Antitrust Chronicle

SEPTEMBER · SUMMER 2020 · VOLUME 3(2)

Price Gouging

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

Price gouging is perhaps the most paradoxical of antitrust offenses. Courts and regulators are at pains to point out that the mere possession of monopoly power is in itself not problematic. Yet the most natural expression of monopoly power – charging monopoly prices – is nonetheless a potential infringement.

Drawing up appropriate rules and benchmarks to assess price gouging is notoriously difficult. For this reason, authorities and courts are loath to enforce this aspect of the law. The picture is further complicated by the myriad adjacent rules and regulations governing prices in various jurisdictions, and on a sector-by-sector basis.

Nonetheless, the basic goal of the antitrust rules is to protect consumers from the illegitimate exercise of market power. The law and its enforcers must therefore tread a fine line, as must companies possessed of market power. Authorities are ill-equipped to become generalist price regulators, yet are obliged to act when faced with a clear infringement. Companies are rational market actors with legitimate profit motives, yet must avoid liability.

The contributions to this Chronicle seek to cut this Gordian knot. These articles are all the more timely since the question of price gouging has become live in 2020, due to supply shortages and stockpiling during the COVID-19 pandemic. The question of excessive pricing will perennially occupy the backs of the minds of regulators, but recent events have brought it to the forefront.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

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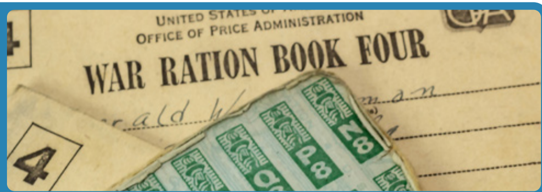

Price Gouging and the COVID-19 Crisis – This Time Is (a Little) Different

By Michael A. Salinger

Shortages resulting from natural disasters invariably lead to allegations of price gouging. By themselves, price gouging laws exacerbate rather than alleviate shortages by preventing the price mechanism from discouraging hoarding and encouraging supply expansion. To retain customer loyalty, some businesses may limit their price increases and instead either impose their own rationing or accept stock-outs. Those private decisions do not justify legal sanctions against companies that do not exercise similar restraint. Given enough implementation time, an alternative to relying on the market mechanism to allocate scarce resources in a crisis-induced shortage is a rationing scheme such as the one United States used in World War II. During the COVID-19 crisis, such a policy may well have been both feasible and desirable for items such as personal protective equipment.

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Uncertainty in U.S. Price-Gouging Law Compliance and Defense

By Ann O'Brien & Brady Cummins

Allegations of price gouging are ubiquitous in the wake of the COVID-19 pandemic. Since the late 1970s, 40 U.S. states have enacted price-gouging laws that restrict price increases during states of emergency. COVID-19 presents the longest and largest state of emergency triggering these laws. These laws are far from uniform across the states, and many consist of vague standards, resulting in significant uncertainty for sellers looking to comply with them. Nationwide sellers face legal and practical challenges navigating this patchwork of state laws during this unprecedented emergency. This article addresses some of the burdensome practical and legal challenges faced by business trying to navigate price gouging laws and offers several possible reforms that states could consider.

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Price Gouging Amidst the COVID-19 Pandemic

By Vic Domen & Daniella Torrealba

Since the outbreak of the Coronavirus (COVID-19) pandemic, the legal landscape surrounding price gouging has changed rapidly and dramatically. Attorneys general and state governors have issued statues, executive orders, or regulations addressing concerns over price gouging. A majority of states have made it clear that they will move quickly and forcefully against any business they suspect to be price gouging. On the federal level, President Trump signed an Executive Order implementing the Defense Production Act prohibiting the accumulation of "scarce" supplies and members of Congress have proposed bills to extend protections against price gouging of essential goods and services. Manufacturers and resellers — particularly of ventilators, personal protective equipment, and other essential supplies that are in high demand — should be prepared for state and federal enforcers to aggressively monitor their price changes during the COVID-19 pandemic and prepare themselves to prove that their conduct does not constitute price gouging. This article provides an overview of price gouging laws and restrictions at both the state and federal level and offers practical considerations for businesses as they adjust to supply pressures and increased consumer demand.

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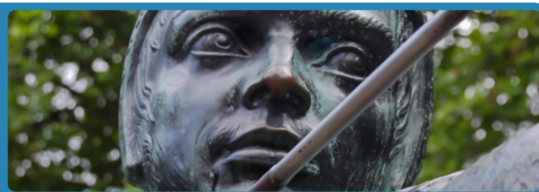

Robbin' Hood

By Harry First

Is it an antitrust offense to sell face masks at a high price in the midst of a pandemic? In this essay I address this question by examining two recent decisions in South Africa that found the high prices for face masks charged by two retailers were excessive under South Africa competition law, even though neither firm was shown to be dominant by traditional methods. In addition to discussing the two cases, I argue that South Africa's effort to use competition law to prevent this kind of price increase has important lessons for antitrust enforcement elsewhere, including the United States. Specifically, the two cases remind us of the importance of price in antitrust analysis; the need to pay attention to justice in antitrust analysis; our over-willingness to rely on market corrections rather than acknowledging market failures; and our need to change our culture of antitrust enforcement. It may be that the "supreme evil" of antitrust is not collusion, but a failure to pay attention to how antitrust can advance justice.

SUMMARIES

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Price Gouging in a Time of Sea Change

By Timothy Snail & Mary Beth Savio

The purpose of price gouging laws is to prevent excessive pricing and profiteering in a state of emergency. But price gouging laws in the United States, exemplified by those enacted by state governments, were generally designed in anticipation of particular types of emergencies or natural disasters and as a result may embody approaches that strain to address the economic effects of novel emergencies such as the COVID-19 global pandemic. This article discusses challenges that arise in applying existing price gouging laws in the wake of widespread economic shocks with long-lasting dimensions and explains how economic analysis and modeling may help sort out these issues.

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The New Transatlantic Attack on High Prices: Price Gouging

By Tilman Kuhn, Kathryn J. Mims & Lily Kim

The COVID-19 outbreak has generated a surge of consumer complaints and governmental investigations about excessive pricing and price gouging. Anti-price gouging laws seek to prevent sellers from taking advantage of emergency-driven demand surges or supply shortfalls for necessities such as food and medical supplies. This article provides an overview of the legal environment and recent enforcement practice, and seeks to help transcontinental businesses understand the anti-price gouging framework in the U.S. and in the EU. It also 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.

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Toward a *Per Se* Rule Against Price Gouging

By Ramsi A. Woodcock

Price gouging is the use of high prices to ration access to a good in unexpectedly short supply. Because sellers can always recoup their costs by choosing not to ration with price and instead allowing the good to sell out, price gouging harms consumers: it transfers wealth from consumers to firms unnecessarily. This harm to consumers could violate the antitrust laws in two ways. First, it could serve as the basis for a *per se* rule against algorithmic price gouging — surge pricing — because the superhuman speeds with which surge pricing algorithms respond to shortages effectively shorten the period during which the effects of competition in the pre-shortage period continue to discipline prices during the shortage, and that should satisfy antitrust's anticompetitive conduct requirement. Second, price gouging's harmfulness to consumers could serve as the basis for an antitrust prohibition on all price gouging were antitrust at last to take its consumer welfare standard seriously and prohibit consumer-harmful pricing even when not accompanied by anticompetitive conduct.

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Interim Measures: A Remedy to Deal with Price Gouging in the Time of COVID-19?

By Penelope Giosa

Interim measures are cease-and-desist orders that can be issued when there is an imminent risk of serious and irreparable harm to competition. The adoption of the European Regulation 1/2003 has extended their scope to embrace the harm to competition, making it possible for the European Commission to seek interim relief, in case of harm to consumers. This gives the impression that interim measures are appropriate to deal with Coronavirus price gouging. However, this article will show that as interim measures currently stand, there are significant constraints on the ability of the European Commission to take interim measures in price gouging cases.

SUMMARIES

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Price Gouging Under Brazilian Competition Law: Better Left Dormant?

By Carlos Ragazzo & João Marcelo Lima

Price gouging is a hot topic in the antitrust community as a result of COVID-19, and Brazil is no exception. In this article, we ask whether it is still worth having CADE open price gouging investigations, or should CADE adopt a policy of no longer pursuing price gouging claims. We argue that CADE should acknowledge the limited relevance of price gouging as a standalone theory of harm worth pursuing, which is largely the policy being adopted in the period after the enactment of Brazil's current competition law and before the pandemic. We also point to other avenues in which we believe the many complex issues around price gouging might be more productively discussed and addressed in Brazil.

WHAT'S NEXT?

For October 2020, we will feature Chronicles focused on issues related to (1) **CRESSE Insights**; and (2) **Policy Roundtables**.

ANNOUNCEMENTS

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CPI ANTITRUST CHRONICLES NOVEMBER 2020

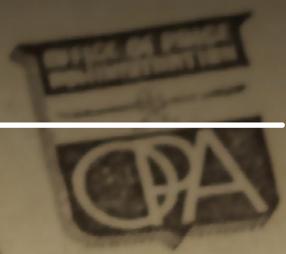
For November 2020, we will feature Chronicles focused on issues related to (1) **Collaboration Agreements**; and (2) **Data Portability**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

PRICE GOUGING AND THE COVID-19 CRISIS – THIS TIME IS (A LITTLE) DIFFERENT



BY MICHAEL A. SALINGER[1]

1 Boston University Questrom School of Business.

I. INTRODUCTION – CONTRASTING VIEWS OF ECONOMISTS AND THE PUBLIC

The conventional definition of economics is the study of the allocation of scarce resources among alternative uses; and both economic research and teaching focus heavily on the role of a decentralized price mechanism in accomplishing this task. In his 1979 Presidential Address to the American Economic Association, Robert Solow observed, "*Ever since Adam Smith, economists have been distinguished from lesser mortals by their understanding of and - I think one has to say - their admiration for the efficiency, anonymity, and subtlety of decentralized competitive markets as an instrument for the allocation of resources and the imputation of incomes*."[2] His observation that "lesser mortals" – i.e. non-economists – do not accept the arguments economists make about the desirability of market outcomes is surely correct. As evidence, Kahneman, Knetsch & Thaler[3] reported the results of a telephone survey in which 82 percent of respondents said that they considered it unfair for a local hardware store to raise the price of snow shovels from its normal price of $15 to $20 during a snow storm.

During the COVID-19 crisis, shortages have arisen as have issues of price gouging. The crisis created a surge in the need for personal protective equipment ("PPE") and ventilators that hospitals needed to treat patients infected with the COVID-19 virus. When President Trump surmised that the drug hydroxychloroquine might be an effective treatment that, in any event, was safe regardless of whether it was effective, shortages of the drug arose.[4] And, after consumers stocked up on extra supplies of toilet paper and paper towels, those items became temporarily unavailable in many stores.[5]

Legal prohibitions against price gouging make it illegal to let the market work. Price gouging laws make the news whenever there is a natural disaster. An example was when hurricanes Katrina and Rita hit the U.S. Gulf Coast in fall of 2005, knocking out a substantial portion of petroleum production and refining capacity in the Gulf Coast as well as pipelines for transporting petroleum and refined petroleum products to particular regions, most notably the mid-Atlantic states. Because of the political pressure stemming from the increase in gasoline prices caused by the hurricanes, Congress mandated that the Federal Trade Commission ("FTC") study the behavior of petroleum markets in the wake of the crisis. The FTC concluded that the price increases that arose reflected the normal and efficient workings of competitive markets in response to shortages.[6]

The COVID-19 episode provides further evidence to evaluate the arguments for and against price gouging legislation and, more generally, for the efficiency of market mechanisms in solving the basic economic problem of allocating scarce resources. In this note, I will argue that, in general, the response of markets to the COVID-19 crisis is another example of the efficiency of markets in solving the basic economic problem of how to allocate scarce resources. By standing in the way of the proper functioning of markets, legal prohibitions against price gouging serve no useful purpose and can do considerable harm. However, I also argue for one exception to the general rule for the efficiency of the market outcome. Some centralized national system for procuring and distributing PPE and ventilators would have been better than simply letting the market operate.

2 Solow, Robert, M. "On Theories of Unemployment," *American Economic Review*, vol. 70 (1980), pp. 1-11.

3 Kahneman, Daniel, Knetsch, Jack, and Thaler, Richard, "Fairness as a Constraint on Profit Seeking: Entitlements in the Market," *The American Economic Review* vol. 76 (1986), pp. 728-41.

4 O'Connor, Anahad, "Coronavirus Continues to Disrupt Prescription Drug Supplies," The New York Times, May 28, 2020 available at https://www.nytimes.com/2020/05/28/well/live/coronavirus-lupus-arthritis-prescription-drugs.html.

5 Corkery, Michael & Maheshwari, Sapna, "Is There Really a Toilet Paper Shortage?," The New York Times, March 13, 2020 available at https://www.nytimes.com/2020/03/13/business/toilet-paper-shortage.html.

6 See "The Federal Trade Commission Investigation of Gasoline Price Manipulation and Gasoline Price Increases: A commission Report to Congress," May 2006, available at https://www.ftc.gov/reports/federal-trade-commission-investigation-gasoline-price-manipulation-post-katrina-gasoline (last accessed July 7, 2020).

II. THE ECONOMICS AND BUSINESS OF PRICE "GOUGING"

A. The Argument for Letting the Market Work

After hurricane Wilma, which hit Miami about a month after hurricane Rita (and two months after Katrina), a Miami man drove his flatbed truck to North Carolina – several hundred miles away – and purchased a set of portable generators, paying roughly $300 for some and $500 for others. He drove the truck back to Miami and sold the generators for approximately double what he had paid for them. The Florida Attorney General sued him for price gouging.[7]

The initiative shown by this truck owner helped alleviate the shortage of generators, since more Floridians were able to acquire generators than if the truck owner had not driven to North Carolina. We do not need to give him an award for his initiative. The market did that, or at least would have if he had not had to pay a fine to the state. It would be interesting to know what that truck owner did the next time a hurricane hit Miami. Perhaps he was civic-minded enough to act to ease the impending shortage without profiting from it. More likely, the lesson he learned was not to show so much initiative.

The example illustrates one of the main economic arguments why price gouging legislation is misguided. The essential problem that gives rise to the price increases that trigger allegations of price gouging is a shortfall of supply relative to demand. Such situations can arise either because of a supply disruption (such as the effects from hurricanes and other natural disasters on petroleum operations) or a sudden increase in demand (such as the effect of the COVID-19 crisis on the demand for personal protective equipment). The price increases that are the natural market reaction to shortages provide an incentive to bring new supplies to market, thereby easing the shortage.

The other main argument for allowing market prices to rise is that it provides an incentive to conserve scarce supplies and prevent hoarding, a real phenomenon that exacerbates shortages. The toilet paper and paper towel shortages that arose in the early days of the COVID-19 crisis are a prime example. There, mere concerns about a shortage (rather than an actual shortage) caused a run on available supplies followed by general unavailability.

B. Qualifications about the Social Desirability of the Market Outcome

In the same address in which Solow asserted that economists admire "*the efficiency, anonymity, and subtlety*" of competitive market outcomes, he also observed that economics provides a foundation for questioning these outcomes' desirability and formulating policies to improve upon them.

One of the objections to competitive market outcomes that one sometimes hears stems from the above-cited Kahneman, Knetsch & Thaler results about public attitudes towards price gouging. Even though economists talk of "market responses" to shocks, the "market" represents the collective response of individual consumers and businesses. A market price increase occurs only if sellers in the market choose to raise their prices. The question Kahneman, Knetsch & Thaler asked survey respondents about raising the price of snow shovels (by even a modest amount) in a snow storm was just one of a series they asked about the ethics of decisions businesses have to make for markets to respond to market forces in ways predicted by a model of competition. They found that what respondents to their survey found to be ethical or unethical deviated in some (but not all) cases from what economists would consider to be the business decisions needed for the efficient functioning of competitive markets.

In evaluating the Kahneman, Knetsch & Thaler results, it is important to distinguish between the implications for individual businesses and for public policy. Kahneman, Knetsch & Thaler themselves made this point. Echoing an argument that Arthur Okun had made previously,[8] they argued that some businesses would rationally forego price increases during a shortage to avoid the loss of reputation they would suffer from taking actions that their customers would find unethical.[9] This concern was evident after hurricanes Katrina and Rita. Under normal circumstances, the price of branded gasoline exceeds the price of unbranded. In its report on the performance of gasoline markets after the hurricanes, the FTC

7 See Salinger, Michael A., "Economics Supporting the Twin Missions of the FTC," 2007, https://www.ftc.gov/sites/default/files/documents/public_statements/economics-supporting-twin-missions-ftc/070420breakfast.pdf (last accessed May 30,2020).

8 Okun, Arthur, "Prices and Quantities: A Macroeconomic Analysis," The Brookings Institution, 1981.

9 Of course, one might suspect that running out of an essential supply during a shortage might also cause a loss in reputation, but it is at least plausible that businesses would decide that the loss of reputation from appearing to take advantage of their customers would be worse from the loss of reputation for maintaining insufficient inventories.

found that this relationship was inverted. Branded prices were below unbranded prices, which may have been because the branded suppliers exercised price restraint to avoid the appearance that they were taking undue advantage of an event that caused great suffering.

If businesses are reluctant to raise prices to market-clearing levels out of concern for alienating their customers then, even in markets where laws do not prohibit price gouging, physical shortages arising from a shock to supply or demand will result in market shortages (meaning demand exceeds available supply at observed market prices and, therefore, there are willing buyers unable to attain supplies). The hypothesis that businesses temper price changes to maintain their reputation provides a potential explanation for the fundamental macroeconomic problem of why markets do not always clear.

But the problem facing individual businesses and the public policy problem are different. The possibility that individual businesses might be reluctant to raise prices to levels needed to eliminate shortages is not an argument for legally preventing businesses that wish to raise prices from doing so.[10]

But there are other valid economic reasons unrelated to the Kahneman, Knetsch & Thaler survey respondents' perceptions of ethical business behavior for questioning whether the right public policy is simply to let the market work. The economic principles that imply the efficiency of competitive markets rely on a specific definition of efficiency known as the Pareto principle. It states that an allocation of scarce resources is efficient if no feasible reallocation of resources could make one person better off without making someone else worse off. The idea that a competitive market could achieve (or even approximate) a Pareto efficient allocation of resources is arguably the most important idea in economics, and it provides an intellectual foundation for relying largely on markets to guide economic activity. Remarkable as that result is, it comes with a well-known caveat. A Pareto efficient outcome might entail a distribution of income that society judges to be unacceptable (or at least suboptimal and worthy of intervention that sacrifices some efficiency for increased fairness).

A key feature of the market outcome when market prices adjust to clear all markets is that the scarce supply of a good is allocated to those who value them most, where value is measured by consumers' willingness to pay for the good (i.e. the consumer willing to pay $4 for a gallon of gasoline must value gas more than the consumer only willing to pay $3). This happens because the only people who voluntarily buy in a competitive market are those who value a good at more than the market price. To take an example that has played prominently in the news, a wealthy person who believed President Trump about the potential value of hydroxychloroquine as a remedy for COVID-19 may have been willing to pay more for it to use in case he got COVID-19 than a poorer lupus patient who got real relief from his condition from the drug.

Another problem associated with the shortages that arise in times of crisis is that large price changes can alter real incomes. Nominal income is income measured in currency units. But people do not consume money. A person's real income is the goods and services that she can purchase with her nominal (money) income. When prices of what a person buys go up, her real income drops because she can no longer buy the same basket of goods and services. Increases in the prices of "necessities" are particularly burdensome on the poor because those items take up a bigger percentage of their budget than is the case for richer people.[11] And, of course, a reduction of real income for someone who is already at the lower end of the income distribution can make her unable to afford necessities like food, shelter, and medicine, whereas richer people can cut back on luxuries. Prior to the crisis, the income of the lupus sufferer might have been sufficient to cover his medication and sufficient food, shelter, clothing, health care, and other necessities. A big increase in the price of hydroxychloroquine could make it impossible for him to purchase the same basket of goods that he had previously been able to buy and present a choice between foregoing his lupus medication and going hungry or homeless.

A common economic argument about this problem is that it can be ignored because additional income policy (through the tax system and income support programs) can achieve a socially desirable distribution of real income while unregulated markets sort out the details of what goods are produced and who gets the available supply. For short, localized market disruptions such as hurricanes, however, there may not be a practical way to put in place the mechanisms needed to provide income support just to those who are affected.

10 Some laws do enforce community standards for ethical behavior. Laws against "indecency" make it illegal to be naked in public. But one can justify such laws on the grounds that public nudity creates negative externalities. With price gouging, the externality argument goes in the other direction. A business's reluctance to alienate one customer by charging a market-clearing price hurts subsequent potential customers who are then unable to buy.

11 For example, suppose two households whose incomes are $40,000 and $60,000 each spend $20,000 annually on food. If the food prices increase by 10 percent and the two households are forced to spend $22,000 annually on food, the inflation has decreased the leftover money the poorer household has to spend by 10 percent ($2,000 divided by $20,000) and the leftover money the richer household has to spend by only 5 percent ($2,000 divided by $40,000).

III. PRICE GOUGING LAWS BY THEMSELVES DO NOT IMPROVE EITHER FAIRNESS OR EFFICIENCY, BUT ALTERNATIVES TO THE MARKET TO ALLOCATE SCARCE RESOURCES DO EXIST

By itself, a law against price gouging does not solve the problem that the market allocation with market-clearing prices of a temporarily much scarcer resource is unethical or unfair. Whether or not prices are allowed to rise to market-clearing levels, the resource will be scarce. When prices rise to equate supply and demand, available supplies go to those willing to pay the most (who may be disproportionately rich). When prices do not rise to equate supply and demand, the scarce supplies go to those who get to the store first; and those who get to the store first might horde available supplies if they expect the shortages to last, thus preventing a wider and fairer distribution of the supplies that are available. Moreover, not allowing prices to rise eliminates the incentives the market provides to increase supplies. As noted earlier, the Florida truck owner wouldn't have driven to North Carolina for generators and other businesses may similarly be discouraged from making investments that expand output. These outcomes are neither fairer nor more efficient than the outcome with market-clearing prices.

In World War II, the United States solved (or at least tried to solve) these problems through rationing of some food items (such as meat and sugar) as well as some non-food items (such as gasoline, tires and shoes).[12] That approach required the time to set up an administrative apparatus for determining the allocation of supplies and developing a way for consumers to spend and for merchants to accept allocations. (In World War II, consumers were issued ration books.) The war-time shortages lasted longer than those that typically arise with weather events, so there was time to put in place the administrative apparatus to implement rationing. But, as the WWII example illustrates, there is an alternative to market allocation of scarce supplies.

IV. POLICY IN THE COVID-19 CRISIS

Turning to the COVID-19 crisis, there were three major developments that any assessment of the optimal policy must consider:

1. Congress was able to pass legislation to increase people's nominal incomes quite quickly. Not only did it increase both the amount and duration of unemployment benefits, it provided for a $1,200 payment per adult and $500 per child stimulus payment for all people with incomes below a certain threshold.[13]

2. Despite the substantial disruption to the distribution that had occurred through brick-and-mortar retailers, on-line retailers – most notably, but not only Amazon – and the distribution systems that supported them performed remarkably well. Interestingly, Amazon placed its own restrictions against price gouging by merchants using its platform to sell items high in demand during the COVID-19 pandemic, such as face masks and sanitizers.[14]

3. Hospitals and other medical facilities faced shortages of key supplies such as PPE and ventilators that they needed to meet the surge in demand to treat COVID-19 patients.[15] The competition among them to obtain these supplies drove prices up substantially.

