

Safeguarding healthy competition during COVID-19¹ *Competition policy options for emergency situations*

How is competition affected by COVID-19?

Government actions to contain the spreading of COVID-19 include containment, treatment and economic mitigation measures. These important and necessary measures have severe economic consequences, including at the microeconomic level.

The measures have at least three consequences for markets: (i) a negative supply shock as most production and service provision has come to a halt or faces production disruptions; (ii) a negative demand shock as final consumers stay at home and businesses reduce their demand for inputs; (iii) a reduction in substitutability as households, businesses and, in particular, governments are deciding on purchases under significant time pressure². There are some exceptions to these trends: In case of the markets for essential goods and services, there has been a large positive demand shock³. The specific implications on price movements will vary from market to market.

These three trends increase the risk of anti-competitive behavior. In particular, suppliers may coordinate to disproportionately pass through price increases to final consumers or to coordinate volumes of supply. Firms could also take advantage of expedited procurement processes to engage in bid rigging. Dominant positions of some electronic platforms and digital market players (particularly in e-commerce) may also be reinforced by the shift in consumption patterns.

At the same time, there are specific public interest objectives that require government action: Firstly, governments want to guarantee supply of essential goods and services at a time when supply chains are logistically disrupted. Secondly, governments seek to protect jobs. While usually, healthy firm churning can generate efficiency-enhancing reallocation of resources, this unusual shock would likely also destroy a large amount of otherwise productive jobs unless the governments supports firms and workers.

Emergency-situations like the one caused by COVID-19 require extraordinary measures. Single-source procurement, large amounts of state aid and antitrust exemptions may all be justified in times of unprecedented supply and demand shocks. Yet, this does not imply that response and recovery policies are at odds with competition principles.

As with other policies, the remedies to deal with this pandemic have alternative designs - with some safeguarding competition more than others. Governments can still consider competition among the criteria for choosing the right intervention. Right now, consumer welfare will be achieved by dealing with

¹ This note is a first draft of a living document to be updated as events unfold. It was prepared by Tanja Goodwin (Senior Economist) and Rodrigo Barajas (Consultant), under guidance by Georgiana Pop (Global Lead for Competition Policy). The team received valuable inputs from Ana Amador, Noelia Carreras Schabauer, Graciela Miralles and Sara Nyman.

² In some markets, where suppliers are resorting to online platforms, customer choice and comparability may decrease and substitutability may increase.

³ This is the result of panic buying and stockpiling in some essential goods, as well as government procurement of important volumes of goods and services to address the health emergency.

the pandemic while maintaining economic stability. However, in the mid- to long-term, consumer welfare requires preserving competitive and contestable markets.

Box 1. This time is different – also for competition

As noted in Reinhart (2020)¹, the features of the economic crisis caused by COVID-19 are different from those of the 2008 global financial crisis (GFC) and other economic or financial crises before. Naturally, the response from competition policy is also often unprecedented. Governments are not only granting significant state aid² and bailing out systemic market players³ as they did after the GFC. They are taking additional measures that reflect much more flexibility to adjust to the unusual circumstances of this crisis, including exemptions to antitrust law. While unusual measures are warranted, the emergency measures during the containment period should not permanently alter the market functioning in the medium-term.

¹ C. Reinhart (2020). *This Time is Truly Different*. Project Syndicate

² Between October 2008 and July 2009, the volume of EC-approved guarantees covered EUR 2.9 trillion in loans, and the funds of recapitalization measures added up to EUR 313 billion. In addition, states notified asset relief measures and direct lending under EU state aid rules. (Adler et al. 2010)

³ See, for example, the U.S. Emergency Economic Stabilization Act 2008 or the General Motors Chapter 11 reorganization. Bail outs in this crisis are so far mostly related to the transport and tourism industry.

