



# Convergence in the Time of Cholera: What Lies Ahead for the International Antitrust Agenda

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## **Introduction**

The economic crisis caused by the COVID-19 pandemic has brought about many reflections regarding public policies on several different levels. As with any exercise on understanding the present to predict future outcomes, these reflections are multiple and influenced by a specific view about how institutions and individuals respond to the current scenario.

On the one side, there are those who, believing in the predominantly exogenous source of the crisis, identify economic measures needed to overcome or at least minimize its impacts, but that should be put aside as soon as the situation is normalized. On the other side, there are those who, glimpsing a still uncertain future, bet on the continuity of these measures, or even on the more radical transformation of policies and institutions.

My goal with this article is to try to explore how the current economic landscape, the transformations it has put into motion, and the measures adopted by countries to deal with the crisis, can impact a specific aspect of competition policies: its cooperation and convergence agenda. In order to do so, I intend to, first, briefly summarize the central aspects of the international agenda as it currently stands, which was structured notably since the 1990s. Second, to discuss how this agenda had already been facing challenges in the past few years. And finally, to address how the COVID-19 crisis affects this dynamic.

Although I am not able to predict the future, my sense is that some changes are here to stay, not because they represent an abrupt break with the previous context, but precisely for the opposite reason. The changes identified in the international antitrust scenario because of the crisis reveal an acceleration of a trend towards the “nationalization” of competition policies that certainly will impact convergence, at least on a substantial level.

## **The International Antitrust Landscape: From the 1990s to Today**

The 1990s saw the explosion of the number of competition agencies throughout the world, owing to structural reforms in many countries that were undergoing trade opening, privatization, and deregulation.<sup>2</sup> In other words, it was influenced by an agenda of economic openness aligned with the structuring of global markets, propelled by the nascent global value chain. This movement was influenced not only by commerce, but also by production, which led the development of food, sanitary, technological, and monetary security to also be included in the new global order, built with reference to this interdependent network of contractual relations, owing to the long-term stability conferred by a competitively healthy environment.

In pursuit of this goal, several legal institutions had to be created to guarantee a somewhat universal rule of law. From the point of view of competition between companies, this movement required the building of converging competition policies. That movement did not lead to the creation of an international competition authority, but to the consolidation of continuous institutional learning led by the OECD and the International Competition Network, that stimulated this agenda by means of a consistent advocacy strategy, carried out on three fronts: (i) institutional, (ii) procedural, and (iii) substantial.

Therefore, for the past 30 years, the world has come to understand that an effective antitrust policy entails its implementation by an independent agency – from the political and budgetary point of view – carried out by a stable and well-trained bureaucracy, commanded by authorities with fixed terms. Procedurally speaking, the observation of due process, transparency and motivated decision-making, in order to ensure a level playing field for companies regardless of their nationality, came to be expected. And lastly, this required decision-making to be carried out with reference to the most

advanced theories of harm, supported by the neoclassical market efficiency model. The idea of a universal economic science, whose laws could be applied in any context, is an essential condition for this convergent agenda. In short, it states that the evaluation of competitive effects running from an economic agent's strategy can be calculated, and that its results are the direct expression of a normative reference.

### **Consolidating the International Agenda: Substantive Developments**

This convergence on substance was gradually consolidated in the three main enforcement antitrust fronts: cartels, mergers, and unilateral conduct. In cartel enforcement, the world experienced the building of an agenda for the fight against international cartels, by means of the strengthening of leniency programs in many jurisdictions, following the U.S. model. These efforts, which created stronger ties between agencies and threw companies into a rush to set down markers, was instrumental to the structuring of reasonably equitable global chains and to the discouragement of export cartels as a tool of industrial policy.

As for mergers and unilateral conduct, regardless of the differences in tools and fundamentals between European and American policies, with time, these jurisdictions built up cooperation and came to share a minimum common vocabulary in their efforts. Even though there have been divergences in the evaluation of the competitive impacts of certain practices and on the drafting of remedies, it remains true that cooperation developed in these areas as well, and that dialogue on certain premises was structured.

Despite the efforts of international think tanks to remain active and of authorities' good will to maintain a cooperative environment, the fact is that the substantial foundations of this agenda have been shaken by several forces in the past years, and lately by the coronavirus pandemic.

### **The Shaken International Agenda: Recent Setbacks**

Perhaps a victim of its own success, the fight against international cartels has recently lost its momentum. The number of leniency applications has dropped, and some time has passed since the last big ex-officio operation against an international cartel took place – which is not to say cartels are not still out there, operating in more sophisticated ways, perhaps even making use of algorithms and artificial intelligence. Two factors from the current crisis contribute to potentially aggravate this scenario. First, there is evidence that we are undergoing a questioning of the global chain value, owing to its instability in guaranteeing safety in the supply of essential products. That may lead to its restructuring to a degree still hard to foresee. And if that does happen, the very object of international cartels may no longer exist, at least as a priority for competition authorities.

