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EXCESSIVE PRICING IN TIMES OF COVID-19

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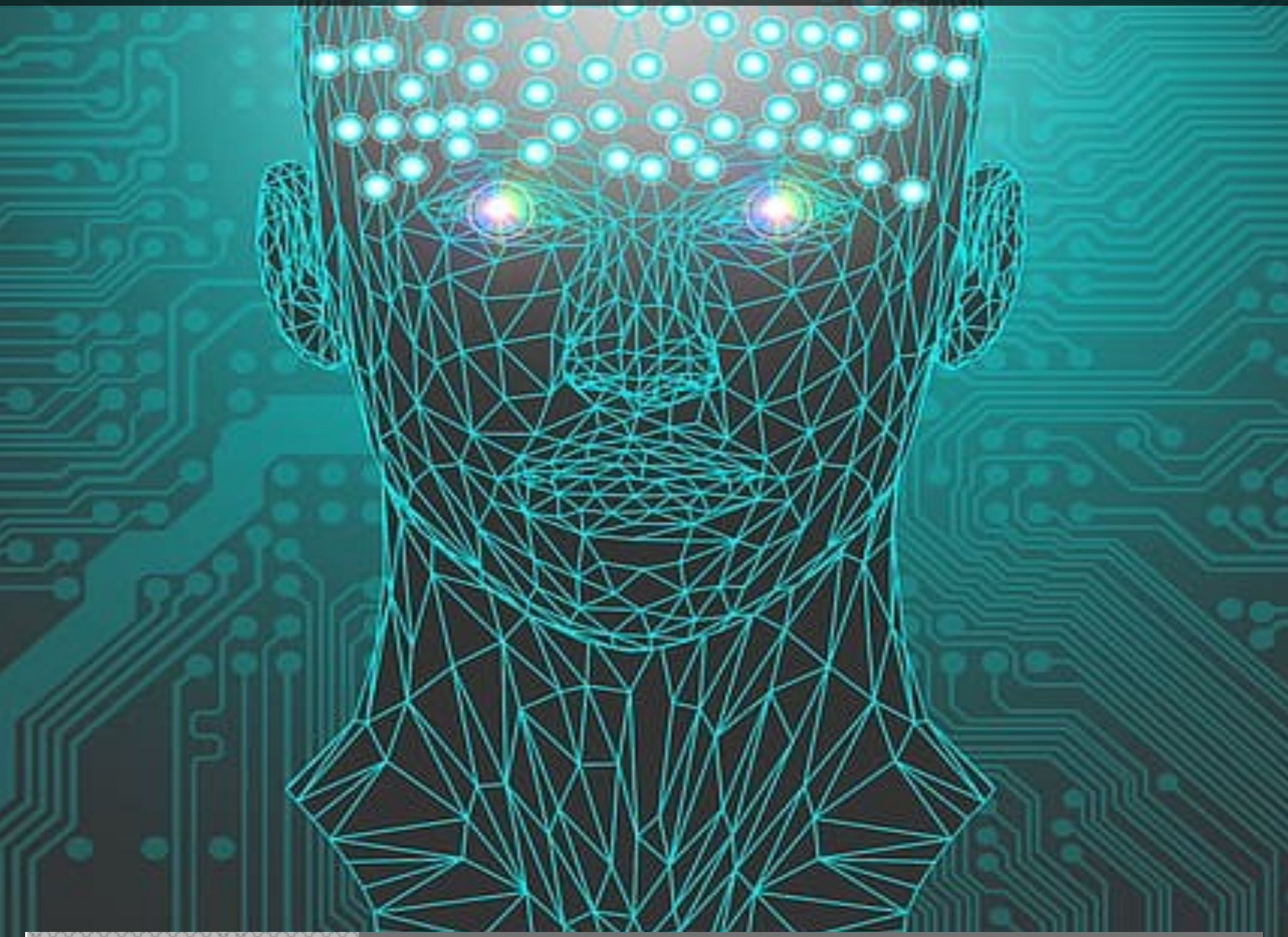

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Abstract:

The COVID-19 pandemic has prompted extraordinary demands and price instability for specific items, as well as fluctuations in firms' expenses. As firms battle to deal with these changes, organizations are forcefully looking to show they are forestalling consumer protection. Governments are exploring dependent on a wide range of instruments, including competition rules, consumer protection law, and & price gouging restrictions. Thereby, in such a scenario, it becomes necessary to remain significantly more cautious (with respect to the advisory issued by CCI for businesses in the wake of Covid-19) than in ordinary occasions if there is a danger of virus profiteering. This Foreword tries to assist the businesses by exploring the rapidly developing challenges of the COVID-19 pandemic. It initially sums up the guidelines on "exploitative" abuse of dominance in India by addressing the inherent problems associated with “excessive pricing”- one of the grey areas under the Competition Act. Second, it portrays the implementation steps that organizations are taking during the pandemic. The author endeavors to explain the troubles experienced by the Indian competition authorities in determining excessive pricing by setting a benchmark value, which is contended to be beyond the competence of competition authorities solely. Towards the end, the author has dissected the unsatisfactory quality of the "one size fit for all" approach and recommended the requirement for more regulatory measures in the presence of individual sector regulators in India.

