



# OECD competition policy responses to COVID-19

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This policy brief discusses how competition policy can help address the immediate challenges raised by the COVID-19 crisis whilst looking to the post-pandemic future and the contribution of markets to medium and long-term economic recovery. It describes competition principles that governments can follow when designing support measures for the economy, including exit strategies. The note also outlines actions competition authorities can take to address the practical, theoretical and evidentiary challenges of the current crisis.

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The coronavirus pandemic has generated a major health and economic crisis, with a very significant temporary demand and supply shock. The extent of the impact of COVID-19 will depend on the duration and seriousness of the outbreak, as well as on when the economic activity restarts and by how much it rebounds, both of which will largely depend on government interventions.

Indeed, the economic consequences of the COVID-19 pandemic require swift and strong government actions to keep markets and the economy functioning. These interventions are necessary and legitimate to overcome the crisis with measures needed in the short term to prop up the economy and then to stimulate the recovery in a way that guarantees a more resilient, inclusive and climate friendly economy. This may require reviewing some of the traditional analytical frameworks of competition policy, including increased consideration of dynamic efficiencies. Policy makers may have to consider the trade-off between efficiency and resilience so that economies are better prepared to face different types of crises, address supply chain challenges and promote social cohesion and environmental outcomes. To achieve these legitimate policy goals, policy makers should assess the different available alternatives, undertake cost-benefit analyses, and select policy options that minimise competition restrictions and distortions.

A broad reflection on an intelligent industrial policy that can help reallocate resources to certain key sectors (e.g. health) in a way that does not distort competition between firms can also help to lay the ground for a resilient and sustainable economy in the long term. Restoring effective competition in the medium to long term is also key to ensuring that the recovery is rapid and consistent.

For markets to function well in the long term, competition authorities can play a role now in advising governments on the design and implementation of these policies to ensure that, wherever possible and appropriate, responses follow competition principles. This will limit distortions that may not be necessary to achieve the legitimate goals of addressing the market failures that arise from this crisis, and preventing the implementation of policies that will slow the economic recovery.

This note is prepared based on the work of OECD Competition Committee which formulates and promotes best practices in the area of competition law and policy. Section A focuses on state interventions and the role for competition policy, Section B focuses on competition enforcement actions in the short and medium term.

## **A. State interventions and the role for competition policy**

The extent of the impact of COVID-19 will depend on the duration and seriousness of the outbreak, as well as on when the economic activity restarts and by how much it rebounds, both of which will largely depend on government interventions. Indeed, in times of extraordinary and temporary demand and supply shocks, governments can support consumers, workers and firms to weather the storm, and ensure readiness to resume economic activity once the crisis passes. As during previous crises, this may mean significant and immediate interventions in several markets, from the most directly affected by the crisis (e.g. airlines, tourism or health) to other markets that may be affected later.

### ***Role for clear and transparent competitive neutrality rules***

Countries may need to ensure that sufficient liquidity remains available to businesses and to prevent the twin shocks to demand and supply from resulting in the exit of efficient firms, thus preserving the continuity of economic activity during and after the COVID-19 outbreak. This may take the form of grants, subsidies, bank guarantees, and other state support. Nonetheless, there is a danger that, if not carefully designed, state support may create competition distortions and un-level the playing field between companies that receive aid and competitors that do not.

Where certain companies are put at an undue disadvantage, goods and services are no longer produced by those who can do it most efficiently. This leads to higher prices as a result of suboptimal use of sometimes scarce resources, using inefficient production methods or the non-adoption of new and better technologies. Competitive neutrality principles thus enhance efficiency throughout the economy.

General aid based on objective criteria, clear rules and applicable to all businesses in an industry (e.g. deferring taxes, or subsidising short-time work across all sectors), should not raise any issues from the competitive neutrality perspective. Support for specific companies may prove more problematic from the competition viewpoint and may require clearer rules to ensure that it does not affect the level playing field between those who receive public support and those who do not.

