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## Competition advocacy during and in the aftermath of the COVID-19 crisis

Note by the UNCTAD secretariat

### *Summary*

Competition advocacy refers to the promotion of competition principles in policy discussion and regulatory processes with Governments and public bodies, the private sector and civil society. Competition advocacy is an influential tool in promoting a competition culture.

The coronavirus disease of 2019 (COVID-19) crisis sparked new initiatives from competition authorities to respond to a fast-paced and evolving market environment but also tested pre-established advocacy tools. Competition authorities carried out advocacy work by means of advising Governments on how to regulate markets to reduce the administrative burdens on companies in crisis situations and to facilitate the entry of new companies.



## I. Introduction\*

1. Governments actively intervened against the coronavirus disease of 2019 (COVID-19) pandemic through highly restrictive measures, forcing widespread confinement to prevent the spread of infections across the population. These measures severely impacted the economy, notably in sectors such as tourism, hospitality, air transport and retail, leading to business bankruptcy and shutdowns and unemployment.
2. Markets suffered a strong setback due to uncertainty and consumption pattern alterations that resulted from the crisis,<sup>1</sup> while the use of digital platforms and electronic commerce increased considerably and led to expanded market power for some digital players.
3. Times of crisis tend to set aside competition in favour of strong state intervention. The COVID-19 pandemic crisis induced Governments to act swiftly without necessarily prioritizing competitive markets.<sup>2</sup>
4. Competition law enforcement remained effective and unchanged as competition rules proved to be flexible. Competition authorities monitored markets, as well as the legislative and regulatory measures taken by Governments, public procurement rules and State aid aimed at economic recovery, and provided advice and expertise, using competition advocacy tools to protect and promote the structures and functioning of competitive markets.
5. The goal of this background note is to outline (a) how competition advocacy can be an instrument to spread competition culture and improve the functioning of markets, and (b) how competition authorities are responding to the challenges posed by the COVID-19 pandemic.

## II. Competition advocacy as an instrument to spread a competition culture

6. Competition advocacy refers to the promotion of competition principles in policy discussions and regulatory processes, but also when addressing market players and other stakeholders.<sup>3</sup>
7. For a competition authority, advocacy entails: (a) promoting a competitive environment, (b) advising Governments and public bodies on legislative and regulatory frameworks and (c) raising awareness of the private sector and civil society on the benefits of competition for consumer welfare, economic growth and sustainable development.
8. Advocacy for pro-competitive policies is especially important when making a transition from public and monopolistic sectors to liberalized markets, through privatization

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\* The content of this background document draws on responses submitted by member States from different regions of the world to a 2020 UNCTAD survey. Responses were analysed between January and March 2021.

<sup>1</sup> Due to the restrictions adopted by Governments and the change in habits in the consumption of goods and services. Indeed, the ban on opening shops to avoid physical contact and reduce the number of contagions has induced consumers to buy online to the detriment of purchases at traditional shops.

<sup>2</sup> Some member States, such as Paraguay, have proposed price fixing for essential consumer goods and services to avoid speculation and excessive prices.

<sup>3</sup> UNCTAD, 2014, Communication strategies of competition authorities as a tool for authority effectiveness, presentation by the UNCTAD secretariat at the fourteenth session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 10 July; see also TD/B/C.I/CLP/28.

and deregulation, namely in strategic economic sectors, such as telecommunications and energy.<sup>4</sup>

9. Activity under competition advocacy is a line of action aimed at preventing and resolving problems in the functioning of markets that arise mainly from the public sector (Governments, parliaments and regulators).

10. Engaging in competition advocacy is especially critical for competition authorities in developing countries, and economies in transition, in promoting and advocating the objectives and benefits of competition policy, as well as recommended changes to legislative frameworks. Promotion of competition advocacy seeks to build capacity to effectively enforce competition rules while these economies are undergoing fundamental market changes. Furthermore, in developing countries and countries with economies in transition, advocacy is less controversial than enforcement, as it translates into awareness-raising, information and advice on taking action, all of which are positive, pedagogical and non-conflicting in nature.

