



*Role of Competition Policy in Promoting Economic Recovery*

December 2, 2020

## I. Introduction

1. *Business at OECD* appreciates the opportunity to contribute to the Competition Committee's roundtable on the role of competition policy in promoting economic recovery. The primary economic effects of the COVID-19 crisis are a reduction of the private sector's economic output, economic growth and productive capacity together coupled with an increase in business uncertainty and risk. This includes a very significant loss of jobs across many countries.
2. *Business at OECD* submits that the State's role in stimulating economic recovery should be focused on supporting economic output and not one which overly regulates the private sector or establishes unnecessary barriers to trade and investments or acquisitions from foreign based entities. Such an approach may well discourage private sector investment, innovation and growth at a time when it is of critical importance.
3. Governments should recognise that the private sector is typically more reactive to market signals and is better incentivised to pursue efficiencies and correct market failures as a result of the pandemic.
4. Governments, however, typically have less liquidity constraints and can take a longer-term view and are, therefore, better placed to balance broader public policy objectives which are not easily commercialised or competently remedied by competition enforcement.
5. In relation to pursuing such broader objectives, including employment, privacy and possibly giving preferential treatment to domestic entities engaged in certain sectors such as health care, supply chains, or technology, *Business at OECD* submits that the primary focus of competition agencies should specifically be focused on maintaining competitive markets and thereby stimulating economic recovery which will ultimately lead to job creation.<sup>1</sup> To do so, governments should not unnecessarily introduce regulatory initiatives that are not pro-competitive and which may cause competition agencies to depart from established standards and benchmarks. In instances where, after taking competition considerations into account, a departure may be required, clear guidance should be provided to the private sector. One

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<sup>1</sup> *Business at OECD* supports the views of the OECD in response to COVID-19. See OECD, OECD Competition Policy Response to COVID-19 (Apr. 27, 2020), available at [https://read.oecd-ilibrary.org/view/?ref=130\\_130807-egxgniyo7u&title=OECD-competition-policy-responses-to-COVID-19](https://read.oecd-ilibrary.org/view/?ref=130_130807-egxgniyo7u&title=OECD-competition-policy-responses-to-COVID-19) [hereinafter OECD Competition & COVID-19]. See also John Oxenham & Patrick Smith, What Is Competition Good For—Weighing the Wider Benefits of Competition and the Costs of Pursuing Non-Competition Objectives (2014), available at <https://africanantitrust.files.wordpress.com/2014/09/140822-what-is-competition-good-for-final.pdf>.

such possible exception may arise in certain cases of proposed acquisitions of failing firms, as discussed below.

## II. Competition Policy in Economic Recovery

6. While certain broader policy objectives—such as “fairness,” “privacy,” “inequality,” “employment” and “preferential treatment of domestic firms in certain sectors”—may be well-intentioned, *Business at OECD* suggests that these are not in and of themselves primarily a function of a lack of competition. As broader policy goals, *Business at OECD* submits that specialist laws and regulators are best placed to address these than competition policy itself. This is particularly so post-pandemic during an effort to bolster economic recovery.<sup>2</sup> In this regard, industrial policy should play a very constrained role in competition policy, especially during the vital period of economic recovery post-pandemic.

7. *Business at OECD* notes that there is an increasing tendency in certain jurisdictions to increase the scope of industrial policy in competition law to support a particular industry or categories of competitors within a sector.<sup>3</sup> Competition agencies should be mindful of their capacity and skill set in order to appropriately balance what are often different competing interests in a manner which does not undermine their primary responsibility—which is to promote competition and enhance consumer welfare.<sup>4</sup> Effective competition and swift enforcement are welcomed.

8. *Business at OECD* recognises, however, that different agencies may pursue alternative competition policies to promote economic recovery. These measures might deviate from traditional antitrust objectives and might constitute a departure from well-established standards and benchmarks. It is important in this instance that the private sector has certainty and clarity on these measures and agencies should endeavour to promote objective guidance.<sup>5</sup> *Business at OECD* welcomes the degree of flexibility that authorities around the globe have put forward in responding to the challenges of this unprecedented crisis while safeguarding the core principles of competition policy.