Second, some authorities have been allowing national companies to fight for their survival by way of cooperative practices. Though not all cooperation is a synonym of collusion, the fact remains that this strategy can be summarized by the idea that it is better to open the way for differentiated, and even attenuated, forms of competition in the present – which in turn preserves both jobs and companies – so that companies can come to compete more vigorously in the future, than pressure for a pattern of competitiveness that, by generating instability, leads to bankruptcy and, in the end, to less competition overall.

This debate was already present in merger analysis before the crisis. It became clear with the criticism by France and Germany of DG Comp's decision in *Siemens/Alstom*. The ministers of the economy from both countries signed a manifesto defending a European industrial policy for the 21<sup>st</sup>

century, claiming that new investments were needed for Europe to remain competitive at a global level, and that the success of long-term strategies, such as a carbon-neutral economy, could only be attained by joint financial and technical efforts from Member States.<sup>3</sup>

The document discusses the need for the rebranding of European antitrust law, in a way that takes industrial organization into account in its decision-making, owing to the supposed inexistence of effectively equal competition at an international scale. It proposes that (i) state intervention/control and subsidies are taken into account in merger analysis; (ii) guidelines for merger analysis be updated so that they encompass international competition and future competition, rather than giving more discretionary power to the European Commission in analyzing relevant markets; (iii) the creation of new appeal mechanisms to the European Commission in specific scenarios; and (iv) the promotion of a more transparent landscape for state aid analysis.

In a nutshell, they believe that European antitrust policy should look more carefully to competition from other countries, especially China – that clearly supports its own industry – and the U.S. – that is said to be lenient towards concentrations, notably in digital markets.<sup>4</sup> The document also claims that competition policy should protect the market not only from the demand perspective, aiming to protect consumers against price surges, but also from the supply side, aiming to guarantee that competitors are on a level playing field from an international standpoint. In the midst of this debate came the pandemic, which has apparently accelerated these tendencies, leading to greater concern with the sustainability of markets in the long-term and a defense of internal value chains. Whether these tendencies are here to stay, only time will tell.

Lastly, there is enforcement against vertical or unilateral conduct. Here the gap between authorities in terms of substantial convergence was already wide ever since Europe adopted a more energetic fight against digital platforms, especially regarding Big Tech, and reactivating views about antitrust enforcement that depart from the neoclassical parameters sedimented by the consumer welfare standard. Although not explicitly, the theories of harm set forth in the European cases against Google, for example, clearly reveal a perspective based on values such as the competitive process and the European market, one that differs from what was sedimented as the international consensus. To a certain degree, that was to be expected, because it is in unilateral conduct analysis that the greatest divergence in terms of anticompetitive effects emerges. Inasmuch as digital platforms' strategies are in essence global, there is nothing more natural than the emergence of international cooperation to counter it, but, in this case, the level of complexity of the analysis is far greater, as it is based on the rule of reason and demands theories of harm that have yet to be adapted to a context of intensive innovation, competition “for” the market, network effects, market tipping, and enormous difficulties in designing remedies.

### **The Pandemic and its Consequences for Antitrust**

As Frédéric Jenny has recently pointed out, with this crisis emerges a discussion of whether the competitive process can adequately allocate resources for society. That has been debated in many countries, that are coming to realize that competition works well when there is economic stability, in other words, when the means of production can, at least potentially, be fully utilized. At the very least, this movement leads to a debate on whether competition authorities should have a more dynamic and long-term understanding of the competitive process.

The tectonic plates of antitrust were already moving due to the aforementioned reasons, having as background the resurfacing of an agenda that searches for competitiveness at a national or regional scale. When a movement such as this emerges – and it is not the first time it has – it sheds light upon a dimension of competition that has never gone away: the competition between States.

Depending on the way it takes place, such a movement can become the protagonist of the discussion, with its all-encompassing power.

It is important to emphasize that the origins of these setbacks to the consolidation of international convergence in antitrust are extremely diverse, but they all lead to the adoption of standards adapted to national contexts, in the attenuated version of my hypothesis, and to the revision of the role of antitrust itself in the “regulation” of markets, in the more extreme version of the same hypothesis. This would have a series of institutional repercussions.

In this context, and given their path-dependence, national authorities tend to reinforce their role and try to move on with the management of their institutional obligations, perhaps having to adapt their structures of incentives for deterrence strategies in order to be self-sufficient regarding policies in other countries. However, the crisis severely impacts productive structures and may lead to the revamping of ruinous competition theories, that at first sight can help justify the agenda for market survival, but at a second glance may serve as a pretext for instrumentalizing a movement towards concentration to face the challenges of a new world order. But that is the topic of a different discussion.

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<sup>2</sup> A clear example is the ICN, which was initially established by 14 competition authorities in the early 2000s and in 2020 had already over 100 members.

<sup>3</sup> Available at [https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F\\_\\_blob%3DpublicationFile%26v%3D2](https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2).

<sup>4</sup> JENNY, F. Economic Resilience, Globalization and Market Governance: Facing the COVID-19 Test. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3563076](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563076).