-19 crisis.

⁴ For example in Brazil, Bulgaria, Denmark, the Czech Republic, the EU, France, Greece, Israel, the Republic of South Africa, Romania, Spain, the United Kingdom, the USA, Turkey.

⁵ These products are considered COVID-19 relevant products, e.g. relevant medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; medical devices, hospital and medical equipment (including ventilators, protective clothing and equipment as well as diagnostic tools) and necessary raw materials; disinfectants and their intermediary products and raw chemical materials necessary for their production (see Communication from the Commission: Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak).

For example, the European Commission has pointed out that its dedicated mailbox should be used to seek informal guidance on specific initiatives, whilst the Spanish authority uses an established dedicated mailbox as an online whistleblowing hotline for reporting anticompetitive practices or complaints related exclusively to competition rules in the context of the current pandemic.

Since the global outbreak of COVID-19, several competition authorities have already initiated or closed investigations into potential infringements of competition laws in the context of the crisis. The Italian competition authority has opened two separate abuse of dominance investigations against the Amazon and eBay platforms with regard to the unjustified and significant price increases of hand sanitizing/disinfectant products, respirators and other health and hygiene products, during the health crisis.⁶

The Greek competition authority has also launched an investigation into significant increases in the retail prices and output restrictions on healthcare materials and other products. It sent requests for information to a large number of undertakings active in the production, import and marketing of healthcare products, in particular surgical masks and disposable gloves, as well as other products such as antiseptic wipes and antiseptic solutions.⁷

At the same time, the Polish Competition Authority initiated proceedings on the conduct of wholesalers supplying personal protective equipment to hospitals, to examine whether the wholesalers terminated contracts with hospitals in order to obtain significantly higher prices for health products and violate competition law, including through abuse of a dominant position and price fixing.⁸

Due to an unprecedented number of complaints received by the competition authority, in the Republic of South Africa numerous undertakings are under preliminary investigation, examining whether retailers and suppliers could be charged for excessive prices of products related to COVID-19 essentials (hand sanitizers and face masks, as well as toilet paper, flu medication and other products).⁹ The competition

⁶ See press releases <https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-begins-investigating-Amazon-and-eBay-for-misleading-claims-and-excessive-price-increases>, from 12 March 2020 (last visited 30 April 2020).

⁷ See press release <https://www.epant.gr/en/enimerosi/press-releases/item/840-press-release-investigation-in-healthcare-materials.html>, from 21 March 2020 (last visited 30 April 2020).

⁸ See press release https://www.uokik.gov.pl/news.php?news_id=16277&news_page=1, from 4 March 2020 (last visited 30 April 2020).

⁹ See press release <http://www.compcom.co.za/wp-content/uploads/2020/03/CCSA-COVID-19-statement-31-March-2020-Final-1.pdf>, from 31 March 2020 (last visited 30

authority has further stated it had referred its first COVID-19 price gouging case to the Competition Tribunal.¹⁰

The Spanish competition authority has announced that, as a result of numerous received complaints of anticompetitive conduct related to COVID-19, it has opened investigations into the financial services, funeral services and health product manufacturing markets. In the case of the financial services sector, the authority is investigating whether the requests for additional guarantees when granting state-guaranteed loans and other financial aid, relate to the COVID-19 health crisis, could amount to anticompetitive conduct. Furthermore, the authority is investigating whether the prices charged by numerous funeral service companies during the health crisis could be due to anticompetitive agreements between competitors or due to aggressive unfair practices that are objectively contrary to the requirements of good faith. In the case of the health products sector (such as sanitising gels and raw materials used in their manufacture (ethanol)), the authority is closely monitoring pricing and market shortages with the aim of identifying anticompetitive practices due to potential price increases.¹¹

The French authority had also to intervene in this sector, but it closed an initial investigation into exclusive import practices in the medical equipment sector intended for hospitals in overseas territories (French Guiana and the French West Indies). The authority opened an initial investigation into exclusive import practices likely to be implemented by an undertaking supplying hospitals with respiratory systems and products intended for patients suffering from respiratory disorders. It notes the decision of the accused undertaking to clarify the conditions for the distribution of its products in these overseas territories in order to strengthen competition and ultimately decided to close the investigation.¹²

2.1. Working Policies of the Competition Authorities

Competition authorities have recognised the COVID-19 pandemic as a health hazard that impacts their continuing enforcement missions, their work and the need to maintain the health and safety of their

April 2020).

¹⁰ See press release <http://www.compcom.co.za/wp-content/uploads/2020/04/Media-Statement-COMMISSION-CRACKS-DOWN-ON-EXCESSIVE-PRICING.pdf>, from 15 April 2020 (last visited 30 April 2020).

¹¹ See press release <https://www.cnmec.es/balance-buzon-covid-7-abril-20200407>, from 7 April 2020 (last visited 30 April 2020).

¹² See press release <https://www.autoritedelaconurrence.fr/en/press-release/respiratory-assistance-equipment-french-guiana-and-french-west-indies-investigation>, from 6 April 2020 (last visited 30 April 2020).

employees. As these expedited responses to the health crisis and the sanitary containment measures being adopted across the world, including constraints on physical distancing and travelling, competition authorities adapted competition procedures and deadlines for the extraordinary circumstances. This was their way of preventing the spread of COVID-19 in their workplace practices.

As priority measures, a vast majority of the authorities is currently working remotely and/or with reduced capacities, by encouraging their staff to work from home, which has procedural consequences, including on in-depth investigations, dawn raids and leniency applications. Some authorities are under lockdown and most competition authorities have closed their offices to the public, cancelling and suspending meetings and hearings. They have also had to adapt deadlines and procedures, by interrupting, suspending or postponing the term of the delays, formally or informally, as well as switch to teleworking and reducing their opening hours. Furthermore, the competition authorities are trying to stay operational, and depending on the technical possibilities, are accepting merger filings and submissions electronically or by email.

3. LESSONS FROM PAST ECONOMIC CRISES

During the COVID-19 crisis, competition agencies inevitably face enormous challenges. Previous crises have shown that competition agencies had paid special attention to these issues, in order to maintain the basic principles of competition. This is why many are wondering whether there are lessons from past economic crises, what are the differences and similarities between them, and what were the effects of these crises on competition law enforcement.

There are many examples of competition authorities worldwide being tempted to reduce competition law enforcement and change the rules and their ultimate goals during crises, e.g. Chinese and Taipei up to and including the East Asian Financial Crisis, Indonesia during the East Asian Financial Crisis, Japan in the post-war era, the Republic of Korea in the 1970s and 1980s, the USA during the Great Depression and the aftermath of hurricanes Katrina and Rita in 2015, as well as the global economic downturn that lasted from 2007 until at least 2009 (see OECD 2011a, 23–38). There is a long history of accommodation and practical thinking about competition law when crises demanded it, while the most representative examples are the crises in the USA during the Great Depression and the global financial and economic crisis in 2008.

At the time of the Great Depression, the USA adopted an approach to antitrust law that effectively suspended the law and legalized cartels

covering a wide swath of US industry, instead of reinvigorating antitrust enforcement. The US Supreme Court declined to treat horizontal price fixing as illegal *per se*, which was considered to have serious anticompetitive effects on the economy in the medium and long term. It is believed that such governmental efforts and the emerged cartels delayed economic recovery during the Great Depression, which is the lesson the USA did not forget (see OECD 2011a, 215–217; Shapiro 2009, 6–12). It is stressed that the prosecution of illegal cartels and other antitrust violations is just as necessary during times of economic difficulty as during times of economic prosperity (OECD 2011a, 218).

