UNIVERSITY OF AMSTERDAM

AMSTERDAM CENTER FOR LAW & ECONOMICS

CORONA CRISIS CARTELS: SENSE AND SENSIBILITY

Maarten Pieter Schinkel

Abel d'Ailly

Amsterdam Law School Legal Studies Research Paper No. 2020-31

Amsterdam Center for Law & Economics Working Paper No. 2020-03

Corona Crisis Cartels: Sense and Sensibility

Maarten Pieter Schinkel[1] and Abel d'Ailly[2]

11 June 2020

ABSTRACT

Western competition authorities responded quick and united to the COVID-19 pandemic with a generous exemption from cartel law for any companies that aim to solve pressing scarcities in anticompetitive collaboration. However there is little reason to expect more supply, fair distribution, low prices or wider use of personal protective equipment faster or at all from horizontal agreements. Embracing the policy might have been about public image, more than high expectations of collaboration amongst rivals contributing to solving the needs associated with COVID-19. That experimental treatment is not without side effects. By relaxing the first article of antitrust, the agencies undermined their authority, just when we need them to effectively control the many markets that are rapidly consolidating as a result of the lock-downs and asymmetric State aids. The agencies may have better stood by competition. This case will be a great source of learning about the effectiveness of public-interest cartels.

JEL-codes: H42, L41, K21

Key-words: cartel, COVID-19, short supply, public image

I. Rapid competition policy response

Ahead of many in social awareness of the devastating consequences of COVID-19 worldwide, Western competition authorities were quick to pledge they would not enforce the cartel laws against companies collaborating to deal with supply disruptions during the corona crisis. On 23 March the joint European agencies stated to understand that the outbreak "may trigger the need" for companies to restrict competition "in order to ensure supply and fair distribution of scarce products to all consumers", which they presumed would generate "efficiencies" that outweigh any negative effects.[3] The FTC and DOJ followed the next day by recognizing cooperation designed to address "urgent public health and economic needs associated with COVID 19 […] consistent with the antitrust laws".[4] The WTO had called the pandemic hardly a week and most countries were not yet in lock-down, or the leading

[1] University of Amsterdam, Department of Economics. Corresponding author at: m.p.schinkel@uva.nl.
[2] University of Amsterdam, Department of Economics.
[3] ECN, "Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis," 23 March 2020. Individual Member States had been even quicker. For example the Dutch ACM head Martijn Snoep already made similar statements on 19 March in the press presentation of its 2019 annual report.
[4] FTC and DOJ, "Joint FTC-DOJ Antitrust Statement Regarding COVID-19," 24 March 2020.

competition law enforcers suspended their first article of antitrust; not to conspire to restrain trade.[5]

Of course these rapid responses were well-intended aims to address the immediate threats of the gathering health crisis. Essential medical products, ranging from protective face masks and disinfectant gels to virus test kits and IC ventilators, were in dangerous short supply, even in the richest nations. IC capacities were too little and could only be scaled up too late to save lives, which sent a shock through the Western world. In its wake, hoarding of basic supplies – food, pain killers, toilet paper – threatened to cause shortages, which in turn induced further hoarding. Empty shelves and long lines at the supermarkets were feared to cause panics, possibly riots. Suddenly the availability of ordinary products that serve our basic needs seemed in doubt. Yet however grave these concerns and sympathetic the offers of expedited comfort letters for antitrust relief, competition always was the tested driver of efficient production. [6] The relevant question therefore is: Were our competition authorities right to pin their hopes for the urgently needed supply efforts on cooperation between competitors?

It is not obvious that they were. After all, a fundamental principle of economics is that competition is the superior mechanism to rely on for the efficient allocation of scarce resources over alternative uses, and for encouraging creative new ways of doing things. Where demand exceeds supply, for such basic consumer products as face masks and toilet paper, prices rise as a flare to entrepreneurs to bring in extra supplies from where they are less needed, for substitutes to be developed, and new entrants to come into production. Cartels, on the other hand, are known to restrict output, capacity and entry, so as to create artificial scarcity to exploit for their own interest at the expense of their customers and society as a whole. Before, competition authorities referred to cartels as "cancers" in our economies.[7] Sure, markets are not perfect and can fail. Government action is needed then. But sudden excess demand is not a recognized market failure, while market power is.

