Exploitative pricing in the time of COVID-19

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One of the many consequences of the COVID-19 crisis is the disruption of supply chains. Together with increased demand, this has led to shortages in a number of essential products. These shortages are influencing the behaviour of firms and may have led to potentially exploitative prices in some cases. Distinguishing legitimate from illegitimate pricing practices, as well as how best to deal with the latter, creates substantial challenges for competition authorities. This note discusses these challenges and raises issues for discussion during a webinar meeting with competition authorities on 28 May 2020. It is part of a series of responses prepared by the OECD Competition Division to help guide the actions of governments and competition authorities as they react to the challenges presented by the COVID-19 pandemic.

The brutal disruption caused by the pandemic has led to difficulties in the production and distribution of a number of essential products. This, in turn, creates opportunities for companies to significantly increase the prices of these products. While price increases can reflect increases in the costs of market participants, and provide essential market signals to increase production and stimulate new entry, they can also reflect exploitative business practices without objective justification. This latter type of conduct can justify intervention by competition authorities.

This note focuses on how crises can lead to sudden price increases, and on the role that competition and public authorities will be expected to play in addressing them. It reviews the challenges of bringing exploitative pricing cases under competition law and analyses possible regulatory alternatives, while providing examples of past and current practice.

1. Economic crises, exploitative pricing and competition law

The brutal disruption caused by the pandemic has led to difficulties in the production and distribution of a number of essential products, which has in some cases led to shortages – either because of increased demand (e.g. face masks, hand sanitisers), insufficient production (e.g. factories unable to open), or difficulties in product distribution due to confinement measures. These supply and demand shocks may significantly influence how firms behave in markets for the supply of essential goods and services.

Firms adjusting their strategies to these new market circumstances can explain most changes in their commercial behaviour. Nonetheless, some corporate conduct might require close scrutiny on the part of competition authorities. There are two main types of potentially problematic activities in this context – arrangements with competitors and exploitative practices, particularly exploitative pricing.

The present note focuses on how crisis can lead to sudden price increases, and on the role that competition and public authorities will be expected to play in addressing them. Agreements in the context of the COVID-19 crisis will be addressed in another note.

Companies may face significant disruptions in their inputs which can increase their costs, and concomitantly their prices. It is also natural for price rises to occur when demand increases and supply shortages take place. This includes in public procurement where government's urgent demand for certain products (e.g. face masks, protective gloves, ventilators, beds, medicines, intensive care material, COVID-19 tests, lab supplies and hospital infrastructure) has significantly increased in tandem with supply shortages.

Price increases provide essential signals to increase production and stimulate new entry. Regardless of the reason for sudden price increases during the crisis, the public and politicians will expect, and perhaps pressure, competition authorities to intervene, and this may well be justified when firms engage in exploitative behaviour without objective justification.

Some competition agencies are empowered to act directly against exploitative pricing abuses under competition law. However, bringing excessive pricing cases is challenging even in normal times. Before bringing such cases, competition authorities should consider whether antitrust enforcement against high prices is needed, proportionate and effective. Agencies should also take into account whether alternatives such as consumer protection, price gouging rules or even price regulation are preferable. Some competition authorities may have competence over these matters, while many do not. However, all competition authorities have the ability to pursue advocacy in favour of measures that protect consumers, while also ensuring that incentives remain in place for products to come into the market where and when needed.

The present note is structured as follows. After describing the powers of competition authorities to challenge exploitative pricing practices in general, section two considers whether and when competition authorities should bring such cases. This section also describes the main challenges of bringing them in the context of the current health crisis – focusing on the difficulties of establishing a dominant position and demonstrating that an abusive pricing conduct took place. Section three will then identify a number of options to ensure that enforcement against exploitative practices is timely and effective, while section four looks at price regulation. The paper concludes with a number of principles that may guide competition authorities' approach to exploitative practices during this period.

2. Bringing exploitative pricing cases during a crisis

Whether and when to bring exploitative pricing cases

In some jurisdictions, competition enforcers are not empowered to challenge high prices charged by a dominant player absent collusive or exclusionary practices.[1] On the other hand, in many jurisdictions around the world high prices may be covered by provisions against excessive pricing practices (see Box 1).

Given the challenges of bringing such cases, however, competition agencies have only exceptionally prosecuted them. In effect, the prohibition of excessive pricing under competition law has long remained underdeveloped conceptually and underused in practice (Akman and Garrod, 2011, pp. 404-405[3]; Jenny, 2018, p. 4[4]). Nonetheless, where they were adopted, legal provisions prohibiting excessive prices have been the subject of continuous enforcement over the years[2] – and may be an important tool in addressing strategic behaviour by companies during the crisis.

There are also alternative mechanisms to control exploitative prices beyond competition law. In addition to classic public utility regulation, most countries – including those jurisdictions that do not enforce competition law against excessive prices – have consumer protection, price gouging and usury laws (Box 1). Despite having different public policy rationales from the excessive price prohibitions found in the competition laws – for example, price gouging laws aim to protect vulnerable consumers from short term, windfall market power in relation to necessities – these rules can often be used to address practices leading to excessively high prices (OECD, 2011, p. 59[1]).