Consequently, during the 2008 global financial crisis, governments worldwide took the opposite approach. Being aware of that reducing competition law enforcement during economic crisis does not promote economic recovery, the competition authorities emphasized that they would not ignore breaching of competition law (OECD 2011a, 44–47, 217). Although during economic crises it is sometimes suggested that lighter enforcement of competition laws would be appropriate, lessons from the past show that relaxing competition policy during such crises would be counterproductive. Therefore, the competition authorities succeeded in avoiding strong political pressure to suspend the importance of competition policy. In the USA it is stressed that competition law does not change in content or enforcement and the same basic principles of antitrust economics that apply during economic expansion also apply during recession (Shapiro 2009, 12–13). Hence, in the medium and long term, there is no convincing reason to do anything other than maintaining present objectives and standards of competition law enforcement because the opposite would endanger future national and global market economies.

While there is no theoretical or empirical basis for changing the basic principles and objectives of competition law during economic crises (Shapiro 2009, 12), competition enforcement still should not be implemented without taking into account specific circumstances of the crisis. The competition authorities should be aware of the real conditions in the market and carry out a case-by-case analysis, taking into consideration the context and effects of the actual crisis. This means that in the short term, the authorities could relax standards of competition law enforcement, not only with respect to procedural merger control, but also for general antitrust work. Therefore, transitory economy distress could have an immediate impact on competition law enforcement, but should not cause a long-term decline in economic activities because history teaches us that reducing competition law enforcement during economic crises does not promote economic recovery (Shapiro 2009, 23). Past experience demonstrates that recoveries from financial and economic

crises were delayed when competition enforcement was relaxed (OECD 2011b, 51–52).¹³

Competition laws are sufficiently flexible to accommodate beneficial cooperation and collaborations between competitors during crises, but not in a way that would support price fixing or abuse of dominance, at the same time. It is by no means clear that vigorous competition law enforcement should be implemented.

Changing competition authority priorities should focus on strengthening advocacy and paying greater attention to restrictive agreements and abuse of dominance proceedings. These are essential for safeguarding the general public interest and ensuring proper functioning of the markets in the short run. Competition authorities will need to adjust competition law enforcement to the new crisis environment without changing their standards, but they should be also prepared for a new wave of mergers. As we have seen in the 2008 downturn, COVID-19 crisis will lead to an increase in the number of mergers and the number of failing firm defences advanced (OECD 2011b, 52–54).

Considering these lessons from past economic crises, authorities across the globe announced temporary and conditional, but cautious relaxation of competition law enforcement in response to competition challenges caused by the COVID-19 outbreak. It is stressed that current crisis may affect the way the competition law is applied which is why competition authorities introduced flexibility in its enforcement. The competition authorities are adapting their practice of addressing restrictive agreements (collaboration between competitors in times of economic difficulties), abuse of dominance (measures to protect against exploitative pricing) and merger control (procedural aspects of control, protective changes of some national merger rules, etc.), which is examined in detail below.

In theory, the view that competition policy should be temporary softened in extreme crises is not completely unfounded. It would be imprudent not to allow such adjustment to reflect economic reality (OECD 2011b, 17; Shapiro 2009, 12). During the crisis, governments worldwide are counting on undertakings to play a critical role in getting through these extraordinary times which will lead them to look for solutions for dealing with this crisis. Undertakings are called on to coordinate their activities in various ways, to assist in responding to the COVID-19 crisis. However, competition law will not be at the top of undertakings' agendas currently, which means that the responses of the competition authorities should provide undertakings with optimal and legal solutions

¹³ For more information about competition policy and economic crises, see Fingleton 2009; Vickers 2008; Lowe 2009; Lyons 2009; OECD 2009a; Amelio, Siotis 2009.

for managing anticompetitive risk, ensuring they can respond quickly and in the best interests of the consumers and the community.

In order to explain the responses of the competition authorities and to stress the importance of the role of competition policy during the current crisis, it is important to thoroughly understand its causes by comparing it to the 2008 economic downturn. The competition authorities should base their activities on the lessons from the previous experiences, but the COVID-19 crisis has already shown a distinctive facet that must be taken into account.

The competition challenges encountered in previous crises are re-emerging, but this crisis brings new one because the current situation is very different. The global economic crisis was caused by financial reasons in nature and with confidence-related effects, while the root of the COVID-19 crises is medical in nature but economic activity is being shut down. During the economic crisis, governmental support was limited to banks, with the aim of preventing the collapse of the financial services sector, while currently the shock of entire countries being locked down is affecting entire economies through different channels, spreading across many sectors. Now there is a supply shock resulting from the disruption of supply chains, there is a demand shock caused by lower consumer demand and there is the negative effect of uncertainty on investment plans and the impact of liquidity constraints on undertakings (Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak). Unlike during the 2008 crisis, current mobility restrictions limit some of the automatic stabilisers/offsetting actions (informal work, share economy) and impose additional costs; there are particular issues with medical equipment and biosecurity of food; the crisis is more services-driven, given the limitations on physical contact and widespread closure of key service sectors (tourism, travel and entertainment); this crisis is having a disproportionate impact on micro, small and medium enterprises; there are greater disruptions to production, leading to pressure on supply chains (OECD 2020c, 7).

A further extraordinary issue is the uncertainty surrounding COVID-19, including in terms of the scale and pace of infection; how long and widespread shutdown measures will prove necessary; and the risk of “second wave” infections as the virus moves around the globe (OECD 2020c, 2). It seems that undertakings are facing particular challenges due to the COVID-19 crisis and that, now more than ever, the competition law enforcement must be flexible enough to account for changing market conditions, even during times of uncertainty. The actions taken by the competition authorities thus seem appropriate in the context of ensuring the health, saving lives and economic security while they must continue to carefully analyse the potential effects of undertakings’ conduct and proposed mergers and stay focused on it.

4. RESTRICTIVE AGREEMENTS AND 'EMERGENCY COOPERATION'

In response to the risk of COVID-19 infections, governments across the globe have limited or cancelled all gatherings, events, educational and commercial activities with the exception of essential activities such as supermarkets, pharmacies, banks, the postal service, etc. Consequently, individuals are increasingly sheltering at home and have stopped buying, whether voluntary or as requested by the state. These measures have led to many businesses temporarily being shut down, factories suspending production, widespread restrictions on travel and mobility, social distancing, financial market turmoil, an erosion of confidence and heightened uncertainty.

Although undertakings are making considerable efforts to ensure 'business as usual' during the COVID-19 crisis, the pandemic is inevitably having a significant impact on their business activities, in terms of struggling to cope with issues like distribution, sourcing inputs, components and other resources. This extraordinary situation triggers the need for undertakings to cooperate or collaborate with competitors to overcome challenges due to COVID-19, in order to ensure the supply and fair distribution of scarce products to all consumers (such as essential utilities, foods and medical supplies). As a consequence, the undertakings may be required to work with competitors and align commercial coping strategies in order to mitigate losses. The economic crisis could invite anticompetitive conduct that triggers competition authorities' attention because the competition rules prohibit undertakings from entering into agreements that directly or indirectly have as their objective or effect the restriction of competition.¹⁴ This means that such cooperation between competitors could generally raise competition law concerns because undertakings may try to collude and take advantage of the economic crisis and gain substantial market power during such a period. The question for the competition authorities is what is the right response to this cooperation, which could be only a short-term problem, and whether they should permit undertakings to cooperate in the public interest without fear of breaching the competition rules concerning restrictive agreements.

