



# United Nations Conference on Trade and Development

Distr.: General  
26 April 2023

Original: English

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

Twenty-first session

Geneva, 5–7 July 2023

Item 6 of the provisional agenda

### Interaction between competition and industrial policies\*

#### *Summary*

Competition policy and industrial policy ultimately aim at achieving the goal of economic growth and development. Their interaction may be complementary or in conflict with each other. Nowadays, as new demands for competition and industrial policies emerge, the relationship between these policies needs to be reviewed. In this note, the interaction between competition and industrial policies is therefore elaborated on, reflecting changes in the economy in the last decade that include digitalization, sustainable development and the global economic downturn. An overview is provided of situations where competition and industrial policies have synergies and face tensions and followed by a discussion of the growing need for cooperation between them in the context of changes in the current economic environment. Lastly, policy recommendations are provided to improve the productive interaction between competition and industrial policies.

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## I. Introduction

1. Competition policy and industrial policy ultimately aim at achieving the goal of economic growth and development. However, as competition and industrial policies differ in specific policy objectives, scope and means, they interact with each other in various ways during policymaking and enforcement. Their interaction may be complementary or in conflict with each other.

2. Competition policy refers to government policy to increase competitive market pressures. Effective competition policy may lead firms to become more efficient, increase innovation, and widen consumer choice and product quality (TD/RBP/CONF.8/6). Competition policy has two major instruments which are competition law and competition advocacy (TD/B/C.I/CLP/3). Competition law prohibits anticompetitive activities in private and public areas, including anticompetitive agreements, abuse of dominance and anticompetitive mergers. Competition advocacy refers to tools to promote the use of pro-competitive means and voluntary compliance in private areas.

3. On the other hand, industrial policy is considered as aiming at enabling a country to achieve strategic objectives by enhancing domestic productive capabilities and international competitiveness, though the definition varies across studies.<sup>1</sup> Industrial policy used to be simply considered to have short-term goals, such as encouraging employment, enhancing international trade earnings and enhancing income equality, as well as long-term industrial development goals.<sup>2</sup> But modern industrial policies are increasingly covering new themes and including objectives beyond conventional industrial development, such as upgrading global value chains, development of the knowledge economy, build-up of sectors linked to sustainable development and competitive positioning for the new industrial revolution.<sup>3</sup>

4. Industrial policy in the twentieth century was recognized as a selective development policy, and criticism about it was mainly because government intervention in the industry did not contribute to economic development.<sup>4</sup> Industrial policy in the twenty-first century, however, goes beyond simple industrial development and aims for more diverse policy goals. These goals include responding to rapid industrial reorganization due to digital technology development, demands for sustainable development and responses to the coronavirus disease (COVID-19) pandemic. There are also discussions that competition policies may complement other government policies given the demands of new economic environments, such as sustainable and inclusive growth and development (TD/RBP/CONF.8/6). As new policy demands for competition and industrial policies emerge, the relationship between competition policy and industrial policy, which have interacted with economic development, needs to be reviewed.

5. For the tenth session of the Intergovernmental Group of Experts on Competition Law and Policy in 2009, UNCTAD secretariat prepared a background document titled “The relationship between competition and industrial policies in promoting economic development” (TD/B/C.I/CLP/3). The background document contained a summary of approach of competition authorities towards anticompetitive practices, mergers, exclusions and exemptions involving industrial policy considerations, as well as the role of competition advocacy. The synergies and tensions of both policies were also examined, considering the economic situation at that time.

6. Building on previous UNCTAD work, in the present document, the interaction between competition and industrial policies is elaborated on, reflecting the changes in the

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<sup>1</sup> UNCTAD, 2018, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations publication, Sales No. E.18.II.D.4, New York and Geneva).

<sup>2</sup> Brooks DH, 2007, *Industrial and competition policy: Conflict or complementarity?*, ADBI Research Policy Brief No. 24.

<sup>3</sup> UNCTAD, 2018.

<sup>4</sup> UNCTAD, 2021, *Trade and Development Report 2021: From Recovery to Resilience – The Development Dimension* (United Nations publication, Sales No. E.22.II.D.1, Geneva).

economy in the last decade, including digitalization, sustainable development and the global economic downturn.

7. The following chapters are organized as follows: in chapter II, the discussion is focused on some points where competition and industrial policies have synergies and face tensions. In chapter III, the discussion is placed in the context of changes in the current economic environment. In chapter IV, some policy recommendations are raised to improve the productive interaction between competition and industrial policies.

## II. Synergies and tensions

### A. General

8. In the past, when industrial policy was mainly a method of selective industrial development, there were cases where industrial policy and competition policy seemed to conflict (TD/B/C.I/CLP/3). After World War II, many developing countries launched industrial policies to foster their own industries. In particular, the experience of East Asian countries in the late twentieth century showed that industrial policy can contribute to economic development. East Asian industrial policy aimed at fostering internationally competitive industries by selectively developing capital and technology-intensive capabilities (TD/RBP/CONF.8/6). In a 1993 study, the World Bank concluded that selective interventions could contribute to growth in some economies if several preconditions were met.<sup>5</sup> In a 1998 UNCTAD report, it was stated that some factors, such as technological mastery and institutional and administrative capacity, were related to the success of industrial policies (TD/B/COM.2/EM/10/REV.1). However, industrial policies of selective interventions sometimes restricted market competition by limiting production and/or the number of firms in the market (TD/RBP/CONF.8/6).

