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#4 Antitrust: Price-fixing, excessive prices, crisis cartel…
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Opening Keynote Speech: Frédéric Jenny

Good morning, good afternoon and good evening depending on where you are. I saw how the list of participants there are people from all over the place, so I'm very glad to have you. We are going to look at a few issues which are raised by competition law enforcement and particularly the antitrust part and enforcement raised by the crisis. As you've heard, we have very eminent panellists and on top of the presentation which has already been made of the panellists, I want to say that each one of them has had a long experience as an enforcer, Luc in DG COMP, John Davies at Mauritius and before this, with the Competition Commission in the UK, and Jerome as the Head of merger enforcement at the competition division of the French Ministry of Finance.

So, they are both thinkers, lawyers, and experts. So, before I give them the floor, let me just start with a few general remarks. My very first remark is that shortage is a word which is rarely used by competition economies or competition authorities. And the reason for this is that we're mainly interested in the adjustment between supply and demand, and mainly interested in making sure that the adjustment is at the competitive level rather than a monopolistic level. But we don't usually conference situation where there is a clear miss-adjustment or lack of adjustment between supply and demand. And yet this is exactly the situation that we are confronted with today.

The lack of adjustment between supply and demand is well known. A sudden considerable unexpected increase in the demand for a number of goods or services which are helping people face the risk of the pandemic of COVID-19. And on the other side, a sudden considerable and equally unexpected reduction or elimination in the supply of those goods and services, either due to the pandemic itself or due to the confinement, which is in many countries the only practical option for people. So, all of a sudden, we're confronted with situations where there is no possibility to meet supply and demand, and this creates a number of problems. Normally, an economist would say, well, we wait and as we wait, demand will go down and supply will go up and eventually we'll get back to an equilibrium. But the thing is that we do not have the time to wait, first of all, because this adjustment between supply and demand is so huge that it is going to take quite a bit of time for the market to readjust supply and demand. But second and maybe more importantly, because the lack of adjustment has or imposes a huge cost on society in the form of lost lives, that's one, and also in the form of opportunity costs of the confinement for all the people who cannot work anymore and have to stay at home. So that means that probably policymakers cannot rely on the normal functioning of market forces and they have to take measure to ensure that the supply is increased as fast as possible, but also that whatever little supply is available is distributed in the best, the most optimal way, and that, of course, means that first, a lot of those products and services have to be delivered to frontline people, people who are at the frontline of the fight against the COVID-19.

So, the supply of masks, the supplies of gloves, the supply of testing kits, the supply of disinfectants, etc., needs to be adjusted. And the two problems that we're confronted with is one, to restart the supply and make sure that the supply is adequately distributed, and this is possibly the most important issue. And second, of course, to make sure that in the meanwhile, some people do not abuse their market power by charging an extortionate price to whatever is available. Now, this creates a bit of a problem for competition authorities. First of all, because we not usually in the business or not necessarily in the business of checking prices. I mean, we do have jurisprudence, particularly, in Europe on excessive price. This is controversial of jurisprudence. We're going to hear about it later on in the discussion, but it is not something that competition authorities feel particularly comfortable doing. And second, competition authority are usually a bit wary of the possibility that when businesses get together with or without governments to produce and then to distribute goods, they may enter into anti-competitive agreements, why? Because they have to coordinate to avoid duplication, to make sure that all of the medicine or all of the products that we need are being produced, and also given the absolute lack of supply to make sure that the distribution is harmonious, is thought about and therefore is organized. So, competition authorities are a bit perplexed, I would say, by those circumstances.

And what I find interesting and now want to focus on is the fact that they have reacted in, what I think are, quite different ways. And I'm going to take four examples because those are examples of jurisdictions that we will talk about [inaudible] in our discussion. The first reaction that I would choose is the ECN statement, which I find interesting. I mean, if I had to summarize it and probably to oversimplify it, I would say that the philosophy is, there is no problem. There is no problem because we competition authorities have an instrument, excessive abusive prices, so we can check on price gouging to certain externalities, to the extent that it's linked with dominant firms.

And second, when you read the statement there is the idea that cooperation among competitors to increase supply probably is not or does not raise any competition issues and if it does raise competition issues, certainly such agreements would be considered to be contributing to economic progress and therefore could be exempted from the prohibition of anti-competitive agreements. Now, this is an amazing statement I find personally for two reasons, but the most important one is that it says something about the fact that agreements between suppliers to organize and distribute supply would in all likelihood benefit from the efficiency defence, whereas first of all, competition authorities have been known in Europe to be fairly restrictive in the conditions that they impose to benefit from this defence and be also, what's interesting is the fact that the national competition authorities who are the authors of the ECN statement are not competent to apply 101(3). So, there's a bit of a question there as to whether the Commission would have the same view. But the basic idea is that national competition authorities think that we the tools that are necessary to face those new problems. When one goes to the Temporary Framework of the Commission, there's a bit of different emphasis, and the different emphasis comes from the fact that the Temporary Framework pretty simply recognizes that in the process of increasing supply and ensuring the fair distribution of that supply, it may be necessary for firms to engage in exchanges of information or commercially sensitive information and to coordinate in ways which might be anti-competitive.

So, unlike the statement by the ECN, the EC recognizes the fact that there may be a situation in which what is necessary to achieve an adequate level of supply and distribution may require indeed behaviours that are usually considered to be anti-competitive. But the Commission then states that in view of the emergency of the situation and in view of the temporary nature of the agreements that would be entered into to try to bring up the supply, the Commission is not going to consider that those

agreements are part of its priority. Now, this is interesting. The Commission does not exactly say why it thinks that shouldn't be a priority and there may be a public interest issue there to protect the health of the people, the supply has to arrive to the people as soon as possible. So, in the name of health quality policy, I will not intervene in those cases.

But I would like to add that there may be a very good economic reason for not intervening in those cases. In other words, we may stay within the confined of economic analysis because what I've said earlier is that the cost of not having those agreements, the cost of doing nothing, of letting the markets adjust by itself is likely to be huge in terms of lost lives and in terms of opportunities cost of confinement. So, one can easily consider that whatever restriction to competition there might be in those temporary agreements, the cost to society is not as large as the cost of not intervening. So, therefore it's better to let those agreements go through and therefore for the Commission to decide that they are not a priority in its enforcement. But there are two possible rationales for the position of the Commission.

One of them is, I would say, public interest kind of rational and the other one is even an economic calculus. Now, when we go to the CMA, which is my third stop and next to the last stop when we go to the CMA, there are two things that change. First of all, the CMA is in a much better position to deal with the first issue, which is the issue of price gouging or excessive prices. Like all competition authorities which have responsibilities both for competition and for consumer protection, it has more possibility to act and deeper possibilities to act them.

The second thing which I find interesting about the CMA statement is the extent that it takes, which is a bit different again from the EU. It doesn't say there is an economic reason for which I'm not going to intervene, it goes right to the heart of the matter and says, I have a public interest goal, which is to deliver what is most needed for vulnerable consumers. Now, vulnerable consumers, of course, include the people who may be exposed to this terrible disease and because I believe that what they most need is access to the supply that is going to protect them, I'm not going to intervene against anti-competitive agreements that are going to deliver what is most needed for vulnerable consumers. So again, it's a shade which is different from the EU. It is less on the strict economic calculus. It is more on the fact that the CMA sees that it has the ability to choose to prioritize the case that it thinks are more politically relevant.

Now, there's a second aspect which is quite interesting in the CMA statement, which is the way in which it is going to treat efficiency defence if for some reason it has to look at some of those agreements which are designed to increase supply and to make the distribution of that supply fair. And it says, well, I have a number of criteria that I have to meet before I can decide that there is an efficiency defence. The first criteria that I will use, of course, is whether, in fact, those agreement are efficiency-enhancing and the CMA says by definition because the increased supply, they are likely to be found efficiency-enhancing. The second dimension is that I have to establish that they give a fair share of the benefit to the consumer. And again, the CMA says, well, by definition because they are going to increase the supply of protective gear and medicine to consumers, it means that consumers are going to get a fair share.

And then we get into something which is extremely interesting, which is the third criteria. The CMA says, I also have to look at the fact that the restriction to competition was indispensable to obtain the efficiencies that are alleged. And there the CMA says, well, I'm going to look at this efficiency

question by keeping in mind the fact that firms, governments, I mean, whoever is involved in those agreements, had to act very rapidly because of the spread of the disease. And in this very short period of time, there was no alternative really to organizing the agreements as they had been organized. So, what it tells us there is that the whole notion of an efficiency defence is very much dependent on the timeframe that you have in mind.