In light of uncertainty about the full extent and duration of the pandemic's impact, governments should not lose sight of medium-term consequences created by the emergency interventions. Temporary measures should avoid locking in behaviors or market structures that would permanently lower competition. Allowing price fixing cartels or implementing price controls will facilitate collusion and lower consumer welfare even after the measures are lifted. Evidence in South Africa has shown that cartels tend to emerge in markets with a history of price controls. In Moldova, evidence indicates that price controls have been counterproductive and have led to higher - not lower - prices for certain food products.

This note lays out a series of policy measures that governments are adopting and provides guidance on pro-competitive solutions to address the intended policy objective.

Figure 1. Policy measures and pro-competitive alternatives

Policy measure		Implementation risks and pro-competitive solutions
Government measures that safeguard healthy competition	Anti-cartel enforcement	Enforcement activities may be on hold in practice. → Communicate plans to be vigilant to deter behavior.
	Merger control	Pressure to approve all mergers quickly. → Expedite M&As/JVs for medical solutions; review 'failing firm' defense case-by-case.
	Tackling regulatory barriers	Health and safety standards should not be compromised. → Coordinate with line ministries/authorities.
Other government measures that can be aligned to competition principles	Enforcement of laws against price gouging	Risk of reducing supply, discouraging pro-competitive effort to meet consumer needs → opt for monitoring and transparency measures instead
	Price controls	
	Expedited public procurement	Risk of foregoing benefits of competitive mechanisms → include measures that allow more players to compete
	Financial support to firms	Selective and ad hoc aid can distort the level playing field → opt for time-bound, limited and transparent aid schemes
	Bailouts and nationalizations	Unduly sustaining failing (private or public-owned) firms → Opt for temporary measures, particularly for failing firms
	Cooperation with tech platforms	Increase in competitive advantage of incumbent platforms → restrict commercial use of new data gathered (or open access)

What can governments do?

Anti-cartel enforcement remains critical during emergency situations. Authorities can reinforce their efforts to detect any evidence of coordinated price fixing, output restriction or bid rigging for goods and services that are either affected by supply chain disruption and/or face higher demand. Enforcement activities may in practice be affected by the restrictions in free movement of personnel. But authorities can clarify that this will not keep them from reviewing firm behavior during the emergency period once regular enforcement activities resume. Publicly announcing higher vigilance can in itself be a powerful deterrent to anti-competitive practices. *For example, the U.S. DoJ announced it would be particularly vigilant for antitrust violations in the manufacturing, distribution, or sale of public health products such as face masks, respirators, and diagnostics.*ⁱ

A case by case exemption from other competition law provisions, such as information sharing among competitors, may be warranted in very specific circumstances. Generally, public health emergencies should not exempt firms from competition laws. Provisions against refusal to supply or bundling of products by firms with market dominance may be important to ensure access to critical supplies. There might be some considerations on a case by case basis to improve the provision of goods and services that become essential when dealing with the emergency. *For example, the U.S. authorities have recognized the existence of legitimate, pro-competitive reasons for information sharing among competitors in response to a crisis.*ⁱⁱ *In the European Union information sharing between suppliers that could help better forecast oversupply/undersupply may be acceptable, as long as it is limited to only what is necessary to correct the market failure.*ⁱⁱⁱ *Chile*^{iv}, *Germany*^v and *Mexico*^{vi} have announced they will allow cooperation between competitors in response to the COVID-19 crisis. Other countries, like the UK,^{vii} have gone further by providing guidance on how collaboration between competitors could be conducted in the context of the crisis. In other jurisdictions, like Australia^{viii}, the competition authority established that it will provide authorization for such coordination between competitors that is ordinarily prohibited but which could be

necessary at this time. The ACCC has already provided interim authorization to collaboration in sectors such as medicines, medical equipment, supermarkets, banking, energy, telecom, among others.^{ix} In the UK, supermarkets have approached authorities to ask for the temporary suspension of certain antitrust provisions in case the COVID19 crisis deepens. This suspension would temporarily allow collaboration on deliveries between retailers in remote areas if shops are forced to close down due to the virus.^x