[5] On 8 April 2020 the European Commission and the ICN followed with more elaborate statements, which also covered R&D cooperatives for the development of medical treatments and vaccines. These are more specific collaborations, with longer-term objectives and established precedent in law and economics, and therefore outside the scope of this paper on immediate supply issues.

[6] To be sure, we emphasize that the exemptions address supply issues, not the sharing of information on medical treatments between health care providers and pharmaceutical companies, which is of vital importance but hardly an antitrust offence. The FTC-DOJ joint statement nevertheless includes that healthcare providers could set "standards for patient management to assist providers in clinical decision-making that also may provide useful information to patients, providers, and purchasers."

[7] Originally remarked by Commissioner Monti in 2000, competition officials at both sides of the pond have used the analogy over the years since.

So how exactly is a pandemic emergency different, so that we need to turn the market order around "to ensure supply"? Three main arguments have been given for encouraging corona crisis cartels: 1. Urgency of production; 2. Fairness of allocation; and 3. Public-health externalities from use of personal protective equipment.[8] We discuss them each on the basis of mainstream economic principles. In addition, we consider the power of private companies that, faced with the pandemic crisis, sincerely want to act in the public interest.

1. Supply coordination

The first argument for resorting to emergency collusion is that the overnight steep growth in demand for typical products, in combination with supply fall-outs due to lock-downs, would be too big an external shock for the price mechanism to adjust to quick enough. Specific healthcare related products, ranging from simple to produce ones like disinfectant gels, to highly complex specialized equipment such as IC respiratory machines, were suddenly in huge excess demand. Shortages in everyday household consumptions goods threatened to happen. Some firms had excess capacity while others faced constraints. Shouldn't they best coordinate? Part of this argument is that important supply lines had come to rely on very tight just-in-time delivery, often from geographically remote producers, who now had shipping difficulties due to restrictions on border crossings and international flights. Such reliance had grown over years of competitive pressure which prioritized low costs over resilience. By allowing competitors to share commercially sensitive information about stocks and supply, and to make agreements about flexible conditions instead, shouldn't production blockages, shortages and hoarding be better spotted and cleared?

While the pressing urgency of these supply chain problems is evident, it is not so clear how their solution would be expedited by letting competitors coordinate. Where supply falls short of increased demand, firms have all the incentives to arbitrage excess stock from elsewhere, increase production and expand capacity. Competition between them is essential to both maintain these entrepreneurial incentives *and* assure that any excess profits are temporary. Prices above average cost soon attract new production. Margins dissipate when supply and demand converge again at a price equal to the marginal cost of production. Total production aligns in the merit order: each firm produces at minimum efficient scale, the least efficient ones needed to meet demand break-even, the others make no more than a Ricardian rent.

[8] We note that the policy was not justified by the joint agencies as 'crisis cartels' of the more common sort, that is to sustain an industry during a downturn – see Vitzilaiou (2011). Schrijvershof et al. (2020) do interpret it as an alternative to State aid. Ritz and Schlau (2020) also make the comparison. This justification doesn't sit well however with the said objectives of ensured and fair supply, which require low prices and profit sacrifice.

The price mechanism is known to work fast and flexible in creative ways that are often hard to image. Of course it takes some time also for market competition to work out and re-equilibrate to the new situation. But by facilitating the free flow of decentralized information, competitive disequilibrium processes beat central planning in advancing regular consumption goods time and again. It is not clear at all that competitors can coordinate on better solutions faster. It requires a lot of communication and contracting, hindered by conflicting incentives and differing information. After that, even the expedited approval process still takes time and effort – if only to filter out attempts to take advantage of the policy. For this the agencies have only limited resources, certainly during the lockdowns.

It is not possible then, in coordination between competitors, to match a shortage of certain parts with one producer up with surplus stock parts of another producer, so as to complete whole final products? Maybe, but unlikely. Two or more rivals would by coincidence need to hold exactly matching compatible subsets of parts, or excess capacities to make them. Yet even if they did, these parts will find each other best in competition between arbitrageurs. The most efficient producers will bid the most for the parts they need to complete finished products, so that the largest possible output at the lowest possible price results, given the scarcity. In those cases in which parts are held up higher in the chain of production, *vertical* coordination of inventory might be necessary to prevent bottlenecks and shortages, and not horizontal. And to the extent that countries locked their borders or blocked the export of certain medical supplies, which also the European Union did, coordination between *governments* would be called for, not competitors.[9] No cartel exemption required.

