

PRICING OF PRODUCTS IN TIMES OF COVID-19 AND THE ROLE OF COMPETITION COMMISSION OF INDIA

India continues to remain under a nation-wide lockdown since March 25, 2020¹ in the wake of the Covid-19 pandemic. During this period, both the Central and State Governments have been working towards ensuring access to and production of essential products and services². Given that the national lock down is set to remain in place for a few more weeks at the least, businesses will continue to face operational challenges due to the non-availability of work force, restrictions on opening facilities and the risk of further spread of the viral infection. In light of the current circumstances, enterprises across sectors are aiming at conserving capital; and exploring means to generate revenue to sustain themselves and ensure business continuity.

For enterprises, the pricing of their products and/or services will increasingly become the most critical component of their business continuity plan. As a result, enterprises may feel compelled to take aggressive and desperate pricing measures (amongst other steps) to improve revenue collection, which in certain cases may potentially raise concerns under the Competition Act, 2002 (**Competition Act**). The enterprises, therefore, need to be mindful of certain issues while they pursue new pricing measures for maintaining their business continuity. A few of these issues have been briefly discussed in this note.

Determination of Fair Pricing of Essential Products by the Indian Government

The Government of India (**Gol**) is empowered to bring certain commodities within the purview of the Essential Commodities Act, 1955 (**ECA**) and determine fair prices of those commodities. The Government undertakes such price determination in order to ensure that prices of essential products do not rise to unreasonable levels. Since the Covid-19 was declared a pandemic, the demand as well as the prices of products such as face masks and hand sanitizers in India has increased many-fold. In exercise of its powers, the Ministry of Consumer Affairs, Gol, has therefore *vide* notification dated March 13, 2020; brought hand sanitizers and face masks under the purview of the ECA for the period until June 30, 2020³. The Ministry has, further *vide* a notification dated March 21, 2020, determined the fair retail prices for face masks, fabric used in production of masks and hand sanitizers⁴. While the Gol ensures fair pricing of essential goods and services, prices of all other important commodities and services can be freely determined by businesses. In some circumstances, such pricing decisions could prove to be to the detriment of the consumer.

Pricing Practices under the Indian Competition Law

Unlike determination of fair prices by the Gol under the ECA, the Competition Act does not empower the Competition Commission of India (**CCI**) to determine prices of commodities or services. However, the CCI, under the Competition Act, is empowered to penalize any person found to be indulging in practices, which have an appreciable adverse effect on competition in India (**AAEC**) or which causes harm to the consumers. Accordingly, practices in the nature of price gouging, price fixation or unfair or discriminatory pricing to the detriment of both the market as well as the consumers may raise concerns under the Competition Act.

¹ <https://economictimes.indiatimes.com/news/politics-and-nation/india-will-be-under-complete-lockdown-starting-midnight-narendra-modi/articleshow/74796908.cms>

² <https://economictimes.indiatimes.com/news/economy/policy/covid-19-dpiit-to-monitor-real-time-status-of-transport-delivery-of-essential-commodities/articleshow/74822623.cms?from=mdr>

³ <https://consumeraffairs.nic.in/sites/default/files/file-uploads/essential-commodities-order/1087.pdf>

⁴ <https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Notification21mar2020.pdf>

The pricing related conduct that may potentially raise concerns under the Competition Act can broadly be divided in two categories – unilateral conduct and collective conduct, which are briefly discussed below.

