

# THE NEW TRANSATLANTIC ATTACK ON HIGH PRICES: PRICE GOUGING



BY DR. TILMAN KUHN, KATHRYN J. MIMS & LILY KIM<sup>1</sup>



<sup>1</sup> Respectively Partner (Brussels and Düsseldorf), Partner (Washington, D.C.), and Associate (New York), White & Case, LLP. This paper entirely reflects the authors' personal views and not those of White & Case LLP or any of its affiliates or clients.

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The COVID-19 outbreak has generated a surge of consumer complaints and governmental investigations about excessive pricing and price gouging. While firms are typically free to raise prices based on supply, demand, and other market factors, anti-price gouging laws typically restrict such freedom during states of emergency to prevent sellers from taking advantage of emergency-driven demand surges or supply shortfalls for necessities such as food and medical supplies.

This article seeks to help transcontinental businesses understand the anti-price gouging framework in the U.S. and in the EU, and suggests practices that can enhance their anti-price gouging compliance. First, we discuss three unusual aspects of price gouging law in the U.S. and in the EU; second, we highlight the increased high price scrutiny on both sides of the Atlantic in light of COVID-19; and finally, we offer several tips for transatlantic companies to mitigate the risk of excessive pricing and price gouging.

## I. THREE “SURPRISES” OF PRICE GOUGING LAW POSING COMPLIANCE CHALLENGES

### A. *Surprise #1: There is no single price gouging standard – even within the U.S. or EU*

No business would be surprised to hear that legal concepts such as price gouging have different restrictions and enforcement on each side of the Atlantic. But even sophisticated in-house counsel may be caught off guard to learn that restrictions on price gouging vary widely *within* the U.S. and EU.

#### 1. U.S.

The prohibition on price gouging in the U.S. consists mainly of a patchwork of state laws; there is no permanent federal price gouging law. At least 38 states and the District of Columbia have specific statutes that prohibit price gouging. Other states implicitly prohibit price gouging as covered by a broader consumer protection law. And still others have adopted temporary measures to address price gouging amid the COVID-19 pandemic.<sup>2</sup> Generally, state anti-price gouging statutes prohibit price increases of covered products during a state of emergency above certain thresholds and then shift the burden to the defendants to rebut the presumptive violation by proving that the price was justified by an increase in costs.

The details of prohibition, however, vary from state to state in many respects, including the time period, type of sellers, and the product cat-

<sup>2</sup> See Minn. Exec. Order No. 20-10, 44 Minn. Reg. 39 (Mar. 20, 2020), available at <https://www.leg.state.mn.us/archive/execorders/20-10.pdf>; H.B. 1663, 2020 Gen. Assemb., Reg. Sess. (Md. 2020); Press Release, Del. Governor Carney, Governor Carney Declares State of Emergency to Prepare for Spread of Coronavirus (COVID-19) (Mar. 12, 2020), available at <https://news.delaware.gov/2020/03/12/governor-carney-declares-state-of-emergency-to-prepare-for-spread-of-coronavirus-covid-19/>.

egories covered. In most states price gouging restrictions are limited in time to a period following some declaration of a state of emergency,<sup>3</sup> but the nuance of the timing may differ. For instance, while California and New Jersey's price gouging protections end 30 days after a declared emergency,<sup>4</sup> a few states, like Michigan, prohibit price gouging at all times.<sup>5</sup> Many state anti-price gouging statutes, like California's, apply only to retailers,<sup>6</sup> while other statutes, like Arkansas' or Pennsylvania's, apply to all parties within the distribution chain, including manufacturers and wholesalers.<sup>7</sup> All states that have explicit anti-price gouging statutes cover goods necessary for public health, such as medical supplies and personal protective equipment necessary for fighting the pandemic, but some states encompass a much broader range of goods and services, ranging from food and household essentials to fuel and building supplies.<sup>8</sup>

Anti-price gouging statutes also vary widely among states as to the standards and thresholds for price increases to constitute price gouging, and the nature and extent to which increases in costs can justify an otherwise suspect price increase. Some states set a specific percentage increase threshold as a benchmark for a presumptive violation. For instance, in New Jersey and California, a 10 percent increase from the price charged immediately before the state of emergency is presumptively unlawful.<sup>9</sup> Other states take a subjective approach and prohibit "unconscionably high price"<sup>10</sup> or "exorbitant or excessive price."<sup>11</sup> For example, Illinois law finds price "unconscionably high" if there is a "gross disparity" between the prices immediately before and after the declaration of emergency, but does not provide any guidance as to these vague descriptors.<sup>12</sup> A dearth of case law interpreting such provisions poses a further challenge to ensuring compliance with the state anti-price gouging laws.