11. One of the most significant areas for competition advocacy is that of regulatory reforms and/or the privatization and deregulation of economic sectors or strategic companies, as developing countries and countries with economies in transition tend to have State-owned companies in infrastructure industries (i.e. telecommunications, electricity, railroads, air transportation, ports and maritime transport, petroleum and natural gas). The competition assessment and advice provided can be extremely valuable, contributing to increased efficiency and an enabling business environment, where foreign direct investment and innovation are welcomed while also allowing for enough opportunities for small and medium-sized companies and supporting a smooth transition to a market economy. The advisory role performed by competition authorities with regard to new legislation and regulation in this context should be undertaken from an economic and legal perspective in an independent and impartial manner.

12. Competition advocacy addressed towards the private sector and civil society has different objectives, underscoring market openness, removal of barriers, reducing bureaucracy and costs, while increasing business opportunities, including for small and medium-sized companies, as well as widening choice, lowering prices and improving quality, and overall increased consumer welfare.

13. Some challenges may exist related to limited independence from Government and important market players and limited recognition from the public and private sectors, businesses and consumers, which may discourage the development of competition advocacy. To overcome this handicap, the support of more experienced competition authorities and of international organizations and networks can help young competition authorities in developing countries to improve their advocacy work.

### **UNCTAD framework**

14. The UNCTAD Model Law on Competition<sup>5</sup> addresses competition advocacy and its relevance in chapter VII, discussing its importance in the relationship between a competition authority and regulatory bodies, including sectoral regulators and regarding regulation and regulatory reform. Indeed, the latest revision of chapter VII commentaries highlights that:

...the advice of a competition authority is particularly valuable in ensuring that the newly created regulatory regime will indeed produce the expected outcomes in terms of enhanced efficiency. The expertise of a competition authority may, for example, be helpful to identify measures to facilitate new entry. As to other forms of

<sup>4</sup> UNCTAD, 2014, Benefits of competition policy for consumers, presentation by the UNCTAD secretariat at the fourteenth session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 8 July; see also TD/B/C.I/CLP/27.

<sup>5</sup> The UNCTAD Model Law on Competition was adopted in the early 1990s. It consists of a part 1, on substantive possible elements for a competition law, that encompasses 13 provisions and a part 2, on commentaries to chapters of the Model Law on Competition, which are regularly updated (see TD/B/C.I/CLP/L.7, the UNCTAD Model Law on Competition (2017), part 2, revised chapter VII).

regulation, it is suggested that the competition authority is actively involved in the legislative process.

The latest revision of chapter VII further adds that competition authorities' opinions can be even more important with regard to new industries and markets and concludes that several competition law regimes confer on a competition authority an advocacy role at the legislative level.

15. Within UNCTAD technical assistance to member States both at national and regional levels, promoting competition advocacy to create a competition culture through a multi-stakeholder approach plays a central part. Within the dissemination of UNCTAD Voluntary Peer Reviews of Competition law and policy, UNCTAD also regularly organizes advocacy workshops for government officials, parliamentarians, sectoral regulators, the business community, consumer organization, practitioners, and the judiciary.

16. Other multilateral bodies have developed practical tools to support competition advocacy, such as the International Competition Network (ICN)<sup>6</sup> and the *Competition Assessment Toolkit* of the Organisation for Economic Co-operation and Development.<sup>7</sup> ICN have also published relevant reports, one on assessment of further ICN work on competition advocacy and another on experiences in conducting competition advocacy in digital markets.<sup>8</sup>

### **III. The challenges posed by the COVID-19 pandemic**

17. Competition authorities have reacted to the market disruptions through various measures, addressing the shortage and price gauging of essential consumer goods, relaxing application of the law to certain types of agreements between companies and advising Governments on how to take decisions to deal with the health and economic crisis.

18. The advocacy work carried out by competition authorities has become essential in the management of the crisis, advising Governments on how to regulate markets to reduce the administrative burdens on companies in crisis situations and to facilitate the entry of new companies.<sup>9</sup>

#### **A. Identifying competition problems arising from measures taken due to the COVID-19 crisis**

19. The economic impact of the pandemic has led Governments to take a strong and active role to protect public health, reduce the short-term economic damage of the pandemic, and encourage a strong, sustainable and inclusive long-term recovery. The pandemic outbreak led to the rupture of supply chains, the deadlock of several economic activities, especially services (retail, hospitality, tourism, cultural and sporting events, among others) and the suspension of international transportation.

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<sup>6</sup> ICN, 2011, Competition advocacy toolkit, part I, available at [internationalcompetitionnetwork.org](http://internationalcompetitionnetwork.org).