Competition policy can inform the development of exit strategies that will make it possible for the market mechanism to be restored after the crisis, while avoiding the damage to the market that might follow an unplanned exit. Support measures should be limited in time in a manner that is reasonable, transparent and foreseeable and Governments should stop providing support as soon as conditions allow. The timing of exit is critical. On the one hand, withdrawing too early may provoke failure of the aided firms and leave competition even weaker. On the other hand, protracted withdrawals could result in some firms becoming reliant on public support and thus reducing its incentives to compete and innovate.

Exit strategies may include introducing incentives for exit from state support as soon as market circumstances permit (e.g. high remuneration for the government recapitalisation or requiring a strict dividend remuneration policy) and to ease markets back toward normality in a manner that promotes competition. Governments should rely on the advice of competition authorities when designing exit



strategies. This can be complex and requires careful consideration, particularly to balance flexibility with legal certainty.

## Example for guidance to ensure competitive neutrality in state interventions

A very recent example of guidance on criteria to ensure competitive neutrality adapted to the current emergency is the [Temporary Framework to support the economy in the context of the coronavirus outbreak](#) put in place by the European Commission 19 March 2020. This framework enables Member states to use the state aid rules to support the economy in the context of the COVID-19 outbreak, to ensure that sufficient liquidity remains available to businesses of all types, and to preserve the continuity of economic activity during and after the crisis. It provides for five types of aid, including schemes to grant up to €800,000 to a company to address its urgent liquidity needs, state guarantees for loans taken from banks and subsidised public loans to companies. It links the subsidised loans or guarantees to businesses to the scale of their economic activity, by reference to their wage bill or turnover, for example.

### ***Industrial policy should not lead to protectionist measures***

As governments switch focus from urgent short-term measures to longer-term efforts to encourage an economic recovery, they will need to ensure competition in markets. More broadly, in the last few years as regards industrial policy, there has been an emphasis on selective policy tools focused on policies such as clustering, place-based and mission-oriented innovation policies. These policies, which focus on addressing specific market failures, should continue to be favoured over more traditional selective policies, such as more lenient merger control, for instance. Shielding companies from competition can reduce their efficiency and their contribution to the economic recovery. Markets should be kept open and respect competitive neutrality principles.

### ***Recommendations***

**Governments** should:

- Request and be receptive to competition agency advice when planning market interventions to ascertain that support is necessary and proportionate to address a market failure identified in a particular market as a result of the crisis. They should ensure that any support measures adopted is transparent and temporary and that positive effects from state measures are not outweighed by the negative ones deriving from the distortion of competition.
- Carefully design any measures targeted at specific companies during this critical period, narrowly tailor support measures to solve the issue identified and on a temporary basis with monitoring. Avoid selective aid to firms that were failing or had significant structural issues before the crisis.
- Exit investments as soon as conditions permit and in a manner that promotes competition and rely on the advice of competition authorities when designing such exit strategies already in planning phase of the measures to be taken.
- Appropriately and transparently reimburse firms in cases where the crisis reveals the need to impose on firms new public service obligations.

**Competition Authorities** should:

- Help governments implement the state support measures by providing inputs and advice, or where have powers to approve such measures to prioritise such cases.
- Issue opinions/guidance to governments on how to ensure a level playing field and avoid market distortions by providing clear, general and objective rules applicable to all firms in the economy, sector or region.



- Step up advocacy with government explaining the competition principles that should be respected to ensure markets remain competitive following the crisis, which will be crucial for an economic recovery. They should advocate for industrial policies that focus on pro-competitive alternatives to any planned government interventions that may risk long-term harm to markets.
- Co-operate with other jurisdictions to ensure a degree of international agreement in the approach that is taken to ensure a level playing field also amongst countries and continue to advocate against protectionist measures.