9. Since the 1980s, trade liberalization and market opening have changed the environment of global markets, and many countries have shifted their policies towards boosting productivity by promoting competition in the private sector. In this context, competition policy is not separate from industrial policy but rather plays an important role in it. There is now a global consensus that competition policy is indispensable for economic growth and prosperity. The number of jurisdictions having competition law has dramatically increased from 12 in 1970 to around 140 today.<sup>6</sup>

10. In the twenty-first century, industrial policy is changing not only to foster specific industries but also to aim for broader policy goals. In particular, the COVID-19 pandemic has threatened the global economy over the past few years and served as an awakening to the need for such new industrial policies. The pandemic has resulted in various adverse effects on the global economy, such as supply chain disruptions, suspension of international transport and shrinking of service industries. Hence, Governments have taken an active role not only in reducing the short-term economic damage from the pandemic, but also in promoting a strong, sustainable and inclusive long-term recovery (TD/B/C.I/CLP/58). This trend can also be seen in the expansion of subsidies and State aid by Governments to support businesses across sectors in a variety of ways, including grants, subsidized loans and tax advantages, to mitigate the impact of the pandemic.<sup>7</sup> For example, the Government of Bangladesh provided \$8.5 billion in subsidized loans to small and medium-sized enterprises; the Government of El Salvador provided \$500 million in low-interest loans and wage subsidies to small and medium-sized enterprises; and the Government of Kazakhstan

<sup>5</sup> World Bank, 1993, *The East Asian Miracle: Economic Growth and Public Policy*, vol. 1, Oxford University Press, Oxford.

<sup>6</sup> See United States of America, Federal Trade Commission, <https://www.ftc.gov/policy/international/competition-consumer-protection-agencies-worldwide> (accessed 24 April 2023).

<sup>7</sup> See [https://dataviz.worldbank.org/views/AID-COVID19/Overview?%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay\\_count=n&%3AshowAppBanner=false&%3Aorigin=viz\\_share\\_link&%3AshowVizHome=n](https://dataviz.worldbank.org/views/AID-COVID19/Overview?%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay_count=n&%3AshowAppBanner=false&%3Aorigin=viz_share_link&%3AshowVizHome=n).

provided \$920 million in soft loans to local businesses.<sup>8</sup> Some Governments are considering industrial policies to respond to changes in the economic structure, such as digital economy and sustainable development.<sup>9</sup>

11. Competition and industrial policies may be complementary, creating synergy in responding to new goals required by changes in the global economic environment and enhancing the credibility of Government and efficient use of limited government resources. But sometimes these policies are also in a tense relationship. In order for competition and industrial policies to work positively, a cooperation system between the authorities that implement each policy is important. The COVID-19 pandemic has well demonstrated the need for such cooperation. An UNCTAD report in 2022 recommended that competition authorities and authorities overseeing microenterprises and small and medium-sized enterprises (MSMEs) work together to overcome the pandemic-caused crisis for MSMEs.<sup>10</sup> In this chapter, examples are reviewed of tools for effective cooperation between competition policy and industrial policy in the three main areas of competition law enforcement, and a model of desirable interaction is explored.

## B. Interaction frameworks between competition and industrial policies

### 1. Competition policy as an industrial policy

12. Competition policy itself plays a direct and an indirect role in industrial policy. The competition process and market efficiency pursued by competition policy are not only essential for industrial development, but also often play an important role in achieving the other values pursued by industrial policies. Early in 2023, the Korea Fair Trade Commission, the competition authority of the Republic of Korea, caught and sanctioned cartels of automakers that colluded regarding pollutant emissions.<sup>11</sup> The European Commission also fined automakers for similar restrictive competition in emission cleaning.<sup>12</sup> This kind of law enforcement is meaningful for sustainable development as well as competition. Competition enforcement also provides guidelines in various digital economy fields, such as big data, personal information and online advertising.<sup>13</sup>

13. Sometimes easing the enforcement of competition laws has industrial policy implications. For example, “safe harbour”<sup>14</sup> in competition enforcement for MSMEs supports them by reducing the level of scrutiny for their activities. The competition authorities of Malaysia have introduced a safe harbour policy that presumes that agreements or conduct by MSMEs with a market share of less than 20 per cent do not affect market competition unless they are serious cartels. This kind of exemption is sometimes used to overcome a crisis. The Competition Commission of South Africa gave block exemptions to horizontal and vertical agreements of companies in the health-care, retail property and banking sectors, excluding prices, during the COVID-19 period.<sup>15</sup>

<sup>8</sup> Ibid.

<sup>9</sup> The United States decided to subsidize the semiconductor industry, and the European Commission eased subsidy regulations for industries related to sustainable development. See United States, Department of Commerce, 2023, [Biden–Harris Administration launches first CHIPS for America funding opportunity](#), 28 February, and European Commission, 2023, [State aid: Commission adopts Temporary Crisis and Transition Framework to further support transition towards net-zero economy](#), 9 March.

<sup>10</sup> UNCTAD, 2021, *The COVID-19 Pandemic Impact on Microenterprises and Small and Medium-Sized Enterprises* (United Nations publication, Geneva).

<sup>11</sup> See <https://www.ftc.go.kr/www/selectReportUserView.do?key=10&crptype=1>.

<sup>12</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3581](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581).

<sup>13</sup> See Organisation for Economic Co-operation and Development (OECD), 2022, *OECD Handbook on Competition Policy in the Digital Age*.

<sup>14</sup> “Safe harbour” is a general expression that refers to mechanisms that make it harder to establish liability for certain business practices. It may include legal assumptions, legal concepts, evidentiary assessments and so on. See OECD, 2017, *Safe harbours and legal presumptions in competition law: Background note by the secretariat*, DAF/COMP(2017)9.