Couldn't companies decrease the time needed to deliver or the cost of production, or increase their output, by sharing technology, production facilities or supply chain resources such as distribution channels? [10] Well, if there had been opportunities for more efficient production of established products, they would have materialized already in competition – for example by sub-contracting or licensing IP-rights. So any additional new gain from cooperation requires new opportunities to decrease costs or produce more, due to the pandemic emergency. But face masks, gels and also established medicines are simple and fully developed products. Why

[9] See Dahinten and Wabl (2020) and Bayer et al. (2020) for details on trade restrictions of medical products within the EU.

[10] Aoki (2020) gives this as the main motivation for the Japanese antitrust response to the earthquake of 2011, but concrete benefits remain unclear. The European Commission (8 April 2020) mentions the consideration in Section 2, recital 10. A comfort letter was given on the same date to producers of pharmaceuticals to coordinate cross-supply of ingredients for the purpose of "jointly identifying where to best switch production of a certain production site to a certain medicine and/or to increase capacity, so that not all firms focus on one or a few medicines, whilst others remain in under-production."

would cheaper ways of making them would somehow suddenly emerge? Under competition, capacity expansion and entry begin alleviating shortages in existing and new ways.

But aren't the circumstances so different and the COVID-19 excess demand so risky and likely temporary that companies are reluctant to invest? After all, companied need to be confident that demand will last long enough for them to recoup the investment costs?[11] Shouldn't they be allowed joint purchasing to pool risks? We don't see the need. Yes these are uncertain times, but risk-pooling only reduces variability if risks are diversified. The demand shocks induced by COVID-19 affect rivals similarly. And sadly the need for personal protective gear, IC materials, medicines and treatments was clear to be huge and long lasting from the beginning. Developing business opportunities and making investments with an uncertain return is what companies do! Entrepreneurial producers have increased output by bringing in capacity from firms outside of the market with related production processes. A matrass company switched to producing face masks; a perfume factory, to hand sanitizers; disinfectant alcohol was distilled from surplus potatoes resulting from the lock-down of fries restaurants. The tested way of inspiring such quick creativity is through competition in production and distribution though, not cooperation.

How about initiatives of incumbents that want to help outsiders become producers too? For example by disclosing to them how to produce IC ventilators or test kits. Such sharing is unlikely to need encouragement by a short-term cartel exemption, as it requires sharing technical business secrets, not of commercially sensitive trade information. It is important to keep in mind, moreover, that incumbents have a strong incentive to prevent the sharing of their technology with others, who would then become future rivals for their markets. In fact, they often have to be made to disclose their business secrets by state intervention, if that is deemed essential, by public or political pressure.[12] Allowing companies that are inherently reluctant to share technology to collude temporarily only might offer them a cover to share less know-how than what would be best for society to make them share otherwise.

2. Fair distribution

The second argument for the policy, explicit in the ECN statement, is that coordination amongst competitors would deliver a fairer distribution of scarce products. Particularly

[11] In a request for comfort, pharmaceutical companies stated that they currently think it is too risky to precautionary buy large quantities of inputs – see European Commission (8 April 2020).
[12] Pharmaceutical company Roche had to be forced to disclose the recipe of an essential corona test fluid. See Ark, E. van and J.H. Strop (2020).

pressing were healthcare related products – for basic food and other supplies, initial fears for shortages turned out mostly unnecessary.[13] It is clear that personal protectives and test kits should be spread as wide as possible over where they are needed, and not pile up in places where they are not. They should first go to health care workers and others in vital occupations, and then be widely available to the public as soon as possible. Medical grade face masks should not be kept in excess storage by opportunistic arbitrageurs waiting for the right time to cash out, or by a few privileged people for just-to-be-sure use. It is a well-known problem of markets that wealth differences can create grave allocative injustices, as wealthy consumers can outbid others even though their needs might be much less. If competitors could cooperate, they would have the market power to avoid such injustices. But can we expect fairer outcomes therefore?

