



Competition Policy After COVID-19

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We are saturated with COVID-19 related news and articles. It is impossible not to think about how to manage this emergency and how to get out of it. General health concerns, crowded hospitals, infection rates and numbers of deaths are increasing in many countries, GDP growth estimates are plummeting and there is the tragedy of rising unemployment. Take all this to developing countries and you get a dangerous cocktail that could reverse decades of economic progress. For Latin America, this setback would be painful in many countries where social discomfort has been growing.

Competition authorities and competition experts around the world are worried about the COVID-19 pandemic as well. In fact, many competition authorities are relaxing - or considering relaxing - some competition rules to deal with a situation without precedent. Some competition authorities are being tougher on price gouging practices, though. Law firms are advising their clients on how to cope with this crisis while complying with competition law.

That said, I do not want to focus on the most immediate competition concerns during this difficult time, but on what will come after the storm. I hope to offer some preliminary ideas that in my view competition authorities should consider for post COVID-19 times. To that end, I will mention two aspects, which might anticipate some competition consequences after the pandemic comes to an end.

The COVID-19 Pandemic and the Anti-Free Trade Trend

Globalization has slowed since 2010, which is of course worrisome for international trade. The trade war between the United States and China has contributed to a new global trend in which many countries are trying to become less reliant on trade, while some companies are considering setting up closer regional supply chains.²

In addition to this trend, there is COVID-19. According to the World Trade Organization (“WTO”),³ international trade will suffer a sharp drop, even under an optimistic scenario. Eventually, there will be a recovery, but when will this occur is still uncertain. It is obvious that the collapse in trade is explained by the economic coma that began after massive lockdowns around the globe.

This is bad news for many reasons, but particularly for international competition, because domestic firms will be less exposed to foreign competition.

Corporate Generosity

The media are reporting on how many corporations and wealthy businessmen are giving millions of dollars to cope with the health emergency and to ease the disastrous economic effects of lockdowns. Many CEOs have promised not to lay off their employees during quarantines. These are hard times for companies, no doubt. Smaller companies do not have sufficient cash reserves for more than one or two months, and government bailouts are and will remain necessary in many cases.

These efforts are remarkable, but I am afraid this might have undesirable implications for competition policy, as well.

The Day After COVID-19

Some countries are beginning to ease their lockdowns. The fear of a deeper recession put pressure on governments to reduce shutdowns in order to revive the economy. Unemployment is particularly worrisome in many countries, even in the United States, where unemployment claims have reached 22 million.⁴ Latin American countries with already relatively high unemployment rates – on average 8.1 percent in 2019⁵ - are particularly vulnerable in this respect.

Such a disturbing outlook brings me to some competition concerns for three reasons.

Firstly, competition authorities have begun to relax the enforcement of some competition rules. For example, on March 19, the UK Competition and Markets Authority (“CMA”) stated that it had no intention of taking competition enforcement action against cooperation between businesses to the extent necessary to protect consumers or ensure supplies.⁶ The Mexican Competition Authority (“COFECE”) recently took a similar approach.⁷ Nevertheless, the urgency of acting now might pave the way for setting aside future competition policies necessary for healthy markets. Therefore, in my view, it should be clear that the current approach of dealing with the emergency must be temporary.

Secondly, after the spread of COVID-19 slows, governments will prioritize the recovery of local markets even if that implies embracing extreme protectionism, which in turn will reduce foreign competition. This is important because this trend would be a force in the same direction as relaxing the enforcement of some competition rules. Competition authorities must bear this in mind for post-COVID-19 times.

Thirdly, and closely related to the two previous concerns, domestic corporations will have strong incentives to lobby for softer enforcement of competition law and might request additional protectionist measures as compensation for corporate generosity and flexibility during the pandemic. If some protectionist measures are arguably acceptable for some time, they should not be at the expense of strict enforcement of competition law in domestic markets.

In such a context, my concern is that competition policy might become excessively lenient. This would be a questionable policy choice. If protectionism was winning supporters before the pandemic, a post-COVID-19 world will tolerate more protectionism in order to back domestic industries and businesses.

For example, corporations could put pressure on competition authorities to be less rigorous when evaluating the anticompetitive effects of barriers to entry, which some will consider necessary or tolerable because of the economic downturn. Merger control will be particularly challenging, because many firms will request merger clearance based on the failing firm defense.⁸ Some competitors might have incentives to abuse of temporary cooperation in order to survive and would argue that this was necessary to ensure supplies. *Ex post* analysis will be very challenging for antitrust agencies.

Final Thoughts

As noted, part of the current economic crisis is a consequence of mandatory lockdowns that at some point governments will ease. Enforcement of some competition rules might be exceptionally relaxed. Many competition authorities have adopted such approaches. Cartels should be punished strictly even during the emergency. After the crisis, competition

enforcement should be slowly adjusted to pre-COVID-19 policies, or perhaps, depending on the particularities of every jurisdiction, it should be stricter.

In general, once countries have overcome the emergency, competition authorities and the public in general must adopt a strict approach to prevent harmful market concentration that might arise because of mergers and bankruptcies. More importantly, strict enforcement in domestic markets will be necessary to compensate for the potential loss of foreign competition caused by COVID-19 and anti-free trade trends, which will cause additional corporate demands for more protectionism.

Countries are dealing with difficult tradeoffs. The COVID-19 pandemic is shaking economies in ways still unknown in modern history. However, competition is at the heart of a healthy capitalism. Basic economic theory teaches how competition is beneficial for consumers, is necessary for efficient markets, and serves society. I do not think the COVID-19 will genuinely change this basic understanding of markets. Therefore, adopting a lenient competition policy after the crisis would, in the long run, harm economies around the world and might artificially favor the emergence oligopolies to the detriment of economic growth, productivity, efficiency and consumers.

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² The Economist, *Slowbalisation. The steam has gone out of globalization*, (Jan. 24, 2019), <https://www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation>.

³ World Trade Organization, Trade set to plunge as COVID-19 pandemic upends global economy, (Apr. 8, 2020), https://www.wto.org/english/news_e/pres20_e/pr855_e.htm.

⁴ Nelson D. Schwartz, The New York Times, *'Nowhere to Hide' as Unemployment Permeates the Economy*, (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/business/economy/unemployment-numbers-coronavirus.html?searchResultPosition=1>.

⁵ International Labour Organization, ILO: Latin America and the Caribbean experience slight increase in unemployment, which could get worse in 2020. (Jan 28, 2020), https://www.ilo.org/caribbean/newsroom/WCMS_735506/lang-en/index.htm.

⁶ Competition Market Authority ("CMA"), COVID-19: CMA approach to essential business cooperation, (Mar. 19, 2020), <https://www.gov.uk/government/news/COVID-19-cma-approach-to-essential-business-cooperation>.

⁷ Paola Name Valdivia, *COVID-19: The Mexican Antitrust Authority's Perspective*, (Apr. 7, 2020), <https://www.competitionpolicyinternational.com/COVID-19-the-mexican-antitrust-authoritys-perspective/>.

⁸ See Tommi Lahtinen and Pieter Huizing, *COVID-19 and the 'failing firm' defence in merger proceedings*, (Mar. 20, 2020), <http://competitionlawblog.kluwercompetitionlaw.com/2020/03/20/covid-19-and-the-failing-firm-defence-in-merger-proceedings/>.