Box 1. Excessive pricing and competition law

In the EU, the Treaties prohibit conduct by a dominant company which consists of '*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*'. The courts have interpreted this as prohibiting unfairly high prices in some circumstances, in particular if the price '*has no reasonable relation to the economic value of the product*'. This will be the case when: (i) the price cost margin is excessive and (ii) the price imposed '*is either unfair in itself or when compared to competing products*'.[1] Similar provisions have been adopted in European jurisdictions, which sometimes have gone even further. For example, in Germany a legal provision was adopted with the goal of facilitating the prosecution of excessive pricing in the energy sector (section 29 of the German Competition Act) (OECD, 2018, p. 7[2]).

However, some jurisdictions – such as the US, Australia, Canada and Mexico– do not prohibit exploitative excessive pricing as such. This approach was justified by the US Supreme Court, which held 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.*'[2] In these jurisdictions, high prices are mere indicators of underlying competition problems which need to be addressed, rather than as a variable on which competition authorities should intervene directly.[3]

On the other hand, these jurisdictions typically have other mechanisms to address certain exploitative pricing practices, such as price gouging laws or unfair trading provisions under consumer law. Under Australian consumer protection law, certain pricing behaviours may be prohibited as unconscionable conduct. In the US, although exploitative pricing abuses do not fall within the scope of antitrust, price gouging laws exist at the state level that prohibit excessive prices of certain commodities during periods of abnormal supply disruption. These laws provide for civil penalties, criminal penalties, or both. Most of them,

1 For the US, see Berkey photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979); United States v. Trans-Missouri Freight Ass, 166 U.S. 290 (1897); United States v. Trenton Potteries Co, 273 U.S. 392 (1927); United States v. Aluminium Co. of America, 148 F.2d 416 (2d Cir. 1945).

2 For a thorough overview of enforcement against excessive prices, see (Jenny, 2018, pp. 2-20[4]).

although not all, are triggered by a state of emergency declared either by the president, the governor or local officials, and apply independently of market power (OECD, 2011, p. 60[1]).

1 Case 27/76 *United Brands Company and United Brands Continental BV v EC Commission* ECLI:EU:C:1978:22, paras 250-252.

2 *Verizon Communications Inc. v Law Offices of Curtis v Trinko LLP* 540 US 398, 407, 124 S Ct 872 (2004).

3 (OECD, 2011, pp. 302-304[1]).

Applying competition law to address exploitative pricing practices directly during a crisis may prove even more challenging than in normal circumstances. These challenges are discussed in greater detail in the sub-section below, and relate mainly to establishing dominance and abuse in highly volatile market circumstances.

Bringing excessive pricing cases in a crisis also comes with risks. Intervention against price increases can lead to products being diverted to places where prices are not regulated, and hence allowed to increase. Further, prices act as signals, and seeking to limit price increases can reduce incentives to increase production, thereby delaying market entry or production increases that would lower prices faster in the medium-term.

Other risks include the consumption of agency resources to prepare very demanding excessive pricing investigations; and the possibility that bringing excessive pricing cases during a short-term crisis runs the risk of being untimely, given the time it may take to successfully bring such cases. As such, competition authorities should consider whether other alternative routes for intervention may be available, as discussed in greater detail below, before initiating enforcement against excessive pricing.

At the same time, bringing excessive pricing cases may well be justified, and the best available alternative to address the challenges caused by significant price increases of essential goods during a crisis. It has even been suggested that there may be a role for competition authorities to act as temporary price regulators in circumstances that allow for price gouging. For example, in case of a natural disaster, the competition authority could assume the role of a temporary price regulator, as urgent action would be needed and the excessive price could easily be determined with respect to the price prevailing prior to the natural disaster and the intervention would be relatively short-lived (Lewis, 2009, p. 588[5]).

Given the challenges to successful and timely intervention outlined in the next sub-section, this suggestion may require express regulation that would make it easier for competition authorities to successfully bring exploitative pricing cases in a crisis. In any event, public and political pressure for competition authorities to act in such instances is to be expected; and when there are structural limitations to supply, or companies are unable to adapt quickly to enter markets in the short run – i.e. when the circumstances allow for some instances of price gouging – this could argue in favour of increased enforcement against exploitative pricing practices, alongside other available regulatory instruments.

Analytical framework and related challenges

In those jurisdictions where competition law prohibits excessive pricing, two main challenges typically arise: (i) the relevant company must have a sufficient amount of market power to trigger competition law's jurisdiction over unilateral conduct (e.g. dominance); (ii) an unlawful unilateral practice (e.g. an abuse) must be established. These are each discussed in more detail below.

The market power threshold

Market power is not problematic *per se*, as it may reflect factors such as superior efficiency or performance to the ultimate benefit of consumers. Competition law is solely concerned with the unlawful protection and exploitation of such market power, which can harm consumers.

A situation of crisis not only creates openings for opportunistic behaviour on the part of companies that already possess market power, but can also lead to the creation of short term, windfall market power (OECD, 2011, p. 59[1]). Such market power can then be abused.