The first two of these are strong evidence that when governments can provide income support quickly, markets are an efficient way to allocate resources, even (and perhaps particularly) when supplies are scarce. The COVID-19 crisis destroyed (temporarily, hopefully) a substantial fraction of the productive capacity of the economy. The economy's capacity for delivering entertainment events (such as concerts, plays, sporting events and theatrically-viewed movies), in-restaurant dining, airline travel, and hotel accommodations was largely or entirely idled. Among the sectors affected was the distribution sector as many brick and mortar retail establishments had to close. Even brick-and-mortar retailers that remained open, such as grocery stores, had significantly diminished capacity as the need for customers to observe physical distancing and to alter packaging and check-out procedures reduced their feasible throughput. The acceleration of a long-term trend of direct-to-home delivery

12 See, e.g. https://www.history.com/news/food-rationing-in-wartime-america.

13 https://en.wikipedia.org/wiki/CARES_Act.

14 Nicas, Jack, "He Has 17,000 Bottles of Hand Sanitizer and Nowhere to Sell Them," The New York Times, March 14, 2020, available at https://www.nytimes.com/2020/03/14/technology/coronavirus-purell-wipes-amazon-sellers.html.

15 See, e.g. the United States Dept. of Health and Human Services' "Hospital Experiences Responding to the COVID-19 Pandemic: Results of a National Pulse Survey March 23-27, 2020," available at https://oig.hhs.gov/oei/reports/oei-06-20-00300.asp.

for in-store shopping will go down as one of the most significant economic developments from the crisis. That Congress was able to quickly provide income support only facilitated this acceleration. Not only did the increased reliance on direct-to-home delivery significantly mitigate the economic hardship, it may well have helped slow the spread of the disease.

In its first quarterly earnings announcement after the shut-downs in much of the world occurred, Amazon reported a reduction in both operating income and net profits despite a 26 percent increase in sales.[16] It is interesting to speculate about what the public policy reaction might have been if Amazon had not placed restrictions on price "gouging" on its platform and if its income had risen significantly. After hurricanes Katrina and Rita, the first quarterly earnings announcements of the major oil companies triggered a strong political backlash that included contentious Congressional hearings and the Congressional mandate to for the FTC to investigate the oil industry. With the increase in the prices of crude oil and refined products that followed, it would have been a sign of gross managerial incompetence if the profits of oil companies did not increase. Indeed, the increase in profits that followed from the hurricanes was evidence of the competitiveness of the markets. The exercise of market power by the oil companies would entail reducing output to increase profits. As a result, it should come as no surprise that the reduction in output caused by the hurricanes had the same profit-raising effect as the exercise of market power would have had.[17,18] And the FTC found evidence of significant efforts by the industry to increase supplies (by, for example, foregoing scheduled refinery maintenance and hiring tankers to divert supplies from Europe) and to reallocate available supplies within the U.S.[19] Yet, while these responses eased the economic damage that resulted from the physical damage caused by the hurricanes, there were political points to be scored by accusing companies like Exxon-Mobil of price gauging. I have no factual basis for concluding that Amazon took explicit actions to report a reduction in earnings, but avoiding the political backlash that might have ensued from an increase in earnings may well have been a silver lining.

The speed with which Congress passed and the Federal government was able to implement stimulus payments will also go down as an important lesson for public policy when future crises hit. There were elements of the crisis that may not be present in future events that give rise to significant shortages. The COVID-19 crisis might well last longer than disruptions that occur to weather events. It was a nationwide crisis, which simplified the determination of who was eligible for support and broadened the political appeal for support. Still, the episode will serve as an example in which cash support successfully (even if imperfectly) used to deal with issues of fairness without interfering with the normal workings of markets to determine the allocation of scarce resources.

V. THE HEALTH CARE SECTOR EXCEPTION

The COVID-19 crisis substantially increased the demand for PPE and ventilators. The Federal government had maintained a stockpile of both, but that stockpile was inadequate to meet the surge in demand. The Federal government left it to the states to obtain additional supplies. According to press accounts, competition among the states (and between the states and the Federal government) caused significant price increases.[20]

Again, simply imposing a prohibition on price gouging would not have helped. The problem was the shortage, and price gouging laws would neither solve the shortage nor necessarily result in a fairer allocation of available supplies. But the question remains as to whether simply letting the market work was the optimal policy or, alternatively, whether the Federal government should have imposed some other allocation mechanism. In particular, would it have improved matters if the Federal government had taken over the procurement of PPE, ventilators, and perhaps other medical supplies and equipment needed in the crisis and then distributed them based on factors such as the number of cases, the number of hospitalizations, and so on? There are several reasons why such an alternative would have been superior.

16 Weise, Karen, "Amazon Sells More, but Warns of Much Higher Costs Ahead," The New York Times, April 30, 2020, available at https://www.nytimes.com/2020/04/30/technology/amazon-stock-earnings-report.html.

17 The Federal Trade Commission Investigation of Gasoline Price Manipulation and Gasoline Price Increases: A commission Report to Congress, at Chapter 7, § II.

18 I do not want to overstate this point. According to basic economic principles, if the oil companies were able to restrict output to monopoly levels (or near monopoly levels), a reduction in output caused by the hurricanes would have lowered industry profits. But the prices of oil and refined products are nowhere near monopoly levels. A basic economic principle states that a monopolist (or a perfectly colluding oligopoly) does not operate in the inelastic region of its demand curve. It is widely accepted (based on econometric estimates) that the elasticity of demand for crude oil and major refined products at the prices that have prevailed for many decades is inelastic. The dramatic reduction in oil prices during the COVID-19 crisis are further evidence of the low elasticity of demand. Thus, the market evidence is that oil prices have not been at or near the monopoly level. But that result does not rule out the possibility of some exercise of market power in the oil industry. Given the size of the markets, even slight output restrictions below competitive levels could cause major profit increases for oil companies paid for by consumers through higher prices.

19 The Federal Trade Commission Investigation of Gasoline Price Manipulation and Gasoline Price Increases: A commission Report to Congress, at Chapter 5, § VI.

20 See, e.g. Nicas, Jack, "It's Bedlam in the Mask Market, as Profiteers Out-Hustle Good Samaritans," The New York Times, April 3, 2020, available at https://www.nytimes.com/2020/04/03/technology/coronavirus-masks-shortage.html.

First, a major reason for questioning the efficiency of market outcomes is the presence of externalities. They are abundant with health care supplies and particularly with respect to PPE. Health care institutions treating patients with the COVID-19 virus were inherently potential hot spots for spreading the virus if infected patients infected health care workers who in turn infected more patients. A classic article about efficient policy toward externalities is Coase's "The Problem of Social Cost."[21] That article is widely misinterpreted to mean that market outcomes are efficient as long as property rights are well defined (and regardless of the initial assignment of property rights). This "principle," commonly called the "Coase Theorem," requires the assumption that there are zero transaction costs. The point Coase made in the article was, however, exactly the opposite of what the Coase Theorem would seem to imply. In the article, Coase argued that because transaction costs exist in real markets, the allocation of property rights does affect the allocation of resources. As a result, assigning property rights to goods to the efficient users (i.e. allocating PPE to the health care institutions that will benefit from them most) can be necessary for an allocation to be efficient.

Second, as Hayek argued, a significant rationale for using markets to solve the problem of how to allocate scarce resources is the virtually infinite complexity of the problem when viewed on the scale of the entire economy.[22] In contrast, the allocation problems with respect to PPE and ventilators are relatively simple. The number of goods, the number of significant supply sources and the number of health care and other organizations most in need of the supplies are all relatively small.

Third, rational bases for distributions were available. The incidence of people infected with the virus and hospitalizations related to the virus varied substantially across geographic areas. Even if the measures were imperfect, they were good enough to provide reasonable estimates of the variation in need across states.

Fourth, the health care sector already is so plagued with distortions arising principally from third-party payers (i.e. insurers) that the argument that the market outcome from letting the market work is much flimsier than is generally the case.

Fifth, the health care sector is already one in which, as a society, we have decided in some cases not to rely on markets to allocate scarce resources. A prime example is the market for organ transplants, where there is an allocation mechanism in place based on medical criteria. This system is, of course, controversial. But the ethics of which COVID-19 patient gets a respirator and which patient with renal failure gets a kidney transplant are closely related. If, as a society, we do not rely on the market in the latter case, we should not rely on it in the former case either.

VI. CONCLUSIONS

As with previous shocks to supply and or demand resulting in shortages, the COVID-19 crisis has given rise to allegations of price "gouging." There might be valid reasons for individual businesses not to raise prices to market-clearing levels, but legal prohibitions against price gouging by themselves serve no useful purpose as they improve upon neither the efficiency nor the fairness of market outcomes.

But the concerns about price gouging raise the more general issue of the efficient way to allocate scarce resources during times of emergency. I have argued that the evidence from the COVID-19 crisis provides strong support for the proposition that largely unregulated markets are the most efficient way to allocate scarce resources and that the argument is stronger during times of disruption than in times of relative stability. While market outcomes can create concerns about fairness, Congress was able to pass income support programs that addressed fairness issues in a way that was almost surely more efficient than trying to micromanage the distribution of goods (and services).

The health care sector provides a possible notable exception to this broad principle. There, a program for national procurement and distribution of supplies of items like PPE would likely have been superior to having the states individually arrange for their own supplies in competition with each other.

21 Coase, Ronald H., "The Problem of Social Cost," The Journal of Law and Economics, Volume III, October 1960, pp. 1-44.

22 Hayek, Friedrich A., "The Use of Knowledge in Society," The American Economic Review, Vol. 35, No. 4, pp. 519-530.

UNCERTAINTY IN U.S. PRICE-GOUGING LAW COMPLIANCE AND DEFENSE

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I. INTRODUCTION

On July 14, 2020, Colorado became the latest state to enact legislation explicitly prohibiting price gouging following emergencies. Currently, 40 U.S. states and the federal government have in place prohibitions against price gouging triggered by the COVID-19 pandemic. While initial widespread shortages of common household goods such as hand soap and toilet paper have subsided, the COVID-19 pandemic continues to cause demand spikes and supply shortages of essential products such as sanitizing products, face masks, and gloves which are used to prevent the spread of the virus. Supply shortages and food prices also remain a concern in the U.S. Amid surging demand and dwindling supply, prices for many of these essential products have jumped.

In response, price-gouging laws and enforcement efforts in the U.S. have expanded in number, scope, and duration. Unlike prior periods of enforcement after more regionalized natural disasters, such as hurricanes, the COVID-19 pandemic is having a major impact on supply chains around the world and is likely to continue doing so for months or even years to come.

The proliferation of price-gouging laws and increased enforcement in the U.S., combined with the nationwide and sustained nature of the COVID-19 crisis, have highlighted some of the difficulties of complying with and enforcing price-gouging laws. There is concern over the potential adverse effects such laws can have on both the supply and demand of products that price-gouging laws are meant to address. Many economists and policy analysts have warned that price-gouging laws in effect set a price ceiling for the goods most needed in the wake of a disaster, and price ceilings have a predictable effect of limiting normal supply responses and exacerbating shortages.[2]

Despite these concerns, state price-gouging laws have accumulated on the books over the past 40 years, typically popping up in the wake of a natural disaster that causes a supply shock. New York was the first state to enact a price-gouging law, in 1979, after heating oil prices spiked during the winter of 1978-1979. By 1990, only three more states – Hawaii, Connecticut, and Mississippi – had added price-gouging laws. Price-gouging laws picked up steam between 1990 and 2010, with 27 states passing them, and another nine states have passed them in the past decade, bringing the total to 40. The penalties for violating these laws can be steep, with civil penalties ranging from $1,000 to $10,000 per violation, and many carry possible jail time. Not only are there state laws, but President Trump also signed an executive order in March triggering the Defense Production Act (DPA), temporarily making price gouging and hoarding of crucial medical supplies a federal crime.[3]

II. FIGURING OUT THE PROHIBITED GOUGE PRICE IS NOT EASY

Price-gouging laws present significant challenges for producers looking to supply and retailers trying to stock and sell essential and high-demand goods in the wake of a disaster without running afoul of the price-gouging laws. The first obstacle that a supplier, particularly one selling nationwide, faces is complying simultaneously with the patchwork of state laws and the DPA executive order, as there is significant variation among the 40 different state price-gouging laws. Nearly all the price-gouging laws consist of some sort of price ceiling, but the level of the price ceiling varies. Some states prohibit prices 10 percent higher than pre-emergency price levels, while others prohibit prices 15 or 25 percent higher. Other states vaguely prohibit "unreasonable" or "excessive" prices. And the time period for which the baseline price is determined also varies from state to state, ranging from the price immediately before the emergency to the average price during the month or months preceding the emergency. Determining the relevant baseline comparison prices can also be very difficult – it is sometimes the seller's price and other times the general market price.

This variation across states presents a legal minefield for nationwide sellers, including most online retailers, to navigate during a nationwide emergency. Determining compliance with a price-gouging law can be a difficult task even under the simplest scenario. Take, for example, an existing seller (as opposed to a new entrant) seeking to sell goods in only one or two states where the price ceiling is based on a specific percentage increase. That seller must determine which current prices to compare (e.g. advertised or sales), then which baseline pre-emergency prices to compare and, finally, what is an acceptable price increase. Determining the acceptable prices is only half of the story, as sellers often face increased costs during times of emergency and therefore need to determine how much of those increased costs can be recovered while not running afoul of the applicable price-gouging laws. Compliance is even more difficult for a prospective new entrant looking to supply a good that is in high demand for the first time. Such a prospective new entrant would not have ready access to historical price data with which it could

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2 See, e.g. W. David Montgomery, Robert A. Baron, Mary K. Weisskopf, "*Potential Effects of Proposed Price Gouging Legislation on the Cost and Severity of Gasoline Supply Interruptions*," Journal of Competition Law & Economics, Volume 3, Issue 3 (2007).

3 The White House, *Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19* (March 23, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-covid-19/; 50 U.S.C. §§ 4501-4568.

calculate some baseline, nor would it have cost data to support a cost increase defense. Many state price-gouging statutes refer to prior pricing, and it is unclear what the comparison price is for new sellers.

Sellers of essential and high-demand goods during the pandemic are looking for a safe-harbor price at which to sell, where they can be sure they will not run afoul of price-gouging laws, but there is no such price given the discretionary nature and variables involved in the web of state and federal price-gouging prohibitions currently in place. Even an army of lawyers and economists could not ensure nationwide compliance with absolute certainty under these vague and varying standards. And businesses are having to make these decisions in real time, as many companies are struggling to stay in business or struggling to supply high-demand products to customers in need of those products and offering to pay higher prices for them.

Unfortunately, as a result of this enormous uncertainty surrounding compliance and the high costs of non-compliance, many sellers simply choose not to supply goods under emergency circumstances at all. This further exacerbates supply effects even beyond what would be expected from an explicit price ceiling. And consumers are left without even the choice to pay higher prices for high-demand products.

III. EXCEPTIONS FOR INCREASED COSTS PLACE ADDITIONAL BURDEN ON SELLERS

Nearly all laws allow some sort of exception with respect to cost increases, recognizing that supply costs often significantly increase during emergencies. But again, the details with respect to these exceptions or defenses vary. Some make price increases that were a result of cost increases a complete defense, while others allow for a cost increase plus some specified margin. These statutes do not delineate what increased costs can be included in cost-exempted increases – for instance, the increased cost of personal protective equipment, cleaning and sanitizing, or other health and safety measures frequently incurred during the current pandemic. Unfortunately, most statutes place this burden on the seller to prove increased costs, even though those increased costs are ubiquitous during the current pandemic and can be very difficult to quantify and demonstrate.

IV. RISK OF PROSECUTION OR LITIGATION

Individuals and companies that do find themselves the target of a price-gouging investigation or lawsuit face a daunting challenge. In addition to the ambiguities in price-gouging laws, the difficulty of establishing a defense, and fines and potential jail time, there is little case law out there that defines the boundaries of these laws and their defenses because price-gouging laws go into effect only during times of emergency.

Perhaps unsurprisingly, the vast majority of defendants end up settling price-gouging charges rather than litigating them. For example, in 2008, the Tennessee attorney general opened investigations into the prices charged by 17 gas retailers after Hurricanes Gustav and Ike destroyed oil production in the Gulf of Mexico. All 17 of the retailers denied wrongdoing but agreed to pay penalties and refund money to customers. One of the retailers released a statement indicating that the company sold gas below its actual cost 50 percent of the time during the three-day period in question. The CEO of another of the retailers said that it was cheaper for his company to agree to the settlement than to fight charges of which it is not guilty. The last retailer to settle, Weigel Stores, did so more than a year after the investigation. On the day it settled, its owner issued a statement explaining the difficult situation it faced: "We continue to maintain that we operated our business appropriately in the difficult circumstances and market disruptions caused by Hurricane Ike. On some days, the company was paying more to buy gas than it was selling it for at the pumps . . . the terms of the settlement proposed to us last year implied that Weigel's admitted to violating the law. The settlement reached now does not carry that implication, and is on such terms, economic and otherwise, that from a business standpoint it is in the best interests of the Company and our customers that we put the matter behind us."[4]

There are relatively few litigated price-gouging cases in the U.S. In *White v. R.M. Packer Co. Inc.*, the First Circuit Court of Appeals upheld a district court's grant of summary judgement in favor of defendant gas stations related to a price-gouging claim.[5] Plaintiffs brought claims under Massachusetts' price-gouging law over the defendants' prices following Hurricanes Katrina and Rita in 2005. The Massachusetts law was typical of many price-gouging laws, prohibiting prices that represented "a gross disparity between the price of the petroleum product and the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency . . . the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption."

4 Knoxville News Sentinel, "*Weigel's settles price-gouging case*" (April 29, 2010), available at https://archive.knoxnews.com/business/weigels-settles-price-gouging-case-ep-408565374-358765961.html/.

5 635 F.3d 571 (2011).

The court noted the vagueness of the standard, commenting, "The regulation defines neither 'gross disparity' nor 'immediately prior.' Significantly, there have been no Massachusetts state court decisions interpreting the rule." Recognizing that the laws are "not regulations meant to give the government control over the setting of petroleum product prices" but rather are "designed to protect consumers from acute and unconscionable increases in the prices they must pay for basic consumer goods during times of market emergency," the court found that margins, not prices, need to be considered. The court wrote, "The language of the price-gouging regulation does not reach gross disparities in price alone. The regulation is concerned with increases in both price and cost, the two factors that determine gross margin . . ." The court stated, "Dramatic changes in gross margin might illustrate that a price increase is a 'gross disparity' in price because it reflects price increases unexplained by cost increases." In applying these principles to the facts, the court found that while the defendants' prices were increasing, "their gross margins were generally rising only very moderately, since their costs were climbing as well," and held that there was no showing of a gross disparity in price.

In a more recent ongoing litigation, defendants have had early success in their constitutional challenge of state price-gouging laws on the basis of the dormant commerce clause doctrine, and the court recognized some of challenges faced by online sellers trying to comply with the patchwork of state price-gouging laws. A federal court in Kentucky granted a trade group representing Amazon sellers' preliminary injunction request to stop price-gouging investigations by the Kentucky Attorney General. It held that the trade group proved a likelihood of success on the merits.[6] The court explained that the dormant commerce clause doctrine prohibits a state law if the "practical effect of the regulation is to control conduct beyond the boundaries of the state, regardless of whether such an effect was intended by the legislature." The Kentucky price-gouging laws had such an effect because there was no way for the sellers to set state-specific prices, and the Kentucky law therefore "effectively dictate[d] the price of items for sale on Amazon nationwide." Additionally, the practical effect of the law must be evaluated "what effect would arise if not one, but many or every, State adopted similar legislation." On this point, the court found that "restrictions imposed by other states would have the potential to subject merchants, as Amazon suppliers, to conflicting state requirements."

The court's reasoning in the Kentucky case borrows heavily from a 2018 Fourth Circuit Court of Appeals opinion that similarly overturned that a Maryland law prohibiting an "unconscionable increase" in the wholesale price of a prescription drug because it violated the dormant commerce clause doctrine.[7] In that case, the court reasoned that "[b]ecause the Act targets wholesale rather than retail pricing, an analogous restriction imposed by a state other than Maryland has the potential to subject prescription drug manufacturers to conflicting state requirements." The court explained, "If Maryland compels manufacturers to sell prescription drugs in the initial transaction at a particular price but another state imposes a different price, then manufacturers could not comply with both laws in a single transaction. The manufacturers' compliance would require more than modification of their distribution systems; it would force them to enter into a separate transaction for each state in order to tailor their conduct so as not to violate any state's price restrictions."

While it is too soon to think that these cases signal the end of state price-gouging laws as we know them, they do show that there are potentially fruitful bases for constitutional challenges of such laws based in the very real practical difficulty presented by over 40 different – and sometimes conflicting – state price-gouging laws.

V. POSSIBLE REFORMS

In order to address some of the burdensome practical and legal challenges that the current formulations of price-gouging laws present suppliers, some areas for possible rethinking include:

- Consider revising price-gouging laws to focus on prohibiting exorbitant profit margin increases rather than pre- and post-crisis price increases. Such an approach would focus on preventing crisis profiteering and build in an appreciation that costs often increase due to market forces during states of emergency. This approach would also do away with the difficult task of figuring out which pre- and post-crisis prices to compare.

- If the current increased price focus is maintained, price-gouging statutes could build increased costs into the elements of offense rather than having them as "exceptions," with the burden falling on sellers. For instance, price-gouging statutes could be revised to prohibit increased prices "above actual costs" during an emergency period.

6 *Online Merchants Guild v. Cameron*, Civil No. 3:20-cv-00029-GFVT (E.D. Ky. June 23, 2020).

7 *Association for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018).

- Price-gouging statutes could be revised to address the comparison point new sellers should use. This would encourage new entrants to provide essential products during an emergency and provide the clarity they need when setting first-time prices during a state of emergency.

- Price-gouging statutes could specifically address resellers and distributors; current statutes focus on pre- and post-emergency prices but do not specifically address how those prohibitions play out for brokers and intermediaries who connect sellers with buyers in need of high-demand products.

The current COVID-19 pandemic is affecting lives around the globe in ways never before experienced in our lifetimes. People will be processing lessons learned and vulnerabilities exposed for decades. Perhaps this crisis will provide a reflection point on existing price-gouging laws.

PRICE GOUGING AMIDST THE COVID-19 PANDEMIC

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I. INTRODUCTION

As the world struggles to contain the COVID-19 pandemic, the resulting states of emergency, need for medical supplies, and panic buying have caused unprecedent changes in supply and demand on an unparalleled global scale. Federal and state antitrust authorities are paying close attention, as there have been numerous reports nationwide of unscrupulous sellers taking advantage of the increased demand of goods and services by engaging in price gouging. Certain medical supplies associated with the pandemic — many now deemed essential or in high demand — are being offered at excessive prices: a single dust mask that sells for $25;[3] a small bottle of hand sanitizer selling for $49.95; a package of disinfecting wipes priced at $220.[4] Recent headlines report that, Amazon has suspended more than 3,900 selling accounts in the U.S. alone for violating the company's fair pricing policies as well as removed 530,000 "high-priced offers" from its marketplace.[5]

As the pandemic continues to unfold, Federal and state law enforcement agencies have been closely monitoring companies' pricing of essential medical supplies and taken action to prosecute price gougers and companies that facilitate sales of goods with inflated prices. Similarly, concerns about price gouging have led to rapid legislative action, both at the federal and state level.