Unilateral Conduct

- **Price gouging:** Businesses may unilaterally increase the prices of their products/services unjustifiably, commonly known as price gouging, with a view to increase their revenue and earn opportunistic profits. Under the current circumstances, such excessive pricing of products may attract scrutiny by the CCI, if it is found to be detrimental to the interest of the consumers. While price gouging is not expressly defined under the Competition Act, any unjustified/unfair pricing may be analyzed under provisions of the Competition Act as being anti-competitive. *For instance:* An exponential increase in price of a product from the price being charged previously, with only an intention of profiteering from the current crisis, may attract scrutiny of CCI in addition to scrutiny by other regulators⁵.
- **Differential Pricing:** The businesses may unilaterally charge differential prices from certain set of consumers based on an unjustified criterion, including type of consumers such as hospitals, public institutions, individuals etc., or based on the income of consumers in an area. Such action by an entity may potentially harm the interest of the consumers and other customers as well. *For instance:* The CCI had, in a matter, initiated an investigation into the allegation of charging different trait fee in different states, without justification.⁶

The Competition Act, under Section 4, prohibits an entity from abusing its dominant position by imposing an unfair or discriminatory price in purchase or sale of goods or services. The CCI will examine such cases, including the position of dominance of the entity, keeping in mind the circumstances of each case; and the criteria specified in the Competition Act, to determine whether the said conduct results in an abuse of dominant position. It is therefore critical for business entities to make sure that their pricing decisions are based on reasonable business justifications and are not implemented in an arbitrary, discriminatory or unfair manner.

For instance, increase in prices of pulses or products which are imported may increase due to the increase in cost of transportation⁷, or prices may increase due to increase in cost of raw material for production of essential goods such as soaps, handwashes etc.⁸ However, in line with the Ministry of Health and Family Welfare issuing directions to private testing labs indicating severe action for violation of maximum price for Covid-19 tests determined by it⁹, businesses should also charge reasonable prices for their products.

Collective Conduct

Determination of prices: Two or more businesses, engaged in provision of services or production/sale of same/similar product, may collectively determine the prices of their products. Such collective decision making amongst competitors, commonly known as cartelization by sellers, which ensures a uniform market price for all similar or same services or products; is presumed to have an AAEC under the Competition Act.

The Competition Act, under Section 3(3), prohibits entities engaged in same or similar businesses from entering into an agreement to directly or indirectly determine the purchase or sale prices of a product or service, and

⁵ <https://economictimes.indiatimes.com/news/politics-and-nation/amid-covid-19-outbreak-sudden-price-hikes-under-the-scanner/articleshow/74782650.cms?from=mdr>

⁶ <https://economictimes.indiatimes.com/news/economy/agriculture/monsanto-abused-dominant-position-in-india-cci-probe/articleshow/69437310.cms?from=mdr>

⁷ <https://economictimes.indiatimes.com/industry/cons-products/food/covid-19-impact-rajma-prices-set-to-increase/articleshow/74646637.cms?from=mdr>

⁸ <https://www.bloombergquint.com/business/consumer-goods-makers-cut-or-hold-prices-amid-coronavirus-outbreak>

⁹ <https://www.livemint.com/news/india/covid-19-test-should-not-cost-more-than-rs-4-500-centre-tells-private-labs-11584817157440.html>

presumes such conduct to have an AAEC. While the business entities might feel compelled to undertake extraordinary and aggressive pricing measures, they should consider that the treatment of their conduct under Section 3(3) of the Competition Act may not be materially affected by the current circumstances.

In this regard, the CCI has recently issued a clarification/advisory¹⁰, acknowledging the disruptions caused in the supply chain due to the ongoing pandemic and the probable need for businesses to coordinate certain activities. In its advisory, the CCI has noted that in order to cope with the significant changes in the supply and demand patterns arising from this extraordinary situation, businesses may need to coordinate certain activities by way of:

- Sharing data on stock levels
- Timings of operations
- Sharing of distribution network and infrastructure
- Transport logistics
- R&D data etc.

In its advisory, the CCI has clarified that coordinated conduct which results in increasing efficiencies, is protected from retribution within the Competition Act. However, the CCI cautioned that only such conduct, which is *necessary and proportionate* to address the concerns arising out of Covid-19, would be granted favorable consideration and that businesses *must not take advantage* of the current situation to contravene the provisions of the Competition Act. Therefore, during the current circumstances, businesses should not engage in coordinating and taking collective decisions on pricing of products/services to meet the challenges being faced by their business during this crisis. Any coordinated **pricing attempt** by competitors, that is detrimental to competition in the market or to the interests of consumers, will be open to scrutiny under the provisions of the Competition Act.

