

Challenges and changes for competition authorities during and post COVID-19



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We are going through unprecedentedly exceptional times due to COVID-19, which as a result makes social and economic impacts around the world. What is worrying more, it is widely acknowledged that predicting when this uncertain situation finishes is not easy as some experts are concerned about the second wave of infections while others are looking ahead with muted optimism. Fortunately, however, researchers and governments in almost every sector beyond healthcare authorities to contain this outbreak as well as market players work on overcoming this problematic situation. This phenomenon is not exceptional in competition policy.

This article examines how competition authorities and international organizations respond to the unprecedented crisis during COVID-19. This article, then, sketches what challenges we will face for competition policy environments post this current pandemic. Among others, the currently ongoing digitalization would be anticipated to accelerate and demand towards big governments strengthened while globalization more retreated to localization post pandemic. Responding to each of these challenges, this article demonstrates what competition authorities have to prepare and change in the new normal.

Even though there have been some transatlantic differences in responding to this challengeable situation, pandemic-adjusted enforcements are discussed among and suggested by competition watchdogs in many jurisdictions. Commonly, they have mostly focused on protecting competition and vulnerable consumers particularly in the industries of essential goods and services such as health, pharmaceutical, medical equipment, and food industries. For example, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) Antitrust Division, on March 24, 2020, jointly announced a statement addressing an expedited antitrust procedure and providing guidance for collaborations of businesses to protect the health and safety during the COVID-19 pandemic. The FTC also provides a guide to help consumers avoid Coronavirus scams and publishes daily-updated coronavirus-related complaint data including fraud and identity theft through its COVID-19 website. Across the Atlantic Ocean, European Commission (EC), on April 8, 2020, stated on the application of the antitrust rules during the current coronavirus crisis and adopted a Temporary Framework Communication, detailing main criteria for assessing antitrust of business cooperation to address the shortage of essential products and services during the COVID-19 outbreak. Recognizing this pandemic challenge, global-level organizations such as OECD Competition Committee and ICN (International Competition Network) also continue their efforts to cooperate with competition enforcers during the pandemic crisis by cultivating adequate competition policy formulation as well as sharing enforcement experience in response to the crisis.

The risk-management approaches on the above by competition authorities are effective in controlling the current emergency situations. However, these approaches might be only quick fixes considering this pandemic will be able to make long term impacts on the global economy through different channels and in different ways, and subsequently, change the industrial structure. Competition authorities should depart from the status quo and be prepared for this new normal after COVID-19. They need to first find out upcoming changes post pandemic, then figure out how the changes will shift their competition policy paradigms, and finally establish a more innovative policy toolkit in response to the permanent changes.

Digitalization, even though it has ever been proceeding to date, would be one of the most rapidly accelerated phenomena post pandemic due to the rise of the 'untact economy.' A competition authority, as a coordinator, should lead a more active discussion in the government addressing the digital economy from the broader context of digital innovation, not simply as a regulator, because digitalization process influences multiple sectors in different ways.

First, while online platforms under digitalization provide numerous benefits to firms and consumers such as wider choices with higher qualities and business opportunities with low cost, they, compared to the traditional brick-and-mortar industry, also raise market concentration, and complicated and debatable competition concerns: market definition and assessment of market power in multisided transactional online platform, competition for the market rather than competition in the market, innovation competition rather than price competition, pro-competitive and anti-competitive effects of network or big-data, etc. The digital economy primarily based on online platforms and big data could have both pro- and anti-competitive effects in the markets. However, robust evidence on which impact on competition and consumers dominates is not verified yet. For instance, innovative but apparently anti-competitive conduct could harm some parties such as sellers and delivery riders in some sides of a multi-sided online platform while other groups such as consumers could be better off in the other subset of the market.

Besides, competition issues in the digital economy are in parts contradictory to other emerging issues such as personal information protection of GDPR (General Data Protection Regulation). For example, while stronger enforcement of GDPR would be helpful for security issues of personal information and in parts beneficial to consumers, the enforcement possibly, in some senses, leads firms to avoid data sharing and could undermine competition and harm consumer welfare by aggravating data concentration of tech behemoths. This convergence feature of the digital economy suggests a policy implication that governments' response to the digital economy should be considered in a more complex and multifaceted way beyond only a competition policy. It is notable that the Competition and Markets Authority (CMA) in the UK launched and leads the Digital Markets Taskforce as an advisor to the Government interacting with other government branches. The Taskforce covers even wider policy objectives including economic growth and innovation, privacy, data protection, and intellectual property rights. The Korea Fair Trade Commission (KFTC) also launched a task force team to introduce a new guideline covering online platform sectors even though its discussion topics are more or less limited compared to those of the CMA.

