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Competition policy: time for a reset?

TUAC contribution to the OECD Global Forum on Competition
Paris, 7 December 2020

Executive summary

In a context of increasing corporate power and rise of inequalities, TUAC welcomes this year theme – Time for reset? – for the OECD Global Forum of Competition. The situation is now taking a new urgency as in the wake of the COVID-19 pandemic, corporate concentration is likely to increase.

Policymakers and competition agencies need to substantially change their current approach so as to fully embrace the sustainability agenda. Some key changes are possible with existing tools and can be implemented swiftly.

Competition principles, when overly strict interpretation prevails, can run against inclusive and sustainable growth. This is particularly true when competition rules run in conflict with freedom of association and collective bargaining rights. Competition authorities should encourage, not restrain, collective bargaining rights, which constitute fundamental rights protected by international standards. Collective bargaining offers a powerful way to counterbalance power asymmetries within and between firms, and prevents labour market monopsonies.

From a systemic point of view, industrial policies and competition must become complementary so as to address wealth and market capture by a few large firms and encourage widespread innovation.

In the longer run, a legal reform of competition policies is also necessary. A narrow focus on the consumer standard is an impediment to a more hands-on approach to corporate power, which is evidenced in the growing digital sector. The risk is for competition authorities to bargain away sustainable competition for cheaper price and consumer choice in the short term. A broader standard will have a positive impact on competition authorities' ability to capture the reality of economic power, and to secure lasting remedies.

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Introduction

On 7 December 2020, [the OECD Global Forum on Competition](#) will discuss potentially fundamental changes to competition policy frameworks, including how to capture a wider range of potentially anti-competitive conducts, consideration of industrial policies and the promotion of sustainability. TUAC very much welcomes such discussions. Both policy-makers and competition agencies need to substantially change their current approach so as to fully embrace the sustainability agenda.

TUAC regularly describes in its contributions to the competition committee how increasing corporate power has to be analysed in the context of rising of inequalities and the falling labour share of income¹. Excessively unbalanced labour relations contribute to wage stagnation, artificially low levels of employment and precarious working conditions.

Yet, in practice competition authorities are hesitant to recognise the societal impact of corporate power. The narrow focus on the consumer standard is indeed an impediment to a more hands-on approach, especially when it comes to the dominance of digital business models. Arguably, competition authorities have been bargaining away sustainable competition for cheaper price and consumer choice.

The situation is now taking a new urgency in the wake of the COVID-19 pandemic. Several challenges are arising. To face the crisis, large businesses will further consolidate their position through mergers and acquisitions. In a bid to increase the resilience of national industries, many governments will ask their competition authorities not to obstruct such operations. In addition, the market reach and capture of digital business models is significantly growing as a result of lock downs.

A reset of competition policies is essential to mitigate the impact of corporate power on workers and public policies. It would allow for more competitive markets and better distribution of productivity gains to both workers and consumers.

It is often argued that public policy considerations imply a subjective assessment, which only the legislator can make. Accordingly, competition enforcement agencies would not be competent to broaden the consumer welfare. In a first section, this paper argues that some key changes are possible within the current frame of competition policies and should as such be implemented urgently. Such changes would involve the suspension of some competition principles when they run against sustainability objectives. The second section makes the case for additional, long-term, legal changes so that competition authorities are better equipped to actively integrate sustainability in their assessment.

An enforcement that meets public concerns

Sustainability and workers' rights must take precedence over competition

As recently raised by the European Commission in considering how to adapt competition policies to the new Green New Deal for Europe, “agreements pursuing sustainability objectives may in principle enjoy the benefits of [block exemptions] so long as they do not contain hard-core restrictions and when the joint market shares of the parties to the agreement do not exceed specific thresholds. The current debate aims to identify whether there are remaining barriers to desirable agreements supporting Green Deal objectives and if so, how such barriers can best be addressed”.ⁱⁱ

Such “desirable agreements” would cover for instance companies pooling resources to develop technological innovation for renewable energy. However, in the absence of appropriate monitoring, profit-seeking businesses are likely to primarily look at strengthening market power, using their contribution to sustainable investment as a means to an end. For this reason, the close involvement of employees in such “green cartels” is an essential element of balanced power within the firm and a strong guarantee against green washing. Environmental and social objectives when assessed together with stakeholders including trade unions and workers’ representatives yield better sustainability results.

