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Post-Lockdown Antitrust:

A Review of the COVID-19 Era and the Outlook for the Near Future

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Editors' Note

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This edition of *Perspectives* is a belated and much more different publication than previous ones. It has been prepared over two years of history in the making, in which drafts kept becoming outdated as strains, lockdowns and regulations kept appearing and morphing all over the world.

The outbreak of Covid-19 triggered a myriad of challenges: antitrust was not only affected but in some cases became a tool to overcome many of the ensuing problems. Due to the worldwide lockdown, authorities and practitioners had to overcome the initial challenges presented and work to adapt their regimes to a new reality (and in almost all cases, from the unexpected workplace of our own homes).

During these unprecedented times, there was consensus regarding several topics, such as the digitalization of proceedings as a common (and necessary) occurrence basically in all jurisdictions. Virtual hearing spaces, electronic files, virtual platforms, videoconferencing, they all became part of the day-to-day activities of enforcers and practitioners. The prioritization of certain industries, as well as their increased scrutiny, can also be highlighted as a point of near unanimity among jurisdictions, as health-related markets took center stage. Yet there were also substantial differences in the approach and decisions implemented by each jurisdiction, as each competition enforcer tailored their activity to jurisdiction-specific emerging needs generated by the health emergency, working to contrive a system better prepared to respond to this new environment.

Over 20 jurisdictions have collaborated on this landmark issue, all with top tier contributors who have provided valuable insight on the state of antitrust regulation in their jurisdiction, delving into the reactions and main initiatives of their antitrust authority, as well as the provisional and long-lasting effects and changes implemented in this context. Each chapter contemplates main issues such as the pandemic's effect on merger control analysis, relevant trends on enforcement and investigations, the spotlight given to new markets and market players, as well as the role of antitrust in ESG policies, among others.

This *Perspectives* is not a record of a bleak moment in our history, but rather a tale of how antitrust strove and adapted itself when the time came, highlighting the main developments experienced by each jurisdiction, the success stories and the hurdles still to come. It is a testimony of change and hopefully a glimpse at the times to come.

POST-LOCKDOWN ANTITRUST: A REVIEW OF THE COVID-19 ERA AND THE OUTLOOK FOR THE NEAR FUTURE

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ARGENTINA

By: Santiago del Rio, Franco Andrea Nigro, Sofía Blanco Ziegler and Ines Bellucci

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

The national government issued Executive Order ("DNU", for its Spanish acronym) No. 260/2020 on March 12, 2020, one day after the WHO declared the outbreak of the coronavirus disease (COVID-19) as a pandemic. Through DNU 260/2020, the administration extended the Public Health Emergency that had been established by Law No. 27,541 in December 2019 for a period of one year and provided for the adoption of new measures to contain the spread of coronavirus.

From that moment on, the isolation measures began. On March 16, DNU No. 274/2020 was issued, which prohibited the entry into the national territory of foreign persons not residing in the country. On March 19, 2020, the administration issued DNU No. 297/2020, which provided for social, preventive, and mandatory isolation (ASPO) for all persons living (or temporarily residing) in the country at the time of its issuance. Compulsory isolation was extended but, different modalities were adopted in the various jurisdictions of the country.

Within the framework of the sanitary emergency, a series of additional measures were taken:

- **Emergency family income**: A supplementary cash bonus was granted to low-income households to alleviate the impact of the health emergency on the economy.

- **Benefits for companies, single taxpayers and self-employed workers**: Through the Emergency Assistance Program for Labor and Production (ATP), companies, single taxpayers and self-employed workers affected by the quarantine were able to access the benefits provided for in Decree 376/2020. Some of these benefits include: (i) compensatory allowance to salary; (ii) postponement or reduction of the payment of employer contributions; (iii) zero-rate credits; (iv) extension of unemployment insurance.

- **Bonuses for vulnerable sectors**: Additional cash bonuses were granted to (i) beneficiaries of certain state-aid programs; (ii) retirees and pensioners; (iii) health workers; (iv) security forces.

- **Rent freeze and suspension of evictions**: Rent and mortgage credit amounts were frozen, and evictions due to lack of payment were suspended throughout the national territory, until March 31, 2021.

- **Credits for companies, cooperatives, and research institutions**: The administration also granted (i) credits for the payment of salaries; (ii) credits to guarantee production and supply; (iii) credits for small and medium-sized enterprises; (iv) support for companies, cooperatives and research institutions that contribute to the sanitary emergency.

- **Measures for commercial establishments**: measures such as reduced opening hours, monitoring clients' body temperature, avoidance of crowds, etc.

- **Measures for exports and imports**: companies had to obtain the administration's authorization to export medical supplies and equipment that the country could need to face the pandemic.

- **Banking measures**: such as (i) the suspension of the closing of bank accounts, (ii) the suspension of ATM withdrawal fees, and (iii) the extension of the deadline to present checks.

- **Tax measures**: such as (i) the reduction of taxes on health services; (ii) the emergency labor and production assistance program; (iii) the reduction of import duties on critical inputs; (iv) the suspension of customs deadlines; among others.

- **Other government measures**: For more information as regards the measures taken by the Argentine government to help face the COVID-19 pandemic, please refer to: https://www.argentina.gob.ar/coronavirus/medidas-gobierno/otras

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

Yes, the administration adopted regulatory measures that entailed price controls. In particular, several measures relating to the enforcement of the Supply Act (Law No. 20,680) were implemented so as to guarantee the regular supply of essential products to the market and prevent price increases. Some of these measures include:

- *Decree 260/2020 – Maximum prices – March 12, 2020.*

The Decree allows the Ministry of Health and the Ministry of Productive Development to set maximum prices for face masks, sanitizing gel, and other critical materials and to adopt the necessary measures to prevent their shortage.

- *Resolution 86/2020 – Sanitizing gel – March 12, 2020.*

It calls for the enforcement of the Supply Act as regards sanitizing gel, as well as other similar products. Furthermore, it ordered: (i) the regression of the price of alcohol to February 2020 values; (ii) the freezing of hand sanitizer prices for a period of 90 calendar days; (iii) the obligation to increase the production of hand sanitizer and its inputs by the companies producing such goods up to the maximum of their installed capacity during the period of effectiveness of such measure; and (iv) the obligation to submit weekly reports to the Secretariat of Actions for the Defense of Consumers as regards the sales price of such goods during the resolution's period of effectiveness.

- *Resolution 100/2020 – Maximum prices (food products, personal hygiene products, etc.) – March 20, 2020.*

Said Resolution ordered all those involved in the production, distribution, and commercialization chain of certain products to maintain, as a maximum, the price informed to the Secretariat of Domestic Trade as of March 6, 2020 during the validity of the Resolution. This resolution was applicable to specific products, mainly food and personal hygiene products.

- *Resolution 114/2020 – Drop in prices of contact body thermometers and face masks– April 17, 2020.*

The resolution called for the enforcement of the Supply Act to companies active in the production, distribution, and commercialization of "contact thermometers" (estalishing that prices cannot exceed those available on March 6, 2020) and non-surgical and/or one layer face masks (also setting maximum prices); and limited the sale of the N95 type, surgical and three-layer sanitizing masks to professionals, staff, and health sector entities.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

Please refer to the answer provided to question 2.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

There are no state aid laws or regulations in Argentina; nor does the Antitrust Commission (the "**CNDC**") analyze these issues.

Nevertheless, the administration has implemented programs[1] to support companies operating in Argentina. These programs generally entail the following benefits: (i) Postponement or reduction of up to 95% for the payment of employer contributions to the Argentine Social Security System. (ii) Complementary Salary: an allowance paid by the National State for workers in the private sector. (iii) Zero Rate Credit for self-employed workers without any financial cost. (iv) Credit at a Subsidized Rate for companies. (v) Comprehensive system of unemployment benefits.

To access these benefits, companies had to prove they had been heavily affected by the sanitary emergency: e.g., that their economic activities were critically affected in the geographical areas where they are developed, that they experienced a substantial reduction in turnover after March 12, 2020.

For additional information, please refer to the answer provided to question 1.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

The Foreign Investment Law (Law No. 21,382) constitutes the legal framework for FDI in Argentina. The health crisis did not affect said regulation nor the way it is applied.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

No.

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

During the quarantine, the justice system was practically paralyzed due to the impossibility of effectively carrying out proceedings remotely.

During the first months of the pandemic, the national judicial system determined an extraordinary judicial recess for all national and federal courts. This situation paralyzed the justice service and reduced it to the attention of urgent matters, such as health, family, and violence cases.

[1] Such as the Emergency Assistance to Labor and Production Program (*Programa de Asistencia de Emergencia al Trabajo y la Producción*) ("ATP") created by Decree 332/2020 (B.O. 04/01/2020) and amended by Decree 376/2020 (B.O. 04/21/2020), within the framework of DNU 260 (B.O. 03/12/2020).

On March 19, 2020, the Secretariat of Domestic Trade resolved the suspension of the procedural terms in all the proceedings under the Antitrust and Fair-Trade Laws, among others. Proceedings before the CNDC were suspended until October 2020.

In August 2020, the CNDC was able to launch its new electronic platform for merger control proeedings and advisory opinions (the TAD system), yet most dockets still experienced delays.

Several measures were taken to re-activate the system[2], such as: the extension of deadlines, the launch of electronic platforms, the implementation of electronic files and digital filing of lawsuits, the approval of digital signatures, among others.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

There have been no changes to the enforcement of merger control rules during the pandemic.

Nevertheless, among the various consequences of the COVID-19 pandemic is that of companies in situations of economic or financial crisis. A possible defence that may arise in this context is that of the "failing firm" defense.

This is a defense that allows a merger to be approved when the one of the companies is in decline, with probable exit of its assets from the market, and as such, the competitive conditions of the market decrease. The analysis carried out by the CNDC in this regard is a strict one, which requires an irreversible financial crisis situation and the submission of all possible means of evidence to prove the probability of the company's exit from the market, as well as the harmful effects said exit would have on consumers, and that there are no other potential buyers that would generate less harmful effects on competition.

Although in Argentina the use of this defense has historically been scarce, at the international level some transactions in which the failing firm defense was invoked due to the impact of COVID-19 have been cleared, such as the Amazon/Deliveroo transaction in the UK and the Jeju Air/Easter Jet transaction in South Korea. All these cases involved companies that had been experiencing economic difficulties, which were amplified by the pandemic. The competition authorities approved these transactions since they considered that if these companies exited the market, the harm to consumers would be greater than the potential harm to competition generated by their approval.

At the time of writing, the CNDC has not validated the failing firm defense, however, it should not be ruled out that this defense may be analyzed by the CNDC as a post-pandemic effect[3] in the coming years.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

There have been no amendments or exemptions relating to thresholds as a result of COVID-19. The CNDC updates its merger notification thresholds on a yearly basis.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any,

[2] The Supreme Court issued Resolutions 5, 9, 11 and 12/2020.
[3] Saij.gob.ar: Covid-19 and the Failing Firm Defense; Miguel del Pino and Carla Antonella Boidi

transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

There have been no variations in the analysis of merger control cases as a result of COVID-19.

11. **Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?**

Yes, the COVID-19 pandemic was not an impediment for the CNDC to enforce decisions and orders.

12. **Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?**

In merger control cases, the economic and/or legal analysis was not affected nor altered due to COVID-19.

13. **Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?**

In Argentina, no remedies have been impacted by the COVID pandemic.

Anticompetitive conduct

14. **Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?**

In our country, there are no relevant anticompetitive conduct trends to identify related to the pandemic.

15. **Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?**

The CNDC has shown a specific interest in the digital and retail markets.

Online platforms have been on the rise for several years now and competition authorities worldwide have been focusing their attention more closely on this industry. Due to the quarantine, most stores were forced to close their doors to the public, causing them to turn to digital platforms to sell their products, furthering the role these platforms play in the commercialization of goods and services.

As online platforms benefitted during the pandemic and gained substantial influence in many markets, anticompetitive practices such as price gouging increased, leading to an increased scrutiny of social

platforms and e-commerce websites. This is evidenced by the CNDC's reaction to WhatsApp's privacy policy update in 2021, which led to the suspension of the update given that it included abusive clauses in the privacy policy terms by using citizens data to increase its market dominance, in detriment to competition. Yet Argentina currently lacks precise guidelines on the antitrust liability of digital platforms, and COVID-19 has presented an opportunity to shape them.

The CNDC has also shown substantial interest in retail, which is evidenced by the supermarket investigation, leading to the approval of the Supermarket Shelf Space Bill, which looks to regulate relations between supermarkets and suppliers. Given current inflationary rates and the different measures undertaken by the Executive Power as a result of Covid-19, it is quite likely that the CNDC will remain focused on these markets[4].

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

To the best of our knowledge, the number of investigations during the pandemic has not increased but has rather remained steady. The CNDC did carry out more investigations during 2021 than during 2020, which is likely due to the fact that procedural terms were suspended during the first months of the pandemic. The conduct investigations were varied, and included cartels, abusive and discriminatory pricing, predatory pricing, refusal to sell, among others.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

In Argentina, although Section 2 of the Antitrust Law prohibits cartels, section 29 states that the competition authority may grant permits "for the execution of contracts, agreements or arrangements that contemplate conducts included in section 2" provided that they do not constitute a detriment to the general economic interest. Although there are still no precedents of the application of this mechanism, the seriousness of the health crisis could activate such mechanism.

Other horizontal agreements between competitors, outside the scope of the prohibitions of Section 2, such as collaboration agreements or reciprocal purchase and sale of products or inputs due to lack of stock, will be legal to the extent that they have a technical justification and do not restrict the general economic interest. They will require a case-by-case analysis in which the efficiencies they generate for competition and consumers will be decisive[5].

No specific guidelines dealing with collaborations among competitors were implemented in the context of the COVID-19 pandemic.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

Please refer to the answer provided to question 17.

[4] https://thelawreviews.co.uk/title/the-public-competition-enforcement-review/argentina#footnote-007

[5] Saij.gob.ar: COVID-19, initial notes to avoid anti-competitive or unfair behavior in Argentina. In the face of the sanitary emergency, is the antitrust law reinforced or suspended?: Carla Antonella Boidi

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

There were no exemptions applicable to unilateral conducts related to COVID-19, nor did they modify the approach in the assessment of dominance in the context of investigations.

In principle, unilateral anticompetitive conduct will be sanctionable as long as it harms (or may potentially harm) the general economic interest.

In any case, certain unilateral conducts, such as the early termination of supply contracts, may respond to legitimate reasons due to the sanitary emergency, namely a lack of stock, protection of workers' health, or issues of economic efficiency. As long as it does not constitute an abuse of a dominant position (by eliminating or substantially weakening competition, or exploiting customers or suppliers), or is carried out in coordination with other suppliers, it should not raise concerns from an antitrust standpoint. Of course, such efficiencies must be validated so as to eliminate any anti-competitive risk[6].

With regards to price controls and abusive pricing, the competition authorities reacted by tightening controls and setting maximum prices. Please see the answer provided to question 2 for further information.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

In the current context of the COVID-19 pandemic, the authority does not seem to have changed its approach in the investigation of unilateral conducts.

Please refer to the answer provided to question 19.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

Due to COVID-19, there has been an increase in regulatory measures regarding pricing control of essential products such as face masks, sanitizing gels, thermometers, and similar products. Therefore, heightened scrutiny is possible in these markets and the authority is likely to be attentive to conducts such as price gouging, refusal to supply, etc.

During 2020 and 2021, the CNDC carried out a wide range of investigations. No guidelines or regulations were issued by the Competition Authority, nor has it expressed signs of how it intends to deal with anticompetitive conduct in the health industry. Nevertheless, the CNDC can be expected to look to neighboring jurisdictions and analyze LATAM tendencies.

ESG and competition policy

[6] Saij.gob.ar: COVID-19, initial notes to avoid anti-competitive or unfair behavior in Argentina. In the face of the sanitary emergency, is the antitrust law reinforced or suspended?: Carla Antonella Boidi

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

The CNDC has defined in various precedents the concept of '*general economic interest*' as "the correct functioning of markets" meaning "the general economic interest is only preserved when the correct functioning of the market is maintained given that in this way all benefits that result from competition are obtained; [therefore] if a proper market functioning is not guaranteed, the economic general interest protected by the norm is at risk"[6].

This concept of general economic interest has come to consider that consumer protection is a fundamental aspect of this "Antitrust legal asset". And as the world evolves, and new agents join the playing field, Antitrust policy is becoming more aware of the relevance of Environmental, Social and Governance ("ESG") issues and of the need to include these ESG factors, encompassing a broader set of goals than those that current enforcement acknowledges.

In Argentina there is no ESG regulation, but the Corporate Governance Code does reference it: "Corporate Social Responsibility - CSR. In line with the concepts expressed by the Economic Commission for Latin America and the Caribbean (ECLAC), BYMA[7] understands CSR as a cross-cutting concept that crosses the organization and the social environment it integrates, with the aim of building a fairer, more stable and prosperous society. In this sense, BYMA is aware of the social responsibility it has with the community in which it operates (...). Thus, it promotes in the organization a culture of solidarity and social, economic and environmental responsibility"[8].

In the current context, expanding competition policy's goals to include ESG-related policy concerns would be extremely beneficial to further promote this "social, economic and environmental responsibility" faced by governments, industries, and companies all over the world, and to broaden the scope of antitrust regulation to protect not only consumer welfare, but also total welfare.

Plausible criticisms to the inclusion of ESG-related policy to the antitrust law could be the high cost of these measures, as it could entail direct taxes or regulations that increase costs of compliance. This, in turn, would mean the imposition of extra costs on consumers, as well as on smaller, more vulnerable companies. Also, it may put countries applying these policies in a competitive disadvantage compared to other jurisdictions where ESG policies are not adopted.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

In Argentina, the CNDC has understood in various precedents that the social impact of a given transaction or conduct is key when performing an antitrust assessment. Such was the case, for example, in "Mirgor / Brightstar", a merger control case in which the CNDC made special emphasis as regards the post-transaction conditions of the involves companies' workers.

Considering the CNDC's case law, one may understand that there has been a clear tendency towards proclaiming social change in the context of decisions, investigations, and business compromises. Nonetheless, this is only setting the mood for more intervention from the CNDC on these types of concerns since society as a whole is far more interested in supporting businesses that are either socially or environmentally responsible and therefore expect authorities to take the lead.

Thus, our antitrust laws need to evolve and embrace social and environmental change, because if the legal framework of competition law does not become more comprehensive of these necessary changes, and if

[6] Res. 106, 12/4/1982, "Ifrisa S.R.L. denuncia c. Yacimientos Petrolíferos Fiscales Sociedad del Estado y ECSAL S.A.", CNDC opinión dated 11/3/1982.
[7] Argentine Stock Exchanges and Markets (BYMA)
[8] https://www.byma.com.ar/wp-content/uploads/dlm_uploads/2019/08/COD-81001.01-C%C3%B3digo-de-Gobierno-Societario.pdf

antitrust enforcers don't push social and environmental change, then practices such as coordinating with competitors to meet sustainability goals, for example, will continue to be characterized as anticompetitive agreements, and disregard the positive impact said actions could have on the environment and on society. As for the role of businesses, companies should not replace the States responsibility to design fair ESG policies. Nonetheless, companies do have a say in these issues and their actions and decisions have a great influence on markets.

In this sense, a great tool for companies would be if the authorities publish guidelines for social and environmental agreements, so they may have clarity on these matters and prevent any anti-competitive concerns.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

While competition law practice only allows agreements if they result in direct benefits to consumers, the carbon defense could allow agreements if it can be proved that they will result in sufficient benefits for society as a whole.

In addition, the carbon defense would give firms more freedom to make binding agreements to reduce their GHG emissions without breaking competition law. For example, agreements for firms to sell only products that meet specific emission standards.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

Argentina's regime as regards company's criminal liability states in section 22 that companies may implement integrity programs comprising the actions, mechanisms, and internal procedures to promote integrity, supervision, and control. The integrity program must be proportional to the risk that each company's activity entails (e.g., environmental risks). However, it does not include specific provisions for individual industries.

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BOLIVIA

By: Diego Villarroel

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

Bolivia, as of March 21, 2020, ordered a total quarantine period with suspension of public and private activities, except for very specific sectors such as finance, pharmaceuticals, and necessities. Subsequently, as of August 27, 2020, the State applied a dynamic quarantine in which people could circulate according to the last digit of their identification number. In both cases, any activity involving crowds such as musical, religious, or sporting events were forbidden.

Regarding economic measures, these focused on: i) granting different bonds (universal, family and family basket) to vulnerable sectors; ii) concessional loans to micro, small and medium enterprises; iii) payments' deferral (credits, insurance premiums, some taxes, etc.); and iv) fees' reduction for basic services.

Currently, municipal governments, depending on the cases in their respective municipalities, may limit commercial business hours and movement of people. Also, municipal governments are entitled to prohibit festive, sporting or any other event that involve crowds.

The Supervision Authority for Companies, which acts as the antitrust regulator in Bolivia ("AEMP" for its acronym in Spanish) has been relatively inactive during the pandemic, and basically focused its resources on issuing INSTRUCTIVO INST/AEMP/DTDC DN/No. OO1/2020 and INSTRUCTIVO INST/AEMP/DTDC DN/No. OO1/2021, dated December 24th, 2020, and January 19th 2021, respectively.

On its part, the state Supervision Agency of Medicines and Health Technologies ("AGEMED" for its acronym and Spanish) and Departmental Health Services in each city (together, the "Health Regulators"), have been very active focusing their work on supervising the distribution of medicine and resources against COVID19, as well as implementing the instructions issued by AEMP.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

Yes, the government through Health Regulators has regulated prices in: i) clinical services related to the diagnosis and treatment of COVID-19; ii) medications (e.g. Remdesivir, Paracetamol, etc.); iii) screening tests; and iv) medical devices.

These regulations were not qualified under specific thresholds. These are applicable to the pharmaceutical and hospital industry.

Moreover, the government announced the preparation of a bill to regulate the prices of funeral services. However, there is no evidence of its treatment in the Chamber of Deputies or Senators.

In principle, these measures are permanent, as they lack a temporary limitation.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

Due to the shortage of medicinal oxygen, the government ordered several measures to ensure the timely recharge of oxygen tubes. To do this, it required health establishments to adopt logistical (centralize empty tubes in one place and improve the supply chain) and administrative (report annual tube maintenance schedule to the State Agency of Medicines and Health Technologies - AGEMED) measures.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

The government applied several measures to help companies operating in Bolivia. Mainly, these are: i) Concessional credit programs for micro, small and medium enterprises; ii) granting of concessional credits for the payment of salaries and social obligations; iii) creation of guarantee funds for financial support of borrowers in certain sectors; and iv) Deferral of payment of taxes and some social benefits (e.g. annual premium).

No specific programs were developed or targeted at national champions or local companies affected by the sanitary crisis.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Yes. Bolivia enacted Law No. 516 on Investment Promotion. This law was not modified because of the health crisis.

The health crisis did not cause regulatory changes in Foreign Direct Investment.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

No.

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

Measures taken were the following: i) extension of procedural deadlines; ii) holding hearings through digital platforms (e.g. Zoom); iii) possibility of monitoring processes through electronic files.

Merger Control

8. **Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.**

Beforehand, Bolivia lacks a specific regulatory framework on merger control. Some sectors have merger control rules such as: telecommunications, energy, hydrocarbons, transportation, water, and finance (financial entities).

These regulations have not been changed during the pandemic.

Our authorities have not granted exemptions in the matter due to COVID-19.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

No.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

There have been no specific market share analyses in merger control cases which can be related in any way to COVID-19.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

We are not aware of the execution of decisions or orders on remedies or gun jumping fines imposed prior to COVID-19.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

It is our understanding that political decisions resulting from COVID-19 did not affect or alter the economic and/or legal analysis in merger control cases.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

We are not aware of any transaction subject to remedies before COVID-19.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your

jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

Formal antitrust investigation procedures are, in theory, of public knowledge, however, there is no portal web or registration where one can verify their progress. Consequently, to the best of our knowledge, there have been no new investigations or causes to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years recently, since it is only possible to be aware of investigations procedures when they start, and the last investigation registered in AEMPS webpage was in 2018.

15. **Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?**

Health Regulators and AEMP have prioritized certain industries related to health, among others pharmaceutical companies, importers and distributors of health goods related to COVID19, ONGs, and hospitals, instructing such industries to comply with antitrust regulations and to refrain from the manipulation, fixation and exchange of sensitive information of sale or purchase prices of health goods or services, among competitors, related to the pandemic due to COVID19, through the issuance of regulation such as INSTRUCTIVO INST/AEMP/DTDC DN/No. OO1/2020 and INSTRUCTIVO INST/AEMP/DTDC DN/No. OO1/2021, dated December 24th, 2020 and January 19th 2021, respectively.

With regards to the enforcer's approach to digital markets, to the best of our knowledge, there have been no visible enforcement priorities, or differences from the approach taken prior to the pandemic. In addition, and also to the best of our knowledge, AEMP and Health Regulators have not initiated specific antitrust investigations on digital markets during the pandemic as mentioned in answer 14.

16. **Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?**

To the best of our knowledge, as provided above, there has not been an increase in the opening of investigations focusing on certain types of anticompetitive conducts given that we do not have any information regarding new official investigation procedures by AEMP since 2018.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

There have been no specific guidelines dealing with collaborations among competitors in the context of the pandemic. However, as mentioned above, AEMP issued general rules directing suppliers of health goods and services, to comply with antitrust regulations and to refrain from the manipulation, fixation and exchange of sensitive information of sale or purchase prices of health goods or services, among competitors, related to the pandemic due to COVID19[9].

The enforcement of regulations has been carried out through Health Regulators (from a sanitary perspective) and not through AEMP (from an antitrust perspective).

[9] INSTRUCTIVO INST/AEMP/DTDC DN/No. OO1/2020 and INSTRUCTIVO INST/AEMP/DTDC DN/No. OO1/2021, dated December 24th, 2020 and January 19th 2021, respectively

18. **Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?**

In Bolivia, 'crisis cartels' are not regulated. Antitrust regulations are stricter, sanctioning not only the companies that took part in the anticompetitive agreements, but also the executives who participated in the decisions. Thus, there are no signs that these arguments would be well received by the enforcer even during the pandemic.

19. **Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?**

AEMP nor other regulators have not announced exemptions applicable to certain types of unilateral conducts related to the COVID-19 pandemic, nor have modified their approach in the assessment of dominance in the context of investigations opened to look into conducts taking place during the COVID-19 pandemic.

20. **Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?**

There have been no signs that could lead us to believe that the Bolivian authorities will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic.

21. **Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

Given the pandemic, and as explained in our answers above, Health Regulators have increased their scrutiny with regards to health-related markets and activities, which can be assessed through the resolutions that were issued instructing providers of health goods and services to refrain from anticompetitive conducts. However, such scrutiny has been enforced through a sanitary perspective, and not through the antitrust regulator, AEMP.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Given the economic and social crisis caused by the pandemic, it would not be advisable at this time to issue even more restrictive regulation, since this discourages investment, particularly in small economies such as Bolivia.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

As provided above, given the need of investment, and especially given the pandemic, it would not be advisable for Bolivian regulators and antitrust enforcers, business, and lawyers to push for more regulation in the ESG front, given that it disincentivizes investment.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

Bolivian competition law sets forth that an investigated economic agent can file for an "Efficiency Gains" defense. Efficiency Gains have a broad scope under Bolivian Law. Thus, it may be possible that Efficiency Gain include ESG related considerations and defenses. However, there is no jurisprudence nor case law on the matter.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

No. If certain fields or sectors are subjected to more scrutiny than others, this would violate the antitrust principle of equalit

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BOSNIA AND HERZEGOVINA

By Olga Šipka and Tatjana Sofijanić

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

Bosnia and Herzegovina (BH) is a largely decentralized country with a complex governance structure. It is made up of Federation of BH (FBH) and Republika Srpska (RS) entities and a self-governing Brčko District (BD) unit. The FBH further consists of 10 cantons with significant autonomy. The BH, the two entities FBH and RS, and BD have all had autonomy in setting up their own measures to counteract the effect of the crisis. Thus, the BH response to the COVID-19 crisis was decentralized and regionalized.

In mid-March 2020, emergency declarations were made across all governance levels in BH. At the BH level as well as in BD and FBH the 'state of natural disaster'[10] was declared, whereas RS declared an 'emergency situation', which was soon upgraded to an 'emergency state'.[11] These declarations allowed for mobilization of resources to curb the spread of the virus and allowed the governments to put in place restriction to existing rights. Key restrictions included temporary curfews, ban on public gatherings and movement of elderly and children, mandatory closure of non-essential businesses as well as mandatory usage of facemasks, mandatory physical distance etc. These measures meant that, like in many other countries, certain types of businesses were closed such as restaurants, cafes, hotels, beauty salons, gyms, hairdressers and many others.[12] The most severe restrictions were in place from mid-March 2020 to end-May 2020 during which time the country was under a lockdown. Subsequently from end of May 2020 the country slowly begun to open.

Although mostly operational since summer 2020, throughout the entire crisis period businesses in BH had to endure different levels of restrictions to their business operations. To help business survive the crisis, BH governments adopted special laws on economic measures. FBH passed a so-called Corona Law I[13] with measures were relevant for almost all most sectors. Corona Law I provided for subsidies, tax relief, suspended enforcement, and established a guarantee fund. Later, a special bylaw[14] with measures for addressing particular sectors was passed in FBH. In addition, some FBH cantons designed their own recovery packages[15]. RS also provided for tax and salary subsidies to businesses[16] as well as recovery measures and grants for specific sectors. In both entities, bank regulators enabled moratoriums on loans and interests.[17]

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

[10] Decision Declaring the State of Natural or Other Disaster Caused by COVID-19 in FBH ("Official Gazette no.18/2020)
[11] Decision Declaring the Emergency Situation for the Territory of RS ("Official Gazette RS", no. 25/20)
[12] Information on all emergency orders and their amendments is available on websites of the FBiH Government at http://fbihvlada.gov.ba/bosanski/naredbe.php and the RS Chamber of Commerce at: https://komorars.ba/usluge/korona_virus/.
[13] Law on Mitigating the Negative Economic Effects ("Official Gazette FBIH", no. 28/2020)
[14] The Decree on Intervention Measures and Support to Sectors Affected by the COVID-19 Pandemic ("Official Gazette FBIH", no. 74/2020 and 21/2021)
[15] For example, Law on Mitigating the Negative Economic Effects and Savings in Sarajevo Canton ("Official Gazette of Sarajevo Canton", no. 18/2020, 46/2020 and 12/2021)
[16] The Decree with the force of the Law on Tax Measures for Mitigating the Economic Effects as a Result of COVID-19 Disease Caused by the SARS-CoV-2 ("Official Gazette RS, no. 35/2020 and 46/2020)
[17] BD also passed a law on recovery measures - Law on Mitigating the Negative Economic Effects caused by the State of Natural Disaster due to COVID-19 in BD of BH ("Official Gazette BD", no. 17/2020 and 40/2020)

Yes. BD, RS and FBH Governments passed bylaws on price control for basic foodstuffs and hygiene products. The FBH and RS Governments also introduced price control for oil derivatives[18]. All these measures were temporary. No market share requirements or other specific thresholds were set forth by the mentioned bylaws.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

No, there have not been any other obligations imposed on companies that would seek to safeguard the pre-pandemic status quo. Contrary to certain countries in the Western Balkan region, BH governments did not ban basic foodstuffs export.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

BH governments adopted special laws with economic measures, such as subsidies, tax relief, etc (see also above answer to question 1). In FBIH, Corona Law I was to address almost all sectors, while a special bylaw that followed the Corona Law I was to help (i) the tourism and hospitality sector and (ii) the food and agricultural sector (so-called Corona Law II)[19]. Additionally, some FBH cantons introduced their recovery packages, e.g., the canton Sarajevo financed the minimum wages, provided relief of administrative and court fees in certain cases,[20] RS and BD governments also provided for tax and salary subsidies.[21] Both national champions and local companies were subject to described measures, under the set requirements.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

At the BH level the Law on Direct Foreign Investment (FDI) Policy in BH[22] is in place and regulates the main policies and principles of participation of foreign investors in the BH economy. Secondly, the FBIH and RS have their own laws on FDI[23] that regulate rights, obligations, status of foreign investors, forms of foreign investments, procedure and authorities competent for investments approval.

The health crisis did not have special effect over above mentioned FDI regulations and they remain unchanged during the crisis. Also, to the best of our knowledge, no change of these regulations is currently planned. Still, please note that the RS Government passed a special bylaw[24] with the aim to support the

[18] FBiH Decision on Measures of Direct Price Control ("Official Gazette FBIH", no. 21/2020); RS Decree on Measures of Direct Price Control on the Territory of RS ("Official Gazette RS", no. 30/2020); RS Decree on Determining the Margin applicable to Price Formation for Oil Derivatives ("Official Gazette RS", no. 36/20); BD Decision on Returning the Prices to a Level Applicable as of March 5, 2020 ("Official Gazette BD", no. 12/2020).
[19] Please see reference no. 6.
[20] Please see reference no. 7.
[21] Please see above.
[22] Law on Direct Foreign Investment Policy in BH ("Official Gazette BH", no. 17/1998, 13/2003, 48/2010 and 22/2015)
[23] FBIH Law on Foreign Investments ("Official Gazette FBIH", no. 61/2001, 50/2003 and 77/2015); RS Law on Foreign Investments ("Official Gazette RS", no. 21/2018).
[24] Decree on the Procedure for Granting the Incentives for Direct Investments ("Official Gazette RS", no. 32/2021).

businesses during the COVID-19 crisis by granting incentives for direct investments. Also, some reforms are proposed and may have effects on the status of foreign investors, such as VAT exemption for certain goods needed for final production in free economic zones (both in RS and FBIH), new draft rules on free economic zones in FBIH, new law on free economic zones in RS[25].

6. Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?

We are not aware of any upcoming regulations or pieces of legislation that could have a direct impact on the issues mentioned above.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

Yes, FBH and RS adopted special laws on case processing during the crisis.[26] This meant that key procedural deadlines were suspended, including deadlines for filing lawsuits, motions for initiating non-contentious procedures and enforcement procedures, as well as other time-bound motions such as ordinary and extraordinary legal remedies. Service of process was limited to via-mail service as only postal service was operational and no over the counter receipt of filings was possible. Judges were allowed to exclude the general public from a trial based on the public health concerns. The listed rules did not apply to urgent cases, which included cases on discrimination in the workplace, companies' statutory matters, registration of businesses, interim measures and preliminary orders and similar.

This emergency mode of operation lasted during the country lockdown i.e. from March 2020 to end of May/mid-summer 2020 as the validity of these special laws was linked to the duration of the state of emergency in RS and the state of natural disaster in FBH. As soon as their application ceased, and given that FBH and RS procedural laws do not allow for the courts to work remotely or online, most courts re-opened, and judges and staff returned to offices. Staring summer 2020 all court processes in BH returned to *business as usual*. This in practice meant that courts were processing cases while being obligated to apply social distancing rules and mandatory wearing of facemasks. In practice processing of cases was slower than usual given courts limited capacity to work in a crisis situation.

As expected, COVID-19 crisis also affected efficiency of the BH Competition Authority (BHCA). In fact, an antitrust restrictive agreement investigation was dismissed because the BHCA, given crisis, was unable to render the final decision within the deadline set forth by the BH Competition Act.[27] Even after the emergency mode of operation, the influence of COVID-19 pandemic on the BHCA operations is present. The BHCA recently adopted supplements to the Rulebook on the BHCA Work Activities in order to explicitly enable the BHCA to hold online sessions in emergency or justified cases.[28]

Merger Control

25 Law on Free Economic Zones in RS ("Official Gazette RS", no. 15/2021).

26 RS Decree with the force of the law on Deadlines and Activities in Court Proceedings during the State of Emergency in the RS Territory ("Official Gazette RS, no. 32/2020); FBiH Law on Deadlines and Activities in Court Proceedings during the State of Natural Disaster on the FBiH Territory ("Official Gazette FBiH", no. 28/2020).

27 Decision in case Agencija za nadzor osiguranja FBiH / Udruženje Aktuarsko društvo as of January 21, 2021 (restrictive agreements), available on the following link: *http://bihkonk.gov.ba/datoteka/zakljucak-o-obustavljanju-postupka-21012021-bos.pdf*.

28 Supplements to the Rulebook on the BHCA Work Activities as of October 2021, available on the following link: *http://bihkonk.gov.ba/datoteka/2250_001.pdf*.

8. **Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.**

There is no information on any exemption being granted by the BHCA due to the COVID-19 pandemic. The enforcement of merger control rules remained the same.

9. **Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?**

No, the notification thresholds have not been subject to amendments or exemptions as a result of COVID-19.

10. **Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected**.

No, the market share component of the competitive analysis in merger control cases has not changed as a result of COVID-19. There are no transactions that have (not) been cleared because of COVID-19. There are no notable differences in approach of the BHCA.

11. **Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?**

There is no specific information publicly available. However, it seems that BHCA enforcement did not change due to COVID-19.

12. **Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?**

We are not aware of any such political decisions resulting from COVID-19 that have influenced the economic and/or legal analysis in merger control cases. To the best of our knowledge, there are no new, amended rules or new exemption rules for merger control that come as a result of COVID-19.

13. **Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?**

We are not aware of any such transactions.

Anticompetitive conduct

14. **Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your**

jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

No, there are no new relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic in BH.

15. **Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?**

Enforcement did not prioritize certain industries over others. Still, based on 2020 draft Report of the BHCA, the most inquires during 2020 were conducted in the utilities market (production and supply of thermal energy, production and supply of electricity, water supply and sewage). Still, there are no indications that COVID-19 crisis had any influence on selection of sectors to be delt with by the BHCA.

16. **Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?**

No, there is no increase in opening of investigations focusing on certain types of anticompetitive conduct.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

No, BHCA did not announce any specific guidelines related to collaborations among competitors that shall be implemented in the context of the COVID-19 crisis. We are not aware of any other relevant change in the BHCA approach to coordinated conduct, as a result of the pandemic.

18. **Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in the light of the pandemic?**

To the best of our knowledge and based on the available practice of the BHCA, no crisis cartel-related arguments were made and accepted by the BHCA as a defense. There are no signs based on which it could be concluded how further practice of the BHCA in the light of the pandemic would look like.

19. **Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?**

No, the BHCA did not announce any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic. There are no changes to the BHCA approach in the assessment of dominance in the context of investigations opened to examine conduct taking place during the COVID-19 pandemic.

20. **Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?**

There are no signs that the BHCA will be more open to certain types of economic justifications put forth by the defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

The current President of the BH Competition Council of the BHCA announced that the focus of the BHCA future work will, among other, be the pharma sector[29] and thus it is to expect that there will be a heightened scrutiny in this health-related market. However, the BHCA has not yet provided any specific guidance on how it intends to deal with anticompetitive conduct in this industry.

ESG and competition policy

5. What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?

Globally, expansion of competition policy's goals to include ESG-related policy concerns is among the main topics discussed by the competition enforcers. Also, companies are recognizing the need to address ESG issues, and the competition rules could potentially be an obstacle to the improvement of their ESG performance. However, we are not aware that the BH or the BHCA is yet participating in ESG-competition related discussions. To our knowledge BHCA officials did not make any specific statement related to ESG goals or ESG goals inclusion into the competition policy enforcement framework in BH.

Still, the ongoing global debate on EGS is expected to reach the BHCA soon and it is likely the BHCA will not be reluctant to develop a practice which will be in favor of achieving ESG goals. For example, in the merger control context the BHCA already took into consideration the advantages a transaction would have for the protection of the BH environment (waste management sector).[30] Also, it is expected that the BHCA will follow the EU practice and approach in EGS area going forward given that BH is in the EU accession process and BHCA finds the EU as a guiding jurisdiction in its practice.

If ESG goals are to shape the competition policy enforcement in BH in the future, the key advantages would be achieved if this is done by way of a clear guideline on when and what ESG arguments are acceptable for BHCA. A guideline would reduce the legal uncertainty while companies would not be reluctant to collaborate to achieve sustainability objectives in specific regulated situations. Such guidelines should also ensure that the risk of misuse of sustainability goals to cover anti-competitive practices (cases of greenwashing) is avoided.

6. What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?

[29] Interview with the President of the Competition Council of Bosnia and Herzegovina as of December 10, 2020.
[30] Decision in the case VITINKA / BANJALUČKA PIVARA as of June 9, 2015, available on the following link (only in Bosnian language): *http://bihkonk.gov.ba/datoteka/Rje%C5%A1enje-Vitinka-09062015-bos.pdf*.

Considering that competition rules are binding rules and that significant fines may be imposed in case of breach, in pushing forward the social/environmental change, a change would need to happen at the BHCA level first. Only after BHCA changes its practice or renders a clear guideline that supports ESG arguments it can be expected that business would become more receptive and flexible to cooperation for achieving the ESG goals and social/environment change.

Further, lawyers may have an important role in spreading awareness of ESG goals' significance and possibilities. However, we are not aware of any such advocacy efforts undertaken by BH lawyers or respective FBH and RS Bar associations in BH.

BH has a vibrant energy and heavy industry sector that would benefit from greater awareness of EGS goals. More could be done by the BHCA and other BH enforcers and lawmakers to consider EGS as an important topic in both regulation and enforcement of rules.

7. Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?

Carbon defense or any other ESG-related efficiency defense has not been tested by the BHCA. BHCA does not make any investigation into EGS issues nor is there a regulatory or any other context which would make such a defense relevant for a merger control or an antitrust proceeding in BH.

As noted above, in a merger control proceeding a benefit related to improvement in environmental protection in BH was taken into consideration by the BHCA in its previous practice.[31] However, BHCA does not analyse ESG efficiency systematically, this analysis is limited to instances where parties have pointed to particular ESG benefits and these benefits are mentioned as secondary and auxiliary to other non-EGS related topics.

As noted above, BH has a vibrant energy and heavy industry sector and could benefit from introducing EGS goals and defences in its competition policy. Also, BH is a contracting party of the European Energy Community (EEC) and under the EEC auspices in the energy sector it deals with EGS arguments and competition law matters.[32]

8. Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?

There is no specific ESG policy of the BHCA and there are no markets or sectors subject to stricter levels of scrutiny and/or different standards of proof in order to push forward ESG-related policy consideration in BH.

As noted above BH has a vibrant energy and heavy industry sector and could benefit from introducing EGS goals in its competition policy for these sectors. In the energy sector it is also under the supervision of the EEC.

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[31] See above reference to case VITINKA / BANJALUČKA PIVARA - benefits that a transaction would have to waste management in BH are taken into account when assessing a concentration.
[32] See more on EEC at https://www.energy-community.org/.

BRAZIL

By: Michelle Marques Machado, João Marcelo Lima and Paulo César Luciano Júnior

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

The Brazilian Government adopted several measures to counteract the effects of the health crises. The main actions involved: (i) increase in public spending, (ii) interventions in healthcare sector, (iii) reduction in the barriers to importations and increase in the barriers to exportations, (iv) support for families, (v) support for companies and (vi) protection of formal jobs.[33]

Increase in public spending

In the beginning of the pandemic in March 2020, the Brazilian Lower and Upper Houses (jointly the "Congress") approved a decree that recognized Public Calamity in Brazil, in which government was not required to meet the fiscal primary balance target in 2020.[34]

In May 2020, Congress approved the so-called "War Budget" that allowed the Brazilian government to have a separate budget specific to face the health and economic crisis caused by the Covid-19 pandemic, which removed the constitutional barriers to the expansion of public spending.[35]

Such legislative changes allowed the Brazilian government to provide financial support for the Brazilian public health system at the federal, state and city levels and to provide financial support for credit transactions carried out by states and cities.

Support for companies

These legislative changes allowed the Brazilian government to create specific credit lines for small businesses, pay sick leave for workers infected with Covid-19, to postpone of obligations to pay federal taxes and other tax duties with federal government.

State-owned banks also opened credit lines for companies to finance payroll, obtain working capital, and make investments. Companies also benefit from more favorable conditions to renegotiate past loans.

Brazilian government also issued a "relief package" to the civil aviation sector, with postponement of collection of concession fees from airports and extension of the period for reimbursement of consumer affected by cancelled flights.

[33] Brazilian Government outlined these economic actions in the document "Brazil's Policy Responses to COVID-19". Following this document, Brazilian government has also adopted other measures, both as a follow-up to the first measure and as an expansion of government actions. Available at: https://www.gov.br/economia/pt-br/centrais-de-conteudo/publicacoes/publicacoes-em-outros-idiomas/covid-19/brazil2019s-policy-responses-to-covid-19.

[34] See Legislative Decree No. 6/2020 (Portuguese Only): http://www.planalto.gov.br/ccivil_03/portaria/DLG6-2020.htm.

[35] See (Portuguese only) https://www12.senado.leg.br/noticias/materias/2020/05/07/congresso-promulga-emenda-que-institui-orcamento-de-guerra.

Tourism-related firms received more favorable conditions to obtain loans and pay past debts and culture-related firms and individuals also received governmental aid.[36]

Support for families

The Brazilian government enacted the "Emergency Help" Program that transferred R$600 (around US$120) to informal sector workers or unemployed members of a low-income family, and widened the scope of the welfare program "Bolsa Familia" so as to include more beneficiaries. The government also allowed the withdraw of funds or anticipated payments of others welfare programs.

Protection of formal jobs

Brazilian government regulated remote work, anticipation of paid vacations and mandatory vacations. In addition, the Emergency Employment Maintenance Program was enacted[37], by which companies were authorized to reduce working hours and wages, provided they keep the jobs of the employees – the government paid an aid for employees to offset salary cuts.

Healthcare sector

The Brazilian government reduced some barriers in the healthcare sector, such as: (i) simplification of the authorization process for hygiene products, (ii) reduction in regulatory requirements on the acquisition of products to face the health crisis by public entities, (iii) imported and domestic goods necessary to face the Covid-19 benefited from tax temporary exemptions; (iv) small hospitals had been authorized to treat infected patients.

Congress also approved the suspension of price increases in medicines for 60 days and the National Supplementary Health Agency suspended price increases of health insurance plans for 120 days and required health insurance firms to include tests for Covid-19 in the mandatory coverage of their insurance plans.

International trade

The Brazilian government facilitated the clearance of imported raw materials, and gave priority for medical and hospital products in customs clearances. It also exempted from import tax several medical and hospital use products. On the other hand, certain products essential to face the health crisis are prohibited from being exported by Brazilian companies.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic**

[36] See (Portuguese only) https://www.gov.br/economia/pt-br/assuntos/noticias/2020/julho/governo-utilizara-plataforma-brasil-para-operacionalizar-os-recursos-da-lei-aldir-blanc.
[37] See (Portuguese only) https://agenciabrasil.ebc.com.br/politica/noticia/2020-07/Publicada-lei-que-cria-o-programa-de-manutencao-do-emprego-e-renda.

status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?

[Items 2 and 3 answered jointly]

In 2020, a profusion of legislative initiatives populated the Brazilian public agenda, including some relating to price control. Those with competition-related content include, for example, proposals of price controls or price freezes in sectors considered essential for coping with the Covid-19 pandemic (e.g. medicines and individual protection equipment), liquid petroleum gas (LPG), funeral services, discounts on schools' tuition fees, fees charged by delivery and individual urban transport applications and basic food basket products.[38]

To our best knowledge, no price control legislation have been enacted at the federal level, with the exception of the suspension of price increases in medicines for 60 days by any company involved in the commercialization of such products that entered into force on March 31, 2020[39], and the suspension by the National Supplementary Health Agency of price increases in health insurance plans offered by any health insurance company, which entered into force on August 31, 2020 and lasted for 120 days.

The Brazilian antitrust authority (the Administrative Council for economic Defense - "CADE") voiced its concern regarding several of the proposed measures, which, according to the authority could produce relevant negative side-effects on the affected markets. Despite the good intention behind the draft bills to prevent an abusive rise on prices due to the extraordinary high demand caused by the Covid-19 crisis and protect consumers, especially those most vulnerable, CADE repeatedly reinforced that price control tools are not the adequate mechanisms to address the issues targeted by such proposals.[40]

CADE argued that state interference on key elements of the market dynamics, such as prices, could end up having the opposite effect than originally intended, i.e. could harm competition instead of protecting it. Price control tools could have discouraging effects over production, distribution, and commercialization, in case companies could not pass along possible cost increases to consumers, and also over investments in innovation.

The Brazilian antitrust agency also highlighted that price controls can entail an asymmetry in the conditions of competition of different companies in the same market, as each competitor has different production and cost structures, which were not considered in the abovementioned proposals. In fact, price controls could make more difficult to smaller companies, which usually operate with more reduced margins. Finally, the implementation of price controls could, in the middle to long run, derive in a general price increase, as companies would try to prevent any possible loss face new price freezes or compulsory discount policies that could be put in place in the future.

With respect to proposals on mandatory discounts in fees, CADE noted that they could compromise the continuation of the relevant businesses' normal operations. Due to lower income from fees, the companies could face unexpected difficulties to cover their costs and payroll. The discounts could also amount to a barrier to new entries, as the attractiveness of investments in such sector could decline because of limited investment returns.

Despite the concerns voiced by CADE, some legislative initiatives were approved by regional governments. This is the case, for example, of propositions regarding discounts on private schools' tuition fees sanctioned

[38] Some examples of relevant bills at the national level are Draft Bills No 1542/2020, 1008/2020, 2608/2020, 1179/2020, 1753/2020, and 1108/2020. Please note that this is a non-exhaustive list and that bills have also been presented at a State and city levels.

[39] See (Portuguese only) http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Mpv/mpv933.htm.
[40] See http://antigo.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/pareceres-do-dee-em-atos-de-concentracao-e-condutas-2020.

by some state governors[41] and the State Law which determines the control of individual protection equipment prices in the State of Paraíba[42] until the end of the state of public calamity.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

Please see item 1 above.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Unlike other jurisdictions, Brazil does not have a single broad authority to review and analyse foreign investments.[43] Some economic sectors have specific regulations, procedures and bureaucracy on the matter, such as the financial sector, land/rural property, nuclear energy, post office, aerospace, oil and gas, mining, and media.

To our best knowledge, there have been no significant changes in the application of Brazilian Foreign Direct Investment regulations as an effect of the pandemic.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

To our best knowledge, there are no upcoming pieces of regulation or legislation that could have a direct impact on the issues above at the federal level.[44]

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

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[41] Examples are the States of Ceará, Rio de Janeiro and Piauí. https://www.ceara.gov.br/2020/05/12/governador-sanciona-lei-de-reducao-das-mensalidades-escolares-durante-pandemia/; http://www.alerj.rj.gov.br/Visualizar/Noticia/48831; and https://www.pi.gov.br/noticias/governador-sanciona-lei-que-concede-descontos-de-ate-30-nas-mensalidades-escolares/.

[42] State of Paraíba's Law No 11,724/20. See http://www.al.pb.leg.br/36965/agora-e-lei-epis-e-insumos-para-combater-coronavirus-terao-preco-tabelado-na-paraiba.html.

[43] From a broad perspective, any entity and individual domiciled abroad owning most types of assets located in Brazil must register with the Individual or Entity Taxpayers' Register of the Brazilian Federal Revenue Secretariat.

Investments by non-residents in Brazil's financial and capital markets are regulated by resolutions and regulations from the National Monetary Council, the Central Bank of Brazil and the Brazilian Securities Commission.

[44] Please note that the main issues of economic regulation are discussed at the federal level, but states and cities also have powers to regulate specific aspects of some sectors, which are more difficult to monitor given the number of entities at the state and city level.

The structure of the Brazilian Court system allows state, federal, labor, electoral and military courts to issue their own rules regarding filing deadlines, videoconferences, and other procedural matters. The Brazilian Council of Justice, responsible for regulating Brazilian Judiciary at administrative level, issued regulations with the goal of unifying the functioning of all Brazilian courts during the pandemic - but courts kept their autonomy to follow such rules.[45] The regulations included: (i) all servants and judges should work from home; (ii) maintenance of the regular pace of all procedures; (iii) remote attendance of lawyers and parties by videoconference, among others.

The Brazilian Council of Justice launched a report with the measures adopted by all courts in response to Covid-19 restrictions at the administrative level, including remote work and videoconference measures and tools. In relation to the suspension of deadlines, several courts suspended deadlines for both electronic and physical lawsuits. Most suspensions ended in 2021, and only a few courts have kept such suspensions in 2022. For a complete list of all Brazilian courts and their regulations regarding deadlines, please see Brazilian Council of Justice's website.[46]

Merger Control

8. **Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.**

9. **Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?**

[Items 8 and 9 answered jointly]

CADE adopted measures to face the Covid-19 crisis and remain operational while ensuring the safety of staff and members of the antitrust community. As part of adjusting to the new scenario, most of its staff started working remotely, face-to-face meetings have been replaced by videoconferencing and conference calls, and CADE's Internal Rules have been amended to allow judgement sessions to be conducted remotely.[47] In the end of 2021, CADE returned to held presential judgement sessions with the adoption of some safety protocols, and some people of the staff returned to work from the CADE's office. However, stricter protocols may be adopted depending on the next developments of the pandemic.

In the merger control front, CADE remained active throughout pandemic, committed to keep filing analysis on the right track and had announced that all deadlines would not be changed. In fact, the number of deals

[45] See Brazilian Council of Justice's Resolution No. 313/2020 (Portuguese only): https://atos.cnj.jus.br/atos/detalhar/3249.

[46] See (Portuguese only) https://paineisanalytics.cnj.jus.br/single/?appid=6c9a3799-e931-4c5a-8900-a13a8bb8a05a&sheet=a45a7e28-6d3b-409a-a78e-145fd8d6cc5c&lang=pt-BR&opt=currsel.

[47] See Mattos Filho's insight 'Cade: activities and deadlines remain unchanged', March 19, 2020, available at: https://www.mattosfilho.com.br/Pages/unico-noticias.aspx?noticia-publicacao=coronavirus-impactos-atividades-cade. For more information see also Lauro Celidonio Gomes dos Reis Neto, Renata Fonseca Zuccolo Giannella, Amadeu Ribeiro, Marcio Soares and Michelle Marques Machado, The Brazilian Competition Authority implements measures in line with WHO recommendations against the spread of the COVID-19', March 18, 2020, e-Competitions, May 2020 - II, Art. No. 93835, available at: https://www.concurrences.com/en/bulletin/news-issues/may-2020-ii-en/the-brazilian-competition-authority-implements-measures-in-line-with-who.

reviewed by CADE in 2020 and 2021 is greater than the number of filings analyzed by the authority in 2019,[48] showing that has been no negative impact over the agency's performance.

As to changes in legislation and notification thresholds, on June 12, 2020, Law No. 14,010 was enacted to set the Emergency and Transitional Legal Framework until October 30, 2020 or while the declaration of state of public calamity remained in force (which lasted until December 31, 2020).[49] With respect to competition enforcement, the new law established:

- The suspension of mandatory filing rules for associative contracts, joint ventures and consortia agreements entered into and in force from March 20, 2020 up until October 30, 2020 (or while the declaration of state of public calamity remained in force – which lasted until December 31, 2020).

- That in case companies charge prices unreasonably below cost or decide to close business without just cause from March 20, 2020 up to October 30, 2020 (or while the declaration of state of public calamity remained in force), such practices shall not amount to an antitrust violation.

- That, when ruling on antitrust violations practiced as of March 20, 2020 and while the state of public calamity remained in force, CADE shall take into consideration the extraordinary circumstances arising from the Covid-19 pandemic.

With respect to the suspension of the abovementioned mandatory filing rules, the law allowed CADE to either request the notification of associative contracts, joint ventures and consortia agreements which were not deemed necessary to fight/mitigate the effects of the Covid-19 crisis or open formal probes to investigate antitrust violations in connection with those agreements.

In practice, it seems the law had limited effects. This is so not only because the suspension of mandatory filing rules was restricted to agreements executed and whose term could not exceed the period in which the state of public calamity was in force, but also given that CADE publicly recommended that even cases that did not fall into the exemption hypothesis should be submitted to the agency's review and approval.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

The Covid-19 pandemic has not significantly changed the merits of competitive analysis in merger control cases in Brazil, including the market share component. CADE continues to adopt the same market share thresholds to filter transactions that should receive a closer look, which is a combined market share of 20% in case of horizontal overlaps and 30% in any of the vertically related markets in vertical mergers. If transactions surpass these thresholds, CADE will carry out a more detailed assessment of the competitive effects of the transaction, including market power of the parties before and after the transaction, entry and rivalry conditions, and efficiencies resulting from the transaction.

In this sense, even though the Covid-19 crisis was mentioned as capable of affecting the structure of some markets, such as aviation and distance learning, it was not a game changer in the analysis of any transactions

[48] CADE analyzed 433 merger cases in 2019, 454 in 2020 and 610 in 2021. Source: "CADE em números" tool maintained by the authority: http://cadenumeros.cade.gov.br/.
[49] See Law 14,010/2020. http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L14010.htm.

in Brazil. It is worth noting that Covid-19 played a relevant role, among other factors, in the review of the remedies imposed to clear the Disney / Fox merger in Brazil.

In February 2020, the case had been approved subject to the divestment of the Fox Sports Channel, which would mitigate competitive concerns in the pay-TV sports channel segment, maintaining the three independent sports channels that existed prior to the transaction – SporTV (owned by Globo), ESPN (Disney) and a third company (Fox Sports buyer). The merging parties did not complete the divestment within the timeframe agreed with CADE. They argued that the business was not profitable without the parent company subsidies, which decreased the interest of potential buyers, and that the Covid-19 pandemic made it even more difficult to find potential buyers, due to the interruption of several sports competitions around the world. Given these difficulties, in May 2020 CADE and merging parties reviewed the commitments to include only behavioral remedies. Such solution was adopted because CADE found that the parties put meaningful efforts to complete the divestment and comply with the first remedy. [50]

From a procedural perspective, CADE and merging parties had difficulties in the merger analysis during 2020 and part of 2021. Market tests lasted longer than the pre-Covid 19 era and contacting clients and competitors of the merger parties to gather data relevant to competitive analysis were particularly difficult.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

In the merger control front, CADE only suspended gun jumping proceedings once, following guidance from the Federal Government during the period in which the Provisional Presidential Decree No. 928, which established the first measures to be adopted by the Government to face the pandemic, was in force. Given its expiration term on July 21, 2020, the deadlines started running again. No suspensions have been applied to merger control cases, including enforcement of remedies decisions.[51]

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

Please see item 10 above. Please note that specific rules applicable to merger control cases resulting from the Covid-19 are not in force and effect since the end of the public calamity state on December 31, 2020, as indicated in item 9 above.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

Please see our commentary about the Disney / Fox case in item 10 above.