We wouldn't count on it. Collusion is not giving suppliers an extra incentive to distribute fairly. On the contrary: companies have a joint incentive to expropriate surplus from the higher willingness to pay buyers if they can, by limiting sales to the lower end of the demand curve. In competition, arbitrage opportunities dissipate quickly, so stocks find users fast. Output expansion drives prices down to the marginal cost of production, so that also lower willingness to pay buyers are served. The biggest total pie can then still be unfairly divided. But the righting of market outcomes to be more socially desirable is a *public policy* task. Governments have a wide arsenal of tools to change market allocations, ranging from spreading endowments, selective subsidies or taxes, to more invasive measures like confiscation production or rationing consumption. With these measures, they can prioritize hospitals and undersupplied parts of the population. Firms should share the necessary information for this, such as where the shortages are most pressing, with the designated public agencies, rather than among themselves. Government leadership is called for. To hope for private companies to collude on a fair allocation is both idle and unnecessary.

3. Public health externalities

A third argument for corona cartels is that there is a public interest aspect to the use of personal protective equipment that consumers nor producers are rewarded for and therefore underprovide it in competition, but would not in cooperation. This argument goes beyond the statements of the joint agencies, but does hold promise. The idea is this. One person wearing a face mask reduces the chances of infection for all those with whom she came into contact, and

[13] The UK CMA (27 March 2020) allowed groceries chain suppliers to coordinate on rationing consumer purchases of particular groceries on this argument.

thereby the wider spread of the virus in the population. This positive externality of mask use, the wearer does not sufficiently value, as her private value of the use is limited to her appreciation for her own protection plus that of those near to her, but not the full circle of people she is actually protecting by wearing her mask. For any given (high enough) price of face masks, there is a group of people who value wearing a mask less than that price and therefore do not wear one. Whereas everyone in the wider circle, whose health would be protected from others wearing masks, would be happy to pay the non-wearers to use a mask, but cannot pay – because their protection is an externality to the wearers. That is, people's willingness to pay for and use personal protective gear is (potentially much) less than the social value of them wearing it. As a result there is too little production and use of such gear, with under-provision of the public interest of reduced spread of the virus as a consequence.[14]

The argument is sophisticated, but for several reasons problematic as a justification for corona crisis cartels. First observe that it applies to only very specific types of products – essentially face masks and sanitizers, maybe also test kits, now, and once available vaccines and cures later.[15] It is already less fitting, for example, to IC units, which are mostly rivalrous. It barely applies to food and toilet paper. For those products (masks, sanitizers), governments can address the underutilization by mandating mask use in open spaces such as public transportation. Second, the cost of production of these products is low. For many people, the private value of wearing a mask just for personal protection alone would overcome the low competitive price for one. While prices in some places have temporarily gone up due to the demand spike, so have private values due to the COVID-19 threat. Still, there may be too little voluntary use of face masks, because the private benefits of wearing one decrease in the number of people that do. In any event, collusion cannot be expected to bring mask and sanitizer prices down faster or further than just letting the competitive process work out.

Furthermore, there is no good reason to think that collusion will promote the production of private goods with public benefits. In fact, the opposite is more likely to be the case. What is required to increase mask use towards the socially optimal level is a subsidy on masks, so that the net price falls below the private value of using a mask. Instead, in collusion producers have an incentive to *raise* the prices of mask, thereby reducing use – and its positive externalities. So for sales promotion we should not rely on collusion. That means that the "efficiencies" the ECN expects a face mask cartel to generate would need to take the form of

[14] De Stefano (2020) argues that spread containment is a tragedy of the commons, to conclude that cooperation is necessary to overcome it.
[15] Vaccination is a textbook example of a public good. See Mirrlees (2006) on page 356.

better protective properties of a mask that stimulate wearing. Yet even if consumers have a higher willingness to pay for the better product, such as higher grade face masks, cooperative product improvement amongst manufacturers is known to reduce product improvement efforts below the competitive level.[16] Essentially this is because in collusion the firms eliminate the business stealing effect between them of having the better product that buyers want. Quality only goes up if prices increase by more than the appreciation for the quality improvement – which on balance only hurts public health, because it reduces mask use.

