



CPI EU News Presents:

Highlights from the OECD Roundtable on the Role of Competition Policy in Promoting Economic Recovery

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On December 2, the Organization for Economic Cooperation and Development's ("OECD") competition committee held a roundtable on the role of competition policy in promoting economic recovery, with a focus on the COVID-19 pandemic. While the roundtable was a closed-door, off-the-record event, the country submissions and speaker presentations are publicly available on the OECD's website.¹ Below are highlights from submissions by various countries and the Business and Industry Advisory Committee to the OECD (BIAC at OECD).

Background - Competition Authorities' Role in Economic Recovery

After a year of government measures in response to the COVID-19 crisis, the roundtable focused on how "competition policy and competition authorities [can] contribute to a faster and more sustained economic recovery."² As articulated by the secretariat's background note, competition authorities' "expertise in how markets function and the key role of competition in ensuring conditions for economic growth and recovery make them privileged stakeholders in a wider policy context."³

Perhaps reflecting COVID-19's disparate health and economic impact across countries, participants' submissions reveal that they undertook a wide range of initiatives aimed at mitigating the impact of the crisis. As but a few examples, participating countries and their competition authorities have: advocated for the prioritized development of ultra-broadband telecommunications infrastructure,⁴ advocated for state intervention in the aviation sector to mitigate its significant financial losses,⁵ and provided technical guidance to local policymakers on assessing the impact of their competition decisions.⁶ This article focuses on three types of initiatives undertaken by multiple participants: (1) issuance of guidance for recovery-related collaborations, (2) increased vigilance around exploitative pricing and related unlawful conduct, and (3) analysis of whether existing merger standards ought to be relaxed in times of economic crisis.

Recovery-Related Collaborations

Seeking to ensure the continued provision of essential goods and services and encourage innovation in response to the COVID-19 crisis, several competition authorities have issued guidance on recovery-related collaborations between competitors. The secretariat's background note identifies that permissible collaborations generally have three common key criteria: "i) the necessity and indispensability of . . . address[ing] a specific market disruption due to the Covid-19 crisis; ii) a positive impact of the co-operation on consumers; and iii) a strict time limit."⁷

The U.S. submission focuses on the March 2020 joint statement from the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), which committed to account for exigent circumstances and provide expedited antitrust guidance for collaborations related to COVID-19.⁸ Since March 2020, the DOJ has approved four COVID-related collaborations through their expedited business review process – three related to the manufacture and distribution of personal protective equipment and/or medication, and a fourth related to the production of pork.⁹ Of particular note, the DOJ permitted various pharmaceutical companies to "exchange limited information

about the manufacture of monoclonal antibodies that may be developed to treat COVID-19” in order to expedite innovation in vaccine production.¹⁰

Italy’s competition authority issued a similar statement in April 2020, announcing that it “d[id] not intend to oppose any necessary, temporary and proportionate measures taken to avoid shortages of supply.”¹¹ Since then, Italy’s competition authority has provided guidance in two instances. First, it declined to oppose a cooperative agreement between two pharmaceutical distributors for the joint purchasing and distribution to pharmacies of disposable surgical masks.¹² Second, it declined to investigate a common scheme among financial providers of consumer loans to defer customers’ main loan terms for a limited time period.¹³ In both instances, the authority concluded that the “exceptional health emergency” permitted such collaborations for a limited duration.

The European Commission similarly adopted a temporary framework for addressing antitrust issues in projects aimed at addressing the shortage of essential products and services during the COVID-19 crisis.¹⁴ The framework contemplates the issuance of “ad hoc written comfort” letters for specific projects. The Commission’s only letter to date favorably assessed a cooperation between pharmaceutical manufacturers to combat the shortage of critical medications for the treatment of COVID-19.¹⁵

Declining to interfere with such collaborations illustrates how competition authorities can exercise discretion in their enforcement powers to address the issues arising from an economic shock. But, as the secretariat’s background note cautions, while such collaborations help prevent supply chain disruptions and encourage critical innovation, “[s]ectors where co-operation between competitors arose as a response to the crisis should be made the target of stricter scrutiny as soon as circumstances change.”¹⁶

Vigilance Around Exploitative Pricing and Related Unlawful Conduct

Participants across the board showed increased sensitivity to exploitative pricing and other unlawful conduct arising from the COVID-19 economic environment. But, as the secretariat’s background note acknowledges, “[d]istinguishing legitimate from illegitimate pricing practices, as well as how best to deal with the latter, has created substantial challenges for competition authorities.”¹⁷ As a result, the roundtable submissions reflect various approaches.

