

TILEC

TILEC Discussion Paper

DP 2020-007

EU Competition Law and COVID-19

By
Francisco Costa-Cabral, Leigh Hancher,
Giorgio Monti and Alexandre Ruiz Feases

March 22, 2020

ISSN 1572-4042

ISSN 2213-9419 <http://ssrn.com/abstract=3561438>

This preprint research paper has not been peer reviewed. Electronic copy available at: <https://ssrn.com/abstract=3561438>

EU Competition Law and COVID-19

Francisco Costa-Cabral,* Leigh Hancher** Giorgio Monti,*** Alexandre Ruiz Feases****

ABSTRACT

This paper explores how EU competition law enforcement might be affected by the COVID-19 pandemic. Each section of this paper reviews how various components of EU competition law are impacted. The paper evaluates the state of play and, where relevant, it makes policy proposals for how competition law might develop. It suggests that the Commission's state aid policy is unprecedentedly lax but more tightening up might be welcomed to ensure state funds are not misspent. In the field of antitrust it recommends that competition authorities should be watchful of excessive prices and price discrimination, using interim measures more boldly. Collusion should remain an enforcement priority but a procedural pathway to review agreements that may be in the public interest is proposed, drawing on practices developed in the US in the aftermath of major natural disasters. In merger control, the Commission's strict interpretation of the failing firm defense is appropriate but, in general, a more skeptical attitude towards mergers may be warranted during this period. Advocacy plays a key role: competition agencies can both point to existing regulations that limit competition and monitor proposed emergency legislation that would harm competition for no good reason.

JEL: K20, K21, L41, L50

1 Introduction

The current health emergency raises significant issues when it comes to securing the population, ensuring the healthcare system works well and implementing measures to contain the COVID-19 pandemic that are effective while preserving fundamental rights. At the same time, as certain sectors of the economy slow down or hibernate, policymakers will have to also take many steps to rescue the economy. At the present stage, this largely entails the use of monetary and fiscal policy, where the consensus among economists is to act fast and aggressively as if this was wartime.¹ This paper hopes to shed some light on how EU

* Assistant Professor, Tilburg Law and Economics Center (TILEC), f.costa-cabral@tilburguniversity.edu

** Professor of European Law, Tilburg University, Tilburg Law and Economics Center (TILEC), L.Hancher@tilburguniversity.edu

*** Professor of Competition Law, Tilburg University, Tilburg Law and Economics Center (TILEC), g.monti@tilburguniversity.edu.

**** Alexandre Ruiz Feases, Post-doctoral researcher, Tilburg University, Tilburg Law and Economics Center (TILEC). E-mail: a.v.ruizfeases@tilburguniversity.edu

¹ R. Baldwin and B. Weder di Mauro, *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes* (CEPR, 2020)

competition law might be applied to handle possible measures taken by states and undertakings during a period of unprecedented crisis.

Although there are lessons to be taken from previous crises, the COVID-19 emergency already shows a distinctive facet: the response involves the partitioning of the internal market. We are seeing this now with strict and unquestioned restrictions on free movement of people. Infection rates across Member States are for the moment markedly different, and some Member States are certainly more vulnerable than others due to their ageing population. If containment is successful the impact of the virus and follow-up measures will vary across Member States, even across regions within them. How EU law will react to public and private measures drawn according to national and regional lines remains to be seen and, as discussed below, this may be also the case with the enforcement of competition rules.

One high level point is emphasized here and is the subject of further discussion in this paper: competition law is not simply a technocratic enterprise, blindsided by the consumer welfare standard. Competition law is a political enterprise, administered by an EU institution and national competition authorities (NCAs) which must, in order to retain their legitimacy, offer an enforcement strategy that serves the public interest.² Like any other administrative agency, competition authorities must pursue that delicate balance between applying their political mandate with independence and integrity while retaining their legitimacy by responding to the needs of the public.

This is particularly pressing at a time where some wish to see a more political competition policy. Since the summer of 2019 we have heard calls for an industrial policy. In the same vein, the COVID-19 crisis might push the same politicians to call for a dilution of competition law for more nationalistic purposes. In the present context, we argue that a wise competition policy should accommodate the needs that arise from the COVID-19 crisis in a manner that sends the following messages: that competition law is part of the policy tools that, applied properly, can serve to preserve public health and accelerate economic recovery but that, at the same time, it retains a degree of flexibility so that rules do not stand in the way of recovery.

History is on the side of this argument: the loosening of competition law in the aftermath of the 1929 depression prolonged it.³ History also shows that those seeking the relaxation of competition are often the least who deserve it: firms that wish to take advantage of the emergency to consolidate positions of power and secure further government help.

Each section of this paper reviews how various components of EU competition law are impacted by COVID-19. The paper evaluates the state of play and, where relevant, it makes

² I. Lianos 'Polycentric Competition Law' (2018) 71 Current Legal Problems, 161, 189. Vickers 'Competition Policy in Troubled Times' (20 January 2009) available at:

<https://publications.parliament.uk/pa/cm200809/cmselect/cmdereg/329/329we12.htm#n63>

³ H.L. Cole and L.E. Ohanian, 2004. "New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis," (2004) 112(4) Journal of Political Economy, 779.

policy proposals for how competition law might develop and how competition authorities may contribute by adjusting their enforcement. In particular, it attempts to clarify how some of the measures already announced by the Commission in a State aid Temporary Framework⁴ and by the ECN in relation to the application of competition law⁵ may be implemented.

2 State Aid

In recent history two episodes have already tested the EU state aid control regime in times of emergency: the 9/11 attacks and the financial crisis. In the first, airlines became the prime beneficiaries of state aid, while in the second banks were rescued by unprecedented measures. The Commission reacted speedily to both events, and lessons can be learned from these episodes.

With production at a standstill, governments will likely announce measures to support a wide range of businesses. The numbers are likely to be massive: the Eurogroup statement on 16 March 2020 indicates a commitment 'to provide liquidity facilities of at least 10% of GDP, consisting of public guarantee schemes and deferred tax payments, and these figures could be much larger going forward'.⁶ By comparison, between October 2008 and October 2011, the volume of support to the financial sector was €4.5 trillion (36.7 per cent of EU GDP).⁷

This makes state aid surveillance after COVID-19 much more challenging than the earlier crises because it applies to a wider range of industries, each with special features that need analysis to ensure that state aid is effective. On the one hand, the Commission cannot be seen to be too strict, but unfortunately in the present political climate populists are able to exploit any action to reveal that the EU is a dangerous beast. On the other hand, state support of business models that were non-viable already before the current pandemic should not be authorised. To give one example, the airline company Alitalia has been the subject of numerous measures to keep it going for a number of years. The temptation to use the crisis to provide firms like this with more state aid should be resisted. However, the pressure to err on the side of states will be inevitable also because some economists are urging that it is better to do too much than to do too little – is this now the consensus?⁸ The challenge is then how to provide a competition-friendly response. In the context of the EU state aid regime

⁴ https://ec.europa.eu/commission/presscorner/detail/en/statement_20_479 (all websites in this paper were last visited on 24 March 2020)

⁵ https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

⁶ https://www.consilium.europa.eu/en/press/press-releases/2020/03/16/statement-on-covid-19-economic-policy-response/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Statement+on+COVID-19+economic+policy+response

⁷ International Monetary Fund, *European Union: Publication of Financial Sector Assessment Program Documentation – Technical Note on Progress with Bank Restructuring and Resolution in Europe*, IMF Country Report No. 13/67 (March 2013) 7

⁸ J. Furman, 'Protecting people now, helping the economy rebound later' in Baldwin and Weder di Mauro (above n 1), p.193

this also means an ‘internal market friendly’ response. State aid rules should be applied to prevent harmful subsidy races and – in the new situation, avoid excessive cross-border distortions that can disrupt trade more than it has already been affected by the break down in value chains and the restrictive measures on travel.