And when you have a very, very narrow timeframe, well, the number of alternatives that were possible is probably very limited, which means that it was indispensable to enter into such agreements. So, what I wanted to point out for the CMA is both the public interest I mentioned and the interpretation of efficiency, and the fact that efficiencies can be interpreted in different ways depending on how you look at the issue and what you think is the relevant timeframe.

My last and final stop will be in South Africa because I know that later on, Jerome Philippe is going to talk about things in South Africa because this is the fourth type of reaction to the difficulty of dealing with the public prices with competition law. There, in South Africa, unlike any of the other countries that I've mentioned or jurisdictions that are mentioned, the government has decided that competition law just doesn't work to solve the problems that need to be solved. And therefore, the government has decided to amend, on the one hand, the competition law and on the other hand, to exempt a number of agreements from the competition law. So, the recognition there is that competition law is not the right tool to try to face the situation. Now, on the amendment to the competition law, the South African government passed a law, an amendment which basically changes or adds to the current competition law presumptions of excessive pricing. And what it adds is the fact that if you increase your price more than your costs and therefore increase your mark-up or your margin compared to the three months before March 1st, 2020, then you are presumed to have increased your price excessively and unfairly. So, that makes it much easier for the competition authority to use its abuse of dominance standard because it now has a presumption which is very easy, which is only based on whether or not you have increased price compared to the situation before the crisis.

Of course, we will hear from John that some economies may have some qualms about the wisdom of doing this, but what's interesting in the case of South Africa is that this presumption has been made both in the competition law and in the consumer protection law because it's the same presumption which is going to work for unconscionable behaviour on the firms, which is administered by the consumer protection agents. When it comes to the exemption, the government has basically said, look, any agreement which is supported by the health ministry to try to increase supply should be exempted from competition law. Okay? So, it's very simple. I don't trust the competition commission to look at them. I worry that they are going to find that those agreements are too anti-competitive. I just want to exempt them.

And the government has also exempted two other sets of agreements from the competition law for the duration of the crisis, which are the banking sector because it thought that the banks should get together to try to alleviate the difficulties of many businesses in South Africa, and finally the retail property sector and that's to try to alleviate the difficulty of many retailers who cannot pay the rent, and that requires also a collective solution. So, we have four types of response, it's business as usual. It is not business as usual, but there are economic reasons for which I will not intervene. There's the public policy aspect tinkering with the definition of what is an efficiency and there is the reservation vis-a-vis competition law in South Africa.

So, I just wanted to point to those different tendencies and now to turn over to Luc who has been around for a long time in the European Commission and therefore has lived through previous crises and is going to tell us whether there are lessons to be learned from the previous crisis of this time.

Panel 1: EU antitrust enforcement policy in COVID-19 days – the past, the present and the future

Luc Gyselen

Thank you, Fred. Hello everyone. Welcome to Bruges, my hometown. I must say it's quite an experience to host over 700 people in my private home. So, I hope we'll make this an enjoyable event.

Starting with the first slide and starting with a high-level point. I think most of us will have read the Temporary Framework that the Commission issued a couple of weeks ago and we've all focused on that part of the framework that shows that DG COMP is willing to take a constructive approach towards certain types, very specific types of cooperative arrangements aimed at dealing with the COVID-19 crisis. But I wanted to remind everyone of paragraph 20 in that Temporary Framework because that paragraph reminds us that the Commission, and I quote, will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for anti-competitive conduct. Which is why I would say that the overall message of this Temporary Framework is, let there be no mistake. The default situation is that there will not be a relaxation of antitrust enforcement policy in these crisis days. And that's not new when we go back to the previous crisis, not comparable but still a crisis in 2008, and I've cited two publications there, the OECD publication and also application from the then director-general of DG COMP. In both applications, you will find references to President Roosevelt's new deal package that included the National Industrial Recovery Act, which was an act that gave trade associations, in particular, an opportunity to come up with self-regulatory codes of ethics of fair competition and seeking approval for that from the president and exempting these coats from the federal antitrust laws.

These publications which have there on this slide make critical references to that act. For the few people amongst you who are US constitutional lawyers, they will remember that this act was quickly declared unconstitutional by the Supreme Court in the *Schechter Poultry Corp.* case and if I may add a personal note, shortly thereafter, a new assistant attorney general that was appointed to the Department of Justice, [inaudible] and that was Thurman Arnold, one of the founding fathers of our firm, Arnold & Porter, and he would become a quite active antitrust enforcer.

Basically, the Temporary Framework makes what I would describe as a very bright-line distinction between two types of cooperation. And I think that distinction reflects the antitrust enforcement priorities as they have been in place for quite a while.

The first bullet refers to, I would say, the pro-competitive arrangements which as we already have heard from Fred, will be either viewed as unproblematic or at least not a priority, so not worth being pursued, so benign neglect, I would call it, versus the other types of conduct that are problematic because they would limit output and not increase output.

Two specific points I wanted to make before we go to the next slide, with regard to the first type of

cooperation, which again, is the focus of the Temporary Framework, you will have seen that the Commission explicitly says that the involvement of public authorities in these arrangements is a relevant factor in particular when they say encourage companies to get together and work something out. I perfectly understand that reference. There is however some tension I think with the settled case law.

There are several cases, and I'm referring to the highest court, the Court of justice, who has reminded us from time to time that even if national authorities encourage, and I'll give later some examples on companies to get together and agree on something, that that will not make them exempt from the competition rules. And there's also the flip side, there is the often forgotten case law because it never really got any bite, the Commission never did anything with it. But the flip side of the case that I've just mentioned is that a state-action may also be anti-competitive and be considered to be unlawful if it renders the application of 101 and 102 ineffective, precisely because it might impose anti-competitive contact on companies. So, there is some tension here with existing case law and that's something I wanted to flag. I think that in essence. The involvement of the public authorities is far less important than the type of cooperation which is at stake. In other words, if the type of corporation is an increase output-oriented animal, then the fact that the public authorities encourage that, in my view, doesn't add much weight to what should be the natural conclusion i.e. that it is not lawful.

The second point I wanted to make with regard to that first type of conduct is a procedural point. Having had the privilege of being a member of the working group that drafted regulation number one, I should simply remind people that what the Commission has done now is unique in the sense that for the first time in 17 years, it has shown willingness to provide guidance and possibly even some comfort informally to companies and that is in line with something that is somewhat hidden in the very last recital, I think, of regulation number one, recital 38, which states that where cases give rise to genuine uncertainty because they present novel or unresolved questions, the Commission might be stepping in and give some guidance.

Why do I mention this point? Because this was a recital before that recital landed in the draft regulation. There was a lot of heated debate within DG COMP for obvious reasons but let me very briefly state them. The first one was, well, if we start giving informal guidance, that will take away the resources that we want to preserve to go after the really important cases. The whole idea after all behind regulation one was not just to give up the monopoly on the application of article 101(3) and share that with the national competition authorities and then national courts, this was a means to an end. It was a means to an end to the objective of freeing resources to go after the hardcore infringements, in particular the cartels. So, there was a concern that if we would go beyond the recital 38, that this would bring back through the back door, the comfort letters that we had issued by the hundreds and the hundreds.

The second concern, secondary but still was important, you might smile when you will hear it is that for those who are old enough to have lived the pre-regulation one area, you will remember that these comfort letters were standard comfort letters, uninspiring, other than giving you the comfort that you were off the hook, there was no motivation. However, in the '90s, having been in DG COMP in those days, I think I know what I'm talking about, there have been cases where heads of units felt the need to put meat to the bones and start drafting sometimes lengthy comfort letters, very motivated. They wanted to explain why a particular region was not anti-competitive. However, that was often not even screened properly by the policy director, DG COMP, let alone the Commission's lead service.

So that was not considered to be a good practice, which is why again, we have nothing else. Recital 38 is not even a legal basis. It just says that the regulation doesn't stand in the way of giving that informal guides. So, I just wanted to give you that historic perspective.

Again, focusing still on the cooperation, the types of cooperation aiming at increasing output, two remarks on the policy objective. The first one is more of an academic point. As you know, the Temporary Framework very much focuses on cooperation to make sure that there is sufficient output of essential scarce products that are needed to combat the crisis, in particular, in the intensive care facilities of the hospitals.