[50] Merger Case No. 08700.004494/2018-53.
[51] Please see http://antigo.cade.gov.br/coronavirus.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

CADE demonstrated to be attentive to potential anticompetitive practices that could take place under the pandemic. The authority has launched a considerably broad preliminary probe into the medical-pharmaceutical sector and is currently conducting a market inquiry to collect information from a large number of health-related firms in order to assess whether such players could have been practicing price gouging in the context of the Covid-19 crisis.[52]

The main purpose of the investigation is to check possible sharp increases in prices and profit margins that may amount to antitrust infringements and could be affecting both consumers and the public health system.[53] Amongst the respondents to the market inquiry there are hospitals, health insurance companies, pharmacy chains and suppliers and manufacturers of surgical masks, hand sanitizers, and medicines used to treat Covid-19 symptoms. Besides the aforementioned requests for information and invoices related to the commercialization of products associated with the pandemic control, additional information such as spreadsheets evidencing the evolution of prices of hand sanitizers, surgical masks, drugs used for treating symptoms of Covid-19, tests and treatments connected to Covid-19 have also been requested from retail pharmacy chains, hospitals, and clinical analysis laboratories. Also, CADE has reached out to the Departments of Health of the State of São Paulo, the State of Rio de Janeiro and the Federal District in order to obtain information regarding the evolution of prices paid to such products' suppliers.

The opening of the investigation, which is still ongoing, is interesting because has never convicted companies for price gouging, even though more than 60 investigations have been opened about this matter. CADE's precedents assert that there is no consensus on the parameters to assess whether a price increase should be considered as abusive, and that only price increases resulting from an anticompetitive conduct (e.g. cartel and unilateral exclusionary practices) should be subject to enforcement (and once a conduct has been prohibited, its negative effects over price will cease).[54]

More broadly, CADE anticompetitive conduct enforcement is evolving, but not necessarily because of the Covid-19 pandemic.

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

CADE is increasing its enforcement towards unilateral conducts over cartels. Even though CADE has not expressly stated enforcement priorities in certain sectors, the so-called "digital markets" like marketplaces,

[52] Preparatory Proceeding No. 08700.001354/2020-48, launched on March 18, 2020.
[53] Please see http://antigo.cade.gov.br/cade_english/cade-started-collecting-data-to-support-investigation-in-the-medical-pharmaceutical-sector.
[54] Please see "Price gouging under Brazilian competition law: Better left dormant?" by Carlos Ragazzo and João Marcelo Lima. Competition Policy International - September 2020.

social networks and e-commerce platforms, financial services and healthcare sectors received significant scrutiny from CADE in the past years. In this context, we have not identified a clear focus on certain conducts, but most of them would fall into the category of "foreclosure" or "exclusion", with exclusive dealing being a target in several industries.

Key cases opened during the Covid-19 pandemic period are briefly described below:

- Hemobanco (exclusive dealing with alleged foreclosure effects): CADE is assessing whether Hemobanco, a company that provides hemotherapy services to patients in hospitals, unlawfully imposed exclusivity provisions in contract with hospitals. The case is still under analysis, but CADE imposed an interim measure on Hemobanco to prevent it to execute new contracts with hospitals with exclusivity clauses.[55]

- Gympass (exclusive dealing with alleged foreclosure effects): Following a complaint by TotalPass (Gympass' competitor), CADE launched an investigation to assess alleged unlawful exclusivity arrangements between Gympass, a digital platform that offer access to various fitness centers, and its network of fitness centers. The case is still under analysis.[56]

- iFood (exclusive dealing with alleged foreclosure effects): Following a complaint by Rappi (iFood's competitor), CADE launched an investigation to assess alleged unlawful exclusivity arrangements between iFood, a food delivery platform, and its network of restaurants. Other iFood's competitors and trade associations also presented complaints and CADE imposed an interim measure against the company to prevent it to form new exclusive partnerships with restaurants until final decision.[57]

Considering the rise and prominence of unilateral conducts, CADE is in a good position to refine its approach and establish clearer standards to assess market power, anticompetitive effects and allocate burdens of proof in a proper way.

In the cartel front, the number of investigations decreased, mostly due to a drop in the number of leniency agreements proposed by companies. Such trend might have been influenced both by the Covid-19 pandemic and the fact that the landmark anticorruption operation "Car Wash" (Lava Jato) had already reached its peak, so did its antitrust repercussions.

In any event, CADE keeps developing institutional initiatives to stimulate the leniency program – a major source of new cases. In September 2021, CADE released guidelines on the type of evidence that has been accepted and rejected in past cases.[58] The authority also has released a new tool to foster propositions of leniency agreements: an online platform through which a company can propose register itself as the first company to report a conduct and initiate negotiations in a fast and secure way.[59] In addition, CADE has issued a regulation ensuring confidentiality of whistleblowers of anticompetitive conducts' identity for 100 years.

Another important trend is that CADE are looking into information exchange as a standalone conduct, and not as comprised within cartel conducts. CADE's precedents have been increasingly differentiating exchanges of information that take place in the context of coordination from standalone exchanges of information.

[55] Administrative Inquiry No. 08700.000381/2020-01.
[56] Administrative Inquiry No. 08700.004136/2020-65.
[57] Administrative Inquiry No. 08700.004588/2020-47.
[58] See https://www.gov.br/cade/en/matters/news/cade-releases-english-version-of-its-guide-for-submitting-evidence-in-leniency-applications.
[59] See (Portuguese only) https://www.gov.br/cade/pt-br/assuntos/noticias/cade-lanca-plataforma-para-recebimento-de-pedidos-de-negociacao-de-acordos-de-leniencia.

In addition, CADE also has been opening new investigations about this topic. In an unprecedented case and as part of a trend that is gaining prominence in other jurisdictions, the authority launched its first investigation ever involving a labour market, specifically related to the healthcare industry in São Paulo, Brazil, as a result of leniency agreement.[60]

According to CADE, the human resources departments of several companies would have exchanged competitively sensitive information, especially regarding remuneration, salary readjustments, and benefits, at least from 2009 to 2018. CADE also points out an allegedly coordinated behaviour regarding hiring policies and people management, which would have included coordination in negotiations with unions.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

On May 28, 2020, CADE had the opportunity to formally rule a collaboration agreement between major beverage and food companies, namely Ambev, BRF, Coca-Cola, Mondelez, Nestlé and Pepsico, which main purpose was to mitigate the effects of the economic downturn faced by small and medium retailers in the food and beverage sector as a result of the social distancing measures related to the Covid-19 pandemic in Brazil. In line with other antitrust authorities around the world, the agency indicated that was – and until is – ready to move quickly and give the necessary guidance to companies willing to cooperate with others as a mean to deal with the challenges presented by the current crisis.[61]

Although the collaboration agreement in question did not meet the filing thresholds and there is a consultation mechanism to assess the lawfulness of agreements and commercial practices (whose review period may last up to 120 days), CADE's General Superintendence reviewed and processed the parties' submission in an expedited fashion under an unregulated fast-track mechanism called 'protocol procedure'.

Acknowledging the exceptionality and urgency of the request and the need for prompt guidance, CADE issued its decision within ten calendar days counted from the filing of the request. CADE considered guidelines from both the OECD and the International Competition Network (ICN) on best practices to review cooperation between competitors amidst Covid-19 and reached the conclusion that, in principle, the cooperation envisaged by the parties did not amount to an antitrust violation. The decision was supported on the following grounds:

- There was a reasonable economic justification for the cooperation agreement and a nexus between the proposed cooperation and the Covid-19 crisis - it was deemed as key for small retailers to resume their economic activities.

- The cooperation would be in force for a limited period (up to October 31, 2020).

- The parties would neither coordinate commercial practices nor exchange competitively sensitive information.

- The parties committed to adopt safeguards to prevent exchange of competitively sensitive information at the meetings among competitors to implement the envisaged collaboration.

- Such cooperation had as goal to generate efficiencies that could not be obtained by each party alone, and, as a result of such cooperation, consumers would be better off.

[60] Administrative Proceeding No. 08700.004548/2019-61.
[61] Proceeding No. 08700.002395/2020-51.

In July 2020, CADE published an informative temporary note regarding collaboration initiatives among competitors in the context of the Covid-19 crisis, but please note that such note is not in force anymore due to the end of the public calamity state on December 31, 2020. In the document, the authority consolidated general guidelines regarding what would be expected from lawful cooperation agreements in the present context, such as:

- Crisis related scope: the cooperated should be specific to deal with the pandemic or its effects.

- Limited term and geographical extension: the time dimension of the cooperation should be specifically limited to the necessary period to mitigate the harmful effects of the health crisis, and at the same time the cooperation should address effects in a well-defined territory and consider that such effects may vary according to the location.

- Governance structure, transparency, and good faith: parties have to structure the cooperation to minimize competition risks, including the sharing of competitively sensitive information, implement compliance mechanisms and interact with CADE in a transparent manner, presenting all documents relevant to analyze the competitive aspects of the cooperation.

CADE also provided information regarding the different communication channels the authority has made available for companies that wish to consult CADE about the lawfulness of a determined cooperation initiative before implementation.[62]

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

No, and CADE already made it clear that the agency will not accept a crisis cartel defense while reviewing the collaboration agreement between competitors.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

No.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

No.

[62] See (Portuguese only) https://cdn.cade.gov.br/Portal/Not%C3%ADcias/2020/nota-informativa-temporaria-sobre-colaboracao-entre-empresas-para-enfrentamento-da-crise-de-covid-19.pdf.

21. **Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

CADE already convicted several companies with activities in health-related markets in the past and is increasing its attention to them. Recently, it has indicated that health-related markets will receive even closer attention both in the conduct and merger control fronts. There is a belief that the industry in experiencing a moment in which players are pursuing inorganic growth and verticalization, within a market structure characterized by high barriers to entry. Some cases analyzed during the Covid-19 pandemic that highlight this trend are indicated below.

For instance, CADE's Tribunal ruled merger cases involving Athena Saúde / Grupo São Bernardo and Hapvida / Plamed. In the first case, CADE refused to adopt filters to exclude overlaps involving a small number (less than 100) of beneficiaries of the parties' health insurance plans from a closer competitive analysis. Without the filter, more relevant markets were analyzed and gave rise to competitive concerns, and CADE also requested more information about them during the investigation.[63]

In the Hapvida / Plamed case, which involved the two main providers of health insurance plans in the affected markets. CADE concluded that the merging parties would have significant market power of the transaction and required both structural and behavioral remedies. The authority imposed several conditions to selecting the buyer of the divested business (sound financial situation, managerial capabilities) and closing was only allowed after the divestment had been concluded. Behavioral remedies including maintaining price levels, allowing Plamed beneficiaries migrate to Hapvida's plans without any requirements and informing CADE about any transactions in the next three after the transaction.[64]

In December 2021, CADE cleared the merger between Hapvida and NotreDame Intermédica, two of the largest health insurance providers in Brazil. CADE raised concerns that the transaction would restrict competition due to the position of both groups in markets for health insurance and hospitals. In this case, CADE analyzed the effects of the transaction in national and municipal scenarios. The authority concluded that even though the parties have significant market share in the market for health insurance and their verticalization may raise the barriers to entry for non-verticalized players, there will be sufficient rivalry in the post-transaction scenario. This case is interesting because CADE requested the parties to present efficiencies related to the transaction, including efficiencies related to the vertical integration, even though the transaction could be cleared based on the conclusion that the any attempt to exercise market power would be contested by rivals. In this regard, CADE rejected most of the claims of the parties about the efficiencies.[65]

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

[63] Merger Case No. 08700.002346/2019-85.
[64] Merger Case No. 08700.001846/2020-33.
[65] Merger Case No. 08700.003176/2021-71.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

[Items 1 - 4 answered jointly]

Generally, competition policy is based on the idea that free markets and the competitive process can lead to economic and technological progress. Nowadays, companies, governments and society more broadly are designing ways to benefit from the market mechanism to pursue societal and environmental goals.

In this sense, competition policy can play a positive role ensuring that markets remain free and competitive as a way to stimulate a better allocation of resources. The benefit of including ESG-related goals in competition policy would allegedly be to ensure that business practices aimed at advancing these goals do not result in a significant restriction of competition and innovation.

For example, competitors may execute agreements to jointly pursue environmental goals. However, such agreements cannot cause an illegal sharing of competitive sensitive information that is not necessary for the proper operation of the partnership and reduce the incentives the parties have to compete against each other. Competitors also must design such partnerships in a way that prevents competition from being distorted through, for instance, the limitation of introduction of new technologies/manufacturing practices, price-fixing, restriction of supply.

In addition, mergers could allegedly lead to a better allocation and use of corporate resources and result in the introduction of new and greener technologies or reduce negative externalities related to the environment, which may be recognized as efficiencies. However, even mergers that promote ESG-related goals should be subject to scrutiny so authorities can assess whether such efficiencies outweigh restriction to competition through the acquisition of market power.

However, ESG-related goals are not easy to incorporate in antitrust analysis because its tools are better suited to deal with pure economic concerns (e.g. impacts on prices, market power, entry and rivalry conditions, among others) in well-defined relevant markets, and not broad societal concerns. Moreover, ESG-related goals are hard to quantify, and antitrust authorities may not be the best regulators to assess environmental or other societal gains from a technical perspective. Therefore, caution is advised because antitrust authorities may be misled by "greenwashing" tactics by market players, i.e. they can disguise anticompetitive practices in well-intentioned initiatives both in the conduct and merger control fronts.

Competition policy is applied in a case-specific manner, while legislators and other regulatory authorities may issue proper rules to advance the ESG agenda if this is the desire of society. Therefore, competition policy should support the advance of ESG-related goals, but other authorities must take the lead in the regulatory front and use their command-and-control powers to set rules, industry standards and clear objectives.

In Brazil, CADE has not issued any guidelines for companies. One reason for this is that CADE does not have a specific framework to analyze non- economic aspects of conducts or transactions.

Even cases focused on solving environmental issues have been analyzed from a pure economic perspective/consumer welfare standard. For example, an association among competitors to organize reverse logistics of electronic equipment was cleared by CADE because such competitors would remain independent and in full competition and the association are not related to their core businesses.[66] More recently, Cargill acquired shares of a company that provides a software that helps to reduce CO2 emissions and fuel consumption, but CADE cleared the transaction on the grounds that it does not cause a major concentration in the relevant markets.[67] The Brazilian authority also did not consider environmental issues in the acquisition by ISP Marl Holding of the Schulke & Mayer's personal care business, even though the transaction was motivated by the desire of the buyer to advance its ESG policy.[68]

In this respect the position adopted by CADE's Tribunal in the decision rendered in the Vale / Ferrous Resources made it clear that Brazilian competition law confers CADE competence to assess only the competitive aspects of transactions and conducts, and that there are other agencies with specific mandates to carry out environmental policy.

Societal pressure and the development of those topics around the world may cause CADE to be eventually called on to tackle ESG-related questions. However, currently, it is unlikely that CADE will accept a carbon defense or increase scrutiny in certain sectors, even in those that are more aggressive to the environment, with these issues in mind.

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[66] Merger Case No. 08700.009764/2015-70.
[67] Merger Case No. 08700.004320/2020-13.
[68] Merger Case No. 08700.000609/2021-36.

CANADA

By Mark Katz and Anita Banicevic

The role of Government

1. Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?

In March 2020, government authorities in Canada began implementing measures to deal with the impact of the COVID-19 pandemic (the "**Pandemic**"). The regulatory authorities responsible for the administration and enforcement of Canadian competition law and the regime governing foreign investment review joined in this effort.[69]

2. Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?

The CA does not prohibit retailers from unilaterally setting their own prices for the products or services they sell, including if that pricing is alleged to be excessively high. Accordingly, "price gouging" is not a practice that is governed or recognized by Canadian competition law.

However, several provincial governments during the course of the Pandemic either introduced new measures or triggered the application of existing emergency measures to prohibit excessive pricing of certain types of products. In Ontario, for example, the provincial government issued an order in March 2020 prohibiting the sale or offer for sale by retailers of "necessary goods at an "unconscionable price"," including masks, gloves, non-prescription medications, disinfecting agents, and personal hygiene products. "Unconscionable price" was defined as "a price that grossly exceeds the price at which similar goods are available to like consumers."[70] Similar measures were taken by the provinces of British Columbia, Alberta, Saskatchewan and Nova Scotia.[71]

Since the beginning of the Pandemic, provincial authorities have received thousands of complaints, initiated hundreds of investigations and issued warning letters. However, apart from one Alberta case where a business was charged with price gouging of certain supplies, it appears that enforcement has been rare.[72]

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69 The *Competition Act* (Canada) (the "**CA**") is the principal Canadian legislation governing competition law. It is a federal statute that is administered and enforced by the Competition Bureau, which is headed by the Commissioner of Competition (the "**Commissioner**"). The *Investment Canada Act* (Canada) (the "**ICA**") is the principal Canadian legislation governing the review of foreign investments in Canada. It too is a federal statute and is administered and enforced by the Investment Review Division ("**IRD**") of the Ministry of Innovation, Science and Economic Development ("**ISED**").

70 Government of Ontario, *Prohibition on Certain Persons Charging Unconscionable Prices for Sales of Necessary Goods*, O. Reg. 98/20, (March 27, 2020), https://www.ontario.ca/laws/regulation/r20098.

71 Government of British Columbia, *Emergency Program Act*, R.S.B.C. 1996, c. 111, s.10 (March 18, 2020), https://www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0115_2020; Government of Nova Scotia, *Emergency Management Act* 1990, c.8,s.1; 2005, c.48, s.1, https://beta.novascotia.ca/government/emergency-management-office/legislation. One difference between Nova Scotia and the other provinces is that the relevant Nova Scotia legislation goes beyond prohibiting unconscionable or grossly excessive pricing and provides that "no person in the Province may charge higher prices for food, clothing, fuel, equipment, medical or other essential supplies or for the use of property, services, resources or equipment than the fair market value of the same thing immediately before the emergency".

72 Meghan Grant, CBC News, "Accused of COVID price gouging, Calgary company pleads guilty and admits to 'grossly excessive' prices" (September 29, 2020), https://www.cbc.ca/news/canada/calgary/cca-logistics-ppe-guilty-plea-fine-price-gouging-1.5743732.

This may reflect the provincial authorities' concern that aggressive enforcement could deter some suppliers from selling needed goods in the province. It may also reflect the fact that price gouging concerns are exaggerated.

3. Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?

Combatting misleading representations is another key enforcement priority for the Competition Bureau.[73] As with merger enforcement, it has been "business as usual" for the Bureau in this area as well.

In May 2020, for example, the Competition Bureau announced that it was actively monitoring the market for misleading representations that gave Canadians a false impression that the products or services being advertised treated or protected against COVID-19.[74] The Competition Bureau stated that it had already issued several compliance warnings to businesses, and it cautioned all businesses to consider the severe financial penalties and jail time they could face if they failed to comply with the CA in this regard. The Commissioner announced subsequently that most of the businesses contacted had taken corrective action to remove products from the market or to cease the misleading claims.[75]

4. Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?

The impact of competition law on labour and employment markets is another area that has not been a specific priority, certainly in recent years. However, this also may change as a result of the Pandemic. Interestingly, though, the impetus for this change, should it occur, will be political rather than emanating from the Competition Bureau.

The issue crystallized when, in June 2020, three major Canadian food retailers simultaneously ended their temporary $2 per hour wage increase, which had been implemented to compensate their front-line employees for the additional risk they assumed during the pandemic.[76] Questions were raised about whether this constituted illegal price fixing contrary to section 45 of the CA. In response to these queries, the Competition Bureau released a statement in November 2020 acknowledging that agreements between competing employers affecting employees, such as wage-fixing and non-poaching agreements, may raise "serious competition issues". However, the Bureau noted that it does not have the jurisdiction to pursue such agreements as criminal violations because section 45 does not apply to agreements between competitors involving the "purchase" of products (such as the services of employees), only the "supply" of products.[77] The Bureau added that while it could pursue anticompetitive "buy-side agreements" under the

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73 The CA prohibits representations to the public that are false or misleading in a material respect. Depending upon the circumstances, misleading representations can be the subject of criminal prosecution or civil proceedings. Penalties include imprisonment (for a criminal offence) and financial penalties (either criminal or civil).

74 Competition Bureau, News Release, "Competition Bureau cracking down on deceptive marketing claims about COVID-19 prevention or treatment" (May 6, 2020), https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-cracking-down-on-deceptive-marketing-claims-about-covid-19-prevention-or-treatment.html.

75 Matthew Boswell, Commissioner of Competition, Speech delivered at the Meeting of the Standing Committee on Industry, Science and Technology (December 3, 2020), https://www.canada.ca/en/competition-bureau/news/2020/12/protecting-canadians-during-the-pandemic-and-driving-economic-recovery.html .

76 House of Commons, Report of the Standing Committee on Industry, Science and Technology, "Wage Fixing in Canada and Fairness in the Grocery Sector" (June 18, 2021), https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/report-6/page-27.

77 Competition Bureau, "Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements" (November 27, 2020), https://www.canada.ca/en/competition-

CA's civil provision governing anticompetitive agreements between competitors (section 90.1), this would require proving that the agreements substantially prevented or lessened competition, which is not "a low threshold" to meet.

The issue was then taken up by the Standing Committee on Industry, Science and Technology, which had initiated hearings into the conduct of the retailers. The Committee released its report in June 2021, concluding that the "lack of provisions prohibiting purchase-side agreements between competitors that amount to cartel-like practices, such as wage-fixing agreements, is a significant gap" in the CA. The Committee also noted that this gap made Canadian law inconsistent with U.S. law, where the authorities have made it a priority to pursue criminal proceedings against wage-fixing and non-poaching agreements between employers. Accordingly, the Committee recommended "that the Government of Canada introduce legislation amending section 45 of the *Competition Act* to prohibit cartel-like practices related to the purchase of goods and services, including wage-fixing agreements between competitors."[78] It now remains to be seen whether this recommendation will be adopted by the government.[79]

Another employment-related issue that has surfaced because of the Pandemic is whether the Competition Bureau should take into account the impact of a proposed transaction on employees when assessing its competitive effects. Again, this is not a factor that has historically been considered in the Competition Bureau's merger review process. However, the impact of the Pandemic on employment has led some observers, including former Commissioners, to raise the prospect that the effect of a transaction on employees is a legitimate merger control concern. The Competition Bureau has not yet commented on this issue itself, but it may be an attractive concept because of another issue that is a current Bureau objective, namely eliminating the CA's "efficiencies defence". This defence allows merging parties to argue that their transactions should proceed because the efficiencies generated (including from reductions in employees) outweigh the anticompetitive effects. The Bureau might like the idea of promoting employee concerns as a cognizable merger control factor if that helps it promote the notion that the efficiencies defence (which in some sense favours employee reductions) ought to be revoked.[80]

In short, the Pandemic has opened the widow to a re-evaluation of whether certain aspects of Canadian competition law and enforcement should be changed.[81] This may be part of a general sense that "things need to be done differently" following the Pandemic. It is also unquestionably influenced by the burgeoning "Biden revolution" in antitrust enforcement in the United States. Regardless, there is no doubt that any such broadening of the areas of competition law concern in Canada, should that occur, would be a major departure from the traditional view that competition law ought to be based on "objective" economics and not "value-based" public

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bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html. This position has since been confirmed by the Federal Court of Canada. See Mohr v National Hockey League, 2021 FC 488 (May 27, 2021).

78 House of Commons, Report of the Standing Committee on Industry, Science and Technology, "Wage Fixing in Canada and Fairness in the Grocery Sector" (June 18, 2021), https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/report-6/page-21.

79 Anticompetitive buy-side agreements were historically subject to criminal sanction in Canada. However, in amendments made to the CA in 2009, they were removed from the purview of section 45, the Competition Bureau having taken the view that since such agreements could be pro-competitive in certain circumstances, they should not be subject to a blanket criminal prohibition. If this position is to be reversed, it will be important to craft any amendments so that they do not automatically criminalize potentially consumer welfare enhancing buy-side arrangements.

80 For a more detailed discussion, see the following articles by Julius Melnitzer: "Perfect Storm for Canadian jobless, Part I:M&A uptick and employment growth" (May 12, 2021) and "Perfect Storm for Canadian jobless, Part II: making jobs count in M&A" May 13, 2021), https://legal writer.net. It should be noted that the strong economic and employment recovery to date may weaken the argument that the Pandemic justifies including employee-related effects as a merger control concern.

81 One issue that has not been raised in the Pandemic context is whether the Competition Bureau should expand its policy goals to include environmental and sustainability concerns. To date, the Bureau's interest in this area has been largely limited to preventing "greenwashing", i.e., false or misleading environmental advertisements or claims. See, e.g., the Bureau's 2008 "Environmental claims" guidelines", which provide businesses with the tools to ensure that their environmental claims are accurate and not misleading: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/guide-for-industry-and-advertisers-en.pdf/$FILE/guide-for-industry-and-advertisers-en.pdf.

5. Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?

The ICA authorizes the Canadian government to review certain investments by non-Canadians in Canadian businesses and, where considered appropriate, to prohibit these investments from proceeding, order investments to be unwound or divestitures made, or permit the investments to proceed subject to conditions or undertakings.[82]

There are two aspects to ICA review:

- the "net benefit review" process, and
- the "national security review" process.

Pursuant to the net benefit review process, a non-Canadian acquiring control of a Canadian business (including a business in Canada owned by a foreign entity), and whose acquisition exceeds certain monetary thresholds, must satisfy the government that its investment will be of net benefit to Canada. These reviews are typically required to take place pre-closing. Although the ICA sets out various factors to be considered in this regard, the decision is largely discretionary and will depend on the type and quality of binding commitments (undertakings) that the non-Canadian investor is prepared to provide the Canadian government with respect to the Canadian business post-investment. Typical undertakings relate to the role of Canadian management; employment; and investments in the Canadian business, such as for capital expenditures and research and development. Virtually all transactions that are subject to net benefit review are approved on the basis of such undertakings.[83]

The ICA also authorizes the Canadian government to review foreign investments to determine if they are potentially injurious to Canadian national security interests. In contrast to the net benefit review process, there are no thresholds for the national security review process. For example, the value of the Canadian business is irrelevant and there is no requirement that control be acquired. Essentially, every foreign investment is potentially subject to national security review.

If the Canadian government finds that a transaction would be injurious to Canadian national security, it may prohibit the transaction, order it unwound (if already completed), or require "mitigating" undertakings as a condition for approval. According to the most recent statistics, available, there have been approximately 29 national security reviews commenced between 2009 (when the national security regime was enacted) and the end of fiscal 2020 (March 31, 2020). The government has issued orders in 18 of these reviews; in seven of the remaining cases, the investor abandoned the transaction after the national security review was commenced, while in only four cases were the transactions permitted to proceed without a remedy. In most of the 18 cases where an order was issued, the government required that the investment either be blocked or unwound; there have only been four cases where an investment was allowed to proceed based on conditions imposed. It is also worth noting that 17 of the 29 reviews involved Chinese investors.[84]

The Pandemic has had the additional effect of generating new interest in foreign investment issues in Canada, and specifically whether the ICA regime should be made more robust.

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82 For additional information regarding ICA review, please see the Annual Report for fiscal year 2019/2020, https://www.ic.gc.ca/eic/site/ica-lic.nsf/vwapj/2019-20AnnualReport_eng.pdf/$file/2019-20AnnualReport_eng.pdf.

83 Because of recent changes to the relevant thresholds, only a very few reportable transactions under the ICA are subject to full net benefit review. In the most recent fiscal year for which statistics are available (April 1, 2019 to March 31, 2020), less than 1% of reportable transactions underwent a full net benefit review (nine in total). As for transactions where the net benefit review thresholds are not exceeded (the vast majority of cases), investors are only required to submit a notice advising the government that the transaction has taken place; they are not required to obtain government approval for the investment. This notice may be filed prior to closing or within 30 days following closing.

84 At least one other transaction involving a Chinese investor was blocked in 2021, *i.e.*, the proposed acquisition by Shandong Gold Mining Co., Ltd. (a Chinese state-owned gold mining company) of TMAC Resources (a Canadian gold mining company operating in the Canadian North).

Most notably in that regard, the House of Commons Standing Committee on Industry, Science and Technology initiated a study in June 2020 to determine if additional changes to the ICA are required, including in response to issues raised by the Pandemic.[85] The committee issued its report in March 2021 with nine recommendations, some of which echo the concerns already seen in the Policy Statement and the Revised Guidelines.[86] For example, the committee recommended that:

a) the ICA thresholds for net benefit review be reviewed on an annual basis (currently only certain thresholds are subject to annual adjustment);
b) all SOE investments, regardless of value, be reviewed under both the ICA's national security regime (as provided for in the Revised Guidelines) **and** the net benefit review regime (currently, only SOE investments exceeding a prescribed threshold are subject to net benefit review);
c) the ICA be used to protect strategic sectors including, but not limited to, health, pharmaceuticals, agri-food, manufacturing, natural resources, and intangibles related to innovation, intellectual property, data and "expertise";
d) any Canadian business or entity holding a "sensitive asset" be required to notify the federal government 30 days before implementing the transfer of that asset to a non-Canadian entity;
e) there be enhanced and mandatory cooperation between the IRD and Canada's national security apparatus to analyze possible national security threats; and
f) the government be required to explain the factors for decisions made under the ICA, and to make public any undertakings or conditions imposed on foreign investors as the basis for the approval of transactions.

In addition to the Parliamentary committee efforts, a federal government task force is currently leading an interdepartmental policy review examining what, if any, additional measures are needed to ensure Canada's continued ability to respond to economic-based threats to national security.[87] The Pandemic was a significant impetus to this effort, as Canada's national security establishment has expressed concerns that the "uncertain environment" created by the Pandemic is "ripe for exploitation by threat actors seeking to advance their own interests" Specific concerns include the loss of sensitive goods, technology and intellectual property, the malicious use of sensitive personal information of Canadians, and compromised critical infrastructure.

Among the issues the task force is exploring is whether the ICA should be amended to help Canada better address economic-based threats to national security. The task force's consultation process is focussing on three principal questions in that regard:

a) should the ICA's procedures be amended to increase the scope of transactions that are subject to mandatory pre-closing review?
b) are mitigation measures (e.g. undertakings) that permit a transaction to proceed subject to conditions effective in dealing with potential national security concerns?
c) should the penalties for non-compliance with the ICA be increased?

It is anticipated that the task force will issue its report in the coming year.

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85 This is the same committee that recommended that section 45 of the Competition Act be amended to criminalize "buy-side" agreements between competitors, such as wage-fixing and no-poaching agreements. See above.

86 House of Commons, Report of the Standing Committee on Industry, Science and Technology, "The Investment Canada Act: Responding to the COVID-19 Pandemic and Facilitating Canada's Recovery" (March 2021), https://www.ourcommons.ca/DocumentViewer/en/43-2/INDU/report-5/page-84#18.

87 Government of Canada, News Release, "Government of Canada expands work to address economic-based threats to national security" (May 27, 2021), https://www.canada.ca/en/public-safety-canada/news/2021/05/government-of-canada-expands-work-to-address-economic-based-threats-to-national-security.html.

6. Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?

- Enhanced Scrutiny" and Extended Timelines

The Canadian government moved quite quickly – and substantively – to adjust its approach to foreign investment review in the wake of the Pandemic. Although no changes were made to applicable thresholds, the government announced in an April 2020 policy statement (the "**Policy Statement**") that it would be applying "enhanced scrutiny" under the ICA to all "foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or the Government". The government added that it would also apply "enhanced scrutiny" to all investments by foreign state-owned enterprises ("**SOE**'s") or "private investors assessed as being closely tied to or subject to direction from foreign governments". The Canadian government did not state expressly what it meant by "enhanced scrutiny" in this regard, but suggested that this could involve additional information requirements or extensions of timelines for review.[88]

The Policy Statement explained that the Canadian government's new approach was necessary "to ensure that inbound investment does not introduce new risks to Canada's economy or national security, including the health and safety of Canadians." The Policy Statement specifically pointed to the concern that foreign investors might engage in "opportunistic behaviour" by snapping up Canadian businesses which had recently seen their valuations decline as a result of the Pandemic. The Policy Statement also expressed concern that foreign SOE's "may be motivated by non-commercial imperatives that could harm Canada's economic or national security interests", e.g., by buying up Canadian companies and re-directing their production to the new "home country".

Following the Policy Statement's suggestion of extended timelines, the Canadian government passed legislation in July 2020 permitting the extension of certain legislative time limits, including those under the ICA.[89] Pursuant to this authority, the government extended the timelines for the national security review process by as much as six months (subject to even further extensions on consent), meaning that the entire process could take up to 260 days to complete (or more). The amending legislation provided that these longer timelines would expire on December 31, 2020 unless otherwise extended. Fortunately they were not extended, and the pre-Pandemic national security review timelines again apply.[90]

The other key question was how long the government would apply "enhanced scrutiny" to foreign investments as set out in the Policy Statement. The Policy Statement said that the new enhanced scrutiny would apply "until the economy recovers from the effects of the COVID-19 pandemic", which afforded the government considerable leeway to decide. In light of that, many observers believed that, whether formally or not, the government's temporary policy would likely become a fixed part of foreign investment review in Canada.

And that is effectively what happened.

In March 2021, the government issued revised "Guidelines on the National Security Review of Investments" (the "**Revised Guidelines**") outlining changes/clarifications to the government's approach to national security reviews.[91] Among other things, the Revised Guidelines state that: all investments by

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88 The Investment Review Division of Innovation, Science and Economic Development Canada, Ministerial Statement, "Policy Statement on Foreign Investment Review and COVID-19" (April 18, 2020), https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html.

89 Government of Canada, "Temporary Extension of Certain Timelines in the National Security Review Process Due to COVID-19" (July 31, 2020), https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81225.html.

90 Pursuant to these timelines, the Canadian government has an initial period of 45 days to decide if it will commence a national security review, which it can extend unilaterally by another 45 days (for a total of 90 day after filing). If the government decides to initiate a formal review (either after 45 or 90 days), the review can last at least another 110 days, subject to further extension. As such, even under now "normal" circumstances, national security reviews can take 200 days or more to be completed. According to the most recent government statistics, the government took an average of 217 days to complete the national security reviews it conducted in fiscal 2019/2020.

91 Government of Canada, "Guidelines on the National Security Review of Investments" (March 24, 2021), https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html.

foreign SOEs in Canadian businesses will now be subjected to "enhanced scrutiny" regardless of the value of the investment. The Revised Guidelines also re-emphasize that one of the factors the government will consider in determining whether a foreign investment constitutes a national security risk will be the impact on "the security of Canada's critical infrastructure", including infrastructure that is "essential to the health…of Canadians". The Revised Guidelines also clarify that in considering whether a transaction will involve the transfer of "sensitive technology" outside of Canada (another form of national security risk), the government will include "medical technology" among its areas of concern.

In other words, the two key (but ostensibly temporary) aspects of the Policy Statement – i.e., an enhanced focus on investments by SOE's and on investments that impact the public health sector – are now enshrined by the Revised Guidelines as permanent elements of the Canadian national security review process going forward.[92]

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

The CA authorizes the Competition Bureau to review any merger transaction to determine if it is likely to result in a substantial prevention or lessening of competition. As part of this merger control process, certain types of proposed mergers that exceed prescribed financial and other thresholds must be notified to the Competition Bureau prior to closing and cannot be implemented until the prescribed waiting period has expired or been waived. This waiting period is 30 days following the filing of the notification, but it may be extended if the Competition Bureau issues a Supplementary Information Request ("**SIR**") to the parties (analogous to the US Second Request or a European Phase 2 review). In that case, the waiting period expires 30 days after compliance with the SIR.

Layered on top of this statutory process, the Competition Bureau also applies non-binding "service standards" to its substantive review of transactions. Pursuant to these service standards, the Bureau will endeavour to complete its review of "non-complex" transactions within 14 days of the filing of relevant materials, and to complete its review of "complex" transactions within 45 days of the filing of relevant materials (unless a SIR has been issued).

If the Competition Bureau believes at the conclusion of its review that a merger transaction is likely to result in substantial anticompetitive effects, it may apply to the Competition Tribunal for an order blocking or unwinding the transaction, or any part thereof.[93] The Competition Bureau has up to one year following the closing of the transaction to bring such a challenge.

The Pandemic did not lead to any adjustments to the statutory waiting periods applicable to notifiable transactions or to the Competition Bureau's service standard periods for substantive review. There was some concern initially that, even though no formal changes were made to the Competition Bureau's service standards, the pandemic would nonetheless lead to slower review times for transactions in practice. Indeed, at the very outset of the Pandemic (at least as formally recognized by the Canadian government), the Competition Bureau issued a cautionary statement that, owing to various restrictions (such as the

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92 There were several other notable changes included in the Revised Guidelines. First, in addition to medical technology, the Revised Guidelines identify other sorts of technology as being "sensitive", including artificial intelligence, biotechnology, and space technology. Second, the Revised Guidelines provide additional examples of what constitutes "critical infrastructure" for national security review purposes, including energy and utilities, finance, food, transportation, water and manufacturing. Third, the Revised Guidelines add two new areas of scrutiny for national security review: whether the transaction will impact the production of critical minerals and critical mineral supply chains, and whether the transaction will enable the foreign investor to access and exploit sensitive personal data. In truth, however, the addition of these two factors came as no surprise in that they had already arisen as issues of concern in prior national security reviews.

93 The Competition Tribunal is a specialized administrative body comprised of judges and lay experts. Its mandate is limited to adjudicating applications with respect to the civil matters governed by the CA, including mergers, abuse of dominance, exclusive dealing, misleading advertising and certain types of non-criminal agreements between competitors.

requirement that staff work at home), it might not be able to meet its service standard timelines for merger reviews.[94]

There were no doubt some issues early on – for example, it became more difficult for Competition Bureau officers to reach market contacts to solicit their views about transactions , and adjustments had to be made regarding the receipt of materials (which now had to be done exclusively online).In our experience, however, the Competition Bureau's merger review process continued to function relatively smoothly overall and inordinate delays were avoided. This is borne out by Competition Bureau statistics for fiscal 2020/2021 (i.e., from April 1, 2020 to March 31, 2021). For example, the average time for non-complex reviews during that year actually decreased from the 2019/2020 (pre-Pandemic) fiscal year; moreover, while the average time for complex reviews increased in 2020/2021from the 2019/2020 fiscal year, it was still below the average time for years before 2019.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

One reason that the Competition Bureau may have been able to weather the Pandemic fairly well is that it was dealing with fewer merger reviews than normal. From that perspective, the Pandemic clearly had a material impact on the merger review process. According to Competition Bureau statistics, a robust 13% year-over-year increase in merger reviews in the first quarter of 2020 was followed by year-over-year declines of 55%, 40%, and 24% in the second, third, and fourth quarters of 2020, respectively.[95] All told, there were only 179 merger filings made in the Competition Bureau's fiscal 2020/2021 year , which marked a 22% decrease from the prior 2019/2020 fiscal year and represented the lowest number of annual filings since the Competition Bureau began collecting this type of data.

The Pandemic's other effect, although more indirect, can be seen in the reduction of one of the CA's key pre-merger notification thresholds in 2021. Under the CA, a merger transaction is notifiable only if, *inter alia,* the target of the merger exceeds the threshold relating to the value of its assets in Canada and gross revenues from sales in or from Canada. This threshold is adjusted annually based on a formula tied to Canada's GDP. The threshold in 2020 was C$96 million, but was reduced to C$93 million in 2021.[96] This reduction reflects the contraction in the Canadian economy stemming from the Pandemic's impact on economic activity.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

Given that the Competition Bureau is not obliged to release reasons for its decisions, we cannot say with complete certainty that no transaction has been cleared during the Pandemic on the basis of failing firm arguments. However, we believe it is a fair assumption that this has not been the case.

[94] Matthew Boswell, Commissioner of Competition, "Letter from the Commissioner to the Canadian Bar Association regarding impacts of the COVID-19 pandemic" (March 18, 2020), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04523.html.

[95] Competition Bureau, "Monthly Report of Concluded Merger Reviews" (June 10, 2021), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04294.html.

[96] Competition Bureau, News Release, "Pre-merger notification transaction-size threshold decreases to $93M in 2021" (February 11, 2021), https://www.canada.ca/en/competition-bureau/news/2021/02/pre-merger-notification-transaction-size-threshold-decreases-to-93m-in-2021.html.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

There was speculation at the outset of the Pandemic that the Competition Bureau might relax its standards in anticipation of an increase in transactions involving target companies under economic duress. This speculation was given a boost by the Competition Bureau's announcement in April 2020 that it had cleared the merger of Total Metal Recovery Inc. ("**TMR**") and American Iron & Metal Company Inc. ("**AIM**") on the grounds that that TMR was a failing firm and that its assets were likely to exit the market in the absence of the merger.[97] Although no connection was drawn to the Pandemic (since TMR had entered into its dire financial straits before that), some market observers thought that this could be a sign that the Bureau would be more receptive to the failing firm argument when made in the Pandemic context.

The Competition Bureau took a different view. In September 2020, for example, the Deputy Commissioner in charge of the Competition Bureau's Mergers branch expressly stated that the Bureau did not intend to relax its standards to accommodate the acquisition of any firms weakened by the Pandemic.[98] The Commissioner delivered the same message in a speech made later in 2020: "Sadly, in the months ahead, it is possible that we will see a rise in merger transactions involving failing businesses. In assessing these transactions, we must maintain our normal rigour and analytical framework. Relaxing our standards in a crisis period could cause irreversible enhancement of market concentration, leading to deeper and longer-term harm to consumers and the economy."[99]

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It is interesting to compare the Competition Bureau's strict approach to failing firm arguments with the attitude of other regulators charged with the task of reviewing potential mergers during this time. This contrast in approach was made very clear in the case of the proposed acquisition by Air Canada of its rival Transat A.T., Inc. ("**Air Transat**").

The parties announced their proposed transaction in June 2019. Pursuant to the special rules applicable to airline mergers in the *Canada Transportation Act* (the "**CTA**"), the transaction was subject to both competition review by the Competition Bureau under the CA and to a "public interest" review by Transport Canada under the CTA (Transport Canada is the federal ministry responsible for transportation matters). Canada's Minister of Transport would then decide the fate of the transaction.

The Competition Bureau issued its report on the proposed transaction in March 2020, concluding that the merger should not be allowed to proceed because it was likely to substantially prevent or lessen competition on numerous routes where the parties competed. The report noted that the Competition Bureau's analysis was based entirely on pre-Pandemic data and that it did not purport to assess the impact of the Pandemic on the airline industry. Transport Canada issued its own "public interest assessment" in May 2020, which also expressed concerns about the transaction. The Minister of Transport then asked the parties to address these concerns, which they did by changing aspects of the proposed transaction and also by proposing detailed remedial measures that they would be willing to adopt.

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97 Competition Bureau, News Release, "Competition Bureau closes investigation of scrap metal processor AIM's acquisition of TMR" (April 29, 2020), https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-closes-investigation-of-scrap-metal-processor-aims-acquisition-of-tmr.html.

98 Jeanne Pratt, Competition Policy International, "Canadian Merger Review: Assessing Failing Firm Claims in Market Conditions Disrupted by COVID-19" (September 7, 2020), https://www.competitionpolicyinternational.com/canadian-merger-review-assessing-failing-firm-claims-in-market-conditions-disrupted-by-covid-19/.

99 Matthew Boswell, Commissioner of Competition, "Protecting Canadians during the pandemic and driving economic recovery", Opening Statement at a Meeting of the House of Commons Standing Committee on Industry, Science and Technology (December 3, 2020), https://www.canada.ca/en/competition-bureau/news/2020/12/protecting-canadians-during-the-pandemic-and-driving-economic-recovery.html.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

N/A

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

In short, although the Minister was prepared to incorporate Pandemic-related considerations into his analysis, it seems that the Competition Bureau remained unwilling to alter its approach to merger review even in the face of these considerations. Once can appreciate the Competition Bureau's desire to maintain standards that are applicable in all circumstances. However, one also wonders if this refusal to deviate even in the face of the Pandemic demonstrates the optimum level of flexibility when dealing with clearly unusual circumstances.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

It is interesting to compare the Competition Bureau's strict approach to failing firm arguments with the attitude of other regulators charged with the task of reviewing potential mergers during this time. This contrast in approach was made very clear in the case of the proposed acquisition by Air Canada of its rival Transat A.T., Inc. ("**Air Transat**").

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The Competition Bureau rejected the adequacy of the proposed remedies, largely because they were behavioural rather than structural in nature, and maintained its objection to the proposed transaction. However, the Minister overruled the Competition Bureau and decided to approve the merger on public interest grounds in February 2021.[100] The impact of the Pandemic on Air Transat and the airline industry was a major factor in the Minister's decision. In particular, the Minister noted the financial challenges faced by Air Transat because of the Pandemic, including the need to raise significant funds to continue operating and compensate for ongoing losses. In language reminiscent of the CA's failing firm consideration, the Minister concluded that it could not be assumed that Air Transat would survive as an independent

[100] Transport Canada, News Release, "Government of Canada approves proposed purchase of Transat A.T. Inc. by Air Canada" (February 11, 2021), https://www.canada.ca/en/transport-canada/news/2021/02/government-of-canada-approves-proposed-purchase-of-transat-at-inc-by-air-canada.html.

competitor, and that rejecting the proposed transaction would help preserve competition. To the contrary, the Minister concluded that allowing the proposed transaction to proceed would benefit competition by ensuring a "clear and stable future" for Air Transat, providing operating efficiencies to the wider Canadian air transportation system, and maintaining employment in the sector.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

The Pandemic's impact on Canadian competition law enforcement has been rather modest. By and large, the Competition Bureau has adopted a "business as usual" approach and no special measures were adopted or amendments introduced to deal with the Pandemic's effects. That said, the Pandemic has encouraged more in-depth consideration of whether Canadian competition law and enforcement procedures should be changed to become more sensitive to public interest type considerations that have not figured prominently in competition law analysis to date. It remains to be seen whether and to what extent this will be translated into concrete steps.

By contrast, Pandemic-related considerations have had a much more profound effect on the application and enforcement of Canadian foreign investment review law, particularly in the realm of national security reviews. The result has been to broaden the potential scope of national security reviews in Canada, and thus the uncertainty faced by foreign investors as to whether and when their investments might be caught. Proposed amendments to the ICA may expand the foreign investment review net even further.[101]

As a result of these changes, foreign parties considering investments in Canada must pay even more attention to the ICA's national security review process in their transaction planning.[102] In certain cases, investors may be well-advised to take steps to engage with the authorities as far as possible in advance in order to clarify the regulatory risk they face. This could involve informal discussions with the IRD and other relevant government agencies. It could also involve adopting filing strategies that expedite the government's assessment of their investments, e.g., by filing materials sufficiently in advance of closing to ensure a response (positive or negative) before the transaction is implemented. In particularly difficult cases, vendors may also wish to consider including "best efforts" or "hell or high water" provisions in the transaction agreement in order to ensure that investors will do what they can to secure government approval.

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

Combatting misleading representations is another key enforcement priority for the Competition Bureau.[103] As with merger enforcement, it has been "business as usual" for the Bureau in this area as well.

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[101] Statistics and details regarding national security reviews since the Pandemic started are not yet available. The only transaction blocked in that time for which information is publicly available involved the potential acquisition by a Chinese state-owned gold mining company (Shandong Gold Mining Co., Ltd.) of a Canadian gold mining company operating in the Canadian North (TMAC Resources). That transaction likely would have been at risk even without the "enhanced scrutiny" of SOE investments precipitated by the Pandemic. That said, our firm has dealt with several cases where this "enhanced scrutiny" led to much more intensive review of foreign investments that would not have raised issues pre-Pandemic.

[102] It would be a mistake for investors to conclude that this is "just a problem" for Chinese investors. Although Chinese investments make up a majority of the transactions subjected to national security reviews so far, the gap is closing.

[103] The CA prohibits representations to the public that are false or misleading in a material respect. Depending upon the circumstances, misleading representations can be the subject of criminal prosecution or civil proceedings. Penalties include imprisonment (for a criminal offence) and financial penalties (either criminal or civil).

In May 2020, for example, the Competition Bureau announced that it was actively monitoring the market for misleading representations that gave Canadians a false impression that the products or services being advertised treated or protected against COVID-19.[104] The Competition Bureau stated that it had already issued several compliance warnings to businesses, and it cautioned all businesses to consider the severe financial penalties and jail time they could face if they failed to comply with the CA in this regard. The Commissioner announced subsequently that most of the businesses contacted had taken corrective action to remove products from the market or to cease the misleading claims.[105]

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

In July 2021, the Competition Bureau made public that it was investigating an accounting firm for potentially false or misleading claims made when promoting services to Canadians wanting to apply for government benefit programs implemented in response to the Pandemic.[106] The Competition Bureau said that it had applied for court orders requiring the firm to produce records and information relevant to the Bureau's investigation. It added that it still had not reached a conclusion of wrongdoing at that time. As of the date of writing, this was the only specific enforcement case that the Bureau had disclosed involving alleged misleading representations related to the Pandemic.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

Interestingly, the Competition Bureau was willing to be slightly more flexible, at least for the sake of appearance, when it came to dealing with another key issue raised by the Pandemic, i.e., the prospect of enhanced collaboration between competitors to respond to the crisis.

Anticompetitive collaborations between competitors can potentially violate several provisions of the CA. For example, section 45 of the CA makes it a criminal offence for competitors to enter into agreements or arrangements to fix or control prices for the supply of a product, to allocate sales, territories, customers or markets for the supply of a product, or to fix or control the production or supply of a product. In addition, section 47 of the CA makes it a criminal offence for parties to engage in bid-rigging. Finally, section 90.1 of the CA authorizes the Commissioner to commence civil proceedings against any other type of agreement between competitors that is likely to prevent or lessen competition substantially in a market.

Early on in the Pandemic, the Competition Bureau announced that it would be willing to "accommodate pro-competitive collaborations between companies to support the delivery of affordable goods and services to meet the needs of Canadians" and that it did "not wish to see specific elements of competition law enforcement potentially chill what may be required to help Canadians."[107]

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[104] Competition Bureau, News Release, "Competition Bureau cracking down on deceptive marketing claims about COVID-19 prevention or treatment" (May 6, 2020), https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-cracking-down-on-deceptive-marketing-claims-about-covid-19-prevention-or-treatment.html.

[105] Matthew Boswell, Commissioner of Competition, Speech delivered at the Meeting of the Standing Committee on Industry, Science and Technology (December 3, 2020), https://www.canada.ca/en/competition-bureau/news/2020/12/protecting-canadians-during-the-pandemic-and-driving-economic-recovery.html .

[106] Competition Bureau, News Release, " Competition Bureau investigates Canada Tax Reviews' marketing practices regarding pandemic benefit programs" (July 9, 2021), https://www.canada.ca/en/competition-bureau/news/2021/07/competition-bureau-investigates-canada-tax-reviews-marketing-practices-regarding-pandemic-benefit-programs.html.

[107] Competition Bureau, News Release, "Statement from the Commissioner of Competition regarding enforcement during the COVID-19 coronavirus situation" (March 20, 2020), https://www.canada.ca/en/competition-bureau/news/2020/03/statement-from-the-commissioner-of-competition-regarding-enforcement-during-the-covid-19-coronavirus-situation.html. Competition Bureau, News Release, "Competition Bureau statement on competitor collaborations during the COVID-19 pandemic" (April 8, 2020),

Specifically, the Competition Bureau stated that it would "generally" refrain from exercising scrutiny in circumstances "where there is a clear imperative for companies to be collaborating in the short-term to respond to the [COVID-19] crisis, where those collaborations are undertaken and executed in good faith and [where they] do not go further than what is needed".

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

Although the Competition Bureau did not materially alter its enforcement policies as a result of the Pandemic, it did use the opportunity to argue that protecting and enhancing competition would be central to both weathering the Pandemic and ensuring a robust post-Pandemic economic recovery.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

The Competition Bureau highlighted in this regard the potential for firms to form buying groups or share supply chain resources, such as distribution facilities, to ensure that Canadians have access to critical goods and services without fear of enforcement under the CA. However, the Competition Bureau also emphasized that its enforcement restraint would be limited to situations in which "firms are acting in good faith, and motivated by a desire to contribute to the crisis response rather than achieve a competitive advantage." The Competition Bureau also said that it would have "zero tolerance" for any attempts to abuse its enforcement flexibility to engage in conduct that would breach the CA.

The Competition Bureau also announced that it would be willing to provide "informal guidance" to companies seeking "greater certainty and more specific guidance on whether the Commissioner of Competition would take enforcement action to proposed business collaborations necessary to meet the urgent needs of Canadians during the crisis."[108] To facilitate this process, the Competition Bureau established a team devoted to providing "rapid decisions" in response to requests for guidance.

Our understanding is that, notwithstanding the Competition Bureau's offer, it has not received any requests for informal guidance on competitor collaborations related to the Pandemic. This may be a result of the several caveats that the Competition Bureau applied to its willingness to provide such opinions, namely that any informal guidance could be time-limited, subject to conditions, and disclosed to the public, and that the guidance would not insulate the collaboration from potential private actions.

It is also the case that, to date, there have been no criminal prosecutions or civil proceedings against conduct tied to the Pandemic. That said, we understand that the Competition Bureau has opened criminal investigations into Pandemic-related conduct, and that warning letters have been sent to parties who had allegedly agreed to raise prices in order to recover from losses incurred during the Pandemic. We also understand that, in one such case, the allegedly illegal conduct was halted in response to a warning received from the Competition Bureau. Given the pace at which the Competition Bureau's investigations normally proceed, it may be many years before we see a criminal prosecution or civil proceeding related to the Pandemic, if ever.[109]

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https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html.

[108] This offer was unusual in that the Competition Bureau, in recent years at least, has not actively encouraged parties to seek advisory opinions, a mechanism which is available under the CA. As one former Commissioner put it, the Competition Bureau is in the business of enforcing the CA, not providing legal opinions.

[109] There was also one Pandemic-related situation in which the Competition Bureau declined to pursue criminal proceedings because of a lack of jurisdiction under section 45 of the CA. This case involved the alleged coordination between several Canadian grocery retailers regarding the cessation of special COVID-19 bonus payments to employees. The Competition Bureau said that while

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

For the most part, this involved repeating the standard message that Canadian governments and regulatory bodies should adopt competition-friendly policies in order to stimulate entry, productivity and innovation. To that end, the Competition Bureau released a "toolkit" to help policymakers at all levels of government assess the competition impact of new and existing policies, and tailor those policies to maximize the benefits of competition to the economy.[110]

21. **Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

In light of the unprecedented stimulus measures adopted by the Canadian government in the wake of the Pandemic, the Competition Bureau also has warned governments to be alert to the dangers of bid-rigging in their procurement processes. In February 2021, for example, the Bureau issued a document that highlights the need for vigilance against bid-rigging "as governments begin to invest in Canada's economic recovery", and provides tips for doing so.[111] This is another traditional enforcement message for the Bureau.

It seems, however, that the Competition Bureau may also be taking the opportunity to use the Pandemic to push beyond the traditional concerns of Canadian competition law (or at least what have been those concerns for the last several decades). We see this particularly in the area of "diversity", where the Bureau is taking a leading role in considering how competition law could be used to address social issues affecting a broad suite of "identity factors" that have long been considered outside the proper purview of competition enforcement.[112]

This was the core message of a recent speech by Commissioner Boswell, where he argued that competition law should be used not only to promote economic growth post-Pandemic (as seen above), but that it should be used to help foster "inclusive" growth that "creates opportunities and reduces barriers for *all* Canadians" (emphasis in original).[113] In making this point, Commissioner Boswell pointed to the "disproportionate" impact of the Pandemic on women and "marginalized groups", and said that the Bureau needs to ask "new" questions, such as whether it should take on cases where the potential anticompetitive damage "may be lower to Canadians *as a whole,* but skewed towards particular segments of the Canadian population" (emphasis in original).[114]

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it viewed such conduct with concern, it lacked the jurisdiction to proceed under section 45 because the conduct involved coordination with respect to prices paid for the "purchase" of a product and not the "supply" of a product, which is the only type of conduct governed by section 45. The Competition Bureau also gave the impression that it would have been difficult to pursue this case under the CA's civil provision prohibiting other types of anticompetitive agreements between competitors because of the requirement to prove a substantial negative impact in the relevant market. As discussed below, this incident has led to calls that section 45 of the CA should be amended to expand the criminal prohibition in section 45 of the CA to wage-fixing and other "buy-side" agreements of this nature.

110 Competition Bureau, News Release, "Competition Bureau launches toolkit to help policymakers strengthen competition in Canada's economy" (August 20, 2020), https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-launches-toolkit-to-help-policymakers-strengthen-competition-in-canadas-economy.html.

111 Competition Bureau, "Competitive bidding processes in the public sector: Procuring good value for taxpayer money" (February 5, 2021), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04575.html.

112 For example, the Competition Bureau is working with the OECD to develop further research on the link between competition and gender.

113 Matthew Boswell, Commissioner of Competition, "Fostering inclusive growth through competition", CBA Competition Law Spring Online Symposium (April 29, 2021), https://www.canada.ca/en/competition-bureau/news/2021/05/fostering-inclusive-growth-through-competition.html.

114 For a more detailed discussion of this issue, see Vassos and Creighton, "The Competition Bureau's Journey Towards Inclusive Competition", CPI Antitrust Chronicle (April 2021), https://www.competitionpolicyinternational.com/the-competition-bureaus-journey-towards-inclusive-competition/.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

CHILE

By: Lorena Pavic, José Pardo, Raimundo Gálvez and Fernando Flores

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

In the context of the COVID-19 pandemic, the Chilean Government and Congress have implemented public policies to face the economic aspects of the current health crisis. Specifically, the Government first announced in March 2020 an Economic Emergency Plan for US$11.75 billion[115], which included a reinforcement of the health system budget, labor income protection, solidarity funds to face the crisis, deferrals of tax payments, among others[116].

Since then, Government-backed programs have been implemented during the health crisis in order to safeguard companies' viability, through state benefits and credits, which are intended to help both families and SMEs who have lost their source of income over the course of the pandemic.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

In relation to price control, it is to note that the Chilean Sanitary Law gives extraordinary powers to the Ministry of Health when there is a pandemic or massive contagious disease threat[117]. In February 2020, the mentioned Ministry issued a Decree that regulated these extraordinary powers, stablishing, among others, the possibility of maximum price fixing for healthcare-related goods. Thus, in March 2020 it was stated that PCR tests had a ceiling price of USD$34 approx.[118], while real estate lease for sanitary residences – where people can do their quarantines– had a maximum price per square meter[119].

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

Not applicable.

[115] Government press release, available in: https://prensa.presidencia.cl/comunicado.aspx?id=148684.
[116] Central Bank of Chile, *Monetary Policy Report*, March 2020, p. 37, available in: https://www.bcentral.cl/en/content/-/details/informe-de-politica-monetaria-marzo-2020
[117] Sanitary Law, article 36: *"When a portion of the national territory is threatened or invaded by a pandemic or an important increase of any illness (…) the President, previously informed by the National Healthcare Service, can give extraordinary powers in order to avoid the illness' spread or take care of the emergency to the General Director".*
[118] Ministry of Health, *Resolución Exenta Nº203*, 25 March 2021.
[119] Ministry of Health, *Resolución Exenta Nº209*, 26 March 2021.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

Not applicable.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Not applicable.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

Other than what has been described above, there has been no price fixing in Chile due to COVID-19, although there have been several stakeholders, including congressmen and academics, who have advocated for its implementation as a measure to address commodities' rising price.