More generally, profit-maximizing cartels that are exempted on efficiency grounds should be expected to do the minimum amount of public interest advancement that they can get away with, just enough to qualify for exemption, against a monopoly price increase.[17] And in this case, the ECN already presumed the efficiencies. It is likely therefore that even if cooperating producers improve the protective properties of their masks somewhat, on balance the higher prices will reduce mask use. Cartels will not promote consumption with positive externalities, that is. Instead of groping for collusion, governments should provide targeted subsidies to obtain wide use of protective gear for its health externalities, remove barrier to production and trade flows, rely on competition to quickly increase supply and quality and drive prices down to the low cost of production, after which the subsidies could be reduced again and given only to those who still cannot afford a mask. The role of competition authorities in this is to protect the competition part in the middle.

II. Acting in good faith

Our arguments against encouraging corona crisis cartels are based on the presumption that firms ultimately are motivated by profit: that is what gives them the incentive to jointly produce less, increase price, sell more to people with the higher willingness to pay, keep vital technology secrets, underexploit positive public health externalities in protective gear use, and avoid costly product quality improvements. For-profit cartels are an unlikely ally in a public health crisis, it seems. Yet during the pandemic, many companies seemed sincere in their intentions to do good and contribute to alleviating the immediate impact of COVID-19 against their own profits. While this compliment is perhaps best directed at the marketing departments, some corporations truly wanted to take social responsibility for their stake holders, certainly in these desperate times.[18] Shouldn't pandemic inspired feelings of

[16] Schinkel and Spiegel (2017).
[17] Schinkel and Toth (2019).
[18] The OECD (16 April 2020) calls for responsible business conduct to address the pandemic.

solidarity and altruism help rivals form benign collaborations? Where the intentions are to share know-how, facilities and provide to the poor, surely the cartel laws must not be in the way?

To begin with, for many of the noble objectives described, a benign company wouldn't need to cooperate with its competitors to do good. Yet perhaps they need commercially sensitive information to locate the most pressing scarcities. And a horizontal agreement might give rivals the assurance that they can make a temporary sacrifice in profits, without compromising their long term competitive position. But talking to rivals, who may be less driven, and trying to coordinate can also easily water down an inspired initiator's good intensions and erode the charities. Altruistic initiatives are fragile. The problem is that in a corporate context, the profit motive is never far away. Even the most benevolent manager will have to report to the owners and shareholders, funders and lenders of his company, who require a rate of return on their investments. Before a company can sacrifice profit, these financially interested parties would need to agree to accept a lower rate of return than they can earn elsewhere in the economy. That is complex enough to achieve for a single firm, let alone for all involved in a cooperation. Rent seeking capital has the tendency to undermine low rate of return corporate social responsible activities, by management interventions and ultimately capital flight.

In cooperation, extra stress is put by the fact that benefitting from another participant's charitable contributions is always tempting. It a special form of cartel defection, the common threat to stability of coalitions that hinders forming one, in this novel context. Likewise, somewhere in the chain of production there will be upstream suppliers or downstream intermediaries that can try to benefit from another layer's good willed low prices by marking them up to profit. Or otherwise some outside arbitrageur will: buying up heartwarmingly sponsored face masks from whom they are delivered to, and turning them around at high prices. Profit is a strong lure: where there is an opportunity, someone will be quick to take it. Corporate initiatives to want to do good are likely to run aground on someone's inherent profit motive somewhere.

III. Impression management

Why then were competition authorities so quick and united in their embrace of anticompetitive arrangements at the first pandemic panic? As experts in competition, how could they have had such high hopes for corona crisis cartels, against their better judgement about collusion? Desperate times call for desperate measures. Yet it may be that the answers

have more to do with impression management. The rapid responses expressed heartfelt concern and could have been meant to avoid the public perception that the agencies stand in the way of any possible means to help in the pressing healthcare crisis.[19] The statements of ECN and FTC-DOJ might have been about public image, more than high expectations of collaboration amongst rivals contributing to solving the needs associated with COVID-19. Image is important to government agencies, in particular when their tasks are somewhat enigmatic to the general public.[20] So far, the competition policy relief has been appreciated. It was well-received by competition experts.[21] OECD's chief competition economist Frederique Jenny applauded it, in an early and thought-provoking paper.[22] It became the basis for an elaborate OECD program on cooperation between competitors in the time of COVID-19.[23] Few commentators have been critical.[24]