II. FEDERAL RESPONSE

On March 23, 2020, President Trump issued Executive Order 13910 which prohibits the hoarding of vital medical equipment and supplies, noting that "it will be a crime to stockpile these items in excessive quantities."[6] Further, the presidential directive delegated the Secretary of Health and Human Services ("HHS") the authority to designate essential health and medical supplies as scarce. Accordingly, the HHS published a list of 15 categories of "scarce or threatened materials," which currently includes the following:

- N-95 facepiece respirators and other specifically designated face masks and respirators;
- Medical gowns and other apparel;
- Disinfecting devices;
- Sterilization devices and related services;
- Drug products containing the active ingredient chloroquine phosphate or hydroxychloroquine HCl;
- Ventilators; and
- Personal protective equipment.[7]

3 Michael Levenson, *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, N.Y. Times (Mar. 27, 2020).

4 Kate Gibson, *A $220 Bottle of Lysol? Coronavirus Leads to Price-gouging on Amazon*, CBS News (Mar. 12, 2020).

5 Annie Palmer, Amazon Removes Hundreds of Thousands of 'High Priced Offers' Amid Coronavirus Price Gouging, CNBC News (Mar. 6, 2020).

6 U.S. Exec. Order No. 13910; The White House, *Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19* (Mar. 23, 2020).

7 U.S. Dep't of Health & Human Servs., *Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950* (Mar. 25, 2020).

Following the President's Executive Order on price gouging, Attorney General William Barr declared that the Department of Justice would crack down on price gouging and hoarding of medical supplies included on the HHS list. The goal is to ensure the availability of critical health and medical resources so that hospitals, first responders, and doctors can have necessary equipment. Additionally, Attorney General Barr announced the development of a Hoarding and Price Gouging Task Force in the wake of COVID-19, and identified law enforcement strategies for prosecuting unscrupulous actors who treat the crisis as an opportunity to get rich quick.[8] According to Attorney General Barr, the task force includes over one hundred federal prosecutors around the country and has already initiated hundreds of hoarding and price-gouging investigations into companies and individuals selling goods designated as "scarce" by the HHS and activities that are disrupting the supply chain.[9]

However, there is no comprehensive federal legislation on price gouging. As it currently stands, the federal law that addresses price gouging is a prohibition against the hoarding of scarce goods under the Defense Production Act ("DPA"). While originally enacted during wartime, the DPA's authority extends to the Executive Branch to act in response to national emergencies, such as the COVID-19 pandemic.

In particular, Section 102 of the DPA prohibits the accumulation of scarce 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.[10] Though it carries both criminal and civil penalties, actors convicted of violating the Act are guilty of a misdemeanor, face only a maximum of one year in prison and must pay a fine of up to $10,000.[11]

Notably, the DPA focuses on accumulation of materials. Hence, a seller that ordinarily purchases personal protective equipment could try to argue that reselling its current inventory at a markup to someone else wouldn't be violating the federal statute. This is in contrast to many state price gouging statues which focus on whether the price being charged is in excess of a determined baseline level. Similarly, while many state price gouging laws have either a specific standard or use specific language to target extreme price increases, the DPA prohibits "resale at prices in excess of prevailing market prices." Because "excess" is not defined in the statute and has not yet been defined by the courts, the DPA imposes a potential burden of proving a given price mark-up constitutes as illegal price gouging. Though, in addressing the Senate Judiciary Committee, the Depart of Justice ("DOJ") indicated that traditional costs may play a role in determining whether price gouging has occurred.[12]

Accordingly, the DOJ's first publicized prosecution for price gouging did not actually charge either hoarding or price gouging under the DPA. On March 30, 2020, the FBI arrested a defendant who massively stockpiled surgical masks and other medical supplies, but, despite evidence that he was selling those goods at a markup, the U.S. Attorney's Office for the District of New Jersey charged him with assaulting and lying to FBI agents.[13]

Nevertheless, more recent enforcement efforts offer guidance as to what might qualify as price gouging under the DPA. In a case brought by the federal government for COVID-19 related price-gouging, criminal charges were brought against a defendant for allegedly using his retail sneaker and sports apparel store to amass and sell large quantities of PPE at a more than 1,000 percent markup. Federal prosecutors have also brought criminal charges against individuals and companies, contending either attempts to overcharge the government for PPE or merely defrauding the government with offers to sell equipment that never existed in the first place.

While current federal enforcement seeks to target unscrupulous selling and hoarding of medical equipment, the broad language of the DPA, combined with the growing reports of active DOJ investigations, makes it all the more necessary to closely monitor and consider federal action when putting a price gouging compliance program in place. Though there is no federal price gouging law, members of Congress have proposed price gouging legislation in recent weeks.[14]

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8 White House Press Briefings, Transcript of Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force (Mar. 23, 2020).

9 Memorandum from Jeffrey Rosen, Deputy Att'y Gen., *US Dep't of Justice, Department of Justice Enforcement Actions Related to Covid-19* (Mar. 24, 2020); Office of the Attorney General, *Memorandum for All Heads Of Department Components And Law Enforcement Agencies… Department of Justice COVID-19 Hoarding and Price Gouging Task Force* (Mar. 24, 2020).

10 50 U.S.C §§ 4512, 4513.

11 *Id.*

12 C. Ryan Barber, *You Will Be Hearing a Knock on Your Door': William Barr Warns Coronavirus Profiteers*, Law.Com (Mar. 23, 2020).

13 United States Attorneys' Office, District of New Jersey, "Brooklyn Man Arrested for Assaulting FBI Agents and Making False Statements About His Possession and Sale of Scarce Medical Equipment" (Mar. 30, 2020).

14 H.R. 6472 (prohibits "unconscionably excessive" pricing "indicating the seller is using the circumstances related to" the emergency to increase prices); H.R. 6264 (creates a new criminal offense for price gouging during a state of emergency); H.R. 6450 (based on California law, limits raising price of consumer goods to no more than 10% after an emergency declaration).

Particularly, following Attorney General Barr's statements on hoarding of essential materials, Missouri Representative Jason Smith (Republican) and New Jersey Representative Josh Gottheimer (Democrat) proposed a federal bill that would "prohibit companies and individuals from selling goods and services at an 'unconscionably excessive price' during national emergencies."[15] Price gougers could serve up to five years in prison or incur a fine of up to $1,000.

III. STATE RESPONSE

Given the limitations on federal enforcement, state laws are a potentially more effective means of pursuing price gouging and could provide an example for future federal law to follow.

Since the outbreak of the pandemic, there has been a high degree of enforcement scrutiny from state attorneys general ("AGs") and many have initiated publicized crackdowns on price gougers. For example, Florida AG Ashley Moody recently announced that her office has already contacted more than 4,500 merchants and recovered more than $500,000 in consumer refunds for aggrieved customers. New York has received nearly 2,000 complaints and issued hundreds of thousands of dollars in fines after finding hundreds of violations; New Jersey has sent almost 1,600 cease-and-desist letters to retailers; the Florida Attorney General's Office has contacted thousands of merchants about price gouging, recovering approximately $500,000 in refunds for aggrieved customers; the Pennsylvania attorney general sent more than 30 cease-and-desist letters and subpoenas regarding price-gouging behavior.[16] As their offices continue to receive thousands of consumer complaints, AGs will increasingly launch investigations and enforcement actions.

Currently, more than 30 states have some form of price-gouging laws, most of which are typically triggered by the declaration of a statewide or national public emergency. Certain states have specific price gouging law while others, such as Texas, prosecute unlawful price gouging under their general prohibitions against unfair or deceptive trade practices. Most state price gouging laws cover a broad range of products and services used by consumers during a public emergency. Other states have expanded their existing price gouging statutes to include scare supplies associated with the pandemic. For example, New York supplemented its price-gouging statute to include "essential medical supplies and services," along with "any other essential goods and services used to promote the health or welfare of the public."[17] Similarly, Massachusetts' AG issued an emergency regulation expanding the state's price regulation that applies to gasoline and petroleum products to cover "any goods or services necessary for the health, safety or welfare of the public."[18]

Generally, businesses that enlarge their offerings in response to a crisis are not necessarily engaged in price gouging, but some jurisdictions do place restrictions on sellers that newly enter a market after an emergency has been declared. In fact, some states have expanded their existing price gouging statutes to account for new sellers. For example, California issued an Executive Order adding restrictions on sellers who enter the market after an emergency has been declared, prohibiting newcomers from selling protected goods at a price that is greater than fifty percent more than what the seller originally paid for the good, or greater than fifty percent more than the cost of producing and selling the good.[19] Sellers thus face two potential obstacles in times of declared emergencies: overpricing commodities they previously sold, and, in some cases, selling new products.

Moreover, most state price gouging laws are not limited to consumer sales and state AGs have been actively pursuing price gouging cases across the supply chain. For example, New York's and Pennsylvania's laws explicitly apply to "any party within the chain of distribution." Therefore manufacturers, distributors and retailers face potential enforcement risk. California's law, on the other hand, prohibits price gouging only on consumer sales. Similarly, sellers that offer products via the online marketplace face enforcement in multiple states.

The states with no price gouging statutes of any kind have taken different approaches to combat potential price gouging. Some states have introduced price gouging legislation or enacted temporary regulations to address the problem. For example, Maryland recently passed

15 Office of Josh Gottheimer, *Gottheimer Announces Bipartisan Nationwide Protections Against Price-Gouging During Coronavirus State of Emergency* (Mar. 13, 2020).

16 Fla. Office of the Att'y Gen., News Release, *VIDEO: Attorney General Moody's Rapid Response Team Acts Quickly to Deter Price Gouging* (Apr. 7, 2020); State of N.J., Office of Att'y Gen. Bob Ferguson, *TRANSCRIPT: March 23rd, 2020 Coronavirus Briefing Media* (Mar. 23, 2020); Office of the Pennsylvania Attorney General, *UPDATE: AG Price Gouging Complaints Surpasses 1,000 Tips* (Mar. 17, 2020).

17 Ryan Tarinelli, Cuomo Signs Anti-Price Gouging Bill to Cover All Essential Goods During Pandemic, Law.Com (Jun. 8, 2020).

18 Office of Attorney General Maura Healey, AG Healy Issues Emergency Regulation Prohibiting Price Gouging of Critical Goods and Services During COVID-19 Emergency (Mar. 30, 2020).

19 C.A. Exec. Order N-44-20 (Apr. 3, 2020).

price gouging legislation, New York introduced legislation to target medical supply price gouging and Ohio's AG indicated that it is working on introducing price gouging legislation.

Other states have relied on executive orders from their governors. Michigan Governor Gretchen Whitmer signed an executive order targeting big markups on supplies and consumer food items through mid-April, while Arizona Governor Doug Ducey issued an executive order cracking down on price gouging related to COVID-19 diagnosis and treatment services. Despite different state coping mechanisms, one thing is clear: state AGs are at the forefront of investigating and prosecuting instances of price gouging.

IV. STATE PRICE GOUGING STATUTES: OVERVIEW

Among the states with specific prohibitions, the statutory frameworks vary significantly. Aside from differences in the types of goods or services they protect, the statutes have different definitions of and metrics for identifying excessive pricing. Complicating matters further, a number of state price-gouging statutes incorporate exceptions for "justifiable price increases," which allow a seller to show that its otherwise substantial price surge was the result of increased costs in the supply chain or other reasonable factors.[20] Finally, the penalties for price gouging differ, ranging from fines per violation to prison time.[21]

Though the baseline periods measured can vary by state, state price gouging laws typically use two distinct baselines for measuring an illegal price increase: (1) the seller's price for the product prior to the emergency declaration or (2) the price at which the product was readily obtainable in the marketplace prior to the emergency declaration. California and New York both use the price "immediately prior" to the emergency declaration for these measures. Florida looks at the product's average price in the 30 days prior to the emergency declaration, and Pennsylvania uses the average price in the last seven days prior to the emergency declaration.

"Bright Line" price gouging statutes identify a specific percentage increase in price that is considered gouging in the context of a disaster or other emergency- generally ranging from ten to twenty-five percent.[22] For instance, New Jersey and California consider it unlawfully excessive for retailers to increase the price of goods by more than ten percent of their ordinary cost during a state of emergency.[23]

However, even in states with a bright-line rule, price increases beyond a certain percentage can be lawful if attributable to increased costs from suppliers or merely from operating during a declared emergency. On the other hand, such exemptions for "justifiable price increases" have limits. In California, for instance, a "justifiable price increase" cannot be "more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business."[24] Thus, even where state laws delineate price gouging by specific percentages, nuances will often require a vastly fact-specific examination. And a lack of uniformity among the various statutes make it all the more complicated for businesses operating in multiple states.

States with opaque price-gouging statutes are even more complicated. These statutes generally prohibit "unconscionable" or "excessive" price increases during a declared emergency, but do not explicitly define these terms. For example, Florida prohibits "unconscionable prices" during times of emergency.[25] Likewise, New York's excessive pricing statute prohibits, among other things, selling goods for an "unconscionably exorbitant price."[26]

With certain exceptions, a complainant can raise a presumption that a price is prima facie unconscionable if (1) there is a gross disparity between the pre- and post-emergency prices (i.e. the price offered during the usual course of business as compared to emergency price) or (2) the amount charged grossly exceeded the prices charged by competitors prior to the emergency.[27]

20 Ark. Code § 4-88-301; Cal. Penal Code § 396(b); Fla. Stat. §501.160.

21 Cal. Penal Code § 396(h); N.Y. Gen. Bus. Law §396-r(4).

22 Ala. Code §8-31-4; Kan. Stat. Ann. §50-6, 106 (drawing bright lines at twenty-five percent); Utah Code §13-41-201; Ky. Rev. Stat. Ann. § 367.374; Ark. Code. 4-88-303 (drawing bright lines at ten percent); Me. Stat. tit. 11 § 1105 (drawing bright lines at fifteen percent); Okla. Stat. tit. 15 § 777.4.

23 N.J. Stat. §56:8-107; Cal. Penal Code §396(b).

24 *Id*; N.J. Stat §56:8-108.

25 Fla. Stat. §501.160.

26 N.Y. Gen. Bus. Law §396-r(3).

27 *Id*. §396-r(3)(b).

Other, more opaque, state statutes require the application of multiple factors to identify illegal price gouging, yet define the relevant factors for consideration differently. For example, Idaho's statute instructs courts to consider three factors: (1) a comparison of the price paid for the good immediately prior to the emergency, (2) additional costs of doing business during the emergency, and (3) the duration of the emergency.[28] Similarly, North Carolina's statute lays out three factors to determine whether price gouging exists, including whether the "price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the triggering event."[29]

Like many of the bright-line price-gouging statutes, *the goal is* not to punish sellers that increase prices because of a strained supply chain. Rather, these statutes target sellers that seek to exploit the pandemic for excessive profit. As such, the statutes might enable businesses to avoid allegations of price gouging if they can point to additional or increased costs that have been imposed on them outside of the seller's control. In this way, the application of price-gouging statutes using multifactor tests will ultimately require the same fact-specific analysis of the underlying costs and market forces as the bright-line statutes that have "justifiable price increase" exceptions.

V. CONCLUSION

In this rapidly changing environment, compliance with the state and federal price-gouging laws will require a complex and nuanced examination. Businesses must weigh their right to remain profitable against various legal restrictions. Regulatory agencies and law enforcers are likely analyzing the extent to which the pandemic has increased other costs of doing business, like more expensive delivery services, payment of overtime employment, or raised prices by manufacturers or distributors.

Likewise, sellers of certain essential products should expect outreach from enforcement agencies for insight into a seller's business costs and profit margins. Quick response to inquiries and demands from government investigators with adequate documentation related to costs may facilitate the investigatory process and perhaps ease investigatory actions. In fact, business might want to consider contacting regulators in advance. In certain circumstances, state and local task forces have expressed a willingness to work collaboratively with businesses to find a reasonable balance between consumer protection and real-world market forces.

Further, a business's pricing considerations should also account for public perception. If consumers feel that a business did not treat the public fairly during the pandemic, the reputational consequences can be severe and long-term.

Lastly, businesses will be under increasing scrutiny to refrain from doing business with price gougers. This particularly applies to e-commerce platforms that host large numbers of independent third-party sellers across multiple states with varying price-gouging laws. As more consumers turn to the internet in order to avoid crowded stores and shopping centers, internet-based retailers have a particular responsibility to guard against price gouging. Online platforms may be asked to assist enforcement agencies to regulate bad actors on their platforms. As such, online platforms may find it prudent to take an active role in identifying third-party sellers who may be price gouging.

Many state AGs have already sent letters to online marketplace operators- including Amazon, eBay, Craigslist, Facebook, and Walmart- asking them to be more vigilant against price gouging on their platforms and to enact measures to prevent price gouging including to: (1) set policies and enforce restrictions on unconscionable price gouging during emergencies, (2) trigger price gouging protections independent of, or prior to an emergency declaration, and (3) create and maintain a "Fair Pricing" portal where consumers can report price gouging incidents to you directly.[30]

While public enforcers have historically had a challenging time making cases against e-commerce entities for the actions of the third parties which list on them, substantial reputational risk is also likely in play for these online sellers. Additionally, online marketplace operators that use algorithms for dynamic pricing must rigorously observe their software in order to ensure compliance with price-gouging laws and regulations.

The COVID-19 health crisis has made price gouging a subject of interest and outrage. Under normal circumstances, businesses should take great care when determining what to charge the public. Now more than ever, it is essential that those selling goods or charging for services that are in limited supply, or are deemed or even perceived to be essential, should be particularly vigilant.

28 Idaho Code §48-603 (19).

29 N.C. Gen. Stat. § 75-38.

30 Spencer Parts, *State AGs Target Coronavirus Price Gouging*, USA News (Mar. 23, 2020).

ROBBIN' HOOD

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1 Charles L. Denison Professor of Law, New York University School of Law. A research grant from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law provided financial assistance for this article. I thank Eleanor Fox for her very helpful comments on an earlier draft.

I. INTRODUCTION

Is it an antitrust offense to sell face masks at a high price in the midst of a pandemic?

In the United States, this rhetorical question would be answered with another question. Why does the pandemic matter? It's not an antitrust offense regardless of when or where. Conventional antitrust wisdom is that high prices don't violate the antitrust laws so long as the high prices are set by a single seller, even by a monopolist selling at the monopoly price.

Outside the United States, the answer would be different. Most antitrust regimes around the world have provisions forbidding dominant firms from engaging in excessive pricing. Even so, the circumstance of the pricing occurring during a pandemic would not seem particularly relevant in most jurisdictions to the test applied for determining when price is "excessive."

The question I pose is not purely rhetorical. Antitrust enforcement authorities in a number of jurisdictions have expressed concern about price-gouging during the coronavirus pandemic. The European Commission, EFTA, and the European National Competition Authorities, for example, have issued a joint statement stressing that it is "of utmost importance" to ensure that products like face masks, which are "considered essential to protect the health of consumers," remain available "at competitive prices." These competition law enforcement agencies announced that they "will therefore not hesitate to take action against companies taking advantage of the current situation by . . . abusing their dominant position."[2]

By and large, however, even jurisdictions that recognize excessive pricing as an antitrust violation have not used antitrust law to go after price gouging in the sale of items such as face masks, although they have occasionally threatened to do so. There is one important exception to this antitrust indifference, South Africa. In two cases decided in June and July of 2020, the Competition Tribunal (the initial adjudicator of antitrust complaints) found that the defendants had engaged in excessive pricing of face masks in violation of South African competition law.[3] These decisions are important and interesting in themselves, but they also shed light on the utility of using antitrust law to deal with excessive pricing. These cases are about South African law, but they are not just about South Africa.

II. EXCESSIVE PRICING IN SOUTH AFRICAN COMPETITION LAW

South Africa's competition law, as originally enacted in 1998, prohibited a dominant firm from charging an "excessive price" to the "detriment of consumers." Excessiveness was defined as a price for a good or service that "bears no reasonable relation to the economic value of that good or service."[4] The Act would be violated if the price were set above this economic value.

The 1998 provision was framed in light of European law on excessive pricing, reflected in the EC Commission's 1978 decision in the United Brands case and then developed in a number of subsequent cases.[5] The South Africa Competition Commission has made some effort to use the 1998 excessive pricing provision, but the Competition Appeal Court (which reviews the Tribunal's decisions) rebuffed the Commission in two separate cases.[6] One involved complex pricing decisions for flat steel products; the other involved the sale of propylene and polypropylene, raw material used in the production of a wide range of plastic products. In both cases the seller was dominant in South Africa and charged higher prices to buyers in South Africa than to buyers in other countries, where the firms faced strong competition. The Competition Appeal Court in these cases recognized the complexity of trying to determine the appropriate standard to apply to "economic value," as well as the difficulties of dealing with issues of costs (transfer pricing from a sister corporation was a perplexing issue in one of the cases), accounting for profits, and the amount above "economic value" that would be considered excessive or unfair.

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2 Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf (accessed August 24, 2020).

3 See Commission v. Dis-Chem Pharmacies, Ltd., Case No: CR008Apr20 (July 7, 2020) (Comp. Trib.), https://www.comptrib.co.za/cases-current; *Commission v. Babelegi Workwear and Indus. Supp. CC*, Case No. CR003Apr20 (June 1, 2020) (Comp. Trib.), https://www.comptrib.co.za/cases-archived.

4 See Competition Act No. 89 of 1998, Secs. 1(1)(ix), 8 (a), http://www.compcom.co.za/wp-content/uploads/2017/11/pocket-act-august-20141.pdf.

5 *United Brands Co. v. Commission*, Case 27/76, 1978 E.C.R. 207 (CJ).

6 See *Competition Comm'n v. Sasol Chem. Inds. Ltd.*, 2015 (5) SA 471 (CAC); *Harmony Gold Mining Co. v. Mittal Steel S. Afr. Ltd.*, 2007 ZACT 21 (CAC).

The Court's interpretation of the law on excessive pricing was done in the context of a competition law statute whose goals included dealing with the legacy of apartheid as it affected the structure of the economy and, specifically, "to provide consumers with competitive prices," to "advance the social and economic welfare of South Africans," and to ensure that "small and medium-sized enterprises have an equitable opportunity to participate in the economy."[7] Despite "legacy" issues in both cases (one company had been state-owned since 1928), and despite the impact on South African businesses required to pay high input prices, the Court applied a rigorously economic lens to the defendants' pricing and expressed skepticism about the exercise of reviewing complex pricing decisions.

In 2018 the South African legislature passed a sweeping amendment to the Competition Act, acknowledging that the 1998 Competition Act had not led to hoped-for "radical economic transformation" and greater inclusion.[8] Among the changes adopted was a revision of the excessive pricing provision.