As platforms move to cooperate with other private or public sectors players in an attempt to address the pandemic, governments should stay vigilant of effects on their market power and risks to competition from information sharing. Various technological platforms are engaging in public efforts to tackle COVID - often in partnership with governments - both in terms of providing analytical capacity and in the delivery of key goods, services and information. Some of the data on behavior, demand, supply and logistics generated through these initiatives may be valuable to other competitors, too. Governments should ensure that data gathered in the context of these initiatives is subject to restrictions on commercial use that prevents those firms from gaining any undue competitive advantage. Governments could also consider ensuring that some of this data is shared through open access initiatives.

Competition authorities should determine if temporary modifications or reductions in their enforcement activities will be put in place, make plans and communicate with the public. Emergency conditions might involve reductions in personnel due to movement restrictions and limited capabilities for performing normal enforcement activities. *Several African Competition Authorities have switched to working remotely, encouraging electronic filings and virtual meetings (e.g. Kenya, Namibia). South Africa has adjusted its merger control timeframe. In the United Kingdom the Competition and Markets Authority is reviewing whether it may need to extend any merger cases due to coronavirus.^{xi} The Danish Authority suspended its time limits for merger control by 14 days.^{xii} The Philippine Competition Authority also suspended any merger control related procedure for the duration of the quarantine.^{xiii}*

Urgent joint ventures or other formal collaboration for research, development or production of critical medical equipment and services merit reduced levels of scrutiny. Firms may formally pool resources and expertise to deliver critical medical solutions. Such joint ventures should be expeditiously approved. *In the United States, the DOJ and the FTC plan to shorten reviews of cooperative efforts by companies aimed at speeding up the delivery of critical supplies like virus testing kits, ventilators and protective equipment like face masks to no more than a week.^{xiv} This has already been put into practice as the DOJ will not challenge the joint logistics activities of five large American medical supplies manufacturers to accelerate the distribution of protective gear during the U.S. coronavirus outbreak.^{xv}*

Merger review should carefully consider financial distress of target firms on a case-by-case basis. Just as in the aftermath of the 2008 financial crisis, upcoming industry consolidation may involve an increase in merger activity. While in some sectors, rapid consolidation may be essential to guarantee stability (e.g. banking sector) and sustainability (tourism operators), or to address supply chain vulnerability, other sectors are likely to return to pre-crisis demand levels quickly. Applicants may argue that in the absence of the proposed operation, the target company would become insolvent and exit. A defense meant for an individual firm's distress situation should not be blindly admitted without taking into account broader consequences. Thus, such transactions should be reviewed carefully to avoid concentration of market structures that unnecessarily and irreversibly reduce contestability. Authorities might also be asked to be less strict due to the economic difficulties that the COVID19 emergency might bring. *China announced they would improve efficiency in the review of mergers filed under the simplified procedure, suggesting that such mergers would be approved more quickly to help the economic recovery.^{xvi} The Italian Competition Authority, "(...)in view of the serious difficulties that the Italian production system is facing,*

as a result of the extraordinary COVID-19 epidemic emergency(...)", allowed an extension for the payment of a fine.^{xvii}

In general, temporary flexibility in antitrust enforcement should not be used as cover up or excuse for other anti-competitive behavior. Whether in merger transactions or cooperation among competitors, the reduced levels of scrutiny or potential exemptions should only be granted to the extent that it addresses the emergency situation. For example, coordination about future commercial strategies or market sharing for non-essential goods and services should be deterred and prosecuted, if needed.

Governments can tackle undue regulatory barriers to testing and deployment of medicines, vaccines and other healthcare material. Any regulatory reform actions in this matter must be coordinated with healthcare authorities to ensure the quality and safety standards are not compromised. These actions could also apply to other products that might be on high demand and that could become scarce. *The US is reducing barriers to testing for COVID-19.^{xviii} The Food and Drug Administration has changed several policies to speed it up. These changes allow certain companies and state health departments to use their own testing as they are being developed without waiting for federal regulatory approval from the FDA.^{xix} In the US, the UK and the Philippines, regulation on transportation of health related goods and food has been relaxed to ensure delivery of products.^{xx} In Indonesia, import restrictions on goods are being relaxed in up to 50% of imported goods. Some of these include soybeans, corn, textiles, vaccines, health equipment, telecommunication tools and equipment, footwear and food supplements.^{xxi}*

What else are governments doing and how should they keep competition in mind?