<sup>15</sup> South Africa, Competition Commission, 2021, [Impact assessment report on the impact of COVID-19 block exemptions and Commission’s enforcement during the pandemic](#).

## 2. Competition advocacy to other government policies

14. Competition authorities that present opinions on other government policies play an important part in the interaction between competition and industrial policies. Competition policy can play a role in checking and balancing industrial policy that slows down the long-term development of the market by focusing on short-term stakeholder interests. The principle that government activities should not distort market competition is also called “competition neutrality”; the OECD announced a recommendation for competition neutrality in 2021.<sup>16</sup> For these functions to work properly, competition advocacy activities by competition authorities need to be established. In the Republic of Korea, competition law requires that ministries should consult with the competition authority (Korea Fair Trade Commission) when revising regulations that limit market competition.<sup>17</sup> Competition advocacy is sometimes related to subsidization. For example, European Union competition law prohibits any aid provided by a member State that distorts or threatens to distort competition, with a few exceptions that can be seen as compatible with internal markets.<sup>18</sup> On the other hand, the United States has recently been discussing legislation to strengthen the monitoring of foreign subsidies in merger reviews. This move has industrial policy implications, as it aims at preventing the domestic market from being disturbed by foreign subsidies. The Merger Filing Fee Modernization Act of 2022, under discussion in the Congress of the United States, requires that companies merging in the United States provide information on subsidies paid by foreign Governments to competition authorities.<sup>19</sup>

## 3. Cooperation with competition authorities and ministries of industry

15. Competition authorities can seek cooperation with other government agencies in the process of law enforcement, and this cooperation can also be seen as an interaction between competition and industrial policies. Competition authorities may have procedures for consulting with competent authorities dealing with competition issues in a particular field. These consultation procedures can contribute to utilizing the expertise of ministries of industry and increasing the consistency of law enforcement between government agencies. In the Philippines, the Philippine Competition Commission should go through the process of hearing opinions from other agencies when there are concerns from the sector regulator.<sup>20</sup> The Competition Commission of South Africa signed a memorandum of agreement (2004) with the National Energy Regulator of South Africa for cooperation, according to which the two authorities may consult each other in respect of complaints received.<sup>21</sup>

16. Information sharing can be another cooperation method between a competition authority and a ministry of industry. The competition authority in Kenya has in place memorandums of understanding with several industrial agencies, including the communications, insurance and energy sectors. According to the memorandums of understanding, the agencies can share confidential information, particularly when conducting investigations, to save time as well as to ensure that decisions made are backed by verifiable data.<sup>22</sup> The Malaysia Competition Commission and nine other sectoral industrial agencies including telecommunications, land transport, finance and energy, established a committee in 2012 to discuss various issues affecting competition in markets involving different sectors.<sup>23</sup>

<sup>16</sup> See <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462> (accessed 24 April 2023).

<sup>17</sup> See <https://www.ftc.go.kr/eng/contents.do?key=503> (accessed 24 April 2023).

<sup>18</sup> See *Official Journal of the European Union*, 2012, [Consolidated Version of the Treaty on the Functioning of the European Union](#), article 107 (C 326/51).

<sup>19</sup> OECD, 2022a, *Subsidies, Competition and Trade*, OECD Competition Policy Round-table Background Note.

<sup>20</sup> Philippines, *Philippine Competition Act*, section 32.

<sup>21</sup> Available at <https://www.compcom.co.za/wp-content/uploads/2021/06/Signed-Memorandum-of-Agreement-Between-NERSA-and-CCSA.pdf>.

<sup>22</sup> See Competition Authority of Kenya, 2020, *Ushandani, Issue 5*, biannual newsletter.

<sup>23</sup> Malaysia Competition Commission, 2019, *Annual Report*.

## C. Tensions between competition policy and industrial policies

17. The cooperation between competitive and industrial policies is not always smooth. First, even if policies have a common goal at a high level, they may not prioritize the same objectives. Competition policies are often aimed at promoting competition in the marketplace, while industrial policies often pursue a variety of public interests, such as building the infrastructure needed for industry, maintaining adequate supply and stabilizing employment. Second, competition policy is usually enforced by competition authorities, while industrial policy is enforced by ministries of industry. This implies that there may be overlapping jurisdictions in managing an issue, which may lead to conflicting decisions. In Tunisia, the competition authority and the telecommunications authority made a dual investigation in the same case in 2012. Following this, both authorities signed a memorandum of understanding in 2015 to prevent jurisdiction conflict.<sup>24</sup> Third, there is a difference in the policy enforcement methods used by each authority. Ministries of industry usually support market players with subsidies or tax benefits, while a competition authority monitors and sanctions market players against anticompetitive conduct. Because of this, ministries of industry usually maintain cooperative relationships with market players in each area, while competition authorities often maintain tension with them. In Costa Rica, a directive by the National Treasury that favoured public enterprises on public procurement was revoked following the advocacy efforts of the competition authority.<sup>25</sup>

18. Competition authorities in developing countries tend to be more exposed to these problems as they face challenges in enforcing competition laws and have fewer resources for competition advocacy. According to research from 2019 by the International Competition Network, 63 per cent of the young authorities (less than 15 years after establishment) experienced challenges related to the application of policies promoting competition within a Government that hinder the correct enforcement of competition policy.<sup>26</sup> The competition authority of Colombia raised the issue that some other government agencies did not know and overlooked the mandatory legal procedures for advocating competition. The competition authority of Ukraine identified that other government agencies' lack of understanding of the role of the competition authority could negatively affect the activities of promoting market competition.<sup>27</sup>

## D. Cooperation in enforcement cases

### 1. Merger control

19. Merger control is an important aspect of competition policy aimed at preventing anticompetitive mergers and acquisitions. In many developing countries, industrial policy sometimes encourages the integration of industries and sectors to increase international competitiveness. This can sometimes lead to mergers and acquisitions that can reduce competition in the market and have anticompetitive effects. Competition policy and industrial policy can interact in two ways. First, competition policies can help prevent mergers and acquisitions from having anticompetitive consequences by requiring companies to dispose of assets or take other corrective actions to preserve competition. On the other hand, industrial policies can provide incentives for companies to merge and integrate to achieve economies of scale and make an industry internationally competitive.