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<sup>2</sup> It does, however, necessitate greater collaboration between competition agencies and other regulators to ensure alignment and avoid issues arising from agencies having concurrent jurisdiction. See OECD, Independent Sector Regulators—Summaries of Contributions, DAF/COMP/WP2/WD(2019)24 (Nov. 28, 2019), available at [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)24/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)24/en/pdf). See specifically South Africa’s contribution which highlights, “The cooperation of the Commission with independent sector regulators in South Africa has proven to be an effective tool to promote and foster joint positions on competition policy and strengthen enforcement through the exchange of confidential information, the sharing of resources, as well as the participation by one regulator in investigations, proceedings or policy making processes of another.” *Id.* at 22.

<sup>3</sup> South Africa has recently amended its Competition Act (1998) to increase the scope of industrial policy in competition law so as not only to support small and medium sized enterprises as well as historically disadvantaged persons, but also place additional obligations on other private firms. See § 8(4) on buyer power which prohibits a dominant firm from requiring from or imposing on a supplier that is a small and medium business or a firm controlled by historically disadvantaged persons unfair prices or other trading conditions. See also §§ 9 and 12A which deals with price discrimination and the consideration of mergers respectively. See also Karl Aiginger & Dani Rodrik, *Rebirth of Industrial Policy and an Agenda for the Twenty-First Century*, 20 J. INDUS., COMPETITION & TRADE 189, 190, 191, 194-95 (discussing industrial policy approaches in various jurisdictions around the world).

<sup>4</sup> OECD, Industrial Policy and Promotion of Domestic Industry—Background Note, DAF/COMP/LACF(2018)5, ¶ 66 (Aug. 22, 2018), available at [https://one.oecd.org/document/DAF/COMP/LACF\(2018\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2018)5/en/pdf).

<sup>5</sup> See OECD, Merger Control in the Time of COVID-19 13 (May 25, 2020), available at <http://www.oecd.org/competition/Merger-control-in-the-time-of-COVID-19.pdf> (“When applicable and where governments are undertaking, promoting or considering public interest objectives in mergers, competition authorities should provide governments with general guidance on how to minimize anti-competitive risks resulting from the merger and advocate for a transparent identification of the public policy objectives pursued[.] Competition authorities should be creative in designing remedies as traditional remedies may become less practicable or not be implemented due to the crisis’ impact, continue to carefully evaluate risks of non-implementation and be prepared to re-consider the scope of remedies already imposed. . .”).

9. Where obligations relating to industrial policy are unnecessarily placed on private sector firms, this amounts in the view of *Business at OECD*, to a shifting of Government’s responsibilities onto the private sector.<sup>6</sup> Such an outcome is onerous and capricious and will discourage private sector investment, undermining economic growth and recovery.

10. Competition agencies and Governments should confer to ensure that new regulatory initiatives are consistent with competition policy.<sup>7</sup> As the Secretary General of the OECD emphasized in his remarks to the OECD Competition Committee meeting on June 15, 2020, competition agencies have and should play an important role in the consultative process within their Governments in the development of new regulatory policies and initiatives directed towards meeting the challenges in these exceptional times. In that respect, competition agencies should be advocates for competition considerations being taken into account by their Governments in developing new policies. In order to do that effectively, *Business at OECD* suggests that competition agencies should be conferring simultaneously with members of the private sector in order to be more informed of evolving economic and competitive effects arising in these exceptional times. It should be understood that these consultative processes should not, however, undermine the independence and impartiality of the competition agencies.<sup>8</sup>

### III. Protectionism and Foreign Investment Reviews

11. *Business at OECD* notes with concern the increasing protectionist approach adopted by agencies in relation to merger control in several jurisdictions.<sup>9</sup> These measures may lead to fewer foreign-based entities entering or expanding in domestic markets, thereby leading to the unfair protection of inefficient domestic producers, greater domestic market concentration and the entrenchment of market power, each to the detriment of domestic consumers. These concerns could be exacerbated especially if the economic effects of the pandemic coupled with continued focus on domestic supply and jobs, extend for a prolonged period prior to economic recovery.

12. Subject to the provisos discussed further below, governments may have recourse to reforming the legal framework governing foreign investment and foreign subsidies to address those concerns while focusing on the competitive impact of those mergers under the prism of competition policy and enforcement.

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<sup>6</sup> For a South African perspective, see John Oxenham, Michael-James Currie & Andreas Stargard, *Changing Africa’s Leading Competition Law Regime: A Populist Departure from International Best Practices*, 10 J. EUR. COMPETITION L. & PRAC. 232 (2019). For other jurisdiction specific examples, see OECD, Competition Policy, Industrial Policy and National Champions, DAF/COMP/GF(2009)9 (2009), available at <http://www.oecd.org/daf/competition/44548025.pdf>.