As noted, once the *prima facie* case of price gouging is established, the burden typically shifts to the defendant to prove that the price increase was justified by an increase in relevant costs. But what "costs" may constitute a valid defense is inconsistent and sometimes unclear. For instance, Pennsylvania's anti-price gouging law does not apply if the price increases are "substantially attributable to additional costs that arose within the chain of distribution with the sale of consumer goods or services[.]"<sup>13</sup> Many states use similar phrases, such as "directly attributable to additional costs," but these terms are often left undefined and have not been interpreted by courts.<sup>14</sup>

On the federal level, there is no generally applicable law against price gouging. But on March 23, 2020, President Trump signed an Executive Order 13910, invoking Korean-war era Defense Production Act (DPA) to temporarily make price gouging and hoarding of crucial medical supplies a federal crime.<sup>15</sup> Executive Order 13910 delegates to the Department of Health and Human Services ("HHS") Secretary an authority to designate any material as "scarce" or "threatened by hoarding."<sup>16</sup> The Executive Order then makes it a federal criminal offense under DPA section 4513 to "accumulate" these designated materials (1) "in excess of the reasonable demands of business, personal, or home consumption," or (2) "for the purpose of resale at prices in excess of prevailing market prices."<sup>17</sup> Like most of the DPA's state counterparts, neither the Executive Order implementing the statute nor the DPA itself provides any objective measurements for a pricing level that is excessive. Moreover, prior to the current crisis, federal prosecutors had never criminally indicted anyone for price gouging under the DPA.

3 See, e.g. ALA. CODE § 8-31-3 (2019); S.C. CODE ANN. § 39-5-145 (2019).

4 CAL. PENAL CODE § 396 (b) (Deering 2019); N.J. STAT. ANN. § 56:8-109 (2019).

5 See MICH. COMP. LAWS § 445.903 (2018).

6 See, e.g. CAL. PENAL CODE § 396(b).

7 See ARK. CODE ANN. § 4-88-303(A)(1) (2020); 73 PA. CONS. STAT. § 232.4(a) (2020).

8 See, e.g. W. VA. CODE. § 46A-6J-1 (2019); 6 R.I. GEN. LAWS § 6-13-21 (2020).

9 N.J. STAT. ANN. § 56:8-108; CAL. PENAL CODE § 396.

10 See, e.g. 940 MASS. CODE REGS. § 3.18 (2020).

11 See, e.g. IDAHO CODE § 48-603 (2020).

12 ILL. ADMIN. CODE tit. 14 § 465.30 (2020).

13 73 PA. STAT. § 232.4(c) (2020).

14 See, e.g. CAL. PENAL CODE § 396 (Deering 2019).

15 U.S. Exec. Order No. 13910 (Mar. 23, 2020) available at <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-covid-19/>; 50 U.S.C. §§ 4501-4568.

16 *Id.*

17 *Id.*

## 2. EU

In the EU, various legal instruments including competition law, consumer protection law, and other “special laws” comprise the prohibition against price gouging. Under the European competition law, agencies can sanction “dominant” firms for abusing their market powers to exploit consumers directly. Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) provides that an abuse may consist in “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,” through, for instance, excessively high pricing.<sup>18</sup>

The standard test on excessive pricing established by the European Court of Justice asks two questions.<sup>19</sup> First, the price has to be excessive compared to the cost incurred. It is important to remember that the acting competition authority has to analyze the difference between the price charged and the costs of the product, especially the possibility of different pricing in different countries. Second, if that is the case, the price has to be unfair in itself or when compared to competing products. In addition, those prices have to be significantly and persistently above competitive level.<sup>20</sup>

Unlike the U.S. anti-price gouging law that applies to all firms regardless of their market positions, the prohibition on excessive pricing under EU law applies only to “dominant” companies.<sup>21</sup> Dominance is defined as “a position of economic strength” and the consequential “power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.”<sup>22</sup> But the definition of dominance remains flexible, as the agencies may narrow down the definition of the relevant market to find dominance more easily, find a firm temporarily dominant,<sup>23</sup> apply the notion of collective dominance to find several companies as dominant together, or regard the ability to charge price above competitive level as an indication of dominance. It is, however, not *per se* unlawful to be dominant. But if dominance is defined as the ability to behave independently and being unconstrained regarding important commercial decisions such as on pricing, how can high pricing then be an abuse? This is the dominance paradox.<sup>24</sup>

In addition, Member states may have stricter national competition laws that apply to a broader array of firms.<sup>25</sup> For instance, French and Italian commercial law includes a provision prohibiting the abuse of a commercial partner’s “economic dependency,” regardless of whether the firm has a dominant position in the market.<sup>26</sup> German law extends the prohibition to the abuse of dominant position through posing exploitative prices by firms that are dominant only in relative terms, in relation to small or medium-sized firms as suppliers or purchasers.<sup>27</sup> In Italy, speculations over prices of basic foodstuffs and other essential goods may trigger criminal liability for both producers and retailers under Article 501-bis

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18 Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 47.

19 See Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, 1978 E.C.R. 207, para. 252, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0027&from=EN>.

