



# United Nations Conference on Trade and Development

Distr.: General  
11 May 2022

Original: English

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**Trade and Development Board  
Trade and Development Commission  
Intergovernmental Group of Experts on  
Competition Law and Policy**

Twentieth session

Geneva, 20–22 July 2022

Item 7 of the provisional agenda

## **Rethinking competition law enforcement: Lessons learned from the pandemic, particularly in socially important markets – Challenges and opportunities for an effective response during the pandemic and economic recovery in the post-pandemic period**

### *Summary*

The outbreak of the coronavirus disease (COVID-19) pandemic significantly impacted competition law enforcement worldwide. The challenges and lessons learned during the pandemic have shown that it is imperative to rethink such enforcement. To this end, it is crucial to take a deeper look at the recent enforcement of competition policy worldwide and to examine evolving trends in this area.

This note draws on lessons learned from competition law enforcement in member States in the context of the pandemic, particularly in developing countries; identifies challenges to and opportunities for effective responses during the pandemic and economic recovery in the post-pandemic period; and suggests options for action and enforcement by competition authorities in the post-pandemic period.



## I. Introduction

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its nineteenth session, requested the UNCTAD secretariat to prepare reports and studies as background documentation for the twentieth session on the topic of “rethinking competition law enforcement: lessons learned from the pandemic, particularly in socially important markets – challenges and opportunities for an effective response during the pandemic and economic recovery in the post-pandemic period”.<sup>1</sup>

2. Competition authorities responded to the pandemic by introducing changes to the way in which they administered and enforced laws, the exemptions they granted and the activities they authorized.<sup>2</sup> Worldwide, competition authorities (along with consumer protection agencies), were at the forefront of the initial responses of public authorities to restrictive business practices generated during lockdown periods and related health and safety measures.<sup>3</sup> Many authorities reacted quickly against price gouging, price fixing and tying arrangements with regard to essential hygiene products, such as face masks, hand sanitizer and basic household products, through law enforcement.<sup>4</sup>

3. At the onset of the pandemic, UNCTAD identified various actions that countries had adopted during a state of emergency and highlighted the important role of competition during the pandemic.<sup>5</sup> In normal circumstances, competition in markets is necessary to keep prices low; during a crisis such as the COVID-19 pandemic, which affects markets worldwide, cooperation is and should be seen as a priority. The far-reaching economic impacts of the pandemic has led Governments to balance the protection of competition, in order that prices do not rise immeasurably, with the granting of exemptions from competition rules, in order to ensure the survival of certain sectors of the economy.

4. UNCTAD research in 2021 indicated that competition law enforcement remained valid and effective during the pandemic. However, flexibility in application, based on prevailing market conditions, was needed. Therefore, competition authorities adopted legislative changes, or opted for soft law approaches. In Armenia, for example, a new edition of the law on the protection of economic competition was introduced in May 2021, providing provisions to enhance enforcement of the law.<sup>6</sup>

5. Due to the significant challenges, competition authorities worldwide, including in Australia, Canada, China, Iceland, the United States of America and the European Union, had to adjust usual operations and adopt new strategies in enforcement efforts.<sup>7</sup> To do so, authorities undertook various measures to mitigate the situation, while ensuring that such

<sup>1</sup> TD/B/C.I/CLP/61, paragraph 16.

<sup>2</sup> T Moreira, 2021, Competition policy’s role in the economic recovery process from the COVID-19 pandemic crisis: Insight from UNCTAD, *Journal of Antitrust Enforcement*, 9(3):407–412.

<sup>3</sup> Due to the different legal tools available, authorities took different approaches to the “policing of exploitative profiteering practices”, with some “applying existing consumer protection laws against exploitative pricing or misleading advertising”, some “relying on competition laws which prohibit abusive pricing practices by dominant undertakings” and others “using price gouging laws that apply in times of crisis”; and amendments to legal rules to more effectively capture and prosecute pricing abuses have been common, although some authorities have opted to adjust economic analyses to “account for the current market climate by introducing concepts such as temporary dominance”.

See <https://www.concurrences.com/en/bulletin/special-issues/competition-law-covid-19-en/covid-19-global-impact-a-world-tour-of-competition-law-enforcement-4-tracker-en>.

*Note:* All websites referred to in footnotes were accessed in April 2022.

<sup>4</sup> Moreira, 2021.

<sup>5</sup> See <https://unctad.org/news/defending-competition-markets-during-covid-19>.

<sup>6</sup> See <http://competition.am/index.php?menu=147&lng=3>.