Challenging excessive prices under competition law (in jurisdictions where this is possible) always requires the competition authority to demonstrate that the infringing company has a sufficient degree of market power. Even in normal circumstances this is a challenging proposition, requiring the identification of the relevant market, followed by an in-depth analysis to ascertain that the investigated company does possess the requisite level of market power (OECD, 2006[6]). These challenges are exacerbated in a crisis, where market power may disappear as suddenly as it appeared, and where the traditional evidence of market power concerning matters such as market shares, entry barriers, buyer power, etc., may be difficult to come by.[3]

Despite this, authorities may still be able to determine whether a company has sufficient market power. In doing so, competition authorities will need to take into account the constraints posed by the crisis.

Limitations in supply and stringent restrictions of circulation may prevent effective 'chains of substitution' within the relevant product markets, making geographic markets smaller than usual. Further, from a supply perspective, the closing of factories, the severing of value chains and the reduction in international trade levels can lead to a supplier becoming essential to the provision of necessary goods in certain areas. On the demand side, confinement may severely limit the ability of consumers to move around to purchase goods and services. In this context, even a local shop may acquire substantial market power, and become able to significantly increase prices even if it enjoys abundant supply (Motta, 2020[7]). Further, the absence of alternatives and the essentiality of the products may provide evidence of a lack of buyer power even when one might expect it to exist, e.g. in the context of government procurement.

The time-dimension of markets is likely to prove particularly relevant in these circumstances. Competition authorities may identify 'situational monopolies', i.e. situations where a firm holds significant market power during a very narrow amount of time (Costa-Cabral et al., 2020, p. 11[8]).This concept, however, is broadly untested under competition law (see Box 2). Even where one can identify a time-limited instance of market power, competition authorities will likely face significant challenges in identifying evidence to support such a conclusion.

Box 2. Temporary dominance

The Secretariat is only aware of very few examples of decisions and guidance considering the time-dimension of markets and dominance, particularly when dominance is short-lived and circumstantial, such as that provoked by a sudden crisis.

In the US, courts have defined monopoly power as "the ability (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion", and often found that firms with dominant market shares lacked monopoly power when their market power was insufficiently durable.[1] As such, it seems very unlikely that temporary market power such as that caused by a sudden economic shock could support a finding of sufficient market power to allow antitrust scrutiny of unilateral conduct.

Elsewhere, a focus on the time-dimension of markets may allow the establishment of temporary dominant positions cognisable under competition law. For example, in 1977, the European Commission considered the time dimension of the oil market, and defined the relevant market as being limited to the duration of the world oil crisis of the 1970s. In the light of this, it found that a number of oil companies became dominant while the crisis lasted, and were under a duty to allocate available quantities of

3 Even though the fact that a firm can charge substantially above the competitive level can sometimes be as an indicator of dominance in itself.

oil to their clients on an equitable basis. The Commission did not impose a fine (Case IV/28.841 - *ABG/Oil*). The decision was annulled on appeal, which did not address whether a dominant position could be established on a temporary basis.

1. *D/SAT v. Associated Press* 181 F.3d 216, 227 (2d Cir. 1999); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 18889 (3d Cir. 2005); *W. Parcel Express v. UPS*, 190 F.3d 974, 975 (9th Cir. 1999) *Colo. Interstate Gas*, 885 F.2d at 69596; *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987); *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307, 31214 (3d Cir. 1982).

2. Case 77/77 *Benzine en Petroleum Handelsmaatschappij* BV ECLI:EU:C:1978:141.

It should be noted that elements relevant to defining a market and establishing (temporary) dominance – such as supply-side substitutability – can also be important when deciding whether to bring a case, since they might provide guidance on the likelihood that such enforcement actions may cause adverse impacts on matters such as production increases and market entry.

Exploitative Pricing

The greatest challenge with bringing exploitative abuses, e.g. discriminatory pricing, unfair terms and conditions, or even exploitative labour conditions, is to demonstrate that they took place and are anticompetitive.[4] This challenge is particularly intense as regards excessive pricing cases, which must demonstrate that the price under investigation is indeed excessive and unlawful. Over time, competition authorities and courts have made use of different methods to determine whether a price is excessive (Motta and Streel, 2007, pp. 33-39[9]).[5]

One important method builds upon a comparison between production costs and prices.[6] In some cases, however, price/cost analysis may not be feasible, e.g. due to lack of data or because the price relates to an intangible good such as an IP right (Whish and Bailey, 2018, p. 740[10]).

A different method relies on benchmarking. One commonly used benchmark is prices. Price-based benchmarks may compare the investigated price with prices charged by the dominant firm in different markets or over time;[7] or compare the prices charged by the dominant firm and those charged by other firms, either (i) in the same market,[8] or (ii) in other markets.[9] Yet another benchmark focuses on the

4 This could theoretically arise, for example, if an employer with monopsony power in labour markets exploitatively changes its employees terms and conditions, who have no options to switch roles during the crisis (OECD, 2018, p. 21[12]).

5 See also the Opinion of AG Wahl in Case C-177/16 Latvijas Autoru apvienība' ECLI:EU:C:2017:286, para. 19-20.

6 This method was followed in Case 27/76 United Brands Company and United Brands Continental BV v EC Commission ECLI:EU:C:1978:22, paras 251; and Case 298/83 CICCE [ECLI:EU:C:1985:150, paras. 24-25.