The stern warnings against price gauging with which the agencies concluded their joint statement, might also be understood in this light. With their open invitation to make anticompetitive agreements, which can be expected to lead to price increases, the agencies told sellers of vital health protection products not to raise their prices by "cartelising or abusing their dominant position".[25] Instead their products "should remain available at competitive prices". This tough act may appeal to a wider audience: profiting from other people's dire lack of basic needs is felt to be morally unjust. Yet it is really counterproductive, as well as moot. Counterproductive because high prices are an essential part of the price mechanism to alleviate shortages by attracting new supplies. Disallowing price increases risks prolonging the undersupply therefore.[26] It is a moot point since excessive pricing cases are difficult to prove and few have been brought successfully by European competition

[19] The Canadian Competition Bureau (8 April, 2020) stated not to want competition law to stand in the way "where firms are acting in good faith, and motivated by a desire to contribute to the crisis response rather than achieve competitive advantage."

[20] See Schinkel, Toth and Tuinstra (2020).

[21] Padilla and Petit (2020) think the initiative deserves praise, as it limits panic. De Stefano (2020), Monti (2020), Jacobovitz,(2020), Costa-Cabral et al. (2020) and Viala and Kupka (2020) all offer descriptions of the competition policy, without questioning the need for cooperation much.

[22] Jenny (2020), published 28 March. For "the very short term" response to the crisis, to Jenny there is fundamental difference between consumers choosing "the best price/quality ratio among products offered by competing suppliers" and the need now "simply to be able to find the product." He also believes that "in times of crisis, markets tends to act sluggishly". From this, Jenny concludes a need for "cooperation between suppliers …. to identify both the needs and the existing stocks." (page 8).

[23] See OECD (16 April 2020), OECD (27 April 2020) and OECD (26 May 2020).

[24] Fox (2020) puts it in question. Goodwin and Pop (2020) support the policy, but warn it should not extend to price-fixing or bid rigging, which they believe can be distinguished. Ormosi and Stephan (2020) and Suslow and Levenstein (2020) offer critiques on the policy's effectiveness and possible side-effects.

[25] ECN (2020).

[26] Motta (2020). Montgomery et al (2007) conclude from a study of gasoline prices after hurricane Katrina that anti-price gouging legislation would have hurt both consumers and the economy at large.

authorities in the past – not even against blatantly dominant firms, let alone dominant collectives. In the US, excessive pricing is not even a federal antitrust offence.

IV. Competition authority undermined

Even if the encouragement of corona crisis cartels was more about sensibility of the agencies than economic sense, didn't the rapid response serve the competition authorities well in the end? Surely government institutions dependent on public support to secure their budget and respect for their decisions. But we warn for long term side-effects of the experimental treatment. Giving up cartel law at the first emergency expresses little confidence in the competitive process, the protection of which is what the agencies are tasked with. It would have send a strong message, would the antitrust authorities have stood by competition and explain its powers, also in the face of scary emergency shortages of vital health protectives. By suggesting instead that competition is part of the problem, we fear the agencies may have undermined their own authority. Corporate interests can be sure to use the precedent to argue a wide variety of future urgent emergency restrictions of competition. This threatens to undermine deterrence and the effective enforcement of the competition laws after.

This is unfortunate, as in the times ahead strong competition policy will be very much needed. There will be abuse attempts of the exemption, where companies will try to get away with malignant collusion. Short-term collaborations, even the benign ones, are likely to have negative long-term consequences, as companies will have gained knowledge of how their rivals operate and beaten paths for future meetings of the mind.[27] Practicing collusion is good for perfecting it.[28] Moreover, the economic damage done by the lock-downs, despite government supports, are expected to include failing firms, take-overs and mergers that will increase market concentrations with anticompetitive effects.[29] The great variety in State aids is feared to lead to asymmetrically disturbed competitive balances across the world economy.[30] We should expect fewer competitors everywhere, resulting in more favorable conditions for collusion, more opportunities for dominance that can be abused, and more anticompetitive acquisitions and mergers. In those consolidated post-corona markets, we will need our competition agencies to stand strong and keep the level playing field. Yet we may

[27] Graig (2020), Crane (2020) and Baer (2020) predict an uptake of cartels during and after the pandemic.
[28] Suslow and Levenstein (2020).
[29] See Motta and Peitz (2020) and Perlman (2020).
[30] Motta and Peitz (2020) warn for distortive effects of State aid in the European Union, as Member States aid their companies in many different ways, leading to differences also in market consolidation.

find afterwards that the generous cartel exemption policy contributed little to alleviating the COVID-19 crisis, but did long term damage to competition law enforcement.