And I see some link with Article 106(2) of the treaty, regarding services of general economic interest. Just for those who may not remember what that provision exactly states, it says that the companies that are entrusted with the operation of such services shall be subject to the competition rules provided, or in so far as the application of these competition rules would not obstruct the performance of the particular tasks that have been assigned to them. In plain language, because this is a very sort of wooden language article I find, but in plain language, it means that competition rules will not apply if they prevent the companies from doing something that they have been asked to do.

And I think that the burden of proof that the companies have under the Temporary Framework is not different from the burden of proof they face in 106(2) cases. Which is that you need to demonstrate, that you need to cooperate, that this is an objective necessity and that you cooperate in such a way that is strictly necessary to deliver if you want. To get to the laudable goal that you have in mind, but it's just one academic analogy I wanted to make.

The second point is too big to handle in this presentation, but I was asking myself whether this Temporary Framework has or will have, going forward, some impact on the debate that we have had and that has not gone away on the role of public interest in Article 101 and 102 cases.

My personal view is not but it all depends on how you define “public interest”. My view is, I don't know whether we have anyone from DG COMP attending, that in all those cases where you can see some public interest language in the Commission's decisions, they have always been presentable. The reasoning surrounding has always fitted well, I think, with a little of the framework for 101(3) analysis. And, in particular, the consumer welfare test that is embedded in the second condition of Article 101(3). I may have said too much in too few words, but maybe we can discuss this later on in this webinar.

Let me turn to the second bullet. I'm now turning to the case that has given rise to this comfort letter. I've been wondering here, again we were not involved, but I was wondering how much genuine uncertainty to repeat the terms from recital 38 in the regulation 1, how much genuine uncertainly there was amongst the participants in this project and how many novels or unresolved questions that cooperative project really raised. The circumstances are clearly unprecedented. My gut senses, but this is just based on what I've read so far is that most of what the participants have in mind, I wouldn't call them no brainers but seemed pretty straightforward to me and in line with the case law. Maybe with one caveat or with one tweak, which is, and I think Fred already mentioned it, the exchange of confidential information. That is always a very tricky thing in such arrangements, even if they have a prime lawful goal.

And I remember I make the point because I remember from my DG COMP days when I was dealing with pharma, I think it was in 2003, there was an issue, not comparable to this pandemic thing, but there was an issue about access to medicines against malaria, TVC and AIDS in the Sub-Saharan part of Africa. An issue was this, the industry was willing, I'm simplifying this, but the industry was willing to make these medicines available in sufficient volumes and at very, very affordable prices. But they were very concerned that there would be paddle traders, shipping them back into Europe. And then they said DG COMP is going to come after us. And I remember there was a large stakeholder meeting at which I explained, backed obviously by my hierarchy including the commissioner, that we saw no issue or would see no issue if the industry would take measures to block the reimport of these medicines.

The project, in the end, I think, didn't take off the ground. So, notwithstanding our reinsurances. And I think, but again this is a bit of a guess and my recollection maybe not too accurate, but my recollection is that the industry members who would participate in this project would also have to deal with an exchange of confidential information. And I think the regulatory department of the Commission insisted on supervising this very much the same way as what I understand DG COMP has asked the Medicines for Europe Association to put in place, a supervision system. So, I found that I had to, was not a smile, but I thought about this earlier case where I think the exchange of information under the supervision of the European Commission authority was not something that the industry members then felt comfortable with. And I've now seen the same idea come back and apparently accepted by the people.

Turning to the last slide, and again, I will not go into too much detail, now, I'm focusing on cooperation aimed at restricting output. As I've already said, no relaxation of the enforcement priorities business as usual. And the *French bovine meat cartel* case is a nice example. Again, the crisis is not comparable to the current one, but this cartel had to be placed against the context of the second mad cow disease crisis. And in a nutshell, what happened was this: the French farmers had teamed up with the slaughterhouses not only to set minimum prices for the French bovine meat but also to stop imports of meat coming from Germany and Holland. And the excuse or the reason that the parties gave was that while the French public authorities have taken pretty drastic measures to combat the BSE crisis, they felt the German authorities and the Dutch authorities had not done so. So, they felt they were entitled to boycott the import of that meat because it might've been contaminated by the mad cow disease. And this case, again, interestingly enough, came on our plate a bit like the current days via another department.

It was DG AGRI who flagged it to us. And what we did is we send an RFI, request for information, to the parties asking them to explain but also telling them, frankly speaking, “don't do this”, “you can't do this”, “you need to stop”. The answers we got in less than two weeks, we gave them very little time. This was a crisis and we wanted to tackle it. The answer we got was, "Okay, we got the message, we'll stop." We were about to write to amount it that we had handled the cartel case in two weeks, but then we discovered that there had gone undercover so to speak. We conducted dawn raids, we found more evidence and it all ended with a prohibition decision with fines. But the important point I wanted to make, to go back to public authorities encouraging or being involved in the matter, not only was the effect that there were EU measures in place to combat the BSE price was not an excuse, the French minister of agriculture who had told the parties that he considered the cartel to be an act of good citizenship was not considered to be an excuse for the farmers and the slaughterhouses to get away

with this. So, that's why I wanted to flag that case as an example of enforcement will always remain in place even if the circumstances are very special. The circumstances in *French bovine meat* case were very special, so special that for the very first time, I think also with the last time under the old finding guidelines, we granted a huge a 60% discount on the fines on account of special circumstances.

Let me turn very briefly to the green zone areas. I don't think I will say much about crisis cartels. Perhaps we can, I think Jérôme may say a few things about that as well, so I will save my gunpowder, if they call it like that, for later.

Clearly the crisis cartels are of a different kind compared to what we have seen in Medicines for Europe initiative. I think the trends we have seen in the past 40 years is that initially, DG COMP was quite generous, if you want, with crisis cartel. The *Synthetic Fibers* case from the 80s, the *Baksteen* case from the 90s, *Irish beef*, that's a preliminary ruling case but it was an Irish competition case, is a different story. Notwithstanding the government in this instigation, this was a case where the Irish government had encouraged the beef processes to set up that cartel. But if you read the judgment, there is a very short reference to Article 101(3) at the very end, but not the very encouraging one. And to my knowledge, this beef cartel has not benefited from an exemption. Whether that was a wise outcome or not, I have my doubts that's a bit provocative, but maybe we can discuss this later.

Perhaps more importantly and more relevant under the current circumstances. One thing is to increase output, another is to restrict output, but you may also or companies today, may also face a situation which they have an unexisting output that they can't quickly expand. And then the question is what do I do if the demand exceeds what I can offer? And then I think the takeaway from the case law, most of us will remember very well the *United Brands* case and the *Lelos* case. *Lelos*, which as you know, refers to *United Brand*s all over the place I would say. There's also the *BP* case from the 1970s. That case law, I think, stands very clearly for the proposition that even a dominant company can allocate its existing output amongst its established customers provided it does so fairly. So, it needs to have an objective allocation key of some sort and then it would be fine.

That's also what the Commission said in the *BP* case. It lost its case in Luxembourg because it had considered the alleged victim of BPs practices as an established customer of BP. But the Court disagreed with that and said “no, no, no, no”, I think they were called the ADP. It was a cooperative buying crude oil from BP had become an occasional customer. So, it was not entitled to, if you want, its fair share of the existing output. So, that's I think is clear case law that supports the proposition I've just made.

And then, really to end on a fizzy note, I would say, the same issue arose in a case I had to handle in my early days when I moved to pharma and agriculture and that was a champagne case. And to keep it very brief, this was a case where a well-known manufacturer, brand manufacturer of premium champagne, which I will not name, had been found to stop or limit severely part of the export of its champagne to the UK via Calais. Story, which we initially did not believe, which I found very intriguing was if [inaudible] champagne is by definition, by its very nature limited in quantity. It has to be produced in the champagne region. And the big houses can occasionally buy up some acres from the [inaudible], but that's very limited. And we want to make sure that all those who love our champagne will be able to have access to. So unless we stop the significant leaks of big volumes of champagne to the UK, we will not be able to meet their demand. And to cut a long story short, we asked the manufacturer to come up with facts and figures and we ended up closing the case without

further ado, no publicity. So, this case has no precedent value, but maybe you'll think about it when you enjoy a glass of champagne once the COVID-19 days are counted. Thanks, Fred and over to, I think, John.

