EDITORIAL

Competition policy’s role in the economic recovery process from the Covid-19 pandemic crisis—insight from UNCTAD

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ABSTRACT

The COVID-19 pandemic outbreak disrupted markets and had a serious negative impact in economies across the world. Competition Authorities were at the forefront of initial public response measures through strong law enforcement and active market monitoring actions, temporary exemptions from competition provisions, merger control procedural adjustments and advocacy, an increasingly important function vis-à-vis Governments and all relevant stakeholders. Competition law and policy have therefore remained highly relevant during this period in both developed and developing countries. Current common challenges faced are raised by the increased digitalization of the economy and the dominance of digital platforms, especially considering the number and market share of micro and Small and Medium Sized enterprises (SMEs), the most seriously affected by the pandemic lockdown measures. Several jurisdictions and international organizations are equipping themselves with new legislation and instruments to address these challenges, namely supporting SMEs fair access to digital markets and promoting competitive public procurement, but less experienced and resource-constrained authorities of developing countries must prioritize otherwise. Competition advocacy is now more than ever a priority for them so that the economic recovery packages preserver open, fair, and equitable markets. International cooperation, bringing together developed and developing countries authorities, provides a crucial framework of support especially at this time. UNCTAD is particularly well placed to support developing countries’ Competition Authorities contributions to “building back better” in times of crisis.

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I. IMPACT OF THE PANDEMIC ON ECONOMIES AND MARKETS

In 2020, the COVID-19 pandemic outbreak disrupted markets across the world, pushing the global economy into a recession not witnessed since the 1930s according to UNCTAD.\(^1\) The unilateral emergency trade measures adopted by 141 countries by mid-September 2020 that followed, seriously affected open and competitive markets. Small and medium sized enterprises (SMEs) were severely hit by the lockdown measures imposed in most countries and by the disruption of supply chains, being furthermore extremely vulnerable to strong and unexpected economic shocks. The expansion of electronic commerce since March 2020 in developed and developing countries (with huge increases registered in Brazil and China) led to rising stock prices of leading technology companies but did not necessarily benefit micro and SMEs as their access to digital platforms on fair terms and conditions was not guaranteed.

Governments responded to the crisis with recovery packages using large amounts of public funds at least in developed countries, aiming to support strategic economic sectors, to maintain employment and to relaunch the economy through new investment. Prospects for 2021 for developed countries are quite positive, a GDP increase of almost 5 per cent being predicted, but it is likely that developing countries will not be so fortunate, further lagging behind. However, UNCTAD’s latest global trade outlook\(^2\) forecast a world trade recovery during 2021, with a projection of +16 per cent, focusing on goods. In developing countries, vaccination is critical to reduce the spread of the coronavirus and the high number of deaths and to allow important economic activities such as tourism to resume.

II. THE RESPONSE OF COMPETITION AUTHORITIES TO THE PANDEMIC-TRIGGERED MARKET DISRUPTION

Around the world, Competition Authorities (along with Consumer Protection Agencies) were at the forefront of public authorities’ initial responses to restrictive business practices generated by the lockdowns and related health and safety measures: the authorities quickly reacted against price gouging practices, price fixing and tying arrangements in essential hygiene consumer products, such as face masks, hand sanitizers and basic household products, through law enforcement (for instance, in Bolivia, Brazil, China, Colombia, France, Greece, India, Italy, Japan, Kenya, Nigeria, Paraguay, Russian Federation, South Africa, Spain, Seychelles, Thailand, Turkey, United Kingdom-UK, United States of America-USA and Uruguay), undertaking active market monitoring actions and warning businesses to encourage compliance. They also exceptionally used exemptions from competition laws to authorize horizontal cooperation agreements to ensure the supply of essential goods and services during the lockdown periods, to encourage research and development projects directly related to the pandemic (pharmaceuticals and medical equipment), and to

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1 Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal, November 2020 - UNCTAD/OSG/2020/1, updated as of 31 March 2021 <https://unctad.org/programme/covid-19-response/impact-on-trade-and-development-2021> accessed on 1 August 2021.

2 Global Trade Update, May 2021 <https://unctad.org/system/files/official-document/ditcinf2021d2_en.pdf> accessed on 1 August 2021.
support key sectors, such as hospitality and SMEs (as in Australia, Brazil, Canada, China, European Union, Germany, Iceland, New Zealand, Norway, South Africa, Russian Federation, UK and USA).