7 This method was followed, for instance, in Case 26/75 General Motors ECLI:EU:C:1975:150 and Case 226/84 British Leyland ECLI:EU:C:1986:421, para. 28. See also Joined Cases 110, 241 & 242/88 Lucazeau/SACEM (SACEM II) ECLI:EU:C:1989:326 and Joined Cases C-147/97 and C-148/97 Deutsche Post [2000] ECLI:EU:C:2000:74.

8 This method was used in Case 24/67 Parke, Davis ECLI:EU:C:1968:1155, Case 53/87 Renault ECLI:EU:C:1988:472.

9 This method was used in Case 78/70 Deutsche Grammophon ECLI:EU:C:1971:59; Case 30/87 Bodson ECLI:EU:C:1988:225; Joined Cases 110/88, 241/88 and 242/88 Lucazeau (SACEM) [1989] ECLI:EU:C:1989:326; Case 395/87 Tournier ECLI:EU:C:1989:319.

profitability of the dominant firm, by comparing such profits either with: (i) a normal competitive profit or (ii) the profits of other firms.[10]

Since all the methods to determine whether a price is excessive under competition law have weaknesses,[11] excessive pricing analyses should be carried out according to as many methods as practically possible, and look for robust evidence that prices are indeed excessive (OECD, 2011, pp. 62-63[1]). In the context of international products and a global crisis, international price comparisons may prove to be particularly useful, even if it must be ensured that the comparators are selected in accordance with objective, appropriate, and verifiable criteria.

While competition authorities may have recourse to each or a combination of these methods, in the context of a crisis it is likely that the main method to determine whether prices are excessive will be to focus on price-based benchmarks, particularly before and after the crisis has begun. Nonetheless, competition authorities should be careful, inasmuch as the companies may be reacting to increases in their own costs – e.g. due to increased input costs, or, when starting to produce countries in the market as a reaction to a global dearth, because of higher labour costs. Ultimately, a careful analysis of markets and companies' behaviour will still be required.

Distinguishing between lawful and unlawful pricing behaviour remains challenging, and will ultimately rely not only on methods to determine whether price increases are excessive, but also on assessments of whether these price increases are unjustified and unfair.

Despite these difficulties, competition agencies have seen it as their duty to challenge exploitative practices during this crisis. There are already numerous examples of investigations into excessive pricing under competition law in the context of the present crisis (see Box 3).

Box 3. Examples of COVID-19 Excessive Pricing cases under competition law

In Europe, the **Spanish** agencies have announced that they are looking into excessive pricing behaviour in sectors affected by the crisis, and have started investigations into anticompetitive practices. This includes funeral services, following the increase in deaths caused by the coronavirus pandemic; hydro-alcoholic gels; and financial lending.[1] **Greece** has launched an inquiry into possible price increases and output restrictions of healthcare materials and other products. The competition authority sent requests for information to a large number of companies active in the production, import and marketing of healthcare products, in particular surgical masks and disposable gloves, as well as other products such as antiseptic wipes and antiseptic solutions.[2] **Romania**'s competition authority also announced investigations into price hikes regarding sanitary products, protective equipment and disinfectants.[3] **Italy** has also started an investigation into the pricing charged by a private health and laboratory group for serological tests to identify COVID-19 antibodies.[4]

In Africa, **Kenya**'s competition authority sanctioned a supermarket for excessively increasing the prices of hand sanitisers.[5] In **South Africa**, the government issued regulations that prohibit an excessive price under the Competition Act for certain essential goods and services, ranging from foodstuff and medical supplies to face masks and surgical gloves. During the State of National Disaster, a price is regarded as excessive if it is higher than the price set prior to March 2020, unless it corresponds to higher costs of production. The South African Competition Commission referred its first COVID-19 price gouging case to

10 Under this approach, a product's price is excessive when the firm's return on capital for that product is greater that its weighted average cost of capital (WACC). This approach was considered by the Commission in the Port of Helsingborg case (Case COMP/A.36.568/D3 – Scandlines Sverige AB v Port of Helsingborg) but was not followed because of the insuperable difficulties the Commission had in establishing valid benchmarks.

11 For a detailed overview of the challenges posed by each of the methods used to identify excessive prices – price-cost test, profitability analysis, price-comparisons, and combination of various methods – see (Jenny, 2018[4]), p. 28- 35.

the Competition Tribunal, concerning companies inflating the prices of facemasks. The Competition Commission also announced that it had concluded other investigations that it will refer to the Tribunal soon, into increases in the price of surgical gloves, facemasks, hand sanitiser and even chickens.[6]

In Asia, the **Indonesian** competition authority is looking into whether hospitals are overcharging for COVID-19 rapid tests. Interim findings showed rapid test packages offered by hospitals varied from 500,000 rupiah to 5.7 million rupiah ($32 to $365), with other tests and services bundled in.[7] **Thailand**'s authorities have lodged a complaint over alleged inflated prices of surgical facemasks being sold on an online platform amid the outbreak of COVID-19.[8]

In the Americas, **Brazil**'s CADE started an investigation into whether companies were profiting unduly from an increase in demand of pharmaceutical products connected to COVID-19.[9]

1 http://www.competencia.euskadi.eus/contenidos/informacion/dosier_de_prensa/es_publi_ac/200401-PRECIOS.pdf; https://www.cnmc.es/balance-buzon-Covid-7-abril-20200407.