Most notably, the majority of competition authorities have announced that they are looking to ease up enforcement temporarily, in order to allow or encourage such pro-competitive cooperation. It is considered that in the current situation cooperation between competitors can speed recovery and that the health crisis could be a legitimate reason

¹⁴ It is suggested that during periods of recession, there is an increased tendency for undertakings to enter into collusive agreements (Amelio, Siotis 2009, 6). For more information about the impact of crises on the incentive to cartelise, see OECD 2011a, 21–24; Stephan 2009; OFT 2005.

justifying potential problematic conduct. There is clear and obvious reason to introduce certain relaxations into competition law enforcement for the purpose of safeguarding public interests.

Across the globe there are indications that governments are experiencing shortages of medicines used to treat patients with COVID-19 or other essential scarce products in short supply. Therefore, there is a clear need to cooperate and keep trade flowing, both to ensure the supply of essential products (to save both lives and livelihoods) and to send a signal of confidence for the global economy. For example, pharmaceutical (or generic drugmakers) and medical companies are encouraged to cooperate in order to develop vaccines, therapies and testing of an effective vaccine, as well as to supply hospital medicines for COVID-19 patients, while hospitals and healthcare providers may need to work together in providing immediate access to healthcare. Additionally, retailers, restaurants, technology and telecommunication companies cooperate in order to limit the economic and personal disruptions caused by the social distancing measure, while other undertakings may need to temporarily combine production or distribution of COVID-19 related supplies. Hence, undertakings active in these markets play a crucial role in overcoming the effects of the COVID-19 crisis because their joint activities may be a necessary response to extraordinary market conditions.

In order to help undertakings to deal with the unprecedented challenges and provide them guidance on the legality of the proposed joint activities in response to the COVID-19 crisis, competition authorities have relaxed enforcement of competition rules. The authorities have made it clear that cooperation between competitors that allow undertakings to continue their business during the COVID-19 crisis, can be considered as market activity that actually aids competition in the long run. If undertakings doubt the compatibility of such cooperation with competition law, they can approach the authorities for formal or informal guidance.

The competition authorities have responded to concerns by providing significant guidance about relaxed application of criteria for restrictive agreements, regarding cooperation between competitors to overcome the challenges raised by the COVID-19, including under capacity, overcapacity and the scarcity of products.¹⁵ Some authorities have introduced new criteria, by adopting new temporary rules related to these conducts. Furthermore, in Iceland, Norway, Australia, South Africa, the UK and the USA, following the COVID-19 epidemic, temporary sector exemption from the competition rules has been granted. At the same time, the authorities warned undertakings not to go beyond what is necessary to curtail the emergency.

¹⁵ For example in Bulgaria, Canada, China, Denmark, Finland, Germany, Greece, India, Luxembourg, Mexico, Netherlands, Romania, Spain.

The Norwegian government has granted the transportation sector a three month temporary exception from the prohibition against anticompetitive agreements and practices prescribed in the Norwegian Competition Act. This exception makes it possible, in particular, to maintain the transportation of passenger and goods in Norway, in order to secure the population access to necessary goods and services. Still, it is pointed out that this exception does not go beyond what is strictly necessary and that the competition authority must be notified if the exception is relied on.¹⁶ In South Africa, block exemption for the healthcare sector has been granted, in order to enable the private healthcare system to cooperate in ensuring adequate capacity and stocks at healthcare facilities throughout the country, in order to respond to the COVID-19 national disaster. This will assist in ensuring that the private and public healthcare system can provide the necessary care to citizens, without the fear of falling foul of the Competition Act. However, these regulations are limited to ensuring an adequate supply of healthcare to citizens and do not give the private healthcare industry the right to cooperate on pricing to the public.¹⁷ These new rules will remain in operation for the duration of the COVID-19 national disaster, or until they are legally withdrawn, whichever comes earlier. In Australia, private health insurers have been granted conditional interim authorisation to coordinate on providing financial relief to policy holders during the COVID-19 pandemic, and broadening insurance coverage to include COVID-19 treatment, tele-health and medical treatment provided at home. The interim authorisation is conditional on details of proposed measures being provided to the competition authority in advance but may be revoked at any time. It also excludes agreements to increase premiums, and specifies that any agreements reached must terminate when authorisation ceases.¹⁸ In Iceland, the competition authority granted a number of temporary exemptions from competition rules, such as in the travel and tourism sectors, pharmacy, financial and health services, fuel market, transportation.¹⁹ In the USA, the competition agencies list several types of collaborative activities designed to improve the health and safety response to the COVID-19 outbreak that would likely be consistent with antitrust laws. It is necessary that such joint

¹⁶ See press release <https://konkurransetilsynet.no/transportation-sector-is-granted-temporary-exception-from-the-competition-act/?lang=en>, from 19 March 2020 (last visited 30 April 2020).

¹⁷ See press release <http://www.compcom.co.za/wp-content/uploads/2020/03/CCSA-COVID-19-statement-20-March-updated.pdf>, from 20 March 2020 (last visited 30 April 2020).

¹⁸ See press release <https://www.accc.gov.au/media-release/private-health-insurers-to-cooperate-on-covid-19-coverage-and-deferral-of-premiums>, from 8 April 2020 (last visited 30 April 2020).

¹⁹ See COVID-19: Application of competition rules and competition enforcement in crisis, <https://en.samkeppni.is/published-content/news/covid-19/>, from 22 March 2020 (last visited 30 April 2020).

efforts be limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, are a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise, such as research and development, sharing technical know-how, joint purchasing arrangements among healthcare providers, etc. The competition agencies also confirm that they will not challenge collaborative efforts by multiple medicinal supplies distributors to expedite and increase manufacturing, sourcing, and distribution of personal protective equipment and coronavirus-treatment-related medication.²⁰

The UK adopted a broad strategy to mitigate the supply chain issues arising from the COVID-19 outbreak and to enable essential business cooperation by relaxing competition rules. It is believed that competition law enforcement could impede necessary cooperation between businesses in dealing with the current crisis and ensuring security of supplies of essential products and services, such as groceries. Firstly, the government temporarily relaxed elements of competition law as part of a package of measures to allow supermarkets to work together to feed the nation (in order to allow retailers to share data with each other on stock levels, cooperate to keep shops open, share distribution depots and delivery vans or pool staff with to help meet demand).²¹ The government intends to temporarily relax elements of UK competition law to support the dairy industry in order to allow the industry to work together to address current market challenges, avoid waste and maintain productive capacity to meet future demand.²² Secondly, the UK Competition and Markets Authority has announced that where agreements are not covered by that legal relaxation, it can offer the following reassurance: the CMA has no intention of taking competition law enforcement action against cooperation between businesses or rationing of products that this is necessary to protect consumers, e.g. ensuring security of supplies. At the same time, the CMA will not tolerate unscrupulous businesses exploiting the crisis as a ‘cover’ for non-essential collusion, such as exchanging information on longer-term pricing or business strategies, where this is not necessary to meet the needs of the current situation.²³ More guidance

²⁰ See https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_fic-doj-3-24-20.pdf, from 24 March 2020 (last visited 30 April 2020); <https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting>, from 4 April 2020 (last visited 30 April 2020).

²¹ See <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>, from 19 March 2020 (last visited 30 April 2020).

²² See <https://www.gov.uk/government/news/dairy-industry-to-join-together-to-manage-milk-supply>, from 17 April 2020 (last visited 30 April 2020).