20. In the context of merger control, the interaction between competitive and industrial policies can lead to both synergy and tension. Competitive policy can prevent mergers and acquisitions from having anticompetitive consequences, while industrial policies can

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<sup>24</sup> OECD, 2022b, *OECD Peer Reviews of Competition Law and Policy: Tunisia*.

<sup>25</sup> OECD, 2020, *Costa Rica: Assessment of Competition Law and Policy 2020*.

<sup>26</sup> International Competition Network, 2019, *Lessons to be Learnt from the Experience of Young Competition Agencies: An update to the 2006 Report*.

<sup>27</sup> Ibid.

provide incentives for companies to merge and consolidate to achieve their objectives (see box).<sup>28</sup>

### Examples of merger control

When reviewing mergers, a competition authority may consider the factors of industrial policy together. In this case, the opinions of industrial authorities are often considered in the process of merger review. In 2021, the competition authority of Chile approved the merger of the electric power company unconditionally, considering that regulations on the electricity industry have already restricted the formation of market dominance in the market.<sup>a</sup> The Namibian Competition Act, enacted in 2003, gave the authority to conduct merger reviews to the competition authority of Namibia, requiring it to negotiate with industry authorities that previously had merger review authority. According to the memorandum of agreement signed by the competition authority of Namibia and the Bank of Namibia, which had enjoyed the authority to review mergers of banks before, merger reviews related to competition should be conducted under the competence of the competition authorities, while they should consult with the Namibian banks to reach a conclusion.<sup>b</sup>

In some cases, the conclusions of each authority may vary when the competition authority and industrial authorities simultaneously conduct merger screening according to their respective policy goals. In Brazil, the competition authority cleared a merger of the country's largest railroad company and a logistics company, subject to behavioural remedies, such as setting price standards and restricting the sharing of sensitive information, even though the transport authority had formerly cleared the case unconditionally.<sup>c</sup>

In developing countries, there are cases where a clear conclusion has not been reached on the jurisdiction of merger review between industrial policy authorities previously in charge of merger screening and a newly established competition authority. In Bangladesh, the telecommunications regulatory authority reviewed the merger between two telecommunication operators in 2016. Representatives from the telecommunications regulatory authority believe that the authority is the primary agency responsible for the promotion of competition in the telecommunications sector, while the competition authority of Bangladesh maintains that the competition law authorizes the country's competition authority to approve or disapprove mergers in the telecommunications sector.<sup>d</sup> In the case of Brazil as well, the competition authority and the Central Bank of Brazil signed a memorandum of understanding in 2018 to resolve the ambiguity of merger review authority between financial entities.<sup>e</sup>

<sup>a</sup> Available at <https://centrocompetencia.com/wp-content/uploads/2022/03/Resolucion-F255-2020.pdf>.

<sup>b</sup> See Namibia, Namibian Competition Commission, 2012, Notice in terms of section 67(3) of the Competition Act, 2003 (Act No. 2 of 2003), *Government Gazette*, [memorandum of agreement](#).

<sup>c</sup> Brazil, Administrative Council for Economic Defence, 2015, [Merger file No. 08700.005719/2014-65](#).

<sup>d</sup> UNCTAD, 2022, *Voluntary Peer Review of Competition Law and Policy: Bangladesh* (United Nations publication, Sales No. E.22.II.D.32, Geneva).

<sup>e</sup> See OECD, 2022c, [Interactions between competition authorities and sector regulators: Background note by the secretariat](#), DAF/COMP/GF(2022)4.

## 2. Prohibition of anticompetitive conduct

21. In addition to reviewing mergers, authorities may initiate investigations or regulations to prevent anticompetitive conduct. In this respect, law enforcement against anticompetitive conduct by a competition authority may affect the policy establishment of industrial agencies and vice versa. However, to induce synergy between competition policy

<sup>28</sup> In some jurisdictions, such as Spain, France and Germany, Governments can exceptionally intervene in a merger control procedure for public interests other than competition. See OECD, 2017.

and industrial policy, it is necessary to prepare cooperation procedures between authorities through regulations or memorandums of understanding, as discussed above.

22. In developing countries, initiatives of competition authorities to promote market competition can play a more important role. Before a market has matured enough to reach a certain size, a small number of companies often form a monopoly or oligopoly. Industrial authorities, which are closely related to players in the given industry, may not take this problem seriously even if anticompetitive practices exist in the market. In such cases, appropriate law enforcement by competition authorities can improve market competition and contribute to the sound development of the industry.