<sup>7</sup> See <https://www.accc.gov.au/media/media-releases>, <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>, <https://www.barrons.com/articles/big-pharma-progress-coronavirus-vaccine-drugs-51582554473>, <https://en.samkeppni.is/published-content/news/covid-19> and [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0408\(04\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0408(04)).

measures were temporary, to safeguard competition culture and competitive markets. Both procedural and substantive enforcement issues were addressed, with a view to the recovery period. Advocacy work conducted by authorities also became essential in management, with advice provided to Governments on how to regulate markets to reduce administrative burdens on companies in crisis situations and to facilitate the entry of new companies. According to a survey conducted by UNCTAD in 2020, different instruments and tools were used to detect competition issues in sectors affected by the crisis and to alleviate repercussions on the business environment by guaranteeing fair competition.<sup>8</sup>

6. This note provides an overview of lessons learned during the pandemic and on challenges to and opportunities for effective responses during the pandemic and economic recovery in the post-pandemic period. In doing so, the note draws on information from previous work by UNCTAD with regard to responses from member States to the pandemic; research; and information provided by competition authorities on challenges faced in competition law enforcement during the pandemic, in response to an UNCTAD questionnaire.<sup>9</sup> Such challenges, as well as challenges in monitoring anticompetitive during the pandemic are addressed in chapter II; competition aspects that may need to be considered in the post-pandemic period are highlighted in chapter III; and a conclusion and suggested ways forward in the post-pandemic period are provided in chapter IV.

## **II. Challenges faced by competition authorities in competition law enforcement during the pandemic**

7. Competition authorities faced significant challenges during the pandemic and, in general, took immediate action through particular measures, depending on the jurisdiction. In addition to legislative action, responses included warnings and recommendations to industry and business, market monitoring, interventions and targeted investigations. Advocacy work carried out by competition authorities also became essential.

### **A. Operational and substantive enforcement challenges**

8. During the pandemic, competition authorities faced several challenges with regard to enforcement. The disrupted market environment, together with government policy responses, led to some competition law concerns that authorities and policymakers worldwide have been addressing. Some issues, such as market dominance in digital markets, existed prior to the pandemic but have been exacerbated by recent events; others were brought into focus due to government responses (e.g. financial aid packages).<sup>10</sup> Such challenges are not unique to developed countries but also present in several developing countries. The most important challenges observed by member States are highlighted in the following sections, along with the measures competition authorities have taken to respond to these challenges.

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<sup>8</sup> TD/B/C.I/CLP/58.

<sup>9</sup> Respondents included the following: Armenia; Barbados; Bahrain; Botswana; Burkina Faso; Colombia; El Salvador; Indonesia; Kazakhstan; Kenya; Morocco; Peru; Russian Federation; South Africa; Thailand; United States; Viet Nam; Zambia; Hong Kong, China; Competition Law and Policy Centre, Brazil, China, India, Russian Federation and South Africa (BRICS); West African Economic and Monetary Union.

<sup>10</sup> See, for example, <https://www.cliffordchance.com/briefings/2020/04/coronavirus--government-financial-aid-to-business---an-african-g.html>; <https://www.dof.gov.ph/dof-says-covid-19-emergency-subsidy-largest-social-protection-program-in-phl-history/>; <https://www.statista.com/statistics/1117254/covid-19-economic-relief-package-latin-america-country/>.

## 1. Operational enforcement challenges

9. At the start of the pandemic in 2020, many competition authorities experienced operational interruptions and delays, particularly during lockdown or curfew periods or states of emergency, which led, in some cases, to temporary suspensions of statutory functions and/or timelines for court cases. Examples of such disruptions in different countries are detailed in this section.

10. Some authorities had to make operational adjustments, since quicker action was required during the pandemic, while, previously, processes might have taken a longer time. In Israel, following the application of emergency procedures, all regular, non-urgent court hearings scheduled in March–May 2020 were suspended and matters not included in the urgent matters described by the Director of the Court of Justice were postponed.<sup>11</sup> In Kenya, the Competition Authority, noting that exemption requests under the Competition Act took time to review and decide upon and that the particular circumstances during pandemics and disasters made it a challenge to quickly review requests, opted for soft law enforcement and advised companies to amend certain prohibition clauses in agreements, rather than applying exemption provisions, which could take longer to review. In Peru, the Competition Authority faced an increased workload and the need to conduct several market investigations at the same time to identify competition problems preventing the supply of scarce goods.<sup>12</sup> In Hong Kong, China, the judiciary adjourned most cases before courts at all levels, including the Competition Tribunal, after end-January 2020.