<sup>7</sup> Aiginger & Rodrik, *supra* note 3, at 198.

<sup>8</sup> OECD, Independence of Competition Authorities—from Designs to Practices—Background Paper by the Secretariat, DAF/COMP/GF(2016)5, ¶¶ 10-13 (Nov. 21, 2016), available at [https://one.oecd.org/document/DAF/COMP/GF\(2016\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)5/en/pdf). Additional examples include the *Siemens/Alstom* case in the EU (Case M.8677, summary at 2019 O.J. (C 300) 14) and the amendments to the South African Competition Act which gives the Minister of Trade and Industry extensive powers to enact regulations on the meaning and/or application of certain provisions of the Act. See also William Kovacic, *Policies and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 704 (2014) (“Partisanship can degrade the brand of the antitrust agencies, reduce their influence abroad, and discourage longer term investments that strengthen agency performance. Though difficult to quantify, these constitute a potentially serious, unnecessary drag on agency effectiveness.”).

<sup>9</sup> For examples on recent protectionist measures in various jurisdictions, see Freshfields Bruckhaus Deringer, Public Interest or Protectionism? Navigating the New Normal (2018) available at <https://www.freshfields.com/49f90b/globalassets/services-page/regulatory-compliance-and-public-law/pifi-report-final.pdf>. See also OECD Competition & COVID-19, *supra* note 1.

13. Increased protectionism, however, which involves assisting domestic companies or imposing additional non-national security barriers to foreign companies to better compete internationally, may lead to reciprocal protectionist measures, thereby undermining the fundamental principle of national treatment in competition reviews and concurrently slowing global economic recovery to the detriment of national economies.<sup>10</sup> At the same time, *Business at OECD* recognises that heavily state-backed foreign takeovers that could put the level playing field in the global market environment at risk are under increased scrutiny by governments. Sound competition policy should not ignore these concerns but rather take a holistic view under the competitive assessment that does not neglect possible artificial advantages that foreign companies may enjoy. Furthermore, in situations where national security considerations are expanded in scope, together with significantly increased time required for such assessments in foreign investment reviews of proposed mergers and acquisitions, all coupled with additional uncertainties, the result likely will lead to fewer foreign based competitors entering or expanding in the domestic market. That may give rise to competition concerns by potentially increasing concentration in the domestic market.

14. The one area where particularly challenging issues may arise in the context of the economic effects arising from the pandemic, coupled with the economic effects of increasing protectionism, is in the review of proposed acquisitions of failing firms. There may be more cases in the course of economic recovery over the next two years—as per the OECD’s Economic Outlook in June 2020<sup>11</sup>—where the only proposed acquiror is the domestic market leader which may entirely or partially follow from the additional barriers and uncertainties faced by foreign based entities. Competition agencies may then have to balance the increase in market power that would likely follow allowing the acquisition, against the imminent liquidation and resulting job losses, if the acquisition is not allowed.

15. In these exceptional times where such cases may arise more frequently, *Business at OECD* suggests Governments consider carefully the extent to which they may want to specifically allow competition agencies to take imminent job losses into account and the weight to be given to such through the period of economic recovery. Otherwise, as that is not a usual consideration in the scope of competition reviews, such job losses would not generally be weighed on the decision-making scale. Moreover, weighing liquidation and resulting job losses against market power would likely be even more challenging than weighing efficiencies against market power arising from a merger. At the same time, *Business at OECD* recognizes that in these unprecedented times, Governments may be more interested in ensuring that regulatory policies during the pandemic do not unnecessarily lead to job losses, while also appreciating that market power does not usually lead to economic growth. Accordingly, it is for Governments to decide whether, and to what extent, job losses should be considered by competition agencies, and if so, the related criteria as well as the related time factor applicable to that exceptional consideration.

#### IV. A Receptive but Consistent Merger Control Regime

16. *Business at OECD* recognises that competition policy applied to merger control can play an important role in economic recovery. This includes supporting the efficient re-allocation of resources during the recovery period. In the context of merger control, *Business at OECD* submits that this can be achieved primarily in two ways: (i) supporting innovation and dynamism through merger control; and (ii)

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<sup>10</sup> See also Thomas A Hemphill, *The ‘New Protectionism’: Industrial Policy Barriers to Cross-Border Mergers and Acquisitions*, 14 J. COMPETITION & CHANGE 124, 125 (2010).