Frédéric Jenny

Yeah. Thank you very much, Luc, for raising a really interesting issue. John is going to talk about the other troubling thing which is what can we do as competition authorities to try to limit the possibility that some firms are going to abuse their market power and charge extortionate prices for these very scarce. so, John.

Panel 2: Abusive prices

John Davies

Thank you very much, Fred. Hello everyone. I find the little counter at the bottom of the screen for the number of participants compelling were over 700. It's a great pleasure and an honour to speak to so many friends and colleagues all over the world. I hope everyone is well and safe.

So, yes, my topic is a fairly narrow one picking up on a point that was made a couple of times on the call on Friday by the Commission officials. And that is exemplified in a couple of quotes from that slide, from their slide deck. One of them was that they would take action against a sharp price increase or shortage of supply as a result of dominance. And the first half at least of that clearly refers to abusive prices. The second is the quote I've put up there that they would take action or have concerns about anticompetitive price increases.

Now, I think the economists in particular, in the audience, will probably share my puzzlement about the language there because, on the face of it, it doesn't really seem to make much sense. An anti-price increase, we're not talking about margin squeeze or anything vertical like that here, but just an increase in price is not really anti-competitive, if anything, it is more likely to spur competition. But what they mean, of course, is the European law around excessive pricing, exploitative abuse under Article 102. Which in its purest form, it's not about anticompetitive price increases, but you can see why they use that language because it is about a price increase that is possible in a non-competitive situation. And a purely exploitative price abuse, purely exploitative abuse, excessive pricing under Article 102 or national equivalents need have no accusation at all, but that the dominant firm has done anything in particular to create its dominant position or to create the situation in which it can raise prices. It is simply a matter that they have put the price as Fred put it, exploitatively high.

Now, you will undoubtedly expect me, and I will, to rehearse the standard economic objections to that and there are many and they are serious. Prices are not simply a way of determining who gets what in our economy, they are also a very important signal. Indeed, prices are actually what makes the economy work. Prices are what makes the free market economy work. If we didn't have prices, if you control prices, if prices do not reflect, as Fred put it, shortages, then basically the free market system simply doesn't work. The whole point about a market economy is that you don't need to, as a Soviet central planner might understand what every factory can do and what every consumer wants, you

really need to respond to prices. One can see a free market economy as being a kind of information, a way of simply collating all relevant into the single measure which is a price. And all sorts of things go badly wrong if prices are not properly reflective of supply and demand.

So, that is the standard economic argument against taking action against very high prices in these sorts of crises. However, I think we have to be realistic and we also have to recognize, all of us, economists too, that there is more to life than total welfare. It's quite clear that the public, in general, does not share the view of a kind of naive economics 101 first-year textbook, but all that matters is the total surplus. And as long as the price is achieving efficiency, then nobody can possibly object to it. People can and do object very vigorously to what they perceive as exploitative price increases unto what they perceive as the fairness, the unfairness of such actions, particularly in a time of crisis. And Fred will be very familiar with this because he chaired a discussion with [inaudible] about the kind of ethics and how people regard the ethics of what we think of as competition issues. And they are very, very different from the way competition professionals, not just economists, but lawyers as well tend to think about these things. And they are certainly concerned about distribution, they are certainly concerned about inequality and they are certainly concerned about fairness. And there is no doubt that the public, in general, in almost everywhere probably, would perceive an opportunity to exploit this crisis to raise prices, particularly for essential medical services, as being unfair.

So, we certainly have a demand to act against these kinds of short term abusive price increases. And, that is not a demand that we can or should ignore. I don't want to set this up as being economics against social considerations. The issue of trust is tremendously important. In the financial crisis, the last really big economic crisis, there was a lot of trusts lost in global economic institutions and national economic institutions. And I think we are still suffering the social and economic adverse effects of that. When people lose trust in economic institutions, then those economic institutions become less effective and we end up with actually much worse economic policy and much worse economic outcomes.

So, I can quite see why competition authorities and other governments need to respond to this. My question is whether Article 102 and excessive pricing is the right sort of solution to what one might best characterize as price gouging to something I should talk about on the next slide.

So, price gouging is actually a well-established phenomenon. Everybody knows the United States does not have excessive pricing in its federal competition law. So, indeed they don't. But what they do have a state level is a lot of laws against price gouging. And price gouging is generally defined in quite a specific way, which is that it applies to price increases on certain commodities, which may be defined in the existing circumstances and typically only when a state of emergency has been declared. And often the price gouging laws at a state level are really very specific in how they operate. They might, for example, say that if the price is more than 10% higher for one of these goods which are listed than had been the case in the previous three months before the crisis, full state of emergency was declared, and that is in itself price gouging. We're going to see some possibilities for defence against that.

And, it sounds to me as if the South Africans have effectively turned their competition law into a price-gouging law because that really does sound very similar indeed. Obviously, these laws are by no means uncontroversial. The Federal Trade Commission, this published study, for example, acknowledging that there is a public demand for them and trying to get them to be as legally certain as possible and also warning about the dangerous suppression of price signals. But particularly, and I

should note as well, that there have certainly been economic studies showing that the impact of price gouging laws is economically harmful. So, for example, following hurricane Katrina, there were studies showing that the economic harm of the price gouging laws that operated in those affected States may have harmed the economy to the tune of about $2 billion.

And the way it typically works is that particularly when you have a local crisis like that, a price-gouging law, that operates in that area effectively, prevents the flow of goods in from neighbouring States and, therefore, harms the people who are actually in the state where perhaps the intention is to protect them and actually benefits people in neighbouring States who do not, therefore, experience price increases.

Price-gouging laws have gone into overdrive in the current crisis. I was reading about New Jersey, for example, which has a very simple law which says that, again, that there is a 10% limit compared to prices just before the emergency was declared. Their division of consumer affairs has had 1,500 complaints about masks, hand sanitizers, sprays. They've sent 167 cease and desist letters and they have carried out 32 subpoenas as of last week. And that presumably just in the few previous weeks.

So, that's what price gouging laws look like. What does Article 102 excessive pricing look like? Well, it looks very different.

Let me mention a couple of cases. You've got the CMA investigation there which is fairly well known because a lot of it's in the public domain, that launched in May 2013 and is still going seven years on following two appeals and now just reverted to the CMA to reconsider. The only one at the European level is the Aspen investigation. Again, pharmaceuticals that launched three years ago and I'm involved in that case and I won't say anything about it, but there is no statement of objections. So, three years on that is still going.

So, for a start, you can see that these cases can take a long time. They're also very, very rare, as Fred said. If you compare that to the 200 odd actions by the department of consumer affairs in New Jersey and in the course of the last few weeks, you can see that these are very, very different things. And they are different things as well if you look at how the legal requirements to enforce them work.

So, in particular, for Article 102 the excess needs to be persistent. So, query whether an Article 102 excessive pricing investigation could even be applied in the case of the existing crisis. You also, of course, need to be dominant. I mean this is 102 and it's an abuse of dominance investigation. Dominance is a prerequisite. If you look at where the complaints are coming in around the world in Europe, this week for example, as well as in the United States, a lot of the concerns relate to third party sellers on online marketplaces. People who basically bought up some face masks and jacked up the price and are selling them over Amazon, not Amazon itself selling them third party sellers. Would those people be dominant? Probably not. You could just about argue it on the economics that they've got some market power they must have because there is such a shortage. But it's a far cry from the normal definition of dominance as you used in European competition law.

So, Article 102 is really very different from these price-gouging law. And that I think might therefore rather disappoint anyone who is expecting that Europe does indeed have this sort of tool in its arsenal which can, [inaudible] metaphorical just, that can deal with this sort of crisis.

I mentioned Pfizer and Flynn, this case involving these two pharmaceutical firms [inaudible] the price for some medicines related to epilepsy. I wasn't involved in that case, but I published an article about it together with my colleague Jorge Padilla. There's an interesting quote here from the recent appeal, the appeal by the CMA, against the decision by the Competition Appeal Tribunal which had sent its decision back for reconsideration. And this is a quote from one of the judges. And I won't read it all out. But to my mind what this quote from the judge is saying, and this, by the way, is in a decision which is upholding the decision of the CAT and saying the CMA needs to give further consideration to this case.