2 https://epant.gr/en/enimerosi/press-releases/item/840-press-release-investigation-in-healthcare-materials.html

3 https://www.agerpres.ro/economic-intern/2020/03/25/chritoiu-daca-produsele-sanitare-nu-se-ieftinesc-vom-lua-masuri-de-urgenta-precum-rechizitionarea-sau-plafonarea-preturilor--473985

4 https://www.agcm.it/media/comunicati-stampa/2020/4/DC9877

5 http://www.cak.go.ke/sites/default/files/2020-03/CAK%20Remedial%20Order%20to%20Cleanshelf%20Supermarkets.pdf

6 http://www.compcom.co.za/wp-content/uploads/2020/04/Media-Statement-COMMISSION-CRACKS-DOWN-ON-EXCESSIVE-PRICING.pdf4

7 https://www.mlex.com/Attachments/2020-04-15_BYK8I4J5QX3JN7QF/Siaran-Pers-No-22_KPPU-PR_IV_2020.pdf

8 https://app.parr-global.com/intelligence/view/prime-3000411

9 http://www.cade.gov.br/noticias/cade-inicia-coleta-de-dados-para-subsidiar-investigacao-no-setor-de-produtos-medicos-farmaceuticos

Open issues

- When should competition authorities bring excessive pricing cases in the context of the crisis? What weight should be given to the additional challenges and risks inherent to bringing such cases in highly volatile market conditions, such as difficulties in collecting evidence and in adopting timely infringement decisions?
- Should competition authorities consider the effects that preventing higher prices may have on the potential for increased production and market entry when deciding whether to bring excessive pricing cases? If so, how? Further, can these effects be outweighed by evidence that price increases are unlikely to lead to timely production increases and market entry?
- How can competition agencies assess whether companies had objective reasons to increase prices – both before starting an investigation, and when deciding whether to punish such conduct?
- What are the main obstacles to conducting a careful analysis of markets and companies' behaviour when bringing excessive pricing cases during a crisis?
- What are the particular challenges to defining markets and establishing dominance in the context of a crisis? What type of evidence can be collected? Is this made more difficult than usual by the high levels of market volatility, or the potentially fleeing nature of (narrower) markets and (temporary) market power?

3. How to deter exploitative pricing practices effectively

Excessive pricing cases are extremely data intensive and unavoidably fact-specific, operate *ex-post,* are subject to high error risks, and rarely provide bright-line guidance on how to set lawful prices. More importantly, such cases are hard to build and often difficult to prosecute, leading to delays and to risks of the case failing to succeed at court (OECD, 2018, p. 30[2]). These traditional challenges of bringing

excessive pricing cases under competition law are, if anything, likely to be exacerbated in the context of a crisis, where market power may be fleeting; and timely intervention is of the essence.

Even as competition authorities feel public or political pressure to bring such cases, it is possible that the likelihood of success of such cases, and the deterrent effect of bringing them, is low. It is also important to bear in mind that intervention against high prices can reduce incentives to increase production and delay the achievement of a lower price equilibrium. Furthermore, intervention against high prices can lead to products being diverted to and ending-up in places where prices are not subject to constraints, leading to local consumers being worse off.

In short, the implications of intervening against high prices must be carefully taken into account before a competition authority intervenes. Competition authorities should also consider relying on a number of other mechanisms to complement, or as alternatives to, antitrust enforcement.

One option that could preclude the need to start formal proceedings consists of competition authorities making it clear that they are closely monitoring the market and ready to intervene promptly (see Box 4). This could take a number of forms. Competition authorities may issue general warnings that they are monitoring the market and will prioritise cases against companies exploiting the crisis to profiteer. When such powers are available, competition authorities may also analyse the possibility of issuing individual informal warnings (e.g. warning letters) to individual or groups of firms, so that they avoid or cease engaging in anticompetitive practices, instead of moving straight to opening investigations. This option has the potential to rectify the concerns raised by excessive pricing in an effective manner, while saving agency resources – even if it may need to be backstopped by competition enforcement on occasion.

Box 4. Market monitoring and informal general and individual warnings

The **European Competition Network** issued a joint statement by the European Commission and EU's national competition agencies emphasising 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. The ECN also warned that that it would not hesitate to take action against companies taking advantage of the current situation, while reminding manufacturers that they are allowed to impose maximum resale prices**.**

Likewise, in **Norway** the competition authority warned that suppliers should not exploit the current emergency situation caused by the COVID-19 pandemic to apply unreasonable prices on products such as face masks. As we will see in more detail below, this was backed by a threat to activate price regulation powers if companies were found to engage in such exploitative conduct.[2]

Spain and the UK have gone further and, while announcing that they are monitoring the market and are ready to intervene, have also created special channels for complaints against anticompetitive conduct. **Spain** has, as already described above, started investigating some complaints about abusive pricing practices.[3] The **UK** has also created a task force to monitor the market, and advised businesses against exploiting the coronavirus crisis by raising prices for items such as hand sanitizer, baby milk and face masks. This has included issuing a general warning against excessive pricing to the pharmaceutical, food and drinks industry; and writing to numerous

individual firms about complaints concerning large price rises for personal hygiene products, such as hand sanitiser and food products.[4]

China has not only issued warnings against price increases, but has also issued guidelines for swift enforcement against increases in the prices of facemasks.[5]

1 https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

2 https://konkurransetilsynet.no/will-prevent-unreasonable-or-excessive-price-hikes/?lang=en.

