

OECD issues coronavirus enforcement guidance

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The Organisation for Economic Cooperation and Development has warned enforcers that structural remedies may not be sufficient to remedy anticompetitive deals during the covid-19 pandemic and urged authorities to be “extremely quick” when dealing with collaboration guidance requests.

Last week, the OECD issued guidance to help governments and antitrust authorities navigate issues around [merger control](#), [competitor collaboration](#) and [exploitative pricing](#) in the wake of the coronavirus pandemic.

Merger control

Without a thorough merger review, there is a serious risk that the coronavirus pandemic could lead to higher market concentration and market power in several sectors, causing price increases, harm to innovation and productivity, the OECD’s competition division said in its guidance on merger control last Monday.

The OECD warned that during unparalleled economic uncertainty, competition authorities will face key challenges in exercising merger control powers and increased pressure to speed up merger reviews. These challenges include increased uncertainty about how markets will evolve and an influx of failing firm defence claims as companies try to acquire competitors in financial difficulty.

The possibilities for customers to switch to other suppliers, the impact on innovation and the relevance of efficiencies will be greatly influenced by the degree of market disruption, the report noted. Competition authorities will need to consider the competitive effects of mergers against several alternative future scenarios and should reach out to other government entities and regulators that have knowledge of a specific market, the OECD said.

The organisation also encouraged competition authorities to be creative to prevent structural remedies from becoming less practicable due to the pandemic’s impact on the economy.

The pandemic may not only increase the importance of remedies, but it may also raise issues regarding both their design and implementation, the OECD said. It added that in markets affected by the crisis, structural remedies may not always be a viable option because of difficulties in identifying suitable buyers and the inability of some parties and authorities to respond to rapidly changing markets.

Antitrust enforcers will have to be more alert to the risks of previously trusted remedies being ineffective, the OECD said.

The OECD said that despite behavioural remedies allowing for greater flexibility, they also have more limitations than structural remedies because they require “burdensome monitoring”. They should be limited so enforcers avoid having to monitor their effectiveness for an undefined time, it added.

Competitor cooperation

The OECD’s guidance on competitor [collaboration](#) noted that evaluating an agreement’s efficiencies is typically determined by the legal and economic context, and that the covid-19 pandemic is no exception.

Analysing cooperation between competitors during the pandemic requires assessing the scope of an agreement together with the need for the cooperation to overcome market disruption, the OECD said.

Competition authorities need to react “extremely quickly” to a request for guidance by businesses, the report explained. This can be done through general guidance to help companies determine, before reaching an agreement, whether a proposed collaboration may be problematic or by adopting regulations to exempt the application of competition law to a given sector for a certain time period, the OECD said.

However, it added that while faster guidance has the advantage of not requiring a time-consuming case-by-case analysis, these cases also mean authorities cannot rescind approval if the agreement is later found to be anticompetitive.

The guidance recommended that enforcers impose obligations on private companies to thoroughly outline the details of an agreement when notifying a proposed cooperation request. “In this way, competition authorities may be able to verify, ex-post, the lawfulness of the cooperation, without creating an ex-ante barrier to its implementation,” the report said.

In the US, the Department of Justice and Federal Trade Commission issued a [joint statement](#) in March promising a quick turnaround when reviewing cooperation between businesses during the pandemic.

Last month, the DOJ approved [collaboration](#) among medical equipment manufacturers McKesson, Owens & Minor, Cardinal Health, Medline Industries and Henry Schein to jointly address the national supply shortage of masks and gloves. The companies [submitted](#) a business review letter on 30 March and received approval from the DOJ on 4 April.

Exploitative pricing

As the pandemic has created global production and distribution difficulties for certain essential products, these supply and demand shocks may significantly influence how companies behave in markets for essential goods and services supplies, the OECD guidance on [exploitative pricing](#) said.

The organisation noted that while some companies can explain most commercial behaviour changes, some corporate conduct might require close scrutiny by competition authorities, including potentially anticompetitive conduct including arrangements with competitors, discriminatory pricing and unfair terms and conditions.

However, for agencies with excessive pricing powers, bringing such cases was challenging even before the coronavirus pandemic, the guidance noted.

Competition agencies need to consider whether enforcement against excessively high prices is “needed, proportionate and effective”, the OECD said. It added that enforcers should also take into account whether alternatives, such as consumer protection, price gouging rules or even price regulation are preferable.

The report also claimed that the greatest challenge in bringing an exploitative pricing case is to prove that the conduct in question is anticompetitive.

“Since all the methods to determine whether a price is excessive under competition law have weaknesses, excessive pricing analyses should be carried out according to as many methods as practically possible,” the OECD said. International price comparisons for excessive products may prove to be particularly useful in determining whether prices are excessive, the guidance added.

“Immensely valuable externalities”

Thibault Schrepel, a Harvard University fellow and professor at Utrecht University School of Law, said the OECD is offering great guidance to antitrust agencies, which in turn provides companies with increased legal certainty.

“Its recommendations rely on sound economic findings and build a consensus on the path toward increasing the common good,” Schrepel said. The organisation is generating “immensely valuable externalities,” he added.

Damien Geradin, partner and founder of Geradin Partners in Brussels, noted that the guidelines suggest governments should request and be receptive to competition agency advice when planning market interventions to address market failures resulting from the pandemic.

“That makes sense as government interventions, if not properly calibrated, can lead to market distortions and make matters worse,” Geradin explained.

The three documents provide guidance on the measures that will be pursued by OECD members and will be a good source for non-OECD countries, he added.

Salomé Cissal De Ugarte, a partner at Hogan Lovells in Brussels, said that while competition authorities may need to adjust their enforcement priorities by exempting certain forms of cooperation, adapting standards for efficiency defence and accepting mergers for failing firms, this should not mean competition law should be weakened or softened.

“The basic principles underpinning competition policy are still valid and should be maintained if we want a speedy and strong economic recovery,” De Ugarte said.

Richard Pepper, counsel at Cleary Gottlieb Steen & Hamilton in Brussels, said that the guidelines are consistent with the approach already taken by many agencies and do not advocate for a material departure from established antitrust principles.

Rather, the guides recommend relaxing merger assessment standards and argue that legitimate competition collaboration should be restricted to what is necessary and limited in geography and time, Pepper explained.

Regarding the OECD’s call for speedy decision-making and more creative approaches to merger remedies, these steps could “certainly help businesses navigate competition issues and proceedings, without undermining the substantive foundations of antitrust,” Pepper said.

He added that agencies should seriously consider these ideas as the world moves from the first phase of the pandemic into a period when some of its early economic consequences become clearer.