I read the judge here is saying, "Come on CMA, come on cat. Look at these prices. How difficult can it possibly be to find that these prices were excessive?" And if even the judges find it that frustrating, then how about the rest of society? How about the public, media, politicians? Why do Article 102 excessive pricing cases take so long? Why are they so complex? Well, they just are. Article 102 is a complex beast and an excessive pricing case is no simpler than they exclusionary conduct cases that people are perhaps mostly more familiar with. As I said, I can't really talk about Aspen. I'm also involved in a couple of cases at the CMA that is similar but not the Phenytoin case. But in each case, I can't help feeling that when the competition authorities started these a few years ago, and this is pure speculation, they probably thought, "This is a slam dunk. This is going to be easy, look at these prices. This is outrageous." And when you see competition officials from these agents, if it's talking about these cases in public, they will often say, "Look, this is just outrageous. These are bad guys. We've got to stop these bad guys." And yeah, okay. But there are two sides of any argument. And these cases depend upon legal and economic analysis that is not always as straightforward, I think, as those competition authorities perhaps expected.

Fred will recall that when I spoke about this at a public event at the OECD, I got an extremely hostile question from the audience effectively saying, "How can you defend these guys?" I don't think I was defending them. I think I was talking about the economics and the legal framework within which the Phenytoin case had been decided by the CMA.

But I can understand the anger, I can understand the frustration. These powers, this excessive pricing legislation is not a swift and flexible instrument. What is? Well, that probably depends upon the national level, so I won't go into it and I'm not even familiar with it. In those cases, at a national level, there are obviously consumer protection regulations. But particularly since a lot of what we're concerned about is the health sector, in the health sector there are regulatory powers which vary according to the member state. And, of course, there is often the buyer power of the state health system as well. And, I suspect that if one wants effective action in the current crisis against abusive prices, and I'm sure that is necessary and will happen and indeed should happen. I may lose my economist union card for saying that, but that is strongly my belief. Not least because some of the normal economic arguments against price controls may not apply to some of the very sharp price increases in some of these sectors not least because these are relatively short term spikes. Yes, that could be good for inducing additional supply into the industry. But I can't help feeling that anybody who's actually able to make masks is busy converting all their capacity to making masks anyway and doesn't need masks to be priced at 10 times the normal price in order to do so. But in any case, these some sort of action is inevitable.

So, what about Article 102, is that the right tool for this? Well, not in its current form. Should it be changed like the South Africans so that one changes the competition law to become more like a

price-gouging law?

Well, I'm not a lawyer, but changing the required standard of proof for Article 102 sounds to me like quite a big deal and probably neither possible nor particularly sensible. So, that really leads the question of whether there is some sort of deterrent effect from having these competition laws. Maybe there is, I've personally always thought that the torrent effect of excessive pricing law is pretty weak, not least because it's extremely difficult to get very clear case precedents on what is a reasonable level and competition authorities don't publish guidance on it, but I think it is quite likely that there will be some cases that get launched out of the current crisis.

I suspect that they might rumble on for years, and if they do rumble on for years the competition authorities in question might find that they have some difficulties with them, and they are not quite the easy wins that they certainly hoped for. But I suspect that, in any case, in the health sector at least, there are regulatory powers that are likely to be more effective and efficient. Thank you

Frédéric Jenny

Thank you very much, John. One question you have not answered, is does that mean that there are advantages to having the consumer-protection and the competition function in the same institution? Here we can come back to this later on, but because you kind of put us in a bind. On the one hand, we cannot ignore the demand for checking the prices, and the fact that people don't understand our economics. On the other hand, you said, "Well, we have a very terrible instrument." So maybe one of the solutions is we have both capacities.

Let me turn now to our last speaker, to Jérôme Philippe, who is going to talk about various jurisdictions and have some deep comments on what inspires him when he reads those statements and when he sees those cases. Jerome.

Panel 3: COVID-19 Antitrust Response

Jérôme Philippe

Thank you very much. After Luc spoke about Champagne, welcome back in Paris for this last part. And thank you also to Concurrences and Nicolas and his team for organizing this. In terms of lockdown, it's absolutely great to have such an opportunity to exchange with so many colleagues all over the place. So, I will briefly, because time is running, go through the main communications made by the agencies, and I will insist on the cooperation aspect.

So, first I will address the European Competition Network, this joint statement of March, which came pretty early. So, the main message that it was, obviously, convened is that competition rules remain relevant and will not be forgotten during the crisis. Then it addresses some kind of cooperation.

But, actually, when you look at what is covered, it is extremely limited. First, it is limited in scope, because it's only limited to ensure supply and fair distribution of scarce products to our consumers. So actually, there are very few products which are concerned, and that's by far distinct from the vast majority of markets that are currently affected by the crisis. So, it's an only very small part which is

directly addressed. And then what it says about those, this small part, is that ECN will not actively intervene against necessary and temporary measures in order to avoid the shortage. So again, this is another very, very limited medium impact on, typically, the comfort to get when just reading this is, I would say, rather low.

At the same time, it passes a very strong message on prices, as has been already mentioned and discussed by John, that the ECN will not hesitate to take action against prices that could be too high. And so, that's a clear warning but I think what it misses when you compare the two is that actually quantities and prices are the two sides of the same thing. You need prices to balance the market. And if supply and demand are not balanced, then you have moved at prices. And, it remains totally silent on this, which I think creates quite a big uncertainty on what will be covered and the kind of comfort you will get actually.

And that leads to a question which is actually if you look at the cooperation that is covered, would those measures be, in the first place, anti-competitive anyway? I very much doubt about that, because those measures are clearly different from the crisis cartel, as they tend to ensure to increase production, so that's really the opposite or to ensure fair distribution of production. So normally, they would rather unlikely be anti-competitive. Clearly, they will not be anti-competitive by effect, because as we've seen the effects are rather positive. So, if we tried to see what could be really addressed, actually we end up with a number of restrictions by object, which normally would raise issues, and in that case, could be looked at in more favourably. And in that, we have the action of confidential information, we have allocating-production and we will find allocations of contingents to resellers by territory, by segment, and finally destination clauses. I think these are the four main restrictions by object, which normally would typically raise issues and which you consider may be covered by that statement from the ECN.

But how was it being covered? Well, it's not said it would be automatically valued, of course. They would be covered by what we could read as some kind of relaxing of the usual 101(3) conditions. We know the standard of 101(3) is very difficult to reach. Very often, it fails on some elements, on the indispensability as it has been discussed already. And here, we could expect from that statement that the relaxation would take place in considering to allow for efficiency defence with 101(3). I did not mention a public interest, but again we could imagine it could be encapsulated in that part of the statement.

If we come now to the International Competition Network Statement, which was on 8, April. Actually, it's very similar to that of the ECN. I will not discuss that for long. It says that a product and services must remain available at competitive prices, and then it focuses, again, on these normal products that are essential to public health. And the main message actually is that the authorities will remain vigilant about increasing prices.

When you've mentioned cooperation, it's again with such a limited scope and limited impact, which you had with the ECN Statement. Again, there is nothing, and I think that's missing about the link between price and availability. When you have more demand than supplies, prices will rise and this is not anti-competitive, and it says nothing about that. Although this is a great deal today. And if you block that rise of prices, which have to balance the market, you create shortages. And that is not a total address.

So, at some point there is kind of even a contradiction between the very strong focus of price, which I would say generally speaking as a consumer, I wouldn't stand. But it's a bit contradictory with the opening two measures in order to avoid shortages. Because precisely, by planning on prices and blocking price movements, you create shortages. This is something we could see in France. The government blocked the price of hydroalcoholic solutions, which was going to very high price but available everywhere and very quickly it became just invaluable because the price was blocked actually. So, there is a contradiction here, and it is not at all stopped by those statements.

Important to note, there is a call to transparency in that statement, which I think is very important that all new guidance and enforcement policies should be even more transparent and provisioned very timely manner as usual and I think this is a very important part.

So, if we, based on this, we can see that the activity of the competition authorities remains very strong. And I apologize in advance if I missed some of them, which is very likely to be the case. There was already a French decision on the beginning of April about the termination of exclusive imports of ventilators to some overseas territories in France, a case which was dealt in the one week only. Actually, it looks like it's not legally a commitment decision, it's a termination of an investigation. But it looks like a simplified commitment decision as that domination was this idea as a consequence of a commitment taken by the importers. So, I think that case in a very short time demonstrate full ability to act and we'll see the will to monitor and take action on the market.