²³ See <https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation>, from 19 March 2020 (last visited 30 April 2020).

on this followed the adopted CMA guidance on its approach to business cooperation in response to COVID-19.²⁴ This guidance sets out details of the CMA's approach to the prioritisation of its work, as well as how it will apply the criteria for exemption from the competition law prohibition on agreements and arrangements restricting competition. Additionally, the UK Government has adopted a number of statutory instruments excluding certain categories of agreement from the scope of application of competition rules, in relation to groceries (concerning the agreements between grocery chain suppliers or between logistic service providers),²⁵ health services for patients in England (concerning agreements between providers of health services to the National Health Service)²⁶ and Isle of Wight ferry routes (concerning cooperation among ferry operators to maintain a crucial lifeline between the island and the mainland).²⁷

Very important relaxation has been introduced in the EU, where the European Commission adopted Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak.²⁸ This came after the issuing the ECN's Joint statement on application of competition law during the COVID-19 outbreak. The European Commission has set out the main criteria that the Commission will follow when assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the COVID-19 outbreak (notably medicines and medical equipment that are used to test and treat COVID-19 patients or are necessary to mitigate and possibly overcome the outbreak), as well as in setting its enforcement priorities during this crisis. The Temporary Framework also foresees the possibility of providing companies with written comfort (comfort letters) on specific cooperation projects falling within the scope of the Temporary Framework. The Temporary Framework is a specific system of self-assessment and valuable temporary aid for a large number of undertakings who are themselves responsible for assessing the legality of their agreements and practices, i.e. such cooperation during COVID-19. This guidance is also important because it is expected that national competition authorities in the EU countries,

²⁴ CMA approach to business cooperation in response to COVID-19, 25 March 2020, CMA118.

²⁵ Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020.

²⁶ Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020.

²⁷ Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020.

²⁸ Communication from the Commission Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (hereafter, Temporary Framework), OJ 2020/C 116 I/02.

candidate countries and some other European countries, follow it in their practice or individually published similar information and guidance on how they will apply competition rules in the context of the COVID-19 crisis. However, the guidance is temporary, meaning that it is applicable until the Commission withdraws it (once it considers that the underlying exceptional circumstances due to COVID-19 outbreak are no longer present).

The Temporary Framework provides useful examples of the types of cooperation that might be required to address emergency situations related to the current COVID-19 outbreak and their assessment under Article 101 of the Treaty on the Functioning of the European Union (TFEU). It is recognized that the response to emergency situations related to the COVID-19 outbreak might require different degrees of cooperation, with a varying scale of potential antitrust concerns, because it includes necessary exchange/communication of information on sales and stocks. The Commission also understands that cooperation in the health sector might for instance be limited to entrusting a trade association (or an independent advisor, or independent service provider, or a public body) to: coordinate joint transport for input materials; contribute to identifying those essential medicines for which, in view of forecasted production, there are risks of shortages; aggregate production and capacity information, without exchanging individual company information; work on a model to predict demand on a Member State level, and identifying supply gaps; share aggregate supply gap information, and request participating undertakings, on an individual basis and without sharing that information with competitors.²⁹

It is stated that such activities do not raise antitrust concerns, provided that they are subject to sufficient safeguards (such as no flow of individualised company information back to competitors), as indicated in the Commission's Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements.³⁰ It is also stated that certain exchanges of commercially sensitive information and coordination between undertakings, in the current exceptional circumstances, would not be problematic under EU competition law or – in view of the emergency situation and temporary nature – they would not give rise to an enforcement priority for the Commission, to the extent that such measures would be: (i) 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; (ii) temporary in nature (i.e. to be applied only as long as there is a risk of shortage or in any event during the

²⁹ Temporary Framework, par. 12.

³⁰ Temporary Framework, par. 14.

COVID-19 outbreak); and (iii) not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.³¹ If certain cooperation is encouraged and/or coordinated by a public authority (or carried out within a framework set up by the latter), it is also a relevant factor that such cooperation would not be problematic under EU competition law or would not be an enforcement priority for the Commission.

It seems that legal the basis for such flexibility in application of criteria for restrictive agreements assessment is either Article 101(1) or Article 103(3) TFEU. Considering these provisions and current circumstances, such cooperation is unlikely to be problematic because it does not amount to a restriction of competition under Article 101 (according to the Article 101(1) TFEU) or generate efficiencies that would most likely outweigh any such restriction (according to Article 101(3) TFEU) (see also ECN 2020). At the same time, it could be more appropriate to justify such flexibility based on the criteria from Article 101(3) TFEU which is a valuable legal framework in times of economic turbulence and for crisis measures, since the Irish beef case (C-209/07) (Van der Vijver 2009, 198–201). Even though under Article 101(1) assessment of an agreement must be always made in light of its ‘economic context’ and accordingly justified by Article 101(3), undertakings must be aware that the crisis as such will not preclude their agreements from falling within the scope of the object restriction of Article 101(1). The Court of Justice found a crisis cartel in the Irish beef market to be a restriction of competition by object (Van der Vijver 2009, 200–201; Lane 2012, 992–993).

It can be concluded that during the COVID-19 crisis there are forms of cooperation between competitors that do not represent cartel collusion and may therefore be allowed. They do not restrict competition or restrict it to a lesser extent, but at the same time can generate efficiencies that outweigh any such restriction, for instance, continuity of supply, efficient production and distribution of scarce products during the crises. Examples of this conduct, which may be permissible in the current circumstances, may include cooperation regarding joint production (specialisation), joint purchasing or sales, shared use of assets, storage and warehousing of critical products, research and development, as well as industry-wide standardising, logistics/distribution cooperation and exchange of non-sensitive information.

Therefore, the European Commission remains vigilant in its detection of anticompetitive agreements and cooperation among undertakings taking advantage of the current situation to breach EU antitrust law, either by engaging in anti-competitive agreements or

³¹ Temporary Framework, par. 15.

abusing their dominant position. It is underlined that the Commission will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for anticompetitive collusion or abuse of their dominant position.³²

It is therefore important to pay attention to cooperation between competitors that may be caused by the COVID-19 crisis but goes beyond the necessary temporary relief. The EU relaxing efforts target cooperation in dealing with short-term shortage of supply that would result in undertakings no longer being able to meet existing demand (undercapacity), but not cooperation to repair overcapacity situations. Any cooperated reduction of production capacity, i.e. agreement to limit capacity, is very likely to be considered anticompetitive by object. Such agreements (sometimes referred to as ‘crisis cartels’) are typical for sectoral, national, and global economic crises, but EU case law generally does not support the view that cooperation that takes the form of crisis cartels deserves special relief. ‘Crisis cartels’ is a technical term used for the agreements, i.e. cooperation between competitors in times of economic distress and are in principle illegal (OECD 2011a). Anticompetitive risks resulting from crisis cartel are obvious, because they deal with exchanges of competitively sensitive information between competitors (about future prices, costs, volumes/output, long-term business strategies), limiting production, fixed prices, or allocation of customers or geographic markets, which would be a prohibited restriction of competition under Article 101 TFEU.

This means that cooperation of undertakings during COVID-19 crisis can’t go beyond what is strictly necessary to manage the crisis; its aim has to be production increase or ensuring a fair distribution of production in order to be considered lawful cooperation during the crisis. Any cooperation aimed at limiting output will likely raise competition concerns and could be considered unlawful. The undertakings should be aware that mere existence of an emergency does not give them ‘carte blanche’ for engaging with each other in order to overcome COVID-19 challenges (OECD 2020d, 6).