23. In some cases, law enforcement for competition law violations has led to improved industrial policies in related fields. The competition authority of Hungary decided that the practice of Hungarian financial institutions, according to which they uniformly set the level of interchange fees used in transactions using Visa and Mastercard as payment cards, infringed the competition law. Although this decision was quashed by the courts, Hungarian financial regulators prepared a bill upon consulting the competition authority of Hungary, and it was adopted by the parliament of Hungary.<sup>29</sup>

24. On the other hand, competition authorities may recognize conducts that violate the regulations of industrial authorities and sanction them according to competition law. In Colombia, a telecommunications company breached a decision of the communications agency that prohibited communications service providers from blocking or restricting the use of terminal equipment in networks other than their own. As the company had a dominant position in the mobile outgoing voice market, the competition authority of Colombia concluded that the telecommunications company's conduct constituted an abuse of dominance.<sup>30</sup>

### III. Growing needs for cooperation

25. As explained in chapter II above, there are both synergies and tensions between competition and industrial policies. As competition policy and industrial policy are both formed and adjusted to consider recent changes and trends in the economy, including digitalization, sustainable development, the impact of COVID-19 and economic downturns, the relationship and interaction between them also might be shifting. These elements are themselves interconnected; the COVID-19 pandemic has accelerated the digitalization of markets and the global economic slowdown. Some member States state that these trends are most efficiently addressed by effective competition and that they therefore have not required any change in the principles of their competition policies while temporary economic measures were implemented or tailored to particularly affected sectors. For example, the Government of the United States issued an executive order in 2021<sup>31</sup> that clarified the crucial role of competition. The executive order called for all government authorities to work together to promote competition and towards building more competitive markets in various industries, such as agriculture, information, health care and telecommunications. At the same time, other member States have been struggling with easing the tensions and achieving a balance between competition policy and industrial policy in the context of these recent changes.

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<sup>29</sup> OECD, 2021a, [Competition enforcement and regulatory alternatives: Note by Hungary](#).

<sup>30</sup> OECD, 2021b, [Competition enforcement and regulatory alternatives: Note by Colombia](#).

<sup>31</sup> United States, 2021, [Executive Order on Promoting Competition in the American Economy](#).



26. In fact, industrial policies set strategies aiming to develop and strengthen certain sectors, for example, focusing on the information technology sector for advancing the national digital transition and innovation<sup>32</sup> and funding for research and development in specific areas, such as the energy sector for promoting renewable energies. Governments are also required to respond to economic downturns by generating and maintaining jobs in hard-hit sectors.<sup>33</sup> They also regulate and raise barriers for imports in order to protect domestic firms<sup>34</sup> or even create national (regional) champions to maintain national competitiveness against foreign firms. This trend is observed not only among developed countries but also developing countries; many Governments have implemented subsidies and State aids in the context of the COVID-19 pandemic.<sup>35</sup> Support can take various forms, such as regulatory frameworks, including legislation, exemptions and subsidies, but also come at the stage of implementation of these policies. For example, Brazil provided subsidized loans to specific sectors such as agriculture, food and tourism and tax advantages to MSMEs. South Africa also offered subsidized loans for MSMEs in the health-care sector, and India provided wage subsidies to MSMEs. In Türkiye, the air transport sector was granted a reduction in airport service charges and licence fees.

27. Competition authorities have been making proactive efforts to minimize negative impacts on competition arising from industrial policies. They are involved in consultations on the policymaking processes of their Governments or closely coordinate and collaborate with sector regulators. They provide advice and recommendations from the competition viewpoint to their Governments, either within a fixed policymaking framework or on a voluntary basis. Some member States have mechanisms that enable competition authorities to conduct competition or impact assessments on competition for activities by regulatory authorities.

28. The debate on the roles of both competition policy and industrial policy and their interaction in supporting economic development is (re)emerging in the context of current economic trends. Against this background, these particular changes are reflected in this chapter, with reference made to concrete examples of Governments around the world.

<sup>32</sup> In the European Union, the digital strategy titled [A Europe fit for the digital age](#) is one of the political priorities for 2019–2024. A communication from the European Commission, titled [Investing in a smart, innovative and sustainable industry: A renewed \[European Union\] industrial policy strategy](#), defined the new priorities in industrial policy: digitalization, a low-carbon and circular economy, investments for the industry of the future, innovation and the international dimension. Austria aims at attaining the 2040 zero emission goal by supporting new ways of production and increasing energy efficiency and through environmental protection and research; the Government has provided massive subsidies for industry greening (see, for example, <https://renewablesnow.com/news/austria-passes-eur-300m-subsidy-budget-for-green-energy-780126/> and <https://www.ft.com/content/007942a9-a55f-4d0c-b59a-d5a12a685e6d>). In other regions, Japan underlined “targeted investment in science, technology and innovation” and “investment in GX (green transformation) and DX (digital transformation)” in the [country’s 2022 action plan](#). The [National Fourth Industrial Revolution \(4IR\) Policy](#) of Malaysia is also set to make technological advancement more robust by focusing on key sectors.

<sup>33</sup> Governments around the world took measures to deal with the economic impact of the COVID-19 pandemic and other external shocks; for example, €806.9 billion are to be spent under the recovery plan for Europe (see [https://commission.europa.eu/strategy-and-policy/recovery-plan-europe\\_en](https://commission.europa.eu/strategy-and-policy/recovery-plan-europe_en)).

<sup>34</sup> For example, in Paraguay, national industry is favoured through tax exemptions, reduced electricity prices and restrictions on imports. Public procurement is also used for protecting national industry; regulations (Law No. 4838/2012 and Decree No. 4929/2016) require a certain percentage or absolute exclusivity for products manufactured in the country and national industry in biddings. Particularly during the COVID-19 pandemic, the margin of preference in favour of local products was increased from 20 to 40 per cent.