11. In addition, in the Dominican Republic, the Competition Authority suspended all terms and deadlines until the end of the state of emergency; in India, the Competition Commission functioned at reduced capacity during the lockdown period starting in March 2020 and adjourned hearings and suspended filings related to anticompetitive agreements and abuse of dominance, as well as pre-filing consultations; in Morocco, the Competition Council continued to process filings in order of priority but non-urgent filings were suspended and all statutory guidelines were suspended during the state of emergency; and, in Portugal, the Competition Authority suspended statutory guidelines as of March 2020.<sup>13</sup>

12. At the start of the pandemic, the Competition and Markets Authority in the United Kingdom of Great Britain and Northern Ireland noted that businesses might encounter difficulties in responding to statutory information requests due to conflicting priorities or staff availability issues and that pre-notification processes in individual cases might therefore take longer.<sup>14</sup> A similar concern was highlighted under the European Commission, with difficulties anticipated in collecting information from third parties and limitations in terms of access to information and databases and of information exchanges following the adoption of remote working measures.<sup>15</sup> Court proceedings were also affected, with courts expected to prioritize urgent cases, extend time limits for ongoing proceedings with the Court of Justice by one month, temporarily suspend hearings and, in certain cases, allow request for extensions of time limits to be submitted to the General Court.<sup>16</sup>

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<sup>11</sup> <https://www.lexmundi.com/LM/Corporate-Counsel-Toolkit/Global-COVID-19-Resources/COVID-19-Global-Competition-Measures-Report/LM/Corporate-Counsel-Toolkit/Global-COVID-19-Resources/COVID-19-Global-Competition-Measures-Report.aspx?hkey=6a1f6d0a-898b-4189-b724-fb2365dad279>.

<sup>12</sup> Response to UNCTAD questionnaire from Peru.

<sup>13</sup> <https://www.clearygottlieb.com/-/media/files/covid19/covid19-antitrust-agency-status--final-pdf.pdf>.

<sup>14</sup> See <https://www.gov.uk/government/publications/merger-assessments-during-the-coronavirus-covid-19-pandemic>.

<sup>15</sup> See <https://www.concurrences.com/en/bulletin/news-issues/march-2020/the-eu-commission-encourages-delay-of-merger-notifications-and-electronic>.

<sup>16</sup> See [https://curia.europa.eu/jcms/jcms/P\\_97552/en/](https://curia.europa.eu/jcms/jcms/P_97552/en/).

## 2. Challenges related to mergers

13. UNCTAD noted that market concentration was likely to increase during the “new normal” of the pandemic period.<sup>17</sup> This could be prevented by competition authorities through robust merger control, including by reviewing failed merger cases. Competition authorities had already taken into account such concerns and implemented responses.

14. According to one survey, in 2020, the number of merger notifications decreased slightly compared with in 2019 and the number in 2021 was estimated to be 41.7 per cent higher than the 2016–2020 average.<sup>18</sup> The trend in 2020 likely reflects operational disturbances and adjustments by competition authorities, as well as uncertainties in markets at the start of the pandemic. The surge in 2021 seems to align with the expected increase in mergers, given that more businesses experienced financial difficulties during the crisis, although situations varied across jurisdictions.

15. Some States, such as Barbados, Botswana, Indonesia, Morocco and Viet Nam, reported an increase in merger notifications submitted to competition authorities during the pandemic. Authorities may have faced difficult decisions regarding whether to change the usual tests for assessing mergers and acquisitions and apply more lenient applications to failing firms.<sup>19</sup> In contrast, in Zambia, for example, the Competition and Consumer Protection Commission reported a decrease in the number of mergers, with a 3.4 per cent increase in merger notifications before the pandemic and a 20.5 per cent decrease during the pandemic. Such differences show that the outcomes necessitated due to the pandemic depended on individual markets and the tools at their disposal.

16. To address such challenges, competition authorities in numerous jurisdictions have been exceptionally relaxing the application of some prohibitions; some of these decisions might have impacts in particular sectors. For example, in Kazakhstan, the Agency for Protection and Development of Competition concluded antimonopoly compliance agreements with 36 market entities and, in October 2020, reduced the price of polymerase chain reaction diagnostic tests from T 12,000 to T 9,000 and, in February 2021, to T 7,000.<sup>20</sup> In Nigeria, time sensitive and urgent notifications were accepted for merger review.<sup>21</sup> In the United States, in July 2021, the President issued an executive order that directed antitrust agencies to revise merger guidelines.<sup>22</sup> In Viet Nam, to overcome challenges related to the pandemic, companies were assisted in mergers and acquisitions through the simplification of notification procedures and, in certain cases, quicker processing of notifications, as well as reductions in notification-related costs.<sup>23</sup>

17. In March 2020, the European Commission requested firms to delay merger notifications where possible until further notice and, in April, stated that it would deal with cases in which firms could show compelling reasons to proceed with a merger notification without delay.<sup>24</sup> Similar measures were used in South Africa by the Competition Commission, which discouraged all merger transactions during the lockdown period that began in March 2020, except those involving failing firms or firms in distress.<sup>25</sup>

18. Other States approached challenges related to mergers with legislative initiatives. In Brazil, the enactment of Law No. 14,010/20 established a temporary legal regime whereby associative contracts, consortiums or joint ventures were exempt from mandatory notification to the Administrative Council for Economic Defence during the state of

<sup>17</sup> UNCTAD, 2020, *Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal* (United Nations publication, Sales No. E.20.II.D.35, Geneva).