If co-ordination between member state’s national support programmes is a worthy endeavor, co-operation between industry is still viewed with suspicion. The objectives of state aid policy are not always or necessarily aligned with those of anti-trust. But a co-ordinated response is elusive and the state aid tool box is not ideal. In a situation of general crises, Member States react with wide ranging measures and can design policy to fall outside the EU regime altogether.

Indeed this was already recognized in its first communication – the Commission Communication on “coordinated economic response to the COVID-19 outbreak”⁹ - which includes a dedicated State aid section.¹⁰ It underlines that the State aid regime has a limited reach – and excludes general measures which do not contain State aid: Member States can decide to take measures applicable to all companies (e.g. “wage subsidies and suspension of payments of corporate and value added taxes or social contributions”). Member States can grant financial support directly to consumers (e.g. subsidies for “cancelled services or tickets that are not reimbursed by the operators concerned”). In other words, if a measure is not selective it is not a state aid. If the measure confers a benefit on a consumer as opposed to an ‘undertaking’ it is not a state aid.

The key objective for the Commission is to safeguard the very relevance of the state aid regime – and to do so it has to have some leverage with the Member States. How much appetite there is likely to be for a co-ordinated response may well vary one state to another and from sector to sector and how much aid is available to the sector outside the EU. In Italy, one of the measures in the 25 billion euro rescue package announced on 13 March 2020 provides for the creation of "a new company wholly controlled by the ministry of economy and finance, or controlled by a company with a majority public stake, including an indirect one" to take over the failing airline, Alitalia. That the Commission was already investigating two packages of support to the company was obviously no real deterrent to nationalization.¹¹ Elsewhere in Europe, Norway announced talks with Norwegian Air executives after the struggling airline called for financial backing similar to that given to SAS by Denmark and Sweden.¹² The resulting rescue package approved several days later came with strings attached – but not at the insistence of the EC.¹³ If all airlines are dependent on government

⁹ COM(2020) 112 final, 13 March 2020

¹⁰ At section 5, pp. 8-9, and Annex III of the Communication outline the various measures that Member States may adopt and the procedure they should follow.

¹¹ <https://www.euractiv.com/section/aviation/news/eu-inquest-into-italys-e400m-alitalia-loan-takes-off/>

¹² <https://www.reuters.com/article/health-coronavirus-airlines-alitalia/italy-presses-on-with-alitalia-nationalisation-idUSL8N2BB4GV>

¹³ <https://www.ft.com/content/27bb17e2-6ac7-11ea-800d-da70cff6e4d3>

bail-outs they are less likely to try to use the state aid regime to contest support to their rivals. In the US meanwhile, proposed stimulus bill to combat the fallout from the virus has earmarked \$50bn in loans and loan guarantees to airlines. It is in this global policy space that the added value of the Temporary Framework will have to be weighed up by Member States and beneficiaries alike.

The first statement released by Commissioner Vestager, in her capacity as Executive Vice-President of the Commission, a draft proposal for a 'State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak'¹⁴ suggests that the legal basis will, like the banking crisis, be Article 107(3)(b) TFEU. At the same time some forms of aid will be authorized under Article 107(2)(b) TFEU. What is the difference between these two pathways?

Article 107(2)(b) TFEU applies to 'aid to make good the damage caused by natural disasters or exceptional occurrences.' Aid granted under Article 107(2) TFEU requires notification to the Commission but it is automatically authorized if it falls within the scope of the provision. This (in theory) gives the Commission much less flexibility in modulating a state aid policy because its only role is to determine the meaning of 'exceptional occurrences.' This term refers to acts that are unforeseeable and probably also of a significant magnitude in terms of the losses they suffer. The beneficiary is not to blame for the losses they face. At the present moment, the Commission foresees that this will only apply to some of the immediate, short-term losses that some businesses suffer as a result of COVID-19. This is the lesson from the first decision in this field: EUR 12 million was made available by Denmark to cover the losses of businesses who had to cancel or postpone events as a result of the pandemic.¹⁵ The Commission decision suggests a restrictive approach in assessing state aid under this Treaty provision: emphasis is placed on ensuring that there is a causal link between COVID-19 and the compensatory measure and that the measure is proportionate (in that it does not allow for overcompensation).¹⁶ This is reproduced in the Notification template that has been released for similar requests.¹⁷

It might be argued that this is far too restrictive an approach: Article 107(2) TFEU provides for limited oversight by the EU, this is aid in an emergency and states might argue that proportionality and the impact to competition are irrelevant. The state may have to respond quickly and should be free to err on the side of over-compensation. After all, this is why the Treaty distinguishes between aid that 'shall be compatible (Article 107(2) TFEU) and aid which 'may be compatible (Article 107(3) TFEU). In other words, the Commission should

¹⁴ Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, Brussels, 19.3.2020. Available at:

https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

¹⁵ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_454

¹⁶ State Aid SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19, see paragraphs 31-40.

¹⁷ Above n 14.

simply verify that COVID-19 is an exceptional occurrence and give the Member States the freedom of maneuver as to how to assist firms that are affected by this.

Moreover, we might reasonably foresee a Member State arguing that the status quo in some countries is exceptional in a wider range of circumstances: President Macron has called the pandemic a 'war' and in many states limits to civil liberties have been imposed that are unprecedented in peacetime: if this is not exceptional what is? Some economists have also suggested that significant payments might be worth exploring. One paper suggests that if the response to COVID-19 means that businesses are effectively in hibernation for a given period then the state should cover the running costs of the business (including salaries) in the expectation that post-crisis the business can restart. Based on US figures the estimate is that such a measure would cost 3.75% of GDP if implemented for three months.¹⁸ The Commission might prefer that such policies are implemented under Article 107(3)(b) TFEU instead, however. This would give it more power to regulate how the scheme is implemented, as we explain below.

The second legal basis, on which the Commission hopes to review most of the state aid is Article 107(3)(b) (aid to remedy a serious disturbance in the economy of a Member State). A temporary framework has been released to guide Member States.¹⁹ On the one hand, the framework emphasizes that the economic damage that Member States will address could not have been foreseen by well-run businesses (thus there is no moral hazard like in the banking crisis) but on the other hand the Commission insists on a strict interpretation of this Treaty base.²⁰ The principal adverse concern that seems to motivate the Commission is to keep the market integrated by ensuring that these measures are not used by some states to strengthen national firms at the expense of others. This is desirable not least as COVID-19 necessarily fragments national markets already.