<sup>7</sup> Organisation for Economic Co-operation and Development, 2010, *Competition Assessment Toolkit*, available at [www.oecd.org/competition/toolkit](http://www.oecd.org/competition/toolkit).

<sup>8</sup> ICN, 2009, Report on assessment of ICN members' requirements and recommendations on further ICN work on competition advocacy, available at <https://www.internationalcompetitionnetwork.org/portfolio/assessment-of-icn-work-on-competition-advocacy-2009/>; and ICN, 2019, Report on ICN members' recent experiences (2015–2018) in conducting competition advocacy in digital markets, available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/AWG\\_AdvDigitalMktsReport2019.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/AWG_AdvDigitalMktsReport2019.pdf).

<sup>9</sup> As will be seen below (in section 1.3.), some competition authorities have established specific instruments to detect and receive complaints in relation to the functioning of markets affected by the pandemic.

20. Many emerging and developed countries' economies are facing a low economic growth projection, heightened socioeconomic challenges,<sup>10</sup> including worsening unemployment, inequality and poverty.<sup>11</sup> Another problem generated by the pandemic is the increase in informal activities, which is the reason economic reactivation is one of the most pressing problems facing economies, especially in developing countries.

21. Competition authorities should work together with Governments to advise them on the design of economic recovery measures, through competition advocacy, a crucial instrument especially in times of crisis. Competition authorities need to consider post-COVID-19 scenarios and explain that a too lenient approach may hinder economic recovery in the medium and long term. Indeed, competition authorities once again have an important role in promoting competitive markets and good regulation and, therefore, should use the instruments granted them by law to assert their opinions.

22. In view of the current situation, competition authorities have chosen to focus on three areas for tackling this crisis: pro-competitive reforms and good regulation, public procurement and State aid.

## **B. Competition as a guiding principle in the adoption of measures for economic recovery**

23. In previous crisis situations, such as for the 2008/09 financial crisis,<sup>12</sup> there was a risk that governments might intervene in markets at the expense of competition, for example, relaxing merger laws, adopting protectionist regulations or targeting stimulus towards “national champions”.<sup>13</sup>

24. Pro-competitive reforms are of particular importance to cope with the current crisis as the lack of liquidity requires measures that favour a rapid recovery of consumption levels to those prior to the outbreak of COVID-19. Therefore, competition authorities have to implement strong advocacy efforts to avoid having short-term objectives – for instance, saving firms from bankruptcy – damage competition in markets and thus weaken economic recovery in the long run. Post-COVID-19 scenarios have to be considered even in the middle of a crisis, and it is up to competition authorities to send a strong message that competition is not the problem, as markets must continue to function efficiently for the benefit of consumers, but rather should be part of the solution.

25. In relation to longer-term measures, advocacy efforts by competition authorities should prevent these reforms from creating new regulatory barriers to market entry and effective competition. A robust and sustainable recovery requires pro-competitive structural reforms and preventing unjustified regulatory barriers from impeding preventing free

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<sup>10</sup> UNCTAD highlights that the brunt of the hit to the global economy is being felt in developing countries with limited fiscal space, tightening balance of payments constraint and inadequate international support. See UNCTAD, 2021, Trade and Development Report Update: Out of the frying pan... into the fire?, Geneva.

<sup>11</sup> UNCTAD, 2020, statement of the Secretary-General of UNCTAD on the occasion of the International Day of Microenterprises, Small and Medium-sized Enterprises, virtual event, 24 June, available at <https://unctad.org/en/pages/SGStatementDetails.aspx?OriginalVersionID=262>.

<sup>12</sup> See Organisation for Economic Co-operation and Development, 2009, Competition and the financial crisis, available at <https://www.oecd.org/competition/sectors/42538399.pdf>.

<sup>13</sup> During the last financial crisis, State aid, nationalization and mega-mergers all took place, and two schools emerged as regards the role of competition law. Some argued that competition rules should be suspended for the duration of the crisis, thus allowing regulators to focus only on the objective of safeguarding the stability of the financial system. Others stressed instead the importance of applying strict competition rules during a crisis in order to ensure a level playing field and a coordinated reaction to the crisis, and to avoid a wasteful subsidy race between countries to attract depositors and investors. Moreover, the long-term effects of relaxing competition policy can be serious. Mergers that lead to highly concentrated markets in particular are almost impossible to reverse. See UNCTAD, 2010, *Creating Business Linkages* (United Nations publication, New York and Geneva).

access for companies and investors in order to protect domestic producers.<sup>14</sup> Therefore, advocacy efforts will be key in order to assist policymakers to adopt pro-competitive reforms to stimulate economic recovery after the pandemic.