<sup>18</sup> <https://www.whitecase.com/publications/insight/shining-light-massive-global-surge-merger-control-filings>.

<sup>19</sup> Response to UNCTAD questionnaire from Zambia.

<sup>20</sup> Response to UNCTAD questionnaire from Kazakhstan.

<sup>21</sup> Response to UNCTAD questionnaire from Nigeria.

<sup>22</sup> Response to UNCTAD questionnaire from the United States.

<sup>23</sup> Response to UNCTAD questionnaire from Viet Nam.

<sup>24</sup> <https://www.concurrences.com/en/bulletin/special-issues/competition-law-covid-19-en/covid-19-global-impact-a-world-tour-of-competition-law-enforcement-4-tracker-en>.

<sup>25</sup> <https://www.compcom.co.za/wp-content/uploads/2020/03/CCSA-COVID-19-statement-24-March-202024497.pdf>.

emergency.<sup>26</sup> China initiated anti-monopoly law enforcement to support pandemic prevention and control and the resumption of work, which allowed for reviews of corporate concentration in pharmaceuticals, food and transport to be expedited.<sup>27</sup>

### 3. Challenges related to anticompetitive practices

19. At the onset of the pandemic, uncertainty in relation to scope and consequences might have led to disproportionate reactions from economic actors in some markets. In particular, demand for goods and services needed to protect against the spread of the coronavirus increased significantly and consumption patterns using digital platforms changed due to lockdown measures. Responses to the UNCTAD questionnaire show that the following two types of behaviour similarly affected States: excessive increases in the prices of some basic hygiene products (price gouging), which was one of the most significant effects at the start of the pandemic; and the rapid expansion of Internet use and the market power of digital platforms throughout the pandemic, which led to various reactions from authorities to possible abusive behaviour and in addressing challenges related to digital market access.

#### (a) *Price gouging*

20. During the pandemic, States experienced increased demand for certain goods, particularly in the pharmaceuticals sector and the fast-moving consumer goods sector, accompanied by price increases, shortages and price gouging (i.e. raising the price of goods or services to a level that is considered unfair or unreasonable). Many responses to the UNCTAD questionnaire noted problems related to shortages of face masks and hand sanitizer. This sudden increase in demand led to challenges in terms of competition. In Peru, for example, to protect free competition, the Technical Secretariat of the Commission conducted research on the public procurement market in the area of medical oxygen and found that the market was highly concentrated, with a single company accounting for 80 per cent of the total volume purchased by public hospitals.<sup>28</sup> The practice of price gouging was reported to be prevalent at the start of the pandemic. Some competition laws prevent price gouging, usually in the form of a prohibition against exploitative abuse of dominance, but many authorities have historically refrained from enforcing such provisions due to difficulties in ascertaining what is fair and reasonable.<sup>29</sup> UNCTAD research at the start of the pandemic examined the issue of price gouging, given the high level of demand for goods in key sectors such as food, health and safety, as well as services.<sup>30</sup> UNCTAD emphasized the need for firmer action by competition authorities and other government agencies to protect consumers.<sup>31</sup>

21. States have responded differently to these challenges. In response to the UNCTAD questionnaire, some authorities reported that it was difficult to define and/or investigate exploitative pricing or abuse of dominance and other authorities noted that they had used warnings in monitoring prices and carried out investigations to deter price gouging. Such experiences show the importance of examining various collaborative actions and options with other government bodies, given that competition law may not be the only or most appropriate tool with which to address market regulation during a pandemic.

22. In Indonesia, for example, at the start of the pandemic, enforcement priorities shifted to the health and medical sectors, with the Competition Commission monitoring and investigating the scarcity of masks, testing services in hospitals and the price movements of food items.<sup>32</sup> In Viet Nam, the Competition and Consumer Authority cooperated with the

<sup>26</sup> <https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/brazil#chaptercontent4>.

<sup>27</sup> See <https://stip.oecd.org/covid/policy-initiatives/covid%2Fdata%2FpolicyInitiatives%2F1230>.

<sup>28</sup> Response to UNCTAD questionnaire from Peru.

<sup>29</sup> See <https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf>.

<sup>30</sup> See, for example, <https://www.competitionpolicyinternational.com/ny-accuses-top-hillandale-farms-of-price-gouging-during-COVID/>.

<sup>31</sup> <https://unctad.org/news/covid-19-firmer-action-needed-better-protect-consumers>.

<sup>32</sup> Response to UNCTAD questionnaire from Indonesia.