## **B. Enforcement - Short term impacts of the pandemic on firms behaviour**

Competition enforcement actions during and after the crisis will be crucial to ensure that markets are functioning well in the short-term, even if the current circumstances raise a number of significant practical, theoretical and evidentiary challenges, including ways to tackle price abuses, cooperation agreements and crisis cartels, review rescue mergers and prioritise investigations and other procedural ways to ensure effective enforcement.

The supply and demand shocks provoked by the COVID-19 crisis may significantly affect how firms behave in markets for the supply of essential goods and services. In particular, COVID-19 has led to a sharp increase of the demand for certain products resulting in difficulties in the production or distribution of essential products as a direct consequence of the confinement measures applied to many workers, leading to shortages. While some changes in the commercial behaviour of firms can be explained by firms adjusting their commercial strategies to the new market circumstances, others might require close scrutiny by competition authorities. Two such behaviours that may eventually be problematic are exploitative pricing and cooperation arrangements with competitors.

### ***Suspicious pricing behaviour***

During a crisis, there may be a sharp price increase of certain goods. While price spikes may be the legitimate consequence of a change in market circumstances due to the crisis, such as shortages of products in high demand or disruptions in international supply chains, there is a risk that firms might strategically exploit consumers in a distressed economy. Consumer exploitation through pricing policies (e.g. excessive pricing) is often referred to as price gouging when it involves significant and rapid price increase after some type of shock in the demand or supply (e.g. as a result of an earthquake or a pandemic).

In these situations, firms may increase prices relative to costs, or reduce output to maximise gains related to prior stocks acquired at lower prices. In some jurisdictions, excessive pricing may be considered an exploitative abuse of dominance. These are complex cases, which require the existence of a dominant position in the first place. Authorities with a consumer protection mandate may equally address such price increases as infringements. In either case, the challenge for enforcers is to distinguish a behaviour that is abusive or unfair, respectively, from one that reflects a lawful response to a temporary shortage resulting from the emergency at issue. Another way to address the problem are price controls implemented by the government. While such policies may protect consumers from price gouging in the short-run, they risk distorting price signals that would otherwise encourage greater production and swift market entry to address shortages.



## Examples of investigations related to consumer exploitation through pricing policies

### **UK CMA**

“The Competition and Markets Authority (CMA) wants to ensure that traders do not exploit the current situation to take advantage of people. It will consider any evidence that companies may have broken competition or consumer protection law, for example by charging excessive prices or making misleading claims about the efficacy of protective equipment (...)” ([COVID-19: sales and pricing practices during Coronavirus outbreak](#), from 5 March 2020).

### **Italian AGCM**

“Today the Autorità Garante della Concorrenza e del Mercato (the Italian Antitrust Authority) sent a request for information to the main online sales platforms and other sales sites about the marketing of hand sanitizers and disposable respiratory protection masks” ([ICA: Coronavirus, the Authority intervenes in the sale of sanitizing products and masks](#), from 27 February 2020).

### **Co-operation agreements between competitors**

Collaboration between competitors is likely to rise during a crisis, as firms may engage in joint R&D projects (e.g. medical research) or in joint production/distribution of essential goods (e.g. food chain or products of first necessity). These arrangements may be necessary during crises to increase the production of a certain product or co-ordinate an essential service. They may even be promoted by governments. Co-operation between competitors may indeed increase consumer welfare by making more products available, and most competition laws allows for competitor co-operation when there are efficiencies and consumer benefits. However, competition authorities should ensure that such co-operation does not spill over into hard-core restrictions of competition, such as price fixing (see below “crisis cartels”). Moreover, competition authorities should ensure that any short-term co-operation does not extend any longer than necessary to address the crisis.

Similarly, competition authorities may wish to provide input to governments when they consider regulation of collective bargaining rights, as well as to analyse whether agreements between workers or grey area workers faced with monopsony power (such as in digital platforms) are effectively anti-competitive.