In this context, there are currently legislative initiatives that refer to commodities' pricing. On May 27th, 2021, the Chamber of Deputies approved a draft resolution requesting President Sebastián Piñera to make use of all the powers granted to him by the state of Constitutional Exception, in order to fix and stabilize prices of commodities, such as food, fuel and materials necessary for construction and repair of housing[120]. However, such draft resolution has no binding character, and only seeks for the Government to accept the idea and promote on its part the administrative and legal changes.

The following day, on May 28th, 2021, a group of Senators presented a bill that seeks to give the TDLC the power to fix the maximum price of food and construction materials, either for the conservation or repair of housing, under a state of Constitutional Exception[121]. The idea is to establish a mechanism to ensure the prices of essential goods for the survival and protection of the population. The bill is still in its first constitutional step in Congress.

On this subject, the National Economic Prosecutor, Ricardo Riesco, recently stated during a seminar organized by a university in early June 2021 that price fixing does not seem to be the right way to solve market failures, adding that, although it has a very noble origin, it does not seem to be the right way, as it is one of the main causes of inflation and prevents competition122. Specifically, Mr. Riesco said that "(…) when the State enters to fix prices, unless of course it is a natural monopoly, the only beneficiaries are the suppliers. And when they are the winners, we already know who the losers are: all of us, the consumers, with higher prices and worse products"[123].

[120] Chamber of Deputies, *Proyecto de Resolución No.1558*, 27 May 2021.
[121] Chamber of Deputies, *Boletín No.14264-07*, available in: https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=14845&prmBOLETIN=14264-07.
[122] Ricardo Riesco's intervention in webinar *Competition: Permanent challenges in changing times* (*"Libre Competencia. Desafíos permanentes en tiempos cambiantes"*), organized by University Finnis Terrae, 13 May 2021, available in: https://www.fne.gob.cl/fne-participo-en-charla-del-club-monetario-de-la-universidad-finis-terrae/.

[123] *Ídem*.

Furthermore, on July 13, 2021, the Supreme Court issued reports on these bills. In particular, the highest Court makes a series of observations to both bills, which in general are related to a series of shortcomings both at the content and procedural level.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

Regarding judicial proceedings, on April 2, 2020, Law 21,226 came into force, which established an exceptional regime for judicial proceedings and hearings, due to the impact of COVID-19 in Chile. The main changes introduced by this law included the suspension of Court hearings (except when urgent intervention is required), rules regarding the interruption of the statute of limitations for actions, suspension of evidentiary terms, teleworking modality and use of videoconferencing, among others. Also, the Chilean Competition Court[124] ("TDLC") and the National Economic Prosecutor[125] ("FNE") changed their protocols and procedures because of the pandemic, establishing that hearings, meetings and filings must be done remotely.

Most recently, on November 20, 2021, Law 21,394 was published in the Chilean Official Gazette, which came to reform the justice system to address the situation after the constitutional state of emergency of catastrophe decreed due to the pandemic, amending various legal bodies in order to mitigate the impact that the health crisis has had on the functioning of the courts of justice. In general terms, the law has two main objectives: to improve the efficiency of the justice system in order to address the current work overload; and to promote online modality for those procedures where this is possible.

Merger control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

In merger control, the Chilean system has not suffered formal modifications due to the COVID-19 crisis. In fact, the FNE has made clear that merger control regime's standards and procedure are strict and cannot be modified even in these critical conditions[126]. Similar statements have been made by the competition authorities of United Kingdom, Australia, and Germany[127].

However, it is to note that, on November 2, 2021, a new regulation on the form of the mandatory or voluntary merger control notification came into force[128]. According to the FNE, this new regulation

[124] TDLC, *COVID-19 sanitary emergency protocol* (*'Protocolo por emergencia sanitaria COVID-19*), 26 June 2020.
[125] FNE, *Resolution No. 188 that approves exceptional measures for procedures before the FNE due to the COVID-19 spread* (*'Resolución Exenta N°188, aprueba medidas excepcionales en procedimientos seguidos ante la Fiscalía Nacional Económica, atendido el brote de Coronavirus"*), 25 March 2020.
[126] Ricardo Riesco's intervention in webinar *Merger control in times of crisis* (*"Fusiones en tiempos de crisis"*), organized by University Adolfo Ibáñez, 13 May 2021, available in: https://www.fne.gob.cl/fne-participo-en-charla-sobre-politica-de-fusiones-en-tiempos-de-crisis/.
[127] *Joint statement on merger control enforcement*, Competition and Markets Authority, Australian Competition and Consumer Commission and Bundeskartellamt, 20 April 2021, available in: https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement.
[128] Available in: https://www.fne.gob.cl/nuevo-reglamento-de-notificacion-de-operaciones-de-concentracion-del-ministerio-de-economia-que-entra-en-vigencia-el-2-de-noviembre-sera-abordado-en-charla-de-la-fne/.

considers the opinions presented in the public consultation procedure held in March 2019 about the past merger control filing regulation form, in force since 2016, and aims to simplify the analysis of transactions that do not raise significant antitrust risks, in order to focus resources on complex transactions.

Mainly, this new regulation seeks to promote efficiency by including new hypotheses for the simplified procedure. Moreover, for cases where there is no horizontal overlap nor vertical relationships, a special notification procedure is created – like a "fast track"– that allows the parties to submit even less information than the required in the simplified procedure.

Recently, the FNE filed a claim before the TDLC against the company Navimag Carga S.A. for having monopolized the maritime route between Puerto Montt and Puerto Chacabuco, in the south of Chile. This, by having acquired the only competing vessel in said route, generating competition risks, increasing its rates, and decreasing the available supply. This is the first case, after the entry into force of the mandatory merger control in 2017, where the FNE files a claim against a company for an acquisition whose parties are under mandatory notification thresholds, for the illicit of "monopolization".

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

Regarding the turnover thresholds that are necessary to determine whether a concentration is subject to mandatory notification, they have not suffered any modifications neither. In August 2020, the National Economic Prosecutor told the press he was willing to reduce thresholds because of the critical financial conditions many enterprises were going through129, but no official change was made. The mentioned thresholds modification is explained because many companies have seen their turnovers reduced due to the financial crisis that COVID-19 caused, and with this scenario normal thresholds may not include transactions that should be assessed by the antitrust authority, considering their eventual competitive risks.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

Notwithstanding the foregoing, the COVID-19 emergency has impacted both the type of cases cleared and the assessment performed by the FNE. For instance, because of the pandemic the failing firm defence was recently claimed in the acquisition of a gas station by the Chilean company Copec130, where the Parties argued that, among other reasons, the pandemic had caused a critical financial situation in the acquired gas station, that would significate its bankruptcy and market exit if Copec did not acquire it. In its competitive assessment, the FNE confirmed its strict and unexceptional approach to merger cases during the pandemic, explaining that national contingency does not change essential requirements of the failing firm defence, that the Parties must prove during the investigation131. As noted in the closing investigation report, the

[129] Ricardo Riesco's interview to the newspaper *La Tercera*, 18 August 2020, available in: https://www.latercera.com/pulso/noticia/fne-apunta-a-bajar-umbral-de-ventas-para-regular-fusiones-y-adquisiciones-debido-a-crisis/SSMX7645E5GLRGUV436MYAEI7M/.

[130] Clearance report, case docket No. F-216-2019, *Asset acquisition from Inmobiliaria y Administradora CGL Limitada by Compañía de Petróleos de Chile COPEC S.A.*, 8 June 2020.

[131] *Idem*, paragraph 274 and Ricardo Riesco's intervention in webinar *Merger control in times of crisis* (*"Fusiones en tiempos de crisis"*), organized by University Adolfo Ibáñez, 13 May 2021, available in: https://www.fne.gob.cl/fne-participo-en-charla-sobre-politica-de-fusiones-en-tiempos-de-crisis/.

FNE stated that every requirement of this exceptional defense had to be fulfilled and issued an extensive analysis as if the operation would had been filed in normal times132.

Also, in the investigation regarding Uber's purchase of Cornershop133, the pandemic was considered a "natural experiment" of the different competitive effects the relevant market experienced, demonstrating the way it reacts to explosive changes in the supply and demand134.

The above-mentioned case consisted in the review of Uber's acquisition of Cornershop –a Chilean start-up app that provides home delivery of grocery stores– which was cleared without remedies. In its competitive assessment, the FNE identified several possible competition risks: (i) potential competitor elimination, considering a likely scenario that without the operation Uber would enter the grocery stores' home delivery market by its own, competing with Cornershop135; (ii) the lack of innovation in the market, because the merger would eliminate competition between the parties and, consequently, incentives for being the first one to innovate136; and (iii) conglomerate effects, meaning exclusionary and exploitative risks due to the important market shares Uber and Cornershop have in their active markets and the crucial role big data and network effects have in digital markets137.

All the identified risks were ruled out by the FNE because of, among other reasons, the role of COVID-19 as a "natural experiment"138. As explained in the closing report, the shock of demand for home delivery services showed how the industry's actors respond to explosive changes in the market structure. This is particularly useful to understand entrance barriers and limitations to competitors' expansion in the relevant market139. On the demand side, the pandemic showed how consumers react to certain products' lack of stock or new actors' entrance to the market, allowing the FNE to clearly understand the elasticity of demand and switching costs' relevance140.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

With respect to merger remedies' enforcement, the FNE has not modified their oversight during the pandemic. In fact, in September 2020 a lawsuit was filed before the TDLC against The Walt Disney Company and its subsidiary TWDC Enterprises 18 Corp.141 for allegedly breaching the remedies imposed by the FNE in the Disney-Twenty-First Century Fox, Inc. merger142 and for allegedly submitting false information during the pre-notification phase and in the merger's filing. Specifically, the competition agency requested a US$4 million fine against Disney and TWDC for the mentioned breaching, which shows the strict and continuous oversight the FNE kept during the pandemic. In June 2021, the FNE and Disney reached a settlement for the merger remedies' breaching whereby Disney will pay a USD$238,747 fine143.

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132 *"As noted in the Guideline, the Parties of the concentration operation that argue the defense must demonstrate the three previous requirements' compliance, which needs the FNE's certainty of the integral compliance of these requirements"* (free translation), *idem*., paragraph 203.
133 Case Docket No. F-217-2019, *Acquisition of Cornershop by Uber Technologies, Inc.*., 29 May 2020.
134 *Idem*, paragraph 86.
135 *Idem*, paragraph 138.
136 *Idem.*, paragraph 168.
137 *Idem.*, paragraphs 176 to 180.
138 *"(…) the pandemic crisis was an event that did not change or determined the investigation results, but reinforced some conclusions, consistent with other investigation records."* (free translation), *idem*, paragraph 90.
139 *Idem.*, paragraph 87.
140 *Idem.*, paragraph 88.
141 For more information, see: *FNE requests the TDLC a US$4 million fine against Disney and its subsidiary for submitting false information and breaching remedies imposed in merger with Fox*, available in: https://www.fne.gob.cl/fne-pide-al-tdlc-multa-de-us-4-millones-para-disney-y-filial-por-entregar-informacion-falsa-e-incumplir-compromiso-adoptado-en-operacion-de-concentracion-con-fox/.
142 Clearance report, case docket No. F-155-2018, *Acquisition of 21CF by Disney*, 19 March 2019.
143 For more information, see: *TDLC clears settlement between the FNE and The Walt Disney Company that established a CLP$174 million fine for breaching remedies*, available in: https://www.fne.gob.cl/tdlc-aprobo-acuerdo-entre-la-fne-

However, TWDC did not settle with the FNE, so the false information claim will continue its process before the Competition Court.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

Not applicable. See response to question 7.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

Not applicable. See response to question 10.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

According to its last annual public address, the FNE highlighted that they have initiated 45 investigations during the last 15 months. Of them, a 62% were opened ex-officio and 38% were initiated following a complaint144.

Specifically, regarding essential healthcare products' markets, several complaints have been filed before the FNE for alleged price fixing cartels and excessive prices. All these investigations have analyzed price variations in certain goods during the pandemic and have concluded that they have occurred because of supply and demand explosive changes, caused by the healthcare crisis. To this date, there have been two investigations145 closed by the FNE where the price fixing cartels and excessive pricing breaches were dismissed.

In the first investigation, members of the Chilean Congress argued that there was a price fixing cartel between supermarkets and drugstores that affected healthcare products (i.e., masks, alcohol gel, soap, sanitizers, wet soaks and COVID-19 related medicines). In its competitive assessment, the FNE concluded that there were no signs of collusion, mainly because prices had only risen by 10-15% compared to the

y-the-walt-disney-company-que-establece-pago-de-174-millones-a-beneficio-fiscal-por-incumplir-medidas-de-mitigacion/.

144 FNE, *2021 Annual Public Address*, 26 May 2021, available in: https://www.fne.gob.cl/wp-content/uploads/2021/05/CC
P2020.pdf.

145 Closing report, case docket No. 2623-20, *Denuncia Reservada*, 20 April 2021 and Case Docket No. 2613-20, *Denuncia Reservada*, 19 April 2021.

previous year146. In this way, a relative stability was verified in the average unit prices of the different categories.

Likewise, sales prices published by pharmacy chains on their websites for alcohol gel, gloves and masks between April and November 2020 were reviewed. This analysis showed that prices would have decreased after the peak identified in March 2020, remaining relatively stable for all categories. Furthermore, the closing report explains that price variations during the first months of the pandemic occurred due to the lack of stock produced by the explosive demand's increase and the higher importation costs, which had a rise of 200%147.

In the second investigation, the Associations of Midwives and Chemicals and Biochemicals claimed bid rigging and excessive prices committed by healthcare products suppliers in public tender processes of the Chilean Central Supply Agency ("CENABAST"). The FNE dismissed the accusations for similar reasons to the ones previously exposed, explaining that the price increase in healthcare products was caused by the lack of stock and uncertainty at the beginning of the pandemic, which also explained the reduced number of participants in CENABAST's public tender processes148. The competition authority also concluded, quoting the OECD, that higher prices during the first months of the COVID-19 crisis must be carefully analyzed by antitrust agencies, because companies may be reacting to increases in their own costs149-150.

Besides healthcare products, other complaints have been filed before the FNE, requesting an investigation into price increases in certain markets during the pandemic, specifically regarding essential goods and constructing materials, all of which reflects that commodities' prices are under constant review by local authorities.

One of the issues that has had the greatest media impact on this regard is the high prices reached by liquefied gas cylinders in the last year, which led to complaints from congressmen arguing anti-competitive behaviors in the gas market151. The latter was already being investigated by the FNE, which began a Market Study in November 2020152, which will comprehensively analyze the gas industry in Chile, given the fact that, according to the FNE, it is a highly sensitive market from a competitive perspective, its high levels of concentration and integration, and that it is a strategic input for the Chilean economy. Preliminarily, the risks identified by the FNE are related to the structure of the industry (from a horizontal and vertical perspective), the price differences between products and the regulatory asymmetry of the gas industry in comparison to other utilities, such as electricity and drinking water.

The above-mentioned Market Study released its preliminary report in October 2021, in which the FNE indeed found a low competitive intensity in the wholesale distribution segment and high coordination risks in the liquefied petroleum gas ("LPG") market. In this sense, they questioned the effects of vertical integration in the markets and recommended prohibiting the participation of wholesale distributors in the retail distribution of LPG. On the other hand, the imperfections of the natural gas ("NG") market would come mainly from regulatory flaws, so the FNE recommended specifying the open access regime NG transport networks and modifying the calculation of the maximum rate of profitability of NG distributors, so that it considers the profitability of the entire vertically integrated economic group.

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146 Closing report, case docket No. 2613-20, *Denuncia Reservada*, 19 April 2021, paragraph 20.
147 *Ibid.*, paragraph 24.
148 Closing report, case docket No. 2623-20, *Denuncia Reservada*, 20 April 2021, paragraph 24.
149 *Ibid.*, paragraph 27.
150 OECD, *Explotative pricing in the time of COVID-19"*, available in: https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf.
151 Chamber of Deputies, *Oficio No. 73028*, available in: https://www.camara.cl/verdoc.aspx?prmTIPO=OFICIO&prmID=173354&DESTINOID=129225
152 Investigation's opening resolution, case docket No. EM06-2020, available in: https://www.fne.gob.cl/wp-content/uploads/2020/11/Oficio-Resolucion-inicio-EM06-final__RRE.pdf

In addition to the investigation initiated by the FNE, the Chamber of Deputies announced the launch of an independent investigative commission, in charge of evaluating the actions of both the FNE and all public agencies in charge of ensuring competition in the fuel supply market153.

We have no information that the FNE, apart from the investigations already described, has decided to investigate based on new theories of harm. However, we do not rule out that the figure of excessive prices is an issue that the FNE will be thoroughly reviewing during this pandemic and going forward. Likewise, we have no record that the FNE has adopted a different approach in the case of digital markets distinct than the one explained in the Uber-Cornershop's case. Nevertheless, in May 2021, the competition agency launched a preliminary version of the new Horizontal Mergers Guideline, which includes a specific chapter for the assessment of mergers regarding digital markets154, given the distinctive characteristics of these markets and the elements that differ from the traditional analysis. For instance, and following the global trend in this matter, the FNE stablished that the competitive assessment in digital markets will analyze in greater detail when an undertaking can eliminate potential competitors or recent entrants that could challenge its competitive position in the market, popularly known as "killer acquisitions"155.

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

See response to question 14 above.

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

See response to question 14 above.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

Finally, the pandemic crisis has concerned, at a worldwide level, antitrust authorities156 and international organizations157, given that several markets have been affected in their logistics, supply, and products' accessibility. In Chile's case, both the FNE and the TDLC have made public statements regarding the extraordinary situation caused by the pandemic.

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153 Chamber of Deputies, *Comisión Especial Investigadora*, available in: https://www.camara.cl/legislacion/comisiones/proyecto_ley.aspx?prmID=3162.

154 For more information, see: *FNE reinforces merger control regime with new horizontal merger guidelines and prenotification guidance*, 13 May 2021, available in: https://www.fne.gob.cl/en/fne-actualiza-y-fortalece-regimen-de-control-de-operaciones-de-concentracion-con-nueva-guia-e-instructivo/.

155 Ídem.

156 For example, the Competition and Markets Authority from the United Kingdom launched Guidelines to allow agreements between competitors, available in: https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-COVID-19/cma-approach-to-business-cooperation-in-response-to-COVID-19.

157 OECD, *Co-operation between competitors in the time of COVID-19*, 26 May 2020, available in: https://www.oecd.org/competition/Co-operation-between-competitors-in-the-time-of-COVID-19.pdf.

First, the FNE announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic, stating that the Chilean antitrust regulation does not include any exception for its application, not even in the extraordinary COVID-19 situation. However, considering the supply and logistics problems that some markets have experienced, competitors may subscribe agreements in order to create efficiencies and solve problems caused by the crisis. According to the FNE, these agreements would not be considered a cartel when they: (i) seek to create efficiencies; (ii) are necessary for the mentioned efficiencies; and (iii) these efficiencies will be trespassed to consumers158.

In other words, the FNE's public statement on competitor agreements had a mix of views of flexibility and maintenance of the application of the basic principles of competition: on one hand, it provided that the antitrust law is applied without exceptions in times of crisis, but, on the other hand, added that these agreements could be reviewed in a more benign way in the context of the pandemic159.

For its part, the TDLC issued an internal procedure statement, in which allows acts or contracts that must be previously consulted for their clearance, to be ex-ante executed. Nevertheless, this is not an exemption to the consultation obligation, but only permits economic agents to implement certain acts or contracts before the TDLC's ruling. As explained by the Competition Court, acts that seek to generate efficiencies in markets related to healthcare products will be specially permitted by this exceptional regime160.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

See response to question 17 above.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

Not applicable.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

Not applicable.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been

158 FNE, *Public Statement*, 3 April 2020, available in: https://www.fne.gob.cl/declaracion-publica/.
159 "*DL 211 does not contemplate any exception in its application, not even in cases as extraordinary as the one we are currently experiencing (…) In a state of catastrophe such as the current one, it is possible that the production and distribution of goods, as well as the provision of services, is no longer possible, or cannot be carried out optimally, without a certain degree of collaboration between competitors (…)*", (free translation), *idem*., paragraphs 1 and 4.
160 TDLC, *'Auto Acordado' regarding extraordinary consults under Article 18 No. 2 of Law Decree No. 211*, 7 April 2020.

identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

See response to question 14 above.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

ESG principles have not been subject to any public statement from competition authorities, as neither the TDLC nor the FNE have analyzed this matter and its connections to antitrust regulation.

About competition policy regarding merger control, the FNE has been very clear about the theories of harm and purposes that must be considered when analyzing a concentration operation. This issue became very relevant in the unconditional clearance of the acquisition of Compañía General de Electricidad S.A. ("CGE") and CGE Servicios S.A. by State Grid International Development Limited ("SGIDL"), where national security related concerns were raised due to the fact that SGIDL is a state-owned Chinese company, administrated by the State-owned Assets Supervision and Administration Commission of the State Council ("SASAC").

In the CGE-State Grid's clearance the FNE stated that Chile's merger control regime is essentially technical and entrusts the competition agency to determine whether, as result of a concentration, structural changes that allow the merged entities to affect competitive variables are generated. In case they could occur because of the operation, the FNE must assess the possibility of consumer or other competitors harm due to them. Other considerations or public interests, such as labor, environment, geopolitical, national defense and security issues, are excluded from the legal assessment that the FNE is legally mandated to perform when analyzing a transaction161.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

Not applicable. See response to question 22 above.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

Not applicable. See response to question 22 above.

[161] Case Docket No. F-255-2020, *Acquisition of Compañía General de Electricidad S.A. (CGE) and CGE Servicios S.A. by State Grid International Development Limited (SGIDL)*, 31 March 2021, paragraph 12.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

Not applicable. See response to question 22 above.

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CHINA

By: Ziqing Zheng

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government to counteract the effects of the health crisis on the national market?**

The main economic and regulatory actions undertaken by the Chinese government in order to counteract the effects of the health crisis on the national market can be divided into the following two phases:

Phase One: In the first few months of the pandemic, as instructed by Chinese President Xi Jinping, the major task of the Chinese government at that time were to encourage the resumption of production, using macro-economic methods to help those industries facing the most severe impact, to stabilize the people's daily life by monitoring price, to stabilize employment, and to stabilize foreign trade. Later, those actions were also structured as the "six guarantees" (ensuring employment, basic livelihood, market entities, food and energy safety, stable supply chains and grassroots operations), which is further integrated with the former "six stabilities" principle (stabilizing employment, finance, trade, foreign investment, investment, and expectations) collectively referred to as "six stabilities and six guarantees".

Phase Two: After Covid-19 has largely been under control in China, the focus of the Chinese government has changed back to continue working on the 14th Five-Year Plan. Among other things, the 14th Five-Year Plan requires breaking up monopolies and local protectionism, enhancing the Fair Competition Review Mechanism and the Anti-monopoly Law ("AML") enforcement. On December 8, 2021, the Central Economic Work Conference considered "strengthening anti-monopoly and anti-unfair competition" as a part of "using microeconomics policies to continuously activate the dynamics of market players", which is one of the seven key tasks in 2022.

In response to the pandemic throughout the country, the State Administration for Market Regulation ("SAMR") issued the Notice on Supporting Anti-monopoly Enforcement of Epidemic Prevention and Control and Reinstatement ("Announcement"), which supports epidemic prevention and control and resumption of production through optimized anti-monopoly enforcement. First, antitrust filings and reviews will follow the "full process" online review approach to ensure that the antitrust review mechanism operates normally during the outbreak. Second, the antitrust review process for transactions involving outbreak prevention and control and resumption of production will be accelerated. Third, the Announcement makes it clear that it will actively exempt some operators' cooperation agreements that are conducive to technological progress, efficiency, public interest, and protection of consumer interests in accordance with Article 15 of AML. Fourth, monopoly practices that impede outbreak prevention and control and resumption of production will be treated more strictly. Fifth, SAMR has also established various forms of specialized channels (including telephone, e-mail, fax, mail, website public messages, etc.), to encourage operators and consumers to submit advice, exemption applications and complaints.

Recently, the Anti-monopoly Law Enforcement Agency has restructured and upgraded. On November 18, 2021, the National Anti-monopoly Administration was officially established. Since 2018, antitrust enforcement agencies have been unified as the Antitrust Bureau under SAMR. Now the establishment of the National Anti-monopoly Administration means that the Chinese anti-monopoly law enforcement system strengthens and improves. It can be expected that the anti-monopoly law enforcement resources will be further concentrated, and number of case handlers will increase in the future.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

Yes, there are. The SAMR consists of more than 20 bureaus handling various aspects of the markets, including the Price Supervision and Anti-Unfair-Competition Bureau ("Price Bureau").

During the pandemic, SAMR issued Guiding Opinions on Investigating and Punishing the Illegal Acts of Forcing up Prices during the Prevention and Control of Novel Coronavirus Pneumonia Outbreak ("Guiding Opinions"), to ensure that the market prices of basic livelihood commodities such as masks, antiviral drugs, disinfection and sterilization supplies, related medical equipment and other epidemic prevention supplies, as well as grain, oil, meat, eggs and vegetable milk related to people's daily lives, are stable during the epidemic prevention and control period. Price Bureau also issued several regulations on pricing control, which did not set any threshold on market shares, and focused only on certain key products. For instance, in early 2020, the Price Bureau published the "Notification on Controlling the Price of Equipment Used for Pandemic Control" and "Notification on Monitoring the Price of Important Materials in Certain Cities During the Pandemic", which regulated the pricing of 15 types of product such as medical face mask, protective suit, forehead thermometer and other medical equipment in 40 identified cities. The Price Bureau also published the "Notification on Investigating the Price of Melting Blow Nonwoven Cloth", which focused only on melting blow nonwoven cloth, an essential material of face mask.

Except that the Guiding Opinions issued by SAMR clearly state that "the implementation will cease on the date of the end of the epidemic", the above pricing control regulations themselves did not clearly provide that they were temporary, in practice, it became unnecessary to implement any of those regulations after the first few months of the pandemic, because the supply of the relevant products has kept stable since then.

The above temporary regulations were good supplements to the permanent price regulations already in place before the pandemic, including but not limited to the Pricing Law and the Provisions on Administrative Penalty against Price-related Unlawful Practices ("Pricing Provisions").

On July 2, 2021, SAMR published a draft for consultation for the Pricing Provisions ("Draft Pricing Provisions"). The Draft Pricing Provisions suggest making the following amendments to the current version of Pricing Provisions, among other things, (i) adding new categories of illegal conducts, including price discrimination and predatory pricing by e-commerce platforms using big data and algorithm; (ii) changing the ways of calculating penalties from fixed penalties to 1-10% of the relevant party's revenue or 5 times of the illegal gains; (iii) granting greater discretion to SAMR to tackle excessive profiteering during public emergency; and (iv) expending the Pricing Provisions to regulate the fees charged by administrative institutions.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

We are not aware of any such legal obligations although companies are encouraged to resume productions as soon as possible and to restore supply chain as much as they can. The Chinese government's role was to provide support such as logistics and information on sources of important raw materials. It is reported that the Chinese government also guaranteed purchase of over compacity sanitary products using governmental reserves, so that the manufacturers were willing to work on full compacity to increase supply of those products.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

As part of the macro-economic methods during the pandemic, both the Chinese central government and various local governments adopted a series of measures to safeguard companies, especially small businesses. Those measures included lowering the loan interest and tax rate, delaying the payment of tax and rent, refunding of social insurance and etc.. Most of those measures were only available temporarily for about 2-3 months during the most difficult period of the pandemic.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Yes, there are. The Foreign Investment Law was published in March 2019 and has taken into effect from January 1, 2020. According to the law, foreign investments in China are regulated by the Negative List for Market Access which is updated by National Development and Reform Commission ("NDRC") and Ministry of Commerce ("MOFCOM") annually.

Stabilizing foreign investments forms part of the "six stabilities" as mentioned in Q1. Chinese government has made efforts to simplify administrative procedures for foreign investors to do business in China. In addition, the temporary supporting policy such as tax refund equally applied to all types of companies including foreign invested companies. On October 22, 2021, MOFCOM issued the 14th Five-Year Plan for the Development of Foreign Investment, which says it will reduce the negative list of foreign investment access, relax the entry threshold for key areas and continuously reduce market access restrictions, and measures that will raise China's level of opening to the outside world.

We are not aware of any increased restrictions on foreign investment due to the pandemic. According to the National Bureau of Statistics, in 2020, despite the impact of the pandemic, the total profits of industrial enterprises above the foreign capital scale amounted to 1.8 trillion RMB, an increase of 7% over the previous year and this rate was 2.9% above the national average. However, due to the complicated international relationships, China has speeded up the legislation work in the field of data protection, export control and national security review to improve the policy toolbox, which may affect the business operations of foreign invested companies in China in one way or another.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

There are a few upcoming laws and regulations regarding better handling public health emergencies, such as the upcoming Law on Responses to Public Health Emergencies, the Law on Prevention and Treatment of Infectious Diseases, the Frontier Health and Quarantine Law, and the Emergency Response Law.

In terms of market regulation, the AML is now under revision, and on October 23, 2021, the Standing Committee of the National People's Congress issued the AML (Draft Amendment) for public comments. A new AML is expected to be published soon by the end of this year.

In addition, the Measures of Online Transaction Supervision and the Anti-Monopoly Guidelines on the Sector of Platform Economies were promulgated in the first half of 2021. And the Regulation on Prohibition

of Online Unfair Competition, the Guidelines on Classification and Grading of Internet Platforms, and the Guidelines on Accountability of Internet Platforms have been published for public comments.

In the protection of personal information and data security, the Data Security Law and the Personal Information Protection Law were implemented in the second half of 2021. Moreover, it is estimated that the Regulations on the Administration of Network Data Security and the Measures for the Security Assessment of Cross-Border Data Transfer will also be issued in the near future.

In addition, according to the State Council's 2021 Legislative Work Plan, it is expected that there will be laws on customs duties.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

In 2020, the Supreme People's Court published three notices on its Guiding Opinions on Several Issues Concerning the Proper Hearing of Civil Cases Involving the COVID-19 Pandemic. Among other things, the three notices provide that (i) mediations are encouraged compared with litigations; (ii) court fees can be reduced or suspended if the relevant party is facing financial hardship caused by the pandemic; (iii) filing deadlines of evidence and certifications can be extended upon the relevant party's application.

In addition, all levels of People's Court can organize remote hearings using the online platform named "smart court" which has already been in place before the pandemic. All the filings, litigations and mediations can be resolved through the smart court platform.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

Enforcement of merger control rules has been strengthened in China during the COVID-19 pandemic. Medical industry and semi-conduct industry continued to be under greater scrutiny by SAMR, and recently the enforcement of merger control rules towards digital platforms has been strengthened as well.

Notably, SAMR blocked the transaction between HUYA corporation and DouYu International Holdings company ("HUYA case") in July 2021. This case ranked as the third blocked transaction in the history of the AML where the second blocked decision dated back to 2014. Both parties to the transaction were major players in the live streaming and short-video market in China. The HUYA case is also the first blocked transaction in digital markets.

The total number of closed merger filings in 2019 and 2020 were stable at the level of around 460-480. However, the number of cases has increased sharply in 2021 by roughly 50%.

There were more gun-jumping investigations concerning transactions in digital markets. Since early 2020 until November 21, 2021, there were 105 gun-jumping cases and more than half were related to digital markets. It is worth noting that on July 24, 2021, SAMR imposed an administrative penalty on Tencent Holdings Co., Ltd.'s acquisition of equity in China Music Group for gun-jumping conducts. In addition to fines, operators are also required to take relevant measures to "return to the pre-concentration status". This is also the first case of SAMR ordering operators to take relevant measures to "return to the pre-concentration status" due to the gun-jumping conducts.

Since February 2020, merger filings with SAMR started to be made electronically. According to the SAMR's Announcement on Supporting Resumption of Employment and Production Through the Anti-monopoly Law Enforcement During Pandemic ("AML Supporting Announcement") published in April 2020, the following industries or transactions can apply for accelerated merger review: (i) medical equipment, food production, transportation, retail, and other businesses that closely related to people's daily life; (ii) restaurants, hotels or tourist industry that were severely impacted by the pandemic; (iii) transactions assisting the resumption of employment and production. Despite of this provision, we are not aware of any precedents where SAMR actually granted exemptions due to COVID-19.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

No. The filing thresholds remain the same since 2008, which is provided by the Rules of the State Council on Declaration Threshold for Concentration of Undertakings. Concentrations that meet one of following thresholds need to be notified and approved by SAMR before closing: in the last fiscal year, either (i) the aggregate global turnover of all the undertakings to the concentration exceeds RMB 10 billion and each of at least two of the undertakings to the concentration has a Chinese turnover of more than RMB 400 million; or (ii) the aggregate Chinese turnover of all the undertakings to the concentration exceeds RMB 2 billion and each of at least two of the undertakings to the concentration has a Chinese turnover of more than RMB 400 million.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

No, the substance of merger review has not been changed in any way as a result of COVID-19.

We are not aware of any transaction that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

Yes, the decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines have continuously been enforced. We haven't seen any circumstance where SAMR's ordinary work was interrupted by COVID-19.

In April 2020, as requested by the relevant parties, SAMR decided that the restrictive condition imposed in 2014 on the transaction of establishing a joint venture by Corun, Toyota China, PEVE and Toyota-Tsusho shall be removed. The parties started to apply for removing the restrictive condition in 2019. As a normal process, SAMR reexamined the relevant market and decided that removing the restrictive condition is proper. However, there is no indication that SAMR's decision has been influenced by COVID-19.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

We are not aware of any circumstance where political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in SAMR's merger review.

We don't believe that the new, amended or exemption rules resulting from COVID-19 would remain after the pandemic is over. Given said, it is possible that the current online review practice would remain after the pandemic is over.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

We understand that there has been no such case in China.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

In China, the following trends in the enforcement of anticompetitive conduct can be identified:

- Encouragement from the higher leadership: The Central Economic Work Conference held by the Central Committee of the Communist Party and the State Council on December 8, 2021 expressly highlighted the importance of enhancing antitrust law enforcement. Both the amendment of the AML and the antitrust law enforcement work were very much prioritized.

- Continuously improve the anti-monopoly legal system: The newly revised AML is expected to be promulgated soon. Other antitrust laws or guidelines have also been issued, including the Interim Provisions on the Examination of Concentrations of Undertakings, the Detailed Rules for the Implementation of the Fair Competition Review System, Guide to the Anti-monopoly Compliance of Businesses, Anti-Monopoly Guidelines on the Sector of Platform Economies ("Platform Guidelines"), the Anti-monopoly Guidelines for the Active Pharmaceutical Ingredient Sector, and the Anti-monopoly Guide for Enterprises Abroad.

- Enhanced rule making and enforcement in digital markets: The Platform Guidelines published in February 2021 shows SAMR's increased concerns over the anticompetitive conduct in the digital market. The Platform Guidelines response to many problematic behaviors conducted by major platforms such as "picking one from the two" (close to exclusive dealing) and using big-data analysis to price products to the disadvantage of existing customers. There have been several milestone investigations on online platforms. In April 2021, Alibaba was fined a record fine of RMB18.2 billion (USD 2.8 billion) for its exclusive conduct of forcing merchants not to sell on other platforms, so called "picking one from the two" conduct. On October 8, 2021, Meituan company was also fined RMB 3,442 million (USD 539.2 million) for the "picking one from the two" behavior. In addition, local antitrust enforcer in Shanghai fined Sherpas, an English-speaking food delivery platform active mainly in Shanghai, for a similar reason, which warned those "small"

platforms with big market shares in some niche markets. We expect more cases concerning anticompetitive conduct in the digital market to be published in the near future.

- Increased antitrust risks of RPM: In the past years, Chinese courts ruled in a few cases that RPM should not be considered per se illegal. This means that Chinese courts would balance a challenged RPM's alleged procompetitive benefits against its anticompetitive harms before making any decisions. Once in a while, although SAMR (and previously the NDRC as well) insisted that RPM was illegal as clearly provided by the AML, SAMR became somewhat cautious in pursuing RPM cases in order to avoid the risks of being challenged by the court. Recently, however, SAMR fined Yangtze River Pharmaceutical Group ("Yangtze River") a fine of RMB 764 million (USD 118 million) for RPM. In its decision, SAMR did not mention the defendant's market shares in the relevant market, which shows that SAMR becomes more confident in finding RPM as a hard core violation of the AML.

We can't simply say that SAMR has been pursuing any new theories of harm because the AML has not been revised yet and SAMR is supposed to be act only within the context of the AML. However, according to the Platform Guidelines, many controversial or frequently debated conducts become highly risky now. Those conducts include but not limited to:

- Using big-data analysis to price products to the disadvantage of existing customers: Article 17(1) of the Platform Guidelines prohibit the behavior of relying on big data and algorithms, implementing differentiated prices or other conditions to the transaction based on users' payment capacity, consumption preference, habits, among other factors.

- Most favored nation clauses: Article 7 of the Platform Guidelines provides that the behavior of platform operators requiring merchants within the platform to provide the most favored transaction conditions may constitute monopoly agreements or abuse of market dominance.

- Hub and spoke agreement: Article 8 of the Platform Guidelines provides that competing merchants within a platform may be considered as reaching a hub-and-spoke agreement with the same effect of a cartel through the organization and coordination of the platform operator.

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

According to the Annual Report on China's Anti-monopoly Enforcement (2020), issued by SAMR, faced the impact of the epidemic continuously, SAMR carried out centralized law enforcement on the pharmaceutical industry, automobile sales, motor vehicle testing, second-hand car transactions and construction materials industry.

- In April 2020, SAMR imposed a penalty of RMB 325.50 million (USD 50 million) on three distributors of calcium gluconate, an Active Pharmaceutical Ingredients ("API"), for collective abuse of dominance. The three distributors sold the products at unfairly high prices to downstream drug manufacturers, as determined by a price-cost comparison. They also imposed unfair transaction terms on downstream drug manufacturers by requiring the latter to sell the final drug products back only to the three distributors. In addition, SAMR also investigated and dealt with the monopoly cases involved Yangtze River, Shangqiu New Pioneer Pharmaceuticals etc., and guided the local investigation of 12 varieties of active ingredient monopoly cases.

- In January 2021, SAMR published a penalty decision against Simcere Pharmaceutical Group Limited ("Simcere") for its abuse of dominance behavior of refusal to deal. Simcere was fined 2% of its annual sales revenue in 2019, which amounts to USD 15.51 million. In 2019, Simcere signed an exclusive contract with the one and only upstream supplier worldwide (DSM Nutritional Products Ltd Branch Pentapharm, a Switzerland corporation). With a market share of 100% and high entry barrier, Simcere was deemed by SAMR to have monopolized the Chinese batroxobin API market, and it refused to sell batroxobin API to downstream pharmaceutical companies without justifications.

- In addition, as mentioned above, SAMR fined Yangtze River RMB 764 million (USD 118 million) for RPM in April 2021.

SAMR has vigorously investigated unilateral conduct taking place in digital markets since late 2020. Many internet giants in China are facing antitrust investigations since then. In April 2021, Alibaba was fined a record fine of RMB 18.2 billion (USD 2.8 billion) for its unilateral conduct, namely the "picking one from the two" conduct. On October 8, 2021, Meituan company was also fined RMB 3,442 million (USD 539.2 million) for the "picking one from the two" behavior. Based on the number of cases opened, we expect more penalty decisions against digital market players to be issued soon. Those investigations signal the end of SAMR's previous principle of prudential tolerance for antitrust enforcement in digital markets before the pandemic.

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

In 2020, anti-monopoly enforcement agencies have made price monopoly agreements, especially horizontal collusion, a priority in enforcement. All 15 monopoly agreements punished in 2020 were horizontal monopoly agreements, 13 of which involved price issues.

There has been an increase in the opening of investigations focusing on the so-called "picking one from the two" conduct, which is one type of exclusive dealing. In April 2021, Alibaba was fined a record fine of RMB 18.2 billion (USD 2.8 billion) for this kind of conduct. On October 8, 2021, Meituan company was also fined RMB 3,442 million (USD 539.2 million) for the "picking one from the two" behavior. There have been other investigations on similar conducts of other internet giants.

In addition, there has been more probe on the conduct of using big-data analysis to price products to the disadvantage of existing customers and on the most favored nation clauses.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

Yes, SAMR has issued the Supporting Announcement, which clarified that certain cooperation agreements between competitors relating to pandemic control or the recovery of employment and production can be exempted if such agreements helped technological progress, improved efficiency, advanced public interest, or protected consumer interest. Examples of such cooperation agreements include agreements concerning the development of new vaccines or testing technology, the efficiency in producing items needed to control the pandemic or the competitiveness of small and medium enterprises.

Given said, we are not aware of any cases of coordinated conduct being exempted by SAMR.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

In theory, it is possible to propose for crisis cartel-related arguments. According to Article 15 of the AML, horizontal agreement is subject to several possible exemptions including "for the purpose of mitigating the severe decrease of sales volume or obviously excessive production during economic recessions". However, due to lack of implementation rules and precedents, it is not certain to what extent such crisis cartel-related arguments can be received by SAMR. Based on previous precedents, excessive production in certain industry caused by overcapacity does not constitute a justification to form cartels.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

No, there hasn't been any such exemptions. Also, we don't see any change to SAMR's approach in the assessment of dominance regarding conducts taking place during the COVID-19 pandemic.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

No, we are not aware of any circumstance where certain types of economic justifications put forth by defendants in the context of unilateral investigations would be more likely to be accepted by SAMR.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

Before the COVID-19 pandemic, health-related markets have already been under great scrutiny by SAMR. For instance, there were several antitrust investigations concerning excessive pricing of API suppliers.

In the first few months of the pandemic, there were incentives of price gouging by market players. SAMR mentioned in the Supporting Announcement that the following sectors will be subject to greater antitrust scrutiny: (i) equipment used for pandemic control such as face masks, medicine, medical equipment and disinfectants, and raw materials needed for their production; (ii) provision of public utilities such as water, gas and electricity; and (iii) other industries closely related to people's living necessities.

In practice, however, comparing with the AML, the Price Law does not require "dominance" to be established, and therefore is considered as a more convenient basis for SAMR to tackle price gouging. From

January to April 2020, SAMR regularly investigated price gouging under the Price Law. Most cases involved face masks and their raw materials, as well as some food-related items.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Integrating ESG-related policy concern into the AML may achieve some beneficial outcome but may also disrupt antitrust enforcements.

In 2018, the China Securities Regulatory Commission revised the Code of Corporate Governance of Listed Companies and established the ESG-related disclosure requirement in China. Since then, ESG gains its momentum as companies integrating such disclosure rule into their governance strategies. If the AML took ESG-related policy into account, it may also achieve good results in social governance and add social welfare.

However, integrating ESG-related policy into the AML may at the same time disrupt the enforcement of antitrust law. Once the enforcer needs to consider multiple policy goals, those goals would probably impede each other and therefore add difficulties to law enforcement. Enforcers would find it hard to decide which policy concern should be prioritized, and antitrust enforcement may become inefficient.

The proposed draft of the new AML clarifies that the goal of antitrust enforcement is "strengthening of the fundamental position of competition policy". Besides, it suggests formally introducing "fair competition review system". These proposed revisions are aiming at lessoning the impact of industry policy or political decisions on antitrust enforcement.

As a result, even though ESG is very important, we haven't seen the trend of expanding competition policy's goals to include ESG-related policy in China. Given said, it is possible to refer to ESG as a defense or justification on case-by-case basis. For instance, Article 15 of the AML provides several possible reasons for the exemption of monopoly agreements, among which the purpose of realizing public interests such as conserving energy, protecting the environment, and providing disaster relief, etc. can be a reason for granting exemption.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

We are not aware of any policy requiring antitrust enforcers and lawyers to push social/environmental change. However, businesses in China shall pay attention to China's new long-term targets, which is to reach peak emissions before 2030 and to achieve carbon neutrality by 2060. These long-term targets are from China's higher leadership and would also have some indirect influence on SAMR's merger review or antitrust investigations. To the minimum in case any antitrust policy is found to be conflict with these long-term targets, such antitrust policy may be altered to avoid impeding these long-term targets.

Pushing social/environmental change has the similar effect of an industry policy. It may or may not impact specific decisions, but overall there must be some kind of impact on SAMR decisions made through a certain period of time.

3. Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?

For monopoly agreements, Article 15 of the AML provides several possible reasons for the exemption of monopoly agreements, among which the purpose of realizing public interests such as conserving energy, protecting the environment, and providing disaster relief, etc. can be one of the reasons. Therefore, theoretically a carbon defense or other ESG-related efficiency defense can be accepted by SAMR. It is worth noticing that there has not been any successful exemption case in China. Sometimes SAMR may decide not to pursue a case based on lack of substantial antitrust concerns or other reasons, but there has not been any public-available case where SAMR exempted the relevant monopoly agreement based on Article 15 of the AML.

For merger or unilateral conduct, the AML and SAMR regulations do not rule out the possibility of using a carbon defense or other ESG-related efficiency defense as well.

4. Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?

As mentioned in Q1, it is controversial regarding whether competition policy's goals shall be expanded to include ESG-related policy considerations. To date, SAMR hasn't issued any regulations or rules to expressly push forward ESG-related policy considerations and we are not aware of any concrete plan of doing so by SAMR either generally or specifically to certain market/business. Given said, the China Securities Regulatory Commission and the State-owned Assets Supervision and Administration Commission have been pushing forward ESG-related policy considerations. As a general rule of merger review, if the relevant parties have unsolved compliance issues under other laws, such as ESG-related noncompliance issues, the relevant merger review may be delayed because of such issues.

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COLOMBIA

By Alejandro Garcia and Pamela Ayala

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your government in order to counteract the effects of the health crisis on the national market?**

Colombian government declared a mandatory lockdown in March 2020 that lasted long through the month of August, yet some industries were allowed to continue their operations and others resumed operations gradually, since June 2020. The government also declared a state of emergency due to an economic, social, and ecological crisis, which stands to date. This state of emergency allows the President to enact policies related to the cause of the state of emergency (in this case those related to the Covid-19 pandemic), without them passing through Congress.

The government launched a series of economic actions in order to help restore all industries, for example, exemptions were granted, and new lines of credit were opened. During this period, there were big incentives to transition into a digital world; internet access became a priority. Throughout 2020 the government initiated a series of incentives and aids to all industries, and the general public, for example, a tax-free period (of three days) on certain goods, especially technology devices, among others.

In March 2020[162], the National Antitrust Authority, the Superintendence of Industry and Commerce "SIC" suspended the terms for administrative and disciplinary procedures until the end of the state of emergency declared by the government. Nonetheless, the procedures that needed to take place regardless of the state of emergency, specifically those directed to help reduce the economic effects of the pandemic continued. This allowed the SIC to resume their functions by implementing necessary measures for continuity.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

Yes, Colombia has implemented some regulations regarding pricing controls (e.g., milk). These regulations are qualified not under specific thresholds, but under certain industries and products that are deemed as necessary (Basic Needs Goods). These measures are usually permanent.

During the state of emergency, the Government included new products to the Basic Needs Goods considered as necessary for all Colombians (e.g., masks, medical devices, etc). Given the importance of these products, their prices are monitored constantly in order to prevent rises and allow access to low-income families. The SIC has special interest in these products and seeks to maintain reasonable prices, now that the immediate and unannounced lockdown, resulted in shortage and rising prices.

Although, there has been no new regulations regarding pricing controls, some investigations were launched against companies, specifically in the personal care and health services market. No specific thresholds were set.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic**

[162] Resolution 12169 of 2021

status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?

The SIC has issued administrative orders with obligations on companies to cease restrictive practices derived from the COVID-19 pandemic. Some of these orders imparted to companies include the obligation to refrain from any conduct aimed at the retention of basic necessity products such as, but not limited to, food and non-alcoholic beverages, personal hygiene, maintenance and cleaning items, pharmaceuticals, alcohol-based solutions or gels, masks and gloves, with the intention to put pressure on price increases.

Also, the SIC instructed companies to withdraw publicity that may mislead consumers, which attributed unrealistic claims about products associated with the cure or prevention of COVID-19[163].

On the other hand, there were no specific obligations to maintain production output, nonetheless, with lockdown, and in presence of a shortage of ethylic alcohol, the government helped local decanters to increase output, but this did not consist in obligations for these companies.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

State aid has played a key role during the health crisis to safeguard companies. New programs were introduced specially for small and medium businesses. At the beginning of the pandemic, the Government had short term responses such as allowing businesses to renegotiate their lease agreements without incurring in penalties, and allowing shortcuts in staff. The most substantial aid the government had offered to safeguard companies was to pay 40% per employee earning a minimum wage, for those businesses that had seen a reduction in their income of at least 20%.

The Government also introduced the possibility to stop paying for 3 months all credit lines This allowed companies, families, and employees to organise their finances and to be able to meet their obligations even with the pandemic.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Colombia has some Foreign Direct Investment[164] regulations, these are mostly focused on controlling foreign currency flows as opposed to controlling the substance of the investment or the target of an investment. There are only restrictions regarding the defence/security industry and foreign purchases of land on border areas. To date, there hasn't been modifications on these regulations that we are aware of.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

Yes, currently there are pieces of legislation regarding pricing controls. A regulation for agricultural inputs and agrochemicals was prepared to incentive the national agricultural production[165]. Another piece of

[163] Resolution 18812 of 2020.
[164] Law 9 of 1991, Decree 210 of 2003, Decree 2080 of 2000, Decree 1844 od 2003, Decree 4210 of 2004, Decree 4337 of 2004, Decisions 291 and 292 of the CAN (Andean Community of Nations) and the agreements the country has signed.
[165] Draft legislation 019 of 2021

legislation[166] resulting from these impacts, defines a legal stand applicable in cases of abuse of dominant position before and after the conduct occurs and implements limitations of contractual dominant positions. This regulation intents to remove breaches that limit the capacity of smaller actors to concur in the market, imposing technical barriers to international and local commerce.

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

The main modification as a result of COVID-19 was the digitalization of procedures. Initially, filing deadlines were suspended, but then the administration decided to resume and continue the terms by acting digitally, which resulted on returning to its regular course. The SIC has also resumed some of the in-person activities, but they do not impose personal assistance. Now, most procedures can be done remotely, and new digital channels have been opened.

Merger Control

8. **Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.**

Considering that many companies are turning to mergers as an alternative to solve problems caused by the COVID-19 pandemic, merger control regulation has strengthened. As a consequence, there has been stricter control from the SIC. In horizontal transactions the authority has taken a stricter view on market shares and how this could potentially limit competition. The authority has also taken a stricter position on the competitive effects of vertical mergers.

9. **Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?**

The notification thresholds have not been subject to amendments or exemptions, the criteria of relevance for the SIC remains exactly the same.

10. **Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected**.

The market share component for the competitive analysis in merger control cases Has become stricter. There have been no cases that have been cleared as a result of a more lenient analysis as a result of COVID-19.

11. **Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?**

[166] Draft legislation 180 of 2020

There have been no decisions enforcing remedies or orders imposed by the authority nor fines for gun jumping.

12. **Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?**

In principle, no. the SIC did not issue nor imposed any regulation regarding merger control.

13. **Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?**

We are aware of one transaction in which the SIC imposed remedies and the parties were not able to comply. During the process of full filing, the parties tried to share a different analysis from the one concluded by the authority which resulted on imposing the remedies. Subsequently, the parties decided not to go forward with the transaction due to the impossibility of acting in accordance to the remedies.

Anticompetitive conduct

14. **Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years**?

The SIC did initiate a few unprecedented investigations for price gauging, specifically in the personal protection products market and in the pharmaceutical market.

15. **Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?**

During the pandemic the authority did focus its attention on personal protection products, healthcare and basic consumer goods. No change in unilateral conducts on digital markets were seen.

16. **Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?**

The SIC has opened various investigations for price gauging, due to the lack of supply and excess in demand of some products that are necessary during the COVID-19 pandemic, especially to companies involved in the health services and health product market.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

The SIC launched a program[167] that seeks to facilitate business collaboration agreements, as a mechanism to face the economic difficulties derived from the COVID-19 crisis. This program creates the presumption that all collaborations formed during the state of emergency are generated with the sole purpose of making companies more efficient. This does not mean that the program has changed the authority's stance on the potential anticompetitive harm of agreements, , on the contrary, it shows the SIC´s willingness to be lenient when assessing coordinated actions of companies in the context of the current pandemic, considering that collaborations can be indispensable for companies to respond to the difficult economic situation.

Unfortunately, despite the SIC´s effort to simplify collaboration agreements, the program remained as a simple idea, now that there was no in-depth development on how the program was going to take course, and the guidelines for dealing with collaboration between competitors did not change.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in the light of the pandemic?

No, cartels in general and under any circumstance are not tolerated by the SIC. Even with the global pandemic this conduct is not tolerated at all.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

No, the Colombian enforcer did not announce any sort of exemptions applicable to unilateral conducts during the COVID-19 pandemic. Looking into the investigations opened during the pandemic, the approach to unilateral conducts as well as the assessment of dominance has remained the same.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

No, the Colombian enforcer has not shown any signs that they will be more open to any sort of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic. The SIC has maintained the same position although it is important to mention that recently the authority has been more vigorous with opening investigations than before.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

The SIC has launched administrative investigations on healthcare market agents, which certainly means there is more scrutiny for this sector, since the pandemic was an opportunity to rise prices, make collaborations, mislead consumers and abuse of dominant position. As to how they have been dealing with anticompetitive conduct in this industry, it has been the same as with any other.

[167] Resolution 20490 of 2020

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Competition policies seek to protect free competition, the effective possibility for market participants to compete with others, in order to offer and sell goods or services to consumers, and to build and maintain clientele, which results in economic growth and progress. ESG addresses environmental issues such as: climate change and greenhouse gas emissions, energy efficiency, renewable energy, green products and infrastructure, carbon footprint, food, water and waste, complex and evolving issues such as privacy and data security, pay equity, health and safety, human rights, diversity, inclusion and social justice and it covers a wide range of corporate activities, including company's corporate bodies, policies, standards, disclosure, auditing and compliance, among others.

The interplay between competition law and ESG policies in Colombia is rather scarce, even though its principles have been dominating investments and the private sector today. The rise of ESG is making companies recognize the need to address other issues and leave a side the idea that the role of business is solely to maximize shareholder value.

As for the pros, we believe that including ESG- related policy into competition regulations will result in additional social, economic, and environmental protections. Considering that ESG is the key to true sustainability for companies, and that it will become the new rule for business practices, including them into competition policies will be key to avoid significant restrictions in terms of competition.

On the other hand, including policies to protect environmental, social and governance aspects, can also result on limitations. For example, we believe that companies will have to deal with difficulties when joining efforts, now that the requirements could become stricter, even new conducts will be acknowledged as anticompetitive in order to comply with ESG policies and therefore limit the capacity of companies at expanding or improving their business.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

Antitrust enforcers, businesses, and lawyers should support and embrace changes regarding social and environmental protection.

As for antitrust enforcers, we believe their role in pushing environmental and social change must be assuring that competition law enforcement is not contrary to ESG goals, and in the same way, ensure that companies that join efforts in order to achieve ESG goals, are not violating competition law. It must be clear as to which conducts will be considered as anticompetitive regarding the implementation of social and environmental changes and prevent sanctions.

Businesses should continue to develop ESG-goals having in mind that they must implement guidelines from antitrust enforcers in order to protect free competition.

Simultaneously, lawyers should also be a part of the implementation of ESG-goals and contribute to antitrust enforcer's effort to regulate, by taking part in the development and revision of the guidelines. They could also participate in bringing together the social and environmental change with legal aspects of business.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense**

We believe carbon, or any other ESG-related efficiency defence should be accepted by competition enforcers. We are under a new reality that companies are addressing and implementing ESG policies in order to improve their environmental and social impact, and in effect are joining efforts with others to achieve these goals. For this reason, competition enforcers should have this in mind when analysing conducts, in order to conclude if they are against free competition, or on the contrary, bring benefits to the market. The fact that ESG goals will not be easily implemented in competition policies, given that it is mostly based on economic factors, will make this implementation difficult. However, in Colombia, SIC has analysed some benefits on mergers based on environmental or social factors.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

As we mentioned before, the protection of ESG goals in competition policies could result in stricter levels of scrutiny for sectors that can be compromising the protection of environmental and social issues, as they may have to change their business practices. Nevertheless, we believe all sectors are capable of implementing these ESG goals, and in addition, enforcers, and policies regarding competition, need to focus on this objective. Different standards of proof or stricter levels of scrutiny are not ideal and could result in discouraging businesses to compete in markets.

Furthermore, in view of the economic factors that are analysed in competition law, which includes market elements, we think that the importance of ESG factors that could take part in competitive cases, should be assessed by the enforcer in every particular case, without having to segregate or tighten markets or business activities.

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ECUADOR

By: Luis Marin-Tobar and Ana María Terán-Merello[168]

The role of Government

1. Can you briefly describe the main economic and regulatory actions undertaken by your government in order to counteract the effects of the health crisis on the national market?

COVID-19 caught the legal landscape in Ecuador by surprise, causing a wide-spread health crisis on the national market. On March 12th, 2020, the Ministry of Health in Ecuador declared a state of sanitary emergency in the country for 60 days for all the establishments of the Public Health System deriving from the imminent possibility of effects produced by COVID-19 and the potential massive contagion of the population. On March 16th, 2020, the President of Ecuador issued Executive Decree 1017 which declared a state of exception in the entire country. The state of exception included mainly the suspension of rights of free-transit and mobility, curfews, and a limit of the number of people that could enter commercial spaces at once, as well as an order to health and prepaid medicine companies to refrain from limiting coverage to patients affected with COVID-19.

In turn, the Superintendency of Market Power Control ("SCPM") issued resolutions SCPM-DS-2020-13 and 14 on March 16th, 2020, by virtue of which it ordered immediate transition to remote work and the suspension of terms and deadlines of ongoing proceedings. The Authority also issued an exhort[169] to manufacturers, suppliers, and marketers of protection devices, respiratory and substances with antiseptic properties, to public institutions of control and the general population, by virtue of which it warned them of potential infringement of competition law regarding anticompetitive agreements, hoarding of products and any other form of price manipulation. A few months later, during the peak of the first wave of the pandemic, the SCPM issued a second exhort[170] to manufacturers, suppliers and marketers; to public institutions, control bodies and to the population in general regarding media coverage regarding emergency contracting by the government during the COVID pandemic by the Social Security Institute ("IESS"), ratifying its request that local *"law considers anti-competitive agreements illegal, hoarding of products and any other form of manipulation to increase unjustified prices. As well as the agreements between suppliers and buyers to direct public procurement processes, and agreements and concerted practices between suppliers to submit bids or refrain from submitting them whose object or effect is to distort competition."*.