Experience shows that crisis cartels generally appear after economic crises, enticing undertakings to collude in order to overcome financial difficulties and avoid competitive pressures (OECD 2011a). Therefore, it is likely that long-term priority for competition authorities could be investigation on cooperation to deal with overcapacity, after the short-run dealing with cooperation about undercapacity (shortage of supply).

It is important to stress that the EU Temporary Framework is limited in scope and has limited impact because the European Commission can only relax its enforcement criteria if undertakings cooperate in order to

³² Temporary Framework, par. 20.

ensure the supply and fair distribution of essential scarce products and services during the COVID-19 outbreak. The undertaking must not exceed what is necessary and temporary to achieve the objective of addressing or avoiding the shortage of supply. It does not cover other form of cooperation or collusion.

5. ABUSE OF DOMINANCE

In addition to the necessity of ensuring the supply and distribution of essential products and services during the COVID-19 outbreak, it is reasonable to expect that products for the protection of health and other scarce products remain available at competitive prices and without discrimination. But, the outbreak particularly affected essential product prices. Those undertakings exploited the current COVID-19 situation to the detriment of consumers, with the aim of maximising their profits, due to the increase in demand at a greater rate than the supply can respond.

That is why a number of competition authorities, as mentioned above, put special focus on exploitative abuses and excessive pricing practices, notably in the pharmaceutical sector and the pricing activities of hospitals, laboratories, suppliers of surgical masks and hand sanitizers. Despite competition authorities usually being reluctant to intervene directly against allegedly excessive prices, these investigations are given the highest priority. It is believed that the (dominant) undertakings have a special responsibility to ensure that their conduct does not distort competition during the COVID-19 emergency.

Although excessive pricing cases are not occurring very often in competition law, it nevertheless has been announced that abuse of market power still would not be permitted in comparative practice in the time of COVID-19.³³ It is clear that there is no flexibility for any attempts of abusing conduct that would violate competition law, despite some relaxation in the competition rules enabling undertakings to cooperate. The competition authorities underlined zero tolerance of such activities since of the severity of the crisis could result in increased market power, based on abuse of the situation in the COVID-19 related product market. Competition concerns arise because, in the short term, the crisis may lead the undertakings temporarily gaining a dominant market position due to the changed market conditions, and in the long term, some undertakings may come under the scope of competition enforcement through excessive pricing provisions, due to increasing market shares after the COVID-19

³³ For more information about excessive pricing in competition law, see OECD 2018; De Coninck 2018; Calcagno Chapsal, White 2019; Ezrachi, Gilo 2009, 249–268; George S. Cary *et al.* 2020.

crisis. At the same time, some competition authorities combine antitrust powers with consumer protection powers (e.g. Australia, Italy and Poland).

Excessive pricing is prohibited under competition law in the EU and most other jurisdictions, but in the USA there is no prohibition of excessive pricing or abuse of a dominant position. The US antitrust law does not recognise the institution of abuse of dominance but provides that undertakings will be punished for monopolization or attempted monopolization of the market. However, both institutions were introduced for the same purpose: to prohibit the single firm conduct (unilateral behaviour) of those undertakings that have a dominant position, that is, who have significant market (monopoly) power, and which can distort competition in the market. Hence, excessive pricing is not regulated in US law as an antitrust violation in and of itself. Any legal basis for taking action against excessive prices must be tied to a recognised violation of antitrust law. Dramatic price increases could be a catalyst for increased regulatory scrutiny and private enforcement claims (OECD 2018a, 14; OECD 2018b).

In the EU, according to the Article 102 TFEU, any abuse of a dominant position in a relevant market is prohibited, e.g. abuse consisting of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. Excessive pricing occurs only in truly exceptional situations, when a dominant undertaking charges prices that are above the competitive pricing level. The EU Court of Justice clarified that two conditions need to be fulfilled to show that the price difference between the product in question and similar comparator products is ‘appreciable’, as it is ‘indicative of an abuse of a dominant position’. To be regarded as ‘abusive’, the difference between the rates compared may be qualified as appreciable if that difference is both significant and persistent: the difference must be significant for the rates concerned and that difference must persist for a certain length of time and must not be temporary or episodic.³⁴

National competition authorities in the EU and most other states apply similar regimes regarding excessive prices, which is why they could be expected to do the same during the COVID-19 crisis. There are no announced new rules that would be applied in this context, apart from South Africa where a special set of criteria was established, according to which excessive pricing will be assessed during the national disaster period.³⁵ It is prescribed that dominant firm may not charge an excessive

³⁴ Case C–177/16, *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v. Konkurences padome*, 14 September 2017, par. 55, 56, 61. See also OECD 2018c; De Coninck 2018.

³⁵ Competition Act (89/1998): Consumer and Customer Protection and National Disaster Management Regulations and Directions, Regulation Gazette No. 43116;

price to the detriment of consumers or customers, during period of the national disaster, regarding a material price increase of basic food and consumer items, emergency products and services, medical and hygiene supplies, and emergency clean-up products and services. It is stated that a material price increase for a listed good or service which either: 1) does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or 2) increases the net margin or mark-up on that good or service above its average margin or mark-up in the three month period prior to 1 March 2020, is a relevant and critical factor for determining whether the price is excessive or unfair and indicates *prima facie* that the price is excessive or unfair (Competition Act (89/1998)).

In the USA, the government is combating prices increase by preventing price gouging for critical supplies during the crisis, which may have some overlap with the issue of excessive pricing. To combat this misconduct, the COVID-19 Hoarding and Price Gouging Task Force was created, tasked with closely monitoring that certain categories of health and medical supplies are not hoarded or sold at exorbitant prices, including personal protective equipment, respirators, ventilators, sterilization services and disinfecting devices.³⁶ Price gouging occurs when, during the state of emergency (e.g. natural disaster or global pandemic), suppliers of a certain essential goods or services sharply increase their prices beyond the level needed to cover the increased costs. However, these two instruments have a different purpose and scope of application: price-gouging laws prevent traders in general from profiteering of situations of necessity, while Article 102 TFEU prohibits dominant undertakings from imposing excessive prices or other unfair conditions (Costa-Cabral *et al.* 2020, 8). The excessive pricing and prohibition of price gouging each aim to serve the same end: realization of lower or reasonable prices for consumers. However, they do so from different perspectives: prohibitions of ‘price gouging’, by contrast, are direct consumer protection measures, generally making no reference to competition (Rubin 2008, 1).

It seems that, for the purposes of exploitation, price-gouging is not an appropriate tool for competition authorities to control prices during crises, because it is not the best EU comparative practice. The prohibition

Competition Act (89/1998): Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals, Regulation Gazette No. 43205.

³⁶ To combat this misconduct, the US President issued an Executive Order pursuant to section 102 of the Defense Production Act, which prohibits hoarding of designated items, and the Attorney General has now created the COVID-19 Hoarding and Price Gouging Task Force (see <https://www.justice.gov/coronavirus/combatingpricegouginghoarding>, last visited 30 April 2020). In USA, there is no federal law makes charging high prices unlawful, but at the state level, there are laws that regulate price increases in certain situations, such as during a state of emergency. Unlike the EU competition law, these laws apply to any undertakings, regardless of their market power.

of excessive pricing may be a more convenient tool, because the EU member states and candidate countries may have no other instrument to control price increases in reaction to the COVID-19 crisis, other than introducing temporary regulations on price control, i.e. rules to limit price increases of food and health protection products, etc. There is a legitimate public interest for competition authorities to intervene in cases of excessive pricing during the COVID-19 crisis, because no one is certain whether market self-correction is likely to occur within a reasonable timeframe.