The amendments to the Competition Act kept the prohibition of excessive pricing as an "abuse of dominance," but changed both the statutory definition of excessive pricing and the allocation of the burden of proof. With regard to definition, gone is the language of "no reasonable relation to economic value," replaced with the definition of an "excessive price" as being "higher than the competitive price" and "unreasonbl[y]" so. The revision adds that "all relevant factors" should be taken into account in making this determination, including price-cost margins and internal rates of return, a number of comparative benchmarks (prices at which the dominant firm sells the product in other markets, prices and profits of other firms selling the product in competitive markets), market structure characteristics, and the length of time the high prices have been charged.[9] With regard to the burden of proof, the revision provided that once a *prima facie* case is made that the dominant firm charged an excessive price, the burden then shifts to the dominant firm to prove the price was reasonable.[10] These changes thus rejected the Competition Appeal Court's approach in the two earlier cases, which had sought a more objective approach rather than a multi-factor approach and which, of course, had put the burden fully on the complaining party.

III. THE CASES

On March 5, 2020, South Africa reported its first case of COVID-19; on March 23 a 21-day national lockdown was announced. Even before the first case was reported, though, stores were running out of face masks. On January 31, for example, one major chain reported that "there's been a bit of a panic" over masks and that they were "practically sold out."[11]

The first case the Competition Tribunal decided involved Babelegi Workwear, a small company located in a suburb of Pretoria that manufactures industrial workwear. Babelegi also sells dust masks that it purchases from suppliers. It claimed to have about 5 percent of the mask market. Between January 31 and March 5, 2020, Babelegi sold approximately 10,000 masks (another competitor, by contrast, sold more than 60,000 masks per day during that period). On January 31, the day the World Health Organization declared COVID-19 to be a worldwide public health emergency, Babelegi increased its price for a box of twenty masks from R50.60 per box to R91. From then through March 5, it raised its price in a series of steps until it was charging R500.00 per box, almost ten times its pre-pandemic price. During this entire time its costs did not change, but its profits sure did. Its profit rate on a box of masks increased from about 20 percent to almost 92 percent and its mark-up rose from 23 percent to 1100 percent.[12] Its total excess profit was about R37,000 (about $2200).[13]

The second case involved a much larger company, Dis-Chem, a publicly-held pharmaceutical retailer with 165 stores located throughout South Africa. Dis-Chem holds itself out as a "low-price destination store" and positions itself as a "discount brand."[14]

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7 See Competition Act of 1998, *supra* note 4, Preamble, Sec. 2 (b), (c), (e).

8 For a full account of the 2018 revisions, see Eleanor M. Fox, South Africa, Competition Law and Equality: Restoring Equity By Antitrust In A Land Where Markets Were Brutally Skewed, CPI Antitrust Chronicle (Dec. 2019).

9 See Act No. 18 of 2018, Competition Amendment Act, Sec. 5, https://www.comptrib.co.za/Content/Documents/Competition-Amend-Act-18%20of%202018%20(9).pdf.

10 See Competition Act Sec. 8(1)(a), (2), (3).

11 Eyewitness News, Dis-Chem running out of face masks as South Africans prep for coronavirus, https://ewn.co.za/2020/01/31/surgical-face-masks-fly-off-shelves-at-dis-chem-stores-in-wake-of-coronavirus (accessed Sept. 1, 2020).

12 *Babelegi, supra* note 3, ¶ ¶115-118.

13 *Id.* ¶ 187.5.8.

14 *Dis-Chem, supra* note 3, ¶ 140 and n.59.

Dis-Chem sold surgical face masks sourced from two South African suppliers and one South African manufacturer. The Commission's complaint charged that price increases taken in March 2020 on two types of surgical face masks, the standard blue masks and blue "foliodress" masks, were "excessive." In February Dis-Chem had raised the price of a pack of fifty standard masks from R47.78 to R78.22 and then in March to R173.87; a pack of fifty foliodress masks was raised from R78.22 in February to R81.70 in March. Comparing overall February prices against the increases in March the Tribunal found an increase in price per pack of 261 percent for 50 blue masks (43 percent for 5) and 25 percent for a pack of 50 foliodress masks.[15] Without giving exact figures (they were redacted from the Tribunal's opinion), the Tribunal concluded that mark-ups increased "exponentially" from mid-February and "more than doubled" in the March period.[16] The excess profit (or overcharge) for the March period was R671,083 (approximately $42,000).[17]

Both cases included charges under the Competition Act and under the consumer protection regulations that the Minister of Trade, Industry, and Competition had issued. Those regulations applied to "excessive pricing" and to "unconscionable, unfair, unreasonable and unjust prices."[18]

The Tribunal found that the regulations could not be applied (they were issued after the conduct in question), but drew an interesting distinction between the prohibition on "excessive" pricing and the prohibition on "unfair" prices. Cases involving the former, the Tribunal wrote, are "competition cases"; cases involving the latter, "consumer protection cases." The former involved only dominant firms, the latter included non-dominant firms.[19] The former are tested by economic criteria (under the regulation, the relation of price to cost), but the latter are the result of "unfair conduct," "misleading" practices, or "manipulation."[20]

Required to take the Competition Act route, the first important question was whether these two firms were "dominant." The normal approach would be to answer this question by defining the market and calculating market share (at least as a start). In neither case, however, did the Commission or the Tribunal define the market or calculate market shares. Indeed, had they done so, the cases against the two firms would have been over. Babelegi asserted that it had less than 5 percent of the market; even if not accurate, it seems doubtful that its market share could have been nine times that amount (45 percent is the line for showing dominance solely by market share).[21] Dis-Chem made a more elaborate argument, identifying the pharmacies and retail chains with which it competed, and using Google Maps to show the number of competitors located within 5km of their top ten stores.[22] Thus, neither firm would seem to be dominant.

Under South Africa law, however, dominance can be found where a firm has less than 45 percent of the market if the complainant shows that the firm has "market power." Can this showing be made without defining the market within which that power is exercised? Yes, the Tribunal found, because market power can be proved by inference from the economic behavior of the firm.[23] The Competition Act itself defines market power as "the power of a firm to control prices or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers."[24] Thus, the Competition Commission argued that it could prove market power inferentially by proving that the defendants were able successfully to increase their prices even though their costs did not increase.[25] Or, as the Tribunal put it in *Babelegi*, Babelegi "successively and boldly increases its mask prices during this period, thus behaving to an appreciable extent independently of its competitors, customers or suppliers."[26]

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15 *Id.* ¶¶ 184, 185.

16 *Id.* ¶¶ 205, 249. The exact figures are redacted in the public version of the Tribunal's opinion.

17 *Id.* ¶ 243.

18 See *Id.* ¶ 42.

19 *Id.*

20 *Id.* ¶¶ 43, 44.

21 See *Babelegi, supra* note 3, ¶ 59. Babelegi included imports in its estimate.

22 See *Dis-Chem, supra* note 3, ¶ 91. The 5km radius is presumably the area within most shoppers will go for alternate sources of pharmaceutical supplies.

23 See *Id.* ¶ 82.

24 See Competition Act section 1, 7. This definition tracks U.S. and EU law, see *United States v. DuPont*, 351 U.S. 377, 391 (1956); *United Brands Co v. Commission* [1978] ECR 207.

25 See *Dis-Chem, supra* note 3, ¶ 82.

26 *Babelegi, supra* note 3, ¶ 145.

The respondents argued that the market power requirement, even if approached through proof of economic behavior, implies some degree of durability. As the parties pointed out, many firms are able to exercise some degree of pricing independent of competitors, and without regard to changes in costs, but such conduct is likely transitory, not durable. Markets will soon catch up with this behavior and, presumably, do a better job of disciplining the firm than judicial enforcement ever could (unless, of course, there is something that would prevent market discipline within a reasonable time).[27] Dominance, you might say, is not a sometime thing.

The Tribunal tried to meet this argument by stressing that the Commission's case was not about market power "in ordinary times" but about market power in the context of COVID-19. "This context is the prism" through which the parties' pricing conduct must be assessed.[28] In a crisis like the pandemic — or some other civil emergency or disaster — markets are "disrupted," allowing parties to "take advantage" of the crisis by charging excessive prices, commonly referred to as "price gouging."[29] Indeed, this was a time when even the normal discipline imposed through shopping around for lower prices was impaired because of the fear of contracting COVID-19 and social distancing measures.[30] Disruption can allow for the exercise of dominance.

The second critical issue in the two cases was whether the price was excessive. Judging "excessiveness" has proven to be a difficult issue in whatever jurisdiction it has been litigated, including in South Africa. But it turned out to be not very difficult in these two cases because they involved retail pricing, not pricing of manufactured inputs sold to intermediate buyers.

The Competition Act defines excessive prices as prices that are "higher than the competitive price" and the difference is "unreasonable." The Tribunal decided that the relevant prices against which to compare the parties' price increases was the parties' own prices prior to the increases; these prior prices, the Tribunal felt, could reasonably be considered to have been the "competitive price."[31] The Commission could then determine whether the difference between the competitive before-price and the higher after-price was unreasonable by seeing whether the higher after-price was justified by an increase in the costs of the products or by some other factor. This, the Tribunal said, was a "relatively simple yet instructive test."[32]

Using this test, the Tribunal had little trouble condemning the prices. Babelegi's costs had remained unchanged but its prices were almost ten times higher and its price-cost margins increased by about 1100 percent. Dis-Chem's increases were not quite as spectacular, but certainly large enough. Its costs appear to have increased slightly, but the increases in its prices ranged from 25 to 261 percent and its mark-ups increased "exponentially."

These prices were not only clearly above the "competitive price." The difference was also "unreasonable." Although the Tribunal hinted that in the circumstances of the COVID-19 pandemic, any price increase in excess of a cost increase might be considered unreasonable, the Tribunal did not need to go so far.[33] Instead, it chose ten percent as the line between a reasonable price increase and an unreasonable one, relying on the use of the ten percent figure in many U.S. state price gouging laws.[34] The increases in both cases were far in excess of that amount.

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27 See *Id.* ¶¶ 61-63.

28 *Id.* ¶ 67.

29 *Id.* ¶¶ 70, 71. In ¶ 74 the Tribunal lays out the parameters of a disrupted market in broader terms than just the COVID-19 pandemic.

30 See *Dis-Chem, supra* note 3, ¶ 87 ("women were limiting the number of shops visited to buy food owing to the nature of the pandemic").

31 See *Id.* ¶ 161

32 *Babelegi, supra* note 3, ¶ 99.

33 See *Dis-Chem, supra* note 3, ¶ 221.

34 See *Id.* ¶ 220, Babelegi, ¶ 157. In Sasol, the Competition Appeal Court noted that Sasol's price increase was less than the 16.67 percent increase in profit that the Talmud considered excessive. See *Sasol, supra* note 6, ¶ 175.

IV. FOUR TAKE-AWAYS

The two cases raise important issues for South African competition law. The Tribunal's approach comes close to making the issue of market dominance irrelevant by stressing the fact that the two sellers were able to get away with substantial price increases, at least for a short period of time. If the price increase itself shows market power and hence dominance, it would seem that the market power/dominance requirement no longer limits the prohibition on excessive pricing.

The Tribunal tried mightily to restrict its approach to the excessive pricing prohibition to markets affected by "abnormal disruptions," although it indicated that such crisis periods were not limited to the COVID-19 pandemic. Whether an "abnormal disruptions" limitation can appropriately be read into the Competition Act is not clear. Even if permissible, could this approach be extended to other disruptions, say, a spike in demand for electricity on a hot summer day or a shortage of basic metal inputs for producing electric vehicle batteries? Finally, it is not clear whether the Tribunal's "simple yet instructive test" for excessive pricing can be applied in the manufacturing context where pricing is more complicated than simple mark-ups over input costs.[35]

As important as these issues are for South Africa, the two cases have deeper implications for competition law and enforcement generally, but particularly for antitrust law and enforcement in the United States. I see four take-aways: the importance of price; the importance of justice; the willingness to rely on markets; and the culture of government antitrust enforcement.

1. Price. Antitrust's focus on price has come under attack in recent years in the United States, crystallized by Lina Khan's compellingly-argued 2017 article in the Yale Law Journal, "Amazon's Antitrust Paradox."[36] This critique has correctly noted that a focus on price may lead to a failure to pay attention to other effects of antitrust enforcement (at least effects on innovation and product quality, but also effects on political power, workers, small business, and income inequality). On the other hand, some who are concerned about the broadening of antitrust's mandate now urge a clearer focus on output rather than price, as a better way both to maximize consumer welfare (even the welfare of labor) and to contribute to a well-functioning economy.[37]

My first take-away from *Babelegi* and *Dis-Chem* is that antitrust law should not abandon its focus on low price in our desire to chase other policy goals. Price may not be everything, but it's an important thing. Lower price is the most understandable benefit of competition, hence the greatest support for competition law.

Beyond the political appeal, lowering price is also an important part of antitrust law's effort to be sure that the benefits of competition are widely distributed, that they go to the broad group of consumers and not to a narrower group of producers. Indeed, we assume that consumers are entitled to keep the consumer surplus in their pockets and not to have it taken by producers, without regard to what happens to output. When a robber takes your money, we aren't indifferent to this act because output isn't affected. We condemn the improper redistribution from the party entitled to keep the money to the party who is not entitled to get it. Antitrust's focus on price effects performs a similar role.

Finally, low prices are of particular importance to those who need low prices the most, the least wealthy in our society. The rise of discount retailers, the innovations of online distribution, the prevention of collusive pharmaceutical patent settlements — in one way or another, antitrust rules have fostered competition that lowers price to the benefit of those of our citizens who are the least well-off. Income distribution is a problem in our society. Antitrust's focus on price can help.

2. Injustice. Antitrust seems to have no sense of outrage over injustice. As my mentor, Louis B. Schwartz, once lamented, "I miss in [our usual antitrust] analysis any reference to that venerable non-economic goal of government, namely justice."[38]

My second take-away is that the concern for injustice comes through clearly in the Tribunal's opinions in *Babelegi* and *Dis-Chem*. The Tribunal called Dis-Chem's price raises "utterly unreasonable and reprehensible," pointing out their impact on poor individuals who were already vulnerable. It condemned the exploitation done when customers were "desperate to lay their hands on an essential item in the fight against a

35 As of September, 2020, Babelegi's case was under review by the Competition Appeal Court; Dis-Chem withdrew its appeal to the Court.

36 Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 710 (2017).

37 See Herbert Hovenkamp, Antitrust's Borderline, https://ssrn.com/abstract=3656702 (August 2020).

38 Louis B. Schwartz, "Justice" And Other Non-Economic Goals Of Antitrust, 127 U. Pa. L. Rev. 1076 (1979).

pandemic of global proportions."[39] Similarly, the Tribunal condemned Babelegi's prices as "reprehensible," exploiting customers "amidst a crisis when these customers are at their most vulnerable and their choices limited."[40]

I find nothing wrong, and something salutary, in making justice part of our antitrust thinking. Like all fundamental concepts (efficiency is a good example), it provokes arguments over definitions and core meaning. But whatever the scope of those arguments might be, I have little trouble in looking to antitrust to deal with the injustice in these cases — extremely large and unjustified price increases for face masks that people need in the midst of a pandemic. Moral condemnation can have its place in antitrust.

3. Markets. Antitrust law expresses an institutional preference for markets over private arrangements or government control. As my colleague Eleanor Fox and her co-author Mor Bakhoum argue, our goal should be "making markets work for people," whether in the United States or in less developed economies.[41]

But markets don't always work to produce the outcomes we would like or expect. Nevertheless, in the United States we have become exceedingly reluctant to use government intervention to fix market failures. If anything, we seem more willing to allow private actors to fix what they consider to be market failures and then to allow such behavior as a defense to an antitrust claim.[42]

My third take-away is the debate in *Babelegi* and *Dis-Chem* over whether we should take a long-enough view of the conduct so that market forces will correct things or whether government should intervene now to fix the failure. The question is not whether markets work but when will they work. Indeed, this is a critical aspect of the debate over monopoly conduct in the United States (including excessive pricing): Is antitrust intervention necessary or will the problem self-correct.

The Tribunal in these cases was willing to take a short-term view, not requiring that the firms have anything close to durable market power. As the Tribunal wrote in *Dis-Chem*,

> it is recognised in competition law that special conditions exist when markets can fail and are not able to deliver the theoretical benefits associated with well-functioning market economies. This is why competition regulators are mandated to regulate markets either through merger control (*ex ante*) or the conduct of firms (*ex post*) to rectify such failures."[43]

Many in the developing world are overly-skeptical of markets, a point that Fox and Bakhoum emphasize in their book,[44] but I think U.S. antitrust law has become too enamored of market self-corrections and too willing to tolerate short-term market failures on the assumption that things will be fine in the end. The two South African cases are a challenge to U.S. law to rethink the balance that we have struck.

4. The culture of government antitrust enforcement. There is a long-running global debate over the goals of antitrust law, but there is also a debate over how antitrust enforcement resources should be used. For example, as a general matter we don't like monopoly pricing, but in the United States we also don't seem to think it's a good idea to use antitrust enforcement to go after such pricing unless we can find some exclusionary behavior to tie our enforcement to. Similar assumptions hold for "price gouging." To use the distinction the Tribunal offered in *Dis-Chem*, price gouging is thought of as unfair behavior, best left to "consumer protection," not worthy of antitrust enforcement resources.

My fourth take-away is to ask why antitrust enforcers turn away from dealing with temporary price gouging. There may be good policy reasons, but I think that an important part of the answer is the culture of antitrust enforcement. Antitrust enforcement, as it has evolved over time, has focused much attention on major manufacturing industries, industries with power and economic importance — the railroads, the oil industry, steel, aluminum, chemicals, mainframe computers, telecommunications networks and equipment. Merger policy focuses on large asset mergers and then only in fairly concentrated markets. Antitrust enforcement looks for economic impact. Individual instances of price-gouging, temporary in nature, do not seem to present a substantial enough impact to warrant antitrust attention.

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39 See *Dis-Chem, supra* note 3, ¶¶ 143, 222, 226, 246.

40 *Babelegi, supra* note 3, ¶ 174.

41 See Eleanor M. Fox & Mor Bakhoum, Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa 4 (2019).

42 See John M. Newman, Procompetitive Justifications in Antitrust Law, 94 Ind. L.J. 501 (2019).

43 *Dis-Chem, supra* note 3, ¶ 142.

44 See Fox & Bakhoum, supra note 41, at 201.

There is nothing wrong with paying attention to the impact of antitrust enforcement, but it may turn out that the desire for big impact has been more hope than achievement, that all that attention paid to large mergers has accounted for too little and ignored too much. For an enforcement effort concerned with "big," the results may not be big enough.

South Africa's effort to fight the unjustified price increases of face masks in the midst of a pandemic is a challenge to the culture of antitrust enforcement. The cases aren't big in the way that we are accustomed to. Babelegi is a small company, but even Dis-Chem, an important retailer, isn't so large that it dominates the South African retailing economy. MassMart, owned by Wal-Mart, is far larger. But the complaints about price-gouging behavior are numerous. The Commissioner for the Competition Authority reported in May of 2020 that there had been over 1500 complaints about excessive pricing of food products, masks, and sanitizers and that 35 firms were then in some stage of settlement negotiations.[45] The Commission's enforcement effort against price gouging behavior clearly takes significant enforcement resources. Are we willing to recognize that it also produces benefits for the consumers who need these masks?

The Tribunal addressed the issue whether investigating price-gouging was an appropriate job for the Competition Commission. In *Babelegi* the Tribunal wrote that "competition authorities are, at times of crisis and instances of exploitative price abuse, duty-bound to act."[46] In *Dis-Chem* the Tribunal elaborated a compelling view of what should be of concern to competition law enforcement:[47]

> [A] competition authority might be in dereliction of its duty if it did not intervene in a timely manner in states of natural disasters or emergencies to protect vulnerable consumers against exploitative firms. Take for instance a natural disaster such as a severe drought in South Africa. How long should a competition authority wait until the market "settles" or reaches equilibrium before it intervenes to protect consumers against pricing abuses by the suppliers of fresh or bottled water?

I don't have a ready answer to the Tribunal's hypothetical, but I do know that the implicit answer of U.S. antitrust enforcers is, "not our job." That's our competition enforcement culture.

V. CONCLUSION

At about the same time that Babelegi and Dis-Chem were raising their prices of face masks in South Africa, the United States was having its own challenge in getting face masks. As the Wall Street Journal reports, in March of 2020, the spread of the coronavirus in the United States was becoming clear, "stoking panic about shortages of medical supplies." What was the U.S. response? Did we try to clamp down on excessive pricing by suppliers? Did we try to use the government to correct for short-term market failures? No, we left it to a nationwide market free-for-all in which medical providers tried to get needed supplies "any way they could," thereby making it "harder to protect health-care workers, treat infected patients and slow the spread of the virus."[48]

I don't want to contend that all would have been fine if only the U.S. had been able to use the antitrust laws to deal with short-run excessive price gouging in face masks and other necessary medical supplies. Presumably, all hasn't been fine in South Africa either. But I do want to argue that our failure to use antitrust tools against excessive pricing is an antitrust blind-spot, one that South African enforcement lets us see more clearly. Antitrust could help the exploited, even if it can't cure COVID-19.

South Africa's enforcement effort to stop excessive pricing of face masks in a time of a pandemic teaches us that we need to direct our enforcement resources to cases that will help people more. More broadly, I think it is time to change the culture of our antitrust enforcement, to listen to the problems of the disadvantaged, to those who need the protection of antitrust enforcement. Perhaps we should redirect Justice Scalia's observation and say that today, the "supreme evil" of antitrust is not collusion, but our failure to pay attention to how antitrust can advance justice.

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45 See Remarks by the Commissioner for Competition, Mr. Tembikose Bonakele, May 29, 2020, http://www.compcom.co.za/wp-content/uploads/2020/05/Press-Statement-COMPETITION-COMMISSIONS-RESPONSE-TO-THE-COVID-19-PANDEMIC-Final.docx_1590759485810.pdf.

46 *Babelegi, supra* note 3, ¶ 104.

47 *Dis-Chem, supra* note 3, ¶ 144.

48 Michael C. Bender & Rebecca Ballhaus, 'Try Getting It Yourselves': How Administration Sowed Supply Chaos, Wall St. J., Sept. 1, 2020, p.1.

PRICE GOUGING IN A TIME OF SEA CHANGE

BY TIMOTHY SNAIL & MARY BETH SAVIO[1]

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The purpose of price gouging laws is to prevent excessive pricing and profiteering in a state of emergency. But price gouging laws in the United States, exemplified by those enacted by state governments, were generally designed in anticipation of particular types of emergencies or natural disasters and as a result may embody approaches that strain to address the economic effects of novel emergencies such as the COVID-19 global pandemic. This article discusses challenges that arise in applying existing price gouging laws in the wake of widespread economic shocks with long-lasting dimensions and explains how economic analysis and modeling may help sort out these issues.

I. THE ROLE OF PRICE GOUGING LAWS IN AN EMERGENCY

Price gouging laws have been enacted by most states, and actions may also be brought under states' unfair and deceptive practices laws or under powers granted by executive orders.[2] California's Penal Code Section 396 illustrates the nature and objectives of many state price gouging laws. It was enacted following the 1994 Northridge earthquake. The earthquake buckled freeways, collapsed apartment buildings, set gas mains ablaze, and resulted in a power outage affecting large swaths of the city. Sixty people died and more than 9,000 people were injured. In the days following the quake, reports emerged of price spikes in essential goods like eggs, batteries, and plywood. Penal Code Section 396 was enacted soon thereafter to prevent sellers from profiting from consumers' sudden, short-term desperation.