The framework provides a menu of options which states may use (individually or in combination) to provide liquidity to firms. This ranges from direct grants or tax breaks (up to a maximum of EUR 800,000) provided that the beneficiary was not in difficulty before 31 December 2019,²¹ to loan guarantees and subsidized interest rates for loans. The framework applies for the duration of 2020 and a reporting obligation is set up. This mild ex post monitoring is less demanding than that under Article 107(2)(b) which suggests the Commission does not wish to stand too much in the way of state spending at this time.

It may be helpful to compare this response with the Commission's approach during the banking crisis: on the one hand, keeping the banking system alive is essential for the vitality over the rest of the economy, necessitating a more relaxed approach to state aid. On the other

¹⁸ <https://econfip.org/policy-brief/keeping-business-alive-the-government-as-buyer-of-last-resort/>

¹⁹ Above n 14.

²⁰ Above n 14. See for example paragraphs 8 and 17

²¹ This ostensibly is a shortcut that assumes that there is a causal link between COVID-19 and the need for state aid.

hand, the Commission had to avoid the risk of moral hazard: banks relying on ever more state aid to take greater risks. The Commission balanced these two considerations by accelerating the procedures and being relatively generous in allowing Member States a range of options to rescue their banks. However, this came with strings attached: state aid was often made conditional on banks taking a number of measures to clean up their businesses, including controversially a requirement that banks internalize some of the losses.²² Banks were also asked to come up with a restructuring plan to ensure their long-term stability. At the time this approach was criticized on a number of fronts. First because the legal basis for emergency aid would have appeared not allow the Commission to issue aid with strings attached, second because some of the measures appeared unrelated to the state aid. At the same time, this shows that the Commission can try and exercise some control over state policies. In the context of the banking crisis, the use of massive amounts of state aid helped the political negotiations that led to the banking union. This reveals how the Commission can leverage its successes under competition law to legitimize policy space.²³

The major difference between the banking crisis response and the COVID-19 temporary framework is that the latter comes with no strings attached for the beneficiary. It may be that if the crisis deepens then businesses might be asked to submit business plans if states propose to offer larger sums to certain beneficiaries. On the other hand, some will argue that since this is an emergency of such large scale one should not worry about moral hazard as much as when banks acted recklessly assuming they would be too big to fail. Absent this risk, state aid for COVID-19 consequences should be more relaxed than it was when the banking sector was rescued.²⁴

In sum, the Commission has been praised already for showing flexibility,²⁵ but this is balanced by it retaining some control over state spending: proportionality and effectiveness of aid are ensured in a similar way whether state aid is based on Article 107(2) or (3) TFEU. Should states call for greater flexibility and the capacity to grant more aid, previous crises suggest that the Commission may increase ex post conditions as a quid pro quo. This paradoxically works to the advantage of states for it serves as an outside check to ensure that state spending is well-targeted. However, the first measures states have announced suggest that the relevance of state aid law as a constraining force is much weaker than in the past.

3 Abuse of dominance

3.1 Substantive Law

²² *Kotnik and Others v. Drzavni zbor Republike Slovenije*, C-526/14, EU:C:2016:767

²³ For a quick summary see Chalmers, Davies and Monti, *European Union Law: Text and Materials* 4th edn (Cambridge, 2019) pp.1000-1005.

²⁴ Martin Wolf, 'The virus is an economic emergency too' *Financial Times*, 17 March 2020.

²⁵ L. Gariciano, 'The COVID-19 bazooka for jobs in Europe' in Baldwin and Weder di Mauro (above n 1), p.131

At the time of writing, the most likely challenge in this field is to check that firms do not take advantage of market conditions in the wake of COVID-19 to increase prices. The ECN has already stated 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’, and vowing to take action against undertakings that cartelise or abuse their dominant position.²⁶ The prohibition of exploitative abuses may be the more apt tool, since consistent enforcement against cartels has made undertakings well aware of the risks of coordinating with their competitors.

The issue of exploitation may have some overlap with price-gouging. It is well understood that these two instruments have a different purpose and scope of application: price-gouging laws prevent traders in general from profiteering of situations of necessity, Article 102 TFEU prohibits dominant undertakings from imposing excessive prices or other unfair conditions.²⁷ This overlap does not prevent applying Article 102 to exploitative abuses. In the absence of effective laws, Member States may have no other instrument to control price increases in reaction to COVID-19; while if the enforcement of price gouging is working effectively, dominant undertakings may still take advantage of their position to discriminate across Member States, withhold supplies, and apply price increases or unfair terms. Practices may even veer into exclusionary territory if selling needed commodities is leveraged to expand or consolidate across markets.²⁸ For the purposes of exploitation, nonetheless, price-gouging serves as a healthy reminder that economists’ objections to interfering with price formation have little pull outside certain competition law circles.

The case law of the Court of Justice of the EU is quite pliable to covering jumps in prices and other shifts in selling conditions. The *United Brands* test for excessive pricing has been recently reaffirmed in *AKKA/LAA*²⁹ and its unfairness condition does not seem especially hard to fulfil by unusual increases following COVID-19. Moreover, the possibility that market

²⁶ Above n 5.

²⁷ There is no harmonization of price-gouging laws, save for the possible application of the Unfair Commercial Practices Directive to certain types of misleading conduct which may be linked to higher prices (see Directive (EU) 2019/2161 amending several consumer protection instruments). The Italian NCA (which is also empowered to apply consumer law) has begun proceedings against Amazon and eBay in relation to high prices, see <https://www.agcm.it/media/comunicati-stampa/2020/3/PS11716-PS11717>. It raises two concerns: first misleading claims about the effectiveness of certain products (which can then allow the seller to charge a higher price) and high prices generally. The first seems to rely on consumer protection (a misleading campaign may also infringe Article 101 TFEU, as referred below in relation to Case C-179/16 *Hoffman La Roche II* EU:C:2018:25, which also originated in Italy), it is not clear on what basis the NCA is reviewing excessive prices.

²⁸ In the US, Google is reportedly working on a screening tool which will require an account giving access to its other services, see <https://www.nytimes.com/2020/03/16/technology/coronavirus-testing-website-google.html>. This could be considered an abusive tying, as the prohibition of operating system forks in *Google Android* was based precisely on the tying of an unfair term, see Case AT.40099 *Google Android* (18.07.2018) paragraph 1011.

²⁹ Case C-177/16 *AKKA/LAA* EU:C:2017:689 36.

power has been exercised to raise prices so that it is currently imperceptible, the biggest practical impediment to finding excessive pricing,³⁰ will be unlikely to occur since cases will probably focus on unprecedented price increases. A sudden 25% increase was already found to be an abusive condition under Article 102 TFEU in *Alsattel*,³¹ a precedent that may be revived in new cases under the current context.³²

The case law is equally applicable to price discrimination across Member States. Excessive prices may be shown by comparison with the prices of other Member States,³³ *AKKA/LAA* establishing generous basic conditions of only having to be ‘consistent’³⁴ and being able to take a limited number of Member States into account.³⁵ Discrimination can however be considered abuse in and of itself since *United Brands*,³⁶ as can withholding supplies to enforce such price differences.³⁷ These principles may serve as safeguards against the exploitation of different Member State’s exposure to COVID-19.