<sup>35</sup> See, for example, [World Bank tracker of subsidies and State aid to mitigate COVID-19 effects](#) (accessed 25 April 2023).

## A. Digitalization<sup>36</sup>

29. Governments set digital transformation as one of the priority areas of their national policies in order to promote economic growth, increase innovation and achieve “Industry 4.0”. They support relevant sectors, such as information and communications technologies, electronics and mechatronics, through legislative measures and subsidies. Competition law and policy are aligned with those objectives in principle, and they can even play a key role in achieving them. However, favourable treatment by Governments to specific firms or sectors can hinder the level playing field in markets, or increase market power concentration, which may lead to the abuse of dominant positions in digital markets. Therefore, competition authorities need to be involved in the process of digital policymaking, by assessing its possible impact on competition through the provision of opinions and recommendations.

30. Competition authorities are engaged in competition policy consideration and law enforcement in digital sectors. They consider appropriate laws, regulations and tools defining and governing those concerns. Some of them also recognize the need for balanced competition policy and law enforcement to ensure that they do not slow down innovation and investment in the digital economy.

31. In the last several years, some jurisdictions introduced new regulation or amended their competition laws to better capture competition concerns in the digital economy. The Digital Markets Act of the European Union is one of the most prominent examples of ex ante regulation on digital platforms. It allows focused enforcement against the most evident and prominent concerns arising in the digital sector in relation to large online platforms. Japan enacted the Act on Improving Transparency and Fairness of Digital Platforms<sup>37</sup> to improve transparency and fairness in transactions, noting that regulations should not interfere with digital innovation.

32. Such new regulations involve cooperation between competition authorities and industrial authorities to encourage digital innovation, as some policy considerations can go beyond the competence of a competition authority. The drafting and implementation of Digital Markets Act involved, besides competition, policy areas such as internal markets, industry, entrepreneurship and MSMEs, communications networks and technology. In Japan, the drafting process of the Act on Improving Transparency and Fairness of Digital Platforms was led by the Cabinet in cooperation with the Japan Fair Trade Commission, the Ministry of Economy, Trade, and Industry and the Ministry of Internal Affairs and Communications. The Act explicitly states that it “must be implemented with the objectives of enabling digital platform providers to fully exercise their originality and ingenuity by keeping the involvement of the State and other regulation to the minimum necessary”. In Germany, where the competition law was amended, a draft amendment was prepared by the Federal Ministry for Economic Affairs and Energy in consultation with the Federal Cartel Office. In India, a Digital Competition Bill will be prepared to ex ante regulate the digital market, in line with the recommendations of<sup>38</sup> and in consultation with interministerial committees in the Government.<sup>39</sup>

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<sup>36</sup> For more examples on initiatives by competition authorities to deal with competition concerns brought about by digital platforms, see “Competition law, policy and regulation in the digital era” (TD/B/C.I/CLP/57).

<sup>37</sup> See Japan, n/d, [Act on Improving Transparency and Fairness of Digital Platforms](#).

<sup>38</sup> See [https://loksabhadocs.nic.in/lssccommittee/Finance/17\\_Finance\\_53.pdf](https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf).

<sup>39</sup> See <https://images.assettype.com/barandbench/2023-02/7e93ae0c-05b9-4565-9b5b-a9a6103ac6ff/Order.pdf>.

33. At the same time, many competition authorities have published statements and guidelines<sup>40</sup> to clarify their approaches towards anticompetitive conduct by digital platforms, with the aim of striking a balance between encouraging innovation and promoting competition in digital markets. These documents drew a line between acceptable and unacceptable business practices and provided legal certainty for businesses.

34. Close cooperation between competition and industrial authorities is required not only from the viewpoint of policymaking, but also technical expertise; competition authorities are usually not equipped with the necessary expertise of technology required in digital services. Better understanding of technology itself would lead to more appropriate competition law enforcement and approaches towards the digital world. The competition authority of Brazil has a technical cooperation agreement with the country's data protection agency to develop joint work and exchange information.

35. Again, promotion of digitalization and innovation in digital markets are in line with the ultimate objectives of competition law and policy. Therefore, close coordination between these two areas is ideal for achieving those objectives in a more effective and efficient way.

## B. Sustainability

36. The United Nations is leading efforts to foster sustainable development. Member States adopted the Sustainable Development Goals in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030 (A/RES/70/1). Governments and businesses across the globe are called to strengthen their commitment to the Sustainable Development Goals, which include supporting affordable and sustainable energy, promoting sustainable industrialization and ensuring responsible consumption and production, as well as combating climate change.

37. In the European Union, the European Green Deal, a set of policy initiatives aimed at making Europe climate neutral by 2050,<sup>41</sup> was adopted. Sustainability, stricter environmental regulations and green investments have become important parts of national development policies of Governments. Examples of specific activities by Governments include the provision of financial support to expand the use of renewable energy, investment for research and development in this field and granting tax exemptions for the consumption of renewable energy. Taking an example from another region, Paraguay enacted a law (Law No. 6389/2019) in 2019 that promotes biofuels by exempting the industry from value added tax and customs duties and forcing the blending of national biofuels with diesel.

38. Competition law and policy can play a key role in support of sustainability initiatives, as they promote innovation, provide a level playing field for businesses and encourage consumers to make the best choices. Businesses are driven to innovate in production, distribution and sales processes to attain sustainability advantages that may result in more profitability due to consumer choice. Indeed, the European Commission stated that competition enforcers need to make sure that they are doing their share to support green policies.<sup>42</sup>

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<sup>40</sup> For example, Austria (proposition paper on digitalization and competition law), China (guidelines on platform economy), Japan (guidelines concerning abuse of a superior bargaining position in transactions between digital platform operators and consumers that provide personal information and so on) and Russian Federation (recommendations on practices in the use of information technologies in trade, including those related to the use of price algorithms; recommendations on the detection and prevention of cartels and other anticompetitive agreements in the digital economy). South Africa recently published [revised guidelines on small mergers](#), which will serve to identify small mergers and acquisitions involving digital markets.