In the U.S., the DOJ created a COVID-19 Hoarding and Price Gouging Task Force. While the U.S. (unlike, for example, the EU) does not regulate pricing or prohibit exploitative abuses, the Task Force “is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities.”¹⁸ Since its creation, the Task Force has aided the investigation of a range of conduct, including the sale of personal protective equipment (“PPE”) at exorbitant prices, fraudulent attempts by individuals to sell PPE they did not possess and had no means to acquire, and foreign countries’ shipment to the U.S. of misbranded and defective PPE.¹⁹

By contrast, rather than exercising purely legal authority, Italy’s initial response to crisis-related abusive conduct relied upon “a form of moral suasion.”²⁰ Specifically,

Italy's competition authority requested information on price spikes in the food and health sectors and announced the changes with a press release, which often prompted corrective action. For example, a press release about various laboratories' prices for antibody tests caused the laboratories to significantly reduce those prices, in some cases by nearly 70 percent.²¹ In another effort to prevent abusive conduct through increased transparency, Italy's competition authority also requested grocery retailers to report on the trend of prices for "basic groceries, detergents, disinfectants and gloves."²² Such reporting helped the authority distinguish legitimate price increases from those that caused concern.

With respect to other types of unlawful conduct, Canada's submission highlighted its Competition Bureau's issuance of warning letters to businesses which "sought to benefit from the fear and misinformation surrounding COVID-19 by selling products that allegedly prevented, treated or cured the disease."²³ In the United States, too, the FTC and the Food and Drug Administration have issued over 90 joint warning letters to companies marketing products as COVID-19 treatments or cures.²⁴

Assessment of Existing Merger Standards

Finally, participants' submissions reflect that many have reassessed whether existing merger standards – in particular, the failing firm defense – ought to be loosened in light of the COVID-19 crisis. The failing firm defense allows for approval of an otherwise anticompetitive merger if certain criteria are met, including that the acquired firm is in danger of failing and exiting the market altogether. Though the possibility that more businesses will fail as a result of the COVID-19 crisis has provoked a second look at the defense, the consensus is that rigorous enforcement of existing merger standards remains the surest path towards economic recovery.

For some historical context, similar discussions arose in 2008 and 2009, stemming from the notion that relaxed standards might help businesses better weather the then-ongoing financial crisis. At that time, participants in an OECD roundtable on the failing firm defense concluded that its "criteria should not be relaxed in times of crisis."²⁵ The secretariat's current background note reaffirms this conclusion, noting that past crises suggest that that suspension of antitrust laws holds back recovery and that relaxed merger control does not improve long-term resilience.²⁶

The roundtable participants tend to agree. For example, the U.S. submission states that the DOJ and FTC's "view of key U.S. antitrust standards has not changed."²⁷ With respect to the failing firm defense in particular, the agencies assert that they continue to apply the same test and to "require the same level of substantiation as was required before the COVID pandemic."²⁸ The EU submission takes a similar view, noting that "the crisis cannot and should not serve as a pretext for approving mergers that would hurt consumers and hold back recovery."²⁹ The positions taken by the U.S., the EU, and others reflect concerns that relaxing merger control based on economic uncertainty, standing alone, would set a challenging precedent and distort competition law in the long-term.

As a counterpoint, the OECD's BIAC, which represents a network of companies across the globe, took a more flexible view. The BIAC submission suggests that the defense "may justifiably be partially relaxed" by, for example, "specifically allow[ing] competition agencies to take imminent job losses into account."³⁰ Nevertheless, it seems unlikely that countries will change their views in response to this recommendation from the business community.