## Examples of co-operation agreements between competitors

### **European Competition Network (ECN)**

“The ECN understands that this extraordinary situation may trigger the need for companies to co-operate in order to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. (...)such measures are unlikely to be problematic (...)” ([Joint statement by the European Competition Network \(ECN\) on application of competition law during the Corona crisis](#), from 23 March 2020).

### **US Federal Trade Commission (FTC) and Department of Justice (DoJ)**

“The Agencies are committed to providing individuals and businesses in any sector of the economy that are responding to this national emergency expeditious guidance about how to ensure their efforts comply with the federal antitrust laws. (...). Interested businesses should refer to the Agencies’ previous statements on how they analyze co-operation and collaboration between competitors. (...)” ([Joint FTC-DOJ Antitrust Statement regarding COVID-19](#), from 24 March 2020). For info, the



European Commission has also committed to speedy and informal guidance: [Antitrust rules and coronavirus](#), March 2020).

#### **Norwegian Competition Authority**

“Following the corona epidemic, the Norwegian government has as of today granted the transportation sector a three months temporary exception from the prohibition against anticompetitive agreements and practices in the Norwegian Competition Act. (...). The Authority must be notified if the exception is relied on” ([Transportation sector is granted temporary exception from the Competition Act](#), from 19 March 2020).

#### **Australian Competition and Consumer Commission**

The ACCC has granted conditional interim authorisation for Medicines Australia (MA), the Generic and Biosimilar Medicines Association (GBMA) and their members to work together to support the continued supply of essential medicines during the COVID-19 pandemic (...) to identify and mitigate any shortages or supply chain problems that could impact the availability of medicines in Australia. This may involve coordinating on and prioritising medicine orders and supply requests, working together on tenders, and sharing information about medicine stocks, supply channels and opportunities to increase the manufacture of medicines in Australia ([Medicine manufacturers to coordinate on COVID-19 response](#), from 3 April 2020).

The ACCC has granted interim authorisation for members of the Australian Securitisation Forum (ASF) to work together to assist smaller lenders to maintain liquidity and issue loans to consumers and small businesses during the economic disruption caused by the COVID-19 pandemic. This follows the announcement of the federal government’s \$15 billion Structured Finance Support Fund (SFSF), which will allow smaller authorised deposit-taking institutions (ADIs) and non-ADI lenders to access funding at competitive prices. The SFSF will be administered by the Australian Office of Financial Management (AOFM). The interim authorisation will allow ASF Members to coordinate their input about how the scheme will be administered. ([Co-operation on funding to aid smaller lenders during COVID-19](#), from 8 April 2020).

### **Competition authorities should carefully assess crisis cartels**

In the face of a crisis, some firms may be tempted to reorganise the structure of an industry by entering into so-called “crisis cartels”, i.e. agreements among most or all competitors to restrict output and/or reduce capacity to increase profitability and prevent market exit in times of crisis. This may increase the likelihood of cartels during the crisis and also in its aftermath. In the past, similar agreements have been permitted or even fostered by governments themselves. This raises the question of whether competition authorities should take a more lenient view of potential anti-competitive practices in such circumstances. Evidence shows that arrangements that lead to price fixing, output restriction or capacity reduction are extremely harmful and should be actively cracked down.

## **Recommendations**

**Competition authorities** should:

- Monitor closely any significant and rapid price increases. In the short term, this may include enforcement actions to identify where and when prices increased in the supply chain, as well as the use of interim measures or warning letters to stop the conduct quickly when appropriate.
- Co-ordinate actions with consumer protection agencies, or rely on consumer protection powers (if available) to protect consumers from unfair pricing practices.
- Use advocacy powers to highlight the risks of price control measures implemented by governments, including those related to distorting price signals that may encourage production and undermine incentives for new entrants to address shortages.
- Clarify to business in a timely manner how they will consider efficiencies in arrangements between competitors (e.g. open fast-track channels to provide advice on specific cases of co-operation), in





particular those dealing with priority sectors in the crisis, such as medical products and food supply chains. They should ensure that legitimate co-operation between competitors are necessary and limited in time. They should not include hard-core restrictions such as price fixing.