3 https://www.cnmc.es/balance-buzon-Covid-7-abril-20200407 and https://www.cnmc.es/prensa/buzon-covid19-pautas-20200424.

4 For complaints, see https://www.coronavirus-business-complaint.service.gov.uk/; on the task force, see https://www.gov.uk/government/publications/Covid-19-cma-taskforce; and on the warning against excessive pricing, see https://www.gov.uk/government/publications/Covid-19-cma-open-letter-to-pharmaceutical-and-food-and-drink-industries and https://www.gov.uk/government/news/cma-publishes-update-on-covid-19-taskforce (24 April).

5 http://www.gov.cn/zhengce/zhengceku/2020-02/06/content_5475223.htm

Another option is to bring interim measures. Such measures are appropriate in cases of urgency where there is a risk that competition will be seriously damaged. They are temporary measures, and may have to be renewed periodically to ensure that the measure is still necessary and appropriate.

However, interim measures have some drawbacks. First, interim measures do not preclude the need to pursue a detailed investigation, as they are typically only justified if it can be demonstrated that there is a *prima facie* infringement or a reasonable suspicion thereof (Burnside and Kidane, 2018[11]). As a result, interim measures do not necessarily enable competition authorities to prevent exploitative abuse in a timely manner, particularly by comparison to alternative tools such as price gouging or consumer protection laws. Second, interim measures must be shown to be necessary to prevent serious and irreparable harm to competition while an investigation is pending. This may be difficult to establish as regards exploitative practices, which may be remedied by means of *ex post* compensation and fines when an infringement is established, and that do not change the structure of competition in the market in the way that some exclusionary practices might.

A third alternative is to take into account the role that other regulatory tools, and regulators, can play in addressing exploitative pricing practices – e.g. consumer protection, public tender rules or price gouging laws. In effect, this may be the only avenue available in those jurisdictions where exploitative abuses are not prohibited under competition law. However, this approach should also be considered where such pricing practices fall within the scope of competition law.

In most cases, the decision of whether to bring excessive pricing cases hinges not only on the legal framework, but also on the institutional capacity of regulators. Thus, an important preliminary question is whether competition authorities or other regulatory authorities have the most appropriate combination of tools and expertise to address excessive prices (OECD, 2011, p. 39[1]). In other words, even when competition authorities have the power to bring excessive pricing cases, it may be best to liaise with other regulators or engage in advocacy to address the issue giving rise to excessive pricing instead.

When competition authorities also have competences in related fields that empowers them to enforce rules other than competition law to pricing practices – and over 30 competition authorities also enforce consumer protection laws – an important question concerns which available legal tool – e.g. competition law, consumer law, e.g. against unconscionable conduct, or rules against price gouging that aim to protect vulnerable consumers from short term, wind-fall market power in relation to necessities by precluding certain types of price increases – will prove more effective in the context of a particular case.

It is true that neither consumer protection or price gouging require the detailed effects analysis that competition law relies on to ensure that intervention leads to increased consumer welfare. This also means

that enforcing these rules is less burdensome on agencies and can be achieved in a more timely manner. Further, consumer protection and price gouging rules do not apply only to dominant firms, since this is not the focus of their concerns. This can prove useful when addressing serious concerns about sudden pricing practices where demonstrating dominance is not relevant given the nature of the concerns. Reflecting this, a number of competition agencies – including authorities that have also started investigation into high prices under competition law – have relied on powers under their competences other than competition law to address excessively high prices (see Box 5).

Box 5. Consumer protection and excessive pricing

Where competition authorities have the possibility of acting against excessive prices under both competition and consumer law, they may opt to bring cases under either one or the other, depending on the circumstances – and sometimes under both. For example, the **UK**'s CMA has made clear its willingness to pursue unlawful behaviour under both competition and consumer law.[1] In **Italy**, the *Autorità* prohibited the online sale of a HIV medicine for EUR 600 on the basis, *inter alia*, that the infringer was engaged in misleading advertising regarding the effectiveness of the product.[2] The *Autorità* has also brought proceedings against *eBay* and *Amazon* for misleading claims and price increases in the sale of masks, hand sanitisers and other pharmaceutical products.[3] As noted in Box 2 above, the *Autorità* has also started excessive pricing proceedings under competition law.

Regulators without competition powers regarding excessive pricing practices have understandably chosen to rely on alternative competences. For example, in **Australia** the ACCC liaised with online resellers to prevent price gouging for products including facemasks, hand sanitizer and some grocery items under its consumer protection powers. The ACCC has also made clear that it would be willing to pursue excessive pricing when this amounts unconscionable conduct under Australian consumer law.[4]

In addition, jurisdictions that traditionally do not regulate prices, under competition law or otherwise, have adopted price control schemes and granted competence to enforce them to the same authority that enforces competition law. In the **United States**, while there are no federal price gouging laws, the President signed an executive order aimed at preventing price gouging and hoarding of crucial medical supplies needed to fight COVID-19.[5] As a result, it is now a misdemeanour to engage in price gouging or hoarding of a number of essential products punishable by up to one year in prison and a fine of up to USD 10,000.[6] Following an earlier warning against companies taking advantage of the crisis to infringe antitrust law, the Department of Justice (DoJ) announced that it would prioritise fraudulent activity and price gouging involving vital supplies needed to fight COVID-19, such as personal protective equipment (PPE) and ventilators. To this end, the DoJ created a COVID-19 Hoarding and Price Gouging Task Force.[7]

1. https://www.gov.uk/government/publications/Covid-19-cma-open-letter-to-pharmaceutical-and-food-and-drink-industries, warning against exploitative price increases, explains that '*If appropriate, the CMA has recourse to a range of competition and consumer powers to tackle bad behaviour.*'

2 https://www.agcm.it/media/comunicati-stampa/2020/3/PS11723.