Keywords: Excessive Pricing, Abuse, Dominant Position, Covid-19, Pandemic, Price Capping, Intervention

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Introduction

The coronavirus (COVID-19) pandemic has incited a general wellbeing emergency unprecedented in living memory. Notwithstanding causing enormous scope death toll and extreme human anguish, the pandemic has additionally gotten underway a significant financial emergency that will trouble our social orders for a considerable length of time to come. History has indicated that similar fundamental standards of Economics and competition apply during times of monetary downturn as during times of financial development. Sound competition policy is even more significant in snapshots of emergency to guarantee that the emergency is illuminated and the resulting monetary recuperation, as quick and continued as could be expected under the circumstances. The merciless interruption brought about by the pandemic has prompted challenges in the creation and appropriation of various basic items. This, thus, makes open doors for organizations to altogether expand the costs of these items. While cost increments can reflect increments in the expenses of market members, also give essential market signs to build creation and invigorate new passage. They can likewise reflect exploitative strategic policies without any proper justification. This type of action can invite the Competition authorities to interfere as Charging "excessive" prices constitute an abuse of dominance in many countries, including almost all OECD members.

During this period, both the Central and State Governments have been moving in the direction of ensuring access to and creation of essential goods and services. Given that since the national lockdown has been unlocked for the sake of being self-reliant and precautious to fight with the infection, organizations will keep on confronting operational difficulties due to the non-accessibility of work power, limitations on opening offices and the danger of the further spread of the viral disease. Considering the current conditions, enterprises across segments are targeting rationing capital; and investigating intends to create income to support themselves and guarantee business coherence. For enterprises, the pricing of their items as well as administrations will progressively turn into the most basic segment of their business congruity plan. Accordingly, undertakings may feel constrained to take forceful and frantic valuing measures (among different strides) to improve income assortment, which in specific cases may conceivably raise worries under the Competition Act, 2002. The undertakings, subsequently, should be aware of specific issues while they seek new evaluating measures for keeping up their business progression. So, this note helps to understand the central problem around how a crisis can prompt abrupt cost increments, and on the job, that Competition and Government authorities will be relied upon to play intending to them. It surveys the difficulties of bringing exploitative estimating cases under Competition law and to bring legitimate alternatives as a result of analysing, while giving instances of past and current practice.

I. EXCESSIVE PRICING- AN EXPLOITATIVE ABUSE

Excessive Pricing is viewed as one of the most quarrelsome issues in the antitrust guidelines. The fundamental target of the policies of Competition regulators is to prevent unfair pricing. Nevertheless, the way in which unfair pricing is done is a consequence of inefficiency in the structure of the market or a result of anti-competitive actions of market entities, instead of a secluded and independent issue in itself can't be disparage. Excessive pricing *per se* is regulated by different methods on both sides of the Atlantic, at least in theory. While the US Competition authorities and case laws exclude the possibility of using excessive pricing actions,[2] by "pristine monopolists."[3] Article 102 of the Treaty on Functioning of the European Union explicitly prohibits a dominant Entity from "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" and is punishable by fine. In the case of exploitative conduct, US authorities are not concerned about it. As long as, a company has become a monopolist by fair means then after becoming a monopolist whatever price they charge, US authorities never go into that. Whereas in Europe, if a firm has become dominant even if by fair means or any other way if they still indulge in exploitative conduct, EU authorities look into it. The distinction in the methodologies proves the partition between the guideline of exclusionary and exploitative conduct: while the exclusionary conduct is viewed as an offense against antitrust laws on the two sides of the Atlantic, the resultant exploitative abuse generally breaches the EU law. Conversely, the Indian Competition Act, although prohibits and condemns "unfair price" by the dominant entity, there are no judicial precedents expressly on "unfair price". The Competition Commission of India ("Commission") is cognizant of the relevance and significance of a suitable systematic framework for determination of unfair price cases that are likely to be addressed in the future. This fundamentally would help to maintain a strategic distance from the risks related to the issue and exorbitant costs to the consumers, economy, and industry. Prevalently, the test before Commission is to maintain a parity between static and dynamic efficiencies, so as to avoid undermining the incentives generation by investment while ensuring that consumers' interest is secured. One of the most controversial theories of damage in competition law as a whole and inside the class of exploitative abuse specifically is excessive pricing. Regulatory Interventions with the point of controlling Excessive Pricing are predominant not just in those jurisdictions that consider exorbitant value cases in antitrust yet additionally in those where competition law doesn't anticipate abusively excessive prices as an antitrust offense.

The reasons against excessive prices cases include *inter alia* the risk of undermining incentives from investment both, of firms as of now in the market and potential entrants, the legal uncertainty that may be

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[2] United States v. Trans-Missouri Freight Ass, 166 U.S. 290 (1897).