Ministry of Industry and Trade and other entities to conduct inspections of enterprises, organizations and individuals suspected to have engaged in concerted actions that might raise competition concerns in the market.<sup>33</sup>

23. Despite the challenges, many competition authorities investigated excessive pricing under competition law.<sup>34</sup> Some authorities issued new rules or guidelines to clarify how they could intervene in this matter and, in other jurisdictions, price control legislation or consumer protection legislation was used to address instances of price gouging; the latter involves collaboration with other government agencies if the competition authority does not have the related mandates.<sup>35</sup> In response to the UNCTAD questionnaire, the Competition and Consumer Authority of Botswana noted that, as the competition law did not include provisions on excessive pricing, emergency regulations had to be issued to, among others, impose a cap on the profit margins of certain basic products. In Zambia, with regard to regulatory restrictions, the Competition and Consumer Protection Commission could not address general price adjustments, particularly in the pharmaceuticals sector or the fast-moving consumer goods sector, under Competition and Consumer Protection Act No. 24 of 2010, and therefore made a recommendation to the Government to amend the act to address unconscionable conduct and profiteering.<sup>36</sup>

24. South Africa adopted regulations on excessive pricing with regard to certain consumer and medical products and services. The regulations and their application suggest a temporary benchmark against which to judge excessive pricing, deviating from previous practice. Intertemporal comparisons assumed a structural shift during the pandemic that changed competition conditions, related to changes in consumer behaviour. Such comparisons also need to account for demand and cost changes. For example, one case involved a small wholesaler of face masks and another, a large pharmacy group and the pricing of masks.

(b) *Challenges in digital markets*

25. During the pandemic, access to digital markets was a concern for competition enforcers. The increasing reliance on digitalization led to varied competition concerns.<sup>37</sup> The enforcement of existing laws might be insufficient, as conventional measures of market power based on firm size might not reflect the true nature of online competition. Some digital services providers also instituted policies that restricted the freedom of participating businesses to deal with competitors or that applied unreasonable fees and conditions, in the exercise of a dominant position.<sup>38</sup> Responses to the UNCTAD questionnaire noted concerns and challenges with regard to the dominant position of large digital platforms, which were exacerbated during the pandemic. The closure of shops and the need to work and study remotely, for example, led to the strengthening of such dominant positions.<sup>39</sup>

26. In Kenya, according to the Competition Authority, at the start of the pandemic, the use of digital platforms with regard to, among others, shopping, food delivery, financial services and pharmaceuticals increased; 44 new financial technology products were launched in the banking sector, resulting in an increase in financial access by small business from 82.9 to 83.7 per cent in 2021.<sup>40</sup> This significant growth led to concerns related to pricing and the quality of goods and services, as well as possible abuses of dominant positions by firms. The Competition Authority, given an increase by 50 per cent in complaints in the electronic commerce area, is drafting proposals for the National Assembly to recommend changes to the law to address the market behaviour of digital platforms, as well as reviewing the banking sector market definition to include aspects of

<sup>33</sup> Response to UNCTAD questionnaire from Viet Nam.

<sup>34</sup> Response to UNCTAD questionnaire from Malaysia.

<sup>35</sup> For example, in Malaysia, Price Control and Anti-Profitteering Act 2011 and Control of Supplies Act 1961 are used to regulate the price of goods in periods of high demand.

<sup>36</sup> Response to UNCTAD questionnaire from Zambia.

<sup>37</sup> See TD/B/C.I/CLP/57.

<sup>38</sup> <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets.htm>.

<sup>39</sup> Response to UNCTAD questionnaire from the BRICS Competition Law and Policy Centre.

<sup>40</sup> Response to UNCTAD questionnaire from Kenya.

online and mobile banking and data accumulation, among others. In Malaysia, the Competition Commission addressed a complaint from the newspaper publishers' association with regard to the sharing of advertisement revenues from certain well-known platforms. In Thailand, the Trade Competition Commission, given concerns about food delivery platforms, issued a guideline on unfair trade practices between platforms and restaurant operators, aimed at regulating online food delivery and preventing platforms from taking advantage of restaurants.<sup>41</sup>

## **B. Market intervention challenges**

### **1. Competition advocacy**

27. Governments actively intervened during the pandemic with highly restrictive social measures, to prevent the spread of infection. Such measures had a significant impact on the economy, notably in sectors such as tourism, hospitality and retail. The pandemic also led to disruptions in supply chains and decreased operations in several economic areas. The services sector (e.g. retail, hospitality, tourism and cultural and sporting events) and international transportation were particularly affected. In times of crisis, such as during the global financial crisis of 2008/09, competition may be set aside in favour of strong State intervention. The pandemic may have induced Governments to act swiftly, without necessarily prioritizing competitive markets. The impacts of the pandemic have led Governments to take a strong and active role in protecting public health, reducing short-term economic damage and encouraging a strong, sustainable and inclusive long-term recovery.