Snapshot of Affirmative Actions by Foreign Jurisdictions

Competition regulators and other authorities across the globe have issued advisories and guidance for the businesses which are struggling to deal with the on-going crises, in order to help them navigate through these challenging times. With respect to pricing of essential products, the Competition and Markets Authority (**CMA**) of the UK, was quick to issue a warning¹¹ on excessive price increases and the possible introduction of statutory rules. The CMA has also launched¹² a task force to combat rise in prices of essential drugs. Similarly, the European Competition Network of national regulators in the EU issued a joint statement¹³ on the application of anti-trust laws in the EU during the ongoing crisis, explicitly stating that the regulators would not hesitate to take strict action against companies trying to take advantage of the vulnerable situation by abusing their dominant positions. The Department of Justice of the United States, in the same vein has also set up a task force¹⁴ to address Covid -19 related anticompetitive conduct *inter alia* price gouging. Other jurisdictions like Brazil¹⁵, Greece¹⁶ and South Africa¹⁷ are already reviewing possible anti-competitive conduct of increased prices

¹⁰ https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf

¹¹ <https://www.gov.uk/government/news/covid-19-sales-and-pricing-practices-during-coronavirus-outbreak>

¹² <https://www.europeanpharmaceuticalreview.com/news/115696/cma-launches-covid-19-taskforce-to-combat-drug-price-hikes/>

¹³ https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

¹⁴ <https://www.justice.gov/file/1262776/download>

¹⁵ <http://www.cade.gov.br/noticias/cade-abre-investigacao-no-setor-de-produtos-medicos-farmaceuticos>

¹⁶ <https://epant.gr/en/enimerosi/press-releases/item/840-press-release-investigation-in-healthcare-materials.html>

¹⁷ <https://www.timeslive.co.za/politics/2020-04-02-companies-who-hiked-prices-during-covid-19-pandemic-to-face-music-says-ebrahim-patel/>

for face masks and hand sanitizers or issuing words of caution against indulging in any anti-competitive practices. The Italian Competition Authority¹⁸ is already underway with its investigation into the alleged unjustified price increases of face masks and hand sanitizers on certain platforms like Amazon and Ebay.

Key Takeaways

It is imperative for businesses to note that the Competition Act continues to be operational in full force, and the current circumstances cannot be relied upon to justify any anti-competitive pricing decisions. The CCI continues to be empowered to monitor and take *suo motu* cognizance of any alleged or possible contravention of the provisions of the Competition Act. Although competition authorities globally, including India, have recognized the importance of collaborative efforts in times of crisis, they will continue to scrutinize any alleged exploitation of consumers or market vulnerabilities caused during the current circumstances. Accordingly, businesses may, at the very least, keep in mind the following during their business decision making process in the current circumstances:

- Ensure independent pricing decisions and maintain a record of all documents supporting such decisions.
- Ensure rationalization of pricing decisions based on the prevalent market factors, such as actual costs and demand-supply availability.
- Refrain from engaging in discussions regarding future pricing mechanism with competitors.
- Ensure adherence to pricing methodology for goods and services as released by the GoI from time to time.
- Ensure enhanced competition compliance - Given that the CCI considers an inbuilt operational competition compliance mechanism as a mitigating factor while assessing conduct under the Competition Act, it would be advisable for businesses to review the competition compliance manual available on the CCI's website and take steps to ensure total compliance with their internal Competition/Antitrust guidelines, if available.
- In case of doubts regarding pricing decisions, do consult with legal advisers prior to implementing any decisions.

Authors:

- **Abhay Joshi – Associate Partner**
- **Sahil Khanna – Associate**
- **Ketki Agrawal – Associate**

***Disclaimer:** The information provided in this article is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein. This article is not intended to address the circumstances of any individual or corporate body. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*

¹⁸ <https://www.agcm.it/media/comunicati-stampa/2020/3/PS11716-PS11717>