20 See Case C-177/16, *Autortiesību un komunikācijas konsultāciju aģentūra and Latvijas Autoru apvienība v. Konkurences padome*, ECLI:EU:C:2017:689, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0177&from=EN>.

21 Member state laws may be stricter. For example, under German competition law, unilateral conduct by an enterprise with market power is governed by Sections 18, 19 and 20 of the German Act against Restraints of Competition (ARC), which prohibit (1) the abuse of a (single or collective) dominant position, and (2) specific types of abusive behavior by enterprises that have ‘relative’ market power in relation to small or medium-sized enterprises (as trading partners or competitors). Germany has thus used the possibility provided for under EU Regulation 1/2003 to enact national legislation on unilateral conduct that goes beyond the substance of the prohibition on the abuse of a dominant position laid down in Article 102 of the TFEU. Another distinct characteristic of German antitrust law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance.

22 See Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, 1978 E.C.R. 207, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0027&from=EN>.

23 See ABG/Oil companies operating in the Netherlands (Case IV/28.841) Commission Decision 77/327/EEC [1977] OJ L117, available at <https://eur-lex.europa.eu/eli/dec/1977/327/oj>.

24 See also Kuhn, WuW 2006, pp. 578 *et seq.*

25 Council Regulation (EC) 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, art. 3(2), 2003 O.J. (L 1) 4,1, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001>.

26 CODE DE COMMERCE [C. COM.] (COMMERCIAL CODE) art. L.420-2 (Fr.). For Italy, Law no 192 of June 18, 1998 (art. 9).

27 Section 20 of the Act against Restraints of Competition in the version published on June 26, 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 10 of the Act of July 12, 2018 (Federal Law Gazette I, p. 1151).

of the Italian Criminal Code.<sup>28</sup>

A number of countries have also introduced emergency legislation against exorbitant pricing practices. France, for example, had announced a decree including price control provisions that impose maximum retail prices of hand sanitizer on March 24, 2020,<sup>29</sup> though repealed the provisions on July 10, 2020.<sup>30</sup>

## **B. Surprise #2: Price Gouging Violations Can Result in Serious Penalties, or Even Jail**

Another notable aspect of anti-price gouging law is that the penalties can be severe, and sometimes include criminal penalties. In the U.S., violations carry civil and criminal penalties as well as injunctive and other relief, depending on the state. More than a third of the states with anti-price gouging statutes carry civil penalties as high as \$10,000 per violation.<sup>31</sup> In Iowa, civil fines can go up to \$40,000 per violation (and an additional \$5,000 if victims were elderly).<sup>32</sup> Multiple states provide for injunctive relief and restitution for victims in addition to civil fines.<sup>33</sup> In states with criminal penalties, price gouging convictions can result in jail time ranging from up to one year (California) to up to five years (Mississippi).<sup>34</sup> Federal law under DPA section 4513 is also punishable by up to a year of imprisonment.<sup>35</sup>

In the EU, firms that have infringed Article 102 of the TFEU are subject to fines based on gravity and duration of the infringement.<sup>36</sup> The starting point for the fine is the percentage (up to 30 percent) of value of relevant sales, depending on the seriousness of the infringement, which in turn depends on a number of factors such as the nature of the infringement and the geographic scope.<sup>37</sup> This is then multiplied by the number of years and months the infringement lasted. The fine can increase (e.g. for repeat violators) or decrease (e.g. for limited involvement), but the maximum level of fine is capped at 10 percent of the overall annual turnover of the company. Several national laws against excessive pricing can also give rise to regulatory fines.<sup>38</sup>

In addition, price gouging behavior may implicate a violation of other statutes, ranging from general consumer protection statutes to wire fraud and conspiracy laws, which may result in stiffer prison terms (federal conspiracy conviction, for instance, is punishable by a prison term up to five years).<sup>39</sup> While Ohio does not have anti-price gouging statutes on the books, Ohio's Attorney General has brought action against individuals

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28 Tribunale di Salerno, Ufficio GIP, dott. Scermino, Order of April 2, 2020; Trib. Lecce, Sez. Riesame (Pres. Cazzella, Est. Gatto), Order of April 21, 2020.

29 Décret no 2020-197 du 5 mars 2020 relatif aux prix de vente des gels hydro-alcooliques and Décrets no 2020-293 du 23 mars 2020 et no 2020-663 du 31 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire [Decree 2020-197 of March 5, 2020 on the selling prices of hand sanitizers and Decrees 2020-293 of March 24, 2020 and 2020-663 of May 31, 2020 prescribing the general measures necessary to deal with the epidemic of covid-19 in the context of the state of health emergency], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 6 and 24 and June 1, 2020. This legislation was criticized because it could put the dealer in an untenable situation. If the dealer bought the sanitizer before the crisis at a higher price than that allowed for resale during the crisis under the special legislation, the dealer would infringe the prohibition to sell at a loss. In order to avoid such infringement, the dealer would have to refuse to supply the customer, which as such could also infringe French law.

