



# Excessive v unfair prices during the coronavirus crisis

A (personal and) practical view on remedies

## (i) The questions

1. What is the **most appropriate remedy** in cases of excessive prices of sanitizer products during COVID-19?
2. What is the role of NCA's **interim measures** in the context excessive pricing cases?
  - Provide context
  - Answer these questions
  - Draw provisional conclusions

*NB: not an ACM position but a personal one informed by my practical experience*

## (ii) Problems of excessive pricing

### High prices for sanitizer products

- Primarily price increases
- Problem of scarcity in supply
  - Not just control price but increase capacity
  - Attract new sources: e.g. beer and spirits producers



### ACM primarily encountered **scarcity of COVID19 tests** in context medical devices

- Dominant provider of test equipment Roche
- Proprietary standards liquids and plastics
  - Inability to supply demand
    - Denial of health essential services
    - Excessivity in the sense of infinite price

### In context of health crisis

- Main problem is availability more than price per se
- Obvious commonality is need for speed and effectiveness

## (iii) Remedies: interim measures

### **If available**

- However may not be available in all Member States/to all NCAs
- Little experience, especially of protecting consumers directly

### **Standards from ECN+ Directive (Feb 2021)**

#### 1. Prima facie evidence of abuse:

- Price hikes and (temporary) dominance

#### 2. Serious and irreparable harm:

- Cannot be rectified by damages payments
- Irreversible health damage

#### 3. Proportionate remedy

- Fines delay the process
- Link periodic penalty payments
- Price cap or alternative price controls
- Does this mean just temporary measures?

# (iv) Alternative remedies: “do whatever it takes”

## 1. Increasing output/grow supply

### a. Art 31 TRIPS: compulsory licenses

- If legal infrastructure in place
- If IP rights are the issue – pharma and medical devices

### b. Judicial injunctions

### c. Public/popular pressure/outrage → reputation/social license to operate

→ Scale up by bringing in new production lines/tied producers

→ Open up proprietary standards/processes and/or provide licenses

- NL case formula shared with public task force
- Full technical support to all of the above

NB: Problem for undertakings involved – measures may not be reversible

## 2. Socialisation of (re)distribution/allocation

- Also protects dominant companies from political/social pressure
- Allows them to focus on production issues
- This in turn promotes output



# (v) Conclusion

## **Objectives**

Increasing output and allocating resources fairly is just as important as controlling prices

## **Instruments**

Interim measures may not be available, nor may compulsory licensing (e.g. no IP rights)

Yet investigations may still be useful to channel, focus and exercise pressure

## **Cooperation**

Working with dominant undertakings to provide commitments may be most effective

To some extent commitments will be open-ended, combined with public measures and planning to increase supply and coordinate distribution

## **Outcomes**

Some measures may be irreversible → balancing act for all concerned in pursuit of common objective of public health in pandemic context

*Thank you for your attention*