On March 22, 2020, Comite of Exterior Commerce ("COMEX") issued resolution No. 004-2020[171], by virtue of which the authority decided to defer to 0%, the application of the tariff rate for imports for consumption of certain tariff subheadings related to the treatment of the COVID-19 pandemic until the Ministry of Public Health notifies the end of the state of sanitary emergency.

On April 3, 2020, the National Committee for Emergencies, resolved, among other points, to instruct the competent authorities, to establish the mechanism to set official prices for articles of basic necessity with the purpose of sustaining the activities of price control and possible speculation, established in article 321 of the Organic Integral Criminal Code. In this regard, the Ministry of Public Health, immediately published the list of official prices of medicines, as well as the list of referential prices for medical supplies with the highest demand due to the declaration of national emergency. About price controls, it is important to note that the Ministry of Public Health is only empowered to fix prices of medicines, but, because the order

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[169] https://www.scpm.gob.ec/sitio/wp-content/uploads/2020/03/EXHORTO-Coronavirus.pdf
[170] https://www.scpm.gob.ec/sitio/wp-content/uploads/2020/03/EXHORTO-A-los-fabricantes-proveedores-y-comercializadores-a-las-instituciones-p%C3%BAblicas-organismos-de-control-y-a-2.pdf
[171] https://macmap.org/OfflineDocument/Covid19/COVID_ECU_2.pdf

issued by the Emergency Committee also reference prices for other kinds of products in the communication to the Ministry of Government, the Public Health Authority clarified that the determined reference prices were not official. [172]

By June 2020, the SCPM clarified that it should be noted that for the establishment of pricing policies which include the setting of minimum or maximum prices, as well as reference prices, article 32 of the Competition Law determines that it is an exceptional power, reserved exclusively to the executive power, and that it must be implemented through an Executive Decree that will have the character of exceptional and temporary and will be motivated by the benefit of popular consumption and the protection and sustainability of national production, therefore, neither the National Committee for Emergency, nor the Public Health Authority, had the power to establish official or reference prices for medical supplies with greater demand for the Declaration of National Health Emergency. This clarification was issued during a work meeting between the SCPM and the Ministry of Public Health in reference to a summon by the ministry contained in document No. MSP-VGVS-2020-0232-O from May 7th, 2020.

All of these measures were identified by the competition Authority in its report entitled *"Special report on the commercialization of medical products during the health emergency caused by the COVID-19 pandemic*"[173], which was made public in February 2021, identifying the key regulatory actions undertaken by the government in relation with the emergency.

Finally, in April 2021, the Minister of Public Health decided to regulate the prices of PCR tests in Ecuador, and issued a ministerial agreement[174], through the Subcommittee of the Tariff of benefits for the National Health System, which established a limit of $45 for a diagnostic COVID-19 PCR test, decision which applied to all private establishments.

2. Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?

As mentioned above, the main focus of the Ecuadorean government during the pandemic has been to maintain competitive conditions throughout the local market, especially regarding products required to combat the spread of the virus. As such, regulations regarding price control have been limited to medicines, medical supplies and a fixed maximum price for COVID-19 PCR diagnostic test in $45. These price controls have not been directly qualified under specific thresholds but are contemplated as general price limits applicable to all economic operators in Ecuador.

The price controls of medicines and medical supplies implemented by the beginning of the pandemic are not in place anymore, and they have been declared illegal by the competition authority. The decision to eliminate taxes on supplies related to COVID 19 also ended by the time that the first emergency declaration ended. On the other hand, the price control established for COVID 19-PCT test has not established a term of duration and are therefore presumed to be indefinite until they are revoked.

3. Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?

[172] National Emergency Committee Resolution. April 3, 2020. https://www.gestionderiesgos.gob.ec/resoluciones-coe-nacional-03-de-abril-2020/
[173] Informe Especial Sobre la Comercialización de Productos Médicos Durante la Emergenciaa Sanitaria Causada por COVID 19. Intendencia de Abogacia de la Competencia. SCPM (2020). https://www.scpm.gob.ec/sitio/wp-content/uploads/2021/04/Informe_emergencia_sanitaria_SCPM-IGT-INAC-001-2020.pdf
[174] https://www.salud.gob.ec/comunicado-oficial-el-costo-de-las-pruebas-rt-pcr-sera-de-usd-45-08/

Aside from broad exhorts related to the sale of protection devices, respiratory and substances with antiseptic properties, there have been no other specific obligations imposed on companies operating in Ecuador to safeguard the pre-pandemic status quo.

It has also come to our attention that pricing controls by authorities regarding first need products have intensified in markets and supermarkets, which has made it burdensome for food companies to maintain their profit margins, because the costs of production and transportation have increased due to the biosafety standards that they have to fulfill. [175]

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

Unfortunately, no. To the contrary, given the severe economic crisis caused by the pandemic and the lack of resources to confront it, on June 2020, the government issued the Humanitarian Law, a code that established a contribution called "Humanitary Contribution", that was effectively a tax, by virtue of which companies had to pay 5% of their of taxable income and the profit available for distribution of fiscal year 2018, if the amount was equal to or greater than USD 1,000,000.00. This contribution was to be paid in 3 installments.

Aside from the contribution, the Humanitarian Law determined Solidarity Measures for Social Welfare, which among others, included the following:

a. Child development centers, private, fiscal and municipal educational institutions, as well as institutions of the Higher Education System will grant discounts of up to 25%, upon justification of loss of employment or decrease in income. Student attendance and evaluation cannot be suspended.
b. During the state of exception and up to 60 days later, evictions of tenants of real estate cannot be executed, except in cases of danger of destruction or ruin of the building, as well as of use of the property for illegal activities.
c. During the state of exception and up to 1 year later, the increase in values, rates or rates of basic services, including telecommunications and internet services, is prohibited, whether they are provided by public or private entities.
d. During the duration of the state of exception, prepaid health companies and insurance companies that offer medical assistance coverage may not cancel or terminate health insurance policies, or prepaid medicine contracts, or suspend the coverage of these.
e. As of the enactment of the Law, the entities of the National Financial System will offer credit lines with special conditions of term, rate and grace periods.
f. All entities of the National Financial have to carry out agreement processes with their clients to reschedule the collection of monthly fees generated by any type of credit obligation.

The Humanitarian Law also determined Measures to Support Employment Sustainability which included:

g. Extension of social security coverage in health benefits for an additional 60 days for members who are unemployed, due to loss of income from the declaration of the state of exception.
h. In order to preserve employment, workers and employers may, by mutual agreement, modify the economic conditions of the employment relationship.
i. Due to events of force majeure or duly justified acts of God, the employer may reduce the working day by up to 50%, having to pay the worker no less than 55% of the remuneration set prior to the reduction.

[175] Ministry of Government. 948 Operativos De Control De Precios Se Han Efectuado A Escala Nacional Para Evitar La Especulación. https://www.ministeriodegobierno.gob.ec/948-operativos-de-control-de-precios-se-han-efectuado-a-escala-nacional-para-evitar-la-especulacion/#:~:text=El%20objetivo%3A%20evitar%20el%20incremento,supervisi%C3%B3n%20en%20los%20lugares%20mencionados./

j. During the year 2020, those non-financial companies that grant direct credits for sales to their clients, must grant them payment facilities, provided that said clients justify a decrease in their income that occurred from March 2020 onwards, which makes it difficult for them to pay credits on time.

The noted in this section where the most important measures taken by the Ecuadorian government in other to face the crisis caused by COVID19.

5. Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?

There are no other regulations applicable to foreign direct investment in Ecuador. This obligation has not suffered any change or been impacted or modified by virtue of the health crisis caused by COVID-19.

Other than an obligation to report corporate information to the Internal Revenue Service and Superintendency of Companies, determined by the Companies Law, which requires international companies that have shares on national companies to have a named attorney in Ecuador, to prove existence in their country of residence and to report their corporate structure until the final beneficiary, there are no other regulations applicable to foreign direct investment in Ecuador. This obligation has not suffered any change or been impacted or modified by virtue of the health crisis caused by COVID-19.

6. Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?

A new government entered into office on May 24th, 2021, with President Guillermo Lasso Mendoza, switching from a period of almost 14 years of a left-winged administration led primarily by former President Rafael Correa, and most recently, Lenin Moreno. The new President has transmitted a collegial speech and openness to receive foreign direct investment in the most stable and secure landscape possible for our country.

In his first weeks as president, Guillermo Lasso proposed a "solidarity" and "environmentalist" economic plan that will require investment and foreign aid in order to begin the reactivation. As an axis, President Lasso has proposed the progressive elimination of the foreign currency outflow tax, and a reduction in interest rates.

The new administration was able to execute and exceed an ambitious vaccination program leading to more than 9 million people being vaccinated within the first 100 days of government. The following have also been key pillars of the administration:

a) New mining decree: In August 2021, the President signed an executive decree to significantly bolster mining opportunities in Ecuador (see: https://www.bloomberg.com/press-releases/2021-08-09/solgold-plc-annouces-ecuador-executive-decree-and-mining-action-plan

b) Ecuador's bonds amongst the world's best: A recent article by Bloomberg describes the change in atmosphere and economic growth in Ecuador (See: https://www.bloomberg.com/news/articles/2021-08-02/ecuador-defaulted-last-year-now-its-bonds-are-the-world-s-best)

c) Cooperation with the USA: The government has extended open arms to Ecuador-US cooperation, and recently welcomed a historic bipartisan delegation of US Senators (see: https://ec.usembassy.gov/bipartisan-delegation-of-u-s-senators-visited-quito/), paving the road for a trade agreement with the USA.

d) ICSID convention signing and ratification: (https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention) In an effort to invite foreign investment, project legal stability and offer a venue for dispute resolution, Ecuador signed the ICSID convention, which has a favorable opinion by the Constitutional Court for its ratification.

e) Tourism focus: Launch of the "**Breathe Again**" campaign inviting tourist to the country, with key attractions like the Galapagos Islands reaching 100% vaccination of its entire population, and the soon to be met campaign to vaccinate the entire countries tourism operators and suppliers (See: https://www.turismo.gob.ec/galapagos-se-reactiva-y-vuelve-a-los-ojos-del-mundo-con-la-campana-breathe-again/)

f) COVID-19 vaccination: The presidential campaign offer to fully vaccinate 9 million people in the first 100 days of office is close to being met, prior to the deadline with Ecuador leading globally in doses applied daily per/100 people worldwide (https://ourworldindata.org/grapher/daily-covid-vaccination-doses-per-capita?country=~ECU, this vaccination rate is directly impacting economic acceleration. The key differentiating element has been the combination of efforts through public sector coordination with execution and support by the private sector, displaying the potential for maximization of public/private partnership opportunities (PPP's) in this government.

g) Reduction of import tariffs on 667 products: The country recently announced the reduction of import tariffs for inputs, raw materials and machinery in an attempt to lower the costs of local production of goods (see: https://www.reuters.com/article/comercio-ecuador-arancel-idLTAL2N2OL2EH)

Another important step given by the new president is the request he formally made to the financial institutions to lower the interest rates for consumer and micro-entrepreneur's loans.[176]

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

Upon issuance of the original decree of state of exception, the judicial system began a systematic transition into a remote access system, including suspension of terms and deadlines for the first months of the pandemic. Slowly, the courts began implementing virtual windows for submission of documents, and private practitioners slowly began implementing digital signatures, a tool which had long been recognized by the E-Commerce Law of April 2002. As digital signatures turned into the rule, documents submitted online were accepted with full validity and physical submission of documents became the exception. The judicial system underwent changes slowly, with judges initially using tools like Polycom and other outdated systems which generated issues during hearings and deterred remote access. In time, several judges began introducing technological measures, and sharing links to virtual hearing spaces, increasing transparency and access to judicial proceedings. The antitrust/competition Authority was one of the most effective administrations in the government with the implementation of a virtual window[177] which detects a valid digital signature, admits documents electronically and issues a notice of reception by e-mail to users when documents become admitted procedurally to the case file.

Since May 2020, the judiciary council, the administrative body of the judicial function, made the virtual window available to citizens through which all judicial bodies in the country can receive documentation within the judicial processes they substantiate. The Council also urged judges to make virtual hearings as a

[176] Plan de Gobierno Guillermo Lasso (2020). https://guillermolasso.ec/wp-content/uploads/2020/10/Plan-de-Gobierno-Lasso-Borrero-2021-2025-1.pdf
[177] https://servicios.scpm.gob.ec/ventanilla/GesDocVirRegistro.aspx

rule, rather than the exception. As a result of the pandemic caused by COVID 19, necessary reforms to the General Organic Code of Processes were promoted, with the aim of including telematic means as official for the use of judicial servants, lawyers and users in general. Among the most important reforms are the following:

a. Anyone who cannot be found personally or whose address or residence is impossible to determine prior to citing by the press, may be cited electronically. The telematic summons will be carried out by sending three summons to the defendant, on three different days, from the institutional account of the clerk of the judiciary. The e-mail summons will be accompanied by the demand or request for a preparatory procedure and the measures relayed to them.
b. All public sector bodies, entities and institutions will be summoned electronically through the Electronic Notifications System (SINE) administered by the National Directorate of Public Data Registry.
c. Every summon will be published in the automatic consultation system of the electronic page of the Judicial Council through the electronic and technological means available to the Judicial Function, which will include the form of the summon or the reasons why this diligence could be carried out.

On the other hand, particularly regarding the competition authority, on May 06, 2020, SCPM Resolutions 2020-16 and 2020-017 were published in the Official Gazette, through which the following Instructions were issued: The first one determined special instruction for receiving documents through electronic means during the health emergency period. Receipt of documents by email recepcion.documentos@scpm.gob.ec. The second one, issued instructions for the abbreviated management of proposals for the simplification of pro-competition procedures. The procedure is established for the SCPM to receive proposals from economic operators, unions and other public or private actors, for the simplification of procedures related to the provision of goods and services during the health emergency.

Later on, by July 2020, the SCPM implemented the virtual window, by which economic operators may send any kind of requirements of notifications to the SCPM, simplifying the process and guarantying the due treatment and reception of information.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

Ecuador is a jurisdiction that has a merger control regime since the enactment of the Organic Law for the Regulation and Control of Market Power in October 2011. Merger control scrutiny is performed by the Merger Control Intendancy who issues a recommendation to a first instance decision-making body, the First Instance Resolution Commission ("CRPI"). Merger control requirement is triggered through two alternative thresholds, one economic (US $80,000,000 in combined sales) and a market share (30%+) threshold

Prior to the COVID pandemic, all merger control procedures underwent formal scrutiny similar to that of a Phase II investigation with the European Commission requiring 4-6 months in non-problematic transactions for clearance, necessary before closing. On April 20th, 2020[178], faced with a significant lag in merger control notifications and pending approvals, which included an abbreviated or fast-track procedure for merger control essentially for: a) Step-in's or changes of control by foreign entities; b) Horizontal or vertical integrations with less than a 30% market share or 2000 HHI; c) Failing firms. Fast-track procedure brought down review times from a maximum of 120 days to approximately 37 days.

[178] https://www.lexvalor.com/ci/index.php/lex/actualidad/content/407

This expedited review was in force until November 2020, when the SCPM issued a new reform to its internal proceedings instructive by virtue of which it adopted a two-phase merger review process179. By executive decree 1193 issued on November 17th, 2020, subject to publication in the official registry for entry into force, the President of Ecuador reformed the regulation to the Competition Law and amongst other things, implemented a two-phase procedure summarized below:

i. 25 working days from admittance as complete for the SCPM to decide whether the transaction does not merit substantive scrutiny and issue expedited approval, otherwise, it will send the transaction to Phase II scrutiny.
ii. The second phase will grant the SCPM the remaining 60 days for review of the transaction, which can be suspended for an additional 60 days.

The reform also repeals a reference regarding the calculation of business volume of the participants of a transaction, deriving the calculation formula only from the provisions of Article 17 of the Law and thus settling a discrepancy with respect to the calculation of market volume for economic groups. The decree also amends Art. 18 of the Regulations and expressly provides for the possibility of scheduling prior working meetings with the Intendancy of Concentration Control in preparation for the presentation of a notification of economic concentration, a usual practice as Authorities such as the European Commission.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

There have been no reforms relating to thresholds during this period, generally, or in reference to COVID-19.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

The market share component of the analysis has not varied as a result of COVID-19. Rules for assessment of market share of the parties are still subject to the same guidelines and procedures. Some transactions which were submitted for approval during the period where the abbreviated proceeding was in force used the failing firm defense. The regulator was reluctant however to accept a "failing firm" defense argument and issued its first decisions laying out the background for what a failing-firm scenario should be.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

Yes. The SCPM has continued to supervise compliance with remedies and to enforce gun jumping fines and ongoing investigations for lack of notification. COVID-19 has not deterred enforcement priorities in this regard. The SCPM has issued three fines for gun jumping, the most recent and significant decision was issued in 2021, with a 2.6M fine on cardboard product manufacturers.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

[179] https://globalcompetitionreview.com/ecuador-adopts-two-phase-merger-review-process

No. Fortunately the SCPM has been able to remain autonomous and independent in relation to politics and policies relating to COVID-19. The new government has also allowed the regulator and its current Authority to continue its work as a fully autonomous and independent body, as was also suggested by the OECD Peer Review Recommendation report which stated that:

> *"SCPM is an administrative body. SCPM's president (Superintendente) is appointed by Ecuador's Council for Citizen Participation and Social Control, out of a shortlist of three candidates nominated by Ecuador's president. SCPM's president can be removed, among others, through an impeachment process initiated by parliamentarians. No technical or non-political body, such as a court, is involved in this process. Ecuador should be vigilant that there is no impeachment process against SCPM's president on political grounds."*[180]

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

We are unaware of any cases which have been made public where remedies have been subject to review as a result of COVID-19.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

No. The Authority has been generally passive in relation to new investigations during 2020-2021.

In 2020, as a result of the pandemic, the SCPM seemed to have initiated a procedure for alleged unfair practices against the producers and marketers of Alcohol in gel, this as a result of a problem detected by the health authority in the sanitary registry of one of them. The majority of summoned companies submitted the corresponding explanations, and the authority has apparently not continued with the investigation against the entire market, but presumably only against individuals who were unable to justify compliance with the regulations around alcohol in gel.

We have not been aware of new trends or shifts in theories of harm by the regulator in its decisions and investigations.

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

We have not seen a particular trend in the approach of the Authority towards enforcement, however, the Authority has been vigilant of conducts of operators in segments related to public health and bid-rigging in the public procurement system, particularly in relation to the acquisition of diagnosis kits for COVID-19,

[180] https://www.oecd.org/daf/competition/ecuador-oecd-idb-peer-reviews-of-competition-law-and-policy-2021.pdf

body bags, gloves, masks and other products whose supply was scarce at the beginning of the pandemic and where several public scandals were exposed during the first semester of 2020.

16. **Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?**

None that are public or known to our practice.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

No. Aside from very general exhorts requesting operators to comply with local law and avoid anticompetitive behavior, there have been no specific guidelines dealing with collaborations among competitors.

18. **Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?**

None that are public or known to our practice.

19. **Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?**

None that are public or known to our practice.

20. **Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?**

The Authority has not issued any statements or decisions allowing us to infer that they may be more open to receive certain types of justifications around unilateral investigations in the context of the COVID-19 pandemic.

21. **Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

A direct result of the OECD Peer Review recommendation report is the fact that the leniency program in Ecuador has been absolutely inefficient in producing leniency applications and fining anticompetitive practices. The Authority has recognized this and issued a strong campaign seeking to reinforce trust in the

leniency program contemplated by our local law and inviting operators to blow the whistle on cartels in the local market.

The possibility of detecting cartels in Ecuador is low compared to the average for the region; when a cartel is detected, a mixture of inadequate institutional transplants and a restrictive interpretation of the standards of the Competition Law makes processing difficult; and, if a cartel is convicted, the fines do not have an adequate deterrent power. Seen this way, when the chances of being sanctioned are low and the fines do not reach the illegal benefits, there would be no incentive to report.

Leniency programs have gained traction as a vital tool to use for the discovery, sanction, and prevention of the cartels. However, it is important to keep in mind that in order to prevent them it is necessary to have a deterrent effect; therefore, deciding to report a cartel to the authorities should be more profitable for businesses and individuals who continue to break the law.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

In Ecuador the development of environmental, social and corporate governance data has been extremely scarce, so much so, that in no area has it been deepened on the implementation of its principles for the consideration of standards. Environmental, social and corporate governance data refer to metrics related to intangible assets within a company. Research shows that intangible assets comprise an increasing percentage of future business value. It is a fact that in the near future the regulator will see these criteria as a form of survival and as the rule for companies to keep on track, especially in markets that are highly concentrated.

> *"The importance of being environmentally and socially responsible has been realized once again with the COVID19 pandemic. During this pandemic, we started to comprehend the importance of the impact of a company´s operations on the environment, keeping employees safe, rapidly taking actions against an unexpected crisis (not necessarily a financial/economic crisis), and at the same time, preserving the core business operations."*[181]

Therefore, a clear benefit of the ESG criteria is the way it automatically brings confidence to a company in periods of high uncertainty. An important example regarding the use of ESG criteria around a Competition case is the one that occurred in the Netherlands where:

> *"(…) the poultry processing industry and chicken farmers who agreed on the 'Chicken of Tomorrow' initiative – that is, minimum standards aimed at increasing poultry welfare (eg, fewer antibiotics and more space) to which all sector participants would need to adhere. The Chicken of Tomorrow was targeted to replace the unnatural broiler chicken but resulted in higher end-prices for consumers."*[182]

The analysis of Competition Authorities when looking at agreements between competitors is solely based on the economic impact to the consumer, therefore this chicken initiative was not accepted because it would mean a significant raise on the chicken price for the consumer. This is the main problem of the ESG initiatives, the legislation is not prepared to accept this kind of initiatives because they mean an economic impact that might negatively affect the consumer in the short run, but the problem is that they do not consider the long run benefits of these kind of initiatives. In this case, what if people pay a bit more for their chicken but in the long run, they have less health conditions because of the cleaner food that they are having.

[181] Çigdem Vural-Yavas¸ Economic policy uncertainty, stakeholder engagement, and environmental, social, and governance practices: The moderating effect of competition. (2020) https://onlinelibrary.wiley.com/doi/epdf/10.1002/csr.2034

[182] Role of competition law in moving towards a more sustainable world. https://www.lexology.com/library/detail.aspx?g=d2acd1f9-19a2-458e-be8e-ce060b74d1d0

In order to include the ESG criteria in competition law, it has to be modified and stop considering criteria for sanctions only from the economic and the short run point of view, leaving aside important issues and efficiencies that some agreements might bring for the long run.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

More than a matter of control and government enforcement, environmental, social, and governance (ESG) criteria are an increasingly popular way for investors to evaluate companies in which they might want to invest. So, this is a matter that will increasingly transform into a determinant consideration for M&As.

We are certain the ESG criteria soon will be a very important exception that the competition authorities will have to consider when analyzing possible cartel cases, and how companies justify their agreements towards more sustainable practices and how they should not be considered as infractions to the competition law.

It is very important that the regulators give companies a clear path that shows them, how further they can go when collaborating with others on sustainability practices, given that now companies are reluctant to collaborate due to legal uncertainty and fear of fines

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

From the current drafting of our competition law, we do not find elements to determine that a carbon defense would likely be acceptable by competition enforcers, as well as any other ESG-related efficiency, unless companies could effectively show that this carbon defense or ESG-related efficiency produces sufficient benefits to compensate any anticompetitive effects of a conduct in the local market.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

Markets which have historically been identified as more prone to environmental and social impact should likely be subject to stricter levels of scrutiny and standards of proof in order to incentivize the adoption of more ESG related policy and a stronger ESG profile. In a country where extraction of natural resources is one of the primary sources of income, extractive industries such as oil & gas and mining should be subject to stricter scrutiny in terms of ESG to reinforce incentives to adopt stronger programs.

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EUROPEAN UNION

By: Rafique Bachour, Lucas Vanassche and Clémence Coppin

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

The European Union ("**EU**") adopted numerous regulatory measures to tackle the effects caused by the COVID-19 pandemic, most of which are outlined in broad terms in the "Communication on a Coordinated economic response to the COVID-19 outbreak" issued at the start of the pandemic.[183] by the European Commission ("**Commission**").[184] These measures include:

- Temporarily relaxing some EU legal frameworks, including:
  - The EU rules on **State aid**,[185] which have been eased with the aim of enabling member states to take swift and effective action to support citizens and companies facing economic difficulties (see question 4 below for more details); and
  - The **fiscal framework** contained in the Stability and Growth Pact – a set of fiscal rules designed to prevent EU member states from spending beyond their means. This framework has been eased as a result of the Commission and the Council of the EU ("**Council**") activating – for the first time ever – the general escape clause.[186] This escape clause allows national governments to temporarily depart from the normal budgetary requirements, provided that this does not endanger fiscal sustainability in the medium term.

- Putting in place several urgent economic measures, including:
  - A **recovery plan "Next Generation EU"**,[187] which involves EUR 750 billion recovery effort to help the EU tackle the crisis caused by the pandemic;
  - **Temporary support for workers**,[188] to mitigate unemployment risks, through the provision of loans on favourable terms from the EU to member states to cover part of the costs related to the creation or extension of national short-time work schemes;
  - **An increase of the EU budget**,[189] by adding EUR 9.3 billion for fiscal year 2020 for the purchase of medical supplies, building field hospitals, transferring patients for treatment in other member states and the development of testing kits and vaccines;

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[183] See, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak, COM(2020) 112 final of 13.03.2020, available at: https://ec.europa.eu/info/sites/default/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf.

[184] See, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak, COM(2020) 112 final of 13.03.2020, available at: https://ec.europa.eu/info/sites/default/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf.

[185] See, The State Aid Temporary Framework, available at: https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en.

[186] See, Press release, Questions and answers, 20.03.2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_500.

[187] See, Recovery plan for Europe, available at: https://ec.europa.eu/info/strategy/recovery-plan-europe_en.

[188] See, The European instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE), available at: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en.

[189] See, Press release, 14.04.2020, available at: https://www.consilium.europa.eu/en/press/press-releases/2020/04/14/tackling-covid-19-council-adopts-amended-eu-budget-for-2020/.

- A redirection of the EU's **cohesion funds**,[190] to help member states most in need, as well as the adoption of measures to ensure additional administrative flexibility in the use of structural funds; and
- Support for the **most affected sectors**,[191] such as agriculture and fisheries, and transports, e.g. in the form of direct support to farmers and fishers and the introduction of "green lanes" to ensure the flow of goods between member states.

2. Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?

The EU did not adopt any regulations regarding pricing control.

However, the European Competition Network ("**ECN**") – a body comprising of the Commission and the member states' national competition authorities – issued a **Joint Statement** on the application of competition law during the COVID-19 crisis ("**ECN Joint Statement**").[192] In its statement, the ECN identifies **excessive pricing** as a particular area of concern, in light of the increase in prices of certain products, stressing that "*it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices.*"[193]

There is no public record of any Commission investigations into excessive pricing in the context of the pandemic. However, several authorities at the **national level** have opened investigations or created task forces. For instance:

- The **French** Ministry for the Economy introduced temporary price controls on sanitizing gels,[194] which ended on 2 June 2021.[195] The French competition authority put in place a monitoring scheme of the prices charged for certain products, such as sanitizing gels and protective masks, in particular on e-commerce and delivery platforms;[196]

- The **Polish** competition authority opened investigations into a number of private medical facilities for having introduced additional "excessive" fees for medical treatments during COVID;[197]

- The **Italian** competition authority opened investigations into Amazon and eBay for excessive prices for sanitizer products sold on their platforms and for misleading information about the effectiveness of certain medical products against the COVID-19 virus;[198]

[190] See, Press release, available at: https://ec.europa.eu/regional_policy/en/newsroom/coronavirus-response/.
[191] See, COVID-19: the EU's response to the economic fallout, available at: https://www.consilium.europa.eu/en/policies/coronavirus/covid-19-economy/.
[192] See, Joint statement by the ECN on the application of competition law during the Corona crisis, 23.03.2020, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.
[193] Id. Para 5.
[194] See, Décret n° 2020-197 du 5 mars 2020 relatif aux prix de vente des gels hydro-alcooliques, 5.03.2020, available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041690995/.
[195] See, Encadrement des prix pour les gels ou solutions hydroalcooliques, Ministère de l'économie des finances et de la relance, 4.06.2021, available at: https://www.economie.gouv.fr/dgccrf/encadrement-des-prix-pour-les-gels-hydroalcooliques-voir-la-faq.
[196] See, Coronavirus : l'Autorité de la concurrence surveille les éventuels prix abusifs, Le Figaro, 16.03.2020, https://www.lefigaro.fr/flash-eco/coronavirus-l-autorite-de-la-concurrence-surveille-les-eventuels-prix-abusifs-20200316.
[197] See, UOKiK's proceedings on wholesalers' unfair conduct towards hospitals, 04.03.2020, available at: https://www.uokik.gov.pl/news.php?news_id=16277.
[198] See, ICA: Coronavirus, the Authority intervenes in the sale of sanitizing products and masks, 27.02.2020, available at: https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-intervenes-in-the-sale-of-sanitizing-products-and-masks.

- The **Belgian** competition authority opened an investigation into potential cartelist behaviour regarding prices of protective masks charged by supermarkets;[199]

- The **Greek** competition authority opened an investigation into price increases and output restrictions in healthcare materials and other products;[200] and

- The **Dutch** competition authority launched an investigation into Roche Diagnostics concerning the supply of testing materials for COVID-19 tests.[201]

So, competition law investigations – rather than regulatory action – have been seen as the main tool to avoid excessive prices in the EU.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

The EU did not impose obligations on companies to safeguard the pre-pandemic status quo as such. However, some initiatives were taken to avoid shortages in essential products and services.

One of these initiatives is the **ECN Joint Statement**[202] referred to in question 2 above. The ECN Joint Statement makes clear that European authorities will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. In its statement, the ECN notes that such measures would either not fall under the prohibition of anti-competitive agreements or would benefit from an exemption due to the obvious efficiencies.

In addition, the Commission issued a communication setting out a temporary framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the COVID-19 outbreak ("**Temporary Framework on Cooperation**").[203] This communication covers forms of cooperation between undertakings aimed at ensuring the supply and adequate distribution of scarce products and services during the COVID-19 outbreak, e.g. in case of an exponential growth of demand. It sets out:

- **The main criteria** that the Commission will follow **in assessing such cooperation projects** and its **enforcement priorities** during this crisis. With regard to the health sector, the Commission lists certain forms of cooperation that:
    - **Would not raise antitrust concerns** under normal circumstances, such as a trade organisation (i) coordinating joint transport for input materials; (ii) identifying medicines for which there are risks of shortages; and (iii) aggregating information on production, capacity, supply gaps; and

[199] See, L'Autorité de la concurrence enquête sur d'éventuelles ententes illégales concernant les prix des masques dans les supermarchés, RTBF, 2.08.2021, available at: https://www.rtbf.be/info/economie/detail_l-autorite-de-la-concurrence-enquete-sur-d-eventuelles-ententes-illegales-concernant-les-prix-des-masques-dans-les-supermarches?id=10816779.
[200] See, Press release, Investigation of the HCC into price increases and output restrictions in healthcare materials and other products, 21.03.2020, available at: https://www.epant.gr/en/enimerosi/press-releases/item/840-press-release-investigation-in-healthcare-materials.html.
[201] See, Press release, ACM has confidence in commitments made by Roche to help solve problems with test materials, 3.04.2020, available at: https://www.acm.nl/en/publications/acm-has-confidence-commitments-made-roche-help-solve-problems-test-materials.
[202] Id.
[203] See, Communication from the Commission – Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, (2020) 3200 final, 8.4.2020, available at: https://ec.europa.eu/info/sites/default/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

- **Would normally be problematic under EU competition rules**, but – in the exceptional circumstances brought by the pandemic – **could be justified or would not amount to an enforcement priority** to the extent they: (i) are objectively necessary to increase output or avoid a shortage of essential products or services; (ii) are temporary in nature (i.e. to be applied only as long there is a risk of shortage, or in any event during the COVID-19 outbreak); and (iii) do not go beyond what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply. Undertakings should document all exchanges and agreements between them; these should be made available to the Commission on request. The fact that a cooperation is encouraged or coordinated by a public authority is also considered a relevant factor in this context. Any cooperation that is required by a public authority, is in any event allowed.

A temporary process where the Commissions can provide **ad hoc written comfort letters** to undertakings in relation to specific and well-defined cooperation projects. To this end, the Commission set up a dedicated webpage[204] and mailbox[205] that can be used to seek informal guidance on specific initiatives.

In the same communication, the Commission stated that it would continue to closely and actively monitor relevant market developments to detect breaches of EU competition law during the pandemic.

The Commission also published **guidelines** in the **labour sector**[206] to ensure workers' rights during the pandemic. These guidelines tend to preserve seasonal workers' rights in the EU and free movements of workers in general during the crisis.

Some **national initiatives** were also issued to maintain fair competition during the pandemic, including the French competition authority relaying on its website the Commission's communication on the Temporary Framework on Cooperation, the Spanish competition authority launching its online whistleblowing hotline to pursue anti-competitive conduct in any sector,[207] and the Belgian competition authority vowing to closely monitor that fair market dynamics will prevail, both in sectors suffering from the COVID-crisis as well as those benefiting from it.[208]

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

The easing of the EU state aid framework is at the heart of the EU's strategy to mitigate the economic consequences of the pandemic.

The Commission adopted a temporary framework on state aid ("**Temporary Framework on State Aid**"),[209] enabling member states to ensure that sufficient liquidity remains available to businesses of all types and to preserve the continuity of economic activity during and after the COVID-19 outbreak. This measure is similar to a temporary framework that the Commission adopted in response to the global financial crisis in 2008 and 2009.[210]

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[204] See, https://ec.europa.eu/competition-policy/antitrust_en.
[205] See, COMP-COVID-ANTITRUST@ec.europa.eu.
[206] See, e.g. Communication from the Commission - guidelines on seasonal workers in the EU in the context of the covid-19 outbreak, C(2020) 4813 final, 16.7.2020, available at: https://ec.europa.eu/info/sites/default/files/guidelines_on_seasonal_workers_in_the_eu_in_the_context_of_the_covid-19_outbreak_en.pdf.
[207] See, Press release, 02.06.2020, available at: https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc.
[208] See, the Belgian Competition Authority's enforcement priorities for 2021, 10.03.21, available (in French) at: https://www.abc-bma.be/sites/default/files/content/download/files/2021_politique_priorites_ABC.pdf.
[209] See, The State Aid Temporary Framework, available at: https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en.
[210] See, Press release, State aid: Commission adopts temporary framework for Member States to tackle effects of credit squeeze on real economy, 17.12.2008, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1993.

The Temporary Framework on State Aid is based primarily on Article 107(3) of the Treaty on the Functioning of the EU ("**TFEU**"), under which the Commission may declare legal state aid by member states, i.a. with the aim to:

- Promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a member state (Article 107(3)(b) TFEU); and

- Facilitate the development of certain economic activities or areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 107(3)(c) TFEU).

The framework sets out the precise conditions for certain types of aid to be approved, Once notified by the member state, such state aid schemes can be approved very rapidly, as the Commission also put in place a number of **procedural facilitations** to ensure a swift approval process.

First, the framework deals with **state aid measures aimed at ensuring that sufficient liquidity remains available** to all companies. It sets out the conditions under which the Commission will declare such aid as compatible with Article 107(3)(b) TFEU. It lists eight types, namely aid in the form of:

- Direct grants, selective tax advantages, repayable advances or equity up to EUR 2.3 million per company;

- State guarantees for loans taken by companies from banks

- Subsidised interest rates for loans;

- Guarantees and loans not directly provided by the state but channelled through banks;

- Short-term export credit insurance; and

- Support for uncovered fixed costs, now up to EUR 12 million per undertaking, for companies facing a decline in turnover of at least 30% compared to the same period of 2019 due to outbreak;

- Investment support measures in the form of incentives for investments by companies, up to 1% of the total budget available for the dedicated scheme; and

- Solvency support measures in the form of guarantees, up to EUR 10 million per undertaking.

Second, the framework lays down the conditions under which the Commission will consider as legal under Article 107(3)(c) **aid aimed at contributing to the development and production of COVID relevant products**. This covers aid for:

- R&D projects related to COVID-19;

- The construction and upgrade of testing and upscaling facilities for COVID-19 relevant products; and

- The rapid production of products relevant to tackle the outbreak (such as medicinal products and treatments; medical devices and equipment; disinfectants; data collection and processing tools useful to fight the spread of the virus).

Third, the framework lists the conditions under which the Commission will declare as compatible with Article 107(3)(b) TFEU, two types of **aid aimed at protecting jobs** in sectors and regions severely hit by the pandemic. This concerns aid in the form of:

- Deferrals of tax payments and/or suspensions of social security contributions; and

- Wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak.

Finally, the framework lists the conditions under which member states can address companies' **long-term solvency issues** by providing state aid in the form of recapitalisation measures and in the form of support for uncovered fixed cost.

Temporary Framework on State Aid was frequently mobilised to clear national measures supporting **airlines** weakened by the pandemic, including several flag carriers. These clearances were challenged extensively by low-cost carrier Ryanair, who lodged 26 appeals against Commission's decisions clearing state aid to competing airlines.[211] Between February and August 2021, the EU's General Court has handed down 10 judgments in the Ryanair cases, seven of which rejected the appeals. However, in three cases, the General Court annulled the Commission's decisions for failure to provide sufficient explanation. While the General Court has – in other (unsuccessful) appeals by Ryanair – offered the Commission assurances in this regard given the context "*of a pandemic*" and "*extreme urgency*",[212] this shows that flexibility is not limitless. The Commission must still put forward a sufficiently clear and objective justification when declaring state aid legal.

Although most support schemes are granted at the member state level, these are complemented by initiatives such as the **Pan-European Guarantee Fund** – managed by the European Investment Bank. This fund represents EUR 25 billion and is expected to mobilise up to EUR 200 billion of additional financing to support mainly small and medium-sized enterprises affected by the outbreak in the 21 participating member states.[213] The fund will provide guarantees on debt and equity instruments.

See question 1 for other economic schemes implemented in the context of the COVID-crisis.

5. Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?

In the EU, the responsibility for screening **Foreign Direct Investment** ("**FDI**") rests with member states. There is no FDI notification mechanism at EU level.

However, on 11 October 2020, the EU adopted a **FDI coordination framework**.[214] The purpose of this regulation is to introduce a collaborative model between member states. The framework provides for common standards for screening mechanisms and common screening grounds. It also lays down rules for **cooperation** between member states, between member states and the Commission, and between the Commission and third countries. More precisely, the new framework:

- Creates a cooperation mechanism where member states and the Commission will be able to exchange information and raise concerns related to specific investments;

- Allows the Commission to issue opinions when an investment threatens the security or public order of more than one member states, or when an investment could undermine a strategic project or programme of interest to the whole EU;

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[211] See, Carmen Perales, Ryanair continues appealing airlines state aid with action against TAP measure, PaRR, 18.08.2021, available at: https://app.parr-global.com/login?onSuccess=https%3A%2F%2Fapp.parr-global.com%2Fintelligence%2Fview%2Fintelcms-mnc24v&d=1.

[212] See, General Court, Judgment of 17 February 2021, Ryanair DAC v. Commission (T238/20), para. 77; and General Court, Judgment of 17 February 2021, Ryanair DAC v. Commission (T259/20), para. 79.

[213] The participating Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Slovakia, Spain and Sweden.

[214] See, Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN.

- Encourages international cooperation on investment screening, including sharing experience, best practices and information on issues of common concern; and

- Sets certain requirements for member states that wish to maintain or adopt a screening mechanism at national level. Member States maintain the ultimate decision power on whether or not a specific investment should be allowed in their territory.

This EU coordination framework **adds up** to national FDI frameworks, where the actual obligation to notify lies. Currently, **18 EU member states have an FDI framework in place**: Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Spain, Czech Republic, Malta, Slovenia, Slovak Republic. A number of the remaining member states are currently considering the introduction of such legislation.

During the pandemic, the Commission feared that there could be an increased risk of attempts to acquire healthcare capacities or related industries such as research establishments via FDI. The Commission therefore issued **guidance** to member states on how to use FDI screening in times of public health crisis and economic vulnerability in the EU.[215] According to the Commission, "[v]*igilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens*".[216]

The aim of the guidance is to preserve EU companies and critical assets essential for the EU's security and public order (e.g. in the health, medical research, biotechnology and infrastructure sectors), without undermining the EU's general openness to foreign investment. More precisely, the Commission:

- Called upon member states that have an existing screening mechanism to make full use of tools available under EU and national law to prevent capital flows from non-EU countries that could undermine the EU's security or public order;

- Called on the remaining member states to set up a screening mechanism. In the meantime, these member states are requested to consider all options, in compliance with EU law and international obligations, to address potential cases where the acquisition or control by a foreign investor would create a risk to security or public order in the EU;

- The Commission also encourages cooperation between member states, notably through the use of its FDI screening regulation's cooperation mechanism;[217] and

- On capital movements, the guidelines also recall the circumstances under which free movement of capital from third countries may be restricted.

At the **member state** level, several governments also issued **temporary measures** as a result of the pandemic:

- The **French** FDI mechanism was reinforced by: (i) the permanent inclusion of biotechnologies in the list of critical technologies covered by FDI control; and (ii) the temporary lowering to 10% of the ownership threshold triggering control of certain foreign operations involving listed companies;[218]

- The **German** government amended its FDI mechanism by providing that foreign acquisitions of at least 10% in German companies developing, manufacturing or producing vaccines, medicines,

[215] See, Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 25.03.2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

[216] Id.

[217] See, Press release, EU foreign investment screening mechanism becomes fully operational, 9.10.2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1867.

[218] See, Arrêté du 27 avril 2020 relatif aux investissements étrangers en France, 30.04.2020, available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041835304/.

protective medical equipment and other medical goods for the treatment of highly infectious diseases require prior governmental authorisation;[219]

- The **Hungarian** government introduced a temporary FDI screening mechanism applicable to investors from inside and outside the EU.[220] Prior governmental approval is needed in 21 industries, including both health and non-health sectors;

- As a result of a modification to the **Italian** FDI rules, acquisitions of certain Italian businesses in strategic sectors originating from the EU (controlling interests) and from outside the EU (10% of the voting rights) are subject to notification;[221]

- A **Polish law** extended the FDI screening mechanism in Poland for 24 months.[222] A foreign acquisition from non-EEA countries requires prior clearance, if it targets a company generating turnover exceeding EUR 10 million that either (i) is a publicly listed company; (ii) controls assets classified as critical infrastructure; (iii) develops or maintains software crucial for vital processes; or (iv) conducts business in one of 21 specific industries.

- **Slovenia** introduces an FDI screening mechanism.[223] Foreign investors in specified sectors or activities are subject to review, if they acquire at least 10% of the shares of domestic firms. The mechanism applies i.a. to critical infrastructure, transport, water, aviation, media, data processing, artificial intelligence, medical and pharmaceutical technology and the supply of critical inputs; and

- Under a new **Spanish** decree, all foreign investors from outside the EU now require prior governmental authorisation to acquire 10% or more of the share capital, or effective management or control, of a Spanish company.[224] This applies to Spanish target companies engaged in sectors or activities that "affect public order, public safety and public health". Furthermore, authorisation is required in relation to some categories of foreign investors, such as state-owned companies.

6. Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?

The **Temporary Framework on State Aid** was amended on 18 October 2021 in order to be expanded until 30 June 2022.

The Commission proposed a new regulation in May 2021,[225] designed to effectively tackle **foreign subsidies** that cause distortions and harm the level playing field in the Single Market. The proposed regulation aims at closing the regulatory gap in the Single Market, whereby subsidies granted by non-

[219] See, Bundesministerium für Wirtschaft und Energie, Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, 20.05.2020, available at: https://www.bmwi.de/Redaktion/DE/Downloads/F/fuenfzehnte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung-vo-bundesregierung.pdf?__blob=publicationFile&v=4.

[220] See, Government Decree 227/2020 (25 May) on measures required for the economic protection of companies having their seats in Hungary with a view to preventing the human epidemic endangering life and property and causing massive disease outbreaks and eliminating its consequences, 25.05.2020, available at: https://www.flandersinvestmentandtrade.com/export/sites/trade/files/attachments/2272020_V.25GovernmentDecreeHungary.pdf.

[221] See, Gazzetta Ufficiale, LEGGE 18 dicembre 2020, n. 176, 24.12.2020, available at: https://www.gazzettaufficiale.it/eli/id/2020/12/24/20G00197/sg.

[222] See, Anti-Crisis Shield 4.0 (the Act), 23.06.2020, draft available at: https://www.spcc.pl/images/file/Ewa/newsy_www/Anti-crisis_shield_newsletter_sdzlegal_update_4_0_29062020.pdf.

[223] See, Služba Vlade RS za zakonodajo, Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19 (ZIUOOPE), 30.05.2020, available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO8206.

[224] See, Boletín Oficial del Estado, Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19., 18.03.2020, available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-3824.

[225] See, Press release, Commission proposes new Regulation to address distortions caused by foreign subsidies in the Single Market, 5.05.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982.

European governments currently go largely unchecked, while subsidies granted by EU member states are subject to close scrutiny under the EU state aid rules. The European Parliament and the member states are now discussing the Commission's proposal in the context of the EU's ordinary legislative procedure. The draft regulation proposes the introduction of three tools:

A notification-based tool to investigate transactions involving a financial contribution by a non-EU government, where (i) the EU turnover of the company to be acquired (or of at least one of the merging parties) is EUR 500 million or more and (ii) the foreign financial contribution is at least EUR 50 million;

- A notification-based tool to investigate bids in public procurements involving a financial contribution by a non-EU government, where the estimated value of the procurement is EUR 250 million or more; and

- A tool to investigate all other market situations, smaller transactions and public procurement procedures. The Commission could start investigations on its own initiative and may request ad hoc notifications.

The Commission is also currently revising the **Vertical Guidelines**[226] **and Vertical Block Exemption Regulation**[227], and launched a consultation aimed at revising its **Horizontal Guidelines**[228]. These are key documents in the assessment of agreements between companies under EU competition law.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

The Court of Justice of the EU (("**CJEU**"), consisting of the General Court and the European Court of Justice ("**ECJ**")) suspended judicial proceedings and/or postponed hearings and procedural deadlines.[229]

Until the end of May 2020, most of the **hearings** before the ECJ or the General Court have been adjourned, while some of them have been replaced with written questions to the parties. Since then, the situation has largely returned to normal, although the parties have to respect social distancing and wear masks at the hearings. If a party is entirely unable to travel to Luxembourg (where the CJEU is based), they may, under certain conditions, be permitted to attend a hearing by videoconference.

The **time limit** for submitting written observations to the ECJ in requests for preliminary rulings has been extended by one month, except in the cases subject to the accelerated or urgent procedure. However, given the evolving improvement in the health crisis, this flexibility will not be extended again beyond August 2021, following which the time limit of two months and ten days to submit observations can no longer be extended. At the General Court, time limits continue to run. Parties are required to comply with those time limits, except if they seek an extension under the general rules allowing such requests.

At the **member state level**, the situation was broadly similar. From March to May 2020, most member states provided for a suspension of judicial proceedings and/or postponement of hearings and procedural deadlines (typically with the exception of urgent proceedings). This was followed by introduction of alternative options to hearings held in person, such as videoconference hearings or hearings held in writing.

[226] See, draft revised Vertical Guidelines, https://ec.europa.eu/competition-policy/system/files/2021-08/draft_revised_vertical-guidelines.zip.
[227] See, draft revised Vertical block exemption Regulation, available at: https://ec.europa.eu/competition-policy/system/files/2021-07/draft_revised_VBER.zip.
[228] See, Press release, Antitrust: Commission publishes findings of the evaluation of rules on horizontal agreements between companies, 6.05.21, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2094.
[229] See, CJUE's change to judicial activities available at: https://curia.europa.eu/jcms/jcms/p1_3012064/en/.

These measures have caused significant **delays** in judicial activities. In March 2021, German courts were still postponing roughly 20-50% of hearings, while for France it was estimated that the time necessary to make up for the courts' backlog in handling proceedings will be at least 18 months. [230]

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

From a **procedural standpoint**, the European Directorate-General for Competition ("**DG COMP**") initially recommended that companies delay their merger notifications where possible and encouraged parties to discuss the timing of notifications of transactions with the relevant case team. It also temporarily allows and encourages parties to use electronic means to notify their transactions.[231] The latest communication on this point insists that this measure is temporary, but this may well develop into a new best practice.

From a **substantive standpoint**, however, there have been no changes in the application of merger control rules. EU Competition Commissioner, Margrethe Vestager, stated that the COVID-19 pandemic did not change the Commission's merger enforcement either. She pointed out that the number of mergers notified to the commission – and the number of deals that it intervened in – was the same during 2020 as in 2019.[232]

This does not mean that the facts underlying the substantive assessment could not have been impacted by the pandemic. For example, the existing **"failing firm"** defence was brought to the fore more prominently by the pandemic. This defence allows the exceptional approval of a merger that may otherwise be blocked, if one of the companies involved is at risk of collapsing. The bar for successfully invoking this defence is set high and has not been lowered by the pandemic. Indeed, the Director-General of DG COMP, Olivier Guersent, stated "[b]*ecause of the crisis, it is perhaps likely that we will see more cases in which the conditions are met. We shouldn't shy away from accepting the failing-firm defense*", adding that the Commission will continue to insist on a high standard of proof. [233]

To accept this defence, the Commission requires compelling evidence that (i) the failing firm would in the near future be forced out of the market due to financial difficulties, if not for the merger; (ii) there is no less anti-competitive alternative to the deal; and (iii) in the absence of the merger, the assets of the failing firm would inevitably exit the market.[234] The Commission may also assess whether the distressed firm might be kept afloat by alternative funding such as government support, which – as set out in questions 1 and 4 above – has increased significantly during the pandemic.

Where the failing firm standard cannot be met, merging parties can argue that their competitive position is **weakened** by the crisis or that changed market circumstances (such as an increase in overcapacity) make anti-competitive merger effects less likely.

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[230] See, COVID-19 : Le retard pris par les juridictions serait de 18 mois minimum, Village de la justice, 2.10.2020, available at: https://www.village-justice.com/articles/retard-pris-par-les-juridictions-raison-covid-pourra-etre-inferieur-mois,36691.html.

[231] See, DG COMP website available at: https://ec.europa.eu/competition-policy/mergers/coronavirus_en.

[232] See, Charley Connor, Vestager: Coronavirus had no impact on merger control, Global Competition Review, 15.06.2021, available at: https://globalcompetitionreview.com/coronavirus/vestager-coronavirus-had-no-impact-merger-control.

[233] See, Lewis Crofts, No competition enforcement let-up as Europe exits pandemic, Guersent says, Mlex, 5.07.2021, available here: https://content.mlex.com/#/content/1306164.

[234] See, European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/C 31/03), para. 89 and 90, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN.

Based on publicly available information, there is nothing to suggest a meaningful uptake in such arguments being invoked successfully during the pandemic. The substantive assessment under EU merger control has thus largely remained unaffected by the COVID-19 crisis.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

COVID-19 did not impact the EU notification thresholds.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

As set out under question 8 above, EU merger-control rules have not been modified during the pandemic, nor has any meaningful impact on the substantive analysis been observed.[235] In the same vein, the market share component of the competitive analysis in merger control cases has not changed as a result of COVID-19. Finally, no transactions have been cleared by the Commission because of COVID-19 that, otherwise, would have been subject to remedies or rejected.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

There is nothing to suggest that COVID-19 affected the Commission's enforcement regarding remedies or gun jumping.

In 2020, the **Commission** adopted three post-decision **amendments to remedy packages**. It waived drug maker Takeda's requirement to sell a pipeline product for approval of its acquisition of Shire[236] and allowed compressor maker Nidec to re-acquire a manufacturing plant it had to sell when it bought Embraco[237]. The Commission also partially lifted commitments for its approval of the merger between Gaz de France and Suez in 2006.[238] However, none of these amendments were related to, or a consequence of, the COVID-19 outbreak.

The pandemic did impact **remedies imposed by member states'** competition authorities. For example:

- In March 2020, the **Austrian** competition authority allowed media outlets ProSiebenSat.1Puls 4 and ATV to stop maintaining editorial independence in terms of designing news programmes because of difficulties in news production caused by COVID-19, albeit temporarily;[239] and

- In June 2020, the **Dutch** competition authority granted childcare providers Kidsfoundation and Partou an extension to the deadline for selling off some of their locations because of COVID-19 delays, only six months after they received conditional approval for the deal.[240]

[235] See, Charley Connor, Vestager: Coronavirus had no impact on merger control, Global Competition Review, 15.06.2021, available at: https://globalcompetitionreview.com/coronavirus/vestager-coronavirus-had-no-impact-merger-control.
[236] See, TAKEDA / SHIRE, Commission Decision of 28 May 2020, Case 8955.
[237] See, NIDEC / WHIRLPOOL (EMBARCO BUSINESS), Commission Decision of 15 May 2020, Case 8947.
[238] See, GAZ DE FRANCE / SUEZ, Commission Decision of 26 October 2020, Case 4180.
[239] See, Press release, 26.03.2020, available at: https://www.bwb.gv.at/en/news/detail/news/prosiebensat1puls_4atv_merger_commitments_relating_to_news_and_information_restricted_until_30_a/.
[240] See, Press release, KidsFoundation en Partou krijgen een verlenging van de gestelde termijn voor de af te stoten kinderopvanglocaties, 25.06.2020, available at: https://www.acm.nl/nl/publicaties/kidsfoundation-en-partou-krijgen-een-verlenging-van-de-gestelde-termijn-voor-de-af-te-stoten-kinderopvanglocaties.

We are not aware of any gun-jumping decision at the national level that have been impacted by COVID-19.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

There have been no political decisions resulting from COVID-19 which affected or altered the economic and/or legal analysis in merger control cases.

For procedural changes resulting from the pandemic, please refer to question 8.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

No remedies at the EU level have been amended or revoked as a result of COVID-19. At the national level, on the other hand, remedies in at least two cases have been impacted by the pandemic. For further details, please refer to question 11.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

While there is no trend of enforcers relying on new or "remote" theories of harm, both **cartels** and **excessive pricing** were under increased scrutiny during the COVID-19 pandemic.

Because of the economic hardship triggered by the COVID-19 pandemic, EU enforcers expected increased incentives for collusion among companies. "*As sad as it is, I do think we can expect the current crisis will increase incentives for companies to collude*" said the Director of the Cartel Directorate of the DG COMP, Maria Jaspers. She added that the Commission would be unlikely to accept the coronavirus as a "*mitigating factor*" in assessing a cartel or fines.[241]

The Commission issued a communication containing its Temporary Framework on Cooperation, which sets out how it would assess cooperation between companies aimed at ensuring the supply of essential products or services of which there may be a shortage resulting from the COVD-19 crisis.[242] The ECN Joint

[241] See, Lewis Crofts, Covid-related cartels are on EU radar, official says?, Mlex, 20.01.2020, available at: https://content.mlex.com/#/content/1258057.

[242] See, Communication from the Commission – Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, (2020) 3200 final, 8.4.2020, available at: https://ec.europa.eu/info/sites/default/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

Statement was issued with similar effect and also identified excessive pricing as a particular area of concern.[243] These frameworks are discussed in more detail in questions 3 and 17.

National agencies also focused on cartels and excessive prices in the context of the pandemic. Many of them announced publicly that they will closely scrutinise such behaviour with respect to the supply of goods in high demand due to COVID-19, such as the markets for protective masks or disinfectants.

As set out in question 2 above, authorities in several member states have already initiated investigations in this context, including:

- The **Belgian** competition authority's investigation into potential cartelist behaviour regarding the prices of protective masks charged by supermarkets;[244]
- The **Polish** competition authority's investigations into private medical facilities for having introduced additional "excessive" fees for medical treatments during COVID-19;[245]
- The **Italian** competition authority's investigations into Amazon and eBay for excessive prices for sanitizer products sold on their platforms and for misleading information about the effectiveness of certain medical products against the COVID-19 virus;[246]
- The **Greek** competition authority's investigation into price increases and output restrictions in healthcare materials and related items, such as surgical masks, disposable gloves, and antiseptic wipes and solutions;[247]
- The **Dutch** competition authority's investigation into Roche Diagnostics concerning the supply of testing materials for COVID-19 tests.[248]

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

New enforcement initiatives during the pandemic largely focused on the **health sector**, including products considered essential to protect the health of consumers during the pandemic (e.g. face masks and sanitising gel).

While applicable across all sectors, the Commission's **Temporary Framework on Cooperation**[249] (further dealt with in questions 3 and 17) focuses in particular on medicines and medical equipment relevant for testing and treating patients or otherwise mitigating the impact of COVID-19.

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[243] See, Joint statement, 23.03.2020, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

[244] See, L'Autorité de la concurrence enquête sur d'éventuelles ententes illégales concernant les prix des masques dans les supermarchés, RTBF, 2.08.2021, available at: https://www.rtbf.be/info/economie/detail_l-autorite-de-la-concurrence-enquete-sur-d-eventuelles-ententes-illegales-concernant-les-prix-des-masques-dans-les-supermarches?id=10816779.

[245] See, UOKiK's proceedings on wholesalers' unfair conduct towards hospitals, 04.03.2020, available at: https://www.uokik.gov.pl/news.php?news_id=16277.

[246] See, ICA: Coronavirus, the Authority intervenes in the sale of sanitizing products and masks, 27.02.2020, available at: https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-intervenes-in-the-sale-of-sanitizing-products-and-masks.

[247] See, Press release, Investigation of the HCC into price increases and output restrictions in healthcare materials and other products, 21.03.2020, available at: https://www.epant.gr/en/enimerosi/press-releases/item/840-press-release-investigation-in-healthcare-materials.html.

[248] See, Press release, ACM has confidence in commitments made by Roche to help solve problems with test materials, 3.04.2020, available at: https://www.acm.nl/en/publications/acm-has-confidence-commitments-made-roche-help-solve-problems-test-materials.

[249] See, Communication from the Commission – Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, (2020) 3200 final,

Based on its Temporary Framework on Cooperation, the Commission has already issued two **comfort letters** relevant to the health sector. These were addressed to:

- **Producers of medicines for the treatment of COVID-19 patients.** The comfort letter exempts from competition law enforcement their cooperation aimed at improving supply, production and distribution.[250] The exemption is granted under certain conditions, e.g. that the cooperation should be open to all manufacturers and does not go beyond what is strictly required Furthermore, any relevant agreements or minutes must be shared with the Commission. Finally, the exemption does not cover discussions on prices; and

- **Producers of COVID-19 vaccines.** The comfort letter covers the organisation of a "matchmaking event" aimed at upscaling production, involving manufacturers of raw materials, companies with production capacity and developers of vaccines.[251] The Commission considers that the event does not raise concerns under EU competition law to the extent certain safeguards are respected. For example, competitors should keep records of topics discussed and not exchange more information than strictly required.