[3] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979).

associated with the concept and also the risk of competition authorities overstepping their legitimacy in light of political pressures. Reasons for excessive prices as an antitrust offense include *inter alia* limited potential for market self-correction because of permanently high entry barriers, the lack of self-correcting expenses, and the absence of a regulator or failures in regulation. One of the most prominent reasons for excessive price cases considering the customer orientation of most competition laws is that excessive prices exert the most immediate negative impact on target consumers. The issue brought here breaks down the regulatory methodologies in explicit jurisdictions of India, the EU, and the US. It likewise covers the dissimilar lawful principles reflecting various suspicions about how the market works in India. The primary part of the issue expects to address the decade long Economists' discussion of whether to manage Excessive Prices or not. Along these lines, the subsequent part examines the clashing US and EU approaches, and its effect on the Indian competition law system. At long last, the article looks to legitimize the intensity of the Commission to regulate "excessive pricing" inside the Indian Competition Act, 2002 by the help of regulatory intervention as compared to Anti-Trust Intervention.

II. WHETHER TO REGULATE THE MARKET OR NOT? – THE DILEMMA

The competition law is perceived to enshrine “the invisible hand” as the most efficient tool to self-correct the market. Subsequently, the discussion on the guideline of excessive pricing spins around two significant inquiries: (I) Whether Excessive Prices can act naturally revising or self-correcting; (ii) Whether an intervention by the competition regulators would create benefits.

The beginning of the Coronavirus emergency has made higher-than-typical requests for certain clinical and certain non-clinical related products and enterprises. The quick-moving circumstance makes it hard for organizations and customers to anticipate request levels and ensure they have the ability to support buyer prerequisites. The COVID-19 episode has prompted abrupt and critical demands for specific items, for example, face covers, hand sanitizers, and paracetamol. These cost changes are a reasonable outcome of a quick increment in demand quicker than supply can react. Notwithstanding, enforcement agencies are hoping to show their cautiousness to people in general in this atmosphere as are looking for abrupt and critical price hikes. In such a scenario, whether to intervene in the market to regulate the prices is a big question. Thereby, in order to decide the same, various approaches are to be considered which are discussed as follows:

A) From the **Non-Interventionist Approach**, the discussion ranges from given market characteristics over properties of regulation and inherent practical difficulties and include general concerns of fairness considerations. It is believed that a dominant undertaking cannot accrue excessive profits in any market

for a prolonged period because new entrants/competitors would be attracted to enter that market in absence of non-transitory entry barriers.[4] The Non-Interventionist approach also believes in the innate self-adjusting properties of business sectors concerning exploitative abuse. It has been expounded that intervention made consistently on the prices set by dominant undertakings doesn't take solve the issue in the long run. Along these lines, the competition authorities or courts ought to limit themselves in checking the industry since economic situations are inclined to change after some time and the undertakings would naturally modify its prices likewise. Furthermore, a frequently quoted example that the US antitrust law, contrary to its European counterpart, does not prohibit excessive prices always exists.[5]

B) From the **Interventionist Approach**, the reluctance of the regulatory authorities to intervene against any exploitative abuse of dominance has been held to be paradoxical.[6] Predominantly, excessive prices can hurt the welfare of consumers, and subsequently, competition authorities will undoubtedly mediate to secure purchasers. This stands as a solid match between the all-encompassing targets of competition policy and a law limiting over the excessive pricing.[7] It is also observed that excessive prices are not always self-correcting. The non-interventionists majorly argue that the high prices of a product attract competition and competition in itself can lower down prices. Conversely, it is not just the pre-entry prices but post-entry prices that eventually attract entry. The interventionists contend that the obstructions of surveying what establishes as an excessive price can't be exaggerated; there are situations where prices might be incredibly high so it is generally easy to show that they are exorbitant.[8] As, it is always difficult to ascertain that the prices are excessive or not, but sometimes on the face of the situation, it can be said that the prices are excessive. So, in those situations, there is no requirement of any comparisons or benchmarking to be done. In spite of the fact that they acknowledge that regulating prices can be nosy and difficult for competition regulating authorities, they present that price regulation isn't the main accessible solution for excessive prices. If it is seen that the excessive price is owed to the strategic entry barriers, the remedy could be to lower such entry barriers. For example, if a firm is manufacturing a product that requires capital investment, so here capital investment is in itself an entry barrier; thus, the remedy here is to lower such entry barrier. On the other hand, if it is due to structural entry barriers, they can be removed by the authorities.

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[4] A Fletcher and A Jardine, Towards an Appropriate Policy for Excessive Pricing, in European Competition Law Annual 2007: A Reformed Approach to Article 82 EC 533-545

[5] Berkey Photo, Inc. v Eastman Kodak Co., 603 F.2d 263, 294 (2nd Cor. 1979)

[6] Lyons, B., The Paradox of the Exclusion of Exploitative Abuses, in The Pros and Cons of High Prices

[7] Fletcher, supra note 3

[8] Fletcher, supra note 3

Strangely, the interventionist and the non-interventionist agree on certain focuses. For example, both interventionist and non-interventionist concur that excessive prices with high and non-transitory entry barriers. What's more, the interventionists don't differ with the non-interventionists on the issue of general trouble to evaluate excessive prices, however, contends that excessive prices can be clear and exact in some outrageous cases. On an understanding of Section 27 of the Indian Competition Act, 2002 that manages the intensity of the commission as for repudiation of Section 4 of the Act, it may be inferred that CCI can take action after proper investigation, can adjust any understanding or can do any type of market correction which are in the negation of Section 4. Wide discretionary power vests with the commission to pass suitable request as it might consider fit. Subsequently, during such a pandemic, when it is very difficult to intervene to regulate the prices and while keeping an eye on an amicable translation of the arrangement under the Competition demonstration it may be derived that the CCI has the imperative capability and position to manage prices if the case warrants so.