V. Experimental treatment

Is there no good at all then in the well-intended joint agencies' response? Yes there is. The sudden generous cartel exemption is a large-scale experiment that may surprise and teach us. Our argumentation above against high expectations for the policy is based on long-established and elementary economics. But the corona pandemic shook the world. Who knows, maybe there do turn out to be unexpected efficiencies in benevolent supply crisis cartels after all. When the crisis has abated, the collaborative initiatives formed in response to the corona crisis cartel policy will be great research material from which to draw lessons on what possibilities there are for public interest cartels.[31] What type of companies or industries applied for comfort? Did the collaborations work as intended and increase supply, and if so why? Did they improve quality of service too? How did competitive enterprises fare? When and how did the collaborations stop again? Was there much abuse of the policy, and if not why not?

The corona crisis cartel policy is a very interesting experimental treatment of public interests by private cartels. There will be issues to debate, such as how the counterfactual competitive solution would have worked out, but the mechanisms tried will be informative.[32] For example for better assessing the active advocacy program for allowing anticompetitive agreements in the fight against climate change, on which the debate on the merits had only just begun.[33] Exemptions on sustainability grounds are complex to obtain. Jointly taking corporate social responsibility jointly may carry too many antitrust liability risks therefore. Advocates of green cartels have argued that this is why very few initiatives have so far come forward. The COVID-19 danger, however, is clear and present, the efficiencies largely presumed and the exemptions generously given. If corona crisis cartels turn our not to work, then maybe there is no hope for allowing collusion in the public interest at all. So let's see how collaborating competitors do in ensuring the supply of face masks and sanitizing gel first, before deciding whether the road to a sustainable future is truly paved with cartel exemptions.

References

Aoki, R. (28 April, 2020), "Antitrust in Times of National and Global Emergencies" CPI

[31] A survey by GCR aims to build such a case file. See: https://bitlylink.com/gLVRe.
[32] Viala and Kupka (2020) note the difficulty of constructing counterfactuals in a crisis.
[33] See the forthcoming CPI July Chronicle on Sustainability.

Ark, E. van and J.H. Strop (27 March 2020), "Roche releases recipe after European Commission considers intervention due to lack of coronavirus tests," Follow the Money

Baer, B. (22 April, 2020), "Why we need Antitrust Enforcement during the COVID-19 Pandemic," Brooking.edu

Bayer L., J. Deutsch, J. Vela and P. Tamma (15 april 2020), "EU moves to Limit Exports of Medical Equipment outside the Bloc," Politico.eu

Competition Bureau Canada (8 April, 2020), "Competition Bureau statement on competitor collaborations during the COVID-19 pandemic," Montreal

Competition and Markets Authority (19 March 2020), "COVID-19: CMA approach to Essential Business Cooperation," retrieved from https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation?

Connor, C. (24 April 2020), "DG Comp official: EU is considering 'restorative or prescriptive' Antitrust Remedies," GCR

Costa-Cabral, F., L. Hancher, G. Monti and A. Ruiz Feases (22 March, 2020), "EU Competition Law and COVID-19," TILEC Discussion Paper No. DP2020-007

Crane D. (May 2020), "Competition Law and Health Crisis; Antitrust during (and especially after) a global pandemic," Concurrences

Dahinten J. and M. Wabl (9 March 2020), "Germany Faces Backlash From Neighbors Over Mask Export Ban," Bloomberg

European Competition Network (ECN, 23 March 2020), "Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis," Brussels. Retrieved from https://ec.europa.eu/competition/antitrust/coronavirus.html

European Commission (8 April 2020), "Communication from the Commission – Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak," Brussels. Retrieved from: https://ec.europa.eu

European Commission (8 April 2020) "Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients," Brussels

Fox, E. (18 April 2020), Review of Jenny (2020), CUTS International

FTC and DOJ (24 March 2020) "Joint FTC-DOJ Antitrust Statement Regarding COVID-19", Washington, DC, USA. Retrieved from https://www.ftc.gov/public-statements/2020/03/joint-ftc-doj-antitrust-statement-regarding-covid-19

Goodwin, T. and G. Pop (April 21, 2020), "Flatten the coronavirus curve, but don't flatline competition," World Bank Blog

Graig, E. (21 April 2020), "Coronavirus will likely lead to more cartels, ex-DOJ official warns," GCR.