We are not aware of any particular Commission investigation in the health sector, sparked specifically by the COVID-19 outbreak. However, it is not uncommon for antitrust investigations to be opened years after the scrutinised behaviour was implemented. So, further clarity on how the pandemic affected the Commission's enforcement priorities can be expected further down the line.

For enforcement in the health sector by member states' regulators, please see question 14 above.

The **digital sector**, which has been at the heart of enforcement priorities in the past years, continued to be scrutinised by the Commission during the pandemic, with a focus on unilateral behaviour of dominant tech giants.

At the start of the pandemic, it was suggested that the digital sector could become less of a priority for the Commission. "*For us, on the Commission side, obviously there are other more urgent priorities now that one has to admit*" said Thomas Kramler, DG Comp's head of unit for antitrust in ecommerce and digital economy in April 2020.[252] However, the Commission not only progressed its ongoing investigations into Amazon (Marketplace), but also opened new investigations into Apple[253] in June 2020, Amazon (Buy Box)[254] in November 2020, and Facebook[255] and Google[256] in June 2021. The Commission continued its investigations into these tech companies throughout the pandemic, demonstrating that the digital sector remained at the top of the Commission's enforcement agenda.

Indeed, EU Competition Commissioner Margrethe Vestager said in September 2020 that there was a need for new tools as digitisation has led to the tipping of markets and the erecting of barriers to entry. "*As digital moves from being just another sector to being part of every sector, we can expect this winner-takes-all*

8.4.2020, available at: https://ec.europa.eu/info/sites/default/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

[250] See, Commission Comfort Letter, 08.04.2020, available at: https://ec.europa.eu/competition-policy/system/files/2021-03/medicines_for_europe_comfort_letter.pdf.

[251] See, Commission Comfort Letter, 25.03.2021, available at: https://ec.europa.eu/competition/antitrust/comfort_letter_coronavirus_matchmaking_event_25032021.pdf.

[252] See, Khushita Vasant, EC official says tech probes may take longer as agency deals with COVID-19 priorities - ABA Spring Meeting, PaRR, 29.04.2020, available at: https://app.parr-global.com/intelligence/view/prime-3027735.

[253] See, Commission Press release, 16.06.2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075.

[254] See, Commission Press release, 10.11.2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

[255] See, Commission Press release, 04.06.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848.

[256] See, Commission Press release, 22.06.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143.

dynamic to play out more" she added, flagging the impact of the COVID-19 pandemic in speeding up the digitisation of certain sectors.[257]

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

The number of investigations seems to have remained relatively steady in the past few years. The pandemic does not seem to have had an impact on the Commission's investigational activity. In the period between March 2020 and August 2021, the Commission opened ten antitrust investigations[258] – roughly the same amount as in the period between March 2018 and August 2019.

Five of these ten investigations concern tech companies, with a particular focus on the gathering and use of data from competitors, third-party access to platforms, tying and bundling, leveraging market power into other markets and self-preferencing. This enforcement focus is in line with the trend of the past years, with an investigation being opened into Amazon (Marketplace) in July 2019.

None of these investigations are explicitly related to the COVID-19 crisis. Nevertheless, it is not unusual for the Commission to formally open antitrust investigations several years following the implementation of the scrutinised behaviour. So, further clarity on how the pandemic affected the Commission's enforcement priorities can be expected further down the line.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

As explained in questions 2 and 3, the **ECN** issued a **joint statement** indicating that the Commission and the member state authorities will, in certain circumstances, not intervene in necessary and temporary cooperation between businesses aimed at ensuring the supply and fair distribution of essential products and services during the pandemic.

As explained in questions 3 and 15, the Commission published a **Temporary Framework on Cooperation** covering forms of cooperation between undertakings in order to ensure the supply and distribution of essential products and services during the COVID-19 crisis.[259] This communication focuses in particular on medicines and medical equipment mitigating the impact of COVID-19, but equally applies to forms of cooperation in other sectors.

The Temporary Framework on Cooperation sets out the key criteria that the Commission will take into account when assessing such cooperation. It also establishes a procedure for the provision of guidance for specific conduct by way of an ad hoc comfort letter – an instrument that was no longer in use since 1 May 2004, following the entry into Regulation 1/2003.

This shows that there is some willingness to relax enforcement or grant certain limited exemptions to enable cooperation that is critical to ensuring security of essential supplies and R&D collaboration to combat the virus. This exceptional flexibility was endorsed by several authorities throughout the EU. As set out in

[257] See, Jacob Parry, Vestager, US antitrust heads spar over EU legislative proposals for platforms - ICN 2020, PaRR, 14.09.2020, available at: https://app.parr-global.com/intelligence/view/intelcms-7x3tfq.
[258] Into the Manufacturing and distribution of garments sector in Germany, Google (Adtech and Data-related practices), Facebook (advertising data), EPEX Spot, PPC (Greek wholesale electricity market), Teva – Copaxone, Mondelēz (trade restrictions), Amazon (Buy Box), Apple (Mobile Payments and Apple Pay), Apple (App Store rules).
[259] See, Communication from the Commission – Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, (2020) 3200 final, 8.4.2020, available at: https://ec.europa.eu/info/sites/default/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

question 15, the Commission already issued two comfort letters based on its Temporary Framework on Cooperation, both relating to the health sector.

In addition, the Commission has introduced a **temporary derogation from EU competition rules for certain agricultural products**. Article 222 of the Regulation on the Common Organisation of the Markets in Agricultural Products empowers the Commission to declare inapplicable Article 101(1) TFEU – prohibiting anti-competitive agreements – to agreements between agricultural producers in situations of severe market imbalances. In the context of the market imbalances resulting from the COVID-19 crisis, the Commission has made use of this power in relation to producers of potatoes,[260] dairy,[261] and flowers[262]. Under this temporary derogation, market participants were authorised to conclude agreements and to make common decisions — such as on free distribution, production planning, market withdrawals or joint promotion — for a period of six months, starting in April-May 2020.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

Crisis cartel-related arguments can be raised to the extent the coordinating behaviour is mandated by law. However, the "**state compulsion**" doctrine is interpreted strictly and applies only to action that is truly determined by the government and does not leave any freedom on the part of the participating undertakings. Consequently, it is only very rarely accepted by the Commission.

The **general justification for anti-competitive agreements** included in Article 101(3) TFEU could also include crisis-related arguments. However, for this provision to apply, the cooperation (i) must contribute to improving production, distribution or technical progress; (ii) allowing consumers a fair share of this benefit; and must not (iii) go beyond what is necessary to achieve these benefits; or (iv) eliminate competition in respect of a substantial part of the products in question. This is equally a very high bar to pass and therefore only rarely accepted by the Commission.

Crisis-related arguments are thus not easily accepted by the Commission. In that regard, according to the Director of the Cartel Directorate of the DG COMP, Maria Jaspers, "*the current crisis is of a different nature than the 2008 crisis, but I would be surprised if the commission would take a different view of similar types of arrangements today*". She added: "*I would also be surprised if the commission would view the underlying crisis as a mitigating factor, be it in our substantive assessment or in the fines*".[263]

Similarly, EU Competition Commissioner, Margrethe Vestager, stated in the context of the COVID-19 pandemic that "*a crisis is not a shield against competition law enforcement*".[264]

Please refer to question 17 above for specific types of cooperation that were allowed under EU competition law, in light of the exceptional circumstances of the COVID-19 crisis. It should be noted that these measures are linked to the pandemic and temporary in nature. The Temporary Framework on Cooperation highlights that it "*shall remain applicable until the Commission withdraws it (once it considers that the underlying*

[260] See, Commission Implementing Regulation (EU) 2020/593 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the potatoes sector, 5.05.2020, available at: https://content.mlex.com/Attachments/2020-05-05_MV4M29NXEL1LEGSN/OJ_EC%20regulation_2020_593_potatoes.pdf.

[261] See, Commission Implementing Regulation (EU) 2020/599 of 30 April 2020 authorising agreements and decisions on the planning of production in the milk and milk products Sector, 5.05.2020, available at: https://content.mlex.com/Attachments/2020-05-05_MV4M29NXEL1LEGSN/OJ_EC%20regulation_2020_599_dairy.pdf.

[262] See, Commission Implementing Regulation (EU) 2020/594 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage sector, 5.05.2020, available at: https://content.mlex.com/Attachments/2020-05-05_MV4M29NXEL1LEGSN/OJ_EC%20regulation_2020_594_flowers.pdf.

[263] See, Lewis Crofts, Covid-related cartels are on EU radar, official says?, Mlex, 20.01.2020, available at: https://content.mlex.com/#/content/1258057.

[264] See, Lewis Crofts, Tweet available at: https://twitter.com/lewis_crofts/status/1243480366800912386.

exceptional circumstances are no longer present)".[265] More generally, the Commission will not allow any longer-term permissiveness now that the pandemic is almost over, Director-General of DG COMP Olivier Guersent confirmed in July 2021.[266] Nevertheless, these measures may serve as an inspiration for responses to future crises.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

The Commission has not announced any exemptions applicable to unilateral conduct during the COVID-19 pandemic. On the contrary, according to the ECN joint statement, "*[t]he ECN will […] not hesitate to take action against companies taking advantage of the current situation by cartelising or abusing their dominant position. In this context, the ECN would like to point out that the existing rules allow manufacturers to set maximum prices for their products. The latter could prove useful to limit unjustified price increase at the distribution level*".[267]

Consequently, there is nothing to suggest that the pandemic impacted the level of scrutiny regarding unilateral behaviour.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

As explained in question 17, some flexibility was – temporarily – allowed during the pandemic in relation to certain forms of cooperation between companies. However, no similar measures were adopted in relation to unilateral behaviour. There is currently nothing to suggest that the Commission will be more open to certain types of economic justifications related to COVID-19 in the context of unilateral investigations.

However, further clarity on how the pandemic affected the Commission's assessment can be expected further down the line. The Commission may still investigate unilateral behaviour that took place during the pandemic in the years to come. It therefore remains to be seen whether such arguments will be raised and how they will be assessed by the Commission.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

The Commission has not suggested any deviations in this regard for the post-COVID era.

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[265] See, Communication from the Commission - Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, (2020) 3200 final, 8.4.2020, available at: https://ec.europa.eu/info/sites/default/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

[266] See, Lewis Crofts, No competition enforcement let-up as Europe exits pandemic, Guersent says, Mlex, 5.07.2021, available here: https://content.mlex.com/#/content/1306164.

[267] See, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23.03.2020 ("Joint Statement"), available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

On the one hand, competition policy is a powerful tool that could contribute to the realisation of ESG objectives as outlined in European initiatives such as the European Pillar of Social Rights[268], the Recovery Plan,[269] or the Green Deal[270]. Indeed, a policy brief from the Commission, published in September 2021, confirms its willingness to use competition policy to support the EU's environmental ambitions.[271] Different aspects of competition law could be useful to help achieve ESG objectives:

- **Cartels/collaboration**: environmental and social cooperation between companies could be beneficial to the society as a whole. Article 101(3) of the TFEU already outlines an exemption for agreements that generate benefits which outweigh the negative effects of restricting competition. While the focus of such exemptions has typically been on *economic* benefits, enforcers could consider also considering *ESG* related benefits. Where companies may currently be hesitant to cooperate to achieve such aims, a shift in the assessment of their cooperation agreements may make them more willing to do so.

- **Mergers**: when assessing the expected impact of a merger, competition authorities could consider not only economic but also *environmental and social* impacts of mergers. Remedy packages could also be based on such consideration.

- **State aid**: state aid policy could be used to promote green solutions, quality jobs and a just transition. It could also be used to prevent public funds from supporting undertakings or innovations contributing to environmental or social dumping.

On the other hand, as outlined by the Commission following a recent consultation on this topic,[272] the goal of competition law is "*to promote and protect effective competition in markets*"; not to shape environmental and social policies. According to the Commission, "*[c]ompetition policy is not in the lead when it comes to fighting climate change and protecting the environment. There are better, much more effective ways, such as regulation and taxation*."[273].

Similarly, the Director-General of DG COMP, Olivier Guersent, highlighted that, even though competition policy "*can and must" play a role in achieving the EU's climate objectives*", it cannot "*substitute for or duplicate*" regulation. "*Competition policy can achieve a lot in terms of aligning incentives, but a competition enforcer also knows that there are limits to what competition policy can and should do*". [274]

[268] See, European Pillar Social Rights detailed at: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights_en.
[269] See, Recovery Plan for Europe detailed at: https://ec.europa.eu/info/strategy/recovery-plan-europe_en.
[270] See, European Green Deal detailed at: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.
[271] See, Competition policy brief "Competition Policy in Support of Europe's Green Ambition", 10.09.2021, available at: https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PD.
[272] See, calls for consultation available at: https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf.
[273] See, Adelaide Luke, Timothy Stutt, Antony Crockett, Joel Rheuben and Howard Chan, ESG collaboration and competition law: change on the horizon?, Lexology, 25.03.2021, available at: https://www.lexology.com/library/detail.aspx?g=2c64968f-b863-414c-bceb-60c335741d07.
[274] See, Giulia Bedini, EU climate goals can't rely on competition policy, we need regulation too, Guersent says, Mlex, 22.06.2021, available at: https://content.mlex.com/#/content/1302808.

In other words, since competition law was not created for this purpose, it is not best placed to shape ESG-related policies.

From a democratic standpoint, it also seems preferable that elected and democratically accountable politicians strike the balance on how the costs of achieving ESG-related policies are divided between the members of society. It is questionable whether unelected competition enforcers should be in charge of striking this balance. In addition, it may be difficult to measure exact environmental or social benefits, and whether they are sufficient to offset potential anti-competitive effects on the market.

Although the **Commission has not yet taken any concrete initiatives** to use competition law as a means of shaping ESG policies, it has recently published a **policy brief confirming its willingness to use competition policy to support the EU's environmental ambitions**.[275] This brief follows the Commission's consultation last year in relation to competition policy and the Green Deal. It explores how EU competition rules and enforcement can complement environmental and climate policies more effectively.

For example, in relation to antitrust, the Commission is planning to provide further guidance on the application of Article 101 TFEU to sustainability agreements – both in the revised Horizontal Cooperation Guidelines and in individual cases, where appropriate. In the area of State aid, new 'Climate, Energy and Environment Aid Guidelines' will allow for aid measures in support of the EU Green Deal objectives that are more comprehensive, flexible and future-proof. Finally, in the context of merger control, the Commission intends to remain vigilant when it comes to protecting green innovation and preventing "killer acquisitions" of companies active in this field.

At the **member state-level**, certain authorities also have suggested that they would start taking concrete initiatives to use competition law as a means of shaping ESG policies:

- The **Dutch** Authority for Consumers and Markets led the way and issued a guidance paper in July 2020 on how competition law will be applied to sustainability agreements.[276] The paper describes types of sustainability agreements that are considered acceptable on the basis that they are either unlikely to give rise to any restriction of competition, or likely to deliver benefits that offset any restriction of competition. The paper also sets out the authority's enforcement policy. It notes in particular that the authority will not seek to impose fines for any agreements that are published and appear to have followed the authority's guidance in good faith, even if they are ultimately found to be incompatible with competition law.

- The **Greek** Competition Commission issued a working paper in September 2020,[277] where it announced guidelines to support businesses entering into sustainability collaboration arrangements. The Greek authority also vows to include environmental benefits and sustainability objectives as part of their substantive assessment in competition law cases.

- The **Belgian** Competition Authority's enforcement priorities for 2021 also reflect this trend.[278] With its enforcement policy, the authority aims to stimulate innovation and technological developments which will contribute to "greenifying" the Belgian economy. In its policy statement, the authority indicates that it is open to help define instances where companies can cooperate to develop green technologies and reach sustainability goals. It will furthermore safeguard that such technologies are not withheld from the market. So, the Belgian authority signals it is open to give

[275] See, Competition policy brief "Competition Policy in Support of Europe's Green Ambition", 10.09.2021, available at: https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PD.
[276] See, ACM, Guidelines – Sustainability agreements, opportunities within competition law, 9.07.2020, available at: https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.
[277] See, HCC, Staff Discussion Paper on Sustainability Issues and Competition Law, Programme Competition Law and Sustainability and Technical Report on Sustainability and Competition, 09.2020, available at: https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.
[278] See, the Belgian Competition Authority's enforcement priorities for 2021, 10.03.21, available (in French) at: https://www.abc-bma.be/sites/default/files/content/download/files/2021_politique_priorites_ABC.pdf.

guidance on specific projects, in contrast to the Dutch and Greek approach of issuing generally applicable guidelines.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

As suggested under question 1 above, democratically accountable politicians should be at the heart of pushing social and environmental change, using state regulation, taxation and state aid.

The role of **antitrust enforcers** could range from:

- Ensuring that the enforcement of competition rules does not hinder ESG-initiatives. Enforcers may e.g. provide guidance on which forms of cooperation will not be considered anti-competitive or enforced. They could also apply state aid rules in a way that they do not hinder public incentives granted to companies with the aim of developing ESG-policies; to

- Taking into account ESG-related efficiency claims in the context of merger control, agreements between competitors, and potentially abusive behaviour by dominant companies; and

- Actively taking ESG-related considerations into account in determining their enforcement priorities.

For each of these potential roles to be effective, enforcers should consider issuing guidelines, given that such considerations have traditionally not been taken into account in the assessment of competition law.

Businesses and **lawyers** could put in place or contribute to CSR initiatives. They could also consider taking part in public consultations, such as the Commission's second consultation concerning the revision of its Horizontal Cooperation Guidelines,[279] to suggest changes that could help achieve ESG-related policies.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

Environmental and sustainability factors, such as a carbon defence, could be considered when reviewing mergers or potentially anti-competitive conduct. Much like the traditional economic factors, it could be considered whether carbon-related efficiencies outweigh potential anti-competitive effects resulting from a transaction, agreement or unilateral behaviour. For the pros and cons of such an approach, see question 1.

The carbon defence could prove to be of particular relevance to the current Commission (2019 – 2024), which has put tackling climate change at the centre of its agenda. The Commission recently presented its Green Deal policy, which aims to cut the EU's greenhouse-gas emissions to net-zero by 2050. EU Competition Commissioner, Margrethe Vestager, stated in October 2019 that "*all of Europe's policies — including competition policy*"[280] would play a role in reaching the Green Deal's objectives. Nevertheless, she warned that enforcers couldn't "*turn a blind eye*" to agreements that harm competition and consumers, "*not even in the name of sustainability*.".[281] She also said that it was preferable for governments to put regulations in place that promote sustainability rather than to "*change*" the competition rules.

[279] See, consultation available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13058-Horizontal-agreements-between-companies-revision-of-EU-competition-rules/public-consultation_en.
[280] See, Angus Reston, Mark Sansom, 'Green' competition law – a changing enforcement climate?, 11.05.2020, available at: https://sustainability.freshfields.com/post/102g6wo/green-competition-law-a-changing-enforcement-climate.
[281] See, Andrew Boyce, Comment: Green competition law is the debate to watch this year, Mlex, 9.01.2020, available at: https://content.mlex.com/#/content/1154284.

The Commission's approval in December 2019 of a state aid project of seven member states to invest EUR 3.2 billion in an electric battery project,[282] illustrates how the Commission can play a part in sustainability projects, without overstepping its traditional role.

4. Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?

It is not necessary or desirable for the level of scrutiny or standard of proof to differ across sectors.

First, it seems hard to define the sectors where ESG-related considerations would always be relevant and those where they would be less relevant. All sectors could likely help push forward such policies.

Second, the substantive assessment in competition law cases (whether merger control or antirust) is characterised by significant leeway for the regulator to consider case- and market-specific elements. The assessment whether ESG-considerations are particularly relevant and able to outweigh potential anti-competitive effects, could be assessed by the regulator in that specific case, without the need for differing standards per sector.

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[282] See, press release available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6705.

FRANCE

By: Laurent Godfroid, Marc-Antoine de Chillaz and Mélanie Gouraud

The role of Government

1. Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?

On 23 March 2020, the French Parliament passed an emergency law n°2020-290 establishing a "*health state of emergency*" to deal with the Covid-19 pandemic.[283] This law contained a series of exceptional measures, including empowering the French Government to legislate by orders to support the economy.

In this context, the French Government has put in place measures to support businesses, including:

1. Delays in the payment of social and/or tax contributions[284];
2. Direct tax rebates[285];
3. Tax credits to encourage landlords to abandon rents in favor of tenants of professional premises[286];
4. A solidarity fund to prevent the cessation of activity of small businesses, micro-entrepreneurs, self-employed and liberal professions[287];
5. State guaranteed loans[288];
6. A credit mediation for the rescheduling of bank loans[289];
7. A partial unemployment scheme[290];
8. A support plan for French exporting companies[291];
9. An exceptional aid for the management of fixed costs for certain companies (hotels, cafes, sports halls, thermal establishments, night clubs etc.). [292]

On September 3rd, 2020, the French Government also released a massive investment plan of €100 billion (including €40 billion provided by the European Union) to further address the economic consequences of the COVID-19 pandemic, by supporting businesses, rethinking production models, transforming infrastructure and investing in training. [293]

283 Emergency Law n° 2020-290 of 23 March 2020 to deal with the Covid-19 epidemic.
284 https://www.economie.gouv.fr/covid19-soutien-entreprises/delais-de-paiement-decheances-sociales-et-ou-fiscales-urssaf
285 www.economie.gouv.fr/covid19-soutien-entreprises/remise-dimpots-directs
286 www.economie.gouv.fr/covid19-soutien-entreprises/report-paiement-loyers
287 www.economie.gouv.fr/covid19-soutien-entreprises/fonds-de-solidarite-pour-les-tpe-independants-et-micro
288 www.economie.gouv.fr/covid19-soutien-entreprises/pret-garanti-par-letat
289 www.economie.gouv.fr/covid19-soutien-entreprises/mediation-du-credit-pour-le-reechelonnement-des-credits-bancaires
290 www.economie.gouv.fr/covid19-soutien-entreprises/dispositif-de-chomage-partiel
291 www.economie.gouv.fr/covid19-soutien-entreprises/les-mesures/plan-de-soutien-aux-entreprises-francaises-exportatrices
292 www.economie.gouv.fr/covid19-soutien-entreprises/prise-en-charge-couts-fixes-entreprises
293 https://www.diplomatie.gouv.fr/en/french-foreign-policy/economic-diplomacy-foreign-trade/promoting-france-s-attractiveness/france-relance-recovery-plan-building-the-france-of-2030/

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

In the context of the COVID-19 pandemic, the French Government also enacted temporary price control measures, thus making an exception to the principle of freedom of prices and free competition in France. In that respect:

- The wholesale prices and retail prices of hydro-alcoholic gels solutions have been regulated from March 2020[294] to June 2021[295] to protect consumers against the risks induced by the abnormal market situation caused by the pandemic;

- For the same reasons, the wholesale prices and retail prices of single-use surgical masks have been regulated from May 2020 to June 2021.[296]

These temporary price regulations ended with the entry into force of law n°2021-689 of May 31st, 2021 implementing a transitional regime for the existing state of health emergency related to COVID-19[297].

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

Please refer to the answer provided in question 2.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

In the context of the COVID-19 pandemic, the European Commission adopted on 19th March 2020 a State Aid Temporary Framework to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the coronavirus outbreak[298].

State aids granted by France in this context have therefore played a decisive role in protecting companies. Examples of such state aids include:

- A solidarity fund to cover the losses incurred by companies as a result of the COVID-19 pandemic[299];

- A guarantee scheme for small and midsize exporting companies affected by coronavirus outbreak[300];

- €2 billion French scheme to support uncovered fixed costs of companies affected by the coronavirus outbreak[301];

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294 See for instance: Decree n°2020-197 of 5 March 2020 on the sale prices of hydroalcoholic gels ; Decree n°2020-858 of 10 July 2020 on the sale prices of hydro-alcoholic gels and solutions and surgical masks for single use.

295 https://www.economie.gouv.fr/dgccrf/encadrement-des-prix-pour-les-gels-hydroalcooliques-voir-la-faq

296 https://www.economie.gouv.fr/encadrement-prix-masques-chirurgicaux-et-enquetes-DGCCRF ; Decree n°2020-858 of 10 July 2020 on the sale prices of hydro-alcoholic gels and solutions and surgical masks for single use.

297 Law n°2021-689 of 31 May 2021 relating to the management of the exit from the health crisis.

298 https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en

299 State aid SA.56823.

300 State aid SA.56868.

301 State aid SA.61330.

- Plans to grant up to €4 billion for the recapitalization of Air France[302];
- Plans to provide €7 billion in urgent liquidity support to Air France[303];
- €5 billion loan guarantee to the Renault group[304].

5. Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?

As a general principle, financial relations between France and foreign countries are free. As an exception, in a limited number of sectors related to national defense or likely to jeopardize public order and activities essential to the protection of the country's interests, Article L.151-3 of the Monetary and Financial Code subjects foreign investments to prior authorization.[305]

A foreign investment is eligible for the IEF procedure ("Foreign Investment in France") if three cumulative conditions are met:[306]

1. A condition relating to the investor;
2. A condition relating to the nature of the operation envisaged;
3. A condition relating to the nature of the target company's business.

This procedure for controlling foreign investment in France has been reinforced during the health crisis. Adaptation measures included *(i)* the permanent inclusion of biotechnologies in the list of critical technologies covered by the IEF control and *(ii)* the temporary reduction to 10% of the holding threshold triggering the control of certain foreign operations relating to listed companies. [307]

216 transactions were examined within this framework in 2019[308] and 275 in 2020[309], which represents about 20% of the total foreign investments (1215 operations recorded in 2020).

6. Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?

Please refer to the answer provided in question 5.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

302 State aid SA.59913.
303 State aid SA.57082.
304 State aid SA.57134.
305 https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etrangers-en-france
306 https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etrangers-en-france/les-conditions-d-une-operation-soumise-a-autorisation-prealable
307 https://www.tresor.economie.gouv.fr/Articles/2020/12/18/prorogation-jusqu-au-31-decembre-2021-des-mesures-d-adaptation-du-controle-des-investissements-etrangers-en-france-pendant-la-crise-sanitaire
308 www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etrangers-en-france/les-chiffres-cles-des-ief-en-2019
309 https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etrangers-en-france/les-chiffres-cles-des-ief-en-2020

In the context of the COVID-19 crisis, courts adapted and modified their procedures. On 16 March 2020, all courts closed, but continued to process "essential" cases.[310]

In judicial matters, on 25 March 2020, as part of the government's ability to take all necessary measures by orders to deal with the consequences of the pandemic, the French Government adopted an order adapting the rules applicable to the courts of the judicial order ruling in non-criminal matters.[311]

Example of such rules included:

- *The use of the single judge*:[312] The court could, by decision of its president, rule as a single judge in first instance and in appeal in all cases submitted to it;

- *The use of videoconferencing*:[313] Judges could decide that the hearing would be held through an audiovisual means of telecommunication which would ensure the identity of the persons taking part and guarantee the quality of the transmission and the confidentiality of the exchanges between the parties and their lawyers. In case of material and technical impossibility, judges could decide to hear the parties or their lawyers by any means of electronic communication, including phone;

- *Setting up proceedings without a hearing*:[314] At any time during the proceedings, judges could decide that the proceedings would take place without a hearing. The parties had to be informed by any means, with fifteen days to object. The procedure could thus be exclusively in writing, with communication between the parties made by notification between lawyers.

Another order[315] was also adopted by the French Government concerning procedural time limits. It specified that all time limits that were to expire between 12 March 2020 and 23 June 2020 were deemed to have been made in time if made within a period that could not exceed, as of the end of that period, the time limit legally allowed to act, within the limit of two months.

In criminal matters, an order[316] was also adopted to adapt the rules of criminal procedure to the pandemic. Certain provisions were made applicable again during the second phase of the pandemic by an order of November 2020.[317] This order provided in particular for:

- The use of videoconferencing, without having to obtain the agreement of the parties, before all criminal courts, investigating courts or trial courts;

- The transfer of all or part of the litigation of a court of first instance likely to be paralyzed by the pandemic to a neighboring court;

- The holding of hearings or the rendering of decisions in restricted publicity or in chambers or the holding of hearings of collegiate courts by a single judge.

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310 Examples include criminal cases and those relating to the protection of vulnerable persons.

311 Order n°2020-304 of 25 March 2020 adapting the rules applicable to the jurisdictions of the judicial order ruling in non-criminal matters.

312 Article 5, Order n°2020-304 of 25 March 2020 adapting the rules applicable to the courts of the judicial order ruling in non-criminal matters.

313 Article 7, Order n°2020-304 of 25 March 2020 adapting the rules applicable to the courts of the judicial order ruling in non-criminal matters.

314 Article 8, Order n°2020-304 of 25 March 2020 adapting the rules applicable to the courts of the judicial order ruling in non-criminal matters.

315 Order n°2020-306 of 25 March 2020, relating to the extension of deadlines that have expired during the health emergency period and to the adaptation of procedures during that same period.

316 Order n°2020-303 of 25 March 2020 adapting rules of criminal procedure on the basis of the emergency law of March 23, 2020 to deal with the covid-19 epidemic.

317 Order n°2020-1401 of 18 November 2020 adapting the rules applicable to the courts of the judicial order ruling in criminal matters.

These measures were applicable until the end of the state of health emergency, extended by one month.[318]

In administrative matters, an order[319] was also adopted to ensure the continuity of the public service of administrative justice despite the spread of the pandemic. This order provided in particular that *(i)* the president of the court could decide that the hearing would be held without the presence of the public or that the number of persons admitted to the hearing would be limited,[320] *(ii)* that hearings could be held using audiovisual means of communication[321], and *(iii)* that a decision could be taken without a hearing, by reasoned order, on applications for summary proceedings.[322]

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

The French competition authority ("FCA") closed its offices on 17 March 2020 and worked remotely. This situation had several practical consequences for the application of merger control procedures[323]:

- *Concerning the exchange of documents*, the sending/delivery of documents in physical form, by hand or by post, was no longer possible;

- *Concerning the time required to process merger cases*, the FCA indicated that the measures to prevent the COVID-19 pandemic would have an impact on the ability of the departments to process merger cases with the usual diligence. In particular, the collection of information from third parties was made more difficult.

  Order n°2020-306 of 25 March 2020 relating to the extension of deadlines during the health emergency period and to the adaptation of procedures during this same period applied to State administrations, including the FCA. Thus, as of 12 March 2020, and until the expiration of a period of one month after the end of the state of health emergency, the legal and regulatory deadlines for the examination of merger transactions were suspended.

  However, the order did not prevent the adoption of an act or the completion of a formality whose term expired within the period in question: it did allow to consider as not tainted with illegality the act carried out within the additional time allowed. The FCA's position on this point was to make its best efforts to issue its decisions and opinions within the normal time limits, without waiting for the expiration of the additional time limits conferred by these provisions. This position concerned all cases considered simple, *i.e.* those that could be settled by a Phase I decision and that did not require a market test.

  In addition, the deadlines for implementing the commitments were suspended or postponed until the expiration of a period of one month from the end of the state of health emergency.

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318 Order n°2020-1401 of 18 November 2020 adapting the rules applicable to the courts of the judicial order ruling on criminal matters.

319 Order n°2020-305 of 25 March 2020 adapting the rules applicable before the jurisdictions of the administrative order.

320 Article 6, Order n°2020-305 of 25 March 2020 adapting the rules applicable before the administrative courts.

321 Article 7, Order n°2020-305 of 25 March 2020 adapting the rules applicable before the administrative courts.

322 Article 9, Order n°2020-305 of 25 March 2020 adapting the rules applicable before the courts of the administrative order.

323 www.autoritedelaconcurrence.fr/en/article/adaptation-merger-control-procedures-due-coronavirus-covid-19 https://www.gide.com/en/news/covid-19-adaptation-of-eu-and-french-merger-and-antitrust-rules-in-the-context-of-the-covid-19

- *Concerning the postponement of merger projects*, the FCA invited companies to postpone any economic merger project that was not urgent.

Despite these provisions, the FCA endeavored to maintain the very short deadlines usually applied. Thus, between 18 March and 18 May 2020, the FCA authorized 25 mergers within an average of 22 working days, including for large-scale transactions such as the takeover of Sinoué by Orpéa or the acquisition of Bombardier assets by Spirit.
The notification thresholds have not been modified or exempted under COVID-19 crisis. The market share component was also not changed.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

The FCA further addressed "*mergers during COVID-19*" in a press release dated December 2020, clarifying that the specific context of the pandemic will be taken into account in the assessment of mergers:

"*In 2021, when examining mergers, the Autorité will pay attention to the context of the economic crisis, related to the health crisis. The year 2020 led the Autorité to examine a large number of transactions involving retail brands in economic difficulty. The year 2021 should see this trend continue. The Autorité will make sure that certain transactions do not artificially escape its control due to the low turnover achieved in 2020 by the companies in question. It will also endeavor to take into account the context in which these transactions will take place, while maintaining vigilant control over the impact of these transactions on competition*".

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

Please refer to the answer provided in question 9.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

Please refer to the answer provided in question 9.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

Please refer to the answer provided in question 9.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

Please refer to the answer provided in question 9.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

The COVID-19 crisis also called into question the balance between practices that could be permitted as pursuing an objective of general interest and those that should be prohibited.

During the COVID-19 crisis, the FCA recalled that it was "*careful that no company can abuse its market power or agree with other companies to the detriment of consumers and the community. It is notably of the utmost importance to ensure that products considered essential remain available at competitive prices*".[324]

The FCA therefore set up an internal network dedicated to pool market surveillance work during the crisis, analyze the various behaviors observed and, if necessary, take action to remedy as effectively as possible the behaviors detected[325].

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

Please refer to the answer provided in question 14.

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

Please refer to the answer provided in question 14.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

In the meantime, competition authorities also decided to take into consideration the specific circumstances of the COVID-19 crisis while applying antitrust rules.

On 23 March 2020, the European Competition Network (the "ECN"), which brings together the European Commission and all competition authorities of the Member States, published a Joint Statement regarding the application of competition rules during the COVID-19 crisis.[326]

The main features of this statement were the following:

- The ECN acknowledged that the extraordinary situation related to the COVID-19 outbreak required companies to cooperate to ensure fair production and distribution of scarce products;
- In the current circumstances, the ECN would not actively intervene against the necessary and temporary measures put in place to avoid a shortage of supply of these products;

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324 https://www.autoritedelaconcurrence.fr/en/basic-page/covid-19

325 Ibid.

326 https://www.gide.com/en/news/covid-19-adaptation-of-eu-and-french-merger-and-antitrust-rules-in-the-context-of-the-covid-19

- In any event, such measures should not raise competition law concerns as they would not constitute a restriction of competition within the meaning of Article 101 TFEU or would be likely to generate efficiencies that would most likely outweigh such a restriction of competition;
- If companies were to have doubts about the compliance of these cooperation initiatives with competition law, they could at any time approach the Commission or the national competition authority concerned for informal advice.

In the same vein, the FCA stressed that "*The current situation is also leading to temporary cooperation movements between companies, notably to guarantee the production and fair distribution of essential products to all consumers. The Autorité de la concurrence supports this type of initiative and is ready to assist them*" (emphasis added).[327]

In this respect, the internal network above-mentioned was also aimed to enable the FCA to quickly respond to requests securing virtuous initiatives and provide informal advice on the compatibility of cooperation projects with competition law.[328]

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

Please refer to the answer provided in question 17.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

Please refer to the answer provided in question 17.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

Please refer to the answer provided in question 17.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

Please refer to the answer provided in question 17.

ESG and competition policy

327 https://www.autoritedelaconcurrence.fr/en/basic-page/covid-19
328 Ibid.

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Environmental issues and competition law. Environmental issues can no longer be ignored while implementing competition law. At EU level, a "*Green Deal*" was unveiled on 11 December 2019 at EU level to propose an action plan to fight climate change through ambitious policies. First climate action initiatives include:[329]

- European Climate Law to enshrine the 2050 climate-neutrality objective into EU law;
- European Climate Pact to engage citizens and all parts of society in climate action;
- 2030 Climate Target Plan to further reduce net greenhouse gas emissions by at least 55% by 2030;
- New EU Strategy on Climate Adaptation to make Europe a climate-resilient society by 2050, fully adapted to the unavoidable impacts of climate change.

On October 2020, the European Commission published a call for contributions on "*how competition rules and sustainable development policies can work together*". As explained, "*The purpose of this call for contributions* [was] *to gather ideas and proposals from everyone with a stake in this issue, including competition experts, academia, industry, environmental groups and consumer organizations*".[330]

On 4 February 2021, the European Commission (Direction General for Competition) organized a Conference on "*Competition Policy contributing to the European Green Deal*", held by Executive Vice President Margrethe Vestager. At that occasion, the VP:

- stressed that "*a competition policy that allows* […] *to get the most from the innovative drive from industry*" was needed;
- acknowledged that "*Competition policy is by no means the main tool to reach our green goals. There are more direct instruments to make our economy greener – such as environmental regulation, taxation, and green investment*", but that "*doesn't excuse us from doing our part*";
- mentioned that "*competition rules already help make our economy greener. Our state aid rules encourage governments to invest in renewable energy*" and explained that "*Our antitrust and merger rules help to keep the pressure on business to use scarce resources efficiently and to innovate*";
- indicated that "*we need to see if competition policy could do more*", highlighting that a review of competition rules was launched "*to make sure they are fit for purpose, in a changing world*"[331].

In its priorities for the year 2020[332], the FCA also highlighted its intention "*to place sustainable development at the core of its action*", by focusing "*in particular on identifying the practices that restrict competition between companies and which harm the environmental protection*".

For 2021, the FCA further stressed that "*concerns relating to sustainable development will continue to be integrated in the decision-making practice of the Autorité, which will focus on targeting the most harmful anticompetitive practices in this area. Several cases that may fall into this category should be concluded in 2021. The Autorité will also continue to support companies wishing to benefit from guidance on this subject, for example when they plan to carry out concerted actions with an environmental objective. The Autorité*

329 https://ec.europa.eu/clima/policies/eu-climate-action_en
330 https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf
331 https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-and-green-deal_en
332 https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-announces-its-priorities-2020

will also participate in the work carried out at European level on this subject within the framework of the Green Deal launched by the European Commission"[333].

Environmental considerations are thus increasingly integrated into competition policies, as further highlighted by recent cases from the European Commission and the FCA.

Enforcement of competition law in this new context. On 8 July 2021, the European Commission found that Daimler, BMW and Volkswagen group (Volkswagen, Audi and Porsche) breached EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning. The Commission imposed a fine of € 875 189 000[334].

At that occasion, Executive Vice-President of the Commission Margrethe Vestager indicated that:

"*The five car manufacturers Daimler, BMW, Volkswagen, Audi and Porsche possessed the technology to reduce harmful emissions beyond what was legally required under EU emission standards. But they avoided to compete on using this technology's full potential to clean better than what is required by law. So today's decision is about how legitimate technical cooperation went wrong. And we do not tolerate it when companies collude. It is illegal under EU Antitrust rules. Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. And this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal*."[335] (emphasis added).

At French level, the FCA imposed sanctions totaling €302 million on the three leading manufacturers of PVC and linoleum floor covering. The FCA notably sanctioned cartel behavior whereby the manufacturers deliberately refrained from promoting environmental performance that went beyond a certain industry 'average standard'[336]. According to the FCA, this may have served as a disincentive to improve technical performance and to innovate as a means of improving the environmental quality of their products[337].

It remains to be seen how these environmental objectives will continue to be integrated into competition policies and the enforcement of competition law by competition authorities. Reflection should also focus on possible conflicts between environmental considerations and competition law. Strict application of competition rules could indeed lead to penalizing companies whose activities are nevertheless in line with the objectives of the Green Deal.

2. What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?

Please refer to the answer provided in question 1.

3. Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?

Please refer to the answer provided in question 1.

333 https://www.autoritedelaconcurrence.fr/en/press-release/after-very-active-2020-autorite-de-la-concurrence-announces-its-priorities-2021-which

334 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581

335 Ibid.

336 https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-announces-its-priorities-2020

337 https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

Please refer to the answer provided in question 1.

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GERMANY

By: Fabian Hübener and Markus Brösamle

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

The German government has passed several Acts introducing temporary changes to legal requirements in various fields of law to avoid case of hardship that would otherwise have arisen as a result of the Covid-19 pandemic (including changes to civil, insolvency, financing, employment, tax and criminal procedure law). In addition, the government has granted coronavirus aid, which is continually being adapted and expanded. Overall, the aid is the most extensive financial assistance in the history of the Federal Republic of Germany. The aid is aimed at stabilizing the economy, helping employees, the self-employed and companies through the crisis and strengthening the healthcare system. Notable measures include an (unprecedented) economic stimulus package of ca. EUR 130 billion, which is intended to not only provide an impetus to stabilize the economy, but also to support investment in the future (e.g. spending on mobility, the transition to green energy and digitalization). More generally, measures include support programs for companies, tax reductions and reimbursement schemes (e.g. several bridging grants for the fixed costs of companies and the self-employed) and the stabilization of the labor market by using the furlough scheme more extensively.

Many of the aid measures were approved under the EU Commission's State aid Temporary Framework adopted in March 2020 (and amended in April and May 2020).

Throughout the pandemic, German competition law has remained in force. The Federal Cartel Office (Bundeskartellamt), however, recognized the need for businesses in certain sectors to cooperate more closely during the Covid-19 pandemic than under normal circumstances (see answer 14 for details).

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

The German Federal Ministry of Health issued an ordinance limiting the markup charged by pharmacies and wholesalers selling Covid-19 antigen tests. The markup limit was only in effect for about a month in December 2020.

We are not aware of any other price control regulations.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

We are not aware of any such obligations regarding production requirements.

There were, however, several Acts introducing temporary changes to legal requirements in various areas. They were all aimed at avoiding hardship cases that would otherwise have arisen as a result of the Covid-19 pandemic. Notable changes included the temporary suspension of the obligation to file for insolvency

under certain conditions and performance refusal rights. The latter restricted, for example, the landlord's right to terminate a lease due to late payment of rent for both residential and commercial rentals. Consumer loan agreements also benefited in certain instances from statutory deferrals of interest and principal payments.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

The government-backed programs have played a vital role in mitigating the economic consequences of Covid-19.

As of June 2021, the German government has granted EUR 105.7 billion in coronavirus aid to companies. In particular, the aviation and tourism industries have been given aid as they were severely affected by the crisis. Under the State aid Temporary Framework adopted in March 2020, the EU Commission approved Germany's plans to contribute EUR 6 billion to the recapitalization of Deutsche Lufthansa AG, the parent company of Lufthansa Group and the country's biggest airline.338 Under the same framework, the EU Commission approved Germany's plans to contribute up to EUR 1.25 billion to the recapitalization of TUI AG, a major German tourism group, which suffered substantial losses due to the coronavirus outbreak and the travel restrictions put in place because of Covid-19.339 Other aid measures include a state-guaranteed EUR 550 million public loan granted via the German development bank Kreditanstalt für Wiederaufbau to another major airline to compensate it for the damage caused by the Covid-19 outbreak.340

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Yes. Germany's control regime on foreign direct investment is regulated in the Foreign Trade and Payments Ordinance (AWV). In May 2020, to help tackle Covid-19 the German Federal Ministry for Economic Affairs and Energy ("BMWi") tightened controls on investment in vaccine and antibiotics manufacturers, manufacturers of personal protective equipment, and manufacturers of medical goods for the treatment of highly infectious diseases. In May 2021, the scope of the notification obligations in AWV was further extended, partly due to Covid-19.341

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

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338 For details, see the EU Commission's press release of 25 June 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1179.

339 For details, see EU Commission's press release dated 4 January 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7

340 For details, see EU Commission's press release dated 27 April 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_752

341 Noerr's post, https://www.noerr.com/en/newsroom/news/inthewakeofthecovid19pandemicgermanyconsidersprohibitiontoclosetransactionpursuanttoforeigndirectinv; Blog von CMS, https://www.cmshs-bloggt.de/gesellschaftsrecht/investitionskontrolle-weitere-reform-bringt-massive-verschaerfungen/

Except for the AWV amendments (see answer 5 for details), we are not aware of any new or upcoming regulations in this respect.

7. How did courts change their procedures in response to Covid-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

Initially, a few courts suspended oral hearings. After a while, more and more German civil courts made use of videoconferencing technology, and remote hearings have gained in popularity, and likely will do so post-Covid-19.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the Covid-19 pandemic? Have your antitrust authorities granted exemptions due to Covid-19? If any, please explain.

The Bundeskartellamt's enforcement activities have not decreased due to Covid-19. The Bundeskartellamt sees a need for continuous, rigorous and effective merger enforcement. The President of the Bundeskartellamt explained, "if we do not rigorously apply merger control and prohibit anti-competitive mergers, the post-merger road that we subsequently have to take [namely abuse proceedings] is a very difficult one." Specifically in respect to Covid-19, the Bundeskartellamt clarified that the pandemic should not be used to bring about a relaxation of the standards against which mergers are ultimately assessed, i.e. whether they significantly impede effective competition. The merger assessment will thus remain focused on the long-term consequences of a merger and not unduly focus on short-term market features.342

The Bundeskartellamt also faces no factual constraints that would impair its enforcement activities. It already stated back in March 2020 that its operating capacity was guaranteed and has not since reported any difficulties in this respect.

9. Have the notification thresholds been subject to amendments or exemptions as a result of Covid-19?

No.

The two domestic German notification thresholds were significantly increased at the beginning of 2021 – from EUR 25 million to EUR 50 million and from EUR 5 million to EUR 17.5 million respectively. These changes, however, were not triggered by Covid-19. Instead, the aim of these changes is to reduce the numbers of filings significantly as the Bundeskartellamt is of the opinion that it reviewed too many unproblematic cases in the past.

342 For details, see Joint statement on merger control enforcement of the Competition and Markets Authority (CMA), the Australian Competition and Consumer Commission (ACCC) and the Bundeskartellamt as well as the related press statement, bot dated 20. April 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/20_04_2021_Joint_Statement_CMA_ACCC_BKartA.html

10. Has the market share component of the competitive analysis in merger control cases changed as a result of Covid-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of Covid-19 that, in normal conditions would have been subject to remedies or rejected.

No.

The Bundeskartellamt is not obliged to publish all its decisions. However, we are not aware of any transaction that has been cleared due to Covid-19 that under normal conditions would have been subject to remedies or a prohibition decision. It is also highly unlikely that such a decision exists, as this would be contrary to the Bundeskartellamt's view that pandemic must not serve as an excuse to relax merger review.

11. Is your jurisdiction enforcing decisions or orders imposed prior to Covid-19 on remedies or gun jumping fines?

As previously stated (see answer 8), there is no noticeable decline in enforcement activities. In principle, this also relates to remedies or gun jumping. However, we are not aware of any gun jumping fines recently imposed by the Bundeskartellamt that would need to be enforced.

12. Have political decisions resulting from Covid-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from Covid-19 remain in your jurisdiction after the pandemic is over?

No.

Temporary procedural changes: The Covid-19 pandemic led to certain procedural modifications to the merger provisions of the German Competition Act. More specifically, the statutory time limit for examining mergers notified to the Bundeskartellamt between 1 March 2020 and 31 May 2020 was temporarily extended – mainly because the market participants' response to the Bundeskartellamt's market research on merger control proceedings took longer than before. Despite this short period, the Bundeskartellamt carried on with business as usual.

No material changes: There have been no material changes to the merger framework. It is unlikely that this will change in the coming months as the Bundeskartellamt's standpoint is that the pandemic must not serve as an excuse to relax merger review.

This includes the application of the failing firm defense. While it seems likely that the pandemic will lead to further market consolidation in numerous sectors and to additional restructuring mergers, the Bundeskartellamt will apply the same standard in respect of the failing firm defense as it did in the past, meaning that the requirements for the failing firm defense remain strict. The parties to the merger have to prove that (i) the exit of the company to be acquired from the market is imminent without the merger, (ii) there is no alternative buyer whose takeover would have less harmful effects on the market concerned, and (iii) the market shares of the distressed company would "essentially accrue to the acquiring company" in the event of a market exit even without the merger (see also answer 18).

13. Are you aware of any transaction that was subject to remedies before Covid-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

We are not aware of any such transaction.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the Covid-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

Covid-19 has not changed the Bundeskartellamt's enforcement efforts. Its President recently stated that economic difficulties cannot justify anti-competitive agreements. Accordingly, the Bundeskartellamt concluded some important proceedings in 2020 and also launched new investigations.343 Overall, the Bundeskartellamt noted a decline in leniency applications. However, it did not link this trend to Covid-19, but to an increase in cartel damage litigation.

In its decisional practice, the Bundeskartellamt largely relied on established theories of harm in the investigations. Where the Bundeskartellamt investigated more controversial theories, these were not linked to the Covid-19 pandemic. An example for this was the debate surrounding the question whether Facebook's German data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and merge it with data collected on Facebook, could constitute an abuse of a dominant position on the social network market in the form of exploitative business terms to the detriment of both private users and competitors.344

In more detail regarding enforcement trends:

Strict enforcement against exploitation of market power: The Bundeskartellamt, in a joint statement with the other European competition authorities, warned in March 2020 against an exploitation of the Covid-19 situation: Competition law also applies in times of crisis, in particular to abusive and clearly consumer-damaging behavior such as excessive price increases.345

More favorable treatment of essential and temporary forms of cooperation: At the same time, it stated that enforcement activities will not target "necessary and temporary measures put in place in order to avoid a shortage of supply" ensuring "the supply and fair distribution of scarce products to all consumers". 346 The Bundeskartellamt handled numerous requests at short notice for guidance on cooperation from companies facing the coronavirus crisis in 2020. Overall, the Bundeskartellamt strived for quick and unbureaucratic guidance to make cooperation possible, for example in order to overcome shortages in production, storage and logistics. The following two examples illustrate the Bundeskartellamt's practice:

The Bundeskartellamt provided guidance to the German Association of the Automotive Industry (VDA) in June 2020. The Association developed framework conditions for restarting automotive production and a

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343 For an overview, see press statement Bundeskartellamt – Review of 2020 dated 29 December 2020, available: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/29_12_2020_Jahresr%C3%BCckblick.html?nn=3591568

344 For detail, see Bundeskartellamt's case summary of the Facebook case dated 15 February 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3

345 See Joint Statement of the ECN dated 23 March 2020, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sonstiges/Corona_ECN_Statement.pdf;jsessionid=DB280C76B566E1E3E82EB39C87F87AB2.1_cid390?__blob=publicationFile&v=2

346 See Joint Statement of the ECN dated 23 March 2020, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sonstiges/Corona_ECN_Statement.pdf;jsessionid=DB280C76B566E1E3E82EB39C87F87AB2.1_cid390?__blob=publicationFile&v=2

model for restructuring suppliers requiring the exchange of information between different groups of stakeholders. The Bundeskartellamt discussed these measures with the VDA and decided, within its scope of discretion, to refrain from a more detailed review under competition law.347

In a second case, the Bundeskartellamt informed the parties to an emergency platform for vaccination equipment in February 2021 that it would not initiate proceedings against the platform. The platform was launched by the German Chemical Industry Association to prevent shortages in the supply of vaccination equipment to the vaccination centers. Via the B2B platform, the Federal German states and manufacturers of vaccination equipment provide information on their current supply situation and their capability to deliver. This transparency is intended to help better coordinate the supply chain to prevent any shortage or misallocation of vaccination equipment. The platform, however, will not provide any details on the prices and quantities of the suppliers and its duration is limited to the current Covid-19 emergency situation.348

As the Bundeskartellamt is part of the European Competition Network, it is helpful to briefly also consider the EU level. On the EU level, the European Commission has provided additional guidance by publishing a Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current pandemic. The Framework explains when and how companies can obtain guidance or even written comfort on whether their envisaged cooperation is in line with EU competition law. It will be applied until further notice. Under this Framework, two letters of comfort – essentially providing legal certainty as to the competition law compatibility of a cooperation initiative – have been issued so far: On 8 April 2020, Medicines for Europe received a letter of comfort. This is an association of pharmaceutical manufacturers and participating companies in relation to a voluntary cooperation project to address the risk of shortages of critical hospital medicines for the treatment of coronavirus patients. On 25 March 2021, the co-organisers of a pan-European matchmaking event, aimed to address bottlenecks in current production of Covid-19 vaccines and accelerating the use of additional available capacity across Europe, received a letter of comfort. The letter identifies the conditions under which the matchmaking and exchanges between participating companies, including direct competitors, can take place at this matchmaking event in compliance with EU competition rules.349

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the Covid-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

Covid-19 has had no noticeable impact on enforcement priorities or brought about any change in the investigation approach.

Regardless of Covid-19, the digital economy was the key area of the authority's work in 2020 and will be in 2021. For instance, the authority dealt with questions such as to what extent the processing of user data from different sources by a social network operator may qualify as an abuse of dominance. In 2021, the German parliament expanded the German Competition Act, allowing the Bundeskartellamt to impose ex ante obligations, such as a prohibition on self-preferencing, on companies with paramount cross-market significance for competition. So far, the Bundeskartellamt has used this new tool to initiate proceedings against Facebook/Oculus, Amazon and Google.

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347 See Bundeskartellamt press statement dated 09 June 2020, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/09_06_2020_VDA.html?nn=3591568

348 See Bundeskartellamt's press statement dated 29 March 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/29_03_2021_Impfzubehoer_Plattform.html?nn=3591568

349 See EU Commission's Temporary Framework dated 8 April 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=EN

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

No such trend is apparent.

At the beginning of the Covid-19 crisis, the Bundeskartellamt stated that it would not hesitate to take action against companies taking advantage of the Covid-19 situation by forming cartels or abusing their dominant position, in particular with respect to products considered essential to protect the health of consumers during Covid-19 (e.g. face masks and hand sanitizer). It also reminded manufacturers of the option of setting maximum prices for their products to prevent extreme price increases throughout the distribution chain.350

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the Covid-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

See answer 14 for details.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

Structural crisis cartels formed with the aim of securing competitive market structures for the post-crisis period without completely eliminating competition are in theory permissible under German competition law. However, the requirements are very high.

A closely related aspect is the so-called failing firm defense in merger law. The Bundeskartellamt is also willing to hear this line of defense, but generally sets strict requirements. An easing of these requirements as a consequence of Covid-19 is unlikely.

The parties to the merger have to prove that (i) the exit of the company to be acquired from the market is imminent without the merger, (ii) there is no alternative buyer whose takeover would have less harmful effects on the market concerned and (iii) the market shares of the distressed company would "essentially accrue to the acquiring company" in the event of market exit even without the merger. If all these conditions are met, the weakening of competition is not due to the merger. However, it is difficult to provide sufficient evidence that the requirements are met, especially to prove that there is no alternative buyer whose merger with the distressed company would have less harmful effects on the competitive situation. Usually this requires at the very least some evidence that the seller has made efforts to sell the business to other parties.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the Covid-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the Covid-19 pandemic?

350 See Joint Statement of the ECN dated 23 March 2020, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sonstiges/Corona_ECN_Statement.pdf;jsessionid=DB280C76B566E1E3E82EB39C87F87AB2.1_cid390?__blob=publicationFile&v=2

No.

20. **Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the Covid-19 pandemic?**

No.

21. **Given that the Covid-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

We do not expect this. Instead, we expect continuous strict enforcement in all industry sectors and not just in health-related markets (see no. 14).

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Increasing importance of ESG: Environmental and social aspects as well as the corresponding corporate governance policies (collectively "ESG") are becoming increasingly important to companies. Sustainable use of resources as well as (worldwide) protection of social aspects are currently key issues for many companies. Also, consumer choice is increasingly being affected by a company's ESG-related decisions.351

Balance of objectives: While unilateral decisions by companies to assign a higher priority to ESG will generally be unproblematic, competition law becomes relevant when companies decide to jointly implement such goals. The main question in this respect is whether and how to take greater account of ESG aspects under the relevant competition law frameworks. Where the goal of protecting competition and the pursuit of public interests' objectives come into conflict, it is ultimately the task of the democratically elected lawmakers to strike a balance between the opposing interests (and thus to provide the general path for moving forward).352

- However, companies currently face legal uncertainty when dealing with bilateral ("cooperation") ESG goals. Cooperating businesses cannot simply claim they are protecting ESG goals (relevant to the public) but must prove, inter alia, that consumers are not placed in a less favorable position due to the agreed-upon ESG goals.

Cf. OECD, Sustainability and Competition, Note by Germany, 1/12/2020; working paper (in German), Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice, Bundeskartellamt, 5/10/2020.

352 Cf. OECD, Sustainability and Competition, Note by Germany, 1/12/2020, para. 89 et. seq.

- With respect to mergers, there are (currently) only very limited opportunities for taking ESG aspects into account in the antitrust assessment (for details, see no. 3 re ESG).

Arguments in favor of expanding competition policy goals: If lawmakers were to broaden competition policy goals to expressly include ESG, in particular by adopting specific ESG regulations, this could lead to greater legal certainty for companies when implementing ESG measures. As a result, more companies might be willing to enter into cooperative agreements on ESG. This could lead to an increase in such initiatives and could strengthen ESG. Also, competition authorities (such as the Bundeskartellamt) have identified the need to take greater account of environmental concerns in their competition law practice.[353]

Arguments against expanding competition policy goals: However, ESG is also a relevant competitive factor. ESG is becoming increasingly relevant to consumers when they decide whether to purchase a product or service. Companies already compete with respect to ESG; this competitive process could also have beneficial effects. Therefore, it could be prudent to let the free competitive process handle ESG goals and not amend the competition law objectives. It should also be kept in mind that expanding competition law objectives to expressly include ESG could lead to additional requirements being imposed on companies. Depending on the individual case, this could lead to more effort and costs for the companies.

2. What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?

To a certain extent, competition law already offers opportunities to take ESG into account. Enforcers and businesses can only shape the playing field within this existing context. In the case of more profound changes, the legislator would be the democratically legitimate body to amend existing provisions. In more detail:

- Authorities and courts can establish a certain degree of legal certainty through case practice by applying and assessing ESG issues in antitrust law and by publishing their decisions or general guidelines. For example, the Bundeskartellamt invited more than 130 competition law experts to discuss and share views on the theme of "Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice." It published the results in a working paper.[354]

- Companies can attempt to enter into cooperative agreements that are compatible with competition law and seek guidance, at least informally, from the Bundeskartellamt. The decisive factor is likely to be whether the companies succeed in presenting and proving the efficiencies/advantages of an ESG cooperation (especially for the benefit of the consumer).

- Lawyers can help (whether now or in the future) to draft legally compliant ESG agreements. They can assist companies in checking for the aforementioned evidence of efficiencies/advantages of the ESG cooperation. They can also develop supporting arguments with the aim of jointly (companies and lawyers) persuading the decision-makers responsible.[355]

353 Cf. OECD, Sustainability and Competition, Note by Germany, 1/12/2020, para. 93.

354 Cf. for instance: Working paper (in German), Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice, Bundeskartellamt, 5/10/2020.

355 Cf. for instance: Press release, Sustainability initiatives and competition law practice – virtual meeting of the Working Group on Competition Law, Bundeskartellamt, 5/10/2020.