28. Competition advocacy refers to the promotion of competition principles in policy discussions and regulatory processes, as well as when addressing market players and other stakeholders. For competition authorities, advocacy entails promoting a competitive environment; advising Governments and public bodies on legislative and regulatory frameworks; and raising awareness among the private sector and civil society on the benefits of competition for consumer welfare, economic growth and sustainable development. Competition authorities have had to work together with Governments to advise them on the design of economic recovery measures, through competition advocacy, which is an important instrument, particularly in times of crisis. Authorities also need to consider post-pandemic scenarios, noting that more lenient approaches might hinder economic recovery in the medium and long terms. In addition, authorities should ensure that competition policy is at the centre of any economic recovery strategy, to increase levels of competition, with priority placed on enabling the participation of small and medium-sized enterprises and historically disadvantaged individuals in markets.

29. In Armenia, the State Commission for the Protection of Economic Competition, at the start of the pandemic, conducted industry studies of some commodity markets to identify obstacles and barriers to competition and take measures to curb them.<sup>42</sup> In response to the UNCTAD questionnaire, the Competition Commission of Indonesia noted that authorities should also direct enforcement efforts to sectors considered strategic in economic recovery and provide a reasonable relaxation of rules with regard to certain activities, to support the processes of businesses. In Kazakhstan, to increase the efficiency of the implementation of competition policy, the institutional status of the antimonopoly body was raised, with a new agency for the protection and development of competition formed in September 2020, directly subordinate to the President, and functions and powers were transferred from the Ministry of National Economy involving, among others, protection of competition and restriction of monopolistic activity in relevant commodity markets and control and regulation of activities related to areas of State monopoly.<sup>43</sup> In Morocco, the need for more advocacy efforts on the provisions of competition law is recognized.<sup>44</sup> In South Africa, the Competition Commission has worked closely with the

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<sup>41</sup> Response to UNCTAD questionnaire from Thailand.

<sup>42</sup> Response to UNCTAD questionnaire from Armenia.

<sup>43</sup> Response to UNCTAD questionnaire from Kazakhstan.

<sup>44</sup> Response to UNCTAD questionnaire from Morocco.

Government and the business sector to provide advice or advocacy regarding proposed policy interventions for economic recovery in order to ensure that competition policy is at the centre of recovery strategies, to increase levels of competition.<sup>45</sup> In Zambia, market studies are used as a form of advocacy and the Competition and Consumer Protection Commission has undertaken two market studies to assess the effects of the pandemic on competition and consumer protection.<sup>46</sup>

30. Competition advocacy activities in many States have contributed to developing measures aimed at not only mitigating the effects of the pandemic but also laying the foundations for a strong, sustainable and inclusive economic recovery.<sup>47</sup>

## 2. State aid measures and other government support

31. In this area, it is important to ensure that Government support mechanisms, such as State aid and public procurement, do not distort markets, limit market access for some firms or reduce competition if mechanisms are not offered on an equal basis. Discontent can arise if benefits are provided to certain companies or industries but not others.

32. The European Union is the only authority that regulates State aid that distorts competition, under articles 107 to 109 of the Treaty on the Functioning of the European Union. During the pandemic, the European Commission adopted the State Aid Temporary Framework, setting out how State aid rules were to be applied during the pandemic; support mechanisms designed to assist microenterprises and small and medium-sized enterprises and other affected sectors have already been approved under the framework.<sup>48</sup>

33. Similar assistance in the form of grants and subsidies has also been provided in developing economies. In Hong Kong, China, the Competition Commission maintains an anti-epidemic subsidy programme and, in 2020, issued statements to remind businesses participating in the programme to adhere to the Competition Ordinance and also urged all parties involved, including public bodies, to be vigilant against potential anticompetitive practices that might undermine procurement processes.<sup>49</sup>

34. Many Governments adopted fiscal measures to mitigate the effects of the pandemic on the most negatively affected sectors. In Myanmar, for example, the Government created a COVID-19 fund and economic relief plan that included measures to offer relief to businesses. Whether support of this nature will distort competition depends on factors such as the amount of aid involved, its objective, the type of measures and the recipients, such as the size and sector of beneficiaries and, where there is no formal State aid regime, consideration needs to be given to ways in which the Government can ensure that funding is provided in a non-discriminatory way.<sup>50</sup> In response to the UNCTAD questionnaire, the Competition Commission of the Philippines noted that some Government stimulus measures might lead to advantages to some firms and sectors receiving more aid than others, particularly tourism, hospitality and retail, leading to an uneven playing field and interfering with fair and healthy market competition.<sup>51</sup> In addition, in response to the UNCTAD questionnaire, the Competition and Consumer Protection Commission of Zambia noted that competitive neutrality might be compromised, leading to policy inconsistencies if government actions were not equally applied and, thereby, competition concerns.