The two other important areas of work for Competition Authorities involved, on the one side, merger control, which only faced procedural adjustments (namely in Australia, Austria, Brazil, Canada, China, Common Market for Eastern and Southern Africa, Denmark, France, European Commission, Germany, India, Italy, Norway, Republic of Korea, Portugal, Spain, South Africa, UK and USA), but remains a powerful instrument in times of market restructuring since mergers and acquisitions were expected to increase due to the shutdown and the bankruptcy of businesses, although some have probably been postponed due to the prolonged Government support measures in many countries. Digital economy-related operations have drawn special attention demanding careful and exhaustive market analysis. Merger control in times of COVID-19 also would allow Authorities to ensure a level playing field and further fair competition for SMEs to leverage their contribution to the economic recovery.

On the other side, competition advocacy is on the rise: a key function of Authorities’ advisory role vis-à-vis Governments’ legislation and regulatory frameworks, especially in times of crisis, and for disseminating a competition culture to the private sector and other relevant stakeholders. Considering the huge amounts of public funds made available to relaunch the economies (for instance, in the European Union, over 750 billion euros, completed by national funds in some cases), and the large number of State-aid measures (subsidies, grants, State guarantees, tax exemptions) adopted by developed and developing countries, this period offered a unique opportunity for Competition Authorities to advocate for a pro-competitive approach within the financial stimulus packages translated into clear, transparent and non-discriminatory eligibility criteria and specific conditions imposed on selected companies and economic sectors subject to close monitoring in order to promote open and dynamic markets in the aftermath of the pandemic as in Brazil, Canada, China, Dominican Republic, European Commission, India, Japan, Kenya, Mexico, Republic of Korea. Therefore, competition advocacy has flourished and thanks to its positive, non-controversial nature and its continuing action, it may have paved the way for Competition Authorities to better convey their expertise and assert their mandates to all stakeholders, so that competition policy is duly considered within economic growth and development strategies at national and regional levels.

Despite the havoc caused by the pandemic, competition law and policy have remained highly relevant since the pandemic’s outbreak in both developed and developing countries, playing an important role within the first public response measures as well as an active part in the “building back better” stage.

3 According to the World Bank Tracker of Subsidies and State Aid to mitigate COVID-19 effects, June 2021 <https://www.worldbank.org/en/topic/competition-policy - Subsidy and State Aid Map> accessed on 1 August 2021.
3. CHALLENGES FACED BY DEVELOPING AND DEVELOPED COUNTRIES

Nevertheless, even if around 140 countries, including a large number of developing countries and least developed countries, have adopted competition legal and institutional frameworks, as well as several regional economic organizations whose members are developing countries (such as the Andean Community, the Central African Economic and Monetary Community, the Common Market for Eastern and Southern Africa, the Eurasian Economic Union, the West African Economic and Monetary Union, and the Central American Economic Integration System, amongst others), challenges remain for developing and developed countries in this context.

Common challenges are raised by the increased digitalization of the economy and the dependence on a few dominant digital platforms to sell and export, on the one side; and by the number and share of micro and SMEs in each country, on the other side.

Several countries and international organizations (as in the case of Brazil, China, Germany, Japan, Kazakhstan, Paraguay, Republic of Korea, Russian Federation, and the European Union’s Digital Markets Act) are equipping themselves with new legislation and instruments to effectively tackle competition concerns raised in these markets; but not all jurisdictions nor Competition Authorities are able to do the same. Indeed, several developing countries’ Competition Authorities face serious resource constraints regarding expert staff, investigative and market analysis tools and budget funding, and often lack access to relevant data and information, relying instead on international and regional cooperation. In most cases, the COVID-19 outbreak increased constraints, requiring additional prioritization and resort to more experienced partners’ collaboration. International and regional cooperation can indeed provide extremely valuable support to Competition Authorities of developing countries, facilitating information and knowledge sharing, providing the pooling of innovative tools, and encouraging joint and coordinated actions, especially regarding digital global companies.

