Resilience and competition law, in times of emergencies and crises: two research agendas

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The term resilience is encountered frequently in times of crisis and emergencies; times as the current COVID-19 situation, times when the ‘normal’ functioning of markets seems absent and competition agencies and governments adopt ad-hoc frameworks for competition law and markets.

Resilience can be defined as a system’s capacity to deal with disturbances and its ability to get reorganized during change without losing its inherent identity, structure, function, and feedback loops.1 Resilience so defined seems to be relevant in at least two ways for competition law and policy and deserves further attention by competition academia and practice. First, resilience is relevant to competition law systems as such. Secondly, resilience is relevant to policy once the immediate situation is over and resilience to future shocks is postulated as an objective by governments.

I. RESILIENCE OF COMPETITION LAW SYSTEMS

Crisis is inevitable. Crises will occur more or less frequently in different areas and markets. The frequency, severity, and breadth are what distinguish a crisis from an emergency. While there seems no bright line to distinguish the two, the establishment of emergencies typically involves some form of declaration. For example, the COVID-19’s situation might be considered a global crisis yet in some countries the effects were so severe that the governments declared an emergency.

Competition law and policy have interacted with different crises throughout time. Yet, the interaction between competition law and emergencies happens less frequently. And emergencies are often said to require extraordinary responses. Discussions have been enduring about how law in general should deal with emergencies and whether emergencies require a different set of legal norms. Two

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1 B Walker and others, ‘Resilience, Adaptability, and Transformability in Social-ecological Systems’ (2004) 9(2) Ecology and Society 4.
fundamentally different approaches can be identified. On the one hand, those which assume that the existing norms are flexible enough to deal not only with a crisis but also with an emergency. This group is concerned about the impact that emergency laws and powers have on the functioning of society and individual freedoms. On the other hand, there are those which argue for a different set of legal rules for emergencies (often referred to as emergency laws and rules). On this side of the debate, the concern is that the powers that exist under the traditional system are not enough to effectively deal with the emergency situation. Moreover, the (extreme) stretching of the existing legal frameworks will create lasting damage that will affect the operation of the system substantially even once the emergency is over. As a research agenda for competition lawyers, this would mean examining in detail the pros and cons of such arguments in our area of law. It might even be desirable to work on designing a template and system that can be enacted and used once an emergency has been identified and declared.

II. PROTECTIONISM VERSUS RESILIENCE
The second research agenda is more closely related to the concept of resilience as such. As also witnessed in the contributions to this special JAE section on COVID-19 and competition law, there are a number of authors and institutions that expect a fall-out from this situation, in particular, with regard to global supply chains, industrial policy, and globalization and specialization as such. Such fears are certainly not unfounded. For example, the French President called for making France ‘fully and completely self-sufficient’ focusing on certain products and materials that have ‘strategic importance’. Beyond this focus on self-sufficiency, there are legitimate concerns regarding resilience. How resilient are the markets and the global supply chains in situations like the one created by COVID-19? In this regard, a closer engagement with the concept of resilience as studied in social and environmental sciences can be insightful. The theoretical frameworks used in the study of social–ecological systems explore a system’s resilience in three different dimensions. First, resilience *stricto sensu* (as mentioned above) is the capacity to deal with disturbances and the system’s ability to reorganize during change without losing its inherent identity, structure, function, and feedback loops. Secondly, adaptability defined as the capacity of actors active in a system to influence resilience *stricto sensu*. Thirdly, transformability comes into play when the system does not manage to stay within a critical threshold. It refers to the capacity to achieve a new stability as an entirely different system. An in-depth engagement with the concept of resilience allows to better distinguish measures genuinely aimed at improving resilience from those industrial policy agendas that are purely protectionist.

III. CONCLUSION
Resilience promises to be an important concept for competition law and policy in the years to come. The question of resilience relates to the capability of the

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2 See <https://www.msn.com/en-za/news/world/italy-records-lowest-coronavirus-death-toll-for-a-week/ar-BB123i3?pI=BBqgP3n> accessed 19 April 2020.
3 Walker and others (n 2).
competition law and policy system to maintain and adjust its current equilibrium state. But similarly, resilience as an objective might be prioritized by governments. A deeper engagement with the theory and literature on resilience by competition law and policy experts might help in distinguishing blunt industrial policy and protectionism from genuine efforts that improve resilience. For example, where state measures support national champions, but these measures provide little to no increase in resilience as compared to other policy options (eg stockpiling of goods). The interaction between these two different resilience-related research agendas seems also useful. For example, the distinction between purely protectionist measures and resilience-improving measures helps with maintaining the resilience of the current competition law and policy system.