Hittinger, C. and A. O'Brien (15 April 2020), "Avoiding Price Gouging, Price Fixing and Other Antitrust Risks During the COVID-19 Pandemic," CPI

ICN Steering Group Statement (8 April 2020), "Competition during and after the COVID-19 Pandemic". Retrieved from https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf

Jacobovitz, J. (10 April 2020), "The Impact of Antitrust Enforcement in a COVID-19 Environment," Arnall Golden Gregory LLP

Jenny, F. (28 March 2020), "Economic Resilience, Globalization and Market Governance: Facing the COVID-19 Test," SSRN

Jenny, F. (May 2020), "Competition Law and Health Crisis: Introduction," Concurrences

Krohs, C., A.L. Hamilton and M. Küttner (9 April 2020), "Collaboration among Competitors & COVID-19: The impact on EU and National case laws," Concurrences

Montgomery, W. D., R.A. Baron and M.K. Weisskopf (September 2007), "Potential Effects of Proposed Price Gouging Legislation on the Cost and Severity of Gasoline Supply Interruptions", *Journal of Competition Law & Economics* 3(3), 357–397

Monti G. (10 May, 2020), "Business Cooperation in Times of Emergency: The Role of Competition Law," CPI

Motta, M. and M. Peitz (18 April 2020), "EU State Aid Policies in the time of COVID-19," VoxEU.org

Motta, M. (22 April 2020), "Price regulation in times of crisis can be tricky," Business Maverick

Mirrlees, J. A. (2006), *Welfare, Incentives, and Taxation*, Oxford University Press, Oxford

OECD (16 April 2020), "COVID-19 and responsible business conduct," Paris

OECD (27 April 2020), "Competition policy responses to COVID-19," Paris

OECD (26 May 2020), "Co-operation between competitors in the time of COVID-19," Paris

Ormosi, P. and A. Stephan (2020), "The dangers of allowing coordination between competitors during the Covid-19 crisis," forthcoming in *Journal of Antitrust Enforcement*

Padilla, J. and N. Petit (May 2020), "Competition policy and the Covid-19 opportunity," Concurrences

Perlman, M. (4 May 2020), "Sens Call For Antitrust Vigilance During, After Pandemic," Law360

Remaly, B. (06 April 2020), "DOJ blesses covid-19 Collaboration for Medical Supplies," GCR

Ritz, C. and M. Schlau (May 2020), "Competition Law and Health Crisis; "Crisis Cartels" in times of COVID-19: Lessons from former crises teach a cautious approach," Concurrences

Schinkel, M.P., and Spiegel, Y. (2017), "Can Collusion Promote Sustainable Consumption and Production?," *International Journal of Industrial Organization* 53, 371-398.

Schinkel, M.P. and L. Toth (2019), "Compensatory Public Good Provision by a Private Cartel," Tinbergen Institute Discussion Paper 2019-086/VII

Schinkel, M.P., L. Toth and J. Tuinstra (2020), "Discretionary Authority and Prioritizing in Government Agencies," *Journal of Public Administration Research and Theory* 30(2), 240–256.

Schrijvershof, D., M. van de Hel and R. Kaushik (20 March 2020), "Crisis Cartels and State Aid as a Solution to the Corona Pandemic," Maverick Law, Amsterdam

Stefano, De G. (5 May 2020), "Covid-19 and EU Competition Law: Bring the Informal Guidance On*," Journal of European Competition Law & Practice*

Suslow, V. and M. Levenstein (4 June 2020), "Can corporations be trusted after regulations are eased during the pandemic?," interview with P. Ercolano, John Hopkins University Hub

UK legislation (27 March 2020), "The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020," Statutory Instruments, 2020 No. 369

Viala, F. and D. Kupka (May 2020), "Competition Law and Health Crisis: Cooperation between companies in times of health crisis," Concurrences

Vitzilaiou, L. (30 March 2011), "Crisis Cartels: For Better or For Worse?," CPI