Many SMEs and micro companies have suffered heavy losses of revenues since March 2020, several closing down, even though Governments’ support measures targeted SMEs through debt finance, employment support and tax relief to reduce the negative impact. Competition Authorities also took into consideration the specific situation of SMEs, having exempted from competition laws their cooperation agreements on a temporary basis and issuing concrete guidance to provide legal certainty and predictability, as in the case of El Salvador, Malaysia and Singapore. Access to online trading remains critical, depending on suitable infrastructures for communications combined with other essential network services such as energy, postal and financial services, which are still limited in many developing countries according to UNCTAD (“COVID-19 and e-commerce: a global review, March 2021, UNCTAD/DTL/STICT/2020/13”). Digital skills are also extremely important and UNCTAD has identified training and capacity building activities and fair terms and conditions to join global digital platforms as key levers for SMEs’ improved access to digital markets. Again, Competition Authorities can raise awareness among SMEs of existing and new competition rules and regulations and provide them with the necessary
guidance to comply with them or more importantly to identify and lodge complaints about anticompetitive conduct by other firms in the markets in which they operate. Competition Authorities should push for regulations to ensure that digital markets remain fair and open (as in Japan and Republic of Korea), and they should use advocacy to negotiate fair terms and conditions for SMEs with platforms to prevent them from abusing their bargaining power or market dominance against small firms, to work towards an inclusive economic recovery.

In order to support SMEs’ access to digital markets in developing countries, UNCTAD is working on a flexible soft law framework for voluntary compliance by digital platforms, which aims to be a reference for jurisdictions less equipped to deal with global digital companies.

Public procurement is an area deserving special attention considering the new investment planned for the economic recovery and the increase of Governments’ share in the economy in most countries. Furthermore, public procurement represents, on average 12 per cent of GDP in the Organisation for Economic Co-operation and Development (OECD) countries\(^4\) and between 15 percent and 22 per cent of GDP in developing countries\(^5\) contributing to improving companies’ performance and promoting innovation.\(^6\)

Competitive public procurement plays an important role in economic growth and development of developing countries. Competition Authorities should closely cooperate with procurement bodies to ensure transparent, objective, non-discriminatory criteria in tenders, sensitize them to the benefits of competitive tendering, and exchange information to prevent bid rigging practices (as in the Dominican Republic, Japan, India, Republic of Korea, Portugal and Spain), and promote the participation of SMEs (as in El Salvador).

The response of Competition Authorities from developed and developing countries during the pandemic period in the different areas of their work and their use of a wide range of tools clearly confirms that competition law and policy is a key instrument to address disrupted markets and ensure an inclusive and balanced economic recovery process. Competition advocacy either through raising awareness of businesses and the public to the benefits of competition for consumer welfare and economic growth and clarifying the practices that can infringe competition rules, or through promoting more pro-competitive regulations and interventions by advising Government and other public bodies, is now more important than ever for all Competition Authorities, but especially for young and small Authorities of developing countries. Indeed, competition advocacy should be a priority for Competition Authorities as it is much needed in countries which usually lack a competition culture: it has a positive, pedagogical and non-conflicting nature, it requires less resources than law enforcement and yet it paves the way for effective competition enforcement, generating support from relevant stakeholders. The current context also demands Competition Authorities play a strong advisory role to Governments.

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\(^{4}\) <https://www.oecd.org/gov/public-procurement/> accessed on 1 August 2021.

\(^{5}\) <https://www.worldbank.org/en/topic/procurement-for-development> accessed on 1 August 2021.

\(^{6}\) Bernard Hoekman and Marco Sanfilippo, ‘Public procurement as an industrial policy tool’, April 2021 <https://iap.unido.org/articles/public-procurement-industrial-policy-tool> accessed on 1 August 2021.
International cooperation in competition law enforcement at a bilateral, regional or global level and through formal and informal arrangements, brings together developed and developing countries’ Authorities in networks across the world in a vibrant manner. It provides an important framework to support less experienced Authorities and to give leverage to young and small Authorities of developing and least developed countries facing the challenges mentioned in this article.

At this time, all Governments can launch more effective industrial, fiscal and social policies, remove unnecessary administrative costs and promote investment in higher value-added and sustainable sectors, for which the advice of Competition Authorities is crucial to maintain effective and fair competition in the markets. Governments need to involve Competition Authorities in the design, implementation, and monitoring of their economic recovery packages to preserve open, fair and equitable markets in the aftermath of the COVID-19 pandemic.

UNCTAD, as the largest intergovernmental forum for dialogue and international cooperation in competition law and policy, is particularly well placed to support Competition Authorities’ essential contribution to ‘building back better’ in times of crisis in developing countries and remains strongly committed to assisting its members in successfully implementing inclusive, resilient and sustainable economic recovery strategies.

CONFLICT OF INTEREST

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