The “just transition” principle is a framework developed by the trade union movement, according to which workers’ rights and live hoods must be secured when shifting towards sustainable production. Just transition measures are a crucial condition to implement the ambitious climate policies we urgently need. Without the correct social conditions there will never be enough support in society for the structural reform of our economies needed to protect the climateⁱⁱⁱ.

→ Ensuring workers’ voice is heard within firms can be a power tool for competition and sustainability to work together.

In a context of labour market monopsony, employers’ power to set wages is not counterbalanced by bargaining power on the side of the workers. To avoid that, the

sometimes unavoidable concentration of industries must be accompanied with the protection and promotion of workers' fundamental rights to bargain collectively^{iv}.

In some ways, by not applying to collective agreements competition law already recognises the contribution of collective bargaining to more balanced power. However, this approach is a negative one and interpreted restrictively - as evidenced by recurrent legal difficulties faced by trade unions in trying to enforce their agreements against free competition principles^v. The lines between dependent employee and independent worker are increasingly blurred and anti-cartel provisions have come as an obstacle to collective bargaining on behalf of non-standard workers. Collective voice to set labour friendly standards should be upheld and expanded to all workers: employees and genuine self-employed workers.

- Collective bargaining should be carved out from competition rules in a context of a steady growth of non-standard forms of work, in particular online platforms blurring the distinction between dependent and independent workers.

Conversely, competition enforcement should be more stringent over business practices seeking to strengthen employers' power over individual workers. These practices include employment contracts restricting access to labour courts, "non-poaching" agreements, whereby firms agree not to compete or 'poach' workers from each other. Trade unions are also seeing a surge in "non-compete" clauses, preventing the employee from working at a competitor. Whilst non-compete clauses may find some justification for workers handling trade secrets, they are clearly abusive in the case of low and middle-skilled workers. The use of algorithms marking workers should be also assimilated to anti competitive practices, having the same effects as no poaching agreements and abusive non-compete clauses^{vi}.

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The interplay between industrial policies and competition must be rethought

The benefits of open trade are not shared evenly among economies. Whilst in OECD countries, trade and investment are linked with higher productivity and R&D intensity, lower income economies are struggling to move up the global value chain in terms of added value activities^{vii}.

Furthermore, the pandemic is shedding a new light on the organisation of global value chains. The geographical concentration of suppliers and dependencies on them have been the source of severe trade disruptions, particularly problematic for the supply of essential goods. Concentration of suppliers is often explained by short-term cost considerations. Organising a supply chain mostly along the cheapest cost factor has severe implications not only for potential trade disruptions but also for public policy concerns, such as environmental protection, responsible production and labour rights^{viii}.

As a response to the crisis, many countries will look at reshoring essential activities through stronger state interventions. However, competition and industrial policies suffer from considerable tensions. Competition authorities are reticent towards direct and indirect state aids, which they consider as distortions to the normal course of free markets. Industrial policies may indeed lead to harmful dumping practices, leading to overcapacity and dumping practices. Another tension may arise between, on the one hand, the need for certain sectors to remain in the race for global leadership and, on the other hand, further strengthening oligopolies, which is ultimately harmful to the economy and social welfare.

These tensions must resolve, and industrial policies and competition become complementary. A global reflection should take place on the necessary objectives and design of state interventions. An increased reliance on industrial policies may foster a reorganisation of global value chains towards a more diverse and greener production. Independently from the pandemic, a reflection should also be engaged on how to foster more market entries, especially in disadvantaged areas. The objective should be to address wealth capture by a few large firms, but also to contribute to more harmonious development globally^{ix}.