30 Décret no 2020-860 du 10 juillet 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans les territoires sortis de l'état d'urgence sanitaire et dans ceux où il a été prorogé [Decree 2020-860 of July 10, 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in territories that have emerged from a state of public health emergency and in those where it has been extended], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 11, 2020.

31 See, e.g. UTAH CODE ANN. § 13-41-201 (LexisNexis 2020); WIS. STAT. § 100.305 (2020).

32 IOWA ADMIN. CODE r. 61-31.1 (714) (2020).

33 See, e.g. MO. REV. STAT. § 407.020 (2020); 73 PA. CONS. STAT. § 232.1 (2020).

34 CAL. PENAL CODE § 396(b); MISS. CODE ANN. § 75-24-25 (2020).

35 50 U.S.C. §§ 4512-4513 (1950).

36 See Council Regulation (EC) 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, art. 3(2), 2003 O.J. (L 1) 4,1.

37 *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, 2006 O. J. (C 210).

38 Mcguire Woods, EU, UK Antitrust Regulators Monitor Price Increases Resulting From COVID-19 Demand, Mar. 23, 2020, available at <https://www.mcguirewoods.com/client-resources/Alerts/2020/3/eu-uk-antitrust-regulators-monitor-price-increases-resulting-from-covid-19-demand>.

39 18 U.S.C. § 371 (2020); 50 U.S.C. § 4501 *et seq.* (2020).

for alleged price gouging under the state's consumer protection statutes that prohibit "unfair and deceptive acts and practices."<sup>40</sup> In enforcing DPA's prohibition against price gouging designated materials, the DOJ has also relied on other statutory tools such as mail and wire fraud, federal theft statutes, and conspiracy charges. On April 22, 2020, the DOJ charged two individuals with conspiracy to commit wire fraud by seeking more than \$4 million from an offer to sell non-existent personal protective equipment at inflated prices.<sup>41</sup> On May 26, 2020, a pharmacist who allegedly hoarded over \$200,000 worth of N95 masks and sold them at up to 50 percent more than their acquisition costs was arrested on charges of violating the DPA as well as committing healthcare fraud and aggravated identity theft.<sup>42</sup>

The European Commission and relevant authorities in the EU member states are also using a number of other statutory and enforcement tools. On the one hand, national authorities have announced that they would apply antitrust law in parallel with consumer protection laws or rules against unfair commercial practices.<sup>43</sup> On the other hand, antitrust regulators in the EU have increasingly implemented interim measures when they found that the conduct gave rise to a *prima facie* breach of Article 102 TFEU proceedings and that there was an urgency due to the risk of serious and irreparable damage to competition.<sup>44</sup>

The European Commission can also work with commitment decisions as a safe and easy way to end an infringement. Those decisions can be very useful, because it may be difficult to prove a violation of Article 102 TFEU through excessive pricing. If the enterprise does not comply with the decision, the European Commission may impose a fine up to 10 percent of the enterprise's consolidated annual worldwide group turnover. Further, while some member state laws do provide the relevant competition authority with the power to issue civil or criminal penalties for individuals – the European Commission is not entitled to do so. For example, under German law, those individuals responsible for an undertaking can be fined with a maximum of € 1 million for a violation of Article 102 TFEU or the equivalent provision in German competition law.<sup>45</sup> However, the authorities in Europe are in practice reluctant to sanction individuals for non-cartel behavior.<sup>46</sup>

### **C. Surprise #3: Price Gouging May Occur Unintentionally**

The final main "surprise" is that companies may commit price gouging unintentionally. Many online retail platforms use or offer to third parties dynamic pricing tools, i.e. a software designed to set price of the products automatically based on real-time changes in marketplace conditions such as supply, demand, and competitor pricing. The unusual circumstances of the COVID-19 emergency could then cause these tools to automatically raise prices on certain products, potentially in violation of anti-price gouging laws.

The risk of unintentional price gouging is significant in both the U.S. and EU. In the U.S., under many state price gouging statutes, price increases above certain threshold after the onset of emergency is a *prima facie* evidence of price gouging and the burden shifts to the seller to present mitigating factors, like in California, for example, where a 10 percent increase in price as compared to pre-emergency price is presumptively unlawful.<sup>47</sup> And in the EU, Germany's Federal Cartel Office ("FCO"), for instance, expressly noted, "the use of an algorithm for pricing

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40 Press Release, Ohio Attorney General, Yost Files Suit Against PPE Price Gougers Who Sold N95 Masks for Nearly 18 Times the Retail Price (April 14, 2020), available at <https://www.ohioattorneygeneral.gov/Media/News-Releases/April-2020/Yost-Files-Suit-Against-PPE-Price-Gougers-Who-Sold>.