26. In this global and unprecedented situation, which affects both developed and developing countries, competition authorities should remain vigilant with regard to the measures that Governments envisage adopting and make use of the powers granted them by law.

27. The following paragraphs provide some examples of specific measures put in place by Governments and authorities.

28. Examples from developing countries and emerging economies include:

(a) In **Brazil**, in the context of competition advocacy, the power of the country's competition authority, the Administrative Council for Economic Defence, to intervene in measures to relaunch economic activity lies in offering technical support for the public decision-making process, especially by analysing the competition aspects of proposals. The Department of Economic Studies supports decision-making in economic matters for the General Superintendence and Tribunal of the Administrative Council for Economic Defence, as well as other Brazilian authorities, providing technical input in public consultations and participating in technical committees to provide technical support, update scientific knowledge and diffuse a culture of competition defence in society.<sup>15</sup>

(b) In **Egypt**, the country's competition authority, the Egyptian Competition Authority, is always keen to participate in the formulation of public responses to the crisis and advise the Government. Notably, with the aim of cooperating with the Government of Egypt in order to address the implications of the COVID-19 pandemic, the Egyptian Competition Authority has undertaken many advocacy measures in the country's medical sector. The Egyptian Competition Authority has provided guidance, on bid rigging and different methods of detection of infringement, to the Egyptian Authority for Standardized Procurement, Supply and Medical Supplies, which is responsible for the purchasing of certain medical goods from different undertakings and the resale of these products to the different hospitals in Egypt.<sup>16</sup>

(c) In **the Russian Federation**, the main activity of the Federal Antimonopoly Service has been the implementation of powers related to the prevention and suppression of actions that restrict competition on the part of economic entities, natural monopolies and authorities. On 23 September 2020, the Government of the Russian Federation approved a national action plan to ensure the restoration of employment and incomes of the population, economic growth, and long-term structural changes in the economy. According to the plan, the Federal Antimonopoly Service is responsible for the implementation of one of the key initiatives to accelerate the technological development of the economy and increase labour productivity.

(d) In 2020, the Government of **South Africa** adopted the South African Economic Reconstruction and Recovery Plan as part of a national response to COVID-19 triggered by its Disaster Management Act. This legislation aimed at: (i) creating jobs, primarily through aggressive infrastructure investment and mass employment programmes; (ii) reindustrialization of the economy, focusing on growing small businesses; (iii) acceleration of economic reforms to unlock investment and growth; (iv) fighting crime and corruption; and (v) improving the capability of the State. The primary role of the Competition Commission of South Africa in ensuring the plan contributes to the reconstruction and recovery of the South African economy is to regulate competition in a manner that removes restraints and barriers to competition, as well as exempting certain potentially anticompetitive practices that may be necessary to support pro-growth coordination between firms. The Competition Commission has worked closely with the

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<sup>14</sup> See UNCTAD, 2015, Addressing regulations and non-tariff measures to strengthen regional integration and sustainable growth, available at [https://unctad.org/system/files/official-document/ditc2015misc2\\_en.pdf](https://unctad.org/system/files/official-document/ditc2015misc2_en.pdf).

<sup>15</sup> Submission of Brazil in response to the 2020 UNCTAD survey (see footnote\*).

<sup>16</sup> Submission of Egypt in response to the 2020 UNCTAD survey (see footnote\*).