There is also a South African decision to refer the case to the Competition Tribunal in early April. So, that was about price-increase. And Frédéric mentioned the new standard of price increase that is now applicable in South Africa. Well, that case is a very specific case as the increased was 900%, so, this one looks very high indeed but there are other cases going. And so, there is quite a lot of activity by the authority on price-gouging at the moment.

I would just like also to mention there are ongoing proceeding in Poland and in Italy and then, which is not on the slide, in Brazil, with large investigations that have been started. So, there is a lot of activity following those statements by ECN and ICN. There is a lot of activity by the Competition authorities.

If we come now to the EC Temporary Framework, I will go rather quickly because I think it has been partly discussed already. Again, it calls for comfort or guidance, is again relatively limited as it concerns mainly essential scarce products and services during the outbreak. So again, this is pretty limited compared to, I would say, needs we see all over the industry. It also mentions that communication, that self-assessment remains at the basis. And so, we clearly remain within the context of regulation 1. The Commission is only here to provide help and made it clear, and it made it clear also during the seminar last week, that guidance is different from comfort. Comfort remains very limited and will be through comfort letters, and at the sole discretion of the Commission in exceptional cases, and clearly all cases coming now, are not exceptional.

So, I think we already had one of the letters by the Commission, although it's very notable as it was the first after nearly 20 years of no such letters. But again, this remains exceptional and for the rest, it's the guidance. The guidance, as we see it in the framework, only concerned a very limited scope of goods.

So, what is, I would say, more important is actually the process for consultation that have been put in place by the Commission. So, the main box that is dedicated one by the Commission, that the same

mailbox you should use to obtain either guidance or comfort depending on the case. And again, it is the Commission that would choose whether it will give comfort or not. But what is very important is that the scope for this is much broader than the scope of the guidance that was given by the communication itself. Basically, you can use that guidance mailbox for every kind of cooperation, every kind of question in relation to the crisis you have, and it's not at all limited to those cases [inaudible] or everything like this.

So, I think actually this is the most important part of the response to the COVID because it really creates a condition to get guidance in a much broader way than the communication itself. And I should add that goes within and outside the European Union, a number of authorities have also opened such [inaudible].

So, if you look at the information provided upfront with such requests to the Commission, well you are the, of course, the firm's concern so it's clearly not on an anonymous basis and, I would say, it's a consultation, on a very open way. And you need to indicate what in your view could raise concern in EU antitrust law and, of course, the benefits and why it's proportionate.

So, if you can see that the item five, why the cooperation is necessary and proportionate to achieve those benefits, it's actually drafted in a rather broad wording, which hints that the criteria of 101(3), typically very difficult to meet, could be relaxed to some extent. And I think this is something very important to note and as I mentioned already, these consultations are in many cases, as what we understood last week from the Commission, have been discussed. One letter of comfort, which is not yet published but, we understood, would be published soon, has been issued. And I wanted to highlight that it has been issued two days after the request. So, this is something which works pretty well and is pleased to be very efficient.

And to terminate and end on this, I would like to highlight, what seems to me, something which is missing at the moment. I have already mentioned the dual approach on price and cooperation, which is not really taken into account, but I think what we are missing at the moment is to discuss the way to recovery. Because today, during the lockdown, we have a number of markets where there is currently neither supply nor demand. So, there is no market. So basically, there is no need for market action. There is a need for financial support to avoid attrition of the market players, but there is no market. So, there is basically nothing to do with all the market. It is when we will come to recovery that we may and encounter new needs because, basically, we will start from demand and supply zero, and hopefully back to demand and supply which would be normal.

The point is we have no idea whether demand will rise quicker than supply, or whether it will be the other way. Whether this will depend from industries, whether this will depend from geographies. So, we may face strong imbalances, temporary but very strong, in the way we get back to recovery. And the number one market for which there is no need for action now, again, will need such action. Typically, take tourism or from most of the people transportation, in tourism-market is totally, at the moment, is totally black. There is no market at the moment basically. Transportation, I think we probably have 5% of the market, no more. When we will go back to full-market, we have no clue how this will go. There may be an excess of supply but is not sure because a number of supply chains have been disrupted. No idea how quickly they will be reconstituted, there may be an excess of demand.

And so, we may see prices go to absurd levels in one way or another. Just give a look at the oil prices

at the moment. I'm not saying it's all due to the COVID crisis, but yesterday at the close, at New York we had negative-price for the barrel. Who would ever have imagined we could see that one day, a negative price for the barrel? So, we can be very erratic prices when in the way to recovery, probably much more than what we see today. This is something we are not discussing today but we should think about it. This issue did not exist in the 2008 crisis. We have no recent experience of a crisis of both demand and supply.

So, this is really something we should anticipate. I mean, if we have a lockdown and then we fail the recovery, it may be much more harmful. So, I would really welcome the thought on that, and probably sooner than later, because we will probably need some guidance in the past. Thank you.

Q&A session

Frédéric Jenny

Thank you very much, Jérôme. I mean, your last question is probably a question for the next seminar or the next webinar, because it's a pretty wide question. Before we go to the questions, there are 24 questions which have been asked, so there is going to be quite a bit of questioning, does anybody want to make a comment on something that one of the other speakers made? No? Luc?

Luc Gyselen

Yes. Well, I'm in two minds. I had a few comments, but we should go to the questions, that Q&A.

Frédéric Jenny

Okay, so let's go through some of the questions. So, we have them by order of popularity.

Question

Okay. So, my question is what about public tenders? Should there have been an exemption to crisis anti-competitive agreements relating to public tenders, and is the analysis any different as it is related to the supplier for essential material to the public health care system?

Luc Gyselen

Yeah, I know. Well, the question reminds me of something I think you heard. Was it the governor of the state of New York mentioned that he was outraged that he had to bid against other states to get enough material, whatever it was, to combat the COVID-19 crisis?

So, I think there are two aspects. If that product has to come from one single manufacturer, then the question is would there be any room for scrutiny of that company's pricing in response to the tenders? Which brings us back to the issue of whether article one or two would apply. On that one, John already said you need to have dominance. Dominance normally requires a sustained position of strength, vis a vis your competitors and your customer over a prolonged period of time. It has to be sustainable. So, it doesn't seem to be irreconcilable with a situation where there's a certain shortage of a particular

product and therefore, whatever the dominance there would be would not be the dominance that we are familiar with. It's more like the notion of economic dependence of customers vis-a-vis suppliers.

So, in that first scenario, I think there would be room, technically speaking, for some scrutiny under article one or two, because I think that may answer one of the other questions if I may fold it into this one, I think the *BP* case that I mentioned, it's an old case that people will not remember or will not have remembered, but in that case, I think the court, the Court of justice, recognized that BP wasn't, or found itself, in a dominant position. Although it was of a very temporary nature, it was caused by the oil crisis.

So, I wouldn't call it a strong case for an enforcer, but technically speaking, it might come up for scrutiny. The different thing is, but that would have nothing to do with the crisis-cartel if several suppliers of particular score goods would somehow part realize that you are into bid-rigging. So, if there is strong demand for a particular product but those that can supply it would find some form of arrangement to soften the price competition, that for me is not a crisis cartel, that's a price cartel.

Frédéric Jenny

Okay. Jérôme, do you want to add something?

Jérôme Philippe

Yes. Thank you. Just in relation to public tenders and, of course, I share what Luc has just said about bid-rigging, but maybe there should be a longer-term thought about the way, not the principle of public tenders of course, but the way they are organized. Because this crisis has shown a lot of tension on the products that are not made locally and that are made very far away. And this has been seen as one of the reasons why there have been some shortages because it's obviously longer to buy those products and to make them come.

So, there has been a debate, which is broader than competition law, about the relocation of production in Europe and closer to the needs of the European people and there has been a lot of things about that. But to some extent, we should understand that the way we do public tender at the moment. If we relocate some production in Europe, it's more likely than not that they will not be competitive and not be selected in public tenders by hospitals because, obviously and that's a reality, they are more expensive to here than in other parts of the world.

So, I think if we raise that question, it means we need to think more about public tenders, the way we organize them, the conditions we put to them in order to permit this. Otherwise, I'm afraid it's a vain wish to relocate it.

Frédéric Jenny
I would add to this, just the fact that in some of the Member States in the EU, I mean there have been several cases where when the tendering agency has been allocating shares, usually, because it wants to have some security for the future, this has been considered to be an anti-competitive practice. There is a case like this in Spain, I know, in the health sector and there are other cases as well. So, I think that Jerome was saying, that we have to think more about how we can deal with those issues in the context of public procurement, is quite important. There was a second question.