3 https://www.agcm.it/media/comunicati-stampa/2020/3/PS11716-PS11717.

4 https://www.accc.gov.au/speech/managing-the-impacts-of-covid-19-disruption-on-consumers-and-business. Australia has also prohibited price gouging of a number of COVID-19 related products under the Biosecurity Act, but the powers to enforce this prohibition were assigned to the Australian Federal Police.

5 https://www.whitehouse.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-Covid-19/

6 50 U.S.C. § 4513

7 See https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing (9 March); https://www.justice.gov/file/1262776/download (24 March).

An alternative is for competition authorities to co-ordinate, and even enter into arrangements, with consumer authorities to co-ordinate their activities. A number of competition authorities actively co-operate with other domestic authorities in enforcing consumer protection laws. This co-operation can be based on

legal frameworks or other arrangements and includes information sharing, collaboration on guidance for businesses, investigations, and enforcement actions.

Open issues

- What are the alternatives to competition enforcement against exploitative pricing practices? How can competition authorities compare the relative advantages of competition enforcement and of those alternatives?
- What mechanisms are available to competition authorities under competition to prevent exploitative pricing practices other than adopting infringement decisions? Can such mechanisms effectively deter exploitative conduct? Which mechanisms are most efficient? How do competition authorities choose between such mechanisms?
- What are the main limitations of mechanisms other than antitrust enforcement in deterring exploitative pricing practices? What considerations do competition authorities take into account when assessing whether: (i) to adopt such mechanisms or bringing infringement proceedings? (ii) to engage in antitrust enforcement or pursue other regulatory alternatives?
- What public body is best placed to engage exploitative pricing practices during the crisis? What considerations are relevant when making such a decision?
- Should competition authorities co-operate with other regulators or public authorities to combat exploitative pricing practices during the crisis? What considerations are relevant to determine whether co-operation is appropriate or not? How should this co-operation occur?

4. Price regulation

Both antitrust enforcement against excessive prices and time-limited price regulation are possible reactions to these market failures. In effect, excessive pricing and price regulation are closely related. Both seek to address the market's failure to deliver goods and services to consumers in an efficient manner at competitive prices, and may be deployed where prices become too high and there is no timely prospect of the market correcting. Further, both price regulation and excessive pricing enforcement may need to be coupled with additional action to address the source of the market failure to be fully effective, and can lead to similar pernicious outcomes: reducing incentives to increase production, delaying market entry or production increases that would lower prices, and leading to products ending up in places where prices are not regulated.

Given its potential for negative effects, even in the context of a sudden crisis price regulation should only be adopted extraordinarily, be limited to essential products affected by the market failures caused by this crisis, and last only for as long as strictly necessary. Ideally, price regulation should be coupled with initiatives that target the underlying conditions giving rise to high price.

A different question is what role competition authorities should play in the context of price regulation. This question can be coloured by a particular concern regarding competition authorities pursuing excessive pricing cases, i.e. that competition authorities may become entangled with price regulation, possibly on a day-to-day basis, and that they simply do not have the resources or the specialised sector specific knowledge that would allow them to do this properly (OECD, 2011, p. 45[1]).

However, all entities that may engage in price regulation have problems. In practice, the choice of the institution best-placed to engage in price regulation is comparative and case-specific; competition authorities and competition law may, on occasion, be best-placed when compared to the institutional alternatives (Motta, 2020[7]).

In short, when high prices are the result of temporary circumstances, there are a number of plausible alternatives to achieve socially optimal outcomes – some of which involve competition authorities, while some do not. On the one hand, the law may leave it to the competition authority to challenge individual

instances of excessive prices and act as a temporary, case-by-case price regulator (OECD, 2011, p. 47[1]). On the other hand, temporary price regulation may be preferred. Since the creation of a specialised sector regulator is unnecessary for transitory market power and abuse of that power, laws typically grant enforcement powers to existing bodies – including competition authorities.

A number of countries have opted for regulating the prices of those products most affected by the COVID-19 crisis (see Box 6). In some cases, competition authorities themselves have called for price regulation, even though competition authorities are not typically responsible for enforcing such rules.