IV. US AND EU: THE PARALLEL APPROACHES

Article 102 of TEFU does not prohibit the acquisition of a dominant position by an Entity. It merely applies to the abusive conduct of an existing entity having a dominant position. This suggests that intervention against unilateral exclusionary conduct by an entity is legally not feasible in some cases. In these cases, intervention against exploitative conduct may be the only remedy to effectively protect consumers' interest. In contrast, this prospect under U.S. antitrust laws to effectively intervene against the acquisition of dominant position might be an aid to explain why the opportunity to intervene against exploitative conduct is not incorporated under the Sherman Act or any other U.S. antitrust laws.

A) The EU Approach

Article 102 of TEFU, states that an abuse of dominance may consist in “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”[9] and makes it apparent that exploitative conduct can be abusive. An analytical framework has been developed by the European antitrust authorities to assess whether a price can be considered as an excessive price under Article 102. The legal standards to determine unfair prices are unspecified by the law and are left to judicial interpretation. The ECJ in General Motors case[10] developed a test to determine unfair price, which defined “a price as abusive when it has no reasonable relation to economic value”. This is still considered as the fundamental definition of unfair pricing today. The ECJ in the landmark judgment of

[9] The Treaty on the Functioning of the European Union, art. 102(a)

[10] General Motors v. Commission (1975) ECR 1367

United Brands[11] laid down the test for the applicability of unfair pricing and gave some insights into the nature of its prohibition. The Court stated that a price is considered as unfair "when a dominant firm has exploited its dominant position so as to set prices significantly higher than those which would result from effective competition." Therefore, a price is regarded as unfair when it is considerably above the effective competitive level, or the economic value attributed to the product. Excessive pricing can also be proved by comparing prices charged by the dominant entity in different markets.[12] Alternatively, excessive pricing can be established by assessing the benchmark price. This method makes a comparison between the prices charged by the dominant entity and the other entities in the same relevant market,[13] or it compares the price charged by the dominant entity in the relevant market with prices charged by it in other markets operating in existing competitive conditions.[14] It can be seen that the Commission's practical treatment of excessive pricing is comparable to that of the U.S. than what a linguistic comparison would imply. However, there exists a significant conceptual difference between these two approaches: the EC's restricted approach to intervening is based on practical reasons, while in the U.S. it is more on ideological and theoretical lines.

B) The US Approach

The U.S. antitrust law has been interpreted to prohibit exclusionary conduct rather than monopolistic status or exploitative practices. This is not solely for economic reasons, but for political and social motives as well. U.S. antitrust law accepts a lawful monopolist, to set their prices as high as they choose. This central principle of U.S. antitrust law is well reasoned by court decisions that have held that “pristine monopolist…may charge as high a rate as the market will bear"[15] and that " natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of "monopolizing" in violation of the Sherman Act…and can, therefore, charge any price that it wants,… for the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute."16

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[11] Co. v. Commission, (1978) E.C.R. 207, 252

[12] Case 226/84 British Leyland, (1986) ECR 3263, 28

[13] Case 24/67 Parke, Davis (1968) ECR 55, 67

[14] Case 78/70 Deutsche Grammophon, (1971) ECR 487

[15] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297

[16] Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1413

The reason that U.S. law does not deem "excessive pricing" to be an antitrust violation is the general belief towards the self-correction tendency of the market.[17] “Why fix what ain’t broken” approach is mirrored in the early decision of American Can, in which the U.S Supreme Court noted that “perhaps the framers of the Anti-Trust Act believed that, if such illegitimate attempts were effectively prevented, the occasion on which it would become necessary to deal with size and power otherwise brought about would be so few and so long postponed that it might never be necessary to deal with them at all.”[18] They believe that higher prices in the absence of significant barriers to entry may actually entice new entrants to the market-leading thus to an increase rather than a decrease in competition. The later judgments and opinions of the Scholars and Jurists also recognized the relevance of monopoly pricing for the dynamics of the market mechanism. Justice Hand in the landmark judgment of the ALCOA case stated that "a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronet.”[19] The current legal regime under the US Anti-Trust law is emphasized by the Supreme Court in its recent Trinko decision, that “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free -market system. The opportunity to charge monopoly prices-at least for a short period-is what attracts "business acumen" in the first place; it induces risk-taking that produces innovation and economic growth.”[20] Question regarding the significance of the disincentive effect is generally brought into the picture, the answer to which depends principally on the nature of the market and the position of the entity in it at the time. It can hence be concluded that US Antitrust regulators strongly believe in giving an unregulated market to a lawful monopolist and thus in spirit follows non-intervention.