41 Press Release, Dep't of Justice U.S. Attorneys Office Eastern District of New York, Two Individuals Arrested for Conspiring to Defraud Purported Purchasers of Personal Protective Equipment (Apr. 27, 2020), available at <https://www.justice.gov/usao-edny/pr/two-individuals-arrested-conspiring-defraud-purported-purchasers-personal-protective>.

42 Press Release, Dep't of Justice U.S. Attorneys Office Southern District of New York, Licensed Pharmacist Charged With Hoarding And Price Gouging Of N95 Masks In Violation Of Defense Production Act (May 26, 2020), available at <https://www.justice.gov/usao-sdny/pr/licensed-pharmacist-charged-hoarding-and-price-gouging-n95-masks-violation-defense>.

43 See, e.g. UK Competition and Markets Authority (CMA), COVID-19: Sales and Pricing Practices During Coronavirus Outbreak (Mar. 5, 2020), available at <https://www.gov.uk/government/news/covid-19-sales-and-pricing-practices-during-coronavirus-outbreak>.

44 See José Rivas, Pauline Van Sande, *The EU Commission imposes interim measures to a technology leader company in the design, development and supply of range of semiconductor sector (Broadcom)*, e-Competitions October 2019, art. 93980 (Oct. 16, 2019), available at <https://www.concurrences.com/en/bulletin/news-issues/october-2019/the-eu-commission-imposes-interim-measures-to-a-technology-leader-company-in>.

45 Section 81 of the Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 10 of the Act of 12 July 2018 (Federal Law Gazette I, p. 1151).

46 See Keith Jones, Farin Harrison, *Criminal Sanctions: An overview of EU and national case law*, e-Competitions March 2014, art. 64713 (Mar. 25, 2014), available at <https://www.concurrences.com/en/bulletin/special-issues/criminal-sanctions/criminal-sanctions-an-overview-of-eu-and-national-case-law-64713-en>.

47 CAL. PENAL CODE § 396.

naturally does not relieve a company of its responsibility.”<sup>48</sup> In *Lufthansa Ticketpreise* (2018), the FCO investigated whether Lufthansa abused its monopoly position for several months following the insolvency of Air Berlin in August 2017, based on the price data of flights that were on average 25-30 percent more expensive than in the previous year.<sup>49</sup> The FCO specifically found the fact that price increases were the result of a price algorithm had no significance to its investigation, considering that the airlines specify and manage the framework data and manually enter unanticipated events.

For the online platforms using automated pricing tools, then, one way to mitigate the risk of inadvertent price gouging violations is to increase oversight and put in place appropriate safeguards. Section III suggests other measures that firms may consider to ensure compliance with price gouging laws.

## II. INCREASED SCRUTINY IN THE US AND EU IN LIGHT OF COVID-19

### A. U.S.

Many states and the DOJ have enhanced enforcement of price gouging laws during the COVID-19 crisis. In response to a surge of consumer complaints of price gouging, state attorneys general have opened investigations, established task forces, and enhanced their complaint reporting mechanisms.<sup>50</sup> While investigations tend to resolve through cease and desist letters or fines,<sup>51</sup> some states have pursued civil actions for injunctive relief and restitution, as well as criminal enforcement. For instance, the Texas Attorney General sued an egg supplier for raising the egg price by about 300 percent to seek an injunction and restitution.<sup>52</sup> California is prosecuting individuals for selling medical supplies at “exorbitant prices” for violation of the state price gouging statute.<sup>53</sup> A number of state attorneys general have jointly sent letters to large online retail platforms such as Amazon, eBay, and Craigslist to urge them to set policies and enforce restrictions on price gouging during the emergency and to create and maintain a page on their websites where consumers can report price gouging.<sup>54</sup>

At the federal level, Attorney General William Barr announced that the DOJ would prioritize hoarding and price gouging of supplies necessary to combat COVID-19 and launched a national COVID-19 Hoarding and Price Gouging Task Force, led by Craig Carpenito, the U.S. Attorney for the District of New Jersey.<sup>55</sup> On April 24, 2020, the Task Force and the DOJ brought the first ever criminal action under the DPA, charging a retail store owner with violating the DPA by hoarding personal protective equipment and selling critical medical supplies at over 50 percent mark-ups to customers.<sup>56</sup>

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48 Bundeskartellamt [BKartA] [Federal Cartel Office], May 29, 2018, Press Release: Lufthansa tickets 25-30 per cent more expensive after Air Berlin insolvency – “Price increase does not justify initiation of abuse proceeding,” available at [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2018/29\\_05\\_2018\\_Lufthansa.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2018/29_05_2018_Lufthansa.pdf?__blob=publicationFile&v=2).

49 The FCO ultimately did not find an abuse; see Bundeskartellamt [BKartA] [Federal Cartel Office], May 29, 2018, Case Summary B9-175/17, available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2018/B9-175-17.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2018/B9-175-17.pdf?__blob=publicationFile&v=2).