Box 6. Price regulation and the COVID-19 emergency

Some countries decided to regulate prices for essential products in a way that did not involve competition authorities. **France**'s government decided to set the price of hydro-alcoholic sanitisers – 50 ml bottles are priced at EUR 2, 100ml bottles are priced at EUR 3, 300ml bottles are priced at EUR 5 and a litre of sanitiser costs EUR 15. It also fixed the price of surgical masks at EUR0.95.[1] Other countries prescribed price caps, instead of setting retail prices. **Australia** adopted an ordinance prohibiting the sale of essential goods – including disposable face masks, gloves, gowns and goggles, protective glasses and eye visors, as well as alcohol wipes and hand sanitiser – at mark-ups exceeding 20% when those products were bought after 31 January 2020.[2] **Portugal** also imposed a profit cap of 15% for protective equipment and alcohol-based sanitisers.[3]

While competition authorities have had no role under these price regulation measures, in some cases authorities have competences in this respect. For example, in **Norway** the competition authority warned that, if necessary, it would apply the Price Policy Act, which prohibits unreasonable prices and business terms, and allows the Authority to regulate prices of important goods and services.[4] In **Colombia**, the competition authority, which is also responsible for preventing price hoarding (*acaparamiento*) under its consumer protection competences, has exhorted municipal powers to ensure that price hoarding does not occur.[5]

Even competition authorities without competences in this area have contemplated the desirability of price regulation. Early in the crisis, the **UK**'s CMA stated that it was going to assess whether it should advise Government to consider taking direct action to regulate prices.[6] The **Romanian** competition authority also explained that, should actions under its competences prove insufficient to limit price increases to acceptable levels, additional measures foreseen in statute – including introducing price caps – might be necessary.[7]

1 Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de COVID-19 dans le cadre de l'état d'urgence sanitaire ; https://www.economie.gouv.fr/encadrement-prix-masques-chirurgicaux-et-enquetes-DGCCRF, 1 May 2020.

2 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020.

3 Decreto-Lei no. 14-E/2020 of 13 April.

4 https://konkurransetilsynet.no/will-prevent-unreasonable-or-excessive-price-hikes/?lang=en

5 Circular Externa no. 004 de 2020 of 31 March.

6 https://www.gov.uk/government/news/covid-19-sales-and-pricing-practices-during-coronavirus-outbreak

7 https://www.agerpres.ro/economic-intern/2020/03/25/chritoiu-daca-produsele-sanitare-nu-se-ieftinesc-vom-lua-masuri-de-urgenta-precum-rechizitionarea-sau-plafonarea-preturilor--473985

Price regulation provides an alternative to competition law enforcement against exploitative abuses in certain cases. At the same time, competition agencies should flag the risks of such an approach to governments, including those related to discouraging production and undermining incentives for new entrants. A related concern is that different measures may be put in place by different jurisdictions, which may result in supplies travelling away from those countries with lower (regulated) prices towards those allowing higher (market) prices, leading to product shortages in those countries that adopted price regulations.

Competition authorities can play a role ensuring that, where used, price regulation is limited in scope – both in terms of coverage and time. Factors that may be taken into account in this context include the

identification of the essential goods that might be subject to price regulation, particularly in light of the potential for increased production of those products in light of price increases, and of the moment and places where price regulation is no longer necessary. In general, competition authorities should seek to ensure that the least distortive measures possible are adopted.

Looking towards the future, competition authorities can help governments design effective crisis mechanisms, which would also be useful for businesses by creating some certainty regarding the types of measures they can expect to see during a crisis.

Open issues

- When is price regulation an appropriate reaction to market failures causes by a sudden crisis? How can one compare price regulation and alternative reactions, such as bringing exploitative pricing cases under competition law, or bringing cases under consumer protection or price gouging rules?
- What should be the role of competition authorities as regards price regulation?
- How can competition authorities contribute to the balancing of attempts to address a sudden, temporary market failure and the negative effects of price regulation?
- Should competition authorities play a role in designing effective crisis mechanisms? Should this extend to price regulation schemes, i.e. to ensure that they are well-targeted, limited in time and that minimise the typical negative effects of such schemes?

5. Conclusions and recommendations

Supply and demand shocks provoked by crises can lead to product shortages and price increases that call for attention by competition authorities. Competition agencies can adopt a variety of measures to address product shortages and price increases, but these must take into account the urgency of the situation and the challenges inherent in using their enforcement powers in the current context.

A number of principles can nonetheless be identified, which can guide competition authorities in their efforts to deter exploitative practices flowing from the COVID-19 crisis. In particular, competition authorities should:

- Monitor closely any significant and rapid price increases. In the short term, this may include actions to identify where and when prices increased in the supply chain, as well as the use of interim measures or warnings to stop the conduct quickly, or even to prevent it taking place. Where appropriate, competition authorities should use the information so gathered to bring infringement cases.
- Evaluate all available tools – under competition law or other rules – to address problematic practices, and adopt or promote the use of the tool most likely to address them successfully and in a timely manner.
- Pursue a careful analysis of the market and the companies' behaviour when bringing excessive pricing cases under competition law. However, competition authorities should also adapt the analysis of dominance and abusive behaviour to the crisis, e.g. by taking into account the reduced geographic and time-dimensions of markets during a crisis, and selecting the most appropriate methodology (e.g. price-based benchmarks before and after the crisis).
- Co-ordinate actions with consumer protection or other agencies, or rely on consumer protection powers (if available) to protect consumers from unfair pricing practices.
- Use advocacy powers to highlight the risks of price control measures, including those related to discouraging production and undermining incentives for new entrants.

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