Question

Well, I have some insights into how the competition agency here works. But my question is there are some young competition agencies, more so in developing countries such as Kenya, they have done quite a bit in terms of bringing their enforcement to a level that it currently is. There's a lot of pushback from companies, most of those who think that the practices they engage in which are passive and competitive, that's just a normal way of doing business. If such agencies such as a Competition Authority of Kenya allow for temporal coordination, would that not roll back the gains that they have made so far? And if that happens, what advice then would you have for such agencies? Thank you.

Frédéric Jenny

Who wants to take this one?

Luc Gyselen

I'm happy to make one or two comments. I'm not sure I will fully answer the question. One, I mean, Jerome made the point, an interesting point, that if you look at what you can do when you reach out to DG Comp to seek guidance, the scope of what you can bring to the table seems indeed broader than the Temporary Framework but that's a slippery slope for DG Comp. As I mentioned during my presentation, there were severe objections to having anything like informal guidance as we now discuss it, and it has taken DG Comp 17 years and an unusually or an exceptional circumstance, to actually, I wouldn't call it giving but to address the need for such informal guidance. My prediction would be that I think DG Comp will be very, very selective in picking the next case, so to speak. And that's not a young agency, that's a mature agency. But I think they will be very economical in making use of that mailbox. It will have to be very, very specific, novel question.

And secondly, if I may add, when I mentioned the French bovine meat case, that was a case where when we had to discuss the level of the fines, we knew we had the legal basis for granting a significant discount on account of special circumstances under the old guidelines. Again, I can tell you there was a debate, within DG COMP and beyond, to take that very special bovine meat case as the first case where that provision from the old guidelines would be applied.

Again, I'm mentioning it because it showed the strong reluctance of a mature agency to make use of something it had. Because I remember the people who were doing the cartels said: “Look if you apply that in your case, they will be queuing to get discounts of fines in cartel cases”. So, what you flag as challenges for the young agency, I fully understand them. And what I'm saying is that even a more mature, or an agency that has been longer around, is facing as well and will have to manage.

John Davies

Can I say a few words? Kenya competition authority isn't that young, is it? I seem to remember visiting Kenya in 2004 and meeting Francis Kariuki and even at that stage, he had been going for some time.

Look, I mean, businesses are always going to try to use any excuse that's going to say, well there

should be a general rolling back of competition law, and they'll lobby government to that effect. And we know that. There are, as Fred can tell you, there are lots of OECD debates and publications where one can hear some war stories from competition authorities that have faced that and come through well. My impression is that competition authorities in developing countries and elsewhere came through the financial crisis without, in general, a diminution of the degree to which they could pursue their mission.

But I mean, I think if there is one fairly obvious thing to do, it is to say that this is not about, do we just turn down the dial of competition policy, or do we turn it up? It's about very specific measures. It's about very specific exemptions. So, there may be reasons why cooperation between companies in some sectors, in some circumstances, is actually valuable and will produce greater output or in some ways of the public better in the current circumstances. But as the official said on the call on Friday, this is not crisis cartels. This isn't about companies just banding together so that they don't talk go bankrupt in bad times. These are very specific reasons and very specific exemptions.

And I think that if the competition authority needs to get ahead of that kind of debate, the way to deal with that is to start a bit of a discussion about that, to put out some guidance on, well what exactly do we need to allow to happen that we didn't use to allow in the present circumstances if those circumstances differ? Rather than just, hey, yeah, we'll suspend competition law in some way for a while.

I think keeping it specific like that helps to then focus it on, well what's actually worth doing and what is not worth doing in the current crisis.

Frédéric Jenny

I would add, going in the same direction that John mentioned. The fact that I think what is key is to be extremely clear on the reasons why won't accept certain kinds of coordination at some point. And that in fact in your question you said, well, competition authorities in developing countries are very fragile because firms might want to take the opportunity of the fact that they have accepted this or that agreement and try to extend this beyond what is reasonable.

First of all, I think that the same fear exists in developed countries, which makes for the statements and frameworks to be very boring because you have a first section that says all the principles stay the same, all the enforcement is going to stay the same. Nothing has changed until you finally get to the part where there is something.

And the reason for doing this is to send a message: “Look, I'm not changing my general views. So if you are going to accept some circumstances, there's one thing that I would, which I think is a bad example and which is given by most of the developed countries' competition authorities, is to say, “well, I'm going to use my prioritization powers to decide not to go after those cases”. I think that this would be a very dangerous thing to do in a developing country because there would be then the feeling that the competition authority is picking and choosing who it wants to go after, and that therefore it is not an equanimous and neutral body.

I think that what is acceptable probably is to write down very precisely what kind of agreements and what kind of circumstances. And this may be where some of the languages which have been used in

those statements are not precise enough. And I'm going to say something which is very not politically correct, but in some way, the South African situation is very much clear: "I'm just going to exempt all the agreements that the ministers push to try to solve the crisis. This is maybe wrong in some way, but in another way, it doesn't lend itself to the fact that there will be an ambiguity in the future. Okay? That only during the time of the national emergency and this is the way it's going to be".

But I think that anything that can allow to anticipate and to be very clear on what is allowed is what I would suggest. But this leads us to a third question.

Question

Well, I found in the communication of the Commission was a bit obscure from the legal point of view. I don't understand why 101(3) is not mentioned as probably this is the legal basis for the exemption. But what is more worrisome is that at a certain point a communication says that if the coordination is encouraged by the State, there is no point. There is no question. It's fine. Well, this is contrary to the case-law of the Court of justice. I don't see the legal basis of that. So, I was wondering if you have some suggestions and elements to answer. Thank you.

Luc Gyselen

Yes. Well first, I liked the question, and at some point, I wanted to make the point that I was wondering whether the conflict letter that DG COMP will issue will be an article 101(3) comfort letter or a 101(1) comfort letter. In the early days your attitude, the negative [inaudible] of comfort letters [inaudible]. I bet it's going to be a 101(3) comfort letter. We can discuss that. That brings us back to the point that Jérôme made, is this agreement within the association actually truly anti-competitive within the meaning of Article 101(1). I'm not so sure about that either. So, I think Jérôme and I share the view that there are arguments to say the contrary. But that's one.

As to your second point, I must say I was more struggling with, well you're referring to paragraph 16 of the Temporary Framework. For me that is, I wouldn't call it copy paste, but in line with the Court of justice's [inaudible] judgment from, I think 97, where the Court has at least said that if anticompetitive conduct is required from the [inaudible] association, or even if it creates a framework that gives them no commercial freedom of action, then you can't hold it against these companies to have engaged in that activity. In a way, they have lost their freedom to decide for themselves, so that doesn't have an impact, or rather that has been forced upon them and so they can escape scrutiny.

Another thing, as I've mentioned, I didn't mention the case, but there is a state action part of it. Technically speaking, if a state for the wrong reasons imposes particular conduct on the undertakings, the undertakers may get off the hook. But technically speaking, there could be an issue under the so-called "effet utile" case law from the Court that we have had for more than 30, 40 years. But that definition has never used, it has never made active use of that at all. So that's my response to the second part of the question.

Frédéric Jenny

Let me add to the previous answer the fact that I find it a bit distressing to use the prioritization criteria for public policy objective in general, particularly when it's not very explicit that this is what is being

done and I think that there is a little bit of this by the Commission.

Now, the next question is "How to ensure there are safeguards so that companies do not obtain more information about each other's potential future actions? It may make tacit collusion more likely in future?"

I think that this question has been answered already. The Commission, I mean in the example that was taken. The Commission wants to monitor very closely the kind of exchange of information that's going to take place. And I think that this is pretty much the way that one the Commission can hope to control.

The foreign question is "what do you suggest for national competition authorities to do after the pandemic is over and markets should go back to operate as normal?"

Now, I'm not sure I understand the question. Because, if the special circumstances in which we are, are not there, I think that competition law was working normally but is [inaudible] around.

So, I propose to take two more questions and after that, we are going to have to stop. There is a question for Luc on the interpretation of in paragraph 20 of the Temporary Framework and the concept of dominant position conferred by the particular circumstances of the crisis. And whether that aligns with the definition of dominance.