35. In this sensitive area, competition authorities have attempted to assist Governments in facilitating access to public measures to the companies most affected by the pandemic (in hospitality, tourism and transport, among others) and to avoid distortions of competition.

<sup>45</sup> Response to UNCTAD questionnaire from South Africa.

<sup>46</sup> Response to UNCTAD questionnaire from Zambia.

<sup>47</sup> See TD/B/C.I/CLP/58.

<sup>48</sup> See, for example, with regard to the approval of three schemes in Italy, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1440](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1440).

<sup>49</sup> Response to UNCTAD questionnaire from Hong Kong, China.

<sup>50</sup> See <https://blogs.worldbank.org/psd/state-aid-and-covid-19-support-now-bear-mind-long-term-effects>.

<sup>51</sup> See <https://www.pna.gov.ph/articles/1108377>.

### III. Competition aspects to be considered in the post-pandemic period

36. To respond appropriately to the pandemic, competition authority interventions were necessary and legitimate in taking short-term measures to support the economy and ensure a subsequent recovery towards a more resilient, inclusive and climate-friendly economy. It is now crucial for authorities to draw lessons from challenges faced during the pandemic and consider the aspects highlighted in this chapter in order to build a more crisis-resistant competition law regime and ensure a comprehensive economic recovery. Competition law as it currently stands needs to be rethought.

#### A. Competition policy considerations

37. In times of crisis, sound competition policy is even more important, to ensure that challenges can be faced and that the subsequent recovery is as rapid and sustainable as possible. Competition law helps ensure that businesses compete on a level playing field and encourages investment, innovation and efficiency, to help generate jobs and economic recovery. The latter cannot be fully achieved without competition law and policy being taken into account. The importance of competition law, particularly in times of crisis, was expressed in many of the responses to the UNCTAD questionnaire. The Competition Authority of Viet Nam, for example, indicated that competition law and policy were important in times of economic difficulty and even more so during economic recovery.

38. In addition, in response to the UNCTAD questionnaire, Indonesia noted the importance of pro-competitive government policies during economic recovery, which could be achieved through targeted lobbying and recommendations by competition authorities on the regulations affecting the recovery. A resilient and sustainable economy could only be created by resilient and sustainable companies and it was therefore important to utilize enforcement powers and merger control to filter out anticompetitive conduct that might harm markets and to preserve companies driving innovation and leading to consumer welfare.<sup>52</sup> Morocco noted that increased communications on the provisions of competition law were needed.<sup>53</sup>

39. In Bahrain, particular attention has been given to the importance of supporting small and medium-sized enterprises, which have become an important part of the economy, in post-pandemic recovery.<sup>54</sup> This has also been an area of focus in other countries, such as South Africa, where the Economic Reconstruction and Recovery Plan aims to support small and medium-sized enterprises. In July 2020, the heads of the BRICS competition authorities issued a joint statement, recognizing the integral role of competition policy and enforcement in protecting the interests of consumers and supporting businesses during the pandemic and overcoming post-pandemic economic crises.<sup>55</sup>

#### B. Close cooperation between different government bodies

40. Given the exceptional circumstances of the pandemic, there were several reasons for competing companies to cooperate. In the post-pandemic period, for the development of more crisis-resistant competition law and for economic recovery, it is crucial that close cooperation between Governments, public authorities, businesses and consumers continue to be vigorously pursued. Increasing economic integration, the rapid digitalization of markets and the economic impacts of the pandemic in various sectors require more and better cooperation between competition authorities at the national and international levels. To comprehensively address the challenges of competition law, close cooperation between

<sup>52</sup> See [https://eng.kppu.go.id/wp-content/uploads/Study\\_on\\_Impact\\_of\\_Covid19\\_Pandemic\\_and\\_Economic\\_Recovery\\_to\\_Competition.pdf](https://eng.kppu.go.id/wp-content/uploads/Study_on_Impact_of_Covid19_Pandemic_and_Economic_Recovery_to_Competition.pdf).

<sup>53</sup> Response to UNCTAD questionnaire from Morocco.

<sup>54</sup> Response to UNCTAD questionnaire from Bahrain.

<sup>55</sup> Response to UNCTAD questionnaire from the BRICS Competition Law and Policy Centre.

competition and consumer protection authorities, as well as with data protection authorities and other sector-specific regulators, should be promoted, to address increasing concerns about the market dominance of large digital platforms. Competition authorities should continue to work together with Governments to advise on the design of economic recovery measures, through competition advocacy. As noted, several States have already actively strengthened cooperation arrangements during the pandemic. In Barbados, for example, the Fair Trading Commission sought closer relations with authorities with similar responsibilities, such as through a memorandum of understanding signed with the Competition Commission of South Africa.<sup>56</sup> The United States has worked to strengthen cooperation between authorities, with the executive order issued in 2021 directing the federal Government to take a whole-of-government approach to promoting competition and government agencies to work together more closely on competition issues, including by sharing expertise and knowledge of industries and competitive dynamics.<sup>57</sup>