50 See, e.g. Michael Levenson, *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, N.Y. TIMES (Mar. 27, 2020) (stating that the Michigan attorney general office received more than 1,800 complaints for potential price gouging).

51 See, e.g. Press Release, N.Y. Attorney General, A.G. James: Price Gouging Will Not Be Tolerated (Mar. 10, 2020), available at <https://ag.ny.gov/press-release/2020/ag-james-price-gouging-will-not-be-tolerated>.

52 Press Release, Attorney General of Texas, A.G. Paxton Files Lawsuit to Halt Price Gouging by Cal-Maine, Foods, Inc. (Apr. 23, 2020), available at <https://www.texasattorney-general.gov/news/releases/ag-paxton-files-lawsuit-halt-price-gouging-cal-maine-foods-inc>; *Texas v. Cal-Maine Foods, Inc. d.b.a. Wharton et al.*, No. 20205427 (Apr. 21, 2020).

53 Jeff Mordock, *San Diego County sheriff arrests 8 in alleged coronavirus price gouging scam*, THE WASH. TIMES (Mar. 19, 2020), available at <https://www.washingtontimes.com/news/2020/mar/19/san-diego-county-sheriff-arrests-8-alleged-coronav/>.

54 Letters from 33 State AGs to Jeff Bezos, Amazon CEO, Jim Buckmaster, CEO Craigslist, Scott Schenkel, CEO eBay, Mark Zuckerberg, Chairman/CEO Facebook, and Doug McMillon, President/CEO Walmart (Mar. 25, 2020), available at [https://www.attorneygeneral.gov/wp-content/uploads/2020/03/03\\_25\\_2020\\_Multistate-letter.pdf](https://www.attorneygeneral.gov/wp-content/uploads/2020/03/03_25_2020_Multistate-letter.pdf).

55 Dep’t of Justice, Attorney General Barr Speaks at the White House Coronavirus Press Briefing (Mar. 23, 2020), available at <https://www.justice.gov/opa/video/attorney-general-barr-speaks-white-house-coronavirus-press-briefing>.

56 Complaint, *United States v. Amardeep Singh*, No. 20-MJ-326 (E.D.N.Y. Apr. 24, 2020). Press Release, Dep’t of Justice U.S. Attorneys Office Eastern District of New York, Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment (Apr. 24, 2020), available at <https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0>.

Moreover, federal legislators have proposed legislations to establish federal price gouging law. On May 15, 2020, the House passed the \$3 trillion Health and Economic Recovery Omnibus Emergency Solutions (“HEROES”) Act, which includes provisions that make price gouging unlawful during the current crisis. In the Senate, a broader Ending Price-Gouging During Emergencies Act was introduced to prohibit price gouging during any federal emergency, beyond the current pandemic.<sup>57</sup>

## B. EU

European competition authorities have also taken actions against excessive price increases during the COVID-19 crisis. On March 23, 2020, the European Competition Network (ECN), comprising the European Commission and the national competition authorities of Member states, issued a joint statement on the antitrust enforcement during the current pandemic and noted excessive pricing as an area of particular concern.<sup>58</sup> The statement confirmed that they would “not hesitate to take action against companies taking advantage of the current situation by cartelizing or abusing their dominant position” in order to ensure that essential products such as face masks and hand sanitizer remain available at competitive prices.<sup>59</sup>

Several national authorities have created task forces, opened investigations, and written letters to firms and trade associations. The UK CMA established a COVID-19 Taskforce to monitor and respond to competition and consumer complaints.<sup>60</sup> On June 18, 2020, the CMA initiated investigations into four pharmacies and convenience stores related to suspected charging of excessive and unfair prices for hand sanitizer.<sup>61</sup> On July 13, 2020, the CMA closed three of those investigations, determining that finding an infringement of competition law as unlikely; the fourth investigation remains ongoing.<sup>62</sup> The CMA Taskforce has also sent open letters to 26 trade associations emphasizing the importance of consumer and competition law compliance,<sup>63</sup> including the early years sector,<sup>64</sup> the package holiday sector,<sup>65</sup> and the pharmaceutical and food and drink industries,<sup>66</sup> as well as 277 letters to individual businesses asking for more information or expressing concern about unjustifiable price rises.<sup>67</sup>

In Italy, the Competition Authority launched on 12 March 2020, two separate investigations against the Amazon and eBay platforms with regard to claims relating to the marketing of hand sanitizing/disinfectant products, respiratory tract protection masks and other health and hygiene products, during the health emergency caused by Covid-19. The two proceedings concern, on the one hand, the presence of claims relating to the alleged effectiveness of the products in terms of protection and/or counteraction against the above COVID 19 virus; on the other, the unjustified and significant increase in the prices recorded for the sale of these products in recent weeks.<sup>68</sup>

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57 S. 3574, 116th Cong. (2020).

58 European Competition Network, Joint statement on application of competition law during the Corona crisis (Mar. 23, 2020) available at <https://www.concurrences.com/IMG/pdf/cne.pdf?58124/4281c64ef9ee69ec930b32bd49dba3cf58c3dd78>.