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[17] Opinion 1/14: Prohibition of Excessive Pricing by a Monopolist (Apr.9, 2014), http://www.antitrust.gov.il/subjec t/177 /item/34133.aspx.

[18] United States v. American Can Co., 230 F. 859, 901-902

[19] United States v. ALCOA, 148 F. 2d 416

[20] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004)

V. THE INDIAN PERSPECTIVE

The Competition Commission of India has time and again realized the extent of intervention is to be guided by an economic rationale. The economic principles on which the Indian competition law is premised are specifically, the provisions relating to abuse of dominance. Such provisions contain in-built checks and balances system to ensure a thorough evaluation of the market conditions prior to the assessment of the impugned actions. Section 4 of the Act lays down the test of establishing the dominance of the firm, is reasonably stringent, which mandates the consideration of various factors such as entry barriers including regulatory, technical, capital cost-related barriers, market structure,[21] monopoly or dominant position that is acquired as a consequence of any statute or by virtue of being a Government company or a public sector undertaking or otherwise, commercial advantages, etc. The Commission should set a high threshold for intervention in cases of excessive price cases in comparison to other cases pertaining to abuse of dominance, known as the downside risks it may pose to dynamic efficiencies. The Act empowers the Commission to lay down the thresholds by considering all or a subset of inclusive factors enlisted in Section 19(4). The Commission has the discretion to consider any other factor that may be regarded as relevant for the purpose of the inquiry. Equipped with these enabling provisions in the law and international jurisprudence on this issue, the Commission has the power to design appropriate intervention criteria for excessive pricing cases that may arise in the future. Analysing the same, the Competition Regulatory Body in India has given conflicting approaches to its powers and scope on regulating excessive pricing. In the recent case of Manjit Singh Sachdeva v. Director General, DGCA,[22] CCI dealt with the issue of arbitrary high airfares being charged by various airlines. The informant here highlighted the lack of any pricing policy evolved by the Aviation regulatory bodies. The Commission explicitly held that "The Commission can neither go into the issue of MRP i.e. what should be the MRP for any product or service and fix the MRP,… In fact, that will be contrary to the spirit of competition law." In contrast, in Kapoor Glass Ltd. v. Schott Glass Ltd[23] when it held rather cryptically held that a price a customer is willing to pay depends upon the value he ascribes to a product, and nothing can be said to be excessive as long as there are buyers for the product.

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[21] The Competition Act, 2002 (12 of 2003),

[22] Manjit Singh Sachdeva v. Director General, DGCA, CCI Case no. 68/2012 (2013)

[23] Kapoor Glass Ltd. v. Schott Glass Ltd., CCI Case No. 22/2010 (2012)

It can thus be seen that the Commission has found it difficult to explicitly address itself as a price regulatory body. The reasons argued by the non-interventionists are attributable for the same, one of which significantly impacting the Indian Antitrust law is specifically regulation of prices.

Statutory Difficulties arises during Anti-Trust Intervention

The Competition Commission of India is mindful of the fact that its intervention decisions should be guided by sound economic rationale. It is reassuring that the Indian competition law is premised on economic principles; in particular, the provisions in the Act relating to abuse of dominance contain in-built checks and balances to ensure a thorough evaluation of the market conditions prior to the assessment of the impugned actions. In the normal scenario, it is already very difficult to establish what is Excessive Prices and what is not, but since it can undergo the due procedure of inquiries and investigations. But during the crisis, it becomes very hard to bring out the shreds of evidence to prove the excessive pricing and following are certain difficulties which arise:

a) Firstly, under Section 4 of the Act, there must be a finding on the fact that whether the particular entity is dominant or not. There are multiple companies at present, i.e., there is not one company or one manufacturer which manufactures hand gloves or face masks or sanitizers. So, no one of them is said to be dominant in the current situation, although they are increasing prices. The Act mandates a rigorous analysis of the dominance of any Entity before investigating the unfair price. This allows for an assessment of essential conditions, for instance, market structure, entry barriers including regulatory, technical, capital cost-related barriers, for intervention in excessive price cases.

b) Secondly, whenever we say that the entity is not dominant in nature, then the only way to penalise the multiple entities together is by proving that they have cartelized. But, again finding evidence of cartelisation is another challenge or difficulty within the ambit of regulating excessive prices. Since it is not a statutory difficulty, but it's a difficulty.