As for any abuse, there is the possibility of objective justification of national price differences and corresponding enforcement, which includes reasons of health and safety,³⁸ potentially applicable to guaranteeing supplies across Member States. There is also some scope for protecting undertakings’ commercial interests with reference to usual orders³⁹ that may prevent stockpiling or profiteering from intermediaries.⁴⁰ Any such justifications are however subject to a proportionality control. In short, the case law makes Article 102 TFEU readily available to exploitative practices with both a wide prohibition and workable justifications.

While it is said that using competition law to challenge excessive prices is rare, in the recent past we have seen the Commission deciding against excessive prices in *Gazprom* (which, crucially, were the result of a strategy to partition markets alongside national borders),⁴¹ the

³⁰ See Commission Notice on the Definition of the Relevant Market OJ (1997) C 372/3 19.

³¹ Case 247/86 *Alsattel* EU:C:1988:469 10.

³² The UK Court of Appeal suggests that even in such seemingly clear cases the competition authority, while not bound to a particular method to assess excessive prices, must carry out a comprehensive assessment including counter-claims by the undertakings involved (*CMA v Flynn and Pfizer* [2020] EWCA Civ 339 – as is in any event the case with EU competition law enforcement, see Case C-413/14 P *Intel* EU:C:2017:632 144.

³³ *AKKA/LAA* above n 29, para.37.

³⁴ *Ibid* para.44. This was developed according to circumstances specific to copyright societies, see *ibid* 52 and following.

³⁵ *Ibid* para.40.

³⁶ Case 27/76 *United Brands* EU:C:1978:22 234.

³⁷ Joined Cases C-468 and 478/06 *Sot. Lelos Kai* EU:C:2008:504 66.

³⁸ See Commission Guidance on Enforcement Priorities in Applying [Article 102 TFEU] OJ (2009) C 45/7 29 and references to the case law, on exclusionary abuses but potentially applicable here.

³⁹ *Sot Lelos kai* above n 37, para.71.

⁴⁰ The ECN also points out that existing rules allow setting maximum prices, which ‘could prove useful to limit unjustified price increase at the distribution level’.

⁴¹ https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3921.

Spanish and Latvian NCAs reviewing the conduct of collecting societies (again, dealing with national monopolies),⁴² and the Italian and UK NCAs taking cases against the high prices of certain medicines.⁴³ Accordingly this prohibition is there to be explored further. Competition authorities may prioritise products that protect the health of consumers such as face masks and sanitising gel, as indicated by the ECN, but this priority should extend to any market power created by COVID-19, from the commerce and entertainment required by situations of lock-down and social distancing to developing therapeutic advances.

The Commission has indeed previously signaled it is ready to act in relation to exploitation of pharmaceuticals. It goes without saying that any advances in the detection, treatment, and vaccination of the coronavirus are liable to charge a significant premium. They may nevertheless fall under the words of Commissioner Vestager that:

‘Often people’s health relies on drugs that are sold by just one company. [...] That isn’t a problem in itself, if prices stay at a reasonable level. But there can be times when prices get so high that they just can’t be justified. After all, people rely on these medicines for their health, even their lives’.⁴⁴

This speech was motivated by the opening of an investigation in *Aspen* of excessive pricing of several cancer drugs.⁴⁵ Two years have passed since this case started, and present circumstances make it highly desirable that the Commission reaches a decision in order to clarify its position on negotiation practices with national authorities to impose high prices that may have fundamental implications for the response to COVID-19.⁴⁶ In particular, the investigation refers to ‘reducing the direct medicine supply and/or threatening supply reductions, as well as defining EEA-wide stock allocation strategies and implementing them in cooperation and/or agreement with local wholesalers’.⁴⁷

The Commissioner also referred to the need to safeguard a reward for innovation, namely ‘new cures for diseases’. Intervening in pharmaceuticals with R&D directed at the coronavirus will be delicate, but the same cannot however be said of the use of pharmaceuticals developed for other ailments.⁴⁸ Pharmaceuticals already in circulation must logically be considered to have had sufficient incentives to be produced. Profits from an

⁴² Leading to the preliminary reference in *AKKA/LAA*.

⁴³ Notably the UK decision leading to the already referred *Pfizer and Flynn*, above n 32.

⁴⁴ https://wayback.archive-it.org/12090/20191129221154/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en.

⁴⁵ https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1323.

⁴⁶ There are reports that the Polish NCA has received complaints about firms not supplying medical equipment to hospitals unless higher prices are agreed, but actions against such conduct might also be grounded in contract law.

⁴⁷ https://ec.europa.eu/competition/antitrust/cases/dec_docs/40394/40394_235_3.pdf.

⁴⁸ In particular if they result tests by medics on the field, see for example <https://www.theguardian.com/world/2020/mar/18/japanese-flu-drug-clearly-effective-in-treating-coronavirus-says-china>.

unexpected pandemic should therefore be considered windfall and, save truly exceptional circumstances, intervention will not affect those incentives.⁴⁹

In view of the above, the main obstacle for the application of Article 102 TFEU is its own requirement of an undertaking in a dominant position. This requirement must nevertheless also be considered in light of the present situation: EU integration is considered in market definition,⁵⁰ and so should COVID-19's effects of market fragmentation. Not only are the 'conditions of competition'⁵¹ different according to national and regional exposure, many of the stringent restrictions of circulation may prevent effective 'chains of substitution' from operating within those areas.⁵² Competition authorities should therefore be open to much smaller geographic market definitions than usual,⁵³ which can in turn lead to more frequent findings of a dominant position.

A related option might be to explore if the notion of 'situational monopoly' applies under Article 102 TFEU, whereby a firm happens to dominate a market in a very narrow space of time.⁵⁴ This could apply to stockouts caused by COVID-19, for example a single outlet being the only one still selling face masks during a weekend and therefore able to charge exorbitant prices. Such situations are usually the reason for price-gouging laws, but as stated Article 102 TFEU may also apply. Even though a temporal dimension is not referred in the guidance on market definition, analysis of 'shocks in the market' is considered fundamental for testing product substitution.⁵⁵

3.2 Interim measures

The COVID-19 emergency may present an opportunity to boost the application of interim measures, a legal tool that has been used infrequently (e.g. *Broadcom*).⁵⁶ The legal basis for this option is provided by Article 8 of Regulation 1/2003, which empowers the Commission to impose interim measures in cases of urgency where there is a risk that competition will be seriously damaged. This solution is temporary and, according to Article 8(2), it must be renewed as far as the measure is still necessary and appropriate. NCAs are also armed with

⁴⁹ Reduction of incentives is the test for objective justification of a refusal to license in Case T-201/04 *Microsoft* EU:T:2007:289 697. Exceptional circumstances would require a systematic impact on the reliability of intellectual property, which is unlikely to occur outside the (regulated) cases of State expropriation.