Plus, competition authorities should take more interests in researching and be prepared for examining the impacts of digitalization and the pandemic on labor markets, especially regarding the prevalence of 'gig economy' or platform labor. Indeed, competition policies have not seriously tackled the monopsony power in the labor market because traditional competition tests largely focus on one-dimensional market and its consumer price. However, in the context of the network-driven digital economy, there are changes in forms of employment where platform workers are not a typical employer, rather a super temporary self-employed. These

changes would be more prevalent post pandemic due to the untact economy. Thus, if there are commercial relationships rather than employment agreement between online platforms and self-employed (but substantially controlled) workers, competition authorities should examine anti-competitive effects when they enforce competition policies, for example when reviewing mergers in the online platform industry. Dating back to the antitrust legislation, antitrust policy cared about monopsony power in the market. It is notable that when Senator John Sherman proposed the Sherman Act he commented “[i]t commands the price of labor without fear of strikes, for in its field it allows no competitors.” (Congressional Record 2457, 1890)

Even though globalization has been in the middle of shrinking since the long-lasting US-China trade tension, this de-globalization phenomenon would proceed even faster in the form of localization and/or reshoring post the current pandemic. Market competition pressure within a country usually comes both from domestic and international factors. The greater de-globalization is, the weaker the degree of competition in domestic markets becomes due to reduced trades and FDIs. The increase in the degree of market concentration in the domestic market will call competition authorities for more active roles and responsibilities to protect market competition and consumer welfare. However, active enforcement does not always mean aggressive intervention in the market, especially in the absence of evident anti-competitive effects proved. In some cases, antitrust toolkit boxes could not fit to address domestic concentration issues. Then, competition authorities should cooperate with other government branches rather than allowing political motivated approaches to apply antitrust box and enter market competition. When a competition authority assesses anti-competition effects of a violation and/or formulates new regulations, the authority should be mindful and armed with the market- and effect-based approach.

Last but not the least, COVID-19 experience would increase the demand for the era of big government. In 1996, a Democratic president, Bill Clinton declared “The era of Big Government is over” in his State of Union address. However, according to the recent USA TODAY/Suffolk University survey on April 28, 2020, 50% of the respondents answered that the government should do something more to solve the country’s problem, which is 18% points higher than responses to the same question in a Gallup poll conducted in December 1995. Big government could be effective and helpful in saving a vulnerable group from the pandemic. Even so, big government should not justify excessive intervention at the expense of market competition and consumer welfare. A competition authority in charge of market competition should play a role of critical advisor to other government branches in the intra-governmental relationship on behalf of competitive private sectors for preserving competition and innovation in the market. To

do so, the authority should monitor and refrain public sectors from excessively stepping in the market against market principles, particularly when the intervention is anti-competitive and harmful to consumers by suffocating innovation. For example, the authority should prevent other branches from introducing anti-competitive legislations generating negative impacts on the market, and cultivate a level playing field for fair competition between state-owned enterprises (SOEs) and private competitors. Also, when the failing firms are recapitalized or funded by the government during and post pandemic, a competition authority should support 'willingness to compete and innovate' in the market by suggesting that financial authorities distinguish competitive and innovative firms from those that do not.

The COVID-19 has threatened almost every sector with unwanted challenges and risks. Competition policies are no exception. Under pandemic situations, competition authorities should expedite antitrust procedures, monitor unfair practices exploiting emergency situations, allocate resources efficiently, and share their experiences through the international network of competition enforcers. However, given that the pandemic could make long term effects on our economy, more fundamental measures should be taken because we might not return to the pre COVID-19. Competition authorities should exploit this crisis as an opportunity to preemptively upgrade their competition policies. To this end, more comprehensive but rigorous R&D on digital economy policies covering innovation-led economic growth as well as competition policy should be conducted. They, when considering innovation factors in competition tests, should balance between 'false positive' (convicting the innocent) and 'false negative' (acquitting the guilty) to avoid choking innovation and falling out of the digital competition. De-globalization post pandemic could reduce inward competition pressures from international markets and then urge competition authorities to engage in more highly concentrated domestic markets. However, the intervention should be based on market- and effect-based approaches rather than politically motivated ones. Lastly, to prevent the excessive growth of big government which seems to appear post pandemic competition authorities should play more critical roles as a protector of market competition within the government. **KIEP**