Any legal actions against price gouging should be taken with utmost care not to curb supply or discourage innovation and quality. Price gouging is usually not prohibited under competition law. Firms are generally free to price goods and services as they deem convenient, if those choices are made unilaterally. Limiting freedom to choose prices might reduce incentives to compete. Additionally, there are difficulties in establishing what would constitute an unlawful price and in crafting remedies.^{xxii} In practice, these actions may have a similar effect as price controls. Nevertheless, in some cases, as at a state level in the US^{xxiii}, when a state of emergency is declared the imposition of limits to price increases can be triggered. *In the wake of the COVID-19 outbreak, China, Poland and the UK have initiated actions against price gouging and other firm behavior through investigations and monitoring efforts.^{xxiv} In China and the US, e-commerce platforms have voluntarily been monitoring prices of goods like protective gear and hand sanitizer.^{xxv} Platforms have also started to remove listings and even ban sales of certain products like facemasks and sanitizer.^{xxvi} Price gouging in e-commerce has been given special attention by the Italian authorities.^{xxvii} The Italian Competition Authority has launched an investigation on Amazon and Ebay related to the unjustified and substantial increase in prices recorded for the sale of hand sanitizing products, respiratory protection masks and other sanitation products.^{xxviii}*

If governments impose price controls, these should not deter the supply of critical goods which would add to the shortages. When implementing price controls, governments typically face challenges to differentiate between markets that could be supplied under prevailing market conditions and those that may merit short-term circumstantial control. Price controls might deter the supply of goods at the exact time they are in exceptionally high demand. They can discourage exceptional efforts to bring goods into areas where they are needed the most. Finally, they can later constitute a reference price for collusion. (For further details, see Table 1.) The objective of mitigating exceptional price hikes in a situation such as that posed by COVID19 may also be partially addressed through additional price transparency. *If price controls are still deemed necessary, prices should be set independently from producers, be time bounded*

and reviewed periodically. Setting price ceilings also allows for more competition than fixed prices. Price controls on healthcare supplies such as masks and hand sanitizer, have been imposed in several countries such as Romania, Philippines, Argentina, El Salvador, Paraguay, and France.^{xxxix} Romania, Philippines, South Africa and Argentina have also imposed price caps on certain food products.^{xxx}

Expedited procurement for the acquisition of healthcare materials, medicines and other equipment should use competitive mechanisms as much as possible. According to the OECD, “accelerated procurement procedures establish alternative procedures to operate during times that demand enhanced flexibility, responsiveness and accountability by public organizations.”^{xxxi} According to guidelines by the OECD and the WBG, during emergencies, accelerated procurement procedures may involve shortened procurement timetables for competitive procedures and increased thresholds for non-competitive procedures. However, at the same time, such procedures may involve measures that increase participation by smaller competitors. These include: higher levels of advance payments, easing the administrative burdens of participation as regards with proofs of eligibility, simplification of qualification criteria, adjustments to internal procedures to expedite contract review and reporting, among others. *Chile is aiming to pay its providers in less than the 30 days established by law^{xxxii} and New Zealand announced a 10-day payment target^{xxxiii}.* Governments should establish time limits on the use of accelerated procurement processes. They should further continuously review the need of extending this timeframe or coming back to normal procedures. Accountability and transparency in accelerated procurement process is important.^{xxxiv} Moreover, as mentioned above, the additional risk of bid rigging that emergency situations generate should always be considered.