⁵⁰ Commission Notice on the Definition of the Relevant Market 32.

⁵¹ *Ibid* 8.

⁵² It is this device that allows unifying areas (or products) which are not directly substitutable, see *ibid* 57.

⁵³ So far the Article 102 TFEU's requirement of involving at least a 'substantial part' of the internal market has posed no constraint, applying to individual cities or ports for example.

⁵⁴ R.A. Posner, *Economic Analysis of Law* 9th ed (Kluwer, 2014) ch.4.9 ⁵⁵ Commission Notice on the Definition of the Relevant Market 38.

⁵⁵ Commission Notice on the Definition of the Relevant Market 38.

⁵⁶ Case AT.40608 *Broadcom*.

this tool, for example of Italy, France or Spain⁵⁷ – three of the first Member States to suffer the social and economic consequences of the COVID-19 pandemic. If competition authorities want to ensure that certain goods remain available at competitive prices, as indicated by the ECN, they are advised to explore this option.

The recent experience of the Commission imposing interim measures is limited. In 2017, in the context of keeping a healthy competitive atmosphere in digital markets, Commissioner Vestager pointed out that interim measures may be an interesting tool in special circumstances.⁵⁸ It seems fair to say that the current emergency situation can be considered as a special circumstance.

While interim measures provide an attractive option for temporary and rapid tailor-made solutions, competition authorities must nevertheless estimate the resources and time required. Philip Lowe and Frank Maier-Rigaud, two former officials of DG Competition, have stated that the adoption of interim measures requires a full-blown investigation to be sure that there is a prima facie infringement.⁵⁹ Otherwise, they argued, the interim measures are likely to be rejected in judicial review. A prima facie infringement nevertheless does not require the certainty of a final decision, being satisfied with the probability of the infringement.⁶⁰ Competition authorities are therefore ready to proceed in relation to this condition after their statement of objections.⁶¹ Lowe and Maier-Rigaud also noted that interim measures may create incentives for undertakings to be more cooperative with competition authorities.⁶² However, absent regular use of such measures this is hypothesis remains speculative.

In this regard, we suggest the creation of special working teams devoted to carrying out rapid inquiries concerning conduct in markets most closely affected by COVID-19. The Competition Commission of South Africa has indeed created a new force task to investigate excessive price cases as a response to the coronavirus crisis,⁶³ and the CMA has also taken steps in this direction.⁶⁴ A similar priority could be considered by other NCAs. This proposal

⁵⁷ See for Italy Art 14-bis of Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato; for France Article L464-1 du Code de Commerce; and for Spain Art 54 of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

⁵⁸ 'EU Considers Tougher Competition Powers' *Financial Times* (2 July 2017).

⁵⁹ Philip Lowe and Frank Maier-Rigaud, 'Quo Vadis Antitrust Remedies', *Fordham Competition Law Institute* (Juris Publishing 2008) 609.

⁶⁰ Case T-44/90 *La Cinq* EU:T:1992:5 61.

⁶¹ Article 27(1) of Regulation 1/2003.

⁶² Above n 59, p.610.

⁶³ 'COVID-19: Immediate Response to Anti-Competitive Conduct during the State of National Disaster' <<http://www.compcom.co.za/wp-content/uploads/2020/03/CCSA-COVID-19-statement-20-March-updated.pdf>> accessed 20 March 2020.

⁶⁴ 'CMA Launches COVID-19 Taskforce' <<https://www.gov.uk/government/news/cma-launches-covid-19-taskforce>> accessed 23 March 2020.

would not demand a big structural change and it would allow them to adapt their enforcement agenda effectively to the current needs of their respective societies.

In comparison, other European agencies have similar means of intervention: the powers of the European Securities and Markets Authority (ESMA), a financial regulatory agency created in the aftermath of the 2007 financial crisis, to adopt interim measures are particularly relevant.⁶⁵ The difference with the interim measures that the Commission can adopt is the moment in which the parties affected by the measure are heard. The Commission must hear the parties before adopting the measure, which can delay the effects of the measure.⁶⁶ The Commission may shorten the time-limit to hear the parties to one week.⁶⁷ However, in the case of interim decisions adopted by ESMA, the parties can be heard after the measure has been adopted.⁶⁸ Once the parties have been heard, if ESMA is still convinced of the necessity of the interim decision, it would issue a confirmatory decision. This allows ESMA to intervene more rapidly than the Commission in situations when time is paramount.

The 2007 financial crisis taught that the supervisory agencies needed to have instruments for quick interventions, and the power of ESMA to issue interim decisions is a product of this lesson. By the same token, the COVID-19 crisis may bring two lessons for competition law: the reinforcement of the idea that the prohibition of excessive prices must always be present in competition law regimes and the need of providing the Commission with tools for early and timely interventions. We understand that a reform of the Commission's powers may not be the priority at this moment; let alone that it would require legislative action. However, with or without such reform, this is an appropriate time to be more courageous in applying competition law.

4 Collusion

Competition authorities should remain vigilant over cartels in times of emergency. History shows that economic downturns are periods when collusion is more likely: when demand is expanding it pays to compete, when there is a contraction, it pays to cooperate to protect profits for the industry as a whole. When the financial crisis hit, the then Commissioner Kroes indicated that she would not revert to a policy of crisis cartels as when the oil crisis hit in the 1970s. At that time a number of agreements were exempted, often linking exemption to measures taken by cartel members to soften the impact of the crisis on workers. Former

⁶⁵ Art. 25 of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. For completeness, ESMA issued a consultation paper in December 2019 that contains suggestions to formalize the procedure of adopting interim decisions. See paras 69-74 of the Consultation Paper on procedural rules for penalties imposed on Third-Country CCPs, TRs and CRAs (ESMA43-370-13) of 13 December 2019.

⁶⁶ Art 27 of Regulation 1/2003.

⁶⁷ Art 17(2) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ [2004] L 123/18).

⁶⁸ See eg Art. 25 of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

Commissioner Kroes instead suggested that EU competition policy was mature enough for a policy of ‘tough love’, meaning that competition law would not let down its guard. The ECN rightly seems to want to follow the same approach at the present, referring to action against ‘companies taking advantage of the current situation by cartelising’.

There may however be other arrangements which, without configuring a cartel, may prove especially detrimental under Article 101 TFEU in the context of COVID-19. To some extent they will be as unforeseeable as the present emergency, so competition authorities must remain open to harm which does not resemble previous enforcement experience or gathers economic consensus – as indicated recently by the Court of Justice by finding, without any precedent to speak of, restrictions by object in misleading campaigns about medicinal properties and in pay-for-delay agreements with generic producers.⁶⁹ Misleading campaigns pose a particular risk in light of the needed public information about the virus, and it is desirable that competition authorities act swiftly to censure agreements that manipulate public fears to discriminate against particular Member States, charge higher prices, or exclude competitors.