<sup>11</sup> OECD, Economic Outlook (June 2020), available at <http://www.oecd.org/economic-outlook/june-2020>.

enhancing the predictability of merger control. Increased economic uncertainty, in no small part driven by policy uncertainty, is a key driver of weak economic outcomes.<sup>12</sup>

17. *Business at OECD* supports the view that merger control might be slightly relaxed in certain industries or sectors which have been materially impacted because of the economic crisis occasioned by COVID-19. As discussed above, merger control scrutiny on the “failing firm” defence may justifiably be partially relaxed.<sup>13</sup> That being said, standard considerations such as there being no less anti-competitive alternatives must remain.<sup>14</sup> Competition agencies would be justified in taking into account longer-term forward-looking outcomes in assessing failing firm defences.<sup>15</sup>

18. If merger control is to be used in supporting economic recovery, authorities should place greater emphasis on the skills and track record of a particular acquirer to support post-merger dynamism.<sup>16</sup> When scrutinizing proposed transactions involving large buyers, competition authorities should prioritize the assessment of the ability of any buyer to bring innovation and a competitive change to a particular market. In this regard, dominant buyers are often treated as having anti-competitive aims while there is little consideration of the ability of these buyers to introduce dynamism and innovation in other markets, industries or geographies. The assumption that “other players” would be more worthy as merging partners usually goes untested. In smaller economies in particular, it is likely that a few large players will often be involved in merger transactions. It will often be important to properly consider buyer-specific abilities, as this will better inform the likelihood of successful post-merger dynamism.

19. During the recovery period, where *ex-ante* evaluation of mergers is relaxed, authorities could consider imposing greater behavioural remedies to assist with monitoring conduct *ex post*. A preference for suitable behavioural remedies as opposed to outright prohibitions or onerous structural remedies would pose less commercial risk to private investors and hence create greater prospects of stimulating investment and economic recovery.

20. *Business at OECD* anticipates that the role of “public interest” or “non-competition” factors during a time of crisis may increase. In this regard, Governments may be inclined—potentially as a result of increased political pressure<sup>17</sup>—to consider greater emphasis being placed on national interests which include factors such as protecting employment. There are differing views in the business community pertaining to the role of non-competition factors, such as employment factors, in merger reviews by competition agencies, even in the context of failing firms. Some suggest this could result in further

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<sup>12</sup> See OECD Competition & COVID-19, *supra* note 1.

<sup>13</sup> By adopting a less stringent approach to failing firm defences, job protection may be favoured rather than the liquidation of firms.

<sup>14</sup> Chiara Fumagalli, Massimo Motta & Martin Peitz, *Which Role For State Aid and Merger Control During and After the COVID Crisis?* 12-13 (Discussion Paper Series–CRC TR 224, Paper No. 184, 2020), available at <https://www.crctr224.de/en/research-output/discussion-papers/archive/2020/DP184>.

<sup>15</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>. The Guidelines describe market definition and market shares to include a substantially forward-looking component. During times of rapid change, such as a crisis, there is probably even more justification for considering likely future states of the market (and market structure). See also Fumagalli, Motta & Peitz, *supra* note 14, at 10 n.21 (welcoming a forward-looking approach by competition agencies in the consideration of a proposed merger).

<sup>16</sup> See Jorge Padilla & Nicolas Petit, *Competition Policy and the COVID-19 Opportunity*, CONCURRENCES N° 2-2020 (May 2020), available at <https://www.concurrences.com/en/review/issues/no-2-2020/foreword/competition-policy-and-the-covid-19-opportunity-94317-en>.

<sup>17</sup> See Elisa Braun, Thibault Larger & Simon van Dorpe, *EU Big Four Press Vestager to Clear Path For Champions*, POLITICO (Feb. 6, 2020), available at <https://www.politico.eu/article/eu-big-four-france-germany-italy-poland-press-executive-vice-president-margrethe-vestager-to-clear-path-for-champions>.

unpredictability and incentives to invest, resulting in fewer firms prepared to invest, which may have a negative impact on overall employment. Others suggest that in the current exceptional environment, the business community should not advocate any regulatory initiatives that may preclude domestic job losses. Further to the discussion above, this is a matter for Governments to confer on with competition agencies and members of the private sector in making an informed decision on this particularly sensitive issue.