Financial support to firms should be made widely available and granted in a transparent way. Governments will issue state aid to compensate specific firms and sectors for damages directly caused by exceptional occurrences and the restrictions imposed. Such financial support should be subject to clear rules that make it transparent. It should be designed in a way that avoids distorting the level playing field by granting some market players an undue competitive advantage in the medium and long-term. Governments should carefully consider state guarantees that cover the entire loan amount. Capping risks covered by the government to less than 100% can safeguard incentives for banks to channel funds to firms that are viable. *The European Commission has pledged to ensure that state aid can flow, in the form of direct grants, tax advantages, guarantee loans, and subsidized interest rates on loans to companies that need it with clear rules during the COVID19 outbreak.^{xxxv} Under its updated temporary state aid framework, for example, state guarantees should be limited in maturity (6 years), with an amount limited to the liquidity needed in the foreseeable future and granted only until the end of 2020. In specific cases, state guarantees can only be called upon after financial intermediaries make recovery efforts themselves (Italy). The government of Kazakhstan is offering local businesses USD920 million in soft loans to protect jobs, prioritizing local producers with the objective of reducing dependence on imports and ensure food security.^{xxxvi} In Malaysia, the Central Bank created a Special Relief Facility worth RM3 billion (USD692 million), that will be available until the end of 2020, providing working capital for small and medium enterprises at an interest rate of 3.75%.^{xxxvii}*

In some cases, governments will need to bailout or nationalize individual firms entirely. In sectors that are hard hit by the travel bans (such as transport), insolvencies would involve great social costs. Public interest criteria – including continuity of service - may merit bailouts by the government or transfer of ownership from private shareholders to the public. These should avoid permanently rescuing firms that were already failing. The role of the SOEs should be assessed in order to ensure that bailout packages are not exclusively and unnecessarily favoring dominant SOE, especially in countries with a large SOE footprint. *Denmark and Sweden have offered USD146 million to state-owned and Swedish-headquartered*

SAS Scandinavian Airlines in credit guarantees.^{xxxviii} New Zealand's government is providing a USD528 million loan to the 52% state-owned flag carrier, Air New Zealand. In Malaysia^{xxxix} and Thailand^{xl}, bailouts for local airlines are also being considered.

To ensure delivery of critical goods and services, government can involve the private sector in flexible ways to leverage their capacities rather than crowding them out. State-Owned Enterprises (SOEs) and other government units can play a key role in delivering emergency goods and services. But Governments should also refrain from engaging in production or service delivery in industries – if and as long as they can be served by the private sector. This may no longer be the case if supply chains are interrupted or export bans for key goods are in place. *In Italy^{xli} and the United States^{xlii}, the military forces have been called upon to help produce and provide medical equipment such as ventilators. In Argentina, the military have been involved in the production of disinfectant gel and facemasks.^{xliii} Indonesia's state-owned aircraft manufacturer has been called upon to produce ventilator prototypes^{xliv}.* The government can engage the private sector to provide health services, produce much-needed medical equipment, and execute welfare payments. Given that time is of essence, these arrangements may not go through competitive procurement and involve the largest market players. As the government plans how to maintain, adjust or exit the temporary arrangements, consideration should be made with respect to smaller market players.

Table 1. Summary of policy considerations around price controls

Purported policy objective of price controls	Main risks associated with price controls and policy alternatives
<ul style="list-style-type: none"> Mitigate exceptional price hikes 	<ul style="list-style-type: none"> Could deter the supply of critical goods which would add to the shortages. Discourage exceptional efforts to bring goods into areas where they are needed the most. Can constitute a reference price for collusion even after lifting price controls. Increases risks for investors Implementation challenges: setting the 'right' price level? Relevant authorities for price control design and enforcement? <p>Alternatively, governments can opt to increase price transparency, deter anti-competitive firm behavior, lift other restrictive policies that reinforce shortages or the ability to increase prices (e.g. import restrictions)</p>