41. Given the international scale of certain crises, it is crucial for authorities to exchange information across borders, to create effective mechanisms to counter companies that engage in cross-border practices restricting competition, considering the characteristics of the legal frameworks and law enforcement practices of different authorities. For example, the BRICS Competition Law and Policy Centre is currently conducting an in-depth study on developing new approaches to regulating digital ecosystems across BRICS.<sup>58</sup>

### C. Access to digital markets

42. Digital platforms are among the few businesses that have benefited from the crisis. The market power of some digital platforms, which had already given rise to competition concerns in certain markets, could further increase and necessitate reviews by competition authorities. To address competition concerns related to digital platforms, competition authorities should increase the monitoring of digital markets, to prevent abusive behaviour. This requires stricter control of the activities of digital platforms, to prevent abusive behaviour aimed at excluding new competitors from markets. In addition, the need to facilitate access to digital marketplaces is particularly necessary with regard to microenterprises and small and medium-sized enterprises, as they have been the most significantly affected. To this end, as highlighted in a study conducted by UNCTAD in 2020–2021, it is necessary to facilitate access to such markets under conditions that guarantee transparency and fairness in relations with digital platforms.<sup>59</sup> In the light of these challenges, and as the application of traditional competition instruments based on prices and consumer welfare in addressing new competition issues in the digital economy presents difficulties due to the characteristics of digital markets, competition laws might need to be reconsidered and this could require new legislative initiatives, such as those already introduced in some countries.

## IV. Conclusion and issues for discussion

43. Economic challenges during the COVID-19 pandemic required urgent and decisive government action to ensure the continued functioning of markets and the economy. State intervention in markets affected by the crisis was and is necessary and a legitimate means to respond quickly to the social and economic impacts of the pandemic, to support markets and to promote and ensure economic recovery. Competition authorities played an important role in attempting to balance State intervention with effective competition. In the long term, full effective competition in markets should be restored. Markets need to be made more resilient, inclusive and climate-friendly, to enable a sustainable economic recovery and to better prepare economies for different types of crises.

<sup>56</sup> Response to UNCTAD questionnaire from Barbados.

<sup>57</sup> <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>.

<sup>58</sup> Response to UNCTAD questionnaire from the BRICS Competition Law and Policy Centre.

<sup>59</sup> UNCTAD, 2022, *The COVID-19 Pandemic Impact on Micro, Small and Medium-Sized Enterprises: Market Access Challenges and Competition Policy* (United Nations publication, Geneva).

44. Responses received to the UNCTAD questionnaire indicate the means and measures taken by competition authorities worldwide during the pandemic that were considered the most effective. These included legislative measures, market surveillance, interventions and targeted investigations, as well as recommendations to industry and companies and warnings to consumers. Attention was paid to the importance of competition advocacy in times of crisis, as many of the advocacy activities of States contributed to laying the foundation for a strong, sustainable and inclusive economic recovery. To ensure a recovery towards a more resilient, inclusive and climate-friendly economy, policymakers should also collaborate closely at the international level, analyse the available policy alternatives, conduct a cost benefit analysis and choose the option that minimizes constraints to and distortions of competition. This may require new legislative initiatives, such as those already introduced in some countries. Given the particular nature of these challenges, it is necessary to ensure the exchange of information between authorities and envisage further cooperation within existing networks.

45. The Fair Trading Commission of Barbados, for example, has highlighted that the challenge for competition authorities in developing countries is to distinguish between practices that should be prohibited from those that should be allowed on the grounds that they have pro-competition effects outweighing restrictions on competition.<sup>60</sup> To this end, such business practices can contribute to public interest goals, economic efficiency, technological advancement and, ultimately, enhanced competition.<sup>61</sup> It is difficult for new authorities to conduct such assessments, as they require detailed economic analysis on a case-by-case basis.

46. Delegates at the twentieth session of the Intergovernmental Group of Experts on Competition Law and Policy, in addressing lessons learned during the pandemic and presenting approaches to rethinking competition law enforcement, may wish to consider the following questions:

- (a) What is the role of competition law enforcement cooperation in times of crisis?
- (b) Which enforcement and advocacy activities are most critical in order to maintain competitive markets and protect consumer welfare during a crisis?
- (c) What measures should competition authorities adopt to prepare for future crises?
- (d) What are some policy options to best ensure access to digital markets for microenterprises and small and medium-sized enterprises in the post-pandemic period?

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<sup>60</sup> Response to UNCTAD questionnaire from Barbados.

<sup>61</sup> [https://www.ftc.gov.bb/index.php?option=com\\_content&task=view&id=132&Itemid=28](https://www.ftc.gov.bb/index.php?option=com_content&task=view&id=132&Itemid=28).