In any case, a dialogue should be pursued between all parties involved in order to develop workable solutions.

3. Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?

This has to be decided by the legislator.

However, German competition law is dynamic and already provides options for accepting corresponding defenses with respect to the ban on cartels. Regarding German merger control, however, there are only limited options for considering such aspects:

- Ban on cartels: There are specific options for assessing ESG initiatives in the existing framework. In particular, the so-called efficiency defense allows for exemptions in individual cases. Agreements between undertakings which

  - contribute to improving the production or distribution of goods or to promoting technical or economic progress,
  - while allowing consumers a fair share of the resulting benefit, and
  - which do not impose restrictions, which are not strictly necessary, and
  - do not grant the opportunity of eliminating competition

  can be exempted. The main issue is to prove that the ESG measure has led to improvements which the consumer also benefits from.

- Merger control: Within the current merger control framework, the standard of review is "significant impediment to effective competition", under which ESG objectives can rarely be considered. This is because ESG considerations do not fall within this standard of review, which is narrowly focused on competition in the relevant product market in each individual case.

  Nevertheless, German merger law permits – currently356 – legitimate non-competitive interests to be considered in the form of ministerial approval (by way of exception).

  Thus, when it comes to merger control in Germany, there is a clear separation between the areas of responsibility of the Bundeskartellamt and those of the policymakers/ministry: the Bundeskartellamt's only responsibility is to protect competition. Overriding public welfare interests, i.e., parameters not relating to an assessment under competition law, are considered within the scope of ministerial approval proceedings. In the Miba/Zollern merger control proceedings, for example, the German Minister for Economic Affairs granted ministerial approval, justifying this partly on the grounds of environmental policy objectives.357

Thus, implementing a corresponding defense could help to promote ESG objectives and would create more legal certainty with respect to the ban on cartels. With regard to merger control, a corresponding "defense"

356 However, there is discussion that the ministerial approval may be abolished.

357 Cf. for instance: Working paper (in German), Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice, Bundeskartellamt, 5/10/2020.

would open up new possibilities in the assessment which do not currently exist in proceedings before the Bundeskartellamt.

4 Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?

The legislator must decide whether competition law is the proper tool to promote these objectives, and whether specific sectors should be subject to stricter standards.

There are apparently specific industries where sustainability has already become a factor:

- For instance, exemptions from the prohibition of anti-competitive agreements had already been discussed (many years ago) with regard to the environmental sector. However, specific criteria for exempting the environmental sector under competition law were ultimately not introduced.

- There already have been decisions in the area of recycling and food in which sustainability aspects have been addressed, albeit in accordance with the general requirements of antitrust law.358

- Other laws, such as the Supply Chain Act, impose a duty on companies to audit suppliers; this applies in particular to the textile industry, for example.

- In a landmark case, car manufacturers were fined (EUR 875m) by the European Commission for restricting competition in emission cleaning for new diesel passenger cars.359

In any case, rules could help in this regard and provide companies with practical criteria. A certain steering effect could thus likely be achieved by implementing stricter or more lenient requirements. However, parliament would have to decide where such steering should take place.

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358 Cf. for instance: Working paper (German), Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice, Bundeskartellamt, 05.10.2020.

359 See European Commission, Press release, 08.07.2021, Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars.

ITALY

By: Francesco Carloni

The role of Government

1. Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?

In 2020, the Italian Government and Parliament deployed far-reaching measures to address the effects of the COVID-19 outbreak in the Italian market. Through the following Italian legislative measures: 'Cure Italy',[360] 'Liquidity',[361] 'Relaunch'[362] and 'August'[363] law-decrees, several economic interventions have been put in place to support different sectors significantly impacted by the COVID-19 crisis. These law-decrees allocated: (i) a total of approximately EUR 9.5 billion to the healthcare sector; (ii) a total of EUR 35 billion to support employment; and (iii) EUR 12 billion to foster national liquidity.

With respect to taxation, the Italian Government adopted the following measures: suspensions, extensions and postponements, cancellation and reduction of taxes, incentives and non-refundable grants, support for capitalization, sector-specific measures, and tax credits. Additionally, to support families, the Government has granted the following measures: economic support for working parents, social safeguards, tax subsidies and income protection.

The economic support for businesses has been another focus of concern for the Government, which adopted extraordinary measures to support Italian companies, ensuring their stability during the emergency while helping them to relaunch their businesses. This action continued with the subsequent 'Aid' law-decree,[364] addressed to the sectors most affected by the pandemic. These measures have introduced non-refundable grants, tax credit for rent, suspension of VAT (i.e., withholding tax and social security contributions), postponement of the second advance payment due for 'IRPEF' (i.e., personal income tax), 'IRES' (i.e., corporate income tax) and 'IRAP' (i.e., regional income tax). Last but not least, in order to support employment, the Government adopted the following measures: the extension of the 'cassa integrazione' (i.e., the Italian redundancy fund),[365] wage supplement scheme, emergency income, smart working incentives, special parental leave and babysitting bonus with childcare vouchers.

2. Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?

Regulatory measures have been adopted concerning price control. In particular, in April 2020 the Italian Government imposed a price cap for the sales of face masks from final retailers to final consumers.[366]

Moreover, the Italian 'Relaunch' law-decree[367] introduced VAT exemptions for 2020 on masks, sanitizing gels, gloves and other instruments used in hospitals to prevent the COVID-19 spread. As of 2021, the VAT rate for these products increased to 5%.

360 Italian law-decree No. 18 of March 17, 2020.
361 Italian law-decree No. 23 of April 8, 2020.
362 Italian law-decree No. 34 of May 19, 2020.
363 Italian law-decree No. 126 of October 13, 2020.
364 Italian law-decree No. 137 of October 28, 2020.
365 Lastly further extended by Italian law-decree No. 146 of October 21, 2021.
366 Order No. 11/2020 of April 26, 2020.
367 Ibid. No. 3.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

We are not aware of such obligations.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

As for many other EU Member States, State aid measures played an important role to foster the economy by safeguarding companies from the economic crisis. This has been facilitated by State aid Temporary Framework - adopted by the European Commission on March 19, 2020 - which enables Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the coronavirus outbreak. In this framework, since March 22, 2020, Italy has been granting 70 support measures to companies of all sizes.[368] Among these support measures, we can mention the following ones:

1. On March 25, 2020, an Italian State guarantee supporting a debt moratorium for banks to small and medium-sized enterprises (SMEs) affected by the coronavirus outbreak;[369]
2. On April 13, 2020, a guarantee scheme for new working capital and investment loans granted by banks, to support companies affected by the coronavirus outbreak;[370]
3. On April 13, 2020, an Italian aid scheme to support self-employed workers and companies with up to 499 employees affected by coronavirus outbreak. The aim of the scheme is to help businesses to cover their immediate working capital and investment needs, thus ensuring the continuation of their activities;[371]
4. On April 21, 2020, Italian aid schemes supporting SMEs in the agricultural, forestry, fishery and aquaculture sectors;[372]
5. On April 21, 2020, a EUR 9 billion Italian 'umbrella' scheme to provide support to companies of all sizes through direct grants, guarantees on loans and subsidized interest rates for loans;[373]
6. On October 18, 2021, a scheme to support companies through tax exemptions and reductions, tax credits and direct grants;[374] and
7. On November 10, 2021, a scheme - in the form of direct grants - to sustain companies and the economy to continue their economic activity.[375]

Concerning specific programs developed for national champions affected by the sanitary crisis, we report the EUR 3 billion financial support granted by the Ministry of Economy to the national airline Alitalia in the context of the 'Relaunch' law-decree, which was then followed by further aid measures,[376] aimed at compensating the damages suffered because of the pandemic.[377]

368 https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases/italy_en.

369 European Commission, SA.56690.

370 European Commission, SA.56963.

371 European Commission, SA. 56966.

372 European Commission, SA. 57068.

373 European Commission, SA.57021.

374 European Commission, SA.62668.

375 European Commission, SA.100091 and SA.100155.

376 Those measures have been approved by the European Commission in cases SA.58114, SA.59188, SA.61676, SA.62542 and SA.63234.

377 It should be noted that, on October 15, 2021, Alitalia sold its aviation business to the newly formed ITA Airways.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Yes, Italy has a Foreign Direct Investment Regime which, due to the COVID-19 outbreak, was amended in 2020 by the 'Liquidity' law-decree.[378] In particular, the Italian foreign direct investment regulatory framework first saw the areas of investments subject to national screening broadened in order to preserve the national supply of critical products. The national screening has also been temporarily[379] strengthened as follows: on the one hand, it has been introduced the possibility for the Government to analyze EU-EU transactions that previously were not considered as 'foreign' investments (and thus were not subject to the national review mechanism); on the other hand, notification is also required with respect to new categories of acts.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

We are not aware of upcoming regulations or legislations in that respect. However, we cannot exclude that the temporary regime concerning foreign direct investment will be further extended, as already occurred in 2020 and in 2021.

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

As for many other EU Member States, Italian Courts needed to adapt to new working conditions. In this respect, law-decree No. 137 of October 28, 2020[380] allowed remote criminal and civil judicial activities through the possibility for inmates to be heard remotely and for judges to be remotely connected. The online civil trial (the so called 'processo telematico') has also been fostered. Judges can also deliberate remotely in case of decisions that need to be jointly taken by several judges. In addition, with respect to both civil and criminal procedures, the Government has introduced the possibility to hold hearings privately instead of publicly as it previously was.

Merger Control

8. **Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.**

The merger control enforcement has been weakened during the COVID-19 outbreak only with respect to certain national merger filings. According to emergency legislation adopted in 2020, transactions notified before December 31, 2020 are deemed to be automatically cleared: (i) in case of compulsory liquidation of small banks;[381] and (ii) for transactions involving companies being relevant for national economic general interests.[382]

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378 Ibid, No. 2, Article 15.

379 Temporary measures will be in force until December 31, 2021, according to Article 11-quinquies of Italian law No. 87 of June 17, 2021.

380 Extended until December 31, 2021, by way of Article 7 of Italian law-decree No. 105 of July 23, 2021.

381 Ibid, No. 3, Articles 168-175.

382 Italian law-decree No. 104 of August 14, 2020, Article 75 paragraphs 1-3.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

No, the Italian Competition Authority ('**AGCM**') amends its merger notification thresholds on a yearly basis. This year, notification thresholds changed on March 26, 2021 regardless of the COVID-19 outbreak.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

We are not aware of such changes in the analysis of merger control cases because of COVID-19.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

We are not aware of any legal impediment to the current enforcement of decisions or orders imposed prior to COVID-19. Nevertheless, terms for payments of antitrust fines imposed *ex lege* by the AGCM and due on February 23, 2020 have been suspended until April 30, 2021. The same rule applied with respect to the payments of fines to be made by instalments.[383]

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

We are not aware of political decisions in that respect, and we are not in the position to foresee whether COVID-19 rules will be in force even after the end of the pandemic.

13. **Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?**

We are not aware of transactions subject to remedies before COVID-19, where parties have been unable to comply with the remedies.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

383 Italian law-decree No. 18 of March 17, 2020, Article 103 and Communication on the interpretation of Article 103 of the Italian law-decree No. 18 of March 17, 2020.

During the COVID-19 outbreak, the only significant enforcement trend relates to the digital sector. Based on the information at our disposal, no investigation has been opened to pursue new / different theories of harm.

15. Has enforcement prioritized certain industries (e.g., health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

In the last years, one of the main areas of concern for the AGCM has been the digital sector.

In particular, Google has been investigated by the AGCM for an alleged abuse of dominant position for the discriminatory use of data, collected through its applications, which would prevent competitors from competing effectively. The AGCM ultimately terminated the investigation without the finding of an infringement.[384] Apple and Amazon have been fined for implementing an anticompetitive agreement prohibiting the sale of Apple and Beats branded products by electronics retailers who are not members of the official Apple programmer.[385] The AGCM has fined Google Ireland Ltd.[386] and Apple Distribution International Ltd.[387] for violations of the Consumer Code regarding the lack of information and aggressive practices related to the acquisition and use of consumer data for commercial purposes. The AGCM also opened an investigation against economic operators offering comparison tools for insurance policies, which would have entered into a cartel through the sharing of sensitive data.[388]

Furthermore, the AGCM imposed a fine of EUR 1.1 billion, as well as behavioural measures, on Amazon for an abuse of dominant position.[389] According to the AGCM's decision, Amazon is dominant in the Italian market for intermediation services on marketplaces, which Amazon unlawfully exploited to promote the adoption of its own logistics service (*Fulfilment by Amazon* (*FBA*)) by sellers active on *Amazon.it* to the detriment of the logistics services offered by competing operators. In particular, Amazon abused its dominant position by:

i. Tying to the use of *FBA* the access to a set of exclusive benefits (*i.e. Prime* label); and
ii. Excluding third-party sellers using *FBA* from the stringent performance indicators that Amazon applies to monitor the non-*FBA* sellers' performance. Non-compliance with these performance indicators can ultimately lead to the suspension of sellers' accounts on *Amazon.it*.

Finally, among the AGCM enforcement priorities planned for the next years there is a focus on digital gatekeepers platforms, their intermediary roles and whether related and potential anticompetitive conducts can be categorized as abuses of economic dependence.[390]

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

Yes, after the COVID-19 outbreak there has been a significant increase in the opening of investigations focusing on unfair commercial practices under the Italian Consumer code, with respect to price gouging or misleading advertising conducts.

384 AGCM decision No. 29845 published in Weekly Bulletin No. 43/2021 of November 2, 2021, case A542.
385 AGCM, decision No. 29889 published in Weekly Bulletin No. 47/2021 of November 29, 2021, case I842.
386 AGCM decision of November 26, 2021, case PS11147.
387 AGCM decision of November 26, 2021, case PS11150.
388 AGCM decision of November 23, 2021 case I856.
389 AGCM, decision of December 9, 2021, case A528.
390 https://www.agcm.it/dotcmsdoc/allegati-news/S4143%20%20LEGGE%20ANNUALE%20CONCORRENZA.pdf.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

In light of the Communication from the Commission of April 4, 2020[391] and of the joint statements of the European Competition Network on the application of competition law during the COVID-19 crisis,[392] on April 24, 2020, the AGCM adopted a Communication applicable in the context of coordinated conducts.[393] According to the AGCM, cooperation is considered lawful in case of: (i) coordinating the transport and distribution of raw materials; (ii) identifying for which pharmaceuticals or medical devices (or for which foodstuffs) shortage problems may arise; (iii) providing aggregated information (not relating to individual companies) on production and available capacity or possible supply gaps.

According to the AGCM, cooperation could also aim at reorganizing an entire production sector to increase production, thus avoiding for example the risk for companies to focus on the production of specific essential drugs or medical devices to the detriment of other essential ones.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

We are not aware of crisis cartel-related arguments accepted as a defense prior to the health crisis, nor that such arguments will be accepted because of the pandemic.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

The AGCM has not announced specific exemptions with respect to certain types of unilateral conducts during the COVID-19 pandemic.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

We are not aware of any signs in that respect.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

391 European Commission Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, (2020/C1161/02).

392 https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

393 https://www.agcm.it/media/dettaglio-notizia?id=2b88e620-408b-4444-b8be-a45fa78f78b2&parent=News&parentUrl=/media/news.

We cannot exclude that the Italian Government will intervene in this respect, in order to ensure a level playing field.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Among the positive aspects, we can mention the enforcement of the European green objectives through a more homogenous approach among European countries. Specifically, with respect to sustainability agreements, one of the negative aspects would be how extensively/restrictively national enforcers will interpret the scope of 'sustainability', thus fostering legal uncertainty.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

Certainly, competition law cannot replace environmental laws and climate policies. However, it can contribute to achieve the Green Deal's objectives and to complement all the relevant regulations in this sector. Decisions/choices made during merger proceedings could have a significant impact on this change towards a more effective implementation of ESG-related policy.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

National competition enforcers may accept ESG-related efficiency defense such as the carbon defense, provided that general, fair and non-discriminatory circumstances occur.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

Applying a stricter level of scrutiny to specific markets/business fields (e.g., to energy-intensive users) may help to foster ESG-related policy objectives.

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MEXICO

By: Christian Lippert and Carlos Chavez

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

Generally speaking, the efforts of the Mexican government to mitigate the effects of the COVID-19 crisis have focused on sanitary measures, such as suspension of non-essential activities and public gatherings, and social distancing and use of face covering requirements. That being said, critical sanitary actions such as vaccine procurement and rollout; staffing and equipment of public healthcare institutions and support to private healthcare providers, are generally perceived as being late, slow and ineffective.

On the economic and regulatory front, it is safe to say that actions aimed at counteracting the collateral economic shock resulting from the pandemic have been limited and narrow in scope, as the emphasis of the administration has been placed on making available low-amount loans to small businesses and creating certain platforms and programs to facilitate transactions between consumers and small businesses. Setting aside certain efforts to cut interest rates, provide relief to mortgage-backed loans and provide liquidity to the financial institutions and the government bonds market, no meaningful, long-reaching relief programs have been implemented by the government to reactivate the domestic market and provide relief to the industries affected by the pandemic.

Along the same lines, no meaningful tax relief programs have been offered to businesses and taxpayers to mitigate the impacts of the pandemic.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

No. Price controls are limited in the Mexican regulatory landscape and generally require a prior showing of absence of effective competition by the competition authority. Exceptionally, certain statutes vest upon the Executive the power to set maximum prices for certain products. Among those, the General Health Act (*Ley General de Salud*) grants authority to the Ministry of Economy to set maximum retail prices for drugs and medical supplies.

While the Executive retains such broad ability to set maximum drugs and medical supplies prices, no price-control measures specific to the pandemic have been taken so far.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

None specific to the pandemic. Actually, Mexico is an important manufacturer of oximeters, ventilators, masks and other supplies critical to fighting COVID worldwide. Businesses engaged in this industry have experienced a surge in output and sales as a result of the pandemic.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

Not generally. While financial aid has been made available to small businesses, no broad financial aid programs or tax breaks have been rolled out to support businesses facing distress. Accordingly, no critical role has been played by the government in this area.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Mexico has indeed a comprehensive foreign investment legal framework. Generally speaking, the rules surrounding foreign investment are as follows:

a) A handful of activities exclusively reserved to the Mexican government, where private entities, domestic and foreign, cannot participate (nuclear power generation, postal service, etc.);

b) A handful of activities exclusively reserved to Mexican investors, where foreign investment cannot participate (legal services, motor carriers);

c) Different areas where foreign investment can participate but limited to 49% (such as broadcasting, ports, air carriers, etc.); and

d) A general regime where foreign investment requires prior clearance from the Foreign Investments Commission (*Comisión Nacional de Inversiones Extranjeras*) to own more than 49% of the capital stock of Mexican companies the total assets of which exceed certain monetary thresholds defined on a yearly basis[1].

In reviewing applications to the Foreign Investments Commission, generally a low threshold is applied. In other words, there is no "net benefit" or similar substantive test that must be satisfied in order to secure this approval. In practice, these filings are used by the Ministry of Economy to keep track of FDI flows into the country and to ensure that the few restrictions that do apply to foreign investment, are complied with.

Neither the legal framework applicable to foreign investment nor the practice of the Foreign Investments Commission has changed as a result of the COVID-19 crisis.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

The Federal Government has issued an executive decree by means of which projects in several industries (including environmental and health), that are funded or are part of the Federal Government's agenda

[1] Currently, approximately USD$1 bn.

may be classified as national security projects. This is aimed at ensuring that any such projects are generally able to start being developed without any kind or permitting or authorizations pursuant to applicable laws and regulations, are not subject to constitutional individual proceedings, and classified as confidential. Although the Federal Government has stated that the intent of this decree is to ensure that its flagship projects in the energy and transportation sectors do not continue to be hindered by individual constitutional proceedings and what they consider unnecessary bureaucracy, this decree provides effective powers to the Federal Government to launch and start developing grand scale purchases and projects without any kind of scrutiny.

This executive decree poses several questions as to its validity and constitutionality and will likely be challenged by different constituencies, including potentially the National Access to Information and Data Protection Institute. The Federal Competition Commission has also expressed concern that this decree could hinder its powers to enforce antitrust laws.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

Court proceedings in Mexico are extremely formalistic. While criminal matters have slowly started to move towards more expeditious oral proceedings, civil and administrative cases still rely heavily on lengthy physical files and frequent visits to the courts to present cases to court clerks, judges and magistrates.

Prior to the pandemic, cases before the Federal Administrative Court already admitted electronic filings but probably only a small portion of all filings were made through that system. The situation was similar for cases before the judiciary, as physical filings and in-person court appearances were the norm.

From the early stages of the COVID-19 crisis, as mandatory lockdowns were ordered in Mexico City and most urban areas, federal courts rapidly authorized emergency rules for remote meetings of the Supreme Court, Circuit Courts and the different chambers of the Federal Administrative Court, among others. Emergency rules were also passed to allow conference calls, videoconferences and other means of remote meetings with counsel and the litigating parties.

Along the same lines, courts and several agencies issued emergency regulations stating procedural terms, extending deadlines and granting other relief to accommodate to the challenges imposed by the pandemic.

Although courts and tribunals have started to operate normally, case assignations and generally, handling of matters brought forward continue to experience significant delays.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

Merger control enforcement has remained the same during the pandemic. While the Federal Competition Commission ("COFECE") initially announced that it would expeditiously look into proposed mergers or collaboration agreements the intent of which was to ensure supply of critical goods and services to assist in the efforts against COVID-19, to our knowledge, no merger control cases have either received preferential treatment or a more relaxed application of antitrust rules because of their relation with the health crisis.

If any, COVID-19 has forced the agencies to work remotely and as a consequence, the expectation around timing to obtain clearance has increased.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

Filing thresholds are fixed in the Federal Competition Act and therefore cannot be amended or revised by the agencies. Only an Act of Congress could amend such thresholds and such an Act has not been proposed, let alone passed, during the COVID-19 crisis.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

The practice in merger control enforcement in Mexico is that a resulting market share of more than 30% will likely be challenged by the agencies, whereas resulting market shares between 20% and 30% usually receive a more in-depth look and could be challenged based on the size of competitors, market structure and dynamics, etc. This approach, however, is fluid in nature as has been generally developed through precedent (mainly from COFECE) rather than fixed on a statute.

This approach has not changed due to the health crisis and, to our knowledge, no matters have been cleared on the bases that the pandemic created special circumstances that justify clearing a resulting market share that would ordinarily be challenged by the agencies in pre-pandemic circumstances.

In fact, in certain matters involving agents engaged in the hospitality industry, which was harshly affected by the pandemic, the parties pleaded to COFECE that it expeditiously grant clearance on the basis of the increased risk that such agents faced of eventually going out of business and weighed such risk against the marginal benefits of an in-depth look into the matter, especially considering the completely different landscape that the industry will show after the pandemic. COFECE, however, did not concede and still applied a full review of the matter before clearing the same.

For the first time, the Merger Guidelines issued by COFECE in 2021, elaborate on the "failing firm" scenario, in which COFECE specifically sets forth that the parties should file evidence of the company's precarious financial situation.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

Yes, no general moratorium or stay has been granted by the agencies on those orders or decisions because of the pandemic.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

No. As noted above, no meaningful decisions or regulations that could change the economic landscape have been entered and therefore there have been no impacts on the economic and legal framework that governs the merger control analysis conducted by the agencies. Along the same lines, there are no exemptions or special rules resulting out of the pandemic that could stay in place after the crisis is overcome.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

The Disney-Fox merger was cleared in early 2019 by the Federal Telecommunications Institute ("IFT"), subject to the condition that the parties divested the business of Fox Sports Mexico by no later than 2020. Due to the effects of the pandemic on businesses and markets worldwide, and especially on live sports, which made an important part of the business of Fox Sports Mexico, IFT agreed to extend the original deadlines a couple of times as the parties claimed an impossibility to comply with the original terms of the remedy.Finally, last month IFT approved the sale of Fox Sports Mexico to a third party that it deemed suitable and compliant with the remedies imposed back in 2019.

A similar case has transcended in the Soriana – Comercial Mexicana merger remedies in the grocery and retail sector, where the pandemic considerably affected the ability of Soriana to divest certain stores. While COFECE has allowed minor amendments to be done to the original resolution, which seek to provide the ability to complete all required divestments, in practice such amendments create additional obligations to Soriana and the divestment trustee and are thus currently being contested in court.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

Not really. The powers of the agencies to investigate anticompetitive conduct are fairly broad. In addition, the agencies retain the ability to launch probes into different markets on the basis of suspected lack of effective competition, barriers to competition and essential facilities (in all 3 cases, even if no anticompetitive conduct is suspected). Thus, even before the pandemic, the trend was that the agencies were increasingly looking into the digital market. In the case of COFECE, it had previously released an annual plan setting forth the industries and markets that it believed were critical for the economy and in which it would focus its efforts.

The pandemic did not really alter such trends nor the caseload of the agencies.

15. Has enforcement prioritized certain industries (e.g., health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

As noted above, the pandemic did not really change the focus of the agencies on specific conduct or industries. At some point in time, COFECE did take a special interest in certain industries, such as rentals of office and commercial space.

With respect to the approach to the digital markets, it is worth mentioning that even before the pandemic, COFECE and IFT have engaged in a jurisdictional fight over the powers to enforce antitrust in such markets. Currently both agencies have launched probes into different aspects of the digital economy, and both seem to take the position that they are competent and better suited to investigate and uphold competition in these markets.

On November 26, 2021, IFT filed a constitutional controversy before the Supreme Court of Justice against COFECE. Through this controversy, IFT is challenging the powers exercised by COFECE when deciding over certain markets in the merger between Televisa and Univision. It is likely that in the near future, federal courts will have to continue weighing in and adjudicate this dispute over different markets.

16. **Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?**

Generally speaking, it is probably fair to say that the conduct more commonly investigated in the recent past has been cartel, in the form of bid-rigging. These investigations have come as a result of increased collaboration between COFECE and the agencies within the administration that ordinarily procure goods and services from private entities through public tender processes. However, a trend or pattern related to probes into specific regulated markets (financial, energy, transportation, and life sciences) has been surging during the past two years.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

COFECE did announce that it would not pursue temporary collaboration agreements among competitors that, in the context of the pandemic, were necessary to maintain or increase output, meet demand, protect supply chains, curb shortages or monopolization of supplies, provided that such agreements did not have the intent or effect of displacing competitors. At the same time, COFECE was clear in the sense that no waivers or exemptions had been created nor were intended to be adopted by the agency, on the basis of the pandemic.

In sum, the guidance from COFECE was that agreements that did not violate the law, would not be pursued. Accordingly, no real change in approach to coordinated conduct has been introduced as a result of the pandemic.

18. **Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?**

Crisis-related arguments were not an accepted defense prior to the pandemic and there are no signs that the same will be well received by the agencies because of the COVID-19 crisis. COFECE actually issued a

press release at the early stages of the lockdown warning economic agents that the pandemic was no excuse to engage in anticompetitive conduct.

19. **Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?**

Not really. Unilateral conduct investigations usually take a long time before a decision is issued by the agency. Any unilateral conduct that occurred during the pandemic will likely not result in a decision in the near term. At this time, however, there is no indication that there will be meaningful changes on that front as a result of the pandemic.

20. **Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?**

Not at this time. As other enforcers, Mexican enforcers and specifically COFECE, tend to be skeptical with respect to efficiencies. There is no sign at this time that this high-threshold approach will be loosened to accommodate pandemic-specific arguments.

21. **Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

COFECE had already showed interest in certain markets associated with medical supplies, especially to the extent the same are sold to the public healthcare institutions. COFECE will be looking closely into this and several other markets hit by the pandemic as it is generally perceived that lower sales and margins may create perverse incentives for companies to collude.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

ESG policies are definitively something governments and companies will be advancing in the near future. Institutional investors and sources of finance also seem to have come to the conclusion that ESG policies need to be something they focus on.

Including ESG policies into antitrust analysis would have the benefit of rewarding investments into ESG initiatives by potentially accepting ESG-related efficiencies as defenses for contested mergers or unilateral

conduct cases. This could boost the adoption of ESG policies by companies and speed up the timeline towards a more ESG-centric business environment.

The downside is that traditional antitrust analysis relies on the rational, profit maximizing firm concept as its cornerstone. If eventually ESG investments or gains are factored into the antitrust analysis, that could potentially take the focus away from the efficiency of the market and consumer welfare.

It is also likely that by building ESG considerations into antitrust analysis, the outcome of antitrust cases will become less predictable, thus potentially creating uncertainty among economic agents and potentially having a chilling effect on potential procompetitive transactions.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

In the case of Mexico, the basic framework of antitrust analysis is set in the statute. Thus, in order to make a change thereto and build ESG policies into the analysis, an Act of Congress amending the Federal Competition Act would be necessary (in other words, the agencies cannot change this as the statute only allows the ponderation of potential harm against efficiencies).

Thus, to the extent a consensus is reached among regulators, practitioners and academia with respect to the benefits of having ESG policies be a part of the substantive antitrust analysis, an amendment to the existing legal framework should be proposed to and lobbied before Congress.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

As noted above, the current legal framework will likely make such a defense cumbersome. Having said that, complex competition cases increasingly put forth the question if carbon and other environmental defenses should be accepted. Among others, cases involving power generation and transportation have recently showed a very interesting intersection of competition, regulatory and environmental considerations. A recent challenge into certain actions of the administration to favor the state-owned power utility which uses conventional means of generation over clean-energy sources, caused courts to side with the clean-energy generators on competition grounds but also on the argument that such actions would violate international commitments to reduce carbon emissions and the general right to a clean environment, by foreclosing the access of clean-energy generators to the market.

Along the same lines, a recent decision of COFECE also called the need to make ESG policies part of the antirust analysis into question as the agency concluded that there was a lack of effective competition in the market of rail transportation for certain chemicals and petrochemicals, such as chlorine, ethylene oxide and ammonia. The problem is that such determination suggests that more of such products should be transported at a lower price. As a matter of public policy, however, one could reasonably ask if society as a whole is better off with higher quantities of chlorine, ethylene oxide and ammonia being transported across cities, towns and the countryside, at lower prices (at the risk of lowering also safety standards).

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

It is difficult to imagine that substantive antitrust analysis principles should vary from one industry to the other. To the extent a consensus is reached that ESG principles should be advanced by factoring them into the analysis that antitrust enforcers must perform, it would appear that having a uniform approach would be more manageable for the agencies and more predictable for practitioners and agents.

Perhaps in the case of agencies that are both regulators and antitrust enforcers, such as the IFT (which is both in the broadcasting and telecommunications industries), having a specific mandate to enforce ESG principles would be feasible, even if a general change is not made to the rules of antitrust analysis as a whole. Conversely, should COFECE be mandated to factor ESG policies into its analysis, probably a general, rather than sector or industry-specific approach, would make sense.

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PARAGUAY

By: Veronica Franco

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

The economic measures adopted by the government have been robust and unprecedented in their magnitude, depth, and speed. Macroeconomic stability has provided a favorable framework for fiscal and monetary policy to move with some leeway, helping to partially offset the strong impact despite some weaknesses that were exacerbated during the pandemic and that have made it difficult to manage the crisis -for example, the high level of informality in the economy. Nevertheless, the measures will come at a cost, especially in fiscal terms. Although public debt levels remain one of the lowest in the region, the pace of growth needs to be corrected so as not to generate potential risks of unsustainability and, above all, not to erode the fiscal credibility built over the last decade.

As of today, the COVID contagion numbers are high, but no general lockdown has been in place in the last months. Restricted activities are limited such as public events and other massive gatherings without social distancing.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

At the beginning of the sanitary crisis, the Government drafted a regulation for the control of prices for medical devices considered as a priority in relation with the Covid-19 pandemic (e.g. alcohol and masks). The regulation was lifted a month later after the government concluded that the shortage was real and that price increases was due to a lack of supply.

The general regulation in force before COVID-19 provides for a control mechanism to avoid excessive pricing of pharmaceutical products registered in Paraguay. The system works as a database were parties register overall retail prices of products. As per the regulation, prices cannot be set above the standard. For imported products, the importer must file an affidavit declaring that retail prices are not higher than the wholesale price of the place of origin. Although the practice of setting prices above the standard may be subject to sanctions pursuant to the regulation (e.g. warnings, fines), there was not a control mechanism in place to oversee compliance and eventually impose sanctions.

During the COVID-19 pandemic, prices of COVID-19 related pharmaceutical products skyrocketed. As a result, and considering the limitations of the regulatory agency to perform an effective control, the Government launched a database so that the public in general can verify whether the retail prices comply with the maximum prices set by the mechanism.

The database is available on the website of the Chamber of Pharmacies of Paraguay and the Secretariat of Consumer Defense (SEDECO). The disclosure of the maximum possible retail price of pharmaceutical products has discouraged retailers to adopt prices beyond the maximum price. With this system, the public in general may also file a claim before SEDECO in case of prices above the standard.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic**

status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?

Through Executives Decrees, oxygen was added to the list of relevant products that require prior export license.[1]

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

Yes, State Aid was granted to help certain categories of people, under Law No. 6524 that declares State of Emergency in Paraguay, against COVID-19 pandemic. Among other aspects, the regulation states the following:

- Subsidies that encompass 25% of the legal minimum wage, for self-employed workers or dependents of MSMEs.
- Credit lines with favorable financial conditions for the economic palliative of MSMEs.
- Due dates of sworn statements of taxes are settled according to Law 6360/19 from January 1, 2020, and all taxes for fiscal year 2019 pending settlements are extended; too.
- New requests for refunds of tax credits and resolutions that are in process are now suspended, except in the case of the accelerated regime, during the validity of the declaration of State Emergency.
- Until the month of June of the current year, failure to pay rent cannot be motive for eviction. Although, at least 40% of the amount established to pay as for rental value must be made.
- Local banks will not be able to apply the sanctions already provided for in the law when a check rejection occurs due to insufficient funds from the drawer as a consequence of this event.
- All people insured by the Social Security Institution must be cared for, regardless of whether or not they are up to date with their contributions, while this Health Emergency lasts.

Furthermore, Decree No. 3530, by which the Ministry of Finance is authorized to assign specific resources to the Guarantee Fund for MSMEs (FOGAPY) for its administration, pursuant to art. 9 of Law No. 6528/2016, in the context of measures taken to mitigate the economic impact of the pandemic caused by COVID-19, ordered by the National Government, states that the destination of the guarantees will be for capital coverage of new credits, different and/or additional to pre-existing ones; provided by Banks, Cooperatives or any Financial Institution for MSMEs.

No aid has been granted to specific companies or national champions.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

No.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

[1] Executive Decree 5074-2021 - Whereby the Registry of Exporters is created and the Prior Export License Regime is established for the products included in Tariff Item NCM 2804.40.00 -Oxygen. Executive Decree 5105: By which extraordinary measures are established in order to increase production and access to supply of medicinal oxygen systems for the hospital network in the framework of the sanitary emergency declared throughout the national territory for the pandemic of coronavirus COVID-19. (April 18th, 2021)

No.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

The Judiciary declared certain extraordinary recesses and non-working days, suspending all judicial activities and postponing deadlines, except for the procedures that can be carried out online.

Since 2012, the Judicial Branch began working on the development and implementation of electronic files. Gradual steps have been taken ever since towards a total digitalization. Currently, a big portion of the civil and commercial courts throughout the country have the digital file tool that allow the parties to file claims and motions electronically.

Further, administrative decisions by the plenary session of the Supreme Court and resolutions made by the Administrative Council of the Court were issued in order to encourage any procedure that can be carried out remotely to be done that way.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

The Paraguayan Competition Authority ("CONACOM" for its Spanish acronym) has launched more investigations than before and has strengthened merger control and surveillance in connection with ongoing cases. We understand however that this is not due to the pandemic itself but a result of the experience and sophistication gained by the authority after its firsts few years of experience.

There have been no exemptions.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

No.

In regard to the filing process, the CONACOM ruled the suspension of terms from time to time accompanying the Government's resolutions in connection with full quarantine and mobility restrictions. The suspension of terms covered (i) terms related to filing deadlines for parties; and (ii) terms related to the CONACOM's analysis of the notifications filed.

Further, in the context of the COVID-19 pandemic, the CONACOM enabled the possibility of filing notifications and other related documents electronically.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

We have not seen any changes in the approach of the CONACOM in connection with merger control cases as a result of COVID-19.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

The CONACOM is currently enforcing decisions imposed prior to COVID-19. No exceptions were applied because of COVID-19.

In fact, last month, the CONACOM imposed the first fine as a result of a failure to comply with behavioral conditions imposed in connection with a merger control notification approved on July 27, 2017. The sanction was imposed to Servicios y Productos Multimedios S.A. (a subsidiary of the Millicom Group in Paraguay) for failure to comply with the provision of reports of activity in the context of the monitoring process of compliance with behavioral conditions. The sanction resulted in the application of fines for approximately USD 15.7K.

Regarding gun jumping, no fines are specifically contemplated in the law or in practice. According to the criteria of the CONACOM, the implementation of the transaction is not recommended before clearance, especially when there is a risk of anticompetitive effects resulting from a transaction. The fact that gun jumping is not specifically forbidden, fines may only be imposed when there are anticompetitive effects arising out of a transaction implemented before clearance.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

No exceptional policies or regulations applicable to merger control were issued as a result of the pandemic.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies?

Yes, several transactions approved with conditions are subject to ongoing investigation/summary proceeding for potential breach of conditions.

The companies that are currently under investigation are (i) Copetrol S.A. (operating in the fuel industry) and (ii) Prosegur S.A. (operating in the security industry). Both investigations are conducted specifically due to failure to provide periodic reports in the context of the conditions imposed by the CONACOM.

We do not consider however that the alleged failure to comply may be in any way related to the pandemic. The above-mentioned transactions are among the first's transactions subject to conditions since the merger control was put in place. Our understanding is that private actors in Paraguay are yet to accommodate internal compliance programs to comply and meet the standards required by the CONACOM. The fact that the very first fine imposed by the CONACOM was imposed as a result of a failure to comply with a condition program in a merger control case may give further incentive to private actors to comply with the reporting obligations in the future and avoid further sanctions.

If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

Not to date.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

The very first law regulating competition in Paraguay was only enacted in 2013. The CONACOM created by the Paraguayan Competition Law and responsible for the enforcement of the law is only operative since 2016. As of today, enforcement of anticompetitive conducts has been almost null. The activity of the CONACOM has been centered in the analysis of merger control cases being notified voluntarily by the economic actors.

There is only one case related to potential sanctioning of an anticompetitive conduct. The case relates to Teledeportes Paraguay S.A. (a subsidiary of the Millicom Group), in the context of an alleged abuse of dominance in connection with its exclusive TV transmission rights over local premier league soccer. An investigation was initiated on July 28, 2020, as a result of a claim filed by two of its main competitors (i.e. AMX Paraguay S.A., that was later joined by TUVES Paraguay S.A.). On April 15, 2021, the Investigations Directorate issued a resolution establishing that Teledeportes Paraguay S.A. abused its dominant position and recommended the imposition of a fine of USD 6M. The case is currently under review of the Board of the CONACOM.

As of today, the activity of the CONACOM on matters related to anticompetitive conducts is still limited and we have not seen any trends or increased activity in this regard as a result of the pandemic, except for a specific case of investigation related to bid rigging in connection of a public purchase of health products as described below.

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

On June 11, 2020, the CONACOM opened a new investigation against Insumos Médicos S.A., Eurotec S.A. and its representatives, in connection with the purchase of health products in the public sector due to potential corruption and bid rigging. On February 24, 2021, the Investigations Directorate issued a resolution establishing that the entities and the representatives under investigation incurred in anticompetitive practices and recommended the imposition of the maximum fine applicable under the Paraguayan Competition Law. The case is currently under review of the Board of the CONACOM.

The case was high profiled at the beginning of the pandemic because of the popular outrage in a context of a country with a poor health system and scarce health supplies to afront the pandemic.

We have not seen however a different approach of the CONACOM as a result of the COVID-19, mainly because the activity of the CONACOM in connection with investigations of anticompetitive conducts has been generally limited in the past.

In addition, we have not seen any enforcement activity in areas related to food delivery or digital markets since the enforcement of the law neither in connection with merger control nor anticompetitive conduct.

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

No. The activity of the CONACOM is still limited in connection with anticompetitive conducts.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

No. As mentioned before, the CONACOM is only operative since 2016 and is yet to issue basic guidelines dealing with matters related to merger control and anticompetitive conducts. We do not expect the CONACOM to issue more specific COVID-19 related guidelines before those other more essential guidelines are issued.

As of today, and since the enforcement of the Paraguayan Competition Law, we have not seen any enforcement activity, including investigations or potential sanctions in connection with collaboration or coordinated conducts in Paraguay nor any changes in this regard as a result of the pandemic.

18. **Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?**

As of today, and since the enforcement of the Paraguayan Competition Law, there are no precedents of investigations or sanctioning of cartels by the CONACOM in Paraguay. In case of an investigation however, we do not expect the CONACOM to apply such defenses in the light of the pandemic as the CONACOM has taken a more formal/law-based approach.

19. **Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?**

No. The analysis of dominance in merger control cases and in the proceeding recommending the sanctioning of Teledeportes Paraguay S.A. for abuse of dominance has not been altered as a result of COVID-19.

20. **Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?**

We do not expect the CONACOM to apply this approach. Probably because the CONACOM is a relatively new public institution (members were appointed in 2016). We expect the enforcement approach to maintain a more formal/law-based approach, at least during this first stage of enforcement and until the CONACOM gains more experience and sophistication.

21. **Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

In Paraguay, we have not seen this trend for consolidation in the health sector. Except for high-profiled cases as the bid-rigging case mentioned above, we do not expect this trend to increase.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

We consider that this is the right approach in more sophisticated context of enforcers and markets players. Due do the recent enactment of the law and the few years of expertise of the CONACOM, we do not expect this to expand to competition policy in Paraguay. There is still a high learning curve in Paraguay that must be superseded to expand the goals of the competition policy to a more global and diverse sphere.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

This should probably start as a regulatory goal and be further pushed by public enforcers in the context of the enforcement of such policy goals. Private actors may push for these goals in the context of the values and mission of the business, but this can be further strengthened by tax and other kind of regulatory incentives.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

This is not specifically contemplated by the law, but we consider that environmental matters should be considered as a valid efficiency defense and may be considered as such in the context of the enforcement of competition laws.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

This is not specifically contemplated by the law; however certain industries have followed this trend by applying ESG-related policies. We do consider that the implementation of ESG policies should be a key aspect to consider and will eventually result in the application of stricter levels of scrutiny.

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PERU

By: Carlos A. Patron, Julia Loret de Mola and David Kuroiwa

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

[Items 1 - 7 answered jointly]

1.1. Economic and regulatory actions undertaken by the Government

On March 15, 2020, just a few days after the World Health Organization declared COVID-19 a pandemic, the Peruvian Government imposed one of the harshest and longest lockdowns in Latin America. Almost all economic activities were shutdown, people were only allowed to leave their homes to access essential goods and work in essential activities, Peru´s borders were closed, schools were also closed, curfews were imposed, and deadlines for judicial and administrative proceedings were suspended.

The Peruvian Government undertook several economic and regulatory actions to counteract the effects of the health crisis in the national market. One of the main economic actions carried out by the Government was "Reactiva Perú", a program aimed to provide working capital to companies affected by the COVID-19 crisis through loans granted by commercial financial entities and guaranteed by the Peruvian Government through the state-owned development bank, Corporación Financiera de Desarrollo S.A. – COFIDE[394], and to avoid breaking the payment chain.

Additionally, several tax measures were implemented to mitigate the impact of the pandemic on the national economy. Some of these measures were the deferral of payments of certain tax debts, the possibility of

[394] The Program "Reactiva Perú" was created by Legislative Decree N° 1455.

paying some tax debts in installments, temporary accelerated depreciation of assets, measures specifically for micro, small and medium-sized companies, and tax relief and incentives to reactivate the economy in the tourism sector.

Moreover, one of the first actions undertaken by the Peruvian Government was to allow companies to suspend the services of their employees. During the suspension, companies were not obliged to pay salaries, but they could not terminate the employment relationship. This measure was in force until October 2, 2021[395]. Labor legislation was also amended to implement remote working for private and public sector employees.

After two months of a very strict lockdown, the Government initiated a plan to reactivate the economy, which consisted of four phases in order to gradually reopen all economic activities.

As of today, almost all economic activities have been reopened, though some of them with certain restrictions. Also, almost all public establishments are open and operational but with limited capacity and social distancing restrictions.

1.2. Price control and other regulations that seek to safeguard the pre-pandemic status quo

In Peru, prices are determined by supply and demand. The only prices that can be administratively set are public utilities fees, in accordance with what is expressly stipulated by Law of the Congress.

Throughout the pandemic, the Peruvian Government has not issued specific regulations regarding pricing control. However, since the health crisis started, Congress has passed several bills which intend to establish pricing control for medicines. Some of these bills proposed pricing control for medicines as a temporary measure during a sanitary emergency, but others intended to establish pricing control as a permanent measure.

Congress has also passed several bills regarding price control for private education tuition as a temporary measure during a sanitary emergency.

The pricing control bills for medicines and private education tuition are still being discussed in Congress and have not been approved yet.

It should be noted also, that in August 2020, the Peruvian Congress approved and promulgated Law N° 31040 which amends the Penal Code and the Consumer Protection Code to include price gouging and hoarding of essential goods in an emergency context as infractions of the Consumer Protection Code and as a crime in the Penal Code sanctioned by imprisonment. Even though this Law came into force last year, national authorities have not yet enforced it.

Regarding other regulations that seek to safeguard the pre-pandemic status quo, it is worth mentioning that on April 3, 2020, the Government published the Urgency Decree N° 035-2020 with complementary measures to reduce the impact of mandatory isolation on the national economy. One of the measures included in the Decree was to ensure the continuity of the provision of essential utility services such as electricity, domestic natural gas and telecommunications for the vulnerable populations and the possibility of deferring payments or payments by installments for said utility bills.

1.3. Foreign Direct Investment regulations

Foreign Direct Investment regulations have been in existence in Peru since 1991, when the Peruvian Government enacted Legislative Decree N° 662 – Law for the Promotion of Foreign Investment and Legislative Decree N° 757, which approved the legal framework for the growth of private investment.

[395] Urgency Decree N° 038-2020.

Legislative Decree N° 662 establishes as a basic principle, the equal treatment of national and foreign capital. This principle was subsequently included in the Peruvian Political Constitution of 1993, which is still in force[396]. Moreover, Article N° 1 of Legislative Decree N° 662 establishes that the State is to promote and guarantee foreign investments made and to be made in Peru for all economic activities and for any kind of business or contractual agreements permitted by national legislation.

Moreover, Peru has signed trade agreements with more than 20 countries around the world.

Foreign Direct Investment regulations have not been affected by the COVID-19 crisis.

1.4. Actions carried out by courts in response to COVID-19 restrictions

Courts have implemented several measures to change their procedures in response to COVID-19 restrictions. As mentioned previously, one of the first measures imposed by the Government was the suspension of filing deadlines in both, judicial and administrative courts. In addition, the courts allowed judges and judicial assistants to work remotely and allowed electronic filings for all procedures. Courts also became more flexible regarding requirements for filing documents and started to admit digital signatures. Virtual hearings and meetings with judges were also implemented to allow witnesses and attorneys to appear remotely. Moreover, courts implemented electronic notifications for all court orders and decisions and changed several internal procedures to facilitate improved access to case files and obtain certified copies of documents

There are no upcoming regulations or pieces of legislation other than the ones mentioned in this section that could have a direct impact on the issues addressed above.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

[396] Article 63 of the Peruvian Political Constitution of 1993 establishes that local and foreign investment are subject to the same conditions.

[Items 8 - 13 answered jointly]

Over the past two decades, merger control legislation has been limited to the electricity sector, imposing mandatory pre-notification and clearance requirements for vertical or horizontal concentrations occurring only in the fields of electricity generation, transmission, or distribution.

However, in January and March 2021, Law N° 31112, a Law that establishes the prior control of corporate mergers (the "Merger Act") and its Regulation were approved and entered into force on June 14, 2021.

Through this legislation, the Peruvian government is now enforcing a mandatory merger control regime applicable to all sectors of economic activities and not only the electricity sector.

Under this new regime, which is very similar to the European Union merger control regime, notification is mandatory for operations that produce effects in Peru, qualify as concentrations under the Merger Act and meet the thresholds contained in the Merger Act.

The Merger Act defines "concentrations" subject to clearance as transactions that involve a transfer or change of control over a company or part of it, including:

- The merger of two or more previously independent economic agents into any form of company or entity.

- The acquisition of rights by one or more economic agents that, directly or indirectly, allow the holder to, individually or in association, exercise control over another economic agent.

- The incorporation of two or more independent economic agents of a joint company, a joint venture or any other form of association agreement in which the former share control over a new autonomous entity that performs an economic activity.

- The acquisition by an economic agent, by any means, of direct or indirect control over productive operating assets of another economic agent.

Additionally, the Merger Act has included two concurrent financial thresholds that are determined by the value of a Peruvian Tax Unit ("UIT"). For the year 2021, the value of the UIT is 4,400 Peruvian Soles ("PEN") or approximately US$ 1,100 (using an exchange rate of PEN 4.00 per dollar). The value of the UIT is updated each year.

A business concentration operation is subject to the prior control procedure when the following is concurrently fulfilled:

- The total sum of the value of annual sales or gross income or the value of assets in Peru of the companies involved in the business concentration operation during the fiscal year prior to that in which the operation is notified, is equal to or more than 118,000 UIT, which is equivalent to PEN 519.2 million or approximately US$ 129.8 million for the year 2021.

- The value of annual sales or gross income or the value of assets in Peru of at least 2 of the companies involved in the business concentration operation (counterparts), during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UIT, equivalent to PEN 79.2 million or approximately US$ 19.8 million by 2021.

The Merger Act Regulation and the Guidelines for the Calculation of Notification Thresholds, which are also very similar to the European Union Guidelines, provide specific rules to calculate the sales, gross income or value of the assets in Peru obtained by the companies involved in the concentration operation.

Concentrations that do not fulfill the above-mentioned requirements may be notified voluntarily. In either case (mandatory or voluntary filing), the concentration cannot be implemented unless and until the National Institute for the Defense of Competition and Protection of Intellectual Property ("INDECOPI") grants clearance.

Finally, INDECOPI may act ex officio in cases where reasonable indications of a concentration operation that may generate a dominant position or affect competition in the market are identified. This power allows INDECOPI to review a concentration even one year after its official closing, regardless of whether mandatory notification thresholds have been met.

As this is a new regime in Peru there have been no amendments or exemptions in the legislation or in ongoing cases as a result of COVID-19 crisis.

Anticompetitive Conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

[Items 14 - 21 answered jointly]

1.5. Enforcement and Investigations of Anticompetitive Conduct

The Law of Repression of Anticompetitive Behavior enacted by Legislative Decree N°1034 (the "Competition Law"),[397] lays down the principal competition rules that apply to undertakings in all economic activity sectors. INDECOPI, an administrative agency with unmatched investigative powers and fining capabilities, is in charge of enforcing of the Competition Law. Notwithstanding, INDECOPI's administrative decisions are subject to judicial review.

The Peruvian Competition Law prohibits and sanctions certain conducts, unilaterally carried out by a single undertaking, that constitute abuse of a dominant position, as well as coordinated or mutually voluntary conducts among two or more undertakings that constitute horizontal or vertical restraints of trade or collusion.

Traditionally, enforcement activities have focused on politically sensitive mass consumer consumption goods and services (i.e. public transportation, flour, poultry, etc.). As modern retail and distribution activities have expanded, enforcement has gradually begun to shift towards vertical restraints. Throughout the COVID-19 pandemic, INDECOPI has not considered any new theories of harm.

However, during the pandemic, INDECOPI prioritized enforcement on businesses in the health industry, in particular medical oxygen providers, hospitals, and drugstores, and has required information from parties involved in those markets to investigate any possible antitrust practices.

Likewise, regarding public biddings on medical oxygen, INDECOPI issued an official report in which INDECOPI recommended the implementation of several policies to increase competition on such public biddings (e.g. reducing the purity level of the medicinal oxygen from 99% to 93%).

Over the past two decades, INDECOPI's ex officio antitrust enforcement activities have been mainly focused on coordinated conduct and in particular horizontal price fixing cartels. To date, INDECOPI is still focusing on those practices and has not investigated unilateral or coordinated conducts in digital markets.

1.6. Collaborations Among Competitors

On April 22, 2020, INDECOPI issued a statement providing an official position regarding collaborations among competitors.

In their statement, INDECOPI declared that although the Competition Law prohibits agreements aimed at restricting competition, it also provides for the legality of practices that seek to maximize efficiency in the production, distribution and marketing of goods and services. Thus, the aforementioned law allows companies (even those that compete with each other) to associate/collaborate, provided that the main objective of that agreement is to promote economic efficiency for the well-being of consumers. In that sense, companies will be able to join their efforts, for example, to aggregate productive assets, share distribution channels or facilitate access to technologies and intellectual property rights, to the extent necessary to achieve legitimate objectives (such as increasing the supply of essential goods or establishing distribution systems to ensure greater coverage of such products elsewhere).

INDECOPI has confirmed, however, that it will remain vigilant so that those situations are not exploited to commission anti-competitive practices aimed at increasing prices, restricting production or coordinating positions in public selection processes, which are sanctionable, even in emergency contexts such as the current one.

[397] Legislative Decree N°1034, published June 25, 2008.

1.7. INDECOPI's Approach to Anticompetitive Conduct in the COVID-19 Context

Besides the increase of preliminary studies and scrutiny by INDECOPI in health-related markets (as described previously), there have not been any signs of how INDECOPI intends to deal with anticompetitive conduct in this industry. It is expected, however, that INDECOPI may consider any potential anticompetitive conduct to be a severe or very severe infraction (under the Competition Law), subject to a fine that must not exceed 12 percent of the gross sales or income earned by the defendant or its economic group in the fiscal year prior to the INDECOPI's decision.

INDECOPI has not announced any exemptions applicable to any type of unilateral conduct during the COVID-19 pandemic. Hence, there has not been any change to INDECOPI's approach in the assessment of dominance in investigations of conduct taking place during the COVID-19 pandemic.

To date, no cartel cases involving crisis related arguments have been discussed before INDECOPI and there are no signs (positive or negative) that these arguments would be well received by INDECOPI in light of the pandemic.

Additionally, to date, no cases involving economic justifications regarding the COVID-19 pandemic have been discussed before INDECOPI and there are no signs (positive or negative) that these arguments would be well received by INDECOPI in the context of unilateral investigations.

ESG and Competition Policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

[Items 1 - 4 answered jointly]

To date, neither INDECOPI nor the Peruvian Government have issued any competition policies regarding environmental, social and governance concerns.

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SERBIA

Role of the Government

1. Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?

In mid-March 2020, the Republic of Serbia (RS) declared a 'state of emergency'[398]. Containment measures that were put in place during the state of emergency included temporary curfews, bans on public gatherings and movement of elderly, mandatory usage of face masks and gloves outdoors and/or indoors, mandatory physical distance etc. Lawfulness of the Decision Declaring the State of Emergency was questioned before the RS Constitutional Court. The Decision and implemented measures have not been declared unconstitutional.[399]

During 2020 and 2021 the RS Government implemented a comprehensive package of emergency measures (monetary, fiscal and banking) aimed to mitigate the negative economic consequences of the COVID-19 crisis:

1) *first package of measures* was adopted in second quarter of 2020 and included among other the following measures: (i) tax measures[400] such as payroll tax deferral and deferral of social security contributions, deferral of advance payments for corporate income tax etc.; (ii) grants to private sector companies for employee salaries and compensations[401]; (iii) liquidity support measures,[402] including loans for procurement of working capital and maintenance of liquidity;
2) *second package of measures*[403] was adopted in third quarter of 2020 and included: (i) grants to entrepreneurs and private sector companies for a two-month period, for employee salaries and compensations; (ii) payroll tax deferral and deferral of social security contributions for a one-month period;
3) *third package of measures* was adopted in second quarter of 2021 and included: (i) grants to private sector companies (including large companies) for a three-month period, for employee salaries and compensations[404]; (ii) measures aimed at liquidity preservation.[405]

In addition to the above, direct aid was granted to companies operating in most severely affected sectors, such as tourism, hospitality, and road passenger transport.[406]

Some measures aimed at maintaining financial stability were introduced by the National Bank of Serbia (NBS), including moratoriums on loans and interests.[407]

[398] Decision Declaring the State of Emergency ("Official Gazette RS", no. 29/20).
[399] RS Constitutional Court Decision on constitutionality of the Decision Declaring the State of Emergency ("Official Gazette RS", no. 77/20).
[400] Regulation on Fiscal Incentives and Direct Grants to Private Sector Companies and Financial Assistance to Citizens Aimed at Mitigating Economic Consequences of the COVID-19 Crisis ("Official Gazette RS", no. 54/20 and 60/20).
[401] *Ibidem.*
[402] Regulation on the Guarantee Scheme as a Measure of Support to the Economy Aimed at Mitigating Economic Consequences of the COVID-19 Pandemic Caused by SARS-CoV-2 ("Official Gazette RS, no. 57/20).
[403] Government Decision no. 401-6052/2020 on Direct Grants to Businesses in August and September 2020 amounting to 60% of Direct Grants Paid in July 2020 ("Official Gazette RS", no. 104/20 and 106/20).
[404] Regulation on Direct Grants to Private Sector Companies Aimed at Mitigating Economic Consequences of the COVID-19 Pandemic caused by SARS-CoV-2 ("Official Gazette RS". no. 11/21).
[405] Law on the Second Guarantee Scheme as an Additional Measure of Support to the Economy due to Prolonged Negative Impact of the COVID-19 Pandemic caused by SARS-CoV-2 ("Official Gazette RS", no. 40/21).
[406] Regulation on Conditions and Manner of Assigning Funds to Improve Domestic Tourism on the Territory of the Republic of Serbia ("Official Gazette RS", no. 156/20), Regulation on the Assignment and Use of Subsidies as a Support to Hospitality and Tourism Sector in relation to the COVID-19 Epidemic caused by SARS-CoV-2 ("Official Gazette RS", no. 11/21, 23/21 and 38/21) etc.
[407] E.g., Decision on Temporary Measures Aimed at Preservation of Financial Stability ("Official Gazette RS", no. 33/20).