59 *Id.*

60 CMA, CMA launches COVID-19 taskforce (Mar. 20, 2020), available at <https://www.gov.uk/government/news/cma-launches-covid-19-taskforce>.

61 CMA, Hand sanitiser products: suspected excessive and unfair pricing (Jun. 18, 2020), available at <https://www.gov.uk/cma-cases/hand-sanitiser-products-suspected-excessive-and-unfair-pricing>.

62 CMA, Statement regarding the CMA's decision to close certain investigations into suspected charging of excessive and unfair prices for hand sanitizer products during the coronavirus (COVID-19) pandemic (Jul. 13, 2020), available at <https://www.gov.uk/cma-cases/hand-sanitiser-products-suspected-excessive-and-unfair-pricing>.

63 CMA, Update on the work of the CMA's Taskforce, (Jul. 3, 2020), available at <https://www.gov.uk/government/publications/cma-coronavirus-taskforce-update-3-july-2020/update-on-the-work-of-the-cmas-taskforce>.

64 CMA, CMA open letter to the early years sectors (Jul. 28, 2020), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/904194/Open\\_letter\\_to\\_Nursery\\_and\\_Early\\_Years\\_\\_settings.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/904194/Open_letter_to_Nursery_and_Early_Years__settings.pdf).

65 CMA, CMA open letter to package travel sector, (Jul. 10, 2020), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/899409/Holiday\\_packages\\_Final\\_OpenLetter\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899409/Holiday_packages_Final_OpenLetter_.pdf).

66 CMA, Open letter to the pharmaceutical and food and drink industries, (Mar. 20, 2020), available at <https://www.gov.uk/government/publications/covid-19-cma-open-letter-to-pharmaceutical-and-food-and-drink-industries>.

67 *Supra*, n.62.

68 Italian Competition Authority, cases no. PS11716-PS11717, press release available at <https://en.agcm.it/en/media/press-releases/2020/3/PS11716-PS11717>. See also Italian Competition Authority, The Italian Competition Authority investigates online sales platforms for excessive pricing of hand sanitizers and respiratory protection masks in the face of COVID-19 outbreak in the country, e-Competitions February 2020, art. 93787 (Feb. 27, 2020), available at <https://www.concurrences.com/en/bulletin/news-issues/>



The Italian Competition Authority also sent requests for information to:

- numerous trade chains to acquire data on the dynamics of retail prices and wholesale purchase prices of basic foodstuffs, cleansers, disinfectants and disposable gloves, in order to identify any financial exploitation of the health emergency;<sup>69</sup>
- a number of private health facilities and testing laboratories located in Rome, regarding the offer of serological tests for the identification of antibodies against the SARS-Co-V-2 virus, at alleged “exorbitant prices.”<sup>70</sup>

The Italian Competition Authority also adopted interim measures consisting in (i) ordering two online platforms (i.e. [www.vova.com](http://www.vova.com) and the [www.oxystore.it](http://www.oxystore.it)) to suspend the advertising and promotion of the sale of products for prevention and/or diagnosis of contagion from the SARS-CoV-2 virus<sup>71</sup> and (ii) shutting down a number of websites, which offered allegedly effective COVID-19 self-tests at excessive prices.<sup>72,73</sup>

### III. PRACTICE TIPS FOR GLOBAL FIRMS

Since there is no uniform threshold for what constitutes price gouging or excessive price, companies lack a reliable safe harbor under which to increase prices and be confident to stay in compliance in every jurisdiction. By following the practices outlined below, however, firms can reduce the risk of violation and enhance anti-price gouging compliance.

#### ***A. Know the price gouging regimes and related statutes in all jurisdictions of operation and ensure that employees with price-setting authority are properly trained on the anti-price gouging obligations.***

Because anti-price gouging laws vary widely from jurisdiction to jurisdiction in many respects, the first step to reducing the risk of being the target price gouging allegations is for companies to *understand where they operate and what laws apply in those jurisdictions*. On the U.S. side, that means understanding the variations in state laws where a company sells products — as well as whether the federal requirements under the DPA apply to any products — and for the EU side of a business, that “dominant” firms must know the competition law of the EU and member states in which they operate, consumer protection rules, and other emergency regulations targeting excessive pricing during the COVID-19 crisis.

Firms should know:

- What goods are subject to price gouging laws?
- Where are those goods covered by price gouging prohibitions?
- How do the laws operate in those jurisdictions (triggered only in a declared state of emergency? Or active full time?)?
- What are the standards/thresholds that constitute price gouging or excessive pricing?

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69 Italian Competition Authority, case no. DS2620, press release available at <https://en.agcm.it/en/media/press-releases/2020/5/DS2620>.

70 Italian Competition Authority, case no. DC9877, press release available at <https://en.agcm.it/en/media/press-releases/2020/4/DC9877>.