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Towards a modernisation of competition law

The above adjustments of existing competition rules may help treating the symptoms, but not necessarily the causes of excessive corporate power. A legal reform of competition policies will be necessary so as to better address the root causes of corporate concentration.

Beyond the consumer welfare standard

Competition law as it currently stands with its exclusive focus on consumer welfare does not sufficiently take into account social welfare and how excessive corporate power fuels increasing inequalities. As a result, competition fails to fulfil its goals of achieving economic efficiency and protecting the vulnerable. Competition objectives must therefore be enlarged. This broadened objective will have a significant impact on methodologies to assess market power, as well as remedies to address it.

The reality of economic power

The current competition methodologies to define markets make it difficult to assess the reality of economic power. Competition policies have not caught up with the development of global value chains. Defining relevant market along product lines was relatively straightforward fifty years ago, before the rise of global value chains. Groups of

companies were traditionally composed of units relatively autonomous in their operations. Globalisation and the digitalisation of the economy have changed the picture. Today, multinational enterprises fragment production throughout the value chain. Business practices have changed and corporate group structures are more complex than ever^x.

For many jurisdictions, a change in focus and methodology is therefore required. A range of products and services in the output market can be very large and yet the global operational and labour strategy piloted by the controlling firm remains the same across the entire corporation. It is therefore essential to approach a group of companies as a single entity, and not as an aggregation of distinct legal units. Corporate power should be assessed having regard to ownership of capital (including intangibles) and rent-seeking behaviours.

Balanced power within the firm

Competition authorities should take a more proactive and positive approach towards workers' bargaining power. Union friendly policies, collective bargaining coverage and the presence of instances for workers' representation should be considered as structural and behavioural remedies to address monopsony power and ensure sustainable and inclusive growth.

Competition authorities should assess the potential impact of mergers and acquisitions on employment and the environment. A first step is to assess to which extent workers have been informed and consulted in the decision leading to the merger or acquisition. The competition authorities should then condition their approval to appropriate negotiations with workers' representatives on possible restructurings and displacements. For this, the recognition of trade unions in all the entities involved should be an essential prerequisite.

The law should also protect employees in case of mergers and acquisitions. Certain jurisdictions guarantee the respect of pre-existing collective agreements and prohibit dismissals of employees for reasons linked to the transfer to a new employer.

And just like a merger can be refused in case of too large supplier power, it should also be possible to stop mergers in case of too large buying power when a labour market monopsony which cannot be addressed by structural and behavioural remedies is arising around the corner.

Finally, excessively rigid franchising, subcontracting and outsourcing agreements that limit price competition should be carefully examined in light of their effect on employment, social cohesion and labour rights.

ⁱ[Conglomerate effects of mergers – impact on employment](#), May 2020

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- [Data rights and competition – the risks associated with workers’ data](#), May 2020
- [Trade and competition – the need to deal with social impact](#), November 2019
- [TUAC proposals to enhance protection against labour market monopsonies](#), June 2019
- [How can competition contribute to fairer societies ? TUAC contribution on market concentration of online platforms](#), November 2018
- ii European Commission (November 2020), [Competition contributing to the European Green Deal](#)
- iii TUAC (September 2019), [Climate action through a well-being lens – another way to say Just Transition?](#)
- iv TUAC (June 2019), *Proposals to enhance protection against labour market monopsonies*
- v See for instance FNV Kunsten Informatie en Media C-413/13, where the Court of Justice of the EU held that collective bargaining on behalf of genuine self employed workers might fall under the scope of EU competition law
- vi TUAC (May 2020), [Data rights and competition – the risks associated with workers’ data](#)
- vii OECD (October 2019), *FDI Qualities Indicators : measuring the sustainable development impact of investment*
- viii TUAC (April 2020), [The OECD trade and investment response to COVID-19 – the need for broader, long-term policy discussions on Global Value Chains](#)
- ix TUAC (November 2019), [Trade and competition – the need to deal with social impact](#)
- x OECD (2019), *Micro-Evidence on Corporate Relationships in Global Value Chains: The Role of Trade, FDI and Strategic Partnerships*