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

Yes, the RS Government passed bylaws[408] on price control for basic foodstuffs and hygiene products. Both wholesale and retail prices, as well as margin levels for all participants in the supply chain were capped to maintain the pre-pandemic status quo. These measures were valid for a maximum of 90 days i.e., pending a threat of supply shortage.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

Yes, RS Government imposed temporary bans on export of certain basic goods, such as sunflower oil, sunflower shells, semi-processed oil, hygiene products etc.[409] Also, a ban on export of medicines was introduced. Domestic producers, importers and exporters of medicines were mandated to continuously and uninterruptedly supply the Serbian market with all medicines they produce and import.[410]

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

Yes, the RS Government adopted special laws introducing economic measures, such as subsidies, tax relief etc. (for more details please see answer to question 1). While majority of these measures were to support all sectors, some measures were specifically designed for companies in severely affected markets, such as tourism and hospitality[411], road transport of passengers[412] etc. Both national champions and local companies were subject to described measures, under the set requirements. Above measures were declared compliant with local State aid rules.[413]

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

[408] Decision on Restriction of Prices and Margins for Basic Food and Hygiene Products ("Official Gazette RS", no. 35/20, 55/20, 57/20, 67/20, 75/20); Decision on Restriction of Retail Prices for Hygiene Products during the State of Emergency Declared due to the COVID-19 Epidemic caused by SARS-CoV-2 ("Official Gazette RS", no. 40/20, 43/20, 48/20, 59/20) – this bylaw relates to hygiene products that were distributed by the Republic Fund of Health Insurance during the state of emergency.

[409] Decision on Temporary Ban of Export of Basic Products Important for the Population ("Official Gazette RS", no. 28/20, 33/20, 37/20, 39/20, 41/20, 43/20); Decision on Temporary Ban of Export of Basic Products Important for the Population ("Official Gazette RS", no. 54/20, 59/20, 63/20)

[410] Decision on Ban of Export of Medicines ("Official Gazette RS", no. 32/20, 33/20, and 47/20), Decision on Ban of Export of Medicines ("Official Gazette RS", no. 55/20)

[411] Please see reference No. 9.

[412] RS Government Decision no. 401-1279/2021 of February 11, 2021 Approving Subsidies Aimed at Supporting Operation of Bus Companies Encountering Difficulties related to the COVID-19 Epidemic caused by SARS-CoV-2.

[413] Regulation on Requirements and Criteria under which State Aid Aimed at Mitigation of Serious Economic Consequences Caused by the COVID-19 Epidemic is Lawful ("Official Gazette RS", no. 54/20, 126/20 and 17/21); Regulation on Requirements and Criteria under which State Aid in the Form of Capital Increase Aimed at Mitigation of Serious Economic Consequences Caused by the COVID-19 Epidemic is Lawful ("Official Gazette RS", no. 126/20 and 17/21).

Foreign Direct Investments in Serbia are governed by the general Investments Act[414]. This Act does not regulate the investments approval procedure, yet sets forth rules on status of foreign investors. The COVID-19 crisis did not have any effect on the Investments Act – it remained unchanged during the crisis.

6. Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?

We are not aware of any upcoming regulations or pieces of legislation that could have a direct impact on the issues mentioned above.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

Special laws on case processing during the crisis were adopted in RS. Key procedural deadlines were suspended[415], including deadlines for filing lawsuits, motions for initiating non-contentious procedures and enforcement procedures, as well as other time-bound motions such as ordinary and extraordinary legal remedies.

During the state of emergency, only hearings in urgent cases were held.[416] Some courts switched to home-based work (mostly when work could not be safely organized on premises). Service of process was limited to via-mail service, with the exception of urgent first instance cases where direct communication between parties and the court was allowed. Defendants in criminal proceedings could have been examined via video conference to curb the spread of the virus.[417] This possibility raised some controversy both among professionals and the general public.

When the state of emergency was lifted in early May 2020, judges and other court staff started returning to the office, but were required to apply social distancing and other measures e.g. mandatory usage of facemasks.[418]

During the state of emergency, the Serbian Competition Authority (SCA) did not hold meetings with parties, but it enabled the communication with parties via telephone and e-mail. Submissions were made via registered mail, with the exception of voluminous merger notifications that could have been filed at the SCA.[419] Procedural deadlines were suspended.[420] Still, the SCA was rendering decisions even in the merger control cases.[421]

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

[414] Investments Act ("Official Gazette RS", no. 89/15 and 95/18).
[415] Regulation on Deadlines in Court Proceedings during the State of Emergency Declared on March 15, 2020 ("Official Gazette RS", no. 38/20).
[416] Decision of the High Court Council no. 119-05-132/2020-01 of March 18, 2020.
[417] Regulation on Defendant Participation in the Main Hearing in Criminal Proceedings during the State of Emergency Declared on March 15, 2020 ("Official Gazette RS", no. 49/20).
[418] Decision of the High Court Council no. 021-05-46/2020-01 of May 7, 2020.
[419] Information on the Organization of Work Activities during the State of Emergency, published on the SCA's website: https://www.kzk.gov.rs/obavestenje-o-nacinu-rada-komisije-tokom-trajanja-vanrednog-stanja.
[420] Regulation on Deadlines in Administrative Proceedings During the State of Emergency ("Official Gazette RS", no. 41/20 and 43/20).
[421] Annual Report of the SCA for 2020, available on the following link (only in Serbian language): http://www.kzk.gov.rs/kzk/wp-content/uploads/2021/10/Godisnji-izvestaj-KZK-2020-Fin-20210225.pdf, page 6.

There is no information on any exemption being granted by the SCA due to the COVID-19 pandemic. The enforcement of merger control rules has remained unchanged.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

No, the notification thresholds have not been subject to amendments or exemptions as a result of the COVID-19 pandemic.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

No, the market share component of the competitive analysis in merger control cases has not been changed as a result of COVID-19. There are no transactions that have (not) been cleared because of COVID-19. No differences have been noticed in the SCA's approach.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

Based on publicly available information, the SCA has handled several gun jumping cases to date. One of these cases was initiated in 2019 (prior to the COVID-19 crisis), and was concluded in 2021 (a fine of cca EUR 75,000 was imposed).[422] Three more cases were initiated in 2020 and 2021, in pharma sector (the merger was implemented in 2018)[423], in the area of consultancy services and digital solutions development (the merger was implemented in 2020)[424], and in the area of providing real estate management services (the merger was implemented in 2021)[425]. SCA's focus on gun jumping cases notably increased in the previous period. Still, there are no indications that this was in any way caused by or related to the COVID-19 crisis.

No information on enforcement of decisions/orders on remedies and gun jumping fines is publicly available. However, it seems that the SCA's enforcement practice has not changed as a result of the COVID-19 crisis.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

Based on publicly available information, the economic and legal analysis in merger control cases has not been affected or altered due to political decisions resulting from COVID-19. To the best of our knowledge, there are no new, amended or exemption rules resulting from COVID-19.

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[422] Decision in *Fortenova Grupa* case of February 12, 2021, available on the following link (only in Serbian language): http://www.kzk.gov.rs/kzk/wp-content/uploads/2021/04/125-12-02-2021-Resenje-FORTENOVA2.pdf.

[423] Decision initiating proceedings in *Apoteka Janković* case of September 17, 2020, available on the following link (only in Serbian language): http://www.kzk.gov.rs/kzk/wp-content/uploads/2020/10/Zaklju%C4%8Dak-o-pokretanju-postupka-Apoteke-Jankovic1.pdf.

[424] Decision initiating proceedings in *Ernst & Young – Zilker Technology* case of March 1, 2021, available on the following link (only in Serbian language): http://www.kzk.gov.rs/kzk/wp-content/uploads/2021/07/Zakljucak-EY-Zilker.pdf

[425] Decision initiating proceedings in *MAT-REAL ESTATE* case of September 6, 2021, available on the following link (only in Serbian language): http://www.kzk.gov.rs/kzk/wp-content/uploads/2021/09/Zakljucak-o-pokretanju-postupka-MAT-REAL-ESTATE-Radijator.pdf.

In its explanatory notice on the concept of concentration the SCA made a reference to the COVID-19 crisis and the increasing number of complex transactions that occur as a consequence of the pandemic.[426] In this notice, the SCA clarified that, when assessing whether several transactions should be treated as a single concentration, it will take into account conditions set forth in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. C. 95/2008, notably: i) whether transactions are interdependent, and ii) whether control is ultimately acquired by the same undertaking(s).

13. **Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?**

We are not aware of any such transaction.

Anticompetitive conduct

14. **Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?**

No, there have been no new relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic in RS. Also, no new theories of harm have been relied upon by the RS enforcer during the COVID-19 pandemic in RS.

15. **Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?**

Enforcement did not prioritize certain industries over others. There are no indications that the COVID-19 crisis had any influence on selection of sectors by the SCA or its approach to assessment of anticompetitive conduct.

16. **Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?**

Based on publicly available data, almost all investigations opened in 2020 and 2021 were related to retail price maintenance (RPM). However, there are no indications that the COVID-19 crisis has had any influence on the type of anticompetitive conduct looked into by the SCA, especially given the fact that some of these investigations relate to practices that took place prior to the crisis.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

[426] SCA's Explanatory Notice on the Implementation of Article 17 paragraph 1 of the Competition Act, available on the following link (only in Serbian language): http://www.kzk.gov.rs/kzk/wp-content/uploads/stav-komisije-clan-17-stav-1.pdf.

No, the SCA did not announce any specific guidelines dealing with collaborations among competitors that would be implemented in the context of the COVID-19 pandemic. We are not aware of any other relevant changes in the SCA's approach to coordinated conduct in RS that would be caused by the pandemic.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

Yes. In 2018, the SCA exempted from prohibition a manufacturing agreement entered into between Imlek and Meggle, competitors in the market for diary products[427]. Namely, Imlek production plant was affected by the fire in 2018 and Imlek was unable to maintain the same production levels and continue supplying the market with some of its products. Thus, Imlek concluded a manufacturing agreement with Meggle. The SCA exempted this agreement from prohibition. It can be inferred from this case that crisis-related arguments may be accepted as a defence by the RS enforcer.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

No exemptions applicable to unilateral conduct during the COVID-19 pandemic have been announced by the SCA. There have been no changes to the SCA's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

Since there have been no notable changes in the SCA's practice during the COVID-19 crisis, there are no indications that the SCA will be more open to certain types of economic justifications put forth by the defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

To the best of our knowledge, the SCA has not made any public statements with regard to potential consolidation in health-related markets. Thus, we cannot predict what the future practice of the RS enforcer will be when it comes to these markets. Nevertheless, the SCA remains authorised to conduct market analyses, and such an assessment may be expected in the healthcare industry since: (i) health-related markets have not been under the scrutiny up to date (no market analysis conducted), and (ii) effects of the COVID-19 pandemic on health-related markets and activities will likely endure.

[427] Decision in *Imlek – Meggle* case, available on the following link (only in Serbian language): http://www.kzk.gov.rs/kzk/wp-content/uploads/2018/11/Imlek-Meggle.pdf.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Globally, expansion of competition policy's goals to include ESG-related policy concerns is among the main topics discussed by the competition enforcers. Also, companies are recognizing the need to address ESG issues, and the competition rules could potentially be an obstacle to the improvement of their ESG performance. However, we are not aware of the SCA currently participating in any ESG-competition related discussions. Nonetheless, the SCA develops and maintains international cooperation with foreign competition enforcers, as well as international organizations and competition networks (such as OECD, ICN etc.). Thus, there is a high chance of the SCA's participation in activities related to ESG matters (e.g., participation at seminars that include ESG-related topics).

Although there have not been any specific statements made by the SCA's officials with regard to inclusion of ESG goals into competition policy enforcement framework in future, it is expected that the SCA will follow the EU practice and approach in ESG area going forward given that RS is in the EU accession process and the SCA considers the EU to be its guiding jurisdiction.

If ESG goals are to shape the competition policy enforcement in RS in the future, key advantages would be achieved if this was done by way of clear guidelines on when and what ESG-related arguments would be acceptable for the SCA. This approach would contribute to the legal certainty and companies would not be reluctant to collaborate to achieve sustainability objectives in specific regulated situations. These guidelines should also ensure that the risk of misuse of sustainability goals to cover anti-competitive practices (cases of greenwashing) is avoided.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

Considering that competition rules are binding on businesses and that significant fines may be imposed in case of breach, in pushing forward the social/environmental change, a change would need to happen at the SCA level first. Only after the SCA changes its practice or renders clear guidelines that support ESG-related arguments, it can be expected that businesses would become more receptive and flexible to cooperation in achieving the ESG-related goals and promoting social/environment change.

Further, lawyers may have an important role in spreading awareness of ESG goals' significance and possibilities. However, we are not aware of any such advocacy efforts undertaken by RS lawyers or respective RS Bar Associations.

RS has a vibrant energy and heavy industry sector that would benefit from greater awareness of EGS-related goals. More could be done by the SCA and other RS enforcers and lawmakers to consider EGS as an important topic in both regulation and enforcement.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

Carbon defence or any other ESG-related efficiency defence has not been tested by the SCA. The SCA usually does not examine ESG-related issues nor is there a regulatory or any other context that would make such a defence relevant for merger control or antitrust proceedings in RS.

As noted above, RS has a heavy industry sector and could benefit from introducing ESG-related goals and defences in its competition policy. Furthermore, RS is a contracting party of the European Energy Community (EEC) and under the EEC auspices in the energy sector it deals with ESG arguments and competition law matters.[428]

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

There is no specific ESG-related policy of the SCA and there are no markets or sectors subject to stricter levels of scrutiny and/or different standards of proof in order to push forward ESG-related policy consideration in RS.

As noted above RS has a vibrant energy and a heavy industry sector and could benefit from introducing ESG-related goals in its competition policy for these sectors. In the energy sector RS is also under the supervision of the EEC.

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[428] See more on EEC at https://www.energy-community.org/.

UKRAINE

By:

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

Due to the global COVID-19 pandemic, on March 12, 2020, the Ukrainian Government ('Government') introduced a nationwide quarantine alongside with various extraordinary measures designed to prevent the COVID-19 spread. Like in many countries, the Government imposed restrictions on holding public mass events, introduced quarantine in educational institutions, stopped public transportation and the operation of shopping malls, cafes, restaurants, etc, prohibited travels from and to Ukraine, etc. So far, Ukraine is operating in a colour-code adaptive quarantine on a regional basis. Depending on the colour of the zone ('green', 'yellow', 'orange', or 'red'), respective restrictions apply in the region.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

On May 14, 2021, the Government approved a resolution which required fuel retailers to follow the limited level of trade margin on fuel when setting the retail prices on fuel (gasoline and diesel fuel). According to the Government, these measures are implemented temporarily (for the period of quarantine) and aimed at stabilizing the pricing situation on the retail fuel market.

Having said this, one should admit, that government has always been trying to exercise price – control for socially important products, services and goods (fuel, bread, drugs, utilities etc), which were widely considered as politically driven attempts to raise loyalty of the electorate. Domestic antitrust agency ('AMC', 'Agency') has always been actively involved ie. 'used' in such actions, opening investigations and sending RFIs to main market players.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

In 2020, the following measures of the Government were implemented due to the COVID-19 outbreak. On March 12, 2020, due to the rapidly increased demand for medical face masks and other protective equipment, the Government imposed a ban on exporting anti-epidemic goods aimed at guaranteeing that Ukrainian citizens have access to the necessary personal protective equipment. The goods included such anti-epidemic goods as medical face masks, respirators, medical gowns, etc. Later, in August 2020, those restrictions were removed by the Government.

On March 23, 2020, the Government banned the export of ethanol from the territory of Ukraine. On May 13, 2020, the Government decided to allow the export of ethanol starting from May 15 2020. The respective decision was adopted due to the fact that alcohol enterprises were able at that time to ensure the production output of ethanol for Ukraine.

In June 2020, the Government approved a resolution which obliged to declare changes in retail prices for goods of significant social importance and anti-epidemic goods. By the resolution, the Government approved *(i)* the list of goods of significant social importance (cereals, sugar, flour, milk, bread, eggs, fuel, etc.); *(ii)* list of anti-epidemic products required to prevent the spread of COVID-19 (medicines, antiseptics and disinfectants, personal protective equipment, etc.); and *(iii)* the respective procedure for declaring changes in retail prices for goods of social significance and anti-epidemic goods. Due to this resolution wholesale and retail traders in anti-epidemic goods had to set marginal prices taking into account the marginal retail markup. Besides, a ban on buying and reselling anti-epidemic goods and/or goods of significant social importance during the quarantine at prices in excess of the established wholesale and retail marginal prices was established.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

The Ukrainian Government adopted no specific programs for companies being affected by Covid-19. However, different measures were implemented by the Government to support businesses during the crisis and to help with mitigation of the negative outcomes after COVID-19.

In particular, the following measures were implemented: *(i)* the companies were exempted from the payment of VAT on imports and supply of goods used to combat COVID-19, such as medicines, medical devices and/or medical equipment, etc.; *(ii)* it was allowed during the quarantine period for legal entities and individuals not to pay fines and penalties in case of defaults under loan agreements, which happened during the quarantine period or within 30 days after its end; *(iii)* the rules for importing medical devices were simplified.

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

FDI – screening has recently become a very important political tool to control inflow of foreign investments all over the world and widely emerged as a noticeable part of national policies to protect national interests. Some jurisdictions have just introduced FDI – screenings while others keep strengthening their rules, which have been around for the last decades.

Following the global trend, Ukraine seems only to start thinking in the same direction, and a respective draft law on the launch the FDI screening in sectors of strategic importance for the national security was introduced in February 2021. If adopted by the Parliament, the law will affect a wide range of business fields.

Interestingly, in addition to the regulation in such expected fields like information systems and telecommunications, defense, space and aviation, nuclear energy and radiation waste, printing and publishing, etc., the law will also affect activities related to the use of causative agents of infectious diseases. It is quite likely that the latter was introduced due to the COVID-19 pandemic.

In absence of the dedicated legal framework, AMC has regularly been used as a tool for blocking transactions, which constitute potential threat for national security. Respective powers were added to the usual arsenal of AMC some years ago allowing the Agency to block the transactions with the counterparties, listed in the Ukrainian sanctions list.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

From the very beginning of quarantine measures, the Government actively regulated all issues arising in connection with the epidemiological situation. Therefore, a number of draft laws were created to regulate issues related to temporary measures to overcome the negative economic consequences of the COVID-19.

One of them dealt with amendments to the Law of Ukraine 'On Public Procurement' to take urgent measures to combat the spread of coronavirus infection COVID-19, which consisted in the temporary removal of the public procurements of artificial ventilation suites and related products from the scope of Law of Ukraine 'On Public Procurement'.

Due to the current situation in the country and the quarantine restrictions, the restaurant business is suffering huge losses. In May 2021, the Parliament of Ukraine submitted a draft law on amendments to the Tax Code of Ukraine to reduce the VAT rate for the restaurant industry and the provision of catering services aimed to support the restaurant business.

In May 2021, a draft law aimed at supporting domestic producers of TV and film products, organizers of cultural and artistic events during the quarantine period in connection with the spread of COVID-19 was submitted to the Parliament of Ukraine.

Besides, a draft law amending the Law of Ukraine 'On State Aid to Business Entities' aimed at improving the control and monitoring of state aid to business entities was submitted to the Parliament of Ukraine in June 2021.

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

The outbreak of COVID-19 has undoubtfully adapted the manner of conducting litigation in Ukraine. In particular, the following measures were implemented in respect of legal proceedings.

Like in many countries, holding court hearings via special applications (such as Easycon, Microsoft Teams, Zoom, Skype etc.) have become the new normal and remain so in 2021. Also, the procedural codes were amended with the provisions allowing the parties to renew missed deadlines because of the quarantine, and obliged the courts, in turn, to take into account the duration of the COVID-19 quarantine when establishing terms for procedural actions.

Merger Control

8. **Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.**

Along with the obligation for the parties to obtain clearance for a merger before its implementation, the Ukrainian merger control regime provides strict timelines and procedures in which such clearance may be granted by the competition authority.

Even though AMC, as many other state bodies of Ukraine, has been suffering from different pandemic waves in the country affecting its officials and their families during the whole last year, in practice the agency has always complied with all the rules, procedures and deadlines prescribed by the law.

To the best of our knowledge, no exemptions have been granted by AMC, and based on the relevant enforcement practice the merger control regime in Ukraine has been neither strengthened nor weakened due to COVID-19.

9. **Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?**

Discussion regarding different options of changing the notification thresholds has been under way in Ukraine. It is worth recalling, for example, that the Ukrainian notification thresholds should be considered at the group level of the parties involved, and that means the assets or turnover of the controlling shareholder or controlling seller should still be counted towards the target. However, the notification thresholds have not been subject to amendments or exemptions due to COVID-19.

10. **Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.**

There are no relevant practical cases in this regard.

11. **Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?**

Based on the relevant practice, AMC prefers behavioral remedies rather than structural ones in high-level merger control cases. Even in COVID-19 times the agency is consistent in its approaches, keeps monitoring compliance with all the imposed remedies as well as collecting all the imposed fines for gun jumping and other violations of the law.

12. **Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?**

As mentioned above, despite COVID-19, the relevant legislation and law-enforcement practice in the area of Ukrainian merger control regime have remained unchanged.

13. **Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?**

We are not aware of such transactions.

Anticompetitive conduct

14. **Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?**

The pharmaceutical, food, fuel, transport markets, etc., were getting major attention from AMC during 2020 and remain so in 2021. However, COVID-19 has forced the Ukrainian antitrust authorities to approach the markets from a different angle.

DIY market. In May 2020, in order to prevent the coronavirus infection spread, operations of supermarkets, including the building ones, was prohibited (except for the online purchases). AMC Kyiv office had started its study in respect of the large DYI retailers in Ukraine. The enforcer stated that they allegedly violated competition law during the quarantine since they did not close their stores and thus gained undue advantages over the competitors.

Taxi services. Although the taxi apps are widely use in Ukraine, neither AMC, nor its regional offices have ever challenged this market. In early April 2021, Kyiv Regional Office of AMC (the 'AMC Kyiv Office') commenced its study of taxicab services pricing in Kyiv. This was due to the fact that on April 5 2021 – on the first day of the announced lockdown in Kyiv when public transport was limited – the taxi tariffs of major providers spiked sharply. The enforcer will focus on the formation of prices for taxi services via the apps (including pricing algorithms) and examine whether taxi service companies violated the competition law (AMC Kyiv Office alleged that parallel behaviour or abuse of dominance might have taken place).

15. **Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?**

As noted above, in 2020, the Ukrainian antitrust enforcer mainly focused on such social sensitive markets as pharmaceutical and healthcare sectors, food, fuel, transport markets, etc. Below is a brief summary of the main investigations and studies started by AMC and AMC Kyiv office in 2020.

As soon as quarantine was announced on the territory of Ukraine, AMC had immediately started closely monitoring the activity of social-sensitive industries, such as pharma (including medicines, medical masks, sanitizers, PPE, medical devices, etc.), food, transport, fuel, to name but a few.

In March 2020, AMC recommended pharma market players (local manufacturers, importers, distributors, and pharmacies), particularly, refraining from any actions which would lead to the increase in prices for imported and domestic goods at a rate that would outperform the increase in the foreign currency rate.

Apart from pricing matters, AMC attentively focused on preventing misleading advertising in the pharmaceutical industry. In March 2020, international and domestic manufacturers were provided with recommendations requiring them to prevent spreading the information (including, in advertisement) related to the treatment of coronaviruses. The same recommendations were also issued for leading television companies.

Mobile operators also found themselves under the antitrust spotlight. In March 2020, AMC issued recommendations for leading operators in Ukraine and called them to prevent increasing prices for tariff plans, closing cheap ones, or transferring consumers to more expensive tariffs.

AMC Kyiv Office was particularly active in replying during the coronavirus outbreak. Even before quarantine – in late February 2020 – aimed at ensuring price stability, AMC Kyiv Office issued recommendations for pharmacies to prevent them from setting retail prices for medical masks on the level exceeding the economically justified. Later, AMC Kyiv Office started the investigation against medical masks manufacturers, suppliers, and pharmacies into alleged significant increases in prices for medical masks.

Also, in March 2020, AMC Kyiv Office recommended major food retailers to avoid setting retail prices for essential commodities, such as medical face masks, sanitizers, and non-perishable foods on the level exceeding the economically justified. Further, AMC Kyiv Office opened an investigation against major food retailers and wholesale food suppliers regarding the rapidly increasing priced for non-perishable foods without any objective economic reasons. Remarkably, AMC alleged that the respondents committed the violation in the form of parallel behavior.

Like many countries across the globe, the COVID-19 pandemic forced the Ukrainian government in March 2020 to close its state borders and restrict international transport and passenger connections. Before the regular international flights were closed, Ukrainian citizens had had some time to return to the country. In this regard, AMC Kyiv Office opened an investigation in order to examine whether one of the major Ukrainian airlines had set excessive prices for airline tickets before the suspension of air flights to and from the country.

AMC Kyiv Office launched an investigation on the facts of increasing prices for cereals and vegetables in March 2020. During the period from the beginning of March to 24 March 2020, prices for storable foods, including sugar, buckwheat and rice, as well as vegetable crops, in particular: potatoes, onions, carrots, beets and cabbage were rebounded sharply in retail chains without objective factors.

In August 2020, AMC Kyiv Office commenced its study to examine whether medical laboratories, suppliers, or manufacturers violated competition laws when setting the prices for polymerase chain reaction ('PCR') tests for the coronavirus.

Regarding the digital markets, it is noteworthy that AMC is not yet advanced in this market. There have been no investigations or digital market studies opened by the Ukrainian antitrust agency so far.

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

In April 2020, AMC issued recommendations for the largest poultry producer in Ukraine. AMC required from the company to refrain from taking actions that may lead to the limitation of production volumes and (or) sale of chicken meat on the local Ukrainian market. AMC explained that as a preventive measures against increasing export of chicken by national manufacturers.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

As specified above, in March 2020, AMC recommended pharmaceutical companies and leading television companies to refrain from advertising medicines/dietary supplements as a remedy against COVID-19. Further, during the year of 2020, AMC paid close attention to the advertising in pharma industry. During 2020, AMC issued several recommendations to pharmaceutical manufacturers whereby recommended to refrain from using claims relating to pharmaceuticals, such as qualities ('high quality') and price ('reasonable price'), leading market position ('No. 1 in the world...'), rapid curing effects of medicines ('quick relief'), to name but a few, that may be considered as misleading advertisement.

At the end of 2020, AMC approved a report summarizing its law enforcement practice in the field of pharma advertising for the period of 2019-2020. Soon in early 2021, AMC issued recommendatory clarifications regarding the application of art. 15-1 of the Law of Ukraine 'On protection from unfair competition' to the advertisement of pharmaceuticals.

It is worth noting that several fines were imposed in 2020 on pharmaceutical companies under art. 15-1 of the Law of Ukraine 'On protection from unfair competition' due to the spreading of information that their products can be used as a treatment against COVID -19.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

It cannot be said that the Agency or its local offices accepted crisis cartel-related arguments as a defense. However, it should be noted that due to the fact that many companies operated remotely – it is fair to note that AMC remained very flexible in terms of prolonging the terms for responses to the RFIs.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

No exemptions or other mitigation options regarding uniliteral conduct during the COVID-19 pandemic were introduced by the Agency. Nor were any changes observed in the Agency's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic.

As regards the abuse of dominance cases, it is worth noting that, in July 2020, AMC adopted methodical recommendations regarding the application of a hypothetical monopolist test when examining the market (well-known as SSNIP-test).

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

We expect that the Agency will keep focusing on the markets most sensitive for consumers, such as food, pharmaceutical and healthcare sectors, fuel, transport markets, etc.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

During 2020, pharmaceutical and health-related markets were in the crosshairs of AMC and its local offices. We expect that the Agency will keep challenging the market of medicines, PCR test, pricing of the laboratories as well as medical centers.

ESG and competition policy

1. What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?

Strengthening environmental, social and governance (ESG) performance may be considered as a globally evolving trend in pursuit of which different businesses oftentimes collaborate with each other. And for better or worse, when developing every ESG performance aspect, strict compliance with competition law is not the first and the main thing the businesses are guided by in Ukraine.

While the ESG idea is well-intentioned, we cannot exclude that its implementation may somehow affect competition in different markets of Ukraine, and thus the bar may be raised in environmental, social and governance fields in so far as it considers the reasonable interest of market participants and does not harm healthy competition.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

It should be a multi-party dialogue on the regular basis to find a balance between the ESG performance goals, interests of market stakeholders, its partners, counterparties, and consumers, etc. However, the key role in this dialogue should be taken by the antitrust enforcers, presuming their in-depth understanding of the functioning of each market in the country and the level of competition on them. At the same time, the antitrust enforcer should be ready to hear ideas of business, but at the same time, the agency is the one who sets the rules of the game and defines the boundaries of what is acceptable for competition.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

In different countries, the competition agencies are vested with a different scope of powers. However, Ukrainian experience has shown that vesting a competition agency with such extra powers, which are usually unnatural for antitrust enforcers, rather overloads the state body and rarely leads to desired results.

4. **Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?**

Given the peculiarities of the Ukrainian economy, it can be assumed that markets with monopolistic or oligopolistic market structures may require stricter levels of scrutiny and/or different standards of proof to push forward ESG-related policy considerations, at least in order to avoid establishing additional market barriers.

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UNITED KINGDOM[429]

By: Matthew Yeowart,[430] Léonore De Mullewie[431] and Sara Moshfegh[432]

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

The UK Government introduced a raft of new legislation to offset the social and economic consequences of the pandemic. These measures included regulations to permit cooperation between firms in the supply of certain critical goods as well as major legislation such as the Coronavirus Act 2020, which granted the government broad emergency powers in respect of the UK National Health Service ("NHS"), social care, schools, policing, local councils and the conduct of courts, and the Corporate Insolvency and Government Act 2020, designed to protect companies in financial difficulty as a consequence of the health crisis.

These steps occurred in parallel with the many legislative measures introduced in the lead up to and immediate aftermath of Brexit. The UK formally left the European Union (the "EU") at the start of 2020 and the subsequent transition period ended on 31 December 2020. The UK's trading relationship with the EU is now governed by the Trade and Cooperation Agreement (the "TCA").

Although economic conditions and the broader regulatory landscape in the UK changed significantly due to the dual impact of the health crisis and Brexit, amendments to the competition law framework have been light-touch. The enforcement focus of the UK's Competition and Markets Authority (the "CMA") from a competition law and merger control perspective has been largely unaffected by the health crisis.

The CMA was also relatively well prepared for the challenges posed by the health crisis. Since the Brexit referendum, the CMA has been increasing staff numbers and readying itself to tackle many of the high profile, cross-border transactions and conduct cases that previously fell under the sole jurisdiction of the European Commission (the "EC") while the UK remained a member of the EU. In the lead up to Brexit, the CMA had a pronounced focus on certain sectors, notably pharmaceuticals, consumer goods and, of course, on digital markets.

Throughout the health crisis, this broad enforcement focus has remained unchanged. The majority of the CMA's headline grabbing initiatives, whether its current investigations into tech-giants Apple433 and Facebook,434 competition concerns resulting from investigating Google,435 the launch of its Digital Markets Unit ("DMU"), or the publication of its online platforms and digital advertising market study final report,436 were in the pipeline before the onset of the pandemic.

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[429] The authors of this chapter are antitrust and foreign investment lawyers based in London. All views expressed in this chapter are entirely personal.
[430] Counsel at Davis Polk & Wardwell.
[431] Associate at Davis Polk & Wardwell.
[432] Associate at Davis Polk & Wardwell.
[433] See CMA's investigation into Apple's AppStore, available at: https://www.gov.uk/cma-cases/investigation-into-apple-appstore.
[434] See CMA's investigation into Facebook's use of data, available at: https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data.
[435] See CMA investigation into Google's "Privacy Sandbox" browser, available at: https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes.
[436] See CMA Market study final report on online platforms and digital advertising market study, 1 July 2020, available at: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

The CMA took steps to relax UK competition rules to allow for cooperation in those sectors deemed critical to the health crisis response. Under paragraph 7(1), Schedule 3 of the Competition Act 1998, the UK Secretary of State is able to exclude the application of the Chapter I prohibition437 to certain activities if satisfied that there are exceptional and compelling reasons for doing so that are in the public interest. Exclusion orders that were issued in relation to groceries, healthcare suppliers, certain ferry routes and the dairy industry have now all been revoked.438

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

Independently of the pandemic, the UK operates a system of sector-specific pricing controls, policed by sectoral regulators such as Ofgem (gas and electricity), Ofwat (water and sewage), Ofcom (media and communications), the Civil Aviation Authority and Financial Conduct Authority. These various regulators, together with the CMA, make up the UK Competition Network.

Pricing controls vary by sector. Ofgem, for example, imposes pricing controls on various companies operating the National Grid and that have responsibility for local electricity and gas distribution. Its price control regulation is designed to ensure that monopolies do not abuse their position, balancing this against the need to make sure suppliers continue to be incentivised to meet their licence obligations.

These powers and the ongoing supervision of the sectoral regulators have largely been unaffected by the health crisis. Regulators have, of course, adapted their work plans to the current economic situation but no new regulations regarding pricing controls have been introduced.439

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

As explained in the response to question 1, reforms to the competition law framework have largely been light touch. Heavily influenced by Brexit, there are, however, ongoing policy discussions about how to safeguard and support UK businesses.

On 16 February 2021, for example, John Penrose MP published his report on the effectiveness of the UK competition regime, advocating that it be modernised to respond to the demands of the digital economy and that the CMA be permitted to impose tougher penalties on firms for non-compliance.440 None of these proposals is intended to safeguard the pre-pandemic status quo. The focus is instead on adapting UK rules

437 The Chapter I Prohibition relates to agreements that have as their object or effect the restriction, prevention or distortion of competition within the UK. This is the UK equivalent to Article 101 of the Treaty on the Functioning of the European Union.
438 See: https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19.
439 For example, recent steps taken by the sectoral regulators have included Ofgem adjusting its tariff cap to allow for the recovery of debt-related costs resulting from the pandemic and the Department for Culture, Media and Sports publishing a joint statement with Ofcom and the telecoms industry which commits to lowering customer bills, removing data allowance caps, offering new mobile and landline packages at low prices and ensuring vulnerable and self-isolating customers get alternative communications if repairs are not carried out expeditiously.
440 See John Penrose MP, "Power to the People: Stronger Consumer Choice and Competition so Markets Work for People, not the Other Way Around", February 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf.

to deal with the longer-term economic challenges posed by the UK's exit from the EU and the accelerating transition to a digital economy.

The UK government is also reluctant to overhaul competition law rules, particularly if reforms are perceived to be protectionist in nature, at a time when the UK is attempting to signal its openness for investment, re-calibrate its trade relationships with other major economies and avoid further political rows with the EU, where possible.

4. Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?

The TCA maintains core principles from the EU state aid regime, although judicial review of decisions will now be the responsibility of the UK courts, rather the Court of Justice of the European Union (the "CJEU").

UK Government support for industries during the health crisis, particularly throughout 2020, therefore had to abide by the pre-pandemic playbook. For a grant of a subsidy to be lawful, it must: (i) pursue a specific public policy objective; (ii) be proportionate and necessary; (iii) generate a change in economic behaviour that assists in achieving the objective; (iv) not compensate for costs the beneficiary could have covered itself; (v) ensure that a less distortive alternative is not available; and (vi) ensure that positive effects outweigh negative ones.

In 2020, prior to the end of the transition period, the UK also had to seek EU approvals for a range of state aid measures. These included the £50 billion scheme to support companies via direct grants, equity injections, selective tax advantages and advance payments, state guarantees for certain loans, support for coronavirus related R&D, and support for the construction and upscaling of testing facilities to tackle the health crisis. It also sought approval for the £10 billion guarantee scheme to support the trade credit insurance market.

The UK government is now, however, in the process of developing a new state aid regime, which takes the economic conditions brought about by the health crisis into account. The Subsidy Control Bill, setting out how the UK will replace the EU state aid rules, is currently before Parliament.

This is intended to replace previous state aid legislation and, in the Government's words, it will "reflect our strategic interests and particular national circumstances, providing a legal framework within which public authorities make subsidy decision".441 The key pillars of the legislation, as promised by the Government, are:

- creating a set of UK-wide principles that subsidy-granting authorities must follow;
- minimising subsidies' negative effects on UK competition or investment;
- exempting certain categories of subsidies from the regime;
- prohibiting or placing conditions on subsidies that are at high risk of distorting markets;
- requiring public authorities to upload information on subsidies to a new UK-wide, publicly-accessible transparency database;

[441] See Queen's Speech 2021, available at: https://www.gov.uk/government/speeches/queens-speech-2021.

- establishing an independent subsidy control body as part of the CMA (the "Subsidy Advice Unit") to oversee the new subsidy control system; and

- providing for judicial oversight and enforcement of the granting of subsidies.

In parallel with this, the government will introduce a Procurement Bill that will combine more than 350 EU derived regulations into a single framework.

5. Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?

Prior to the pandemic, the Government was able to intervene in CMA merger reviews on public interest grounds where a deal raised national security, media plurality or financial system stability concerns. In response to the crisis, the Government added a new public interest ground for intervention, in order "to combat and to mitigate the effects of, public health emergencies".442 This ground for intervention was not utilised during the pandemic.

Most notably, the UK National Security and Investment Act (the "NS&I Act") became fully operational on 4 January 2022 and introduced a new standalone review system for transactions potentially giving rise to national security concerns. The new regime is broad in scope, catching transactions even where there is very limited UK nexus. Based on its initial impact assessment, published when the bill was introduced to Parliament, the Government expects between 1,000 and 1,830 deal notifications each year. This is considerably higher than the 60-80 deals typically notified to the CMA annually under the merger control rules.

The NS&I Act is the culmination of a series of steps taken since 2017 to broaden the UK Government's discretionary powers to intervene in any transaction where there is reasonable suspicion that it might present a risk to national security. It is informed by developments in other major jurisdictions, notably the EU, reforms to national-level screening regimes within the EU and the recent strengthening of the powers of the Committee on Foreign Investment in the US ("CFIUS").

The key features of the new notification regime are summarised below.

Mandatory notification: The NS&I Act introduces a hybrid notification regime. Mandatory pre-closing filing obligations will arise for acquisitions of, or significant interests in, companies, assets and IP in certain sensitive sectors. The 17 sensitive sectors identified in the NS&I Act include civil nuclear, communications, data infrastructure, defence, artificial intelligence, autonomous robotics and advanced materials. Definitions for each of these sensitive sectors have been finalised within the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021. The broad definitions mean that the mandatory regime will catch a large number of cross-border transactions.

Voluntary notification: The NS&I Act also sets in place a voluntary filing regime, allowing for notification of investments in businesses that are not active within any of the 17 sensitive sectors, but which may nevertheless raise national security issues. Critically, this part of the hybrid notification system gives the newly-established Investment Screening Unit ("ISU") the ability to "call-in" transactions for review at its discretion. Similar to current CMA practice, there is expected to be a dedicated merger intelligence team within the ISU, responsible for identifying transactions for potential "call-in". Investors will need to consider the likelihood of a call-in when conducting pre-signing risk assessments and designing transaction timetables.

[442] The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020.

As the NS&I Act only become fully operational in 2022, the operation of the new regime has not been affected by the health crisis.

6. Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?

As discussed in the response to question 4, the Government is working on draft legislation, setting out new state aid and public procurement regimes. These are in addition to the now fully operational NS&I notification regime described in question 5.

The Government is also currently analysing feedback from a consultation on precautionary powers that would give it the ability to intervene in and potentially block cases in which a UK listing would raise national security concerns.443 This is expected to apply to all initial equity listings and admissions to UK public markets, although it would not apply to secondary trading. There would be additional disclosure requirements for issuers.

7. How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?

At the outset of the pandemic, the English courts moved rapidly to supplement their civil procedural rules with practice directions and protocols, designed to facilitate remote working. These included:

- a protocol advising on good practice for the production of e-bundles;
- a protocol for preparations for and conduct of remote hearings;
- practice directions for the conduct of remote hearings and allowing for extensions to time limits to take account of procedural delays resulting from the health crisis;
- guidance notes on the administration of oaths and affirmations, and the development of remote facilities to ensure clients and their legal advisers can exchange privileged communication; and
- establishing a real time courts and tribunals tracker.

In addition, the Coronavirus Act 2020 made provision for live streaming of hearings and permitted individuals to travel to fulfil certain legal obligations, including participating in legal proceedings, during the various lockdowns imposed by the Government.

The UK's specialist competition law court, the Competition Appeal Tribunal (the "CAT"), also adapted its practices during the pandemic. It accepted that the health crisis justifies a 14-day extension to the deadline to file a notice of appeal against a CMA merger decision, and a seven-day extension to file a notice of appeal of a CMA Competition Act 1998 decision. It also allowed documents to be filed electronically and used videolink for hearings.

[443] See HM Treasury Consultation on Power to Block Listings on National Security Grounds, June 2021, available at: https://www.gov.uk/government/consultations/consultation-on-a-power-to-block-listings-on-national-security-grounds.

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

Despite the dual challenges of Brexit and the pandemic, the CMA's established jurisdictional and substantive assessment framework was viewed by the Government as sufficiently robust to allow for effective enforcement activity without material revision to merger control rules.

In fact, the CMA may have been better prepared than regulators in many other jurisdictions. Pre-pandemic it had significantly increased staff numbers and improved its IT systems in preparation for Brexit. Whilst in the fiscal year 2020-2021 the number of merger cases reviewed by the CMA dropped to 38 from 62 the preceding year, 44 cases were already under review from April 2021 to 31 December 2021, indicating a return to pre-pandemic levels.444 However, the proportion of reviewed cases referred to phase 2 increased from 21% for the fiscal year 2019-2020 to 26% for the fiscal year 2020-2021. There is an expectation of an upwards trajectory in cases reviewed in coming years.

One clear benefit of the current UK merger control system is that it is highly flexible. The CMA has wide discretion to identify transactions of particular interest for detailed investigation. It also applies a prioritisation principle to ensure that it does not allocate staff and other resources to review deals that clearly will not raise substantive competition law concerns. This is in contrast to the EC and many other regulators that routinely review no-issues cases that nevertheless trip applicable jurisdictional thresholds.

There has therefore not been any need to grant health crisis related exemptions from merger control rules for certain types of transactions. The only major merger control related development has been amendments to the grounds by which the Government can make public interest interventions in CMA merger reviews, as described in the response to question 5.

From a procedural standpoint, the CMA has also adapted quickly to remote working conditions and the other challenges posed by the health crisis. The CMA had little difficulty in moving case review meetings and hearings with merging parties to remote videoconferencing. For the most part, the CMA has also managed to maintain pre-pandemic review timelines, at least in the majority of cases.

At the outset of the pandemic, the CMA did, however, issue guidance, noting that the crisis would constitute reasonable excuse for not providing information by requested deadlines. Where this is the case, the CMA will not impose penalties, but it will be able to stop the statutory review clock. The CMA also noted it may not start the 40 working day Phase 1 review clock if parties are not able to meaningfully engage in pre-notification discussions, and it will maintain its practice of imposing interim measures, with derogations where necessary.445

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

[444]See the CMA's merger inquiry outcome statistics here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1053787/Merger_outcomes_to_January_2022.ods.

[445]See CMA Guidance on merger assessments during the COVID-19, available at: https://www.gov.uk/government/publications/merger-assessments-during-the-coronavirus-covid-19-pandemic/merger-assessments-during-the-coronavirus-covid-19-pandemic

The UK has maintained its voluntary notification system and its turnover and share of supply jurisdictional tests throughout the pandemic. This system gives the CMA wide discretion to identify cases of potential interest it that it may call-in for formal review, even where a target business has very limited UK activities.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

In its updated substantive guidelines, published on March 2021,446 the CMA detailed a flexible approach to market definition when conducting merger reviews and emphasised that market shares are not the only tool that allow for analysis of the competitive effects of a merger. There is now an increased focus on internal documents and what they indicate regarding closeness of competition, particularly when assessing digital markets, rather than on attempting to draw potentially artificial boundaries around discrete products and services.

The focus on internal documents is perhaps an indication that the CMA is moving more towards a US model, where a detailed review of internal documents is a cornerstone of merger reviews. In fact, the CMA is often open to accepting production sets already made to US regulators to assist with the UK focussed assessment. When considering this approach, notifying parties should be mindful of the different privilege rules that apply in the two jurisdictions and take steps to ensure that documents responsive to CMA requests are not erroneously withheld.447

The CMA's latest substantive guidelines were being developed before the onset of the pandemic and are designed to give the CMA wide discretion when assessing what deals to review and where to focus its competitive analysis. This discretion has allowed the CMA to adapt its practices relatively easily to the unique circumstances of the health crisis.

One established, albeit rarely accepted, aspect of UK merger control rules is the availability of a failing firm defence. In brief, for the CMA to clear a deal on the basis of this defence, a notifying party would need to demonstrate that: (i) the target would exit the market absent the transaction; (ii) there is no less anti-competitive alternative purchaser available; and (iii) the competitive outcome of the transaction will not be worse than if the target business exited the market.448 In April 2020, the CMA published a summary of its policy regarding failing firm arguments, which stressed that these would be analysed on a case-by-case basis and outlining the framework of assessment.449

Inevitably, the crisis has seen a number of failing firm arguments tabled during merger reviews. Recent examples of cases during which failing firm arguments were considered include:

- Amazon / Deliveroo:450 on 17 April 2020, the CMA provisionally cleared the transaction on the basis that: (i) the health crisis had made Deliveroo's exit from the market inevitable, absent any

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446 See CMA Merger Assessment Guidelines, 18 March 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986475/MAGs_for_publication_2021_-.pdf.

447 As is explained in response to question 11, the CMA fined Sabre in September 2019 for wrongly withholding documents from disclosure but erroneously applying US rather than UK privilege rules.

448 For this final limb, the CMA considers the impact that the exit of the failing firm would have on competition within the markets at issue (looking at the overall market structure and taking all relevant parameters of competition into account) compared to the competitive outcome that would arise from the acquisition.

449See Summary of CMA's position on mergers involving "failing firms", April 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880565/Summary_of_CMA_s_position_on_mergers_involving__failing_firms_.pdf.

450 See CMA Amazon / Deliveroo merger inquiry, available at: https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry.

additional funding; (ii) only Amazon was readily able to provide a rapid liquidity injection; and (iii) Deliveroo's exit from the market would be more harmful to competition than allowing Amazon's investment to proceed. These provisional findings were, however, subsequently revised, with the CMA concluding that Deliveroo's exit from the market was not inevitable. The deal was ultimately cleared on the basis that the CMA did not identify any substantial lessening of competition in any of the markets under review.

- Viagogo / Stubhub:[451] the parties submitted that the health crisis had materially weakened revenues and that primary ticketing platforms are better able than secondary platforms to operate effectively during the pandemic due to their ability to control inventory. Although the CMA recognised the immediate short-term impact of the pandemic on the parties' businesses, it assessed the deal on a longer-term basis, determining that, absent the transaction, Stubhub would have been purchased by a third party and continued to operate in the UK. The CMA also emphasised that it had not seen evidence that the long term incentives of venues would materially change as a consequence of the crisis.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

As the UK is a voluntary filing jurisdiction, the CMA does not impose gun-jumping fines. Firms are permitted to close a deal even if a Phase 1 CMA merger review is ongoing, unless the CMA has used its interim order-making powers to prevent this. A prohibition against further share dealing does arise if the CMA refers a deal for Phase 2 investigation at the end of its Phase 1 process. However, there are no recent examples of merging parties breaching this prohibition as a failure to comply would immediately be apparent to the CMA and enforcement action would follow.

The CMA does, however, have a range of measures in its "toolkit" to prevent pre-clearance integration of the merging parties' businesses. In particular, the CMA is increasingly using initial enforcement orders ("IEOs") either to prevent closing, where this in itself would potentially harm competition, or more often to prevent post-closing integration activities, pending a CMA decision. In the two fiscal years 2019-2020 and 2020-2021, there were 30 IEOs imposed, the majority prohibiting post-closing integration. From April 2021 to 31 December 2021 alone, there were 17 IEOs. The health crisis has had no obvious effect on the CMA's use of IEOs.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

No, the CMA has stressed on several occasions that the standard of its substantive assessment of deals has not been relaxed. It continues to run thorough, forward-looking, evidence-led investigations, with limited political oversight or intervention. The potential impact of the pandemic on merging businesses is assessed on a case-by-case basis, within the relevant commercial context.

The lasting impact of the health crisis on CMA merger reviews is therefore likely only to be procedural in nature, as the CMA has adapted its processes to allow for remote hearings with notifying parties, particularly in the context of the Phase 2 investigations. It may continue to use these tools for future reviews,

[451] See CMA viagogo / StubHub merger inquiry, available at: https://www.gov.uk/cma-cases/viagogo-stubhub-merger-inquiry.

particularly when dealing with companies with key personnel located in different regions who are not able to travel to the UK easily, at short notice, for in-person meetings.

This, of course, is not to say that arguments have not been tabled by merging parties that the economic and legal standard of assessment should be altered due to the health crisis, particularly regarding the appropriate counterfactual by which a deal should be assessed. Commentary on failing firm defences made to the CMA is provided in response to question 11.

In addition to these cases, in JD Sports / Footasylum,452 the CMA considered the negative impact of the pandemic on Footasylum's business but determined that longer-term consequences on competitive dynamics were not sufficiently clear to incorporate into the counterfactual. The CMA ultimately prohibited the deal, concluding that the health crisis would not materially reduce the extent to which the parties are close competitors, or increase constraints posed by other retailers.

In June 2020, JD Sports appealed the prohibition decision, with the CAT ruling that the CMA had acted irrationally by coming to conclusions on the likely effects of the health crisis without having the necessary supporting evidence. In particular, the CAT found that the CMA, despite being aware of the lack of robust evidence to support its conclusions, had decided not to conduct further enquiries prior to issuing its final report. The CAT therefore quashed the CMA's final report and remitted the case to the CMA for reconsideration. The CMA prohibited the deal once again in 2021 and issued the parties with a fine of almost £5 million for breaching an IEO.453

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

In JD Sports / Footasylum, the CMA decided that the divestiture period could be extended beyond the usual six months, in order to provide JD Sports with greater scope to achieve divestiture at a time when the retail and financial markets had stabilised. However, in the CMA's final decision, it did not find it necessary to extend the initial divestment period given that past and present uncertainties caused by COVID-19 had not prevented M&A activity in the UK's retail sector. It further reserved the right to appoint a divestiture trustee should JD Sports fail, or look unlikely, to successfully divest within the initial divesture period, or such extended period as the CMA may allow.

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

In 2019, the CMA issued four infringement decisions under the Competition Act 1998 Chapter 1 Prohibition. This increased to 11 in 2020, with aggregate fines totalling £60 million. These fines related to a range of activities, including the use of most favoured nation clauses on price comparison websites, price-

452 See CMA JD Sports Fashion plc / Footasylum plc merger inquiry, available at: https://www.gov.uk/cma-cases/jd-sports-fashion-plc-footasylum-plc-merger-inquiry.

453 See "Sports retailers fined almost £5m for breaching CMA order", available at: https://www.gov.uk/government/news/sports-retailers-fined-almost-5m-for-breaching-cma-order.

fixing of roofing materials and restrictive agreements in the supply of various pharmaceutical products. These infringement decisions, of course, reflect CMA activities launched prior to the health crisis.

During 2020 and 2021, there was no obvious, significant shift in the CMA's enforcement focus or that of the various sectoral regulators. Investigations were opened into matters such as the resale price maintenance in the domestic lighting sector, the pricing of replica football kits and the supply of electric vehicle chargepoints on or near motorways. These demonstrate a continued commitment to theories of harm that were commonplace pre-pandemic.

Similarly, the CMA's investigations into digital markets represents a continuation of its pre-pandemic activities. The Digital Markets Taskforce and the DMU are the results of initiatives set in motion before the onset of the health crisis, following on from its commissioning of the Lear report evaluating past merger decisions in the digital sector454 and the Furman report on digital competition.455 The CMA is firmly committed to ramping up its enforcement activities in the digital sector and wants to establish itself as a thought leader in this space.

Where the health crisis has had a clear influence on enforcement activity is in policing companies that might use the pandemic as cover for anticompetitive activities that do not have a public interest justification. On 20 March 2020, for example, the CMA sent an open letter to the pharmaceutical, food and drink sectors warning firms that they should not seek to capitalise by charging unjustifiably high prices for essential goods or making misleading claims around their efficacy during the pandemic.

Various investigations have been opened in this regard but most have now been ended without any action being taken. Although these investigations have not resulted in fines or other remedies being imposed, they at least demonstrate the CMA's willingness to take action against companies to the extent there is evidence of wrongdoing during the pandemic. This, of course, would not require the CMA to develop novel theories of harm. The CMA would be applying established competition rules to a specific economic context.

15. Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

The CMA's current policing of pharmaceuticals and the food and drinks sector is described in response to question 14. The CMA has issued warning letters and initiated investigations but these have not resulted in any formal statement of objections.

From a unilateral conduct perspective, the CMA continues to have a particularly active interest in digital markets. This has remained the case throughout the health crisis. For example, on 4 March 2021, the CMA announced it was opening an investigation into whether Apple is abusing a dominant position in the distribution of apps on Apple devices in the UK by imposing unfair or anti-competitive terms on developers using the App Store resulting in users having less choice or paying higher prices.456

The CMA also investigated Google's proposal to remove third party cookies on Chrome and replace their functionality with a range of "Privacy Sandbox" tools, following a complaint received in November 2020

454 See Lear, "Ex-post Assessment of Merger Control Decisions in Digital Markets: Final Report", 9 May 2019, available at https://www.gov.uk/government/publications/assessment-of-merger-control-decisions-in-digital-markets.
455 See "Unlocking digital competition; Report of the Digital Competition Expert Panel", March 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.
456 See press release, "CMA investigates Apple over suspected anti-competitive behaviour", available at: https://www.gov.uk/government/news/cma-investigates-apple-over-suspected-anti-competitive-behaviour.

from a coalition of technology and publishing companies.457 The CMA focused on whether the proposals would cause advertising spending to become even more concentrated within Google's ecosystem, to the detriment of its competitors. This investigation leant on the findings of the CMA's online platforms and digital advertising market study final report, published in July 2020.458 In February 2022, the CMA secured legally binding commitments from Google to address competition concerns. Among the commitments were that Google:

- would engage with third parties and publish its test results, with the CMA able to require that Google address concerns raised by third parties or the CMA;
- not remove third-party cookies until competition concerns are addressed to the CMA's satisfaction;
- involve the CMA in its development and testing of the Privacy Sandbox;
- committed not the prefer itself over other advertising services;
- committed to restrictions on sharing data within its ecosystem; and
- accept the appointment of a Monitoring Trustee to monitor compliance with Google's obligations.

Relatedly, and also making use of the findings from this market study, the CMA announced on 4 June 2021 that it is investigating whether Facebook is abusing a dominant position in the social media or digital advertising markets through its collection and use of advertising data.459 The EC has opened a parallel investigation into the same conduct and the two regulators plan to work closely together. It is also anticipated that the CMA will investigate Amazon's use of data. This may well address similar theories of harm to those currently under investigation by the EC, particularly the standard agreements Amazon enters into with marketplace sellers and the role of data in the selection of the "Buy Box".460

Further, the CMA on 15 June 2021 launched a market study into the UK's mobile ecosystems, with assessments focusing on competition in the supply of mobile devices and operating systems, the distribution of mobile applications, the supply of mobile browsers, and Apple and Google's role in competition between app developers.461

On 27 January 2022, the CMA also launched a market study into music and streaming services, with a focus on the roles played by record labels and music streaming services. Though the study will concentrate on harm to consumers, it will also assess the impacts of lack of competition on the artists.462

In parallel with these various investigations, the DMU has started to look at how codes of conduct could work in practice to govern the relationship between digital platforms and groups, such as small businesses, which rely on these platforms to reach potential customers. The DMU is also tasked with further evidence-gathering on digital markets, in the expectation that this will prompt the launch of further investigations.

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457 See CMA investigation into Google's "Privacy Sandbox" browser, available at: https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes.
458 See CMA Market study final report on online platforms and digital advertising market study, 1 July 2020, available at: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.
459 See CMA investigation into Facebook's use of data, available at: https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data.
460 See press release, "Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon", available at: https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291.
461 See CMA mobile ecosystems market study, available at: https://www.gov.uk/cma-cases/mobile-ecosystems-market-study.
462 See CMA music and streaming market study, available at: https://www.gov.uk/cma-cases/music-and-streaming-market-study.

Digital markets therefore remain firmly in the spotlight. The CMA is allocating significant time and resources to pioneer competition law enforcement in this area, cooperating closely with the EC and US antitrust authorities. To the extent that the CMA does develop novel theories of harm, it is therefore likely to be in respect of digital markets rather than in those sectors adversely affected by the health crisis.

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

As in other jurisdictions, the pandemic has created unprecedented supply uncertainties, high demand and considerable price volatility for various critical products in the UK. These factors have resulted in unpredictable fluctuations in companies' costs. In this challenging economic environment, the CMA has been tasked with policing the behaviour of firms to make sure that price changes passed on to consumers are justifiable and that companies are not engaging in profiteering under cover of the pandemic.

The CMA sent warning letters to companies in certain sectors at the beginning of the pandemic. In March 2020, the CMA sent an open letter to the pharmaceutical, food and drink sectors warning firms that they should not capitalise on the current situation by charging unjustifiably high prices for essential goods or making misleading claims around their efficacy. Relatedly, in May 2020, the CMA's COVID-19 Taskforce published an update noting the high levels of complaints it had received, the majority of which related to unfair pricing. At this point, the CMA had written to more than 250 traders to collect further information regarding these complaints.

In July 2020, the CMA published a joint statement with various industry trade bodies warning about enforcement action being taken if companies engaged in price gouging during the health crisis. The largest price increases concerned hand sanitiser, with a median reported rise of around 400%, and average reported increases across all products subject to complaint of 160%.

Despite its willingness to investigate, the CMA's information gathering has not yet led it to issue formal statements of objection. In fact, a number of abuse of dominance investigations relating to the pricing of hand sanitisers were closed in July 2020 with the CMA concluding that the companies' behaviour was not contrary to UK competition law. A further investigation was closed in September 2020 without any wrongdoing being identified.

The CMA will continue to play a monitoring role. However, as the global supply chain continues to adapt successfully to the challenges posed by the health crisis and there is consequently less pronounced price volatility, it seems unlikely that the same volume of complaints will be received or investigations opened by the CMA in relation to excessive pricing and price gouging as compared to the initial phase of the pandemic. Indeed, the CMA noted the number of consumer complaints had fallen to 5,000 in February 2021 from a peak of 30,000 in May 2020.

In its Annual Plan for 2021-2022,[463] the CMA indicated that it will concentrate on consumer protection and driving recovery during and after COVID-19, with particular focus on the protection of vulnerable consumers from competition and consumer protection law breaches, as well as poorly functioning markets. Its COVID-19 Taskforce has been tasked with dealing with the related complaints on unfair pricing and practices. Another point of concentration for the CMA is fostering competition to promote innovation, productivity and growth in order to support the UK economy. The CMA aims to do this by careful assessment of mergers that may weaken competition and a clamping down on cartels and collusive behaviour seeking to keep prices high.

[463] See CMA Annual Plan 2021 to 2022, available at: https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2021-to-2022.