Government and business to provide advice or advocacy regarding specific proposed policy interventions for economic recovery. This is to ensure that competition policy is at the centre of any economic recovery strategies, to increase levels of competition – with priority towards enabling the participation of small and medium-sized enterprises and historically disadvantaged individuals in markets.<sup>17</sup>

29. Examples from developed countries include:

(a) **Australia** is in a good position due to previous reforms to the country's national competition policy that installed principles to guide regulatory policy development. There is a broad principle across all levels of government in Australia to consider competition factors when designing policies. However, there is still a need for the Australian Competition and Consumer Commission, as the competition authority, to be actively engaged with Government and advocate widely for the principles and benefits of competition.<sup>18</sup>

(b) In **Spain**, the National Commission on Markets and Competition can be formally consulted regarding legislative proposals or administrative decisions (i.e. analysis of public procurement tender documents) that the Government of Spain may be developing in order to confront the economic crisis and accelerate economic recovery. In such cases, this leads to the publication of a report with recommendations that include the official position of the National Commission for Markets and Competition on the matter. These reports are not binding, but they are always public.<sup>19</sup>

### C. Public procurement and State aid

30. These are two other areas that competition authorities should monitor closely.

31. Public procurement will be a challenging area in the next few years. The public sector has expanded in most economies in response to the pandemic, and thus its procurement needs will increase, and firms will rely more on public demand due to the crisis. Therefore, competition authorities should work closely with public authorities, especially with public procurement bodies, to guarantee an efficient and competitive public procurement framework. Indeed, an area of government policy in which a competition authority can be especially helpful is procurement policy. A competition authority should be active in advocating reforms in procurement procedures that introduce market discipline. These reforms will translate directly into savings for a country's citizens. Successful advocacy in this arena will also be visible and contribute to the enhancement of the authority's reputation.<sup>20</sup>

32. On economic recovery packages, Governments have provided unprecedented amounts of public funds (subsidies, tax rebates or exemptions, subsidized loans, public investments in companies, etc.) to firms to avoid a major wave of bankruptcies of efficient firms due to a liquidity crisis. It was a fundamental set of measures seeking to reduce the impact of the crisis but, if not correctly designed, could lead to other challenges, such as

<sup>17</sup> Submission of South Africa in response to the 2020 UNCTAD survey (see footnote\*). See also UNCTAD, 2021, *How COVID-19 Affects Microenterprise and Small and Medium-sized Enterprise Access to Markets and Competition: A Review of Key Issues and Recommendations for Future Action* (forthcoming).

<sup>18</sup> Submission of Australia in response to the 2020 UNCTAD survey (see footnote\*); Australian Competition and Consumer Commission, 2020, [Australian Competition and Consumer Commission] receives international competition advocacy award, 23 September, available at <https://www.accc.gov.au/media-release/accc-receives-international-competition-advocacy-award>.

<sup>19</sup> Submission of Spain in response to the 2020 UNCTAD survey (see footnote\*).

<sup>20</sup> Ensuring the effective functioning of public procurement markets necessitates addressing two distinct but interrelated challenges: (a) ensuring integrity in the procurement process (i.e. preventing corruption on the part of public officials); and (b) promoting effective competition among suppliers, including by preventing collusion among potential bidders. These two challenges sometimes merge, for example, where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion.

competitive distortions.<sup>21</sup> Currently, few jurisdictions foresee enforcement powers for competition authorities regarding State aid. Indeed, only the European Union has the power to exert strict control over State aid. However, most competition authorities have advocacy powers to provide advice to Governments on what competition impacts can be expected from a given support measure, and on how to minimize the competition concerns identified.

#### D. Tools for advocacy by competition authorities

33. In response to a 2020 UNCTAD survey on competition advocacy, most competition authorities<sup>22</sup> refer that they use similar measures in conducting their advocacy role. Indeed, the competition advocacy tools used include several instruments to detect existing and emerging obstacles to effective competition, including those caused by the pandemic.

34. These instruments include:

- **Market studies**, which consist of a comprehensive economic and regulatory analysis of the dynamics of competition in a market, identifying existing restrictions, which may hinder or prevent competition and efficient resource allocation. Such studies allow further examination of different market aspects. Based on statistical data from major market players, authorities can understand competitive strategies (such as the integration level of a production chain, intellectual property rights, impact of the digital economy on a field, etc.). Market studies include several recommendations to public administrations and stakeholders operating within the market with the aim of encouraging competition and achieving efficient economic outcomes.<sup>23</sup>
- **Advice/opinions on draft regulation**, in which at the request of the drafting authority, or ex officio (on their own initiative), competition authorities identify potential restrictions existing in the legislation or regulatory proposals which are still at the drafting stage.<sup>24</sup> These opinions are issued by the competition authorities, sometimes at the request of the Governments or ministries that prepare them prior to their adoption or ex officio by the authorities.<sup>25</sup> It should be noted that these are non-binding reports or opinions, although in practice, they oblige the proposing authority to justify why the recommendations in them are not being complied with. In the case of Spain, it is notable that the National Commission on Markets and Competition has an effective instrument to enforce its recommendations to prevent the establishment of obstacles to competition by the Government and territorial administrations.<sup>26</sup>

<sup>21</sup> See JA García and D Neven, 2005, State aid and distortion of competition, a benchmark model, HEI Working Paper No: 06/2005, Graduate Institute of International Studies, Geneva.