c) Whatever comes under Section 3 or Section 4, it demands some inquiry or investigation be done and it takes a very long time, and this being something of a very current situation of crisis, whatever they are doing, they are correct at present. Whether Competition Law a viable tool to solve this problem is a big question amongst this crisis. So, this is a very lengthy procedure and we need an immediate hardship correction. Since we say that Section 27 of the Act tells about the remedies but these remedies do not provide such an effective remedy in such situations as of Covid-19 Crisis. Whatever action will be taken upon the sellers by imposing penalties and can recover the amount which they charged

excessively, but the point here arises that it again cannot correct the market itself. In the future, there may be such a situation, when sanitizers will lose their relevance after some time. Whether imposing penalties or whatsoever remedies given under Section 27 are suitable for this kind of situation, even when they are saying that you can recommend the Central Government for the division of an enterprise. The situation is such that even smaller enterprises are charging high, so it's not the problem currently that the enterprises are high and that is why they are charging excessively. Thus, all these things take a lot of time to discover the actual situation. And these kinds of situations need immediate solutions. Actually, the situation of this crisis was immediate and hence it required an immediate solution. Thereby State Government came up with the regulatory intervention of price capping by capping the prices to regulate prices in the market. But there is certain criticism to price capping which includes that whenever price capping is done, people consider it as a benchmark price. Price Capping is not considered to be a very good market solution as it tells the players about maximum acceptable price and generally, the players come cluster towards the price cap. This is a kind of rational behavior if there is a price cap. Even the price caps imposed by different State Government is also a regulatory intervention because this was done to regulate the prices. Price cap regulation also deprives regulators of opportunities for learning. They may have misread the evidence in the first place; they may have underestimated or overestimated the reaction of the firm to their intervention; they may not try out interventions at an affordable cost for the firm and welfare. Knowing that they cannot fine-tune their intervention may also make regulators overly cautious.

VI. RECENT DEVELOPMENTS AMID COVID-19 CRISIS

In this particular section, the discussion is going to be taken on the recent developments in the enforcement or application of antitrust laws within Europe, the US, and India respectively.

A) Developments in Europe

On March 23 the European Competition Network, comprising the EC and Member States' national competition authorities, issued a joint statement on the application of antitrust law during the COVID-19 outbreak. The statement identifies excessive pricing as a particular area of concern, stressing that: "it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices." In a similar vein, on March 27, Commissioner Vestager explained that "a crisis is not a shield against competition law enforcement" and that the EC "will stay even more vigilant than in normal times if there is a risk of virus-

profiteering.”Several national authorities have opened investigations or created task forces during the pandemic:

The UK- The CMA has launched a COVID task force and set up a form for consumers to report unfair business practices during the outbreak. On March 25, the CMA stressed that its focus over the next few months is "to protect UK consumers from the adverse consequences of the COVID-19 pandemic." It is committed to ensuring that the prices of products deemed "essential" to protect consumers' health are "not artificially inflated by unscrupulous businesses seeking to take advantage of the current situation." On 24 April, the CMA published an update on the work of its task force, noting that it is investigating complaints of "unjustifiable price rises" (particularly for personal hygiene goods and basic food products) and has written to 187 traders that been the subject of over 2,500 complaints.

France- On March 5, the French Ministry for the Economy introduced temporary price controls on sanitizing gels. On March 16, the French competition authority announced that it is closely monitoring the prices charged for certain types of products, such as sanitizing gels and protective masks, in particular on e-commerce and delivery platforms.

Italy- On February 27, the Italian competition authority sent requests for information to major retailers and merchant platforms, including Amazon and eBay, investigating price increases and misleading claims concerning face masks and hand sanitizer on their sites. Two investigations against Amazon and eBay were formally opened on March 12.

The Netherlands- On March 18, the Dutch competition authority issued a statement that it will closely monitor whether dominant companies raise prices excessively during the crisis. The authority also acknowledged that online platforms such as Bol.com, Marktplaats, and Amazon are actively taking steps to prevent traders from charging exorbitant prices or misleading consumers in relation to COVID-19 on their platforms.

Spain- On March 12, the Spanish competition authority announced that it is closely monitoring any potential abuses that could hinder the supply or raise the prices of products needed to protect citizens in light of the COVID-19 emergency. It also called for public cooperation to detect these practices. On April 7, the Spanish competition authority launched a probe into the funeral services sector investigating pricing behaviour. The authority is also closely monitoring the pricing of certain healthcare products, such as sanitizing gels.

Poland- On March 20, the Polish competition authority set up a task force to investigate the rise in the prices of food and hygiene products. The agency is also investigating two face mask wholesalers for allegedly canceling existing contracts to re-sign them at higher prices. Agencies have also indicated that they intend to apply antitrust law in parallel with consumer protection laws or rules concerning unfair commercial practices. The UK CMA, for example, has indicated that it will apply both competition law and consumer protection rules if firms fail to respond to its warnings. Finally, agencies may try to take action swiftly through interim measures. Following its recent interim measures decision in Broadcom, Commissioner Vestager stated that she is "committed to making the best possible use of this important tool" so as to enforce competition rules "in a fast and effective manner." National agencies in France, Germany, and the UK have likewise pushed for greater use of interim measures.