However, prohibition of excessive pricing has some obstacles that would probably force governments to use consumer protection legislation to take action against unjustifiable price increases during the crisis. Having in mind the particular circumstances of this crisis, the main obstacle for the application of excessive pricing criteria is the condition that only the dominant undertaking may fall under its scope and the need to consider it in light of the definition of the relevant geographic market (see also Costa-Cabral *et al.* 2020, 11). Being aware of COVID-19 crisis effects on market fragmentation, the competition authorities might not be open to much smaller geographic market definitions than usual, which can in turn lead to infrequent findings of a dominant position (see also Costa-Cabral *et al.* 2020, 11). Further, if an undertaking is found to be a dominant player, it is necessary to prove that the actual price charged exceeded the benchmark range on a ‘persistent’ basis. Considering that COVID-19 is apparently temporary or episodic, it would be difficult to prove that price increase persists for a significant or certain period of time. Therefore, there is no competition concern from this point of view. Still, the authorities may try to intervene promptly by imposing interim measures that empower the authorities to act in cases of urgency where there is a risk that competition will be seriously damaged (Costa-Cabral *et al.* 2020, 11; Cary *et al.* 2020, 5).

It appears that the criteria for excessive pricing do not suit well the combating of COVID-19 through prohibition of abuse of dominance. This pillar of competition policy therefore does not seem to be a strong tool in responding to the COVID-19 challenges. But, if it is expected that the market will accordingly self-correct increased prices, then such an aspect of competition law enforcement is not needed. This is in line with the view that if a competition authority decides not to intervene regarding the excessive pricing, it should do so predominantly based on its belief that in a particular case excessive prices stimulate investment, or due to difficulties in implementation (Ezrachi, Gilo 2009, 268). If there is no risk that problems of excessive pricing assessment are compelling, competition policy intervention should be considered a viable option during crisis.

6. MERGER CONTROL

Merger control is particularly affected by the COVID-19 crisis because it has a major impact on the merger control proceedings and working policies of the competition authorities, as mentioned above. Competition authorities face challenges regarding the functioning of the authority administration, accessing information and conducting market investigations as they are working remotely and, at the same time, must follow relevant procedures under strict and short legal deadlines. Additionally, undertakings are also compelled to address the inquiries of the competition authorities and requests for information.

Competition authorities worldwide have reacted to the new circumstances. With more than 100 competition authorities in existence, at least half have announced changes to their merger control proceedings and how they will operate during the crisis (Krohs, Hamilton, Küttner 2020). Similar merger control guidance has been issued across Europe and in the USA, reflecting important coping strategies of competition authorities. Despite these announcements, merger control regimes are still in operation and undertakings are obliged to file mandatory merger notifications in accordance with procedural delays. Merger control rules thus continue to apply, with adjusted timelines and procedures.

Some of the authorities in particular encourage undertakings to delay merger notifications, where possible and when they are not urgent (e.g. in Belgium, the EU, Germany, Ireland, the UK). Such recommendations will be in force until further notice in light of the outbreak of COVID-19 and the government restrictions that have been put in place. This could be expected to include the cancelling of a number of measures to ensure business continuity and implementation of competition law by each authority. Where it is not commercially possible to delay the closing of a transaction, undertakings are still permitted to file mandatory merger notifications without delay, in particular in urgent cases of financial distress. For example, the EU DG COMP stands ready to deal with cases where firms can show very compelling reasons to proceed with merger notification without delay. In other jurisdictions there is no request to delay merger notifications, but the review deadlines for merger control have formally been suspended or prolonged (such as in Argentina, Austria, the Czech Republic, Denmark, Ecuador, France, Italy, Lithuania, Norway, Portugal, Serbia, Spain, the USA, etc.). These deadlines are extended by special temporary rules that will be in force until specified date or linked to the end of state of emergency in each country.

Moreover, a majority of authorities have requested that notifications be submitted by using electronic means. This temporary accepting of electronic copies of notifications, without requiring hard copies, could

be used as a positive development in establishing a permanent electronic process of notification, in order to facilitate the filing of notification forms and all supporting documentation.

On a procedural level, for mergers that have already been filed and are currently under review, it is expected that delays of ongoing merger investigations will be unavoidable, due to the impact of the crisis on the working policies of the competition authorities. Additionally, the authorities are facing several difficulties in carrying out of market investigations and market test of remedies (e.g. in collecting information from the notifying parties and third parties, such as customers, competitors and suppliers, or the ability to conduct dawn raids), exercising the right of defence (e.g. access to the file), in implementation of commitments and monitoring of remedies, in organising meetings and hearings, etc.

While undertakings are forced to delay the implementation of transactions that are mandatorily notifiable, they are not permitted to implement them prior to receiving approval from the authority. Despite certain procedural changes of the merger control regimes, undertakings are still subject to the notification and standstill obligation. There is no relaxation of such obligation and undertakings may only request for derogation from the suspension obligation, in accordance with the merger control rules and current urgent circumstances. Consequently, undertakings should be aware of the increased risk that any coordination of competitive strategies or behaviour prior to clearance may be considered an infringement of competition law (gun-jumping) due to the fact that current economic conditions might lead undertakings to work together during the pre-clearance stage. This concerns the implementation of the merger prior to clearance, as well as any coordination in behaviour or exchange or future strategies or commercially sensitive information prior to the permitted closing of the transaction that infringes rules on restrictive agreements.

On a substantive level, there is no indication that competition authorities will change their approach to the substantive analysis of notified mergers. There are no efforts to introduce special merger control rules in the light of the COVID-19 crisis, as well as no announcement specifically addressing this issue, as of yet. Because of this it can be concluded that the legal standard will not change, even in the event of an increased level of market concentration due to the consequences of the economic crisis. Rather, the authorities use existing provisions, in their proceedings, to address merger assessment, as well as special provisions for dealing with ‘failing firm’ defences. Moreover, it has been confirmed in the UK that the COVID-19 pandemic has not brought about any relaxation of the standards by which mergers are assessed or investigational standards, because of the need to preserve competition in

the markets through rigorous merger investigations in order to protect the interests of consumers in the longer term.³⁷ The UK CMA is a rare example of providing such guidance during COVID-19, which is annexed with a short reference guide for how the CMA will assess mergers involving ‘failing firm’ claims.³⁸

On the other hand, on the topic of changing the assessment criteria, it is possible that some competition authorities will take a different stance towards mergers in essential industries during the COVID-19 outbreak, in particular if specific legislation could be enacted to facilitate mergers in such industries, as well as towards mergers of large tech companies that are anyway becoming singled out as a particular area of concern in digital markets. Moreover, competition authorities will probably face a large number of cases relying on the failing firm defence to obtain merger approval, which would not be approved under normal circumstances. The crisis may also lead to calls for the revival of the failing firm defence, particularly in the airline and tourism industries, as well as to consideration of a re-evaluation and loosening of the criteria for merger assessment and application of the merger rules. Similar issues were raised in connection with the 2008 global economic crisis and the health of the disrupted financial sector. It remains to be seen how strong such voices will be and how frequent such cases will be during and after the current emergency.