Luc Gyselen

Yeah. I had already spotted the question when I was addressing the earlier one. As I said, I was trying to fold it into my earlier answer. I think, frankly speaking, if you look at the various elements that the Commission carefully lists in, I think it's also paragraph 20, but of its guidance paper on what it takes to be dominant. Duration is one element. I call it sustainability. But I think finding dominance in a very specific set of circumstances that are short-lived doesn't sit well with the definition of the case law as expressed also or also summarized in the guidance paper. So that's one.

I guess many companies might have become dominant and elusive standards. So, I don't have a better answer than that other than what I mentioned, which is that I would have to read that case more carefully. And I confess I didn't do it before this call. With the *British Petroleum* case from the late 70s, this is an old case, this is not often a Russia united brands. But this is a case where the Court accepted that BP was dominant. Again, in the circumstances that seemed a bit similar to what we have here, so there seems to be at least one precedent where a temporary position of strength was considered to be strong enough to qualify under the dominance test. I'm just flagging it, I don't have a better answer.

John Davies

If I can just come in, Fred. I mean, I think this is similar to what I was talking about with excessive pricing. But I think you might find competition authorities launching cases under 102, and then one or two cases take a long time. In a year or two years' time these things could still be going on and they might be looking at them in the cold light of day when we hope things are back to normal and better. And thinking, well how the hell am I going to prove this dominance? Transitory dominance even

though it can be quite tight is quite hard to justify in an economic sense as well. When you think about the notice on market definition, that effectively talks about a relevant market as being something in which you can sustain a price differential compared to outside that market for a year.

So the idea that a temporary price spike as opposed to, and I'm not talking about something like always being dominant at 11 o'clock in the morning if you're an electricity generator, that's a different matter, but a short term thing there may well be legal instruments in the area of consumer protection and so on that can take action against that. But I think competition authorities would find themselves with some quite difficult cases on their portfolio if they launched these things without really thinking that through.

Frédéric Jenny

Okay, thank you. The next question is, I think it's a comment: “I do not think §15 has cartels in mind (crisis cartels). It has certain horizontal agreements in mind which could be "problematic" as this para says under "normal" circumstances. If it had cartels in mind, it would not have used these terms. In fact, para 20 mentions cartels and is clear that these are prohibited”.

Luc Gyselen

Can I make a comment on the comment?

Frédéric Jenny

Okay.

Luc Gyselen

Very brief. I think you're absolutely right. I refer to crisis cartels as the grey zone areas. And the temporary brain framework focuses on arranging that increase output versus arrangements that decrease output. And then you have this middle ground, I would say, where you have an existing output. And crisis cartels are of course cases that may or may not arise, not now, but later. Once we get back to normal you may find a situation where the market has come back that is, there is demand. That the demand is not meeting the surplus capacity. So, I expect that at that point in time the crisis cartel issue may come up again. But I totally agree that this is currently not sitting in either paragraph 15 or 20, it's in the middle.

Frédéric Jenny

Okay. Two more questions and then we are going to have to stop.

Question

Thank you very much for the presentation, quite interesting and helpful. But my question is, well it's perfectly clear that competition authorities will see with very nice eyes agreements that improve production capacity, increase production capacity. But precisely because of this problem with time and this cost resources that some companies have, they have to make a choice. If I want to produce more

of this product, I have to produce productions in others. So, if it is done on a lateral basis, there's no problem. If it is done as a cooperation agreement, it may end up that some companies in a concerted way are going to reduce the output of certain selected products. We can turn my lead to price increases. When analysing the efficiencies of these agreement to improve increase output, should we expect that authorities will also look at these other potential parallel effects of reducing outputs of other products in a coordinated manner? That's a point. Thank you.

Luc Gyselen

I think you are right. And I'm curious to see what the Commission will say about this in the comfort letter because I would expect that it might have come up in the case that they will know about. In any event, I think, and again I'm not doing anything more than to flag it, I think in paragraph 10 of the Temporary Framework, the Commission explicitly refers to that hypothetical.

Well, it's sort of hypothetical to that situation whereby companies as they are working together to fill a hole, if you want, to address a need for a scarce product that is essential, they may need to shift production to make that happen. But that may then go at the expense of other products that may be equally essential or less essential. I have no idea how you deal with this, but what I'm saying is, it is a problem I think that the Commission has flagged. And I assume that it has flagged it because it has been brought to its attention. And I don't have a good solution for this, that requires a judgment call of some sort. But it would be a little perverse, so to speak, if you would allow companies to cooperate to deal with a shortage of supply and then hit them with the remark that they have failed to meet the demand for another product.

Frédéric Jenny

I have nothing to add to this particular answer, but I think that one of the things that I heard through the various interventions today is a bit bothersome. Just because firms cooperate or collaborate, whatever you use as word, to try to increase output, doesn't mean that it's not anti-competitive. I mean, I can see very clearly how two firms who decide that they're going to produce masks because there's this terrible lack of masks. And then one of them is going to say, well, I'm going to do the PP2 mask, and I'm going to reserve those masks for people on the frontline for doctors and nurses. And the other ones say, well if you do this, then I'm going to do the surgical masks, and I'm going to reserve them for the general public.

There you have the element of coordination, which is necessary for the output to increase, which is maybe considered to be anti-competitive. So, in other words, when Jérôme Philippe was saying earlier on, well there's not much to see because if it's an agreement to increase output, it's all right, and then wouldn't be objectionable otherwise. I think there are many ways, including the one which was mentioned in the question, but also more direct ways in which the kind of coordination to increasing good in itself implies some possible restriction to the competition. So, I think there are more cases of application that seem to be the case. And just don't want it to be said that just because the agreements increase output it's all right. Not always all right. It's not always.

Okay? So, I think that we now have to finish because we are over time. I'm sorry for the other questions. I will try to answer some of them in writing. Unless one of the others have something to add, I would like to turn the floor over to Nicolas. First, Luc, John, Jérôme, you have anything to add?

Luc Gyselen

No. Fred, I was just asking myself whether there will be a means of addressing the questions that we've not been able to cover right now. I guess the answer is yes, but I will have to be told how to do that.

Nicolas Charbit

Thank you very much to speak here as a participant. This webinar is now off. You will have the opportunity, all the speakers, to write, to answer the question written. Actually, I will provide you with the email you need to come back to any question you like to answer. But I understand there is a lot of question and you may not be able to answer all of them.

So, participants will receive a survey, the usual survey. This is going to be helpful to prepare for the next webinar, I'm going to say a word about this. Before this, this documentation is in free access for all. As I mentioned earlier, you are the access to the E-competition special issue which is updated every day and it's covering 85 jurisdictions. So, there's some free access and you can access it through the Concurrences homepage. You also have the special issue of the Concurrences Review with a forward to written and soon to be released by Frédéric Jenny.

For the webinar materials, for this [inaudible] for Concurrences+ subscribers only as opposed to the free access for the building and the journal. Tonight, we're going to post the PowerPoint presentation, the video recording and the podcast. And in a few days, the Concurrences team will publish the transcript and synthesis of this talk.

My last word would be to thank you participants and our sponsors Arnold & Porter, Compass Lexecon and Freshfields. So, thank you for support. And as mentioned, part of the proceeds received for this series of webinars would be donated to Doctors Without Borders in charge of helping people affected by the COVID-19 crisis. Be safe and keep going. Thank you.

Frédéric Jenny

Thank you very much Nicolas for this. And I want to really thank Luc, John and Jérôme for very interesting comment and kind of a lively discussion. But one of the takeouts I have from one of the things I derived from all this discussion is that there are still a lot of grey areas, whether it comes to the legal interpretation or it comes to the economic interpretation. And that maybe competition authorities have wanted to communicate very fast on what they would do and wouldn't do. But maybe because they went so fast, I mean, they were not quite as explicit or as precise as they should have been, or they could have been. So, let's hope that there is going to be more precisions coming. I mean, [inaudible] to the comfort letters, that's one of the positive aspects of the comfort letters if they come.

And possibly in the caseload as Jérôme was mentioning, and possibly also in adjustments to the temporary statements or the temporary plans that they have. I know that several competition authorities have mentioned the fact that they reserve the right to adjust their thinking as the crisis develops and as their experience is getting bigger in or larger on those issues.

So, I think more precisions might come and this would be very useful to know whether we're dealing with a public interest issue. We're dealing with a new interpretation of efficiency. We're dealing with prioritization. And whether those criteria were always clear, and so on and so forth.

So, thank you very much all of you and I'm sure we'll keep on talking about those issues.