B) Developments in the US

The White House, State Attorneys General (AGs), Federal Trade Commission (FTC), and Department of Justice (DOJ) have also made announcements about potential price gouging issues in response to the COVID-19 pandemic. We expect this to be a continuing area of attention and enforcement, going beyond the following recent activity:

White House- On March 23, President Trump announced signing an Executive Order to “prohibit the hoarding of vital medical equipment and supplies” and to “prevent price gouging” under the Defense Production Act (analysed in more detail here). As part of these efforts, the DOJ announced it will prioritize detection, investigation, and prosecution of price gouging and other fraudulent activity related to medical resources.

DOJ/FTC- Both DOJ and FTC currently focus on combating COVID-19 related fraud. In particular, on March 9, the DOJ issued a statement cautioning businesses against violating antitrust laws in the public health product industry in light of COVID-19. Though the statement does not explicitly mention price gouging, it is expected that DOJ’s action in this space would be covered under the mandate to detect, investigate, and prosecute “all criminal conduct related to the current pandemic.” On March 26, FTC Chairman Joe Simons followed up with a statement noting that the Commission planned to work with state and federal law enforcement to combat unfair and deceptive business practices.

Senate- Senators Klobuchar, Blumenthal, Hirono, and Cortez Masto announced plans to introduce a federal bill prohibiting price gouging during states of emergency. The bill was introduced in the Senate on March 24 and in the House of Representatives on April 7. A number of senators also penned a letter to the FTC urging it to take action against price gouging for consumer health products under Section 5 of the FTC Act.

State-level- Many State AGs have already opened investigations. The Missouri State AG announced that it issued eight civil investigative demands to third-party Amazon sellers to combat price gouging. Michigan State AG took her first enforcement action against an individual selling high-priced products through eBay. The Washington State AG and Illinois State AG also announced investigations into hundreds of complaints of price gouging relating to COVID-19. Other states have ramped up efforts via task forces, press releases, and complaint reporting mechanisms. Based on agencies' statements and actions to date, the focus is currently on protective equipment and medical supplies deemed essential to consumer health (broadly consistent with the pre-crisis focus on excessive pricing for pharmaceutical products with inelastic demand). As the crisis continues, however, attention could extend to food and basic consumer goods, or even other sectors that have witnessed supply shortages, such as home office supplies or consumer electronics.

C) Developments in India

The severe disturbance brought about by the pandemic has prompted challenges in the production and distribution of various essential items, which has now and again prompted deficiencies – either in view of an increase in demand (for example, face masks, hand sanitisers), reduce in production (for example manufacturing factories unable to open), or troubles in product distribution because of restriction measures. These demand and supply stun may altogether impact how firms act in business sectors for the regular supply of essential goods and services. With the national lockdown set up, all organizations had to close down and the main movement allowed was what came extremely close to essential commodities – for example, supermarkets, medical shops, banks (ATMs), etc. Because of the idea of the infection that was the reason for such uncommon advances being taken by nations everywhere throughout the world, there was a quick sharp increment in the interest for sanitisers and face covers everywhere throughout the nation. Seeing a chance to gain profits on the detriment of the overall population, in such seasons of emergency, companies manufacturing face covers and sanitisers self-assertively expanded. For instance, an N-95 mask which was originally sold for Rs.150/- each was now suddenly being offered at Rs. 500/- each. Similar to the masks, even prices of hand sanitisers shot up through the roof – a 30 ml bottle which would normally cost between

Rs.35-50/- was now being sold at Rs.999/-.In this way, costs of such basic things were controlled by the producers to fill their pockets, at the wellbeing danger of guiltless individuals on the large scale. As Covid-19 patients keep on ascending in India, a few retailers and mask makers are capitalizing on the fear of the virus by raising costs by multiple times. As the demand of hand sanitizers and masks increased, the Ministry of Consumer Affair, Food, and Public Distribution, in the exercise of its powers under the Essential Commodities Act, 1955, issued a notification dated 13th March 2020 whereby an order was passed directing "masks (2ply & 3ply surgical masks, N95 masks) & hand sanitizers" to be included in the Schedule as an essential commodity to enable the Government to regulate the production, quality, distribution, logistics of masks (2ply & 3ply surgical masks, N95 masks) & hand sanitizers (for COVID 19 management). Thereafter on the 21st of March 2020, the Ministry of Consumer Affairs, Food, and Public Distribution issued another notification seeking to regulate the price of masks and hand sanitizers. Vide the said order, the Ministry directed as follows:

- The retail prices of Melt Blown non-woven fabric used in manufacturing masks (2 ply and 3 ply) was ordered to be not more than the prices prevailing on 12.02.2020;
- The retail prices of masks (3ply surgical mask) was directed to be not more than Rs.10 per piece and that of the mask (2ply) shall not be more than Rs.8 per piece;
- The retail price of hand sanitizer was ordered to be not more than Rs. 100 per bottle of 200ml and for other quantities, it was directed to be fixed in the proportion of the prices fixed.

The said order was ordered to remain in force till 30th June 2020.

Actually, the circumstance was grave to such an extent that Supreme Court of India entertained a PIL documented by an NGO, Justice For Rights Foundation[24], whereby the Petitioner asked for guidelines from the Supreme Court to the Government to guarantee reasonable and impartial distribution of N95 face masks and the sale and distribution of hand sanitizers and fluid cleanser and to make such things accessible to the general population everywhere at sensible costs. Hon'ble Supreme Court vide its order dated 3rd April 2020 in the wake of contemplating the steps taken by the Government with respect to accessibility of N95 face masks and hand sanitisers at sensible costs, disposed of the PIL.