- Carefully assess justifications put forward in support of crisis cartels. Any exempted cartel should be granted a finite lifetime and be subject to review according to pre-specified criteria.

### C. Enforcement - Medium-term impact of the pandemic on market structures

A structural consequence of the economic crisis triggered by the COVID-19 pandemic will probably be an **increased level of concentration** in markets, insofar as some firms will undergo financial distress and exit the market. Next to market exit, concentration will be favoured by M&A activities driven by companies seeking to improve their condition by merging with healthier competitors. As a result, competition authorities will be called to scrutinise a number of urgent and critical mergers, including alleged “**rescue mergers**”, i.e. acquisitions of firms that may be facing bankruptcy. In this context, merger control may play a key role in preventing transactions that would result in long-lasting harm to market structures.

#### ***Competition authorities should scrutinise carefully failing firm defences***

Financial and economic difficulties will force some firms to exit the market in the aftermath of the crisis. Consequently, competition authorities will probably be called upon to scrutinise a number of urgent and critical mergers and to ensure that authorisations of anti-competitive mergers based on public interest considerations remain limited in scope.

Merger review might become particularly challenging for so-called rescue mergers in which the merging parties claim that the target firm would exit the market but for the merger (the “**failing firm defence**”) and request authorisation for transactions that would have otherwise restricted competition. If an asset would leave the market anyway, the merger may be more pro-competitive than just letting the firm go bankrupt, despite the increased market power of the resulting entity. Competition authorities will therefore need to continue to carefully analyse such mergers and ensure that the parties meet the standard of proof to demonstrate that the failing firm defence should indeed apply. Otherwise, the competition authorities run the risk of approving anti-competitive mergers with a long-lasting negative structural impact on the marketplace.

#### ***Competition authorities should continue to look carefully at public interest considerations***

Competition authorities will come under **pressure** to clear certain mergers for the sake of public policy objectives, including the preservation of national champions or to ensure the production of certain products in their territory. The crisis may further call into question some elements of the traditional analytical framework of competition policy with an increased emphasis on the evaluation of dynamic efficiencies and leading to a reflection on the need to also take into account supply chain, social cohesion and environmental considerations.



## Example of failing firm defence in the European Union

In its [Guidelines on the assessment of horizontal mergers](#), the European Commission points out that an otherwise problematic merger may be authorised if one of the companies is a failing firm. For that to happen, evidentiary thresholds are high. Three cumulative conditions should be met: i) absent the merger, the failing firm would exit the market in the near future as a result of its financial difficulties; ii) there is no feasible alternative transaction or reorganisation that is less anti-competitive than the proposed merger; iii) absent the merger, the assets of the failing firm would inevitably exit the market.

### Recommendations

**Competition authorities** should:

- Closely review claims of rescue mergers and only accept failing firm defences following scrutiny of the evidence, to avoid achieving short-term benefits at the cost of longer-term and higher costs.

**Competition authorities and governments** should:

- Authorise anti-competitive mergers based on other public policy considerations only in exceptional circumstances and in a transparent manner.

### Related OECD work

[Competitive Neutrality](#) (2015)

[Competition Policy, Industrial Policy and National Champions](#) (2009)

[Competition, State Aids and Subsidies](#) (2010)

[Exit Strategies](#) (2010)

[Industrial Policy and the Promotion of Domestic Industry](#) (2018)

[OECD Recommendation on Hard-Core Cartels](#) (2019)

[OECD Competition Assessment Toolkit](#) (2019)

[Crisis Cartels](#) (2011)

[Excessive Prices](#) (2011)

[Excessive Prices in Pharmaceutical Markets](#) (2018)

[Information Exchanges between Competitors under Competition Law](#) (2010)

[Interface between Competition and Consumer Policies](#) (2008)

[Public Interest Considerations in Merger Control](#) (2016)

[Failing Firm Defence](#) (2009)

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