<sup>41</sup> See [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en).

<sup>42</sup> See [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en).

39. Meanwhile, businesses increasingly taking responsibility for developing a more sustainable economy may need coordinated action with their competitors in order to reach a certain outcome. In this context, a potential conflict between sustainability goals and protection of competition may arise.

40. Here, the question is to what extent cooperation or coordination between competitors on sustainability can be permitted from the viewpoint of competition, and whether competition authorities need to shift to a more lenient approach regarding sustainability agreements. To address these questions, many competition authorities are increasingly providing guidelines or statements on what is permissible under competition law. Such guidance aims to strike a balance between encouraging sustainability initiatives and ensuring market competition. For example, in March 2022, the European Commission launched a public consultation on drafts of the revised Horizontal Block Exemption Regulations and Horizontal Guidelines, which included a new independent chapter on the assessment of horizontal agreements pursuing sustainability objectives.<sup>43</sup>

41. Competition authorities in member States of the European Union, such as Austria<sup>44</sup> and the Kingdom of the Netherlands<sup>45</sup> also prepared guidelines on sustainability agreements that clarified the application of their competition laws to those initiatives. The Competition and Markets Authority of the United Kingdom launched an open consultation on its draft guidance on environmental sustainability agreements in February 2023,<sup>46</sup> which were in line with the European Commission's Horizontal Guidelines. The competition authority of Japan also published a draft of the "Guidelines for Business Initiatives, towards the Realization of a Green Society" in January 2023, clarifying what type of collaboration agreements can raise competition concerns.<sup>47</sup>

42. There is also a movement towards legislative actions for clearer consideration of sustainability in the field of competition. Austria amended its competition law in 2021, which expressly acknowledged that sustainability agreements can benefit from an exemption from competition law if the agreement "contributes significantly to an ecologically sustainable or climate-neutral economy". China has also introduced the concept of environmental sustainability in its competition law. It sets out a list of public interest exceptions that would allow for collaboration agreements even when they restrict competition, including energy conservation, environmental policy and disaster relief.<sup>48</sup>

43. Overall, sustainability initiatives by competition authorities have mostly been undertaken in European countries, with few exceptions. The discussion on the interaction between sustainability and competition is still premature. At the same time, competition law in many jurisdictions can consider public interests, pro-competitive effects or efficiency claims as general justification, where sustainability may be able to be factored in. Therefore, concrete and clear guidance on what is admissible and what is not, in terms of competition, is highly desirable, complemented by collaboration between competition authorities and other governmental bodies, and exchange of best practices between competition authorities in different jurisdictions. Here, the role of UNCTAD as a global forum to facilitate information exchange and dialogue would be noteworthy.

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<sup>43</sup> The regulations comprise the Research and Development Block Exemption and the Specialization Block Exemption; see [https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en).

<sup>44</sup> See

[https://www.bwb.gv.at/fileadmin/user\\_upload/AFCA\\_Sustainability\\_Guidelines\\_English\\_final.pdf](https://www.bwb.gv.at/fileadmin/user_upload/AFCA_Sustainability_Guidelines_English_final.pdf).

<sup>45</sup> See <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>.

<sup>46</sup> See <https://www.gov.uk/government/consultations/draft-guidance-on-environmental-sustainability-agreements>.

<sup>47</sup> See <https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118.html>.

<sup>48</sup> See [https://www.icao.int/sustainability/Compendium/Documents/China/download-antimonopoly-law-in-china-63824%20\(3\).pdf](https://www.icao.int/sustainability/Compendium/Documents/China/download-antimonopoly-law-in-china-63824%20(3).pdf).

### C. The COVID-19 pandemic and the economic crisis<sup>49</sup>

44. The current economic crisis, including the negative impact of the COVID-19 pandemic, stimulates increased demands for State intervention in the market. Although it has been three years since the pandemic occurred, recovery from the economic downturn that it brought about is still one of the top priorities on the agenda of Governments. Industrial policies started to proliferate, and massive financial subsidies are being justified as emergency support in exceptional circumstances to sustain businesses, support essential sectors and secure employments.<sup>50</sup> Some of these measures can take the form of economic nationalism to protect domestic companies, by providing subsidies or State guarantees to these companies or by raising barriers for imports.

45. The COVID-19 crisis has raised a wide range of competition issues. These include anticompetitive practices, such as cartels and abuse of market power to take advantage of the crisis, price gouging, horizontal agreements for research and development in medicine, and exemptions from competition rules in order to secure the production and distribution of essential goods or to support industries in the economic downturn.<sup>51</sup> Competition authorities, under pressure to relax prohibitions of anticompetitive conduct and merger reviews in these exceptional circumstances, are required to strike the right balance between the urgent need to deal with the economic impact on businesses and the goal of preserving effective competition and a level playing field in the long run.