21. While *Business at OECD* is concerned that the role of public interest factors may undermine the efficacy and predictability of merger control and discourage investment, to the extent these non-competition factors are going to be considered there should be clear legislative guidance on how these factors will be considered and weighted particularly where there might be inherent tensions between competition and non-competition factors (or indeed tension between different non-competition factors).<sup>18</sup>

22. Post-crisis, there has been an increased tendency for greater ministerial or executive involvement in mergers.<sup>19</sup> Competition agencies must remain independent and impartial in order to ensure that the objectivity and predictability of the process is not undermined.<sup>20</sup> A competition policy supportive of recovery should be independent and focus on long-run dynamism rather than allowing special-interest groups to derail mergers (in order to avoid the short-run costs of necessary structural change).

## V. Crisis Cartels, Co-operation Agreements and Cartel Enforcement

23. Pro-competitive cooperation can foster the economic recovery.

24. *Business at OECD* endorses the approach adopted by certain agencies to grant exemptions on a “fast-track” basis to respond to immediate challenges posed. For example, in South Africa COVID-19 “block exemptions” have been granted for certain industries, including the healthcare, banking and retail property sectors. Similar exemptions have been granted in Australia, Norway, the United Kingdom and Germany.<sup>21</sup> In Canada, the Competition Bureau issued guidance on April 8, 2020 to the business and legal communities in relation to competitor collaborations in response to the pandemic and on April 29, 2020 in relation to failing firm reviews also in the context of the economic effects of the pandemic.<sup>22</sup> At the same time, the Competition Bureau has indicated quite clearly that it will be vigilant with respect to price-fixing by competitors as well as bid-rigging, particularly in regard to public sector contracts in this exceptional environment where Governments are trying to carefully allocate their resources.<sup>23</sup>

25. In many territories (particularly developing countries), expanded government expenditure on infrastructure projects is considered a key response to stimulate aggregate demand and support economic recovery. This expenditure is likely to be allocated by means of project bidding and/or

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<sup>18</sup> See also OECD Competition & COVID-19, *supra* note 1, at 8.

<sup>19</sup> From a South African perspective, see Oxenham & Smith, *supra* note 1, at 12.

<sup>20</sup> See Aiginger & Rodrik, *supra* note 3, at 200 (emphasizing the importance of the government as a whole to tackle industrial policy, rather than delegate to special agents, ministers etc.).

<sup>21</sup> See OECD Competition & COVID-19, *supra* note 1, at 5.

<sup>22</sup> Press Release, Competition Bureau Canada, Competition Bureau Statement On Competitor Collaborations During the COVID-19 Pandemic (Apr. 8, 2020), available at <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html>; Press Release, Competition Bureau Canada, Competition Bureau Closes Investigation of Scrap Metal Processor AIM's Acquisition of TMR (Apr. 29, 2020), available at <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-closes-investigation-of-scrap-metal-processor-aims-acquisition-of-tmr.html>.

<sup>23</sup> See *COVID-19: What the Competition Bureau is doing*, COMPETITION BUREAU CANADA, available at [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_04525.html](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04525.html).

auctioning. In this regard, competition policy can play an important role in ensuring sufficient rivalry and entry in the bidding process.<sup>24</sup>

## VI. Enforcement of Unilateral Conduct

26. In certain developing jurisdictions, such as South Africa, industrial policy objectives essentially require large rivals assisting smaller rivals.<sup>25</sup> There are much more effective, efficient avenues for this sort of industrial policy/state aid. This sort of intrusive regulatory burden on larger rivals is likely to lead to unintended consequences and dampen competition and investment to the detriment of consumers and broader economic growth.

27. Competition authorities can also support economic recovery by adjusting their enforcement approach to exploitative practices. Authorities can enhance market functionality and improve business certainty by pursuing only clear cases of excessive pricing and by opting for a forward-looking approach in relation to abuse of dominance provisions.<sup>26</sup>

28. Certain jurisdictions have proactively utilised competition laws to tackle price gouging cases. While protecting consumers from exploitative prices occasioned by the crisis is an objective which *Business at OECD* supports, competition agencies should not become “quasi-price regulators,” particularly if the crisis might be extended beyond an immediate short-term market shock.<sup>27</sup>

29. To ensure that certainty is created—and the rule of law upheld—*Business at OECD* recommends that specific anti-price gouging laws be adopted rather than utilising traditional competition law standards to address price-gouging in a manner which might undermine the traditional standards.<sup>28</sup> An overly punitive approach to price gouging is likely to decrease incentives to invest or encourage supply side expansion particularly if the rules apply beyond a very short-term period.<sup>29</sup>

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<sup>24</sup> One way to enhance the detection of bid-rigging practices related to publicly funded projects is by means of a centralised bidding database. Such a database should contain the particulars of competing (i.e. including unsuccessful) bids for municipal, provincial and national government projects. It will enhance cartel detection, by providing a set of comparable prices to allow competition authorities to assess bid or price symmetry across projects, geographic markets and over time. It will also allow plaintiffs access to a valuable source of data for damage calculations.