California's restrictions are triggered by a declaration of a state of emergency by the President of the United States, Governor of California, or a local governmental entity, and the state of emergency remains in force for 30 days unless extended. During this period, price increases for essential goods and services are capped at 10 percent above the seller's price immediately before the state of emergency was declared. California allows the post-emergency price to reflect cost increases incurred by the seller, including the seller's customary markup on cost. Furthermore, California Senate Bill 1196 proposes to amend the law to allow new entrants to apply a 50 percent markup to costs they incur in providing essential goods during the state of emergency. In states like California where limits on price increases include an allowance for post-emergency increases in cost, the net effect of the law is to cap the increase in a seller's profit margin.[3]

California's legislation attempts to strike a balance between the interests of sellers and consumers in the immediate aftermath of a disaster. The law provides sellers some inducement to offer goods during the state of emergency, while simultaneously limiting the increase in prices, thus creating a kind of temporary, muted marketplace in which the plight of consumers and the incentives of sellers are each accounted for to some degree.

What the law does not allow is for a seller to profit from the full increase in consumer demand or the full decrease in consumer price sensitivity that may stem from distress in a state of emergency. All else equal, when demand increases or consumer price sensitivity is reduced, sellers can increase price somewhat without losing so much demand as to make the price increase unprofitable; but price gouging laws limit sellers' ability to do this. Economists have noted the implicit trade-offs that result: the incentives for pre-emergency preparation, post-emergency expansion, and entry are reduced, and queuing or rationing replace allocation based on consumers' willingness to pay for a good. The contours of state price gouging laws imply that lawmakers view these trade-offs as acceptable in the short run. However, queuing and rationing do not ameliorate the underlying problem of excess short-run demand; instead, allowing prices to adjust to market conditions would provide incentives for entry and expansion to meet the demand, which would ultimately drive prices back down again.

Given that price gouging laws are designed to prevent profiteering from short-run surges in demand, how do these laws perform when market shocks recur or have long-lasting reverberations? This question naturally arises in the context of the current COVID-19 pandemic, which has had a material impact on supply and demand for numerous products and services. The emergence of pandemic hot spots and the potential for additional waves of infection make it likely that markets will be characterized by ongoing shifts in supply and demand as the pandemic ebbs and flows. What are the implications for states that have extended the emergency period covered by their price gouging laws — such as California, where price gouging restrictions are currently slated to be in effect from February 4, 2020 to March 4, 2021 — and for states that may reactivate their price gouging laws with the onset of new waves of infection? Do the objectives of state price gouging laws fit these economic circumstances? What kinds of challenges arise in determining whether or to what degree the laws have been violated?

2 Actions have also been brought under Section 102 of the Defense Production Act, which focuses mainly on hoarding and excessive pricing.

3 For reconstruction or emergency cleanup services, the law remains active for 180 days. https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN§ionNum=396; https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1196. https://www.gov.ca.gov/wp-content/uploads/2020/04/4.3.20-EO-N-44-20-text.pdf.

II. THE ROLE OF PRICE GOUGING LAWS IN A SERIES OF EMERGENCIES

During the pandemic, consumers have lodged complaints of potential price gouging for goods and services amid increasing prices and rapidly changing market conditions, such as shifts in demand. What are the implications of price gouging laws in these circumstances? To fix ideas, consider the sale of meat in grocery stores. Meat processing and delivery are mainly performed on a just-in-time basis, with meat processing facilities commonly operating at large scale with high capacity utilization. The emergence of the pandemic created unexpected supply reductions due to illness-winnowed workforces in meatpacking plants[4] and increased costs.[5] Simultaneously, consumer demand for meat shifted from restaurants to grocery stores due to restaurant closures, prohibitions on on-site dining, and consumer concerns about exposure to illness.[6] The shift in dining at restaurants to home also changed the demand for specific cuts of meat since meat bound for restaurants generally involves larger cuts for which buyers need space to store and the ability to butcher. Consumer surveys suggest this shift in demand may endure while consumers avoid public places like restaurants.[7] Consumers may also decide to reduce household spending for a time, including eating out, due to job losses and future economic uncertainty. While the surge in demand for meat at grocery stores may wane as consumer concerns dissipate, the emergence of new infection hotspots could lead to new rounds of restaurant closures and safety concerns as well as associated imbalances of supply and demand at grocery stores.[8]

The reduction in supply and increase in demand for meat at grocery stores resulted in higher prices.[9] A number of grocery store chains — including Giant Eagle, Kroger, Costco, Sam's Club, Wegmans, Tops, Hy-Vee, and H-E-B — also instituted rationing, placing limits on the number of packages of meat that consumers may purchase at the register, when demand exceeded supply for specific types of meat.[10] The use of rationing suggests that these stores' price increases did not fully reflect changes in supply and demand, because if they did, the available supply of meat could be sold without rationing to consumers who were willing to pay more than the current price.

The reluctance of grocery stores to increase prices to market-clearing levels might represent an investment in consumer goodwill aimed at ensuring repeat business. But it is likely that compliance with price gouging laws also plays a role, especially considering the cautionary tales provided by grocery stores and chains that have been accused of price gouging in recent months.[11]

If the increased demand for meat in grocery stores persists or recurs with resurgences of infection, a question arises as to the objectives achieved by the extension or reactivation of states of emergency that trigger price gouging laws. For example, a longer-term shift in demand creates a greater opportunity for expansion by existing suppliers or entry by new or alternative suppliers, which (through increased supply) would lead to lower prices, all else equal. Examples of such suppliers could include smaller meat processing companies (although without the advantages of economies of scale) or makers of plant-based products that consumers view as meat alternatives.[12] The incentive for new and alternative suppliers to enter the marketplace increases with price, but price gouging laws place limits on price increases. This highlights one of the trade-offs inherent in price gouging laws — by artificially limiting price increases, price gouging laws constrain the ability of market forces to incentivize and match willing buyers and potential sellers. While lawmakers may have determined this trade-off to be appropriate in the short run, the current pandemic raises the question as to whether this trade-off is optimal in the longer run.

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4 https://www.nytimes.com/2020/04/13/business/coronavirus-food-supply.html?searchResultPosition=3.

5 Meat processing facilities experienced pandemic-related increases in costs, for example, due to increased sanitation and safety measures, worker recruitment costs and bonuses, staggered shifts, and keeping facilities open for Saturday shifts.

6 https://www.wsj.com/articles/two-months-that-tore-apart-the-food-chain-11588174236.

7 https://www.forbes.com/sites/daphneewingchow/2020/03/31/five-ways-that-coronavirus-will-change-the-way-we-eat/#10145e7b1a2b.

8 https://www.cnn.com/2020/07/16/business/farmers-restaurants-closures/index.html; https://www.cnn.com/2020/07/17/perspectives/coronavirus-meat-shortages-mcdonalds/index.html.

9 https://abcnews.go.com/Health/wireStory/us-food-prices-historic-jump-stay-high-70969164.

10 https://www.supermarketnews.com/meat/grocery-chains-limit-meat-purchases-prevent-hoarding; https://www.seattletimes.com/business/meat-prices-are-going-up-and-grocers-are-putting-limits-on-your-purchases/.

11 https://www.nytimes.com/2020/05/06/us/coronavirus-eggs-price-gouging-lawsuit.html; https://www.sfchronicle.com/crime/article/Coronavirus-Price-gouging-charges-filed-against-15254753.php.

12 https://www.npr.org/2020/04/30/848179283/small-meatpacking-plants-thrive-as-covid-19-forced-bigger-ones-to-close; https://www.seattletimes.com/business/meat-prices-are-going-up-and-grocers-are-putting-limits-on-your-purchases/; https://www.foodnavigator-usa.com/Article/2020/03/04/Impossible-Foods-slashes-prices-Our-goal-is-to-reach-price-parity-and-then-undercut-the-price-of-conventional-ground-beef.

III. APPLYING PRICE GOUGING LAWS IN A SERIES OF EMERGENCIES

The economic upheaval created by the current pandemic also raises several questions about the practical application of price gouging laws. As noted above, price gouging laws are generally triggered by the declaration of a state of emergency of limited duration (e.g. a month or two), although some declarations may be renewed or extended. These provisions are not surprising as many price gouging laws were enacted with a specific type of emergency or natural disaster in mind, such as a hurricane or wildfire, which are relatively discrete events. These provisions also seem to envision that the shocks to supply and demand accompanying the emergency will be relatively short-lived. In contrast, the COVID-19 pandemic has been an evolving crisis accompanied by a series of shocks to the economy that have not yet subsided, receding and (re)emerging in different geographic locations within the United States and around the world. It remains to be seen whether actions taken under various price gouging laws will treat the COVID-19 pandemic as a single emergency or a series of emergencies, and how evolving conditions will be evaluated.

Why does the discrete nature of price gouging triggers matter? One reason is that it may have a substantial effect on how one estimates the price increase due to price gouging. Price gouging laws that codify excessive price increases usually prohibit those of at least a specific percentage above the prices in a pre-emergency benchmark period (e.g. 30 days, 60 days, or immediately prior to the emergency), a period that is meant to reflect sales without price gouging. Most price gouging laws allow defenses for increased costs during the emergency, which may also involve a comparison to the benchmark period. The date on which the triggering emergency is declared generally marks the end of the benchmark period. Since prices may be sensitive to the specific benchmark period chosen, the position and duration of the benchmark period is likely to affect the determination of whether and the extent to which prices were elevated during the emergency. Other considerations involving benchmark periods may arise. If there are two contiguous declared states of emergency, could the latter one's benchmark period fall within the first one's emergency period? If there is a gap between emergency declarations that could potentially serve as a benchmark period, will sufficient time have elapsed for the market to come into equilibrium? And to the extent that a state of emergency lasts for many months or even over a year, how comparable are the market conditions that existed before the emergency to those during the emergency?

Further, what if the post-emergency events that affect businesses do not line up with the time period covered by the declared state of emergency? The COVID-19 pandemic has disrupted supply chains in complex ways over time due to its effects on business operations and how governments have responded. For example, the pandemic has periodically knocked out key manufacturing operations, disrupted normal sources of supply and the transportation of goods, and reduced the pool of available labor and its productivity. Some of these effects may have been evident when the emergency was declared, while others were realized only later. Further, at various times following declarations of emergencies many state governments have issued stay-at-home or shelter-in-place orders and ordered closures of non-essential businesses — some of which have been phased in or lifted and reinstated.[13] These attempts to flatten the curve of infection and achieve longer-term gains to the health of the population and its workforces have generated vigorous public discourse in part because some actions have reduced short-run economic activity and increased the costs of doing business (e.g. through capacity restrictions). Governments have also augmented unemployment benefits, provided stimulus payments to those who satisfy income limits, and offered grants or loans to aid qualified businesses at various times during the pandemic. The wide range of short-lived and longer-lasting economic shocks affecting businesses, which vary over time and geography, may complicate the application of price gouging laws during the COVID-19 global pandemic. Thus, the application of price gouging laws in the wake of a series of emergencies requires a careful assessment of economic circumstances so as to determine appropriate benchmark periods.

Once appropriate benchmark periods are determined, the parties to a price gouging dispute are faced with two fundamental economic questions: what is an excessive price, and what costs or changes in market conditions are viewed as mitigating factors for price or markup increases? These considerations can generally be addressed through econometric modeling.

13 See Kaiser Family Foundation, State Data and Policy Actions to Address Coronavirus, https://www.kff.org/coronavirus-covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/.

Most price gouging laws expressly specify that excessive pricing is to be ascertained through a comparison over time, and even laws with ambiguous definitions of excessive pricing (e.g. "unconscionable") may invite a similar temporal comparison. These questions can be addressed with econometric tools familiar to antitrust practitioners as they resemble models commonly used in evaluating alleged cartel overcharges. For example, the extent of price elevation can be determined using a regression analysis that compares pricing during the emergency to that in the benchmark period, in its simplest form by using a dummy variable for the time period. This is what is commonly called a "before/during/after" or "benchmark" model. Mitigating factors — such as changes in costs and market conditions — can be accounted for by adding control variables or by separately estimating factors that drive costs. If the analysis finds the seller's prices during the emergency to be similar to those during the benchmark period after controlling for appropriate costs and market factors, it is unlikely that the seller was engaging in price gouging. However, unlike antitrust matters, some price gouging laws may limit the extent to which changes in exogenous market factors can be used as a defense to the contested conduct.[14]

Businesses may experience increased costs due to the pandemic in many forms, such as increased costs of production (e.g. "hero" pay for essential workers, increased sanitation, more costly purchased inputs); increased search costs for new suppliers of goods in short supply; the purchase of new equipment or packaging as a result of the emergency; decreased capacity due to supply chain interruptions leading to higher unit costs (e.g. workforce absences among truck drivers, maritime port congestion, limited air cargo space due to reduced passenger flights); and higher costs for new entrants who had not previously produced the products at issue — a few states' price-gouging statutes even incentivize entry through graduated price increase thresholds for incumbents and new entrants.

Some price gouging laws allow comparisons to benchmarks for similar products or other geographic areas. These so-called "yardstick" models compare, for example, prices of the seller and product at issue to those of its peers (i.e. its rivals). If the analysis finds the seller's prices to be similar to those of its peers, it is unlikely that the seller was engaging in price gouging. "Difference-in-differences" econometric models are among those that may be used if the price gouging law allows comparisons that involve not only prices that vary across time, but cross-sectional variation across similar products, different sellers, and various sets of customers who could obtain the products in the relevant trade area. These models control not only for observable changes, but for unobservable changes that impacted both comparison groups in the same manner.

IV. CONCLUSION

A situation like the current pandemic — characterized by widespread and recurring shifts in demand and supply — poses challenges that might not have been fully foreseen when state price gouging laws were established. The nature of the trade-offs inherent in price gouging laws change when a state of emergency endures or recurs, suggesting that the value of imposing these laws should be reassessed as a state of emergency wears on. Furthermore, the practical application of price gouging laws in a time characterized by ongoing economic upheaval requires a careful assessment of a wide scope of economic factors to determine appropriate benchmark periods, prices, and costs.

14 While most state price gouging laws allow costs as a defense to price increases, a few expressly mention changes in market conditions (e.g. seasonality) as a defense.

THE NEW TRANSATLANTIC ATTACK ON HIGH PRICES: PRICE GOUGING

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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.[2] 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 categories covered. In most states price gouging restrictions are limited in time to a period following some declaration of a state of emergency,[3] 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,[4] a few states, like Michigan, prohibit price gouging at all times.[5] Many state anti-price gouging statutes, like California's, apply only to retailers,[6] while other statutes, like Arkansas' or Pennsylvania's, apply to all parties within the distribution chain, including manufacturers and wholesalers.[7] 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.[8]

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.[9] Other states take a subjective approach and prohibit "unconscio-

2 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/.

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.

nably high price"[10] or "exorbitant or excessive price."[11] 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.[12] 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[.]"[13] 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.[14]

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.[15] 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."[16] 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."[17] 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.

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.[18]

The standard test on excessive pricing established by the European Court of Justice asks two questions.[19] 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.[20]

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.*

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 komunicēšanās 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.

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.[21] 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."[22] 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,[23] 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.[24]

In addition, Member states may have stricter national competition laws that apply to a broader array of firms.[25] 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.[26] 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.[27] 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 of the Italian Criminal Code.[28]

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,[29] though repealed the provisions on July 10, 2020.[30]

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).

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.

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.[31] In Iowa, civil fines can go up to $40,000 per violation (and an additional $5,000 if victims were elderly).[32] Multiple states provide for injunctive relief and restitution for victims in addition to civil fines.[33] 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).[34] Federal law under DPA section 4513 is also punishable by up to a year of imprisonment.[35]

In the EU, firms that have infringed Article 102 of the TFEU are subject to fines based on gravity and duration of the infringement.[36] 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.[37] 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.[38]

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).[39] While Ohio does not have anti-price gouging statutes on the books, Ohio's Attorney General has brought action against individuals for alleged price gouging under the state's consumer protection statutes that prohibit "unfair and deceptive acts and practices."[40] 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.[41] 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.[42]

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.[43] On the other hand, antitrust regulators in the EU have increasingly implemented interim measures when

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).

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.

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.[44]

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.[45] However, the authorities in Europe are in practice reluctant to sanction individuals for non-cartel behavior.[46]

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.[47] And in the EU, Germany's Federal Cartel Office ("FCO"), for instance, expressly noted, "the use of an algorithm for pricing naturally does not relieve a company of its responsibility."[48] 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.[49] 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.

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 Harrisson, *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.

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.

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.

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.[50] While investigations tend to resolve through cease and desist letters or fines,[51] 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.[52] California is prosecuting individuals for selling medical supplies at "exorbitant prices" for violation of the state price gouging statute.[53] 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.[54]

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.[55] 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.[56]

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.[57]

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.[58] 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.[59]

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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.texasattorneygeneral.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.

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.

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.*

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.[60] 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.[61] 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.[62] The CMA Taskforce has also sent open letters to 26 trade associations emphasizing the importance of consumer and competition law compliance,[63] including the early years sector,[64] the package holiday sector,[65] and the pharmaceutical and food and drink industries,[66] as well as 277 letters to individual businesses asking for more information or expressing concern about unjustifiable price rises.[67]

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.[68]

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;[69]

- 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."[70]

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.

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.

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/february-2020/the-italian-competition-authority-investigates-online-sales-platforms-for.

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.

The Italian Competition Authority also adopted interim measures consisting in (i) ordering two online platforms (i.e. www.vova.com and the 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[71] and (ii) shutting down a number of websites, which offered allegedly effective COVID-19 self-tests at excessive prices.[72,73]

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?
- 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."[74])

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.

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 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.

74 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.

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.[75]

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.[76]

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.

75 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.

76 See, e.g. Ga. Code Ann. § 10-1-393.4 (2020); W. Va. Code § 46A-6J-1 (2020).

TOWARD A *PER SE* RULE AGAINST PRICE GOUGING

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I. INTRODUCTION

The antitrust laws in the United States do not prohibit price gouging. But they could.[2] Surge pricing — the use of algorithms to charge high prices in response to unexpected surges in demand — could, for example, constitute conduct illegal *per se* under Section 2 of the Sherman Act.[3]

Surge pricing is price gouging, in that it exploits the power created by unexpected shortages. As such, surge pricing harms consumers, who are better off as a group if firms simply sell out during a demand surge. But unlike low-tech price gouging, surge pricing also exhibits the element of anticompetitive conduct required for antitrust liability.[4] The algorithms used in surge pricing execute much more quickly than can human beings, allowing gouging to kick in sooner in response to unexpected shortages, and therefore reducing the period of time during which the effects of competition in the pre-shortage period carry over into the shortage period to discipline prices. It follows that surge pricing is anti-competitive in effect.

But antitrust could go even further, to ban all price gouging, whether enabled by technology or not, if antitrust would only more fully embrace the spirit of its consumer welfare standard by doing away with the requirement of proof of anticompetitive conduct that today severely limits antitrust's ability to protect consumers.[5] Absent the anticompetitive conduct requirement, antitrust could hold firms liable based solely on proof of market power combined with any act, such as the charging of higher prices, that harms consumers.

Price gouging would be an excellent candidate for condemnation under such an expanded antitrust regime because price gouging is easy to identify, allowing antitrust to sidestep the problem of distinguishing cost-driven price increases from consumer-harmful price increases that otherwise complicates such a regime.[6] A coincident increase in demand and price reliably signals price gouging, and price gouging is never cost justified and so always harms consumers. Enforcers would also readily be able to identify the price that the court should enjoin the gouger to charge: that is just the price charged before the firm encountered the increase in demand.

II. ANTITRUST'S COMPLICATED POSTURE TOWARD HIGH PRICES

The antitrust laws maintain a complicated posture toward high prices. On the one hand, the power to raise price remains the single most important element of any antitrust case and indeed may fairly be called the supreme evil that antitrust seeks to prevent.[7] The power profitably to raise price must be proven to win any single-firm conduct case.[8] Prophecies about whether the merged firm will have the power profitably to raise prices also govern the outcome of merger cases.[9] And virtually all collusion cases require proof of market power as well.[10] The only exception, the claim of price-fixing, exists because, the courts have said, when firms agree on prices it is obvious that they will agree on higher ones.[11]

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2 This article draws heavily from, and indeed restates, many of the arguments in Ramsi A. Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, 105 Iowa L. Rev. 1759 (2020), Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, 39 Cardozo L. Rev. 1741 (2018), Ramsi A. Woodcock, The Economics of Shortages, Law and Political Economy Blog (Jun. 2, 2020), https://lpeblog.org/2020/06/02/the-economics-of-shortages/, and Ramsi A. Woodcock, *The Hidden Shortages of the Market Economy*, Law and Political Economy Blog (Jun. 3, 2020), https://lpeblog.org/2020/06/03/the-hidden-shortages-of-the-market-economy/. Please note that my forthcoming reply in Iowa Law Review Online contains important changes to The Efficient Queue and the Case Against Dynamic Pricing. That reply should be read before consulting the article itself.

3 15 U.S.C. § 2 (2018). For more on surge pricing, see Le Chen et al., *Peeking Beneath the Hood of Uber*, Proceedings of the 2015 ACM Conference on Internet Measurement 495, 495 (2015). For a bit more on *per se* rules under Section 2, see Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1777 n.9.

4 See Herbert Hovenkamp, Federal Antitrust Policy, the Law of Competition and Its Practice 356–58 (6th ed. 2020) ("Is Bad Conduct Necessary?").

5 See Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, *supra* note 2, at 1756–60.

6 Absent an anticompetitive conduct requirement, antitrust liability would turn only on proof of market power and proof of harm to consumers. The latter would amount to the requirement that plaintiff prove that defendant exercised defendant's power to reduce consumer welfare, either by increasing prices or reducing the quality of the product without a cost justification. Cost is difficult to measure. See W. Kip Viscusi et al., Economics of Regulation and Antitrust 539–57 (5th ed. 2018).

7 See John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. Rev. 1169, 1172 (2018) ("Market power . . . lies at the core of antitrust law.").

8 See Hovenkamp, *supra* note 4, at 103–4.

9 See *id.*

10 See *id.*

11 See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 (1979) (stating that the *per se* rule applies when a practice would "almost always tend to restrict . . . output," which of course implies that the practice would raise price).