46. Many competition authorities stressed the importance of advocacy for more pro-competitive measures and awareness-raising on competition to convince their Governments in this situation. For example, the competition authority of Mexico compiled and reframed recommendations from past advocacy efforts related to cross-cutting sectors to foster a “build-back-better” approach in the recovery context. The competition authority of Indonesia was also involved in the preparation of a job creation law responding to the economic downturn. The Block Exemption Regulations for Small, Micro and Medium-Sized Businesses of South Africa in response to the economic consequences of the COVID-19 pandemic were published after consultation with the Competition Commission of South Africa.<sup>52</sup>

47. The Federal Competition Authority of Austria published a statement on the macroeconomic effects of mergers in the context of the COVID-19 crisis (shutdown mergers)<sup>53</sup> to clarify its position on the economic crisis. The statement offers companies a checklist for the assessment of shutdown mergers, explains the criteria applied to assess financially distressed companies, gives an overview of the impact of market power and its macroeconomic effects and lists possible alternatives to shutdown mergers.

48. There are also some cases where competition authorities interacted with interventions by other governmental bodies. Among such cases, one example is the competition authority of Indonesia, which was involved in drafting the country’s job creation law with the aim of mitigating its negative impact on competition. The competition authority of Brazil provided recommendations to the Government to reject new regulations that aimed at controlling prices in markets affected by the COVID-19 crisis.

<sup>49</sup> For the economic impact of the COVID-19 pandemic and Governments’ response for recovery, see, for example, UNCTAD, 2020, *Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal* (United Nations publication, Sales No. Sales No. E.20.II.D.35, Geneva).

<sup>50</sup> See also above, footnote 47.

<sup>51</sup> See, for example, <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2325>.

<sup>52</sup> See [https://www.gov.za/sites/default/files/gcis\\_document/202208/46838reg11482gon2431.pdf](https://www.gov.za/sites/default/files/gcis_document/202208/46838reg11482gon2431.pdf).

<sup>53</sup> See [https://www.bwb.gv.at/fileadmin/user\\_upload/PDFs/AFCA\\_Positioning\\_paper\\_Shutdown\\_Mergers\\_EN.pdf](https://www.bwb.gv.at/fileadmin/user_upload/PDFs/AFCA_Positioning_paper_Shutdown_Mergers_EN.pdf).

## IV. Conclusions

### A. Efforts to preserve and restore competition before and after the introduction of industrial policy measures through strengthened cooperation with ministries of industry and economy

49. As many Governments are required to react to the recent changes in the economy through interventions based on their industrial policies, competition authorities should make more efforts to assess the impact on competition. They should aim at recovering the affected competition during and after the implementation of industrial policy measures, through cooperation with industrial policy authorities.

50. In this regard, competition authorities have emphasized advocacy activities as a tool for increasing competition awareness of sector regulators and policymakers and gaining support for more pro-competitive measures. Such advocacy includes their advisory role in policymaking processes and awareness-raising events targeting these stakeholders. In fact, national industrial policies, not only in developed countries but also developing countries, recognize the importance of competition as a pillar of economic growth<sup>54</sup> and task competition authorities with being involved in the formation of industrial policies by intervening and providing competition policy recommendations to Governments.

51. It would be desirable to have more systematic mechanisms of cooperation between competition and industrial authorities, for example, mandatory consultation with competition authorities and competition assessment before and after the introduction of industrial policy measures, rather than mere voluntary and ad hoc cooperation.

### B. Capacity enhancement of competition authorities to respond to economic changes

52. Governments are facing a cascade of changes in the economy and the fast-evolving digital economy. Competition authorities are required to monitor the emergence of industries and respond quickly.

53. Therefore, there is a need for competition authorities to enhance their capacity and expertise to be able to promptly and effectively deal with such changes. Technical cooperation between industrial authorities is a means of addressing the lack of expertise. In Canada, a significant boost in resources was provided to the competition authority in 2021 to enhance enforcement capacity and ensure that it is equipped with the necessary digital tools to protect competition in today's economy.<sup>55</sup> Malaysia plans to amend its competition law in 2023 to enhance institutional capacity in enforcement, particularly in relation to its powers in handling digital economy-related matters.<sup>56</sup>

54. It is also important to improve the consistency and reliability of competition policy. This becomes a substantial asset when competition authorities enforce competition laws or cooperate with other industrial authorities. In particular, the reliability of a competition

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<sup>54</sup> For example, the [Malaysia Digital Economy Blueprint](#) mentions that the Government streamlines pro-competition measures with digital economy policy to promote fair competition and that the competition authority of Malaysia shall take the lead to assist the Government in ensuring efficient and effective implementation, as well as enforcement of competition policies and laws, in order to achieve a level playing field in the digital economy. The Blueprint also includes plans to establish a "competition impact assessment framework included in the regulatory impact assessment process in the formulation of laws and policies". Paraguay has adopted a [National Development Plan](#), which includes competition as one of the pillars for inclusive economic growth, acknowledging the significance of the national competition law as a tool to protect consumers.

<sup>55</sup> See <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/building-more-competitive-canada>.

<sup>56</sup> See <https://www.mycs.gov.my/sites/default/files/Consultation%20Document%20for%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf>.

authority helps with acceptability on the part of other stakeholders when the competition authority's law enforcement or competition advocacy has industrial policy implications. To enhance the credibility of competition policy, competition authorities should accumulate expertise through continuous communication with other government agencies, international organizations and academia.

55. Against this background, member States may wish to consider the following questions on the interaction between competition and industrial policies:

(a) What is the role that competition authorities can play for Governments to better deal with recent economic changes, such as digitalization, sustainable development and the economic crisis?

(b) What are the challenges that competition authorities, particularly recently established ones, face in applying competition policies on industrial policies? What are the solutions to these challenges?

(c) How can the interaction frameworks and mechanisms between competition authorities and industrial policymakers be improved?

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