<sup>22</sup> Competition authorities of Brazil, Colombia, the Dominican Republic, Egypt, Germany, the Russian Federation, Spain and Thailand. See also footnote\*.

<sup>23</sup> The decision of competition authorities to pursue a market study is in response to indications that there may be competition issues or market failures in the sector being studied.

<sup>24</sup> In this context, the Administrative Council for Economic Defence of Brazil is committed to analysing, identifying and providing guidance on the potential competitive and economic effects of measures that artificially change the competition conditions in markets affected by the pandemic. In summary, the Administrative Council for Economic Defence has expressed itself on the following measures: (a) bills of law to propose price freezes or general discounts in medicine, educational services and food staples, among others; (b) bills of law to propose the adoption of general discounts in individual transportation services provided through mobile applications; (c) thematic reviews related to price controls in educational services; and (d) the work of government institutions that impose maximum prices on certain products, such as liquefied petroleum gas.

<sup>25</sup> Advocacy processes of the Competition Commission of South Africa focused on ensuring that any policy consideration for economic recovery and sector-specific interventions to assist firms are centred around the promotion of competition, particularly in enabling the entry of small business as a catalyst for economic growth and market concentration.

<sup>26</sup> Articles 12 and 13 of Competition Act 15/2007 of 3 July 2007 of Spain introduced a quasi-enforcement mechanism whereby the National Commission on Markets and Competition or the regional competition authorities have locus standi to challenge uncompetitive administrative acts and



- **Reports on other non-legislative activities** undertaken within the public sector, which serve as a guide to the issuing entity for achieving more effective and competitive activities.
- **Guidance instruments** addressed to public administrations, market operators and civil society organizations that cover a broad spectrum of activities, such as public procurement, business associations and efficient economic market regulation. For instance, the superintendence of competition of El Salvador has produced a guide to facilitate the access of microenterprises and small and medium-sized enterprises to public procurement, given that, in general, their participation in such procedures is limited.

35. These instruments can help to identify challenges and sectors that need to be monitored closely due to the pandemic, which in turn allows authorities to understand how markets are functioning and detect inefficient regulations or other barriers to effective competition.

36. The effective application of these instruments requires close collaboration with public authorities (legislators, Governments, sector regulators and the like), which can be positive as well as have disadvantages, as mentioned above. This collaboration allows competition authorities to advise authorities and promote pro-competitive reforms and provides relevant information, which helps identify challenges to effective competition and regulatory problems that might affect consumer welfare.

37. In addition, some authorities, in both developed (Spain) and developing countries and emerging economies (Dominican Republic, Colombia and Russian Federation), have undertaken specific activities to strengthen the supervision of certain markets:

(a) The competition authority of **Spain** (National Commission on Markets and Competition) developed a specific tool to detect competition problems during the pandemic. The tool consisted of a COVID-19 mailbox, set up in March 2020, to centralize all complaints and queries related to the enforcement of competition rules in the context of the COVID-19 outbreak and, thus, protect consumers and firms affected by anticompetitive conduct during this period. It has been successful, with over 700 complaints received. As a result, the National Commission on Markets and Competition identified different problems and started several investigations, mostly related with particularly sensitive sectors during the pandemic, such as financial services and the funeral services sector.

(b) The competition authority of the **Dominican Republic**, the National Commission for the Defence of Competition, has established the Observatory of Competition Conditions that monitors the conditions of competition in markets. The Observatory allows the identification of risks that pave the way for anticompetitive practices through the analysis of six criteria: (i) prices of goods in the family basket; (ii) economic growth; (iii) characteristics and dynamics of the market; (iv) essential intermediate inputs; (v) regulations of interest; and (vi) concerns of society.