At the same time, in these exceptional circumstances, cooperation between undertakings may be in the public interest. The ECN refers to ensuring ‘the supply and fair distribution of scarce products to all consumers’. Many goods and services fall under this, notably food and other day-to-day commodities, which may require allowing supermarkets and other actors on the supply chain to agree on opening hours or joining forces to supply them – as it already happens for regulated professions like pharmacists. The scope of useful cooperation can nevertheless be drawn wider than supplies, in particular by ensuring that workers in contact with the public are not endangered. This kind of cooperation should also take the degree of emergency into consideration, such as the current lack of emergency medical equipment, which may involve setting quantities to be manufactured by different firms which would raise objections in other circumstances.

The ECN has stated that it ‘will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply’, advising undertakings to reach out to competition authorities for informal guidance. However, this approach more or less replicates existing practice and is unsatisfactory: there is no transparency and it offers few safeguards that like cases will be treated alike.

Therefore, we propose that NCAs should instead provide for a notification system for these cooperative agreements. In exchange, NCAs will undertake not to intervene in relation to notified practices but will reserve the right to take either of the following steps: (i) to request firms who submit patently anticompetitive agreements to abandon these, thus nipping anticompetitive action in the bud, or (ii) to advise firms on whether less restrictive options may be available.⁷⁰ This should not overwhelm NCAs: a well-formulated standard form can

⁶⁹ *Hoffman-La Roche II* and Case C-307/18 *UK Generics* EU:C:2020:52.

⁷⁰ The ECN refers that one of the justifications for not intervening (other than the apparent lack of competitive harm) is that these practices would ‘generate efficiencies that would most likely

be created by the ECN to allow one of two officials to sift the notifications and to build up best practices as notifications come in. Lessons from the state aid practice discussed above indicate that this is feasible.

This proposal is not unprecedented. In the aftermath of the Katrina and Rita hurricanes the FTC and DOJ devised a streamlined procedure to issue business review letters to firms wishing to cooperate with competitors but uncertain about the legality of their conduct.⁷¹ The agencies undertook to respond within five working days of receipt. Parties wishing to notify were asked to explain how the cooperation is related to the natural disaster, explain the rationale for their proposal, the market this would cover, the temporal and geographic scope of the agreement and to send documents that contained the contents of what was agreed as well as the names of customers and competitors. A business review letter certifying that the agency sees no concerns would be valid for one year but it could be renewed by re-notification if this is still necessary to respond to the disruption caused by the hurricanes.

The proposal we have in mind here is analogous save that we would not recommend that the competition authority respond to every notification, but only issue advice when the agreement is patently out of line (i.e. it does not adequately address the stated concern, notably hidden cartels) or where less restrictive alternatives can be identified relatively easily and the parties refuse to implement them. Absence of response from the NCA would be interpreted as an indication that the agreement is unproblematic and no fine would be expected. As indicated by the ECN, this would only apply to agreements with a time limit. Coherence between NCA decisions would be less important than usual considering the emergency, so that a practice would be able to be implemented in a Member State even if it is objected in others. The ECN could institute a review mechanism by the Commission for such situations.

In contrast to this proposal, the UK government is intending to revise the competition legislation so that certain forms of cooperation among supermarkets are tolerated for a temporary period.⁷² This is not a smart approach. It is limited to a specific set of market actors, which might not be sufficient if cooperation is needed in other levels of the value chain or in other markets altogether. This is why the CMA supplemented the Government's announcement by reassuring that 'the CMA has no intention of taking competition law

outweigh any such restriction'. It would nevertheless not be advisable to model the practice around the exemption for efficiencies of Article 101(3) TFEU, which the Commission has been reluctant to apply to some restrictions by object and requires a clear pass-on to consumers, thereby excluding situations like worker safety. A better alternative would be to consider that the NCAs are applying their enforcement discretion in relation to objective justifications based on public interest in line with the *Wouters* case law – hence the obligation of proportionality.

⁷¹ DOJ Business Reviews and FTC Staff Advisory Opinion letters related to hurricane Katrina and hurricane Rita aftermath <https://www.justice.gov/atr/doj-business-reviews-and-ftc-staff-advisory-opinion-letters-related-hurricane-katrina-and>

⁷² 'Supermarkets to join forces to feed the nation' 19 March 2020

<https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>

enforcement action against cooperation between businesses or rationing of products to the extent that this is necessary to protect consumers – for example, by ensuring security of supplies.’⁷³ It further insisted that ‘unscrupulous businesses exploiting the crisis as a “cover” for non-essential collusion’ would not be tolerated.⁷⁴

A blanket exception such as the UK’s proposed legislation makes it all too tempting for firms to collude, and it is impossible to delineate the boundary between lawful and unlawful cooperation without open-ended principles. If the last 40 years of competition law have shown us anything, it is how hard it is to set out formal conditions to distinguish anti-competitive agreements from those that enhance efficiency. The specific content of the UK legislation is not available at this time, but it is hard to see what advantage such a statutory exception has over a case-by-case ex ante analysis informed by the current period of crisis.

5 Merger review

On 16 March, the IMF issued a warning about the possibility of a bankruptcy cascade due to the severe economic downturn that COVID-19 may cause.⁷⁵ Indeed, experts have sent a letter to the Dutch House of Representatives urging it to pass as soon as possible the new bankruptcy law which was already prepared to ease the major impact that the crisis may exert upon Dutch companies.⁷⁶ At this stage of the pandemic, it is difficult to foresee whether the economic crisis that is about to come will have the same deleterious effects than the 2007 financial crisis. Nonetheless, there are already some voices pointing out that, for certain industries such as airlines, the COVID-19 crisis may be even more devastating.⁷⁷ Airlines have already cancelled a large number of routes and flights and, according to one report, if this situation lasts until May 2020 a large number of airlines may go bankrupt.⁷⁸ Adverse consequences are also likely to apply to sectors like tourism and services.

Against this backdrop, it is not unreasonable to think that in the short or medium term we might witness a new wave of mergers to rescue companies facing serious viability difficulties. Under EU merger control, merging parties can resort to the failing firm defence

⁷³ COVID-19: CMA approach to essential business cooperation (19 March 2020). <https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation>

⁷⁴ Ibid.

⁷⁵ ‘Policy Steps to Address the Corona Crisis’ (International Monetary Fund 2020) Policy Paper No. 20/15 <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/03/16/Policy-Steps-to-Address-the-Corona-Crisis-49262>>.

⁷⁶ Tom Kreling, ‘Expers pleiten voor zo snel mogelijke invoering nieuwe faillissementswet’ *de Volkskrant* (18 March 2020) <<https://www.volkskrant.nl/cs-b12d8ab4>> accessed 19 March 2020.

⁷⁷ This concern was voiced by the Chief Executive of British Airlines in his speech “the Survival of British Airways”. See ‘Coronavirus Is Grounding the World’s Airlines’ *The Economist* (15 March 2020) <economist.com/business/2020/03/15/coronavirus-is-grounding-the-worlds-airlines> accessed 18 March 2020.