Failing firm defences usually occur during times of financial or economic crises, because it is expected that, as such circumstances continue, a number of undertakings will fall into financial difficulty and be forced to exit the market (facing bankruptcy or sale in order to avoid bankruptcy) while competitors might attempt to acquire them in the aftermath of the crisis. According to IMF, potential cascading bankruptcies and massive layoffs with lasting effects for future recovery (IMF 2020b, 2), could lead to a new wave of mergers to rescue companies facing serious viability difficulties (Costa-Cabral *et al.* 2020, 16). Looking at the 2008 global crisis, it would not be a surprise if the authorities receive much more failing firm defence arguments because, in the course of 2008 crisis, the competition authorities did not review a number of mergers directly associated with the financial and economic crisis. Hence, the potential failure of an undertaking’s business is a relevant factor in the substantive assessment of a merger, including in COVID-19 crisis circumstances.

Historically, it is not unusual for competition authorities to accept failing firm defence in times of financial distress, as was the case in

³⁷ CMA, Merger assessments during the Coronavirus (COVID-19) pandemic, 22 April 2020, CMA120, par. 21.

³⁸ CMA, Annex A: Summary of CMA’s position on mergers involving ‘failing firms’.

the EU in 2013, in Nynas/Shell/Harburg Refinery (COMP/M.6360) and Aegean/Olympic II (COMP/M.6796). The European Commission's approach suggests that there was no relaxation of failing firm defence during the crisis and it was applied very narrowly. It was considered that the failing firm defence is designed to identify the limited circumstances where a firm's assets would exit the market if not for the proposed merger, while merger control rules provide the necessary flexibility to deal with decisions that require fast treatment, such as transactions that are part of rescue operations (Kroes 2009, 4; as well as Komninos, Jeram, Sarmas 2020; Fountoukakos, Geary 2013). The European Commission declared that the proposal that a more lenient failing firm test (or more generally a more lenient SIEC test) should apply in times of recession must be rejected; just as much as the proposal that a tougher test should apply in good times (OECD 2010, 187). The same approach was adopted by numerous countries (OECD 2010).

Therefore, there is no reason for relaxing the failing firm criteria in a distressed economic situation, such as those we are experiencing presently (see, for example, Komninos, Jeram, Sarmas 2020; OECD 2020d, 7–8). Safeguarding a competitive market structure is a time-tested way to protect consumers and competition in the long run, and merger control rules worldwide provide enough tools to approach market concentration assessment (Costa-Cabral *et al.* 2020, 20). To conclude, the economic crisis and declining markets should not directly affect the failing firm defence criteria in merger control, and competition authorities should not favour a more lenient approach to the failing firm defence, or, more generally, a more lenient SIEC test. Such an approach is explicitly confirmed in the UK, where the CMA, in its new guide on how the CMA will assess mergers involving 'failing firm' claims, issued as a general 'refresher' on how it is likely to approach such claims during the COVID-19 pandemic. The guidance reiterates the principles and stringent conditions for the failing firm scenario, outlined in the CMA's existing Merger Assessment Guidelines and decisional practice in this area, which govern how the CMA will assess mergers in which such 'failing firm' claims are raised, underlining no relaxation of the standards by which mergers are assessed.

In its first application of the failing firm defence during the COVID-19 pandemic, the CMA provisionally clears Amazon's investment in Deliveroo under this argument (CMA 2020).³⁹ The CMA provisionally concluded that the transaction would not be expected to result in an substantially lessening of competition (SLC), in either the market for online restaurant platforms or the market for online convenience

³⁹ CMA, Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, Summary of provisional findings, Notified: 16 April 2020.

groceries, on the basis that, as a result of the COVID-19 crisis, Deliveroo is likely to exit the market unless it receives the additional funding available through the transaction. The CMA provisionally found that no less anti-competitive investor was available and concluded that the loss of Deliveroo as a competitor would be more detrimental to competition and to consumers than permitting the Amazon investment to proceed and, therefore, the transaction would not be expected to result in an SLC. It is claimed that the COVID-19 crisis has substantially affected the market and Deliveroo's financial position. This decision is an example of the CMA's refined approach and also indicates that the CMA is willing to take into account the changed economic circumstances in its assessment.

However, the failing firm defence may be challenging for undertakings because of the high burden of proof on them. The standard for accepting this argument is high and there are strict criteria to be met for mergers to be cleared. Where the failing firm conditions cannot be fulfilled, undertakings still can underline their weakened competitive and financial position or changed market circumstances due to the crisis in order to diminish the anticompetitive effects of the merger. For instance, the EU merger control rules allow the European Commission to take into account rapidly changing market conditions during the competition assessment. Even if it cannot be shown that each of the prescribed failing firm criteria are met, a counterfactual analysis of what would be the development of the market absent the merger could still lead to the conclusion that the deterioration of competition in the market is not a causal effect of the merger (OECD 2010, 186–187). It is important to bear in mind that this particular application of the general causality test under the EU Merger Regulation does not require any change in the standards by which failing firm cases are assessed during the pandemic. In UK, for instance, the CMA already took advantage of the possibility to carry out such an analysis and take into account the impact of the COVID-19 outbreak when it approved a private hospital merger. As part of its assessment, the CMA took into account the fact that private hospitals have effectively put their entire hospital capacity temporarily under the control of the UK National Health Service to deal with the COVID-19 outbreak, which in particular may delay the planned opening of new hospitals both by the merged company and its competitors.⁴⁰

Considering that mergers play a fundamental role in allowing for efficient economic restructuring, while merger control protects competition from anticompetitive effects, it is important to stress the need for competition authorities to not consider matters unrelated to

⁴⁰ Completed acquisition by Circle Health Holdings Limited of BMI Healthcare Limited – Summary of the CMA's decision on relevant merger situation and substantial lessening of competition, ME/6864/19.

competition, including controversial issues of national and European champions, as well as ‘predatory’ or ‘hostile’ acquisitions of strategic assets by foreign investors. In times of economic distress, political pressures to consider these issues tend to increase, because politicians usually assert protectionism, industrial or public policy reasons in merger assessment. The COVID-19 crisis will certainly highlight the voices for reconsideration of some elements of the traditional framework of competition policy, like it was in the context of SIEMENS-ALSTOM merger case which triggered a new phase in Europe’s ongoing debate on the reform of EU merger control to allow for industrial policy concerns and on the ability of European undertakings to compete in the global market.

Furthermore, in the context of the COVID-19 crisis, there is increased focus on protectionism of weakened domestic companies from foreign takeovers, particularly in the EU. Countries are seeking to protect their strategic healthcare assets and related infrastructure from allegedly predatory acquisitions by foreign firms, i.e. foreign direct investments (FDI). This is not unexpected considering that the EU already has rules on screening by Member States of foreign direct investments into the Union on the grounds of security and public order, whereby ‘screening’ means a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments.⁴¹

As part of the overall response to the COVID-19 crisis, the European Commission also singled out the issue of foreign direct investment screening due to its pervasive effects on the economy of the European Union. The European Commission issued guidelines calling member states to make full use of their existing FDI screening mechanisms and to fully take into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors, as envisaged in the EU legal framework.⁴² The Commission also calls upon those member states that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to set up a full-fledged screening mechanism to address cases where the acquisition or control of a particular business, infrastructure or technology in the EU would create a risk to security or public order, notably in industries such as health, medical research, and biotechnology (‘predatory buying’). National screening mechanisms are already in force in 14 member states and

⁴¹ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I/2019 (FDI Screening Regulation).

⁴² Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), Brussels, C(2020) 1981 final.

some of them already adjusted their foreign investment screening regime in light of COVID-19, in order to empower the blocking of takeover of domestic undertakings that may have become weakened due to the economic consequences of the crisis (such as Italy, France, Germany, Spain) (Ahlborn, Barth, Santos-Goncalves 2020).

