



Introduction

The coronavirus (**COVID-19**) global health crisis risks becoming a global economic crisis impacting businesses of all sizes worldwide and for the long term. It is undisputed that extraordinary public and private resources are necessary to address and mitigate the economic repercussions of the COVID-19 crisis.

At the national level, governments have already taken commendably bold steps and put in place short-term measures to buffer shocks to the health system, the economy and to financial markets. Some governments and competition agencies have intensified their monitoring of potentially anti-competitive conduct in critical sectors, such as the food, transportation and medical sectors, or have given guidance aimed at facilitating efficiency enhancing cooperation between undertakings in the context of assuring the supply of essential products and services.

As the trusted institutional private sector partner to business, governments and international organisations, representing over 45 million companies in more than 100 countries, the International Chamber of Commerce (**ICC**) is developing tools for business and policymakers, in line with its commitment to help chart an effective international response to the pandemic.

The ICC Commission on Competition ensures that business needs and the realities of markets are taken into account in the formulation and implementation of competition laws and policies. It also identifies key issues in competition policy facing the international business community and contributes the business voice to debates to resolve these. The commission brings together over 300 leading experts in the field of competition law from 42 countries, working together to develop cutting-edge policy for business. As such, the commission is recognised as a venue for exchange and innovation, and regularly shares the voice of business on competition law issues with intergovernmental forums such as the European Union, the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), as well as competition agencies.

This framework paper provides a synthesis of the immediate policy measures in the field of competition policy and enforcement that could be part of an effective response, many of which countries have already adopted or are actively considering. This paper is aimed at governments and competition agencies alike. Its objective is two-fold: (i) to minimise the negative economic crisis on economies, markets and consumers in the short to medium term, and, more fundamentally (ii) to protect the structure of economies and the competitive fabric of markets in the longer term to confront the economic challenges that lie ahead after the immediate consequences of the crisis have abated.

General Comments and Recommendations

1. ICC welcomes the seriousness with which governments and competition agencies are taking the COVID-19 crisis. In particular, ICC recognises the willingness of competition agencies to provide guidance and increased certainty to companies participating in the response to the consequences of the COVID-19 crisis. This includes the establishment of new procedures or the allocation of staffing resources. In addition, it should be recognised that a temporary adjustment of priorities can help businesses through these unprecedented times.
2. Competition rules remain essential to safeguard consumers and businesses. They are fundamental, in particular, to avoid abusive exploitative pricing (such as price gouging) and other anti-competitive business conduct. As a result, these rules should not be compromised while the COVID-19 crisis lasts.

3. Competition rules, if applied with care to the exceptional circumstances of the COVID-19 crisis, can play a valuable role in facilitating the transition towards less distressed markets and economies. More importantly, they ensure that the basic structures, necessary for a post-crisis recovery, remain intact, for example in permitting efforts to support ailing sectors. ICC therefore encourages governments and competition agencies to explore how competition law enforcement can support economic policies aimed at overcoming the adverse economic effects caused by the COVID-19 crisis during the management of the immediate crisis and as economies emerge from lockdown and look to rebuild.
4. However, governments and competition agencies should remain mindful that there is a serious risk of an economic breakdown in many industries across the globe, which could jeopardise fundamental economic and societal priorities. In certain sectors and in some instances, cooperation may need to be more far-reaching and extend to the preservation of economic structures that will be directly or indirectly necessary to sustain innovation and growth post-recovery. Allowing some degree of flexibility during (and in the aftermath of) the crisis—while safeguarding the application of the rules to spot anti-competitive behaviour—will eventually contribute to support trade and investments.

Recommendations Specifically Aimed at Governments

5. Governments are encouraged to continue to make funds available to overcome the immediate consequences of the crisis. Furthermore, where necessary and appropriate, it is important to clarify quickly or temporarily relax State Aid and other rules that may limit governments' discretion to intervene without delay in an effective way. The rules on state subsidies also have a role to play in ensuring that necessary financial aid provided to businesses is distributed appropriately, safeguarding supply of products and services as well as the livelihoods of employees, the self-employed and business owners. ICC encourages governments to reach out pro-actively to competition agencies, such as the European Commission, to ensure that State Aid is made available in a coordinated, transparent and fair manner in line with the relevant requirements.
6. Governments should consider a relaxation or more sympathetic assessment of competition rules for certain types of cooperation. They should do so by ensuring that competition agencies issue clear guidelines to support the economic survival and required growth of specific critical sectors and sustain innovation more broadly, or, in exceptional cases, consider the temporary disapplication of the competition rules under the state action doctrine. These guidelines could provide materiality thresholds or caveats to make sure that businesses can benefit from them where appropriate but that no businesses can take advantage of them. It is of paramount importance that this is done in a way that would confer legal certainty to undertakings and provide adequate protection against private litigation claims.
7. Governments are encouraged to provide all appropriate means, funding and resources that competition agencies may need to be able to conduct their work effectively and efficiently, and to take decisions quickly in order to respond to the needs of business within often short periods of time.
8. ICC encourages governments to coordinate their actions closely with the other stakeholders both locally and at supra-national level to support the international business community in an optimal manner. Such coordination should aim to safeguard competitive markets and to avoid misalignments at State level, which to the detriment of competition and trade, would result in inefficiencies, inequalities and/or unlevel playing fields. As the global economy is highly inter-related, competition agencies should guard against measures that may cause irremediable government-imposed market distortions and failures.
9. A number of authorities around the world have introduced new foreign investment rules or have substantially amended (lowered) their existing thresholds, in part in response to the COVID-19 crisis. ICC encourages governments to guard against protectionism. Businesses

require certainty and clarity about the applications of these new laws, in particular as regards the specific industries/ sectors and the level of investment captured. In addition, it is important to be transparent in relation to the effective date of application (these laws must not be retrospective), the review process (mandatory/suspensory) and how long the review process will take.