On the other hand, it is equally a staple of antitrust law that the power to raise prices — not to mention the act of raising them — is not enough to violate the antitrust laws.[12] Anticompetitive conduct, understood not to include the act of raising prices itself, is required.[13] The reason, as Herbert Hovenkamp has aptly put it, is that "[a]ntitrust, it should be recalled, is designed to be a *market alternative* to price regulation, not merely price regulation by another name."[14] Antitrust cares more than anything about high prices and the distributive consequences of high prices, but antitrust is limited in what it can do about prices by its mission, which is to use competition to influence prices, rather than to dictate prices directly to markets. Accordingly, the requirement of anticompetitive conduct that serves as a precondition for liability in every case ensures that antitrust has a competition-oriented remedy available to push prices down: that of prohibiting the anticompetitive conduct buoying the defendant's prices.[15]

III. LEGAL AND ECONOMIC DEFINITIONS OF PRICE GOUGING

Antitrust's complex posture toward high pricing — great concern for the problem but limited means of addressing it — makes for an equally complex posture toward that peculiar form of high pricing known as price gouging. In the laws of the United States, price gouging refers to a grab bag of state-level prohibitions on the charging of high prices for certain goods during emergencies.[16] Consumers are suing supermarkets for raising egg prices during the pandemic, for example, in violation of a California law that prohibits increases in excess of 10 percent within 30 days of the declaration of a state of emergency.[17] The California law applies to a broad range of necessities, from food to heating oil, but other states prohibit only gouging on fuel.[18] Still other states make it difficult to prove price gouging for price increases of less than 25 percent.[19]

The economic definition of price gouging is more straightforward. Gouging is the use of price to ration access to a good that is in shortage, where shortage means that demand unexpectedly exceeds supply at the original price set by the seller before the unexpected demand materialized.[20] To understand the implications of this definition, start with a market that is in equilibrium. The sellers in the market choose their prices in anticipation of encountering a certain level of demand. If the market is competitive, those prices will be determined by the market. If the sellers have some power, then they will choose their prices.

Now suppose that demand turns out to be greater than expected, perhaps because a global pandemic has changed consumer purchase habits. Regardless the level of market power the sellers had before the surprise, now each has more power to raise prices. Why? Because supply cannot adjust as quickly as price to the unexpected spike in demand.[21] Particularly in markets in which prices are digitized — including all of online retail — prices adjust at the execution speed of the pricing algorithms that firms increasingly employ to make pricing decisions.[22] But some software services aside, the goods and services firms sell still take days and weeks to produce, and sometimes months cost-effectively to ship from their places of manufacture around the world.[23]

Until supply has time to adjust, sellers have power to raise their prices in response to the surge in demand.[24] But the market does not *require* that they raise their prices, which creates the freedom, and moral implications, that turn the morally-neutral practice of charging higher

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12 See Hovenkamp, *supra* note 4, at 356–58.

13 *See id.*

14 *Id.* at 387 (emphasis in the original).

15 See Andrew I Gavil et al., Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy 1378–79 (3d ed. 2017) (discussing antitrust remedies).

16 For a state survey, see *Price Gouging Laws by State*, Findlaw, https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html (last visited May 18, 2020).

17 See Class Action Complaint at 11, *Adrienne Fraser et al. v. Cal-Maine Foods Inc. et al.*, No. 3:20-cv-02733 (N.D. Cal. Apr. 20, 2020); Cal. Penal Code § 396(b).

18 See Indiana Code § 4-6-9.1-2 (2018).

19 See Kansas Stat. Ann. § 50-6,106(b)(1) (stating that only an increase in excess of 25 percent creates a prima facie case of price gouging).

20 See Woodcock, *The Economics of Shortages*, *supra* note 2; Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1766 (articulating this definition in the context of dynamic pricing).

21 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1766–67.

22 See *id.* at 1766–70 (listing markets in which surge pricing technologies are currently employed).

23 See *id.*

24 See *id.* at 1770–72.

prices into the morally-freighted practice of price gouging. Firms do not need to raise prices in a shortage if they do not wish to raise them because when they chose their original prices, firms would have taken their costs into account, ensuring that their original prices cover their costs.[25] Firms will survive whether they raise prices in a shortage or they do not.

That has a profound implication. It means that the market power created by shortage is one of the few instances in economics in which power can reliably be perceived by anyone, even the man on the street. The act of jacking up prices in response to a surge in demand sends an unambiguous signal that a firm has chosen to exercise shortage-created market power.[26] The price increase cannot be necessary to cover existing costs, because the original price was sufficient to do that. And the price increase cannot be needed to cover an increase in costs, because not enough time has elapsed for the firm to produce additional output and incur those costs. The inability of supply to adjust, and the concomitant absence of additional production costs, is, after all, what it means to be in a shortage.[27] An increase in prices alongside an unexpected increase in demand can therefore only be driven by the profit motive. It is for this reason that the public attaches the vehemently pejorative term "gouging" to price increases of this kind. By contrast, outside of the shortage context, an increase in prices could be driven by costs, and so does not attract universal condemnation.[28]

The economic problem faced by a firm encountering an unexpected surge in demand is at its heart that of rationing.[29] The surge means that there are more buyers willing to buy at the seller's chosen price than there are goods available. The question for the seller is how to ration access to the goods. Charging a higher price — price gouging — is one approach.[30] That rations access based on willingness to pay, which is often a proxy for wealth. Not raising prices and letting the goods sell out — the approach preferred by the public — rations instead based on place in line, which is often, though not always, less of a proxy for wealth.[31]

Because it involves an allocative choice that is not fully determined by market forces, rationing is an inherently political activity.[32] That explains why so many state legislatures have voted to condemn rationing with price in emergencies, particularly with respect to necessities.[33] Justice suggests that necessities should not be allocated based on the buyer's station in life whenever the market does not so require.

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25 See *id*. at 1774–75.

26 I would distinguish this sort of power from the power over price created by scarcity more generally. Scarcity-based power arises when the excess of demand over supply is expected but the seller is unable to increase output for technical reasons or because of the nature of the good (e.g., the good is land). By contrast, shortage-based power arises from an unexpected excess of demand. See *infra* note 36. Thus the homeowner who asks a high price because he knows his location is unique exercises scarcity-based power whereas the homeowner who initially asks a low price, thinking his location is poor, but revises it upward after discovering that there is great demand for his house, exercises shortage-based power. See *infra* Part VI.

27 See Woodcock, *The Economics of Shortages*, *supra* note 2.

28 See, e.g. Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 321–24 (2019) (arguing that recent evidence of increased markups across the economy may not reflect increasing market power because fixed costs may have increased as well).

29 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1782–83.

30 See *id*. at 1784–87.

31 See *id*.

32 For a broader pocket of political discretion in the interstices of the market, see Ramsi A. Woodcock, *The Antitrust Case for Consumer Primacy in Corporate Governance*, 10 UC Irvine L. Rev. 1403–26, 1444–49 (2020) (arguing that the broader question of whether a firm should extract any amount of surplus from the market in the form of profits is not determined by efficiency requirements, particularly where firms have the power to personalize prices).

33 *Price Gouging Laws by State*, *supra* note 15 (listing price gouging laws in 36 states and the District of Columbia).

IV. ANTITRUST LIABILITY FOR PRICE GOUGING

A. No Antitrust Liability for Price Gouging under Current Law

Do the antitrust laws have the power to punish firms that choose to ration with price, instead of place in line? Price gouging during shortages is an exercise of market power, satisfying one of the two elements required for antitrust liability.[34] Price gouging is not driven by cost increases. The only reason sellers can gouge is that neither they nor their competitors can increase supply in the short run, reducing competition and creating power over price. But the anticompetitive conduct element is missing in price gouging.[35] A genuine shortage is unexpected, meaning not created by sellers, whether through anticompetitive conduct or otherwise.[36] If demand were to outstrip supply because the seller were affirmatively to restrict supply by producing less and taking steps to prevent competitors from filling the gap, then there would be anticompetitive conduct.[37] But that is not the context of price gouging.

There is, however, one possible exception.

B. Toward a Per Se Rule against Surge Pricing

I argue in a recent law review article that surge pricing — the use of algorithms to price gouge — should satisfy antitrust's anticompetitive conduct requirement.[38] Surge pricing algorithms automatically increase prices in responses to surges in demand, allowing firms to price gouge in markets in which they would have been too slow to gouge in the past and to increase the speed with which they gouge in markets in which they would have gouged anyway.[39] Uber made surge pricing famous when the company starting using it to increase rideshare prices during peak demand periods, such as during bad weather.[40] But Uber is not alone in engaging in surge pricing; firms across the economy appear to be adopting the practice.[41]

Surge pricing is anticompetitive conduct because it is quick. Price gouging has always been a part of markets, because it always has been possible to raise prices faster than output during times of shortage. But surge pricing increases the gap between the moment when a firm can respond to surging demand by increasing prices and the moment when firms and their competitors can respond by increasing output.[42] Once upon a time it took a day or a week to change price labels. Often retailer management did not know there was a run on a particular product until it had run its course and inventories were depleted. With digital pricing and algorithms, firms can now identify demand surges as they unfold and adjust prices in real time.[43] That is anticompetitive, because surge pricing extends the period during which a seller can take advantage of the lack of competition made possible by an unexpected increase in demand.

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34 See Hovenkamp, *supra* note 4, at 103–4 (discussing the market power requirement).

35 See *id*. at 356–58 (discussing the conduct requirement).

36 If the shortage is expected, then the charging of high prices counts not as price gouging but rather as the extraction of scarcity rents. See David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, 43 Antitrust Bull. 801, 818 (1998) (calling these "Ricardian [scarcity] rents"). The same arguments that support the extension of the antitrust laws to prohibit price gouging may also apply to the extraction of scarcity rents, but that is not the subject of this article. See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1793–96 (arguing that antitrust should reach scarcity rents).

37 See Hovenkamp, *supra* note 4, at 358–59 (defining "exclusionary conduct").

38 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1766–82.

39 See *id*. at 1766–70.

40 See Ben Popper, *Uber Surge Pricing: Sound Economic Theory, Bad Business Practice*, The Verge (2013), https://www.theverge.com/2013/12/18/5221428/uber-surge-pricing-vs-price-gouging-law.

41 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1766–70 (describing adoption by businesses ranging from theme parks to apartment complexes); Stephan Liozu, *Penetration of the Pricing Function among Global Fortune 500 Firms*, J. Revenue Pricing Mgmt. 6 (2019) (finding that 22 percent of global Fortune 500 firms have in excess of 20 "dedicated pricing professionals," suggesting these firms use "revenue management" technologies).

42 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1766–67.

43 See *id*. at 1770–72.

To be sure, allowing firms to move quicker to exploit shortage-based market power is not the same thing as directly sabotaging competitors by refusing to sell them essential inputs.[44] But the distinction is not meaningful. Antitrust's mission is to use competition to restrain market power.[45] It follows that antitrust should intervene to stop defendants from engaging in activities that reduce the effects of competition, even if those activities do not directly harm competition in the sense of forcing a competitor out of the market. A firm that lacks the technology to raise prices quickly in response to a shortage experiences the lingering effects of competition for a longer period after the onset of the shortage than does a company that can adjust prices quickly. Antitrust can therefore prolong the twilight of competition after the arrival of a shortage by prohibiting surge pricing.

The argument is not as novel as might at first appear, because antitrust's *per se* rule against price-fixing is similar in kind.[46] For price-fixing does not normally spring whole from competitive markets. Instead, it is a way for firms to strengthen and institutionalize collusion that started as merely parallel conduct.[47] The price fixing does not harm competition directly — the firms have already stopped competing and started tacitly colluding — but instead strengthens or prolongs the effects of a pre-existing ebb in competition.[48] That makes price-fixing quite like surge pricing, a practice that magnifies the effects of a preexisting collapse in competition, rather than a practice that harms competition directly. Like the power incident to shortage, conscious parallelism is legal, but enhancing or prolonging its effects through a price fixing agreement is not.[49] Prolonging and enhancing the effects of shortage-based power through surge pricing should receive similar treatment.

C. Price Gouging Almost Always Harms Consumers

1. Price Gouging Harms Consumers Statically

Surge pricing should not just be illegal under the antitrust laws, but illegal *per se*, just like price fixing. The Supreme Court has said that a practice should be illegal *per se* when it always or almost always harms consumers.[50] That is true of price gouging generally, and certainly of price gouging achieved with surge pricing algorithms.[51] In choosing to ration with price, the seller forces the group that can afford to pay the ration price to pay prices in excess of the original low price that the firm could charge were the firm to ration based on place in line.[52] Thus surplus is transferred from consumers as a group to the firm in the form of profits, which is precisely the sort of wealth transfer that the antitrust laws seek to prevent.[53] To be sure, some consumers who would be able to buy at the gouging price may not be able to buy at the low price, because they may not get in line quickly enough. But others who could not afford to buy at the gouging price will be able to buy at the low price, and so in aggregate consumer surplus will be greater at the low price than at the gouging price, other than in some special cases.[54] It follows that whenever a firm engages in surge pricing, the firm harms consumers, by prolonging the period during which consumers face prices designed to ration access to the good.

2. Price Gouging Does Not Help Consumers Dynamically

Defenders of price gouging argue that any static harms to consumers from gouging are more than offset by dynamic benefits, because gouging

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44 See Hovenkamp, *supra* note 4, at 381–87 (discussing refusals to deal).

45 See *id*. at 387.

46 See *id*. at 327–35 (discussing the *per se* rule against price fixing).

47 See *id*. at 202 (describing "parallel behavior" by firms as the norm and conspiracy as adding to that parallelism).

48 See *id*.

49 See *id*.

50 See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 (1979).

51 For a graphical demonstration of the consumer harm incident to price gouging, see Woodcock, *The Economics of Shortages*, *supra* note 2.

52 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1770–71.

53 See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 201–6 (2008).

54 Consumer welfare is not *necessarily* greater under rationing via first-come-first-served relative to rationing with price because the value placed on the product by those who get in line first may be less than the value placed on the product by those who would buy at the ration price. Consider the following example. Suppose that there are only two units of a good available, but that there are three consumers who are willing to pay the good's original, pre-shortage, price of $1. The first consumer places a value of $100 on the good. The second consumer places a value of $3 on the good. And the third consumer places a value of $2 on the good. At the ration price of $3, consumer welfare in aggregate is $97. At the original price, consumer welfare is greater if the first two consumers get in line first ($101), and if the first and third consumers get in line first ($100), but less if the second and third consumers get in line first ($3).

acts as a signal to suppliers to ramp up production or to shift higher-cost inventories into the market.[55] If sellers gouge in the early stages of the shortage, they argue, the price they charge will serve as a rough indicator of the maximum price that other sellers will be able to charge if they enter the market.[56] That conveys valuable information upon which the market can act.[57] Sellers will enter the market, selling at prices slightly below the gouging price, until eventually price is driven down to a new equilibrium and the shortage disappears.

Many scholars uncritically accept this account of price gouging.[58] But the account does not actually establish that gouging is *better* for consumers than charging low prices, only that gouging is one way of achieving long-run equilibrium.[59] It turns out that charging a low price, rationing based on place in line, and letting the good sell out is just as good a way to signal the need for market entry.[60] When a firm does not raise prices during a demand surge, and just lets the good sell out, the fact that the good sells out conveys to other sellers the same information that a gouging price would convey to them: that demand exceeds supply and some reward can therefore be expected for entering the market.[61]

The only difference between gouging and selling out as signaling mechanisms is that selling out tells sellers that they are likely to be able to sell at a price a little above the current (low) price, whereas gouging tells sellers that they are likely to be able to sell at a price a little below the current (high) price.[62] A consequence of this difference is that selling out may even be a more efficient way of achieving long-run equilibrium. Both selling out and gouging serve to induce entry into the market, but selling out at low prices induces the lowest-cost entry to take place first because the sell-out price conveys information about the minimum price that new entrants can charge if they enter the market, rather than information about the maximum price that new entrants can charge, as happens with gouging. That is an advantage from an efficiency perspective, and good for consumers, because it means that consumers will face lower prices as the market adjusts to a new equilibrium.

It was once the case that charging low prices and rationing based on place in line carried with it a special efficiency penalty, because waiting in lines is a waste of time.[63] It was common to hear free-market economists marvel at the parsimony of a price system that could embody in a single number — price — all the information that the market might need to adjust to unexpected spikes in demand, whereas by contrast price-regulated markets subjected consumers to endless lines.[64]

The internet has almost completely eliminated the inefficiency associated with rationing based on place in line.[65] Whereas a customer facing a shortage 20 years ago had to go down to the store, and perhaps get there early and wait, only to learn that the shortage item had sold out, today the customer logs into an online store and instantaneously obtains an answer to the question whether he will be able to buy.[66] This is true not only for items sold online but also for items sold in stores, as many retailers now allow customers to reserve items online for in-store pickup.[67] Today rationing based on place in line is an efficient alternative to rationing with price, making efforts to use surge pricing to enhance the practice of ration pricing a good candidate for *per se* condemnation under existing single-firm conduct rules in antitrust.

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55 See, e.g. J.D. Tuccille, *Price-Gouging Laws Will Do More Harm Than Good During the Coronavirus Pandemic*, Reason (Mar. 16, 2020), https://reason.com/2020/03/16/price-gouging-laws-will-do-more-harm-than-good-during-the-coronavirus-pandemic/ (stating that price gouging "tells manufacturers and distributors that they should increase production").

56 See *id.*

57 See *id.*

58 See, e.g. Antony Davies & James Harrigan, '*Price Gouging' During Crisis a Good Thing*, TribLIVE, https://triblive.com/opinion/antony-davies-james-harrigan-price-gouging-during-crisis-a-good-thing/.

59 See Woodcock, *The Economics of Shortages*, *supra* note 2; Woodcock, *The Hidden Shortages of the Market Economy*, *supra* note 2.

60 See Woodcock, *The Economics of Shortages*, *supra* note 2.

61 See *id.*

62 See Woodcock, *The Hidden Shortages of the Market Economy*, *supra* note 2.

63 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1789–90.

64 See, e.g. F. A. Hayek, The Fatal Conceit: The Errors of Socialism 86–87 (2011).

65 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1789–93 (discussing the "low cost of queuing in the information age").

66 See *id.*

67 See Woodcock, *The Economics of Shortages*, *supra* note 2.

V. TOWARD A *PER SE* RULE AGAINST PRICE GOUGING GENERALLY

A *per se* rule against surge pricing would reach a practice that appears to be taking root across the economy, but it would fall far short of a general ban on price gouging, because it would not prevent price gouging by conventional, non-algorithmic means. Under a *per se* rule against surge pricing, supermarkets would not be able to build surge pricing into their pricing algorithms, for example. But if the manager of a particular branch were to watch a run on eggs develop in Aisle Two, he would still be free to impose a surcharge without violating the antitrust laws, although state price gouging laws might limit his options.

Antitrust can go further to ban all price gouging, but only if antitrust at last comes to terms with the radical implications of the "Chicago revolution" that brought the consumer welfare standard to antitrust starting in the 1970s.[68]

Before that revolution, courts thought the mission of the antitrust laws was to promote competition regardless of the effect on the welfare of consumers.[69] Thus at the time a court would have thought little of breaking up a large firm in order to enable competitors to enter the market, even if the large firm was better positioned to provide the highest-quality products to consumers at the lowest prices.[70] That approach changed in the 1970s, with the introduction of the consumer welfare standard, which holds that antitrust should promote competition only when competition is consistent with maximizing consumer welfare in the sense of ensuring that consumers receive the highest quality products at the lowest possible prices.[71] The consumer welfare standard created the obsessive focus on prices, and the power to raise them, that characterizes antitrust today, effectively adding market power to anticompetitive conduct as a second independent requirement for antitrust liability to exist.[72]

The addition of this requirement caused many anticompetitive activities that once would have run afoul of the antitrust laws no longer to do so, because the firms engaging in them did not have the power to harm consumers.[73] But what antitrust observers have so far failed to appreciate is that if the consumer welfare concept may be used to roll back antitrust enforcement, there is no principled reason why it should not be used to expand enforcement as well.[74] A commitment to protecting consumers, coupled with the ability to revise old rules, would seem to demand that antitrust eliminate the anticompetitive conduct requirement and condemn market power even when there are no tools available for the court to use to eliminate the power through competition and the court can therefore only remedy the violation by dictating lower prices.[75]

Eliminating the conduct requirement would transform antitrust from competition regulator to economy-wide price regulator. Consistent with antitrust's roots in competition policy, enforcers of this new regime would still be required to use competition to reduce power whenever possible. But now enforcers would be able to fall back on price regulation whenever no avenue for the promotion of competition is available to them. European Union competition law already takes this approach.[76] I have argued that antitrust could take baby steps in this direction by eschewing injunctive price setting and instead relying on nominal damages and the symbolism of an adverse judgment to punish excessive pricing.[77] Such an approach would minimize error costs, because firms subject to mistaken findings of liability could simply pay the dollar in damages and carry on.[78]

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68 See Woodcock, *supra* note 2, at 1756–60. For the Chicago revolution, see generally George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & Econ. S1 (2014).

69 See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (Supreme Court 1958) (stating that "the policy unequivocally laid down by the [Sherman] Act is competition" rather than low prices or high product quality).

70 See Gavil et al., *supra* note 15, at 486–89 (discussing the Alcoa case).

71 See Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 338–48 (2010) (surveying the development of case law and practice).

72 Proof of market power had long been required in single-firm conduct cases (under the "monopoly power" moniker, but power did not become a general antitrust requirement until the need to prove it was extended to most collusion cases as part of the Chicago revolution. See Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L.J. 363, 373–74 (1998) (tracing the first use of the term "market power" to a 1969 case).

73 See Priest, *supra* note 68, at S3–7 (cataloguing Chicago-driven changes to the antitrust laws).

74 See Woodcock, *supra* note 2, at 1756–60.

75 See *id.*

76 At least on paper. Actual cases are few. See Liyang Hou, *Excessive Prices within EU Competition Law*, 7 European Competition Journal 47, 47–51 (2011).

77 See Woodcock, *supra* note 2, at 1772–80.

78 See *id.* at 1776, 1778.

But in some contexts, including price gouging, the danger of error is so low that a light touch is unnecessary.[79] An enforcer need only observe a spike in demand, and a coincident spike in price before supply can adjust, in order to identify gouging. Because the pre-shortage price must have been chosen to cover costs, there can be no question that the price increase is unnecessary, and therefore harmful to consumers, and consequently no need for enforcers to engage in the difficult process of measuring costs that normally bedevils price regulation schemes.[80] That makes price gouging of any kind, not just surge pricing, an ideal first target for an expanded antitrust willing to take the consumer welfare standard beyond the confines of antitrust's legacy competition remit to dictate consumer-friendly pricing.

The gouging context is also peculiarly amenable to a new price regulatory role for antitrust, because the consumer-friendly price the court would need to dictate is directly observable: it is the price that the seller charged immediately before the unexpected surge in demand.

VI. A *PER SE* RULE AGAINST PRICE GOUGING WOULD TRANSFORM THE ECONOMY

The advantage of using antitrust to pursue price gouging is that antitrust's laser focus on consumer welfare would allow antitrust to do a better job of isolating genuine cases of gouging than do state gouging statutes today.

State gouging statutes tend to be both overbroad and under-broad. They tend to be over-broad because they apply for arbitrarily-fixed time periods, but price gouging exists only while the market is unable to increase supply.[81] Once new supply comes online, the cost of that new supply may push prices up and firms should be able to incorporate those costs into prices. State price gouging laws also tend to be under-broad because they apply only to certain products and only to price increases in excess of a certain percentage.[82] But the economic definition of price gouging does not distinguish between the nature of the product at issue or the magnitude of the price increase. Using a price increase of *any* amount to ration access to *any* product in short supply is price gouging in the economic sense, and harms consumers.