Even if the abovementioned considerations do not affect merger control as such or are generally not within the scope of the competition authorities' powers, one cannot rule out that they may influence competitive assessment of foreign takeovers. Nevertheless, competition authorities should continue bear in mind such considerations and avoid populism in competition policy and increased politicisation of merger reviews. The enforcement of merger control rules is not a way to support the creation of new or strengthening of exiting national champions, which is confirmed in the EU. It is stressed that competition enforcement does not prevent the creation of European champions. The relaxing of merger control, as well as other competition rules, does not represent a panacea for alleged weaknesses and competitiveness challenges of the European industry and carries significant risks – notably if this translates to authorising anticompetitive transactions (European Political Strategy Centre 2019, 4).

Additionally, national champions distort competition because they are very often dominant in the domestic market, which is a condition that enhances the likelihood of competition being distorted by them (OECD 2009b). This means that competition authorities should follow such an approach and support strong public voices against amending the competition rules to allow for the creation of national and European champions, which we may see as a trend in the aftermath of the crisis. This approach would entail recognition and achieving competitive neutrality, as a fundamental principle of competition law and policy. There is no economic reason to abandon the principle of competitive neutrality because maintaining a level playing field between public and private business is essential for the effective use of resources within the economy, consequently achieving growth and development. The competition law should not allow undertakings benefit to from undue advantages due to their ownership or nationality.

7. CONCLUSION

The COVID-19 pandemic has been recognised as an exceptional situation that has shut down businesses worldwide and kept people in their homes, while generating an extraordinary health and economic crisis and a serious demand and supply shock. During this crisis, unprecedented

measures were applied globally, taking sometimes precedence over competition law. Therefore, it is necessary to cautiously consider the effects of the crisis on competition law enforcement.

Undertakings must primarily be warned that the current crisis is not an excuse to breach competition laws and that competition laws continue to apply, with no general emergency exemption, including during the COVID-19 crisis. The competition authorities, for the time being, are not (and should not be) considering changes to competition law that might be necessary during the crisis. Although they have recognised the social and economic impact of the crisis, it is stressed that competition law is flexible enough to take into account for the changed economic environment.

Further, there is growing interest in the positive contribution that competition policy could provide in combating the COVID-19 pandemic due to the fact that the effectiveness of national health policy responses could be reduced by the demand and supply shock and by competition law obstacles. Consequently, this appealed the need to relax competition law enforcement in the context of allowing undertakings in the health sector to temporarily coordinate and cooperate, as is the case in the retail and food industry, in order to meet consumers demand. Competition authorities worldwide have announced that they would not intervene if such conduct were to occur, if it is necessary to ensure the supply and fair distribution of scarce products to consumers. This means that, due to the exceptional circumstances resulting from COVID-19, the rules on restrictive agreements will be pragmatically and less strictly enforced. Such clarification is very important for undertakings in such time of great difficulty and uncertainty because it is confirmation of the issues presented by the crisis, and it serves the greater public interest during this crisis. The undertakings are also warned that they must not exceed the limits of what is necessary to tackle the crisis in their business. They are not allowed to use the crisis for anticompetitive and non-essential collusion, such as price fixing and exchange of sensitive information.

When it comes to excessive pricing, relaxation of competition law does not cover any abuse of dominance and it would not be tolerated under competition law. This seems reasonable considering the necessity that products for the protection of health and other scarce products remain available at competitive prices and without discrimination. That is why a number of competition authorities, as mentioned above, in the short run, have put special focus on excessive pricing practices.

For merger control, undertakings must continue to notify mergers where the notification obligation applies but notifications may be delayed, and electronic filings are required. They are also encouraged to carefully assess the timing of their transactions due to the current crisis and limited working policies of the competition authorities. Regarding

the substantive assessment of mergers, the merger control rules are not softened or suspended in times of economic crisis, including the failing firm defence criteria. It is considered that those rules are flexible enough to take economic crises into account, which seems justified.

It can be concluded that in the short run, the role and focus of competition authorities should be to facilitate cooperation among undertakings and to eliminate excessive pricing, in order to ensure critical goods and services reach the market promptly, at competitive prices and without discrimination. Historically, this seems the right response to the economic crisis because, in the long run, the negative consequences of the opposite approach would be harmful, such as fewer competitors, reduced innovation, and higher prices. Therefore, the competition authorities must stay the course, while, at the same time, retaining a degree of flexibility so that competition law does not obstruct economic recovery. According to the recommendations, restoring effective competition in the medium to long term is a key to ensuring that the recovery is rapid and consistent (OECD 2020d, 1).

The ongoing COVID-19 crisis is particularly challenging for all competition authorities because of the uncertainty surrounding COVID-19, including in terms of the scale and pace of infection; how long and widespread shutdown measures will prove necessary; and the risk of “second wave” infections as the virus moves around the globe (OECD 2020c, 2).⁴³ It is difficult to discuss about this health emergency and its consequences while science still has no clear answers about the coronavirus and COVID-19. Competition law enforcement is no exception; there are many unknowns about what impact the COVID-19 pandemic will have on further competition law enforcement.

Even when the economic situation begins to stabilize and the phasing out of emergency measures starts, competition authorities and competition policy should play an important role in the design and implementation of recovery measures, bearing in mind that effective competition policy contributes to the economic recovery in the aftermath of crisis. Still, the questions remain: when will this emergency end and how quickly will the economies recover?

If we consider three traditional paths of recovery (V-shaped, U-shaped and L-shaped recovery),⁴⁴ there is confirmation that V-shape,

⁴³ There is useful clarification that there is no complete shutdown of economies worldwide, rather large reductions in economic activity, because (like in US economy), sectors vary widely in the extent to which they continue to operate in such a scenario. For example, while the travel, tourism, entertainment, and hospitality industries are almost completely or wholly shut down, retail stores (like supermarkets) and health care facilities would continue to provide vital supplies and services as well as sectors like software and telecommunications (Lever 2020).

⁴⁴ V-shaped recovery is quick recovery, while U-shaped is slow recovery. L-shape describes no recovery for a significant period of time.

describing the ‘classic’ real economy shock, have been the most common in previous recoveries and supply shocks, including epidemics such as SARS, the 1968 H3N2 (‘Hong Kong’) flu, the 1958 H2N2 (‘Asian’) flu, and the 1918 Spanish flu (Carlsson-Szlezak, Reeves, Swartz 2020, 7; Baldwin, Weder di Mauro 2020, 24). We can hope that COVID-19 recovery may be V-shaped, but there is a fear of the possibility that this crisis will be U-shaped rather than V-shaped (Baldwin, Weder di Mauro 2020, 24; Mann 2020, 82; Cochrane 2020). It is pointed out that the final shape recovery depends on the sector of the economy, intensity of an economy’s production, consumption, and trade, because each sector will have a different ‘shape’ of shock and recovery. Accordingly, it is estimated, for instance, that manufacturing will show a ‘V’ or ‘U’ shape while tourism and transportation will experience an ‘L’ shape (Mann 2020, 82). Additionally, it must be mentioned that the COVID-19 crisis had experience both a demand and a supply shock which did not exist in the previous 2008 global crisis, so it would not be surprising if the COVID-19 recovery was V-shaped. Meanwhile, we must wait the end of COVID-19 pandemic and crisis to see more evidence of their damaging effects on economies.

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