(c) The Superintendence of Industry and Commerce of **Colombia** has developed a data analysis project called “Inspector”, which carries out automated inspection tasks for the review of different websites of entities that frequently produce regulatory projects to identify those that may have effects contrary to free economic competition. If changes in the published regulations are detected, the system automatically sends an alert to the sector concerned informing of the new development.

(d) A widespread problem that arose at the beginning of the pandemic was the lack of supply and the excessive increase in the prices of some basic goods. The Federal Antimonopoly Service of the **Russian Federation** intervened in this issue with advocacy activities, creating an operational centre, which monitors prices daily and whether or not there is a shortage of goods. The experts of the central office and 84 regional offices

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regulations from which obstacles to the maintenance of effective competition in the market are derived in national courts. This represents a competence that not many jurisdictions enjoy but that has nonetheless proved to be highly effective in the fight for more competitive and efficient economic regulation.

monitor prices on markets of socially important goods, based on a list of established by the Government of the Russian Federation, as well as on markets of other goods and services that allegedly have seen an increase in speculation in prices. The Federal Antimonopoly Service also launched a special hotline to be used by any resident of the country or enterprise. On receiving information about a possible violation or the existence of a shortage of any product, the Federal Antimonopoly Service immediately takes control of the situation, opening an investigation to solve the detected problem.

### **The issue of State aid**

38. Some competition authorities do not have the opportunity to comment on or contribute to the drafting of State aid measures. In the aftermath of the pandemic outbreak, entire sectors of economic activity have been paralysed, creating an unprecedented situation that affects employment. This has meant that Governments have had to intervene in a first phase to cushion the blow, through aid to maintain employment and the granting of public guarantees for access to soft loans, as well as recapitalization of companies in basic sectors, such as some airlines.<sup>27</sup>

39. State aid is a particularly relevant issue in the European Union as competition in the European Union internal market may be distorted. State aid control aims at preventing the use of public resources from distorting intra-Community competition between firms. Only when the positive effects of aid outweigh the negative ones may the European Commission allow State aid.<sup>28</sup>

40. What is important is that the aid satisfies several conditions so that any negative effects on competition are offset by the positive effects of that aid on the general interest goals selected. In this sense, it is important that aid should be granted based on objective conditions, have an incentivizing effect (that is, aid should be necessary for a company to carry out an investment), be proportional to the amount of investment made and have a compensatory justification in the form of more innovation, better jobs or better products.

41. The European Commission's response to the COVID-19 crisis in the area of State aid control was prompt. In March 2020, the Commission established a temporary framework for the granting of State aid to companies, in order to prevent aid granted by member States from distorting competition in the internal market to an extent contrary to the common interest of the European Union.<sup>29</sup> A major economic recovery plan has also been adopted and is to be implemented over the next few years.<sup>30</sup>

42. At the national level, and not only in the European Union, given that Governments can alter the conditions of competition in markets, competition authorities should intervene from an advocacy perspective, as they know the structure of markets and are well placed to assess the effects of public aid on competition. In the current situation, such intervention is even more necessary, given that the financing needs are great and the means available are limited. Therefore, especially in an economic recovery phase, it is particularly important to select the sectors, type and size of a company (notably for microenterprises and small and

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<sup>27</sup> Most European Union member States have granted substantial aid to their airlines to avoid closures and redundancies of workers. See <https://www.lw.com/thoughtLeadership/covid-19-EU-state-aid-aviation-sector> (accessed 26 April 2021).

<sup>28</sup> For instance, the European Commission may approve aid for research and development, employment or environmental purposes in view of their positive effects in the general interest of the European Union.

<sup>29</sup> See [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html) (accessed 28 April 2021).

<sup>30</sup> The European Commission has approved a package of 750 billion euros to be awarded in the form of grants (40 per cent) and loans (60 per cent) for economic recovery, to promote investments mainly in the fields of the digital economy and ecological transition. Most recently, the European Parliament and the Council of the European Union adopted a regulation establishing the Recovery and Resilience Facility. See European Union, Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *Official Journal of the European Union*, L57/17 (February 2021), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R0241&from=ES>.

medium-sized enterprises), as well as the investments, to be financed with public funds in order to ensure that the recovery is sustainable and inclusive.<sup>31</sup>

43. Globally, most competition authorities refer to the danger of State aid of competition because of its perverse effects, which can be negative if the granting of aid does not meet clear, efficient and non-discriminatory criteria. Some competition authorities refer to their advocacy function, which allows them to intervene in this field even if the law does not expressly authorize them to do so.