⁷⁸ ‘Most Airlines Face Bankruptcy by End of May, Industry Body Warns’ *Financial Times* (16 March 2020) <<https://www.ft.com/content/30a3a26e-674f-11ea-800d-da70cff6e4d3>> accessed 18 March 2020.

if the merger is likely to significantly impede effective competition. This option gives green light to those concentrations where one of the undertakings involved in the transaction would exit the market unless the merger takes place. The reason that lies behind this option is intuitive: society could be better off post-merger than in a scenario where one competitor had to leave the market due to financial distress: the assets of the failing firm remain productive and fewer jobs are lost.⁷⁹

The acceptance of the failing firm defence in times of financial distress is not unprecedented. In *Aegean/Olympic II*,⁸⁰ the Commission cleared the merger between two Greek airlines on the grounds that, Olympic, a division of the investment holding Marfin, was no longer viable. The Greek economy was hit by the 2007 financial crisis, which affected the travel sector. As pointed out by one of the firms, the number of passengers fell from 16.5 million to less than 13 million between 2008 and 2012, and the number of passengers on domestic routes from Athens also dropped from 6.1 to 4.5 million in three years.⁸¹ The Commission acknowledged that, even though the Hellenic Civil Aviation Authority estimated that the demand would be more stable in the medium term, the evolution of the sector was uncertain.⁸²

This precedent may be a temptation for companies that will suffer the impact of COVID-19 in the coming months. However, the failing firm defence may be challenging for merging parties. According to the Commission,⁸³ the legal test for the failing firm defence consists of three cumulative conditions: (i) the failing firm would in the near future be forced out of the market; (ii) there is no less anti-competitive alternative purchase than the notified merger; and (iii) the assets of the failing firm would inevitably exit the market. If these three requirements are met, it means that there is no causal link between the merger and the detriment to competition: absent the merger the acquiring company would dominate the market anyway.⁸⁴ The evidentiary burden of proof is on the parties,⁸⁵ and some uncertainty remains, for example it is not clear what 'near future' means in condition (i) and the inevitability test of condition (iii) sets a standard of proof which some consider too high.⁸⁶

In light of the intrinsic difficulties of the legal test of the failing firm defence and the current emergency situation, some might argue that a relaxation of the conditions of the legal test is timely and adequate. Others might even suggest a general loosening of merger review standards. Similar questions were posed concerning the economic crisis of a decade ago and

⁷⁹ G. Monti and E. Rouseva 'Failing Firms in the Framework of the EC Merger Regulation (1999) 24 European Law Review 38

⁸⁰ Case No COMP/M.6796 *Aegean/Olympic II*. Decision of 9 October 2013.

⁸¹ *Ibid*, para 651.

⁸² *Ibid*, paras 656-657.

⁸³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ [2004] C 31/5), para 90.

⁸⁴ *Ibid*, para 89.

⁸⁵ *Ibid*, para 91.

⁸⁶ Antonio Bavasso and Alistair Lindsay, 'Causation in EC Merger Control' (2007) 3 Journal of Competition Law and Economics 181, 194-195.

the health of the financial sector. At that time, the Commission responded that for the same reason the test is not stricter in times of economic prosperity, it should not be more lenient in times of economic downturn.⁸⁷ We suggest the same policy stance is valid today. Indeed, merger should be the last option to be considered and insolvency or state aid should be preferred when firms struggle.

If we compare the welfare effects of merger and insolvency, the latter is preferable: assets are allocated among different purchasers, avoiding the risk of one player gaining pre-eminence over others. Furthermore, an effective insolvency regime is also a stimulus to enter markets in the first place, thus stimulating competition. This is why the failing firm defence tolerates an otherwise troublesome merger only when the assets would otherwise disappear: insolvency is the preferred option, merger is a second-best.

State aid has some anticompetitive effects, in that it gives the beneficiary an advantage, but the state aid regime for firms in difficulty is also designed to stimulate the development of a plan to restructure the beneficiary so that in the long term it returns to be a viable competitor. Granted, the state aid option places the cost on the state, but its anticompetitive effects are temporary – a merger's effects are permanent.^{88 89}

Both state aid and merger control face the risk of Type 2 error: conferring an unfair competitive advantage on the beneficiary or the merged entity respectively. The failing firm defence tolerates this risk only when there is no alternative solution: the state is unwilling to carry out the rescue and the merger has at least a chance of keeping productive assets in the market.

In sum, the design of the failing firm defence already acknowledges that mergers are the last resort, and these are tolerated in situations when there is a chance that the merger has some countervailing efficiencies.⁹⁰ We understand that choosing one among the different regulatory tools is not only the task of competition authorities, but also of state and local governments. Moreover, insolvency laws remain under the auspices of Member States of the EU, which impedes the Commission to provide an EU-wide response. Having said that, our proposal is that governments and competition authorities should pause for reflection on the use of merger control and the failing firm defence instead of using other regulatory

⁸⁷ 'Roundtable on Failing Firm Defence' (OECD 2010) DAF/COMP(2009)38 187 <<https://www.oecd.org/competition/mergers/45810821.pdf>>.

⁸⁸ Although, as in mergers, removing State aid may be difficult because of rent-seeking behaviour. See John Fingleton, 'Competition Policy in Troubled Times' (2009) <<https://publications.parliament.uk/pa/cm200809/cmselect/cmdereg/329/329we12.htm>> accessed 19 March 2020.

⁸⁹ As noted by the former Deputy Assistant Attorney General, Carl Shapiro, recessions are temporary, but mergers are forever'. See Carl Shapiro, 'Competition Policy in Distressed Industries' (2009) <<https://www.justice.gov/atr/speech/competition-policy-distressed-industries>> accessed 19 March 2020.

⁹⁰ G. Monti, 'Merger Defences' in G. Amato and C-D Ehlermann (eds), *EC Competition Law – A Critical Assessment* (Hart, 2004).

instruments that may be more beneficial for consumers in the long run. Ideally, they should be able to envision a smart regulatory strategy to optimize their limited resources and achieve the best regulatory outcome. For instance, public authorities can devote their resources to assist the most-necessitated industries in the coronavirus crisis, while leaving competitors to acquire assets of exiting firms in other sectors first through insolvency laws and, as a last resort, through rescue mergers.

At a more general level, it should be remembered that the stimulus packages that countered the financial crisis fueled a wave of corporate acquisitions to which merger control posed little regulatory obstacle. Post-crisis we might see a similar merger wave. For this, some lessons from the recent past are worth considering: in the digital sector many acquisitions slipped under merger thresholds due to low turnover of startups, while others saw their impact discounted because of no market overlaps of digital services.⁹¹ Following the adage that generals always prepare to fight the last war, there have been several proposals to adjust merger control guidance to the acquisition of digital startups.⁹² The scope of these proposals might nonetheless prove too narrow for a merger wave that engulfs the whole economy.