An antitrust prohibition on price gouging would eliminate the mismatch between actual price gouging and state price gouging laws. Governed by the consumer welfare standard, an antitrust prohibition would apply only during periods of genuine shortage, before manufacturing and distribution processes can respond to demand. After that, antitrust would not prevent prices from rising to enable firms to bring higher-cost inventories to market to satisfy demand. In the California egg case, for example, it would be illegal gouging in antitrust terms for supermarkets to raise prices on existing egg inventories in response to pandemic-driven demand surges. But it would not be an antitrust violation to raise prices in order to acquire new inventories. By contrast, California's price gouging law would likely condemn both the shortage-driven price increase and the cost-driven price increase without distinction.[83]

But an antitrust prohibition on price gouging would also extend far beyond state price gouging laws to cover conduct that Americans do not normally associate with gouging, even though the conduct qualifies as such in the economic sense.[84] Consider the stock market. Price increases in stocks are often triggered by unexpected increases in demand. Moreover, the time required for firms to issue additional shares is often counted in months and years. It follows that any investor who offers shares at the market price, but ends up selling at a higher price due to a surge in demand, is gouging.[85] Making a profit on a sale of shares never violates state price gouging laws, but it would violate an antitrust rule against price gouging.

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79 I have argued that data-driven personalized pricing is another example of a consumer-harmful pricing practice that courts can safely ban. See Ramsi A. Woodcock, *Personalized Pricing as Monopolization*, 51 Conn. L. Rev. 311, 319–20 (2019).

80 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, supra note 2, at 1770–71, 1777.

81 See, e.g. Cal. Penal Code 396(b) (prohibiting price gouging for 30 days after declaration of a state of emergency).

82 See, e.g. *id*. (restricting coverage to an enumerated list of product categories and requiring an increase in price in excess of 10 percent).

83 In theory, a defendant can use evidence of cost increases to escape liability under the California law. See *id*. (exempting cost-driven price increases). But proving costs is hard. By contrast, under an antitrust prohibition on price gouging, the defendant would only need to show that the defendant raised prices on new inventory, rather than old pre-shortage inventory, in order to escape liability, because antitrust's consumer welfare standard would allow antitrust to apply the economic definition of price gouging and honor its implications.

84 See Woodcock, *The Hidden Shortages of the Market Economy*, *supra* note 2.

85 See *id*.

So too would a great many real estate transactions.[86] Any homeowner who lists a home at one price, but sells at a higher price because buyers have gotten into a bidding war over the home, gouges the winning bidder.[87] Needless to say, state gouging laws do not apply, but an antitrust rule against price gouging would. Incorporating a rule against price gouging into the antitrust laws would transform the economy from one that rations based on willingness to pay, and by extension based on wealth, to one that rations on the more egalitarian basis of first-come-first-served.[88]

VII. CONCLUSION

The pandemic-related shortages currently rippling through the economy make this an ideal moment for antitrust enforcers to experiment with antitrust condemnation of price gouging. Antitrust's consumer welfare standard would allow antitrust to do that with a combination of focus and breadth that state price gouging statutes lack.

86 See *id.*

87 See *id.*

88 See *id.*

INTERIM MEASURES: A REMEDY TO DEAL WITH PRICE GOUGING IN THE TIME OF COVID-19?

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I. INTRODUCTION

During the coronavirus (COVID-19) pandemic, the price of products in high-demand, such as face masks and sanitisers, has been heavily inflated. As firms are struggling to cope with the high demand and fluctuations in their costs, governments and the general public urge National Competition Authorities ("NCAs") and the European Commission to lead the fight against firms charging excessive prices to consumers.[2] In the same vein, Commissioner Vestager stated that the European Commission will stay even more vigilant than in normal times if there is a risk of virus-profiteering and that COVID-19 should not be a shield against competition law investigations.[3]

In this context, it has been suggested[4] that NCAs should take prompt action against firms' price hikes through interim measures, especially after the recent interim measures decision in *Broadcom*.[5] Likewise, NCAs, such as the Competition and Markets Authority ("CMA") in the UK, have demanded repeatedly the greater use of interim measures. Indeed, it is important for antitrust enforcers to be able to apply provisional remedies by means of interim relief, in addition to commitment and prohibition decisions. Provisional remedies can avoid market developments that enforcers cannot easily remedy at a later stage, when a final decision is adopted. However, as this article will show, it is questionable whether the adoption of interim measures is an easy and effective way to deal with Coronavirus-related profiteering in the EU. Though interim measures require only a *prima facie* finding of an infringement and can order the maintenance or the restoration of market conditions in favour of the public interest, the European Commission has made rare use of this remedy and as a result, we have only little insights how it applies. Moreover, the practical and conceptual difficulties that excessive pricing cases in the time of COVID-19 involve make rather problematic the fulfilment of the substantive requirements for granting interim measures, particularly the requirement for irreparable harm to competition.

The article is structured as follows: Section II discusses the first European case on interim measures as well as their regulatory framework before and after the adoption of Regulation 1/2003. Section III analyses the *prima facie* condition and shows that despite the relatively low threshold that the EU Courts set for a prima facie condition, there are still various hurdles making it difficult for the European Commission to prove there is "at first sight" infringement of competition rules. Section IV deals with the second substantive requirement for granting interim measures, i.e. the urgent need for protective measures due to the risk of serious and irreparable harm to competition. As this section will show, it is difficult for the European Commission to satisfy the requirement for irreparable harm in excessive pricing cases, because both the prohibition and the commitment decisions are effective remedies in the European Commission's antitrust enforcement toolkit for the reasons explained below. In section V, the article ends with a summarising conclusion.

2 A price is excessive if "it has no reasonable relation to the economic value of the product supplied." See Case 27/76 *United Brands v. Commission of the European Communities*, [1978] ECR 207; [1978] 1 CMLR 429.

3 Kyriakos Fountoukakos, Peter Rowland & Dafni Katrana for Herbert Smith Freehills "Exploring Opportunities: The Impact of COVID-19 on Competition Law in the Pharmaceutical Sector (Europe)" https://www.herbertsmithfreehills.com/latest-thinking/exploring-opportunities-the-impact-of-covid-19-on-competition-law-in-the.

4 George S. Cary, Maurits Dolmans, Bruce Hoffman, Thomas Graf, Leah Brannon, Richard Pepper, Henry Mostyn, Alexis R. B. Lazda, Savannah Haynes, Kristi Georgieva & Jan Przerwa "Exploitative abuses, price gouging & COVID-19: The cases pursued by EU and national competition authorities," April 30, 2020, e-Competitions Competition Law & Covid-19, Art. N° 94392 https://www.concurrences.com/en/bulletin/special-issues/competition-law-covid-19-en/exploitative-abuses-price-gouging-covid-19-the-cases-pursued-by-eu-and-national-en#nh20.

5 The European Commission ordered Broadcom (Case AT. 40608), the world leader in the supply of chipsets for TV set-top boxes and modems, to unilaterally cease to apply the anticompetitive provisions identified by the Commission. See Commission press release of October 16, 2019 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109.

II. INTERIM MEASURES BEFORE AND UNDER REGULATION 1/2003

The European Coal and Steel Community Treaty ("ECSC Treaty") was the first that contemplated the application of interim measures in Article 66(5) in order to safeguard the interests of competing undertakings and of third parties. In virtue of this article, the European Commission issued its first decision on margin squeeze and adopted an interim measure against an undertaking in a dominant position. In that case, it was held that the dominant firm had an obligation to arrange its own prices to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term.[6] Despite this decision and the explicit provision in the ECSC Treaty, the first antitrust Regulation 17 [7] did not contemplate the remedy of interim measures. The Court of Justice soon wanted to fill this legislative gap.

The power of the European Commission to grant interim measures in the context of the application of the competition rules of the Treaty was firstly established in 1980 in the *Camera Care* case.[8] In that case, the Court of Justice clarified in paragraph 28 of its judgment that protective measures may be granted only where the practices of certain undertakings are *prima facie* such as to constitute a breach of the Union rules on competition in respect of which a penalty could be imposed by a decision of the Commission. Furthermore, such measures are to be taken only in cases of proven urgency, in order to prevent the occurrence of a situation likely to cause serious and irreparable damage to the party applying for their adoption or intolerable damage to the public interest.

In legislation, interim measures were enshrined with the adoption of Regulation 1/2003.[9] Article 8 of the Regulation contemplates what the Court of Justice in *Camera Care* case held, i.e. that in cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures. The Regulation brought about two major changes in relation to the regime developed by the case law. The first change was that the European Commission could order interim measures on its own initiative, enabling in this way the *ex officio* initiation of the procedure by the Commission, without needing the prior request of a complainant.[10] This is a development that has paved the way for further use of interim measures by the European Commission and from a procedural perspective, it enables the Commission to take swift action whenever there is urgency, like in the case of COVID-19. The second change was that the risk of serious and irreparable harm should amount to harm to competition, thus demonstrating that the order of interim measures focuses henceforth on the safeguarding of the public interest and not of individual rights.[11] This has been another step in the right direction, as it makes the remedy of interim measures comply with the rationale of Articles 101 and 102 TFEU ("Treaty on the Functioning of the European Union"), which is not the protection of individual undertakings but the protection of competition in the market. Moreover, this change extends the protective scope of interim measures, which cover not only harm to the competition structure, but also harm to consumers.[12] Such a possibility unties the European Commission's hands, as it has the freedom to pause anticompetitive conducts, such as exploitative excessive pricing, that harm the consumers without necessarily harming other market players.

6 National Coal Board, National Smokeless Fuels Ltd and the National Carbonizing Company Ltd, 79/185/ECSC (1976) OJ L 35/6.

7 Council Regulation No. 17, First Regulation Implementing Articles 85 and 86 of the Treaty (1959-62), OJ Spec. Ed. 87.

8 Case T-44/90 (1992) La Cinq v. Commission, ECR II-1, (1992) 4 CMLR 449.

9 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1, last amended by Council Regulation (EC) 1419/2006, (2006) OJ L269/1.

10 Gábor Gál & Konstantina Strouvali "Interim Measures" in Ekaterina Rousseva (ed), *EU Antitrust Procedure* (Oxford University Press, 2020), p. 295.

11 *Ibid.* 290; See also Draft Regulation implementing Articles 81 and 82 of the Treaty, COM (2000) 582 final-CNS 2000/243-Explanatory Memorandum, Article 8; Commission Notice on handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004) OJ C 101/65, points 16 and 80, Staff Working Paper on Regulation 1/2003, SEC (2009) 574 final, point 111.

12 Case IV/30.696 *Distribution System of Ford Werke* (1982) OJ L 256/20, para 42, declared void in joined cases 228 and 229/82 *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v. Commission* of the European Communities, ECLI:EU:C:1984:80.

III. *FUMUS BONI IURIS- PRIMA FACIE* FINDING OF AN INFRINGEMENT

The first requirement for granting interim measures is the *prima facie* finding of an infringement. Prior to the adoption of Regulation 1/2003, the European Commission has not applied a very high *prima facie* standard. In *Peugeot*, the Court held that serious doubts regarding the legality of the conduct are sufficient to trigger interim measures.[13] In *La Cinq*, the *prima facie* requirement was held to be "the probable existence of an infringement."[14]

The relatively low threshold that the EU Courts set for a *prima facie* condition arguably makes it easier for antitrust enforcers to establish excessive pricing under the urgent circumstances that COVID-19 has caused. It is sufficient for the European Commission to prove that there is exploitative excessive pricing at first sight or that its conclusions about the excessive pricing at first sight are not wrong.[15] Yet, the threshold for defending the adoption of interim measures against applications for suspension is still high, as interim orders may have negative consequences on the business activity of the undertakings involved. Hence, it is not an exaggeration to say that the procedural requirements for the adoption of interim measures outweigh the *prima facie* condition. To be more specific, the Commission must open proceedings according to Article 2 of Regulation 773/2004. Then, it must adopt a Statement of Objections and give the opportunity to the undertaking at issue to be heard.[16] This is done by giving the undertaking access to the relevant file of the case and by enabling it to reply to the Statement of Objections and have an oral hearing.[17] Moreover, the European Commission must consult the Advisory Committee before adopting any interim orders.[18] As a result, the interim measure procedure can take on average three to eight months.[19] This means that the European legislator gives with one hand and takes away with the other. The lengthy interim measure procedure makes it impossible for the European Commission to take urgent action and apply promptly the relevant remedy, negating in this way the mission of an interim relief to ensure the effectiveness of competition law enforcement in a timely manner. Perhaps, this is one of the reasons that we have not seen widespread application of this remedy in the EU, despite the apparent price gouging that COVID-19 has caused.

In addition to this, after the adoption of Regulation 1/2003, it is doubtful which the exact scope of the *prima facie* condition is, as there has been only one interim measures decision.[20] The decision has not been published yet and it has not been reviewed by the national courts of the EU Member States. Moreover, Broadcom, the undertaking against which the European Commission imposed interim measures, offered commitments to meet the concerns expressed by the Commission in its preliminary assessment, without admitting any of the conduct subject to the investigation. The lack of experience with the application of Article 8 of Regulation 1/2003 probably makes the European Commission quite reticent to impose interim measures against firms that charge excessive prices in the time of COVID-19, as the exact scope of the *prima facie* condition had repeatedly been a ground for appeal in interim measures decisions.

Furthermore, there may be major difficulties for the European Commission to come up with a *prima facie* finding of infringement, when the undertaking's activity does not violate the discrete prohibitions of Articles 101 and 102 TFEU, i.e. when the price gouging is genuinely unilateral and not collusive, due to an abnormal level of demand, in terms of both the number of consumers who desire the item and the sense of urgency that increases that desire or when there is not only one dominant company in the market setting excessive prices on goods and services in high demand. Where there is an oligopoly and the firms proceed to tacit coordination regarding the prices they charge, which falls short of an agreement or concerted practice, usually the European Commission avoids the condemnation of their parallel behaviour as abusive because in principle it does not want to act as a price regulator.[21] This is why the European Commission has initiated only few investigations of high prices under Article 102 TFEU. In the same vein, there are practical and conceptual difficulties of proof associated with finding exploitative excessive pricing, or otherwise exploitative abuse of collective dominant position by charging prices which are higher than they would be in a competitive market. Some of these difficulties include the market share threshold of the infringing undertakings, which shall be 40 percent and more in

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13 Case T-23/90 *Peugeot v. Commission*, EU:T:1991:45, paras 21 and 63.

14 Case T-44/90 *La Cinq v. Commission*, ECLI:EU:T:1992:5, paras 32, 59, 62, 66.

15 See the Order of the President of the Court of First Instance in Case T-184/01 *R IMS Health v. Commission*, ECLI:EU:T:2001:259.

16 Gál & Strouvali, *supra* note 10, p. 303.

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 *Broadcom*, Case AT. 40608, see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40608.

21 Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 2012), p. 580.

order to establish their dominant position in the market, the calculation of the difference between the dominant firms' production costs and the price of the product/service, as well as the several methods used to analyse excessive pricing.[22] Hence, these hurdles may make it hard for the European Commission to show that the relevant undertaking infringes "at first sight" competition rules, thus interim measures should be taken.

IV. RISK OF SERIOUS AND IRREPARABLE HARM TO COMPETITION

The second requirement for granting interim measures is the urgent need for measures due to the risk of serious and irreparable harm to competition. The requirement of emergency is met, if there is likelihood of serious and irreparable harm. As explained above when talking about the *prima facie* condition, there is no need for certainty that the harm is imminent, but it is enough for the European Commission to prove that the harm is foreseeable with an adequate degree of probability.[23] The concept of serious and irreparable harm requires severity of harm, which is assessed on a case-by-case basis, as well as irreversibility of market conditions that render the application of interim measures necessary in order to secure effective enforcement.[24] Even though it may not be difficult for the European Commission to show that excessive pricing can cause serious harm to consumers, it may be difficult for it to prove that the high standard of irreparability is met. This is because in case of price gouging the market developments are reversible, in the sense that a prohibition or commitment decision may be able to reverse the harm. It is well known that prohibition decisions have a strong deterrent effect on the infringing undertakings at issue, but also on the other market players, especially when the European Commission imposes fines as well. Prohibition decisions establish irrefutable evidence before the national courts of EU Member States that the infringing undertakings at issue were responsible for breaching Article 101 and/or 102 TFEU. Hence, as soon as the addressees of prohibition decisions are notified for its adoption, the way for injunctions or damage awards against them is open before the national courts of the EU Member States.[25]

As far as the commitment decisions are concerned, the European Commission issues them when it intends to adopt a decision requiring that an infringement be brought to an end, and the companies under investigation prefer to offer commitments in order to remove the European Commission's competition concerns as expressed in a preliminary assessment.[26] Commitment decisions may also be preferable if the case is not one where a fine would be appropriate or when efficiency reasons justify that, the Commission limits itself to making the commitments binding, and does not issue a formal prohibition decision.[27] In the time of COVID-19, commitment decisions could be a good remedy for exploitative excessive pricing because they restore undistorted conditions of competition in the markets in a swift and effective manner, as the administrative process for commitment decisions is generally short.[28] Commitment decisions can be either behavioural or structural and can be limited in time, meaning that the European Commission is able to reassess them if a material change takes place in the meantime.[29] They do not establish an infringement and do not require any admission by the parties, as they only require commitments as to future behaviour.[30] This can be an incentive for firms to pursue the commitment route, as they know that in this way they will avoid any damage to their reputation as well as a formal finding of an infringement against them. In addition, the Court of Justice does not require a strict proportionality test for assessing the remedies imposed by the European Commission in a commitment decision, as it would do in case of interim measures or of a prohibition decision.[31] If a firm does not comply with the commitment decision, the European Commission is able to impose a fine up to 10 per cent of the firm's annual turnover without having to prove any violation of the competition rules.[32] Therefore, a commitment decision saves money and time. Moreover, the

22 For further information about the practical and conceptual difficulties to pursue excessive pricing cases in the time of COVID-19, see Penelope Giosa "Exploitative Pricing in the Time of Coronavirus - The Response of EU Competition Law and the Prospect of Price Regulation" Journal of European Competition Law & Practice, lpaa029, https://doi.org/10.1093/jeclap/lpaa029.

23 Case C-149/95 *P (R) Commission v. Atlantic Container*, ECLI:EU:C:1995:257, para 38; Case C-471/00 *P(R) Commission v. Cambridge Healthcare*, ECLI:EU:C:2001:218, para 108.

24 Gál & Strouvali, *supra* note 10, p. 298.

25 *Ibid.* 210.

26 European Commission "Memo/04/217- Commitment Decisions (Article 9 of Council Regulation 1/2003 Providing for a Modernised Framework for Antitrust Scrutiny of Company Behaviour) https://ec.europa.eu/commission/presscorner/detail/en/MEMO_04_217.

27 *Ibid.*

28 European Commission "Antitrust: Commitment Decisions- Frequently Asked Questions" https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_189.

29 European Commission "Memo/04/217," *supra* note 26.

30 European Commission "Cartel case Settlement" https://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.htm.

31 European Commission, *supra* note 28.

32 *Ibid.*

European Commission is able to impose periodic penalty payments of up to 5 per cent of the average daily turnover of a firm until it complies with the commitment decision.[33]

V. CONCLUSION

Interim measures are cease-and-desist orders that can be issued when there is an imminent risk of serious and irreparable harm to competition. The adoption of Regulation 1/2003 and the direct provision for this remedy under Article 8 of this Regulation has brought several positive changes. The European Commission can now order interim measures on its own initiative, without needing the prior request of a complainant. In addition, after Regulation 1/2003 the scope of interim measures has embraced the harm to competition, enabling in this way the European Commission to seek interim relief, in case of harm to consumers.

These two major developments give the impression that interim measures are appropriate to deal with Coronavirus price gouging. However, this article has highlighted and explained the significant constraints on the ability of the European Commission to take interim measures in price gouging cases. Firstly, the threshold for defending the adoption of interim measures against applications for suspension is high and this is because their impact on the infringing undertakings may be great. Secondly, the interim measure procedure can take on average three to eight months, thus undermining the main goal of this remedy to ensure effectiveness of competition law enforcement in a timely manner. Thirdly, the explicit provision of interim measures under Regulation 1/2003 has caused uncertainty regarding the scope of the *prima facie* condition, as *Broadcom* is the only interim measures case after the adoption of Regulation 1/2003. This uncertainty is getting greater, if we also bear in mind that the exact scope of the prima facie condition had repeatedly been a ground for appeal in interim measures decisions. Fourthly, there are major difficulties that make it hard for the European Union to prove *prima facie* infringement of competition rules, when the undertaking's activity is not against the discrete prohibitions of Articles 101 and 102 TFEU.

The article has dealt with two cases, i.e. where the undertakings are in an oligopolistic market and they charge excessively high prices according to the conditions of the market on which they operate and where collectively dominant firms set unfairly high prices on goods and services in high demand. In the first case, the conduct of the undertakings may easily fall within the ambit of parallel behaviour, which is not caught by Article 101(1) TFEU and the European Commission avoids acting as a price regulator. In the second case, there are evidential difficulties in finding exploitative abuse of collective dominant position by charging prices, which are higher than they would be in a competitive market. Indicatively, it is difficult for the European Commission to prove that the infringing companies enjoy a position of dominance in the market, i.e. their market share threshold is 40 percent and more, because the sellers of goods in high demand due to the COVID-19 outbreak are often small businesses. Fifthly, it is hard for the European Commission to prove that the second procedural requirement for the adoption of interim measures, i.e. the irreparable harm to competition, is fulfilled. In case of price gouging, the market developments are reversible, as both prohibition and commitment decisions are suitable remedies to reset prices to a non-excessive level and reverse the relevant harm.

For all these reasons, the article concludes that interim measures as they currently stand, are not an easy and effective way to deal with Coronavirus-related profiteering in the EU.

33 *Ibid.*

PRICE GOUGING UNDER BRAZILIAN COMPETITION LAW: BETTER LEFT DORMANT?

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I. INTRODUCTION

Price gouging was, previously, a dormant theme in Brazilian competition policy and has now resurfaced in the midst of the COVID-19 pandemic (much like in other antitrust jurisdictions). Brazil's Competition authority – the Administrative Council for Economic Defense ("CADE") – has in the past pursued price gouging as a theory of harm in a number of cases (between 1994 and today, more than 60 cases where opened).[3] At the time of writing, there are still a few price gouging investigations being conducted, out of which at least one (a preliminary procedure targeting a number of companies in the healthcare/pharma sectors) was opened in the context of COVID-19.[4]

CADE has however never convicted companies for price gouging. The view in some of CADE's precedents – articulated by one of the authors of this brief piece[5] – is that economic theory simply has not, to date, developed to a point where there is wide consensus on the standards and approach that should be adopted by enforcers so as to assess whether a given price increase falls under the legal concept of abusiveness/exploitation. This in turn meant that the provision in Law nº 8,884/1994 – the Brazilian competition law in force at the time in which price gouging was a hot topic, later overhauled by Law 12,529/2011 – which specifically established price gouging as an antitrust infringement was legally ineffective. Whether or not such view ultimately influenced the Brazilian Congress, fact of the matter is that, in Brazil's current competition (Law 12,529/2011), there is no legal provision which unequivocally establishes price gouging as an antitrust infringement (as opposed to Law 8,884/1994).