44. However, there are authorities in developing (Dominican Republic) and developed (Japan and Spain) countries that have more specific powers in relation to State aid measures:

(a) In the **Dominican Republic**, the competition authority, the National Commission for the Defence of Competition, can analyse “the effects on the conditions of competition of subsidies, State aid or incentives granted to public or private undertakings, charged to public resources, and shall proceed, where appropriate, to request the public authorities, by means of a reasoned recommendation report, to abolish or modify such subsidies, as well as to adopt any other measures conducive to the restoration of competition”.<sup>32</sup>

(b) The National Commission on Markets and Competition of **Spain** can make State aid reports on public aid schemes, which include recommendations to the public authorities to preserve effective competition in the markets. Likewise, the National Commission on Markets and Competition issues an annual report on public aid granted in Spain, which is made available publicly. The annual report for 2020 incorporates statistical data about State aid granted in Spain. The report also includes an annex with provisional information about a temporary framework for State aid of the European Commission, with data about Spain and the other member States of the European Union.<sup>33</sup>

(c) In **Japan**, regarding public support by the Government, the Japan Fair Trade Commission released guidelines on the concept of public support for revitalization in view of competition policy, on 31 March 2016.<sup>34</sup> These are cross-industrial sectoral guidelines that incorporate some factors of which supporting organizations should be aware in view of competition policy, when providing public support, in order to minimize the influences on competition of public support for revitalization.

45. In short, competition advocacy should have as a priority avoiding unfounded concerns about the impact of competition policy, such as the perception that it is at odds with recovery and stability. This can be achieved by contributing to ongoing debates and, as far as possible, publishing on specific issues. Providing additional guidance and clarification on policy in relation to specific matters would help to demonstrate how competition policy can contribute to resolving a crisis. Such guidance should highlight specific challenges that may arise and the proposed approach to deal with them.

<sup>31</sup> In the context of the COVID-19 pandemic, for example, under the European Commission’s new guidelines, aid is likely to be granted to companies investing in digitization and an ecological transition, which are the two pillars around which the European Union’s industrial policy will be directed. For more on the European Union’s industrial strategy, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0102&from=EN>.

<sup>32</sup> Dominican Republic, General Law No. 42-08 on the Defence of Competition (16 January 2008), article 15, *Official Gazette No. 10458* (January 2008).

<sup>33</sup> With regard to this matter, it should be noted that the National Commission on Markets and Competition has publicly voiced concern about the possible fracture of the single market because of the sheer volume of State aid to which some member States of the European Union have committed. By the beginning of June 2020, the National Commission on Markets and Competition addressed the national competition authorities of every member State and invited them to elaborate a joint declaration in support of rigorous State aid control in order to avoid distortions in the single market. Many competition authorities expressed their support to a declaration, though they declined to participate as they lacked competence on State aid matters.

<sup>34</sup> Available at <https://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160331.html>, see annex.

## IV. Conclusions

46. As a consequence of the COVID-19 pandemic, the competition advocacy activities of competition authorities can be expected to play a more significant role. The advice of competition authorities for the decision-making process of policymakers should highlight competition distortions from State interventions and design measures to prevent them, supporting well-informed policy choices.

47. Developing country Governments now have an opportunity to relaunch more efficient industrial, fiscal and social policies, remove unnecessary administrative burdens and promote investment in higher value added sectors. To achieve these goals, public measures should consider the maintenance of effective competition in markets.

48. Competition authorities should play a central and defining role in the adoption of measures by public authorities that are positioned to promote a robust, inclusive and sustainable economic recovery. Their advocacy interventions should focus on actions in the fields of regulation, public procurement and the granting of State aid.

49. According to the 2020 survey conducted by UNCTAD, different instruments and tools have been used during the COVID-19 pandemic in order to detect competition issues in sectors affected by the crisis and to alleviate the pandemic's repercussions on the business environment by guaranteeing fair competition in the market.

50. At a meeting to be held during the nineteenth session of the Intergovernmental Group of Experts on Competition Law and Policy, member States will have the opportunity to present best practices in competition advocacy, both in terms of their collaboration with policymakers and in their advisory role, aimed at preventing the adoption of measures or practices that hinder free competition in markets.

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