Recommendations Specifically Aimed at Competition Agencies

- 10.** Competition agencies should be mindful that there is a risk of an economic breakdown in many industries across the globe. This could jeopardise the long-term competitive nature of markets. Indeed, the only realistically available means to avoid these effects may be carefully defined and temporary entrepreneurial cooperation, including among competitors. A general relaxation of the competition rules is, in ICC's view, not appropriate. Competition agencies should continue to enforce the competition rules vigorously (but appropriately) to safeguard the long-term competitiveness of markets. However, competition agencies have an important role to play in providing guidance, both general and in response to specific requests, from companies who are proposing necessary cooperation to combat the immediate- and long-term challenges, but require comfort on potential competition concerns.
- 11.** ICC encourages competition agencies to factor this reality into their analysis of business conduct and transactions, and accordingly to organise and prioritise their activities in the area of cooperation among companies, unilateral conduct and the review of M&A activity. In this latter regard, ICC would also welcome a broader reflection by the competition agencies on how merger control can encourage investments, since M&A activity may be impacted due to the growing economic crisis. In addition, businesses and advisers alike would welcome guidance on the application of derogations to the standard rules that prohibit closing before clearance so that companies can assess (and potentially apply for) a derogation if they find themselves in a situation where they urgently need to close a transaction before competition law approval is received.
- 12.** Competition agencies should be flexible to specific instances where further clarification or guidance is required to permit the business community to meet the challenges of the COVID-19 crisis. This may be the case where demand has fallen significantly, and where collaboration among competitors is necessary to secure a base supply of goods or services that are essential to the public. This could be the case for food, medicines, basic transport, systems other infrastructures or other retail goods.
- 13.** As recommended above to Governments, competition agencies should also be encouraged to issue clear guidance on how companies can cooperate, in particular when it comes to matters directly linked to combating the effects of the crisis. Such guidance may for example relate to joint research to combat the virus, the production of protective equipment or other medical equipment, supply chain problems, the exchange of (competitively sensitive) business information, and the work of trade federations. In addition, there may be an urgent need for informal (but authoritative and binding) guidance in individual cases, in particular in cases that potentially trigger competition law exposure and that require significant company resources or investments.
- 14.** Guidance should also explain when certain agreements that are aimed at securing the supply of important goods and services may be exempted from competition law rules in the context of the economic crisis. This applies in particular if the agreement in question is likely to contribute to improving the production or distribution of goods or services with limited access due to the COVID-19 pandemic, does not lead to lasting structural changes in the market and does not apply for a longer period of time than is necessary. Competition agencies could helpfully explain that certain forms of cooperation will be presumed to benefit consumers in the current circumstances.

- 15.** ICC welcomes many competition agencies' willingness to consider, sometimes on an urgent and informal basis, proposed business transactions and proposed co-operation initiatives.
- 16.** In the area of unilateral conduct, competition agencies should, if their mandate so permits, be vigilant against potential price gouging and exclusionary practices that may eliminate already weakened competitors from the market.
- 17.** In jurisdictions where competition agencies do not have consumer-protection powers, ICC would welcome appropriate liaison between the competition agency and the government services in charge of consumer protection so that complaints can be filed appropriately.
- 18.** In the field of merger control, it is particularly important to ensure that maximum review periods will be adhered to and that businesses will not face lengthy delays in obtaining merger control approval. In particular, competition agencies should be sympathetic to the fact that obtaining information quickly in the times of lockdown may be extremely difficult or even impossible—and should not hold up a transaction because of the genuine inability to provide extensive data within unreasonably short deadlines. If there are suspensions of the merger review period, there should be legal clarity around how long the suspension would apply.
- 19.** ICC supports enhanced coordination among competition agencies in different jurisdictions to ensure consistency in the approach vis-à-vis the assessment of concentrations involving distressed companies, for example on how competition agencies intend to interpret or adjust the “failing firm” doctrine in these times of distress (including updated guidance).
- 20.** ICC encourages agencies to permit and enable their personnel to work remotely and to handle internal and external meetings by telephone or videoconference or other remote means. Competition agencies should be encouraged to reallocate resources across the agency to maintain continuity of core operations (e.g. by accepting merger filings electronically, accepting electronic signatures, and other appropriate measures). Staff reallocation would also allow competition agencies to concentrate on business transactions that may have a direct impact on markets particularly affected by the consequences of the COVID-19 crisis. In certain cases, it would also be appropriate to consider the relaxation of deadlines for compliance with competition agencies' directions.
- 21.** To the extent possible, competition agencies should engage in advocacy initiatives vis-à-vis their governments. This will ensure that legislative initiatives which address immediate shocks are also properly aimed at the long-term recovery of competitive markets and economies.
- 22.** Finally, ICC believes there is a role for competition agencies and supra-national international bodies (such as the ICN and the OECD) to facilitate the adoption of best practices across the authorities. This will be key in achieving greater convergence on the treatment of different forms of collaboration and assisting international businesses which need to assess their competition law risk in multiple jurisdictions within very short periods of time.