In this sense, one proposal has urged US competition agencies to ban every merger involving companies with more than 100 million dollar in annual revenue.⁹³ The main idea is to prevent an uncontrolled increased of market concentration during the present crisis given that today agencies need to devote their resources to more pressing needs. In our view, this proposal has certainly some merit, particularly if we consider some sensitive sectors such as education or health. The strict rules of social distancing that are being imposed in multiple countries to stop the rapid spread of COVID-19 have forced educational centres to replace in-person classes by online teaching. As a consequence, the demand of online conference apps such as Zoom has skyrocketed in a matter of weeks. Similar concerns can be voiced regarding developers of data-driven technologies that are key to track the spread of the pandemic.⁹⁴ It is plausible to imagine that this may awaken the corporate giants' appetite for acquiring such companies in times of crisis and, therefore, careful scrutiny of these mergers is crucial for the sake of consumers.

⁹¹ See the expert Report to the Commission by Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, 'Competition Policy for the Digital Era' <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

⁹² Not only the referred Report to the Commission but also proposals by Member States, notably Germany's Report by the Commission 'Competition Law 4.0' https://www.bmwi.de/Redaktion/EN/Downloads/a/a-new-competition-framework.pdf?__blob=publicationFile&v=2.

⁹³ 'Open Markets Calls for Ban on Takeovers by Large Corporation and Funds for Duration of Crisis' (*Openmarketinstitute.org*, 21 March 2020) <<https://openmarketsinstitute.org/blogs/open-markets-calls-ban-takeovers-large-corporation-funds-duration-crisis/>> accessed 23 March 2020.

⁹⁴ Anindya Ghose and D Daniel Sokol, 'Unlocking Platform Technology to Combat Health Pandemics' (*Yale Journal on Regulation*, 18 March 2020) <<https://www.yalejreg.com/nc/unlocking-platform-technology-to-combat-health-pandemics-by-anindya-ghose-and-d-daniel-sokol/>>.

The main issue in translating this proposal to the EU merger system is that it would require legislative intervention to change the thresholds of Regulation 139/2004. As mentioned, proposals and amendments for the digital sector are on their way. It would be encouraging if these proposals led to some concrete results in the interim which might be transposed more generally to the mergers that may follow the present pandemic. In the meantime, we note that the Commission has adopted special measures regarding merger control, such as requesting merging companies to delay their notifications as much as they can.⁹⁵ These procedural measures are welcome.

Nonetheless, a more skeptical attitude towards mergers during the COVID-19 emergency would be healthy and easy to implement. Safeguarding a competitive market structure is a conservative but time-tested way to protect consumers in the long run, and the substantive standard of Regulation 139/2004 and the Commission guidance provide enough tools to object to market concentration. Competition authorities can do a lot in this regard by simply increasing the scrutiny of market definition and potential competition that underestimates the merging parties' competitive pressure and overestimates those of its competitors, notably closeness of competition as a defense by merger parties. This can be supplemented by attempting to mainstream theories of harm to innovation formulated for pharmaceutical and agro-chemical markets: the loss of competing R&D post-merger is not exclusive to those heavily regulated environments.⁹⁶

6 advocacy and deregulation

A recent article notes how in the United States, the cross-border movement of professionals is much more regulated than in the EU. It reports that states like Massachusetts have recently agreed to reduce the regulatory burden on recognizing trained nurses and other medical professionals qualified in other states.⁹⁷ Free movement of this essential part of the labour force helps fight the pandemic but it also goes to show that some regulatory standards are unnecessary. It won't be the first thing that policy leaders will consider, but the crisis may serve to reveal regulatory burdens that are either completely unnecessary (emergency or not) while other burdens might be removed only for emergencies.

In theory, EU Law allows the NCAs to intervene against national regulation that has anticompetitive effects in certain limited circumstances. Italy has conferred more serious advocacy powers to its NCAs, but unfortunately the ECN plus Directive failed to incorporate provisions mandating a harmonized advocacy function. In the longer term, this should be remedied. For the time being, NCAs can play a useful role in signaling market failures that come to their attention.

⁹⁵ ec.europa.eu/competition/mergers/information_en.html

⁹⁶ See Case M.7932 Dow/DuPont (27.3.2017) and Case M.8084 Bayer/Monsanto (21.3.2018), in particular the use of 'innovation spaces' for targeted research which covers several defined markets.

⁹⁷ <https://reason.com/2020/03/15/tired-there-are-no-libertarians-in-a-pandemic-wired-there-are-only-libertarians-in-a-pandemic/>

But there are limits to deregulation. On 19 March 2020 the UK government announced it would remove certain regulations that limit the number of hours drivers may work to ensure supplies to shops.⁹⁸ This seems a highly risky strategy since the rules are there to guarantee that drivers are well-rested and road accidents are avoided.

7 Conclusion

EU competition law enforcement is not in the front-line during the COVID-19 crisis, but competition authorities cannot avoid taking a stand on how their enforcement practices will affect the efforts to combat it. In this brief paper we have signaled some of the major challenges and how these might be confronted.

The state aid policy announced to date broadly replicates efforts seen during earlier crises: it remains to be seen if this is sufficiently flexible. As indicated above, a more generous use of Article 107(2)(b) TFEU might be requested by Member States. To date the Commission is following its normal approach of affording flexibility with procedures and giving states some latitude to assist undertakings, while retaining some powers to ensure that aid is effective and proportionate: the more generous the Commission is towards Member States, the tougher the ex post requirements are. If new COVID-19 frameworks are released we might, as with state aid to banks, find that there are more requirements for the beneficiary.

When it comes to anti-competitive behaviour, current enforcement priorities (e.g. over digital markets and collusion) should not be affected significantly but competition authorities must remain vigilant to prioritise COVID-19-related situations as they emerge. A more imaginative use of the tools available to restrain firms from exploiting or colluding under market conditions affected by the virus may be necessary, which may act in overlap and complementary to consumer protection regimes such as price-gouging law. It may also be opportune to use this moment to take advantage of interim measures more frequently.

Some cooperation between undertakings will be necessary in light of COVID-19 and we suggested that a policy statement followed up by a notification system like that deployed in the US after two serious hurricanes hit is a desirable policy initiative. The Commission's notification requirements for state aid resulting from COVID-19 reveal that creating a simple template for notification that allows the Commission or NCAs to review planned measures is workable, and the statement by the ECN that competition authorities will not intervene against certain practices would benefit from a fleshed-out procedure.

For merger control, it is likely that those governments who have insisted on merger reform to support national champions might find that COVID-19 offers them another opportunity to advance their arguments. However, the lesson of earlier crises hold up: there is no need to loosen merger standards as there are better-placed tools to handle firms in difficulty. The

⁹⁸ 'Supermarkets to join forces to feed the nation' 19 March 2020 (<https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>).

competition community should hold the fort here. Preparations should also be set in place for a potential wave of mergers fueled by financial stimulus.

It is with advocacy that competition agencies have the biggest role: governments will be proposing many new rules, revoking others. It is the task of all independent agencies to serve as advisors to lawmakers to ensure that measures taken in an emergency weigh up all costs and benefits appropriately. It is hoped that this also spurs the Commission to review the ECN-plus Directive to empower NCAs to discharge this function.