71 Italian Competition Authority, case no. PS11752, press release available at <https://en.agcm.it/en/media/press-releases/2020/5/PS11752> Italian Competition Authority, case no. PS11732, press release available at <https://en.agcm.it/en/media/press-releases/2020/4/PS11732>. As part of these cases, the Italian Competition Authority indicated that it will investigate the high level of prices recorded in recent weeks with reference to these products. See also case PS11734 on the [www.wish.com](http://www.wish.com) marketplace, for which the Authority did not deem necessary to adopt interim measures, given the spontaneous suspension of the advertising and sale promotions on the relevant products.

72 Italian Competition Authority, case no. PS11727, press release available at <https://en.agcm.it/en/media/press-releases/2020/3/PS11727>; case no. PS11733-PS11735, press release available at <https://en.agcm.it/en/media/press-releases/2020/4/PS11733-PS11735>; case no. PS11723, press release available at <https://en.agcm.it/en/media/press-releases/2020/3/PS11723>.

73 Italian Competition Authority, The Italian Competition Authority investigates online sales platforms for excessive pricing of hand sanitizers and respiratory protection masks in the face of COVID-19 outbreak in the country, e-Competitions February 2020, art. 93787 (Feb. 27, 2020), available at <https://www.concurrences.com/en/bulletin/news-issues/february-2020/the-italian-competition-authority-investigates-online-sales-platforms-for>.

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- Are there any statutory defenses?

Simultaneously, firms must watch for other antitrust law implications. For instance, U.S. firms that adjust pricing strategies to comply with different price gouging limits may face increased Robinson-Patman Act and resale price maintenance compliance issues, which may be *per se* illegal under certain state antitrust laws, even though federal law applies rule of reason. (But in the EU, the ECN expressly noted that the existing competition rules “allow manufacturers to set maximum prices for their products,” which would be “useful to limit unjustified price increase at the distribution level.”<sup>74</sup>)

Firms must also properly *train employees* who set and approve prices on these anti-price gouging obligations in all relevant jurisdictions. If a firm uses automated pricing tools, the firm should strengthen oversight and *implement safeguards to prevent inadvertent price gouging* violations.

### ***B. Document procompetitive justifications thoroughly and contemporaneously.***

Firms should *rigorously document any justification for increased* prices based on increase in costs, profit margins, or market prices during an emergency and do so contemporaneously with new pricing decisions. Generally, in the U.S., state anti-price gouging statutes allow businesses to pass along increased costs to customers, and the DPA permits sales not in excess of “prevailing market prices.” Similarly, in determining whether the price is excessive, European competition law compares the price to the costs the company incurred and to the prices of competing products.<sup>75</sup>

Businesses should also *retain documentation* of prices and costs prior to the emergency. Many state anti-price gouging statutes link the acceptable selling price to the price and/or cost of the product in the affected area over a time period immediately preceding the declaration of emergency.<sup>76</sup>

It is important to note that while market prices could be useful for defending a higher price, firms should refrain from contacting competitors for such data, since coordination with competitors raises the risk of antitrust law violations. Instead, firms should gather the necessary information from sources that would not create such risk. Even if firms believe communication or coordination with competitors may be procompetitive and appropriate, it may be prudent to seek a business review letter from the DOJ or an advisory opinion from the FTC, or similar advance permission from the relevant state authority.

### ***C. Take proactive steps about suspected price gouging behavior of your business partners and competitors.***

Companies may consider *taking proactive steps* to protect their reputation as well as to limit potential liability when they suspect their business partners or competitors have engaged in price gouging conduct. If a supplier (of goods, transportation, or labor) increases prices to potential price gouging levels, consider demanding justification. And while a firm should never report a competitor’s behavior for the sole purpose of gaining competitive advantage, companies may in good faith consider contacting and cooperating with government authorities to prevent or address price gouging violations by third parties in their markets. In fact, some U.S. state attorneys general have urged companies to work with them to prevent price gouging in the distribution chain and the European national competition authorities have also encouraged businesses to report excessive pricing.

Because manufacturers and online platforms are particularly vulnerable to reputational damage and potential legal risks from alleged price gouging conduct by others (e.g. distributors or third-party sellers on an e-commerce site), such firms may therefore also consider the availability of trademark law to protect their brands from retailers who price their products excessively. Online platforms may consider deleting listings or suspending accounts associated with price gouging.

<sup>74</sup> European Competition Network, Joint statement on application of competition law during the Corona crisis (Mar. 23, 2020), available at <https://www.concurrences.com/IMG/pdf/cne.pdf?58124/4281c64ef9ee69ec930b32bd49dba3cf58c3dd78>.

<sup>75</sup> See Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, 1978 E.C.R. 207, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0027&from=EN>.

<sup>76</sup> See, e.g. GA. CODE ANN. § 10-1-393.4 (2020); W. VA. CODE § 46A-6J-1 (2020).

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