Conclusion

Despite the arrival of a COVID-19 vaccine, rising case numbers and new lockdowns have left many countries and their competition agencies in the emergency phase of pandemic management. Understandably, then, most country submissions to this roundtable focused on short-term, immediate measures to lessen the most disruptive economic impacts of the crisis – a necessary first step. But the true test of competition policy's role in promoting economic recovery is still to come, when, in the recovery phase, "the focus [will turn to] building back the economies in a speedy and sustainable manner."³¹

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- ¹ See The Role of Competition Policy in Promoting Economic Recovery, OECD, <https://www.oecd.org/daf/competition/role-of-competition-policy-in-promoting-economic-recovery.htm>.
- ² Note by the Secretariat, The Role of Competition Policy in Promoting Economic Recovery – Background Note, at 2, DAF/COMP(2020)6, [https://one.oecd.org/document/DAF/COMP\(2020\)6/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)6/en/pdf).
- ³ *Id.* ¶ 44.
- ⁴ See Note by Italy, The Role of Competition Policy in Promoting Economic Recovery, ¶¶ 29–31, DAF/COMP/WD(2020)78, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)78/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)78/en/pdf).
- ⁵ See Note by Egypt, The Role of Competition Policy in Promoting Economic Recovery, ¶¶ 20–23, DAF/COMP/WD(2020)85, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)85/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)85/en/pdf).
- ⁶ See Note by Canada, The Role of Competition Policy in Promoting Economic Recovery, ¶ 12, DAF/COMP/WD(2020)76, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)76/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)76/en/pdf).
- ⁷ Note by the Secretariat ¶ 134.
- ⁸ Note by the United States, The Role of Competition Policy in Promoting Economic Recovery, ¶ 27, DAF/COMP/WD(2020)82, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)82/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)82/en/pdf); see also U.S. Dep't of Justice & Fed. Trade Comm'n, *Joint Antitrust Statement Regarding COVID-19* (Mar. 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.
- ⁹ Note by the United States ¶ 28.
- ¹⁰ *Id.*
- ¹¹ See Communication from the Autorita Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency (Apr. 24, 2020), <https://en.agcm.it/dotcmsdoc/pressrelease/AGCM%20Communication%20on%20Cooperation%20in%20time%20of%20Covid-19.pdf> (non-official English version).
- ¹² Note by Italy ¶ 12.
- ¹³ *Id.* ¶ 13.
- ¹⁴ See 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, 2020/C 116 I/02, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408\(04\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=en).
- ¹⁵ Note by the European Union, The Role of Competition Policy in Promoting Economic Recovery, ¶ 12 n.9, DAF/COMP/WD(2020)83, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)83/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)83/en/pdf); see also Letter from European Commission, Director-General (Apr. 8, 2020), https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf.
- ¹⁶ Note by the Secretariat ¶ 126.
- ¹⁷ *Id.* ¶ 120.
- ¹⁸ Note by the United States ¶ 5, see also Office of the Att'y Gen., Memorandum for All Heads of Department Components and Law Enforcement Agencies (Mar. 24, 2020), <https://www.justice.gov/file/1262776/download>.
- ¹⁹ See Craig Carpenito & Nicholas Grippo, *An Inside Look at DOJ Fight Against COVID-19 Price-Gouging*, Law360 (June 24, 2020), <https://www.law360.com/articles/1285498/an-inside-look-at-doj-fight-against-covid-19-price-gouging>.
- ²⁰ Note by Italy ¶ 17.
- ²¹ *Id.*
- ²² *Id.* ¶ 18.
- ²³ Note by Canada ¶ 8 n.7.
- ²⁴ Note by the United States ¶ 13.
- ²⁵ Executive Summary by the Secretariat, The Failing Firm Defence ¶ 5, DAF/COMP(2009)38, <https://www.oecd.org/competition/mergers/45810821.pdf>.
- ²⁶ See Note by the Secretariat ¶¶ 18–38.

²⁷ Note by the United States ¶ 20.

²⁸ *Id.* ¶ 21.

²⁹ Note by the European Union ¶ 18.

³⁰ Note by the Business and Industry Advisory Committee to the OECD, The Role of Competition Policy in Promoting Economic Recovery, ¶¶ 15, 17, DAF/COMP/WD(2020)88, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)88/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)88/en/pdf).

³¹ Note by the Secretariat ¶ 8.