The Competition Commission of India likewise stepped in to give a warning to Business in the midst of Covid-19, intended to fill in as an impediment to failing companies enjoying wild extravagant increment in

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[24] & Ors V. Union of India & Ors

costs of certain basic items, for example, ventilators, face covers, gloves, sanitisers, medicines, and basic administrations, for example, logistics, testing and so forth. Vide its warning gave on 19th April 2020, the CCI cautioned the organizations of different outcomes under the Act that could be pulled in because of the uncontrolled excessive increment in costs of basic items – In the expressions of the Commission: "COVID – 19 has caused disruptions in supply chains, including those of critical healthcare products and other essential commodities/ services. To cope with significant changes in supply and demand patterns arising out of this extraordinary situation, businesses may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of the distribution network and infrastructure, transport logistics, R & D, production, etc. to ensure continued supply and fair distribution of products." Vide the said advisory, CCI aware overall population as well as business units managing essential commodities of the different arrangements of The Competition Act, 2020 restricting behaviour that causes or is probably going to cause a calculable unfavorable impact on competition. It informed businesses regarding the arrangements of Section 3(3), 19(3) of the Act which empowers the Commission to conduct competition investigation and in that procedure, it can have due respect, among others, to the collection of advantages to buyers; improvement underway or distribution of goods or providing services; and advancement of technological, scientific and financial improvement by methods for creation or distribution of goods or providing services. It further cautioned the businesses by telling the CCI's capacity to impose punishments on the companies liable of disregarding the provisions of the Act. Subsequently, it was advised that the businesses should not take advantage of the pandemic to contradict any of the provisions of the Act.

CONCLUSION

The other important contention in unfair price cases is that it is the regulatory intervention (if possible), rather than the antitrust intervention which is best placed to intervene in markets satisfying the necessary conditions. Regulatory intervention in cases of the unfair or excessive price is an onerous task, considering the issues of estimation and the trade-offs between static efficiency and dynamic efficiency. "*One size fit all*" is not an appropriate approach to deal with unfair pricing. Instead, the focus should be to determine the appropriate test for deriving unfair prices or to formulate a workable method applicable to specific industries, pursuant to the facts of the cases under investigation. As per the ideal interventionist approach, in cases of excessive pricing, the competition authorities should primarily deal with the causes of the excessive price. Amongst the few competition cases that deal with excessive pricing, direct price intervention has not been viewed as the appropriate response to the anti-competitive act. Thereby, after assessing all these difficulties and the steps taken so far, it is to be ascertained that Is Section 27 capable of providing remedies to the problem of excessive pricing in such a situation. Therefore, here it can be said that Regulatory Intervention is quite handy in such situations to control the excessive prices where the regulations can be made where the things cannot go beyond that particular limit. Regulatory Interventions then can be imposed by either sector-wise or by the government itself and can be said as Government Intervention. And it is quite efficient and it is the better way to correct the market. Even the price caps imposed by different State Government is also a regulatory intervention because this was done to regulate the prices, but criticism for price capping can be ignored somewhere in critical situations. Looking at the problems which are facing with respect to the Antitrust Interventions, there is a way to undergo a proper procedure of inquiries and investigations. But in the present situation, seeking to take the help of Antitrust Intervention is a challenge in itself. Regulatory Intervention by State is one of the better solutions to this problem. And, for this type of situation, even the criticism which is attracted when we talk about Regulatory Intervention (for example, criticism for price capping) can be ignored. In essence, Regulatory Intervention is not seen as a very good remedy to solve the situation of excessive pricing because it intervenes with the invisible hands of the market. We never see that Competition authority when they tell that prices are excessive saying that what should be the price if it is excessive. So, Regulatory Intervention comes up in exceptional situations, especially where different sectors come up with the specific regulations, in a similar way as for example, Railways does regulate the prices. Thus, this is something that is different between what theory tells and then the practical difficulties. But Anti-trust Intervention is such interventions that come under the Antitrust laws or Competition Laws which can be done after conducting proper inquiries and investigations. So, The Competition Act, 2002 does not allow competition authorities to take any action under Section 27 until and unless proper inquiry or investigation is done in contravention of Section 4. So, CCI cannot issue any directions with respect to regulate prices just by

issuing any Circular, it has to undergo a proper procedural course, it requires a due course of time and the difficulties defined above is also a part of it. So, whenever they say that the particular price is excessive, then firstly they have to go under inquiry to show that the entity is a dominant firm before conducting investigation upon the abusive conduct. So, these are certain problems with Antitrust Intervention and this is the type of Intervention that is not suitable for the present situation.

The Indian Competition law is benefitted from international jurisprudence in excessive pricing. Now, the real challenge before the Indian Competition authorities remains to maintain a balance between incentivizing investors and preventing consumer harm.