However, price gouging can still technically be pursued as a theory of harm on the basis of the broad wording of Article 36 of Law nº 12,529/2011, which some suggest was intentionally left vague so as to ensure that Brazilian antitrust enforcers have the discretion to pursue new theories of harm backed by sound economic support but that may not have been specifically anticipated by lawmakers (and thus embodied in a specific legal provision).[6]

It has taken us the COVID-19 pandemic to put the following question back on the spotlight in Brazil: is it still worth having CADE open price gouging investigations, or should CADE adopt a policy of no longer pursuing price gouging claims (which is largely the policy being adopted in the period after the enactment of Law 12,529/2011 and before the COVID-19 pandemic)?[7] We believe that the answer is affirmative: CADE should stop waiting for economic theory to catch up and acknowledge the limited relevance of price gouging as a standalone theory of harm worth pursuing. That does not mean we are suggesting that excessive pricing be left entirely unregulated – clearly some form of policy action may be required in certain circumstances, particularly in moments of acute crisis and artificial formation of monopolies like the COVID-19 pandemic. We just do not think that the right way forward is through Brazilian competition policy, and we point to other avenues in which we believe the many complex issues around price gouging might be more productively discussed and addressed.

3 See Ribeiro, Eduardo Pontual & Mattos, Cesar, "The Brazilian Experience with Excessive Pricing Cases: Hello, Goodbye," In: Excessive Pricing and Competition Law Enforcement, pp.173-187, 2018.

4 See https://www.conjur.com.br/dl/cade-investiga-empresas-aumentando.pdf.

5 See Ragazzo, Carlos, "A Eficácia Jurídica da Norma de Preço Abusivo," Revista de Concorrência e Regulação, 2012, pp. 189-211.

6 See Mendes, Francisco Shertel, "O controle de condutas no Direito Concorrencial Brasileiro: Características e Especificidades," Master's dissertation submitted to the University of Brasilia, 2013, available at https://repositorio.unb.br/bitstream/10482/14731/1/2013_FranciscoSchertelMendes.pdf.

7 For instance, CADE's General-Superintendence dropped a price gouging investigation opened in 2014 after roughly one year, and explained that "*Regarding price gouging claims, CADE has adopted the position of rejecting them either because the investigated firms did not possess dominance or because of the principle that competition policy should not be confused with price control.*" See Preliminary Investigation nº 08700.007937/2014-34.

II. PRICE GOUGING TODAY: STILL LARGELY THE SAME OBSTACLES FOR ENFORCEMENT?

As noted above, although the competition law currently in force in Brazil (Law nº 12,529/2011) contrasts with its predecessor by not specifically establishing price gouging as an antitrust offense, CADE may still pursue price gouging cases on the basis of the broad wording of Article 36, and the non-exhaustive nature of the list of competition offenses listed under paragraph 3º of said provision.[8] Notwithstanding, the fact is that there is still no sound economic theory which Brazilian enforcers can rely on when pursuing price gouging claims. More specifically, there is no economically sound way for enforcers in Brazil to assess whether a given price increase qualifies as "abusive" (which is broadly similar to the "unfairness," or "excessiveness," or "exploitative" standards that enforcers in other jurisdictions may rely on to assess price gouging cases). Further, it is unclear what Brazilian enforcers should actually do when there is a finding of price gouging: adequate remedies to address the problem are yet to be designed and tested. Recent developments regarding price gouging investigations in other antitrust jurisdictions seem to suggest that this is still largely true today.

The United Kingdom, for example, is arguably the jurisdiction where price gouging has in the recent past sparked the most attention from the competition community. This happened most notably because of an investigation opened by the Competition and Markets Authority ("CMA") into whether Flynn Pharma and Pfizer had engaged in price gouging: there was evidence that, between 2012 and 2016, Flynn (acting as Pfizer's distributor) increased the prices charged to wholesalers for Epanutin (used to treat epilepsy) by 2,680 percent. In 2016, the CMA fined Pfizer and Flynn Pharma a total of EUR 105 million upon concluding that the companies had engaged in excessive pricing. So as to verify whether the companies had engaged in excessiveness, the CMA relied on a cost-plus analysis – derived from the United Kingdom's voluntary Pharmaceutical Price Regulation Scheme – to set a benchmark of 6 percent profit on sales margin: on that basis the CMA concluded that Flynn charged between 31-133 percent above the benchmark for Epanutin. However, in 2018, the CMA's decision was overturned by the Competition Appeal Tribunal ("CAT"), which found that the CMA had committed factual and legal errors when concluding that Flynn's prices were excessive.[9] Earlier this year, the Court of Appeal of England and Wales held that the CMA did not adequately prove that Pfizer and Flynn had engaged in price gouging but concluded that the enforcer was not required to pull together a hypothetical benchmark price in order to assess whether a given price increase was excessive. The case was remanded to the CMA for further investigation, and its overall fate remains uncertain.

Despite the substantial criticism that the CMA's decision in *Pfizer/Flynn* attracted, the United Kingdom's enforcer opened, in the context of COVID-19, at least two price gouging investigations involving hand sanitizer products. In a statement issued in mid-July of this year,[10] the CMA announced that it was officially dropping the investigations after less than one month of analysis: although the enforcer is still investigating whether one pharmacy charged excessive prices and noted that it may reopen the investigations it drops in light of new evidence, the CMA acknowledged that there was no reason to continue investigating the companies given the available evidence. The opening of the investigations had been interpreted by the antitrust community as a "warning signal" from the CMA to deter companies from engaging in excessive pricing. While it is unclear to what extent the legal challenges to the CMA's approach in *Pfizer/Flynn* affected the enforcer's decision to drop these investigations, it seems reasonable to assume that the CMA has become more cautious in deciding whether or not to pursue price gouging cases given a lack of clarity on the legal grounds to support a finding of infringement.

8 When opening a preliminary price gouging investigation in the middle of the COVID-19 pandemic, CADE cited items I, III and IV of Art. 36, which establishes generally that: "*The acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved: I - to limit, restrain or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively.*"

9 According to the CAT, the CMA was required to – and failed to – set a benchmark price using "*objective, appropriate and verifiable criteria*," and when comparing the benchmark price to the actual price charged, the CMA should have taken into account wider market conditions, the reasons for higher prices, and previous decisions finding excessive prices. The CAT also noted that the CMA must also consider whether the excessive price charged was unfair because it "*bears no reasonable relation to the economic value of the product*" – and that the enforcer had failed to do so.

10 See https://assets.publishing.service.gov.uk/media/5f0c5a7d3a6f40037ed4848c/Closure_Statement_.pdf.

The rest of Europe has been relatively more tepid in its pursuit of price gouging cases. This is not to say that price gouging cases are not being opened or ultimately resolved in European jurisdictions (including the European Commission).[11-12] In the specific context of the COVID-19 pandemic, several European enforcers announced concrete efforts to tackle price gouging. This has included approaches such as (a) the issuance of formal information requests to certain players suspected of price gouging; (b) the general policy statements warning companies of possible antitrust enforcement if abuses are identified; (c) the establishment of task forces to monitor specific sectors deemed particularly vulnerable to price gouging; and (d) the opening of formal investigations.[13]

Notwithstanding these recent developments – which are largely in line with that one can verify in the Americas more generally, and Brazil in particular – we do not believe that they have brought to light any major developments in economic theory that would suggest that this is a trend that will remain in place post-pandemic. In fact, it seems more likely to us that these recent developments boil down to institutional efforts to deter excessive pricing by way of "warning signals."

When it comes to price gouging, competition enforcers seem to be cautious of engaging downright antitrust enforcement via the issuance of fines following formal investigations. And there is good reason to adopt such an approach. Take, for example, South Africa's recent experience with excessive pricing investigations. The Competition Commission ("CC") has recently settled certain price gouging cases by requiring companies to adopt the following remedies: (a) to desist immediately from the price gouging conduct; (b) to reduce the gross profit margins of essential products to a percentage agreed upon by the CC, for the duration of the pandemic; (c) to pay the excess profits to the COVID-19 Solidarity Fund or to customers that purchased the excessively priced essential products; (d) to donate essential products to hospitals or charitable institutions such as old age homes; (e) to implement a competition law compliance programme ensuring future compliance with competition laws and the price gouging regulations; and (f) to communicate the contents of the settlement agreement to employees and management of the company.

The CC has also recently referred its first COVID-19 excessive pricing case to the Competition Tribunal[14] – and if it is successful, one can expect a combination of the above remedies to be imposed on the company under investigation. However, the economic soundness of the standard applied by the CC in order to identify price gouging is unclear. Furthermore, some might argue that at least some elements of the CC's approach to remedying excessive pricing may produce effects that are to some extent analogous to price regulation, which in turn raises the risk of distorting the market. Substantial economic inefficiencies may be produced when governments – rather than companies – engage in price regulation, particularly when the market at issue is not characterized by market failures that would render price regulation an appropriate remedy (e.g. a natural monopoly).

In the absence of robust parameters to pursue price gouging cases, the risk of government failure via antitrust enforcement in price gouging investigations is high, for two main reasons. First, enforcers risk convicting false positives: legitimate price increases may be erroneously interpreted as competition infringements. Second, even if enforcers end up convicting price increases that actually do distort competition (thus amounting to antitrust infringements), it is unclear what remedies should be designed so as to address the problem appropriately: the risk of competition enforcers producing significant market inefficiencies by engaging in price regulation is high.

11 Commentators have noted that the European Commission's ("EC") so called "stand-still" approach to excessive pricing – which has been largely prevalent since the seminal *United Brands* decision in 1978 – was called into question when the EC launched an investigation into the pricing of five cancer drugs by Aspen pharmaceuticals (see further De Cononick, Raphael, "Excessive Prices: An overview of EU and national case law," E-Competitions: Antitrust Case Laws e-Bulletin, Concurrences, 2018, available at https://www.crai.com/sites/default/files/publications/Excessive%20Prices-%20Foreword.pdf). In mid-2020, Aspen Pharmaceuticals proposed a 73 percent price reduction for six off-patent cancer medicines to remove the EC's excessive pricing concerns. A final decision is yet to be issued.

12 Importantly, the same conduct currently under investigation by the European Commission in *Aspen* was assessed by the Italian Competition Authority, which in 2016 concluded that the company had indeed engaged in price gouging and imposed a EUR 5 million fine.

13 See further: "Exploitative Abuses, Price Gouging & Covid-19: The Cases Pursued by EU and National Competition Authorities," April 2020, available at https://www.concurrences.com/en/bulletin/special-issues/competition-law-covid-19-en/exploitative-abuses-price-gouging-covid-19-the-cases-pursued-by-eu-and-national-en.

14 The CC has concluded that a South African manufacturer of medical face masks charged mark-ups in excess of 500 percent between January 31, 2020 and March 5, 2020, by increasing the price of a box of face masks significantly. It also concluded that the manufacturer had increased its price by at least 888 percent during the period of December 9, 2018 and March 5, 2020.

III. IS THERE A FUTURE FOR PRICE GOUGING IN BRAZIL?

This leads us to what we believe is a somewhat overlooked question: what are the pros and cons of price gouging investigations being opened by CADE? The cons seem rather obvious: the unnecessary burden of legal costs for companies, and the public resources spent on what seem to be pointless investigations. There may however be pros: the mere opening of an investigation may have deterrent effects on companies worried about reputational damage. Albeit unclear whether this pro may in turn be mitigated by confidentiality rules applicable to CADE investigations, we believe that the core question that needs to be covered is whether price gouging cases occur at a rate high enough to deserve enforcement.

The only set of circumstances where it seems reasonable for an antitrust authority to pursue a standalone price gouging infringement case is where an unforeseeable event – such as, for example, a pandemic – allows firms that have artificially gained market power (e.g. because of restrictions on consumer movement) to charge clearly higher prices than those that were being charged before that event. This gaining of market power/dominance is in some cases temporary, thus making it unclear whether the increase would merit antitrust intervention.

For example, a retailer's decision to increase the price of a product which is in high demand during a moment of crisis may well be economically justified by the fact that demand for other products supplied by that retailer has decreased substantially: the price increase in this context might help offset the financial implications of an overall drop in demand, thus allowing the retailer to pay off fixed costs (which remain largely the same in moments of crisis) and remain in the market. The counterfactual here is important: if the price increase is banned, this might mean that the retailer will have to leave the market, thus reducing overall supply and resulting in increased market concentration (which may be hard to address post-crisis).

More broadly, a decision to intervene via antitrust enforcement to address what seem to be unreasonable price increases in the context of crises can backfire by unsettling investment incentives. Take the COVID-19 crisis. When it was arguably at its apex, the price of face masks and hand sanitizers experienced substantial increases in some countries/regions. That however encouraged a number of firms to shift production efforts to the manufacture of these products: firms originally outside the market became attracted by its increasing profit pool. As a result, in a relatively short period of time new players entered the markets for the manufacture of hand sanitizers and face masks, thus making it harder for incumbents to sustain price increases.[15] Had competition enforcers intervened as soon as substantial price increases were identified, the incentives to enter the market might have been disrupted, to the detriment of competition.

But in cases where there is a risk that the firm (which was either dominant before or became dominant) would maintain the price increases post-event, it does seem to be legitimate for antitrust concerns to arise. Even in these circumstances, the question of whether CADE should pursue the price increase remains. In addition to Brazilian Competition Law, price gouging can be pursued by Brazil's National Consumer Secretariat, a part of the Ministry of Justice, and by state-wide Procons. Together, they have the power to pursue consumer defense cases in Brazil: and one of the areas they have jurisdiction over is price gouging on the basis of art. 39, X of the Brazilian Consumer Code. There is an important discussion surrounding the correct application of this provision (particularly in light of recent policy action from Procon-SP, in the context of COVID-19),[16] and we believe that the core problem is that agencies that together form Brazil's consumer defense policy do not have the institutional capabilities required to adequately address whether a given price increase constitutes price gouging.

In our view, a suitable solution for price gouging concerns is one that is capable of dealing with the problem at the apex of the crisis (or unforeseeable event), but that does not, in doing so, lead to distortions in the medium and long-term by for example producing a "chilling effect" on market incentives to self-correct short-term distortions.[17] To this end, a productive analysis would be one that asked two questions: (a) is the product/service experiencing a price increase essential?; (b) is the increase the result of an access problem (e.g. there is only one supplier capable of serving a given geographic area), which can therefore be regulated on that basis?

15 This occurred in several jurisdictions, including Brazil and Europe. See: https://edition.cnn.com/2020/03/18/business/alcohol-companies-hand-sanitizer-scli-intl-gbr/index.html. See also: https://www.gazetadopovo.com.br/vozes/parana-sa/industria-se-adapta-producao-alcool-em-gel-parana/.

16 See: https://www.procon.sp.gov.br/procon-sp-aplica-mais-de-3-milhoes-em-multas-por-precos-abusivos/; https://agenciabrasil.ebc.com.br/justica/noticia/2020-07/procon-sp-aplica-r-3-milhoes-em-multas-por-praticas-abusivas#:~:text=O%20Procon%20de%20S%C3%A3o%20Paulo,R%24%202%2C3%20milh%C3%B5es.

17 As noted above, price increases in the COVID-19 pandemic, for example, quickly induced several entries in the markets for hand sanitizers and face masks.

Clearly, consumer agencies in Brazil are not equipped with the necessary resources/expertise – or legal power – to address these two questions. And neither is CADE.[18] These questions can, in our view, only be resolved if there is political engagement. New policy approaches and corresponding institutional arrangements need to be designed and implemented to address these problems in Brazil. In the United States, for example, the Defense Production Act of 1950 ("DPA") was invoked in order to adopt an executive order designed to respond to the COVID-19 pandemic. The DPA technically allows the U.S.´s administration to control the supply of products deemed essential during the pandemic. Under the DPA, firms may be ordered to prioritize the production of essential products over non-essential products, as defined by the government; firms may also be ordered to shift their production efforts to the manufacture of products deemed necessary to tackle national emergencies (even if they were not originally produced by these firms). The U.S. relied on the DPA to, amongst other things, contract with General Motors to produce ventilators.[19] This in turn has sparked a discussion around U.S.'s timid reliance on the DPA: some are of the view that it should be used more thoroughly to address the pandemic by for example aiding vaccine production.[20] It is an important debate, which has gained national attention – and corresponding public engagement – to an extent that antitrust investigations rarely do.

The correct approach to price gouging is one that addresses the problem on the basis of granting more access to the supply of those products and services that people simply cannot do about. There needs to be a democratic debate to help provide support for the criteria chosen to provide policy answers embodying an analysis of the two questions we pointed to above. That is not something that relatively insulated governmental institutions such as CADE and Brazil's consumer policy system cannot do this to an extent that would be deemed necessary given the importance of the issues at stake.

There are obvious risks associated with relying on members of elected bodies of government to find a solution for price gouging behavior in moments of crisis/emergency. A proposal under review in the Federal Senate for example intends on imposing a price freeze on the Brazilian pharmaceutical industry during the COVID-19 pandemic.[21] Similarly, in the U.S. over 24 state governments may rely on legislation prohibiting price gouging during emergencies or market disruption phases; standards for the verification of price gouging vary, ranging from the prohibition of "unconscionably excessive" increases to increases over 10 percent or 20 percent .[22] These legislative approaches might end up reproducing the same inefficiencies associated with addressing price increases via antirust policy or consumer protection laws. We however believe that even when blunt proposals are put forward, the fact that there is national debate on the issue is productive: it pushes price gouging to the spotlight of the political arena, and through opposition, it may be the case that a suitable policy approach is agreed upon.

IV. FINAL REMARKS

We believe that Brazil needs to take a step back and rethink its approach to price gouging policy action. While there are clear positive externalities resulting from having CADE and Brazil's consumer policy system have the power to engage in enforcement proceedings (most notably, companies gain the incentive to self-assess their commercial policies so as to mitigate exposure), there are also costs (i.e. consistently erroneous decisions, unnecessary costs for companies, lack of suitable policy tools to address the problem, and most importantly the chilling effect resulting from antitrust intervention that distorts market incentives to self-correct). But the main cost is having an institutional arrangement that encourages the status quo, and not an open debate on the best way forward to adequately tackle excessive price increases in moments of crisis where people are the most vulnerable.

Given the sensitivities around criticizing the price increases of specific firms, it may be politically advantageous for an elected actor to not engage in a debate covering strategies to address the problem: and if jurisdiction to address the problem can be pointed to an unelected actor or independent institution, that is even more politically advantageous. However, moments of crisis subvert that state of affairs to a certain extent: during them it may become politically advantageous to condone clearly excessive price increases. That is why the COVID-19 pandemic is an unparalleled opportunity for Brazil to push forward on a sound agenda to address price gouging in the future.

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18 CADE is an independent agency with high technical expertise, but low democratic accountability. This institutional arrangement makes sense when there are good reasons to believe that they are applying the law on the basis of sound economic theory, and that they have the necessary policy tools to address the issue effectively.

19 See https://www.theregreview.org/2020/04/15/sevener-covid-19-defense-production-act/.

20 See https://www.nytimes.com/2020/04/03/opinion/defense-protection-act-covid.html?action=click&module=Opinion&pgtype=Homepage.

21 See https://www12.senado.leg.br/noticias/materias/2020/03/31/projeto-congela-preco-de-remedios-durante-pandemia-do-coronavirus.

22 See Argiropoulous, Anthony; Woolson, Sheila, "Coronavirus Emergency Declarations Trigger Anti-Pricing Gouging Laws," National Law Review, March 13, 2020, available at https://www.natlawreview.com/article/coronavirus-emergency-declarations-trigger-anti-pricing-gouging-laws. See also: HBS Online, "Supply and demand or price gouging? An ongoing debate," Harvard Business School Online, Business Insights, April 1, 2020, available at https://online.hbs.edu/blog/post/supply-and-demand-or-price-gouging-an-ongoing-debate.

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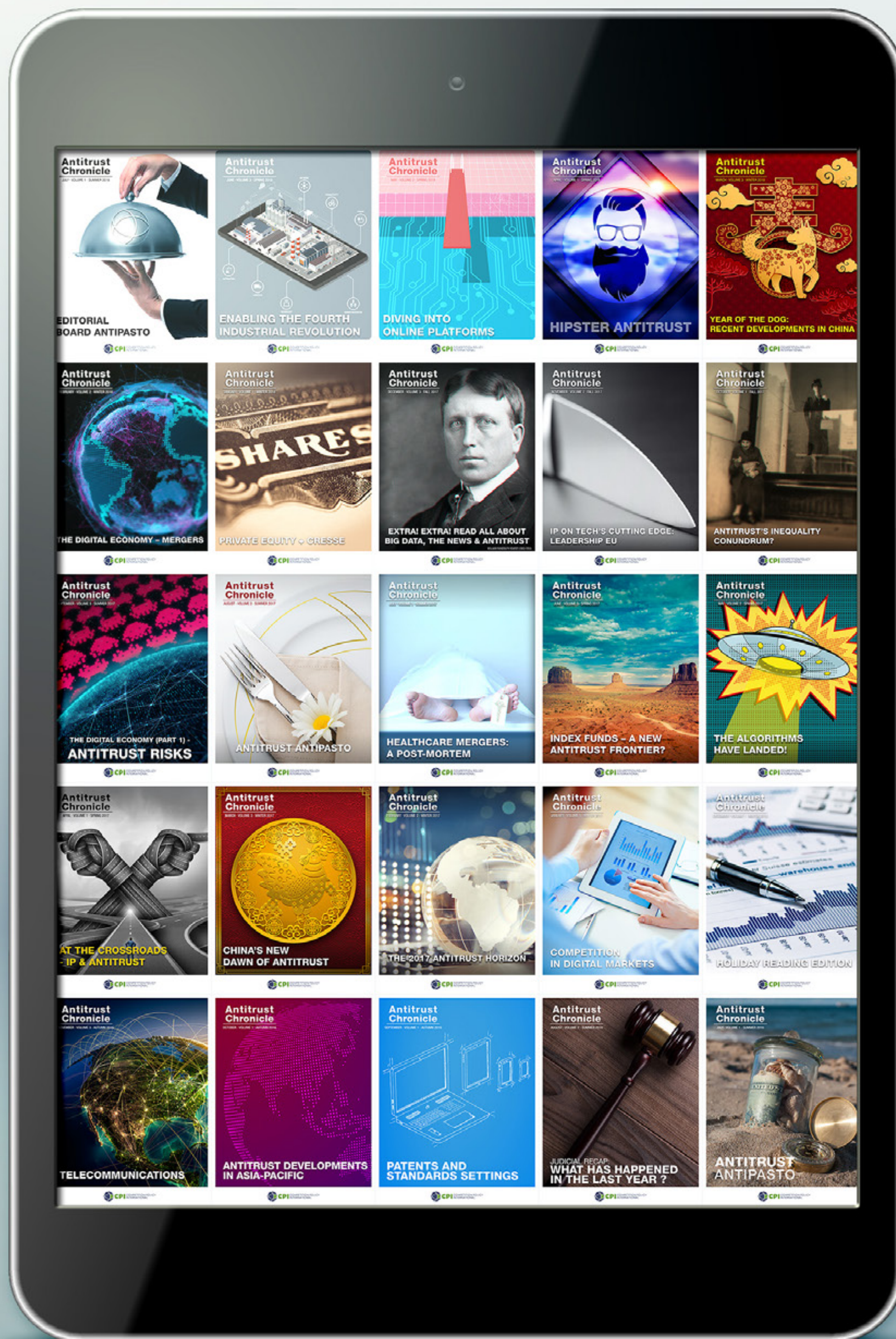

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