Examples of price controls imposed in reaction to the COVID19 crisis			
Country	Product	Type	Time frame
Argentina ^{xlv}	Food products, personal hygiene products, medicines and medical supplies.	Maximum prices	30 days (extendable)
Brazil ^{xlvi}	Medicines	Suspension of the price readjustment of all medicines	60 days
Cyprus ^{xlvii}	Personal hygiene items as well as masks and thermometers	Maximum prices	No information available
El Salvador ^{xlviii}	Masks and antibacterial gel.	Maximum prices	No information available
	Beans, rice, corn, eggs, and whole milk powder.	Maximum prices	
France ^{xlix}	Hand sanitizer	Maximum prices	Until 31 May 2020

Laos ⁱ	Face masks.	Maximum prices	No information available
Malaysia ⁱⁱ	Face masks	Maximum prices	No information available
Paraguay ⁱⁱⁱ	Gloves, face masks, hand sanitizer	Maximum prices	No information available
Philippines ^{liii liv}	Emergency medicines and medical supplies	Fixed prices (“freeze prices”)	6 months
	Food products.	“Suggested retail prices”	6 months
Poland ^{lv}	<p>New Polish Anti-Crisis Shield legislation:</p> <ul style="list-style-type: none"> •The Minister of Development can introduce the maximum prices and margins on retail and wholesale levels in relation to goods and services which are significant for the protection of human health or safety or for household maintenance costs; •Minister of Health can introduce the maximum prices and margins on retail and wholesale levels in relation to certain medical products, medical devices, food products for particular nutritional needs, medical raw materials and biocidal products, which may be used to counteract Covid-19 coronavirus or in the event of problems with their availability due to Covid-19. <p>In case of a violation of the maximum prices or margins, the relevant inspectorate authorities can impose a fine from PLN 5 thousand to PLN 5 million.</p>	No information available	No information available
Romania ^{lvi}	Medicines and medical equipment, on strictly necessary foods and on public utility services.	“Prices may be capped”	“During the emergency period”
Sint Maarten ^{lvii}	Latex and silicone gloves, hand sanitizer, masks, disinfecting wipes and sprays, rubbing alcohol	Maximum prices	Until further notice
South Africa ^{lviii}	Food products, personal hygiene products, medical supplies	Prices may be increased only if input costs rise, and profit margins must be maintained at the levels they were at before March.	No information available
Spain ^{lix}	Liquid petroleum gas	Fixed price (by suspending the update of regulated prices which are regulated).	6 months
Sri Lanka ^{lx}	Dhal and a tin of canned fish	Maximum prices	No information available
Thailand ^{lxi}	Face masks and hand-sanitizing gel	Inform authorities of production costs and seek approval before making price changes.	No information available

Note: The information is partial and preliminary based on sources available as of the date of this note.

- ⁱ <https://www.natlawreview.com/article/doj-and-ftc-to-focus-antitrust-and-consumer-protection-violations-relating-to>
- ⁱⁱ DOJ. *Antitrust policy statement on sharing of cybersecurity information* <https://www.justice.gov/sites/default/files/atr/legacy/2014/04/10/305027.pdf>
- ⁱⁱⁱ European Commission. *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>
- ^{iv} <https://www.fne.gob.cl/declaracion-publica/>
- ^v <https://lebensmittelpraxis.de/handel-aktuell/26802-kartellamt-ausnahmeregel-moeglich-2020-03-20-12-58-31.html>
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- ^{vii} <https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation>
- ^{viii} <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic>
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- ^{xvii} <https://en.agcm.it/en/media/press-releases/2020/3/ICA-TIM-fined-116-million-for-hindering-fiber-development>
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- ^{xxi} <https://www.thejakartapost.com/news/2020/03/12/indonesia-relaxes-trade-rules-to-cushion-covid-19-effects.html>
- ^{xxii} OECD Working Party No. 2 on Competition and Regulation EXCESSIVE PRICES -- United States
<https://www.justice.gov/sites/default/files/atr/legacy/2014/05/30/278823.pdf>
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