<sup>25</sup> See, e.g., Competition Act, 89 of 1998 (as amended), § 8(4) and § 9 (S. Afr.).

<sup>26</sup> Particularly in circumstances where abuse of dominance provisions have recently been amended, such as those contained in South Africa’s Competition Amendment Act.

<sup>27</sup> A sudden but temporary spike in demand—perhaps due to panic buying—does not change long-run prices. If long-run prices do not change, competition authorities may well be justified in prosecuting substantial and persistently elevated prices (in the absence of justifiable cost increases). Even so, cases where a demand shock translates into persistently higher demand (e.g. permanently higher demand for medical facemasks), the appropriate long-run benchmark price, against which prices are assessed, may well be higher. That is, the competitive price may well be a substantially higher price because of higher demand. Prices that align with this benchmark price are not necessarily excessive and not permitting prices to increase in such cases will damage the functioning of markets.

<sup>28</sup> See John Oxenham, Michael-James Currie & Charl van der Merwe, *COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases*, J. EUR. COMPETITION L. & PRAC. (2020), available at <https://doi.org/10.1093/jeclap/lpaa070>.

<sup>29</sup> The recent excessive pricing investigations of South African competition authorities do not pay much attention to the nature of the demand shock in the particular market. Indeed, the emphasis has been on preventing price increases for essential items. Put differently, excessive-pricing provisions, at least during the disaster period, has effectively been a tool for de facto price control. In addition, the focus has been on quite narrow geographic settings, often resulting in the prosecution of small firms, which would not be subject to competition policy scrutiny in normal times. As South Africa exits the crisis phase, and “normal” price pressures resume, the competition authorities will have to adjust focus and refrain from their attempt to intervene in price-setting on a large scale. A clearer focus on demand is likely to provide authorities with a means of selecting those cases

30. *Business at OECD* welcomes the efforts of certain agencies to stress that the competition framework can allow manufacturers to set maximum prices for their products in order to counter unjustified price increases at the distribution level. *Business at OECD* supports a “rule of reason” test for price maintenance.<sup>30</sup>

## VII. State Aid

31. As a general remark, the regulation of state aid should be fairly and objectively applied with the appropriate safeguards in place. The extent of aid should be non-discriminatory and proportionate to the temporary distortions in the market.<sup>31</sup>

32. Even in jurisdictions where there is no “formal state aid” regime, state aid should also be understood as reducing regulatory barriers and creating a more business friendly environment.

33. In providing support to distressed companies, Governments are required to conduct comprehensive due diligences to determine the long-term commercial viability of the firm in question and the degree of State support required. Governments may not have the skills to conduct this type of assessment. There is a greater role that competition agencies and the private sector can play in this regard.<sup>32</sup>

34. *Business at OECD* supports the view that governments should only intervene in circumstances where the market failure cannot be remedied by private investors under ordinary regulatory processes.<sup>33</sup>

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that should receive more scrutiny. It will also provide retailers with improved legal certainty. See also Massimo Motta, *Price Regulation in Times of Crisis*, DAILY MAVERICK (Apr. 22, 2020), available at <https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/>.

<sup>30</sup> See Eur. Competition Network, Antitrust: Joint Statement by the European Competition Network (ECN) on Application of Competition Law During the Corona Crisis (Mar. 23, 2020), available at [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).

<sup>31</sup> Massimo Motta & Martin Peitz, *EU State Aid Policies in the time of COVID-19*, VoxEU (Apr. 18, 2020), available at <https://voxeu.org/article/eu-state-aid-policies-time-covid-19>. See also Fumagalli, Motta & Peitz, *supra* note 14, at 7.

<sup>32</sup> C.D. Howe Inst., COVID-19 Crisis Business Continuity and Trade Working Group—Communique #6: For resilient re-opening, test, trace and target support 6 (May 4, 2020) available at [https://www.cdhowe.org/sites/default/files/attachments/communiques/mixed/CWGR\\_2020\\_0504.pdf](https://www.cdhowe.org/sites/default/files/attachments/communiques/mixed/CWGR_2020_0504.pdf).

<sup>33</sup> *Id.*