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

Under Section 9 of the Competition Act 1998 an agreement that restricts competition is permissible if it satisfies four criteria:

- contributing to improving production or distribution, or promoting technical or economic progress;
- allowing consumers a fair share of the resulting benefit;
- not imposing restrictions unless they are indispensable for the attainment of those objectives; and
- not creating the possibility of eliminating competition in a substantial part of the product or services in question.

On 25 March 2020, the CMA issued guidance on its approach to applying these legal criteria in the exceptional circumstances of the COVID-19 pandemic.464 Notably, the CMA indicated that these criteria will likely be met by any coordinated actions that are designed to: (i) avoid a shortage, or ensure security, of supply; (ii) ensure a fair distribution of scarce products; (iii) continue essential services; or (iv) provide new services such as food delivery to vulnerable consumers.

In addition to this guidance, the CMA created a COVID-19 Taskforce with responsibility for taking enforcement action against companies exploiting the pandemic through unjustifiable price increases or misleading claims, and advising the government on the need for additional emergency legislation to ensure competition law does not stand in the way of legitimate measures to protect public health and support the supply of essential goods and services.

Previously introduced exclusion orders that permitted cooperation between health service providers and between grocery suppliers were revoked on 29 July 2021 and 9 October 2020 respectively.

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

We have seen no evidence for crisis cartel-related arguments being accepted in the UK. To the extent that any such arguments have been made, these are unlikely to become a matter of public record until the CMA or the sectoral regulators have completed investigations and published their key findings.

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

464 See CMA Guidance on approach to business cooperation in response to coronavirus, 25 March 2020, available at: https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-to-covid-19.

The only exemptions granted are as described above. These relate to permissible cooperation between competitors during the health crisis. No exemptions have been granted by the CMA or sectoral regulators in respect of unilateral conduct.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

The CMA will assess conduct on a case-by-case basis. Economic arguments linked to the unprecedented challenges posed by the health crisis may be tabled in UK conduct investigations. However, there is scant evidence that the CMA will be receptive to the arguments if the conduct in question breaches competition rules and does not have a robust public interest justification.

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

The CMA has a long-held interest in examining health-related and pharmaceutical matters, both in merger control and conduct terms. In 2020, for example, the CMA fined three pharmaceutical companies for entering into pay for delay arrangements regarding the supply of fludrocortisone acetate tablets.465 One of the respondents, agreed to pay £8 million to the NHS directly as compensation. The CMA also imposed fines on pharmaceutical companies for information exchanges and market sharing regarding the supply of nortriptyline tablets.466 In the CMA's 2021-2022 Annual Plan, it reaffirmed its continuing assessment of the UK pharmaceutical sector to ensure that the NHS does not pay excessive amounts for essential medicines and treatments, and that consumers reliant on such drugs and treatments do not lose out.

The CMA will continue its dual-track approach of investigating potential anti-competitive behaviour in the healthcare sector, particularly where there is risk of the NHS paying over the odds, and using its merger review powers to closely scrutinise healthcare deals. The health crisis may help intensify this focus.

ESG and competition policy

1. What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?

This is a topic of ongoing debate in the UK, EU and other major jurisdictions. The CMA and other regulators are beginning to grapple with how to reconcile the existing competition law framework with the evolving ESG policy objectives of government. By way of example, the CMA published guidance on

[465] See CMA decision on fludrocortisone acetate tablets anti-competitive agreement, available at: https://www.gov.uk/cma-cases/pharmaceutical-drugs-suspected-anti-competitive-agreements-and-conduct.
[466] See CMA nortriptyline investigation: anti-competitive agreement and conduct, available at: https://www.gov.uk/cma-cases/pharmaceutical-sector-suspected-anti-competitive-agreements-and-conduct-50507-2.

environmental sustainability agreements and competition law in January 2021. The primary objective of this guidance is to make sure that competition law does not become an unnecessary obstacle to sustainable development and that businesses are not deterred from taking part in lawful environmental initiatives in fear of breaching competition law.

We should, of course, not lose sight of the fact that competition law and ESG-policy objectives are often not at odds. Competition law in the UK is structured so as to improve market conditions and foster innovation, for the benefit of consumers. As the CMA has noted, "many forms of collaboration between businesses for the achievement of sustainability goals are unlikely to raise competition issues".[467]

A tension between ESG policy objectives and competition law, however, does arise where forms of cooperation significantly restrict competition. Regulators, including the CMA, are signalling that they will assess these restrictions on a case-by-case basis, through reference to the specific economic context, and seem open to granting some latitude to companies where the benefits of, for example, sustainability agreements outweigh potential restrictions of competition.

In principle, it also seems possible for regulators to design block exemptions or similar mechanisms to allow for certain types of cooperation that have a clear public or environmental benefit. In the EU and UK, block exemptions already cover matters such as joint R&D, technology transfers and specialisation. The set of block exemptions could be expanded in order to allow companies to conduct self-assessments without requiring prior regulatory approval.468

However, to the extent that competition law in the UK and elsewhere develops exemptions for certain categories of behaviour, if justified by ESG policy objectives, these will need to be carefully drafted, setting out a series of tests for regulator and the courts to apply consistently. Loose drafting would risk allowing parties to use ESG-policy objectives as cover for profiteering or other anti-competitive conduct. There is also a broader question about whether integrating these types of policy objectives into a competition law framework risks undermining or distracting from a regulator's core consumer-protection mission.

Most industry practitioners would take the view that competition law assessments should not become overly politicised and complex, with many different standards of review, subject to varying interpretations, being balanced one against the other. A well-designed competition rulebook should give companies some level of certainty as to what conduct is permissible and what will potentially prompt investigation and sanction. Striking the correct balance between consumer protection, on the one hand, and the achievement of more nebulous (and potentially rapidly evolving) policy goals, on the other, will be difficult to judge.

Nevertheless, in July 2021, the Secretary of State for BEIS asked the CMA to advise the government on how the UK's Net Zero and sustainability goals could be supported by the tools available under competition and consumer law. Before responding, the CMA has sought the views of all interested parties to ensure and informed response is provided to the government. In particular, the CMA has sought information on competition law enforcement, merger control, consumer protection law, and market investigations.469

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

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[467] See CMA guidance on environmental sustainability agreements and competition law, 27 January 2021, available at: https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law.

[468] For summary of EU block exemptions retained by the UK post-Brexit, see Department for Business, Energy & Industrial Strategy Notice Retained Block Exemptions, 10 February 2021, available at, https://www.gov.uk/government/publications/retained-block-exemptions/retained-block-exemptions.

[469] See press release, "CMA consults on environmental sustainability advice", available at: https://www.gov.uk/government/news/cma-consults-on-environmental-sustainability-advice.

The UK system has historically been fairly resolute in its determination that competition should be the primary focus of competition law enforcers. As the responses to questions 24 and 25 below make clear, current legislation governing the conduct of merger and conduct proceedings would not generally permit social/environmental factors to be weighed in the balance. It is ultimately for the Government to determine whether legislative time should be made available for that purpose, but there is no obvious appetite at the enforcement level for these factors to outweigh demonstrable anticompetitive effects.

3. Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?

In the UK, as is the case in the EU, competition law rules currently prevent companies from agreeing with one another to reduce carbon emissions. To the extent that a company wants to reduce carbon emissions beyond legally established targets, it would have to do so unilaterally. Whilst this may create an upside from a public relations standpoint, to the extent that the firm can demonstrate to customers that it is a "greener" alternative to rivals, it also potentially increases costs, thereby placing it a competitive disadvantage compared to companies that have not taken similar action.

The "carbon defence" seeks to address this by providing a mechanism by which competing firms, in certain specific contexts, are permitted to enter into binding agreements with one another to reduce their respective carbon emissions. Commentators have suggested that such a defence would be acceptable even in situations where it increases prices for consumers, as these would be justified on the basis that reducing emissions in the public interest will likely lead to firms having higher costs as they diversify away from traditional energy resources.

The integration of a carbon defence into competition law rules strikes us as an imperfect solution to an issue that should more properly be addressed by policy-makers, who have the ability, through legislation, to impose more ambitious carbon emission reduction targets. To allow companies to self-assess on appropriate levels of carbon emissions and the level of costs it is reasonable to pass on to consumers would seem to run contrary to calls from environmental campaigners for government to drive decision-making on climate action.

A carbon defence may also create considerable uncertainty for companies. Many would inevitably plead a carbon defence as justification for increasing consumer prices and it would be far from straightforward for the CMA or other competent regulators to assess the merits of these arguments.

Some commentators argue that competition authorities are well-placed to assess a carbon defence on the basis that in-house economists routinely estimate the price effects of restrictive agreements and they would also be able to look to a range of authoritative independent estimates of the economic costs of carbon emissions when conducting assessments. What is not clear, however, is how regulators would balance potentially significant price increases on vulnerable consumers against a particular carbon emissions reduction policy objective.

These challenging decisions should be made by policy-makers, not personnel within the CMA, who have historically analysed conduct through reference to a well-established consumer welfare principle. Integrating public policy objectives into competition law assessments risks distracting the CMA and other regulators from what they are good at doing – protecting consumers. To the extent that regulators do struggle with the merits of a carbon defence assessment, this also raises the prospect of at least some companies using agreements on carbon emissions as cover for anti-competitive collusion that is harmful to consumers.

More generally, integrating a carbon defence into UK competition law also has the potential to politicise the activities of the CMA. Although the CMA currently has some level of political oversight, the conduct

of its investigations and merger reviews is largely free from interference by politicians. Different political groupings, however, may have divergent views of how a carbon defence should be applied in practice, particularly regarding high profile companies and sectors. It is also likely to take time before relevant legal tests have been appropriately stress tested by the courts and a consensus view on application has emerged. Even once established, different standards may apply in different jurisdictions, posing considerable challenges for businesses with cross-border operations.

This is not to say that a carbon defence could not be successfully integrated into the UK competition law framework. It certainly seems possible to establish a system that would make agreements between firms permissible from a competition law standpoint where they have the objective of eliminating or reducing carbon emissions, allowing for investment in carbon off-setting measures and/or which require firms only to sell products which meet certain emissions standards.

Such a system may well have some advantages in accelerating the reduction of carbon emissions across the UK economy. Questions remain, however, regarding whether a change to UK competition law is the correct and most efficient method of tackling this issue, what impact this would have on competition law enforcement more generally and whether integrating policy goals into these assessments threatens to undermine the fundamental consumer protection mission of the current competition law framework.

4. Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?

It seems highly likely that regulators will use their discretion to prioritise enforcement in certain sectors, particularly where populated by corporates viewed as bad actors requiring policing. In principle, there is nothing wrong with a regulator adapting its enforcement practices to the specific conditions of a particular sector. In fact, regulators already do – and should continue to – assess the merits of certain activities on a case-by-case basis. This seems generally preferable to developing divergent sector-specific standards within legislation.

The benefit of the consumer welfare standard currently applied by most regulators is that it has, for the most part, allowed enforcement action to maintain a consistent focus across borders and sectors, irrespective of which political party is in power. This has significant advantages in providing firms with relative certainty as to how they should behave and what types of conduct may prompt disruptive and costly investigations.

Integrating ESG-related policy considerations into competition law assessments and applying different standards to different sectors may lead to swings in enforcement action that mirror changes in political discourse. This would create uncertainty and pose serious challenges to businesses, which need to have a clear understanding of what standard they are being judged by, without fear that this will be revised every few years.

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UNITED STATES

By: Timothy Cornell, Santiago Roca Arribas, Adam Thomas and Timothy Lyons

The Role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

The US government has taken various economic and regulatory action in response to the COVID-19 pandemic. The following economic stimulus and spending bills and measures are of particular note:

- On March 13, 2020, President Trump declared a national emergency under the Stafford Act.
- On March 18, 2020, the Families First Coronavirus Response Act became law.[470] This law provided paid sick leave, tax credits, and free COVID-19 testing; it also increased food assistance, unemployment benefits, and Medicaid funding.
- On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") became law. The CARES Act authorized more than $2 trillion of funding to address COVID-19, including direct cash payments to individual citizens, a loan program for small businesses, funding for hospitals and other medical providers, and other provisions.[471]
- In December 2020, the Consolidated Appropriations Act became law. This included $900 billion in stimulus relief alongside a $1.4 trillion spending plan for the 2021 federal fiscal year.[472]
- In March 2021, the American Rescue Plan Act of 2021 became law. This was a $1.9 trillion economic stimulus bill, which included expanded unemployment benefits, $1,400 direct payments to individuals, several tax provisions, education and housing funding, and grants to small businesses and state, local, and tribal governments.[473]

Independent agencies have also played a role in counteracting the pandemic's effects on the US economy. The Federal Reserve lowered interest rates and continued to make short-term loans as a "lender of last resort" for banks,[474] while the Federal Deposit Insurance Corporation ("FDIC") put in place an additional series of regulatory and banking supervision measures.[475]

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g., market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

In the US, pricing control related to public health emergencies is primarily dealt under state law. In most states, once a public health emergency has been declared on the state or local level, price gouging statutes take effect. The National Conference of State Legislatures has identified at least 30 states with relevant

[470] https://www.congress.gov/bill/116th-congress/house-bill/6201
[471] https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf
[472] https://www.congress.gov/bill/116th-congress/house-bill/133
[473] https://www.congress.gov/bill/117th-congress/house-bill/1319/text
[474] https://crsreports.congress.gov/product/pdf/R/R46411
[475] https://www.fdic.gov/coronavirus/

price gouging statutes.[476] Price regulation at the federal level is essentially limited to antitrust law (which generally does not address unilateral pricing decisions).

However, the Defense Production Act ("DPA") offers an alternative method of price regulation in times of public emergency. Both President Trump and President Biden invoked the DPA to address COVID-19 and pricing control. The DPA allows the president to identify "scarce materials or materials the supply of which would be threatened by such accumulation" and to prevent hoarding or "resale at prices in excess of prevailing market prices."[477] The Act can also be used to prevent domestic companies from exportation of certain goods. The Trump and Biden administrations have used the DPA to create "priority-rated" contracts with manufacturers; these contracts require involved companies to expedite production and to produce at market prices. However, while contractors subject to these contracts may not charge higher prices or impose different terms and conditions than for comparable orders, the government in turn may not dramatically alter the contract's terms from "regularly established terms of sale or payment."[478]

The Trump and Biden administrations also used executive orders to tackle price gouging and hoarding of health and medical resources, practices that were of acute interest in March 2020.[479] Both ex ante measures and ex post measures were used.

In terms of ex ante measures: A March 2020 executive order directed the Department of Health and Human Services ("HHS") to identify resources to be designated as "scarce" or "threatened." HHS identified 15 categories of items that could not be hoarded or sold for high prices: personal protective equipment ("PPE"), including masks, shields, gloves and other medical apparel, respirators, ventilators, and disinfecting devices.[480]The Biden Administration later referenced that executive order in its own executive order on the "Sustainable Public Health Supply Chain,"[481] which directed the Secretaries of Defense, Health and Human Services, and Homeland Security to provide recommendations concerning the pricing of pandemic response supplies and the future use of reasonable pricing clauses in federal contracts and investment agreements.[482]

In term of ex post measures: U.S. Attorney General William Barr formed a task force in March 2020 in response to hoarding, market manipulation, price gouging, and fraud in the markets for PPE and COVID-19 test kits, treatments, and charities.[483] The task force sought to prevent and prosecute these actions. As of December 2020, the U.S. Department of Justice ("DOJ") had become involved in at least four cases against individuals arrested or charged for price gouging of COVID-19 related supplies.[484]

3. Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g., obligations to maintain production output, obligations to locally source raw materials, etc.)?

Production output has been safeguarded by executive orders pursuant to the Defense Production Act ("DPA"). The Trump and Biden administrations have both used the DPA to expedite critical materials in vaccine productions, including equipment, machinery, and supplies. Under the DPA, the Federal

[476] https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx
[477] 50 U.S.C. § 4512
[478] Department of Health and Human Services, Health Resources Priority and Allocations System ("HRPAS"), 45 C.F.R. § 101.33 (2015), https://www.federalregister.gov/d/2015-17047/p-187
[479] https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-covid-19/
[480] https://www.justice.gov/file/1264276/download
[481] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-a-sustainable-public-health-supply-chain/
[482] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-a-sustainable-public-health-supply-chain/
[483] https://www.justice.gov/file/1262776/download
[484] https://www.justice.gov/usao-sdny/pr/licensed-pharmacist-charged-hoarding-and-price-gouging-n95-masks-violation-defense

government may designate its contracts as "rated orders" that companies must fulfill before completing any of their other previously agreed upon contracts.[485]

Immediately following his inauguration, President Biden directed the US Departments of State, Defense, Health and Human Services, and Homeland Security to make an inventory of COVID-19 related supplies and use rated orders to spur production of any undersupplied item.[486] The administration soon expanded its overview of production through an executive order related to American supply chains, which required a 100-day review period of global supply chains due to COVID-19 related shortages in medical equipment and other key industries.[487] The order increased government oversight of the manufacture and supply of semiconductor chips, large capacity batteries, pharmaceuticals and active pharmaceutical ingredients, and Department of Defense investment in the expansion of rare earth mining outside of China.[488] The Biden Administration has specifically touted these developments as responsive to both the COVID-19 pandemic and related "structural weaknesses in both domestic and international supply chains."[489]

4. Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?

Several of the stimulus and recovery bills discussed above involve some amount of governmental support for specific industries. Most notably, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") created two programs to support businesses: the Paycheck Protection Program, which set aside $349 billion in funding for small business payroll costs and benefits,[490] and the Business Lending Program, which has provided loans to eligible businesses.

The CARES Act also included a great deal of support for the aviation industry, including $10 billion in funds awarded for eligible U.S. airports and $25 billion in payroll support to passenger airlines and some airline contractors. The Consolidated Appropriations Act created the Payroll Support Program Extension, which led to an additional $15 billion for passenger air carriers and $1 billion for contractors.[491] The American Rescue Plan provided a third round of funding for the airline industry, with $14 billion in payroll support for airlines, $1 billion for airline contractors, and $8 billion for airports.[492]

Funding for small businesses affected by COVID-19 has continued into 2021. The U.S. Small Business Administration announced that the agency had provided $44.8 billion in total funding and 61,000 loans to small businesses in the fiscal year 2021.[493]

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[485] U.S. Dep't of Health and Human Services, Health Resources Priority and Allocations System ("HRPAS"), 45 C.F.R. § 101.33 (2015), available at https://www.federalregister.gov/d/2015-17047/p-187

[486] January 21, 2021 Executive Order on a Sustainable Public Health Supply Chain, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-a-sustainable-public-health-supply-chain/

[487] Executive Order on America's Supply Chains, February 24, 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-americas-supply-chains/

[488] https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities/

[489] https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities/

[490] https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf

[491] https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf

[492] https://www.congress.gov/bill/117th-congress/house-bill/1319

[493] https://www.sba.gov/article/2021/oct/29/sba-administrator-guzman-announces-448-billion-through-signature-lending-programs

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

Foreign Direct Investment in the US is largely overseen by the Committee on Foreign Investment in the United States ("CFIUS"). CFIUS reviews outside investment into or acquisitions of US businesses or real estate for national security purposes, and it can modify, forestall, or unwind transactions that it identifies as potentially detrimental to national security. CFIUS's powers are no longer limited to regulating transactions that could lead to foreign control of US businesses; since 2018, its review extends to "non-controlling, non-passive investments in certain categories of US businesses," including those that deal with critical technologies or sensitive personal data, particularly genetic data or clinical test results.[494]

The US government has not introduced as a direct result of COVID-19 any new legislation, policy, or regulation concerning foreign direct investment. CFIUS's 2020 Annual Report to Congress, released July 26, 2021, demonstrates a lack of any significant change to Foreign Direct Investment regulation during the first year of the COVID-19 pandemic.[495] The proportion of transactions subject to mitigating measures in 2020 (12%) was similar to that of 2019 (14%).[496]

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

Several pieces of legislation have been proposed that could have a direct impact on the issues discussed above. Most of the proposed bills relate to antitrust enforcement, including the Ending Platform Monopolies Act, the Platform Competition and Opportunity Act, the American Choice and Innovation Online Act, and the Augmenting Compatibility and Competition by Enabling Service Switching ("ACCESS") Act. Taken together, these bills could allow enforcers to force companies to divest some portions of their businesses, prevent platforms from preferring their own services to those of competitors, block platforms from purchasing nascent competitors, and possibly even break up tech companies. The bills would also increase merger filing fees for large companies and require platforms to maintain interoperable data management standards. A bipartisan group of 34 State Attorneys General in a letter to Congress affirmed their support of this package of bills,[497] and the Biden administration reportedly supports at least some of these bills as well. As for Foreign Direct Investment, the proposed Foreign Adversary Risk Management Act ("FARM" Act) would expand the CFIUS' definition of critical infrastructure to include agricultural real estate and facilities.[498]

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

Federal courts in the U.S. altered their procedures soon after the COVID-19 pandemic began and have continued to adapt as the situation has developed. Under guidance promulgated by the Administrative Office of the U.S. Courts, individual courts have followed a "gating strategy," adjusting procedures and operations and lifting and reinstating restrictions as the pandemic developed, based on changes in local COVID-19 data and conditions.[499]

[494] https://home.treasury.gov/news/press-releases/sm872
[495] https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf
[496] https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf
[497] https://coag.gov/app/uploads/2021/09/Antitrust-Package-Support-Letter-.pdf
[498] https://jackson.house.gov/news/documentsingle.aspx?DocumentID=279
[499] https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge

A number of operations changes were advised and approved in March 2020. Courts asked employees to work remotely and delayed filing deadlines.[500] The Judicial Conference of the United States, which is the national policy-making body for the federal courts, temporarily approved the use of video and teleconferencing software for civil proceedings and some criminal proceedings.[501] Media organizations and the public were also allowed electronic access to some criminal proceedings.[502] Federal circuit, district, and bankruptcy courts utilized a wide variety of different audio and video conferencing platforms to hold oral arguments, preliminary hearings, arraignments, misdemeanor sentencing, and other procedures remotely.[503] Several courts also conducted remote bench trials (i.e., non-jury trials).[504] By February 2021, at least five district courts had also completed "virtual" civil jury trials, in which jurors dialed into the courtroom from home.[505]

Throughout the pandemic, courts throughout the U.S. also postponed jury trials, grand juries, and other court proceedings, and some courts extended these procedural changes even after the spring of 2020.[506] For example, in June 2020, the District of Arizona postponed jury trials and closed customer service counters in several cities.[507] That same month, the Eastern District of Louisiana postponed criminal and civil jury trials, the Southern District of Florida suspended jury trials and grand jury proceedings, and the Southern District of California extended its postponement of jury trials.[508] In November 2020, roughly two dozen U.S. district courts again suspended jury trials or grand jury proceedings.[509]

Merger Control

8. Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.

Since the start of the COVID-19 pandemic, US regulators have made clear that consistent enforcement of merger control rules would continue but have highlighted the degree of procompetitive collaboration that the rules permit. In March 2020, the DOJ and the Federal Trade Commission ("FTC") announced in a joint statement that while both agencies would continue to prosecute all civil and criminal violations of the antitrust laws related to COVID-19, the agencies would account for exigent circumstances in evaluating the competitive effect of collaborative efforts by firms to tackle the pandemic, particularly in healthcare and production of COVID-19-related supplies.[510] In May 2020, the leader of the DOJ's Antitrust Division emphasized that the legal standards concerning merger review would remain unchanged throughout the pandemic. As for exemptions to the existing antitrust laws, in an April 2020 statement, the FTC reiterated that the enforcement of merger control would not change, stating that "'emergency' exceptions to the antitrust laws are not needed."[511] It is worth noting, however, that in January 2021, President Trump signed

[500] https://www.uscourts.gov/news/2020/03/17/federal-judiciary-confronts-coronavirus-spread-judicial-conference-acts-court
[501] https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic
[502] https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings
[503] https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak
[504] https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology
[505] https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology
[506] https://www.uscourts.gov/news/2020/03/26/courts-suspend-jury-trials-response-coronavirus
[507] http://www.azd.uscourts.gov/sites/default/files/general-orders/20-30.pdf
[508] https://www.uscourts.gov/news/2020/07/16/some-courts-slow-reopening-plans-covid-cases-rise
[509] https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge
[510] Dept. of Justice & Fed. Trade Comm'n, Joint Antitrust Statement Regarding COVID-19, https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf
[511] https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain

into law the Competitive Health Insurance Reform Act of 2020 ("CHIRA"), which repealed the McCarran-Ferguson Act's antitrust exemption for health insurers.[512]

During the early stages of the COVID-19 pandemic, both agencies also expedited their respective processes for reviewing guidance requests from firms and individuals.[513] The FTC's "Staff Advisory Opinion" procedure and the DOJ's "Business Review Letter" procedure provided firms and individuals preparing to engage in activities an opportunity to ask the agencies whether they plan to challenge such action under the antitrust laws; throughout the pandemic, DOJ issued responses to such requests stating that they did not plan challenge the activity described. The relevant activities included a collaboration among distributors of medical supplies to produce personal protective equipment;[514] a collaboration among pork producers with the U.S. Department of Agriculture to respond to a pork supply shortage;[515] and a collaboration among pharmaceutical companies to share information relating to monoclonal antibody production.[516]

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

The Hart-Scott-Rodino Act ("HSR Act") notification thresholds are indexed to gross national product ("GNP"). Although there have been no amendments or exemptions to the thresholds since the start of the COVID-19 pandemic, economic trends resulting from the pandemic have affected GNP levels and in doing so affected the merger thresholds. Specifically, in March 2021, the US merger notification thresholds declined for just the second time since 2005, when the HSR thresholds were first indexed to gross national product.[517] The "size of transaction" threshold for larger parties fell from $94 million to $92 million, while the "size of transaction" threshold for smaller parties fell from $376 million to $368 million.[518] The only previous decrease in notification thresholds occurred in 2010 and was most likely due to the global financial crisis.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

The FTC and DOJ have not announced any change in the market share component of the competitive analysis in merger control cases. As explained above, neither the DOJ nor the FTC have made any changes to their approach in addressing civil or criminal violations of the antitrust laws in response to the COVID-19 pandemic.[519]

[512] https://www.justice.gov/opa/pr/justice-department-welcomes-passage-competitive-health-insurance-reform-act-2020
[513] https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf
[514] https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting
[515] https://www.justice.gov/atr/page/file/1276981/download
[516] https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-monoclonal-antibody-manufacturers-expedite
[517] https://www.ftc.gov/news-events/press-releases/2021/02/ftc-announces-annual-update-size-transaction-thresholds-premerger
[518] https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds
[519] https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

Remedies or gun-jumping fines imposed prior to the COVID-19 pandemic have not been affected by the COVID-19 pandemic. As explained above, the FTC has stated that "neither the legal standards that apply to transactions nor the Bureau's investigational standards have been relaxed in light of the coronavirus pandemic."[520]

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

No legislation resulting from the COVID-19 pandemic has directly affected or changed how economic or legal analysis functions in merger control cases. Competition authorities and other authorities responsible for reviewing mergers may be reconsidering certain analytical methods in light of President Biden's Executive Order on Competition, which directs the DOJ and FTC to enforce the antitrust laws vigorously, challenge illegal mergers even if already consummated, and update their guidelines to provide "more robust scrutiny of mergers."[521]

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

There is no record of any party becoming unable to comply with a competitive remedy due to the COVID-19 pandemic. However, in at least one instance, the COVID-19 pandemic was taken into account in the modification of a previous merger remedy, specifically by allowing a firm that had been subject to a divestiture order to repurchase its divested assets. In August 2020, a federal judge permitted an operator of movie theaters to repurchase theaters it had been required to divest in 2016; the defendants' unopposed memorandum in support of modifying the remedy cited the divestiture buyer's liquidation due to the pandemic, the theaters' subsequent abandonment, and the "economic hardship" that the COVID-19 pandemic had caused to the entire movie theater industry.[522]

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

US regulators have emphasized that they are continuing to enforce the antitrust laws according to the standards in place before the pandemic. There is no indication that any investigations have been based on new theories of harm due to the COVID-19 pandemic. Agencies have, however, prioritized anticompetitive

[520] https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews
[521] https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/
[522] See Amended Final Judgment in United States v. AMC Entertainment Holdings, No. 16-2475 (RDM) (Aug. 28, 2020).

conduct involving supply chain disruptions and excessive pricing (see questions 2 and 3) and have focused their efforts on several key industries (see question 15).

15. Has enforcement prioritized certain industries (e.g., health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?

President Biden highlighted several different industries as priorities for competition enforcement in his July 2021 Executive Order on Promoting Competition in the American Economy. The order expresses concern about concentration in "labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets and United States markets directly affected by foreign cartel activity."[523]

Competition authorities have taken action in many of these markets since the start of the COVID-19 pandemic. In terms of labor markets, the FTC and DOJ jointly announced in 2020 their intent to target collusion in labor markets,[524] and the DOJ has since brought criminal prosecutions against individuals and corporations for agreeing to fix wages[525] and for agreeing not to solicit each other's employees.[526] In terms of health care markets, the FTC announced in January 2021 that it was reexamining six prior health insurance mergers it had previously permitted,[527] while an ongoing investigation by DOJ into anticompetitive practices in the generic drug industry has led to seven new cases against companies and four against senior executives;[528] on the legislative side, the Senate and House of Representatives held separate hearings in May 2021 highlighting the negative ramifications of healthcare consolidation on healthcare costs, quality of care, and employee wages.[529] In terms of repair markets, the FTC voted in July 2021 to increase law enforcement against repair restrictions that limit the ability of purchasers to repair their own products or to shop for service providers to perform repairs.[530]

The FTC has also expressed concern about concentration in consumer goods and how that concentration might relate to supply chain disruptions. In late 2021, the FTC began a study intended to examine the relationship between competition and supply chain disruption; to aid the study, the FTC ordered nine large suppliers, wholesalers, and retailers to provide the FTC with reports and answers to specific questions about their structure, operations, and business relationships.[531]

16. Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?

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[523] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/
[524] U.S. Dep't of Justice & Fed. Trade Comm'n, Joint Statement Announcing Alert for Collusion in U.S. Labor Markets, available at https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement
[525] See, e.g., United States v. Jindal, No. 4:20-CR-00358, 2021 WL 5578687 (E.D. Tex. Nov. 29, 2021).
[526] See, e.g., Superseding Indictment *in* United States v. Surgical Care Affiliates, LLC, No. 3:21-CR-011-L (N.D. Tex. Jul. 8, 2021).
[527] https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers?utm_source=govdelivery
[528] https://www.justice.gov/atr/division-operations/division-update-spring-2021/generic-drugs-investigation-targets-anticompetitive-schemes
[529] https://www.judiciary.senate.gov/meetings/antitrust-applied-hospital-consolidation-concerns-and-solutions
[530] FTC to Ramp Up Law Enforcement Against Illegal Repair Restrictions (Jul. 21, 2021), available at https://www.ftc.gov/news-events/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions.
[531] https://www.ftc.gov/news-events/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions

During the COVID-19 pandemic, US authorities have continued to investigate a wide range of anticompetitive conduct, including price-fixing, market allocation, and output restriction.

A specific concern related to the COVID-19 pandemic arose from the procurement of COVID-19 relief and recovery contracts through a competitive bidding process. The DOJ, noting that such efforts can be harmed by collusion, announced that its Procurement Collusion Strike Force would work with federal, state, and local government agencies "to deter, detect, investigate, and prosecute violations of criminal antitrust laws, such as bid rigging and collusion in the competitive bidding process." The task force's roles included training government workers about "identifying and preventing collusion and fraud in the competitive bidding process" as well as investigating and prosecuting any violations.[532]

17. Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?

In March 2020, the Antitrust Division of the Department of Justice and the FTC released a joint statement regarding COVID-19.[533] The agencies highlighted that certain collaborations among businesses working on tests, treatments, and vaccines would not be illegal, and reminded businesses that the existing enforcement regime allows for "procompetitive collaboration that does not violate the antitrust laws." The agencies also announced an expedited review process for any firms using existing review processes (i.e., the Antitrust Division's Business Review Process and the FTC's Advisory Opinion Process) to determine the legality of cooperation. The agencies' statement emphasized the temporary nature of these joint efforts, stating that they would be limited in duration as necessary to assist patients, consumers, and communities affected by COVID-19. Finally, the agencies reminded businesses about several of its policy positions, namely that (1) firm collaboration on research and development is typically procompetitive; (2) sharing of technical know-how, rather than company-specific data about prices or costs, may be necessary to achieve pro-competitive effects; (3) most joint purchasing arrangements among healthcare providers do not raise antitrust concerns; and (4) agencies are reluctant to challenge providers' development of suggested practice parameters when those parameters provide useful information to patients, providers, and purchasers.[534]

Since the March 2020 statement, the DOJ has issued several Business Review Letters in response to requests by businesses seeking approval for conduct that could potentially pose anticompetitive concerns. In April 2020, the DOJ indicated to a group of health care companies its lack of intent to challenge their collaboration in the production and distribution of PPE supplies, citing the fact that the collaboration would be (1) facilitating the US governmental response to COVID-19 and (2) undertaken at the direction of government agencies, including FEMA and HHS.[535] In May 2020, DOJ advised the National Pork Producers Council that it did not plan to challenge a collaboration among pork producers in response to a national pork shortage, citing oversight by the U.S. Department of Agriculture.[536] In two sets of business reviews in July 2020 and January 2021, the DOJ advised multiple pharmaceutical companies that it did not plan to challenge their plans to share information concerning development of antibody treatments for COVID-19[537] and collaborate in the development of COVID-19 convalescent plasma.[538]

Coordination in the production of vaccines has been highlighted as especially procompetitive. President Biden, in a March 2021 speech, highlighted the importance of an ongoing collaboration on vaccine research

[532] https://www.justice.gov/coronavirus/DOJresponse
[533] https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19
[534] https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19
[535] https://www.justice.gov/atr/page/file/1266511/download
[536] https://www.justice.gov/opa/pr/department-justice-supports-national-pork-producers-council-s-ability-combat-meat-shortage
[537] https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-monoclonal-antibody-manufacturers-expedite
[538] https://www.justice.gov/opa/pr/department-justice-issues-positive-business-review-letter-companies-developing-plasma

and production between Merck and Johnson & Johnson, who typically compete in pharmaceutical markets.[539] The president stated that his administration "helped forge a historic collaboration between two of the largest U.S. health care and pharmaceutical companies."[540] Merck CEO Kenneth Frazier added that while "[s]ome may view this corporate partnership as the coming together of rivals[,] . . . in these extraordinary times, we are colleagues, not competitors."[541]

18. Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?

Arguments related to "crisis cartels" were not accepted as a defense in the US prior to the COVID-19 pandemic, and there is no indication that such a defense has or will become available.[542] As mentioned above, the FTC has reiterated that merger control enforcement will not change its standards in response to the pandemic, stating that "'emergency' exceptions to the antitrust laws are not needed."[543]

19. Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

Neither the DOJ nor the FTC have announced any exemptions applicable to unilateral conduct or any change in the assessment of dominance during the COVID-19 pandemic, and we see no indication of any change in approach during the pandemic.

20. Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?

Neither the DOJ nor the FTC have indicated any change in the acceptability of any specific economic justifications proffered by defendants in the context of the COVID-19 pandemic. As previously mentioned, FTC has directly stated that "'emergency' exceptions to the antitrust laws are not needed."[544]

21. Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?

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[539] https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/02/remarks-by-president-biden-on-the-administrations-covid-19-vaccination-efforts/
[540] https://www.hhs.gov/about/news/2021/03/02/biden-administration-announces-historic-manufacturing-collaboration-between-merck-johnson-johnson-expand-production-covid-19-vaccines.html
[541] https://www.c-span.org/video/?509757-1/president-biden-announces-plan-purchase-additional-100-million-single-shot-covid-19-vaccines
[542] https://www.oecd.org/competition/cartels/48948847.pdf
[543] https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain
[544] https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain

Both the president and independent agencies have highlighted health care as an industry that may require heightened antitrust scrutiny. President Biden's July 2021 Executive Order on Promoting Competition in the American Economy makes specific reference to excessive concentration of industry in "healthcare markets (including insurance, hospital, and prescription drug markets)."[545] Meanwhile, the FTC passed a set of resolutions in 2021 directing its staff to focus its civil demands and subpoenas on a set of "key industries" that included health care, such as pharmaceutical companies, pharmacy benefits managers, and hospitals.[546] FTC Chair Lina Khan has indicated her concern about the level of concentration in the health care industry and indicated that the industry would be a focus of future enforcement.[547]

- Other notes if more content is necessary:
    - August 2021 - Antitrust State of Play for Healthcare Providers Under a New Administration – **Full overview of healthcare developments**
    - October 2021 - FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics[548]
    - Healthcare
        - Physician Practice Acquisition Retrospective[549]
        - An Active Year for Health Care Antitrust Enforcement
        - COVID-19 Relief Fund and Provider Consolidation Investigation[550]

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

The debate over whether to include ESG-related policy concerns among the goals of competition policy has compelling reasons on both sides.

On the "pro" side: First, although governments will likely play the largest role in addressing ESG matters through regulation, taxation, and investment, private actors can supplement the role of governments and indeed offer several advantages in doing so. Industry players may understand their own operations and structure better than governments do, and they may be better positioned to develop and institute complex or technical requirements. Relatedly, by working in tandem to collaborate on ESG-related efforts, business may be able to act and update their practices and standards more quickly and efficiently than governments bound by "red tape."

Second, expanding competition policy's goals to include ESG-related policy concerns would enable a more comprehensive view of consumer welfare and consumer harm that a narrow focus on short-term price and output effects would neglect. Using an approach purely focused on price theory, authorities might condone

[545] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/
[546] https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities
[547] https://www.ftc.gov/system/files/documents/public_statements/1591510/remarks_of_chair_khan_on_the_investigatory_resolutionsjuly_1_2021.pdf
[548] https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following
[549] https://www.natlawreview.com/article/executive-order-encourages-ftc-doj-to-address-hospital-consolidation-vigorously
[550] https://www.natlawreview.com/article/executive-order-encourages-ftc-doj-to-address-hospital-consolidation-vigorously

an agreement that lowers prices but substantially increases carbon emissions, or they might condemn an agreement or merger that slightly raises prices but substantially reduces carbon emissions. In the latter scenario, competition law would have played a role *actually adverse* to ESG-related concerns. In contrast, viewing ESG-related benefits as cognizable procompetitive effects would, inter alia, direct companies' investments toward initiatives with greater improvements to total welfare, away from initiatives with improvements that are lesser in magnitude but that qualify as "procompetitive" in nature under a narrower understanding.

Finally, over the past several years, investors have increasingly included ESG values among the factors they consider when investing in firms.[551] Competition authorities, when assessing the behavior of individual firms, should be cognizant of this trend and (when relevant) should be willing to consider evidence that a firm is acting with the purpose of addressing ESG concerns even at the expense of maximizing its profits.

On the "con" side: For all its drawbacks, basing competition policy in price theory alone gives it a "lodestar" that in general relieves authorities and courts from having to make difficult value judgments. These value judgments are arguably more appropriately made by democratically accountable politicians, rather than unelected judges and competition enforcers. The goals of competition policy under a simple price-theory model – namely, lower prices and increased output for consumers – are sometimes at odds with other values, as recognized in several statutory exemptions from the antitrust laws. In fact, the goals of competition law may sometimes be in direct opposition to the goals of other bodies of law, such as public health law or environmental law. By fixing the price of cigarettes above the competitive level, sellers could reduce the demand for cigarettes and facilitate better public health outcomes;[552] by fixing the price of gasoline above the competitive level, gas stations might be able to reduce gasoline usage and thereby reduce emissions. It would be difficult (if not impossible) to resolve these disputes, which pit values at the core of competition law against values antithetical to competition law, within the bounds of competition law alone, rather than through supplemental regulation.

Moreover, even with the ability to establish a balancing formula (say, an understanding that a specific amount of CO_2 reduction is worth an increase in prices by a specific dollar amount), quantifying ESG-related benefits may be more difficult than determining changes in price and output. It may be far easier to predict how a merger will affect price and output than how it will affect various environmental and social factors. The use of difficult-to-measure factors may create uncertainty for businesses and lead to arbitrary outcomes across enforcement actions.

It is important to note that existing competition law in the U.S. already "includes" ESG considerations, at least in terms of preventing agreements that harm competition among ESG values. If a group of competitors were to agree not to make their products or processes "greener," such as by agreeing not to use a costlier but more environmentally friendly input, such an argument would almost certainly violate the antitrust laws unless supported by a strong procompetitive justification. In addition, U.S. competition authorities already recognize that collaboration among competitors can have benefits other than simply lower prices or increased output, such as "enhancing quality, service, or innovation."[553]

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[551] See Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans' (Aug. 19, 2019), available at https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[552] Compare, e.g., Case C-221/15, Openbaar Ministerie v Etablissements Fr. Colruyt NV (Apr. 21, 2016) (holding that Belgian public health measure precluding the sale of discounted tobacco products did not impede "healthy competition"), available at https://curia.europa.eu/juris/document/document.jsf?text=charter%2Bof%2Bfundamental%2Brights&docid=176763&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=210710#ctx1, with Statement of Fed. Trade Comm'n, In the Matter of Reynolds American, Inc. and Lorillard Inc. (June 8, 2015) (analyzing consent agreement in merger of cigarette companies and citing as procompetitive the divestiture buyer's "greater opportunity and incentive to promote and grow sales of the divested brands" and "incentive to reduce prices and promote products in new areas"), available at https://www.regulations.gov/document/FTC-2015-0064-0001.

[553] Federal Trade Commission & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000).

2. What – if any – role should be played by antitrust enforcers, businesses, and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?

Many businesses view themselves as having an important role promoting ESG values.[554] Certain types of collaboration among businesses, such as industry certifications and similar standard-setting practices, may facilitate these efforts. However, these collaborations also have the potential to harm competition, even when motivated by ESG considerations or other procompetitive factors. Lawyers, aided by guidance from competition authorities, can advise their clients on how to effectively collaborate to promote ESG values while staying within the bounds of the antitrust laws.

Competition authorities have a role to play in facilitating procompetitive, pro-ESG transactions and arrangements among businesses. While the authorities may change their focus on social and environmental factors in the context of merger proceedings and investigations, that need not be the case. Rather, in advance of any proceedings or other actions, competition authorities can provide ex ante guidance to businesses and lawyers. By reducing uncertainty about whether a proposed collaboration would violate the antitrust laws, enforcers can incentivize beneficial collaboration among businesses who wish to promote ESG values through joint action. U.S. competition authorities already publish guidance for businesses seeking to make procompetitive agreements with their competitors,[555] and may add to these guidelines or make a separate set of guidelines to address ESG issues specifically. Businesses and their lawyers, through public comment, could contribute insight that would aid the development of these guidelines. Further, through business review letters and advisory opinions, the agencies can address questions from specific businesses about their proposed ESG efforts.[556]

Finally, in their role as enforcers, U.S. competition authorities have inherent discretion under federal administrative law to select the targets of their enforcement efforts.[557] As a result, when deciding which transactions and agreements to challenge, the agencies may consider ESG factors.

3. Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?

As a defense to an otherwise anticompetitive merger, a "carbon defense" may already be available as a merger-generated "efficiency." When reviewing a merger's potential to affect competition, the Department of Justice and the Federal Trade Commission refer to their 2010 Horizontal Merger Guidelines, which state that neither agency will "challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market."[558] The Guidelines note that mergers have the "potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete," thereby benefiting the economy through "lower prices," "improved quality," "enhanced service," or "new products." Mergers can create efficiencies by "permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets," or by "shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production."

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[554] Business Roundtable, htts://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[555] See Federal Trade Commission & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000). The Department of Justice and Federal Trade Commission have published several other sets of antitrust guidelines. See, e.g., U.S. Dep't of Justice, Antitrust Division & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016); U.S. Dep't of Justice, Antitrust Division & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 2017).

[556] See U.S. Dep't of Justice, Antitrust Division, "What is a Business Review?", available at https://www.justice.gov/atr/what-business-review; Fed. Trade Comm'n, Advisory Opinions, available at https://www.ftc.gov/policy/advisory-opinions.

[557] See Heckler v. Chaney, 470 U.S. 821, 832-33 (1985).

[558] Horizontal Merger Guidelines, ch. 10.

Firms who are seeking approval for a merger and believe that their combination would reduce carbon emissions could point to the above language. Although the agencies have not spoken explicitly about whether carbon emission reductions could constitute an "efficiency," merging firms could argue that harm to the environment is a type of "cost" that harms not only the two firms but society as a whole.[559] As a caveat, however, the Guidelines warn that efficiencies "are difficult to verify and quantify," and proffered efficiencies will be rejected if speculative, unlikely, or of insufficient magnitude to outweigh the anticompetitive effect of a merger. Finally, some reductions in emissions resulting from a merger will never be cognizable "efficiencies"; in determining whether a likely reduction is cognizable, the nature and cause of the reduction is crucial. For example, if two goods-producing firms, by merging and combining their factories, would be able to reduce the amount of carbon emitted as part of the production process at any given level of output, the agencies may find such an efficiency to be cognizable. On the other hand, if the merger would give the merged entity the incentive to exploit its market power by reducing output, any reduction in emissions that would follow from that reduction in output would not be a cognizable efficiency.

Outside of the merger context, agencies and courts have recognized that coordination among businesses can have procompetitive effects but nevertheless have closely scrutinized such coordination. The agencies have explained how they approach potentially procompetitive agreements in their Antitrust Guidelines for Collaborations Among Competitors.[560]

4. Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?

Antitrust law in the U.S. typically does not make categorical distinctions between industries or fields of business. Federal antitrust law contains some statutory exemptions and modifications, such as for agricultural cooperatives and for major league baseball, but these exemptions are narrow and few in number.

However, in examining whether a particular agreement or practice violates antitrust law, the nature of the market or field of business may be relevant in assessing the nature, purpose, and effect of a restraint. When applying the rule of reason in evaluating potentially anticompetitive conduct, courts and authorities conduct a "fact-specific assessment of market power and market structure" to assess effects on competition.[561] In analyzing the reasonableness of restraints not subject to a per se rule, courts consider "the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."[562] Under this analysis, certain characteristics of the economic actors involved may be relevant in determining whether they have violated antitrust law. For example, the Supreme Court has said that certain restraints among "professions," such as engineering and legal practice, may not violate federal antitrust law even when such a restraint among "businesses" would; professions may have certain "features," such as a "public service aspect," that require that their practices be viewed differently.[563]

While ESG considerations have conceivable relevance to the decisions of virtually any company, the exact nature of those considerations will vary not only by industry but also by size, location, and organizational structure. These factors, like other case-specific factors, should be taken into account in assessing the competitive effects of, and intent underlying, practices related to ESG.

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[559] Cf. HMG ch. 10 ("Research and development cost savings may be substantial and yet not be cognizable efficiencies because they . . . result from anticompetitive reductions in innovative activities.").
[560] See supra, note XX.
[561] Ohio v. American Express, 138 S. Ct. 2274, 2284 (2018).
[562] United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972).
[563] Goldfarb v. State Bar of Va., 421 U.S. 773, 788 n. 17 (1975).

URUGUAY

By: Alejandro Alterwain

The role of Government

1. **Can you briefly describe the main economic and regulatory actions undertaken by your Government in order to counteract the effects of the health crisis on the national market?**

Uruguay successfully managed the COVID-19 Pandemic during most of 2020, with very low rates of infections, deaths and health system occupancy. Uruguay was seen as a model country in this regard. However, COVID-19 cases began to rise in 2021 and severely affected its population in terms of infections and death rates.

On the other hand, Uruguay is currently (June 2021) one of the top countries in the world in terms of vaccine doses administered per capita, yet the results of the vaccination policy are still to be fully seen.

The Government undertook mainly three economic and regulatory actions: (1) no general lockdown, relying on what the President called "responsible freedom;" only some activities have been restricted during certain periods, such as in-person schooling (replaced by virtual classes), prohibition of public performances (such as concerts and cultural activities), border shutdowns, and capacity and opening hours regulations for certain commercial activities; (2) bolstering of the health system, particularly the increase -by close to 60%- of intensive care unit beds available in the country; and (3) targeted social cash transfers (2:5% of GDP) focused on strengthening the health system, social welfare plans and the social security system.

2. **Have there been any types of regulations regarding pricing control? If so, have they been qualified under specific thresholds (e.g. market share requirements) or set out as regards certain industries? Are these temporary or permanent measures?**

The Government has not issued price control regulations.

3. **Other than pricing control regulations, have there been any other obligations imposed on companies operating in your jurisdiction that would seek to safeguard the pre-pandemic status quo (e.g. obligations to maintain production output, obligations to locally source raw materials, etc.)?**

There were no obligations imposed on companies operating in Uruguay that would seek to safeguard the pre-pandemic status quo. Particularly, there were no price controls or minimum production obligations.

4. **Has State Aid or similar Government-backed programs played a role during the health crisis so as to safeguard companies? Have there been any specific regulations or programs developed for national champions or local companies that may have been affected by the sanitary crisis?**

The Government has shaped some policies to help companies operating in Uruguay to get through the economic crisis caused by the pandemic (whether said policies have been adequate or sufficient is open to discussion).

The most relevant policies have been (1) the strengthening, flexibilization and extension of unemployment insurance, which permitted companies to maintain their business-employee relationships while the State covered part of the employment costs (also, providing incentives to those companies reinstating workers to

their jobs), (2) the issuance of banking regulations, which allow banks to restructure credits while maintaining their clients' credit scores, (3) offering of flexible credit lines by a State-owned bank (Banco República), and (4) the strengthening of the State guarantees regime available to small and medium companies (SIGA). No specific programs were developed or targeted at national champions or local companies affected by the sanitary crisis

5. **Are there any Foreign Direct Investment regulations in your jurisdiction? What has been the effect of the health crisis over your Foreign Direct Investment regulations or the way they are applied?**

There are no Foreign Direct Investment regulations in Uruguay. Foreign direct investment is generally regulated by Bilateral Investment Treaties and by local regulations which foster and protect investments, both local and foreign, in Uruguay, none of them affected by the Pandemic.

6. **Are there any upcoming regulations or pieces of legislation being considered that could have a direct impact on the issues mentioned above?**

Some opposition party legislators presented bills of laws related to the pandemic. Particularly, one of them introduced pricing control regulations applicable to certain basic products. None of said bills, however, have moved forward in Congress.

7. **How did courts change their procedures in response to COVID-19 restrictions (e.g., were filing deadlines extended, processes created so witnesses or attorneys could appear remotely)?**

Since the outbreak of Covid-19 in Uruguay and declaration of the sanitary emergency by the Executive Branch (March 2020), Uruguayan Courts have adopted several measures which have affected the regular functioning of the Judiciary. Among other measures, the Judiciary declared certain extraordinary recesses and non-working days, suspending all judicial activities and postponing deadlines. In addition, certain hearings -not including witness depositions- were held by videoconference. Additional sanitary and social distancing measures were also put in place.

Merger Control

8. **Has enforcement of merger control rules strengthened or weakened during the COVID-19 pandemic? Have your antitrust authorities granted exemptions due to COVID-19? If any, please explain.**

First it should be noted that the new merger control regime, introduced by Law 19.833, entered into force on April 12, 2020, so it basically coincided with the outbreak of the COVID-19 pandemic. The main change introduced by the new regime is that antitrust filings now always have suspensory effects. Apart from economic sanctions applicable to gun-jumping situations, the new regulations prohibit the closing of covered transactions without the antitrust authority's prior explicit or tacit authorization.

Since the entrance into force of the new regulations, only one case was decided under a second phase procedure (another is currently pending). The decided case involved authorization, subject to remedies, of the planned acquisition of Globalia (Air Europa) by IAG Group (Iberia). The Commission sent the deal to phase 2 based on several factors, one of them being the current market fragility related to the COVID-19

pandemic. On March 16, 2021, the Commission cleared the transaction subject to remedies negotiated with the parties.

9. Have the notification thresholds been subject to amendments or exemptions as a result of COVID-19?

The new regulations set a single filing threshold, repealing the market share threshold applicable under the old regulations. Under the new ones, parties to an "economic concentration act" must request prior authorization from the antitrust authority when the parties' combined gross turnover "in Uruguayan territory" in any of the last 3 fiscal years equaled or exceeded 600 million indexed units (currently, some USD 65 million).

Said threshold -which can only be amended through a national law- has not been amended or exempted as a result of the pandemic.

10. Has the market share component of the competitive analysis in merger control cases changed as a result of COVID-19? Is your jurisdiction more or less strict? Describe, if any, transactions that have been cleared because of COVID-19 that, in normal conditions would have been subject to remedies or rejected.

There have been no specific market share analyses in merger control cases which can be related in any way to COVID-19.

11. Is your jurisdiction enforcing decisions or orders imposed prior to COVID-19 on remedies or gun jumping fines?

No, as said before, the pandemic outbreak coincided with entry into force of the new merger control regulations. Prior merger control regulations had suspensory effects only under exceptional circumstances.

12. Have political decisions resulting from COVID-19 affected or altered the economic and/or legal analysis in merger control cases? Will any of the new, amended or exemption rules resulting from COVID-19 remain in your jurisdiction after the pandemic is over?

It is our understanding that political decisions resulting from COVID-19 did not affect or alter the economic and/or legal analysis in merger control cases.

13. Are you aware of any transaction that was subject to remedies before COVID-19, where parties have been unable to comply with the remedies? If so, have the parties approached the authority to offer alternative remedies? Has the authority accepted the alternative remedies?

There were no merger control authorizations subject to remedies prior to the pandemic. The first remedies authorization was issued during the pandemic, on March 16, 2021 (the *Iberia* case).

Anticompetitive conduct

14. Are there any relevant trends in the enforcement of anticompetitive conduct during the COVID-19 pandemic that one can identify in your jurisdiction? Have enforcers in your

jurisdiction been opening investigations to pursue new theories of harm, or theories of harm that had not been relied upon by the enforcer in the past years?

There are no relevant anticompetitive conduct trends related to the pandemic. However, it is possible that antitrust authorities may have de facto accepted certain flexibilities - certain types of alleged minor coordinated acts among competitors. For example, supermarkets have extended open hours and have requested that a single family member enter the supermarket facilities to do the shopping. Also, public and private hospitals have shared their available ICU beds' information. However, this is not necessarily a COVID-19 related exception but could be explained under the complementary logic of the local health system (akin to a Bismarck model), where public and private hospitals must collaborate with one another under certain circumstances.

15. **Has enforcement prioritized certain industries (e.g. health, manufacturing, food delivery)? How has your enforcer's approach to unilateral conduct taking place in digital markets been during the COVID-19 pandemic? Are there any relevant differences from the approach taken before the pandemic?**

There are no visible enforcement priorities from the antitrust authorities or differences from the approach prior to the pandemic. From our knowledge the authorities have not initiated antitrust investigations in the digital markets during the pandemic.

16. **Has there been an increase in the opening of investigations focusing on certain types of anticompetitive conduct (e.g., price gouging, refusal to supply, discrimination, tying)?**

No, there has not been any increase in the opening of investigations focusing on certain types of anticompetitive conducts. Antitrust has not been used as a specific tool or weapon to fight pandemic-related conducts.

17. **Have enforcers in your jurisdiction announced specific guidelines dealing with collaborations among competitors implemented in the context of the COVID-19 pandemic? Have there been any other relevant changes in the enforcer's approach to coordinated conduct in your jurisdiction, as a result of the pandemic?**

No specific guidelines dealing with collaborations among competitors in the context of the COVID-19 Pandemic have been announced or implemented. The pandemic has not caused changes in the enforcer's approach to coordinated conduct, except for a certain de facto acceptance of minor coordination between competitors in particular industries, as explained above.

18. **Were crisis cartel-related arguments accepted as a defense in your jurisdiction prior to the health crisis? Are there any signs that these arguments would be well received by the enforcer in light of the pandemic?**

We are unaware of cartel-related arguments put forth by investigated parties in antitrust proceedings. If argued, acceptance by the authorities will be uncertain, unless said activities were coordinated by government or public agencies, in which case the authorities may accept that the government should not punish government fostered activities.

19. **Has the enforcer announced any exemptions applicable to certain types of unilateral conduct during the COVID-19 pandemic? Has there been any change to the enforcer's approach in**

the assessment of dominance in the context of investigations opened to look into conduct taking place during the COVID-19 pandemic?

The antitrust authorities have not announced exemptions applicable to unilateral conducts related to the COVID-19 pandemic, nor have the authorities changed their approach in the assessment of dominance due to the pandemic's special circumstances.

20. **Are there signs that the enforcer will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic?**

There are no special signs that the authorities will be more open to certain types of economic justifications put forth by defendants in the context of unilateral investigations opened in the context of the COVID-19 pandemic, unless such activities were in any way coordinated by the Government.

21. **Given that the COVID-19 pandemic has significantly affected health-related markets and activities, and to the extent to which a trend toward consolidation in this industry has been identified in some jurisdictions and may occur in others, do you expect there to be heightened scrutiny as a result of an increase in incentives for market players to engage in anticompetitive practices? Has the enforcer in your jurisdiction expressed signs of how it intends on dealing with anticompetitive conduct in this industry?**

We do not expect specific trends or criteria to be applied to health-related markets and activities.

ESG and competition policy

1. **What are the pros and cons of expanding competition policy's goals to include ESG-related policy concerns in the current global context?**

Expanding competition policy's goals to include ESG-related policy concerns is probably a sensible approach in the current global context. However, in countries like Uruguay with young competition policy regimes, where authorities have not yet consolidated enforcement standards in many types of practices, ESG considerations may make competition policy more unpredictable. Therefore, ESG-related policies should preferably be introduced in Uruguayan antitrust law with bright-line rules.

2. **What – if any – should be the role to be played by antitrust enforcers, businesses and lawyers in pushing social/environmental change? Does change need to necessarily come via specific decisions/choices made in the context of merger proceedings or investigations?**

Despite possible acceptance of ESG considerations in merger control examination, social and environmental change in Uruguay needs to be pushed by specific regulations in those areas and, in our opinion, through further education and cultural change in that realm.

3. **Should a carbon defense be accepted by competition enforcers? Or any other ESG-related efficiency defense?**

Uruguayan competition law's goal is the protection and fostering of "consumer welfare", which is an undefined expression under local law. "Consumer welfare" is clearly a very flexible expression and,

therefore, in our opinion it should also embrace ESG-related considerations. However, there are no precedents of this kind of extensive interpretation.

There is a current pending case where the antitrust authorities may need to decide whether investigated parties of an alleged cartel agreement may be entitled to allege and justify the agreement based on certain environmental benefits brought by the agreement.

4. Should specific markets/business fields be subject to stricter levels of scrutiny and/or different standards of proof so as to push forward ESG-related policy considerations?

Economic conducts must negatively impact "consumer welfare" to be anticompetitive. As "consumer welfare" has not been defined under the antitrust law, any ESG-related policy consideration should be incorporated into the consumer harm theory adopted by the local law. In other words, it could be argued that consumer welfare is also composed of non-economic factors, such as the ESG-related policy considerations.

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