

EXCESSIVE PRICING: IS PRICE REGULATION BY COMPETITION AUTHORITIES WARRANTED?

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INTRODUCTION-WHAT IS EXCESSIVE PRICING?

Semantically, excessive pricing refers to imposing a price that is considered to be 'too high' in the eyes of the consumers. Economically, the dynamics of any given market dictate that price equals marginal costs of production in order to ensure that the social optimum of price and output is attained.¹ As opposed to this standard, 'the textbook monopoly model conveys complete control over price to a single firm, which is constrained in its pricing and output decisions only by the costs of production and the elasticity of demand.'² That being said, invariably any excessive pricing schemes in the market can be ascribed and traced back to accumulation of monopoly power in the hands of a dominant firm in a market.

There is a plethora of literature on the upsides and downsides of excessive pricing and whether they warrant an interventionist approach by the Competition authority in any given jurisdiction. It is well accepted that when the competition authority finds that the risk of undermining investment and problems of assessment are not compelling, intervention should be considered as a viable option.³ This paper while not delving into the debate of interventionist v. "hands off" approach, aims at demystifying the scope of regulation of excessive pricing in the light of divergent views of more mature jurisdictions like the U.S and EU.

WHY IS IT A PROBLEM?

At the outset, it is pertinent to note that in the global competition law framework, there exist two kinds of abuses – exclusionary and exploitative. Predatory pricing (below cost pricing), for instance, falls within the radar of exclusionary conduct since it is geared towards eliminating competition from the market. Excessive pricing, on the flip side, has no such exclusionary (market distortion) effects. It therefore falls squarely within the

¹ Michal S. Gal, "Monopoly pricing as an antitrust offence in the U.S and the EC: Two systems of belief about monopoly", New York University, Law and Economics Research Paper Series

² *ibid.*

³ Ariel Ezrachi, David Gilo, "Are excessive prices really self-correcting?", Forthcoming Journal of Competition Law and Economics

definition of exploitative conduct. To extrapolate on that, it counts as exploiting monopoly power and using this position in the market to impose high prices at the detriment of the consumers. The objection to excessive pricing is that the monopolist is using his monopoly position to “reap trading benefits that [he] would not have reaped if there had been normal and sufficiently effective competition.”⁴

Falls within the ambit of exploitative conduct

This exclusionary conduct cannot be gauged historically in the context of how the monopoly power had been achieved. These costs of monopoly are independent of the manner in which the monopoly was historically achieved or of its engagement in predatory or exclusionary conduct. Every company (read: player) in the market is a rational player in the sense that its behaviour in the market will axiomatically be geared towards maximizing profits. Even a firm/company that has equitably acquired its monopoly will inadvertently indulge in monopoly pricing.⁵

The need to regulate

'In the consumers' eyes, excessive pricing by a dominant firm is one of the most noticeable and blatant forms of abuse'.⁶ In many ways it is regarded as a classic economic evil, a clear exploitation that transfers wealth from consumers to powerful undertakings and directly causes the inefficiencies competition laws are meant to prevent.⁷ Therefore, from the consumers' perspective, the impact of such exploitative excessive pricing behaviour could be very palpable in product markets having low demand-side substitutability. Even though, jurisdictions like the U.S might believe markets to self-correcting, it might not be the case in every economy. As a result, it should come as no surprise that the certain Competition authorities, like in India and the EU find it prudent to resort to an interventionist approach in regulating such behaviour.

THE AUTHORITIES REGULATING EXCESSIVE PRICING: THE GLOBAL VIEW

Given the inefficiencies entrenched in excessive pricing, competition authorities consider it their prerogative to regulate such (exploitative) behaviour. Unbeknownst to them, this

⁴ Michal S. Gal, "Monopoly pricing as an antitrust offence in the U.S and the EC: Two systems of belief about monopoly", New York University, Law and Economics Research Paper Series

⁵ *ibid.*

⁶ David Gilo and Yossi Spiegel, "Excessive price regulation", (Extended abstract submitted to 1st Conference of the Research Network on Innovation and Competition Policy: Modern Approaches in Competition Policy)

⁷ Ariel Ezrachi, David Gilo, "Are excessive prices really self-correcting?", Forthcoming Journal of Competition Law and Economics

regulation on the part of a competition authorities like the CCI, snowballs into economic (/price) regulation, which cannot be categorized as competition regulation. In the last several years, competition agencies across Asia, have indulged in passive intervention in the matter of excessive pricing. Jurisdictions such as China, Korea, and India, have issued decisions and draft guidelines that prohibit the holder of an intellectual property right ("IPR") from charging "unfairly high" or "excessive" royalties.⁸

In the context of the two kinds of abuses defined above, there exists a blanket prohibition on only exclusionary conduct on both sides of the Atlantic. But, exploitative conduct such as excessive pricing generally only breaches EU law.⁹ The U.S as the norm, usually resorts to a non-interventionist approach in matters that do not fall squarely within the realm of exclusionary conduct. Competition authorities here are guided by the understanding that markets are self- correcting and that the dynamics of the market including monopoly pricing should not be interfered with. On the other end of the regulatory spectrum, the European Union (EU/EC) considers any kind of market distortion including exploitative conduct to be an antitrust violation and meets it with condemnation. Excessive pricing is therefore heavily regulated by the competition authorities in the EU. To that effect, the law in EU categorically and explicitly prohibits abuses in the form of "unfair" purchase or selling prices.¹⁰

In India, akin to the line of reasoning in EU, excessive pricing is understood in the context of 'unfair pricing'. Section 4(1)(a) of the Indian Competition Act, 2002 (hereinafter referred to as "the Act") prohibits imposition of unfair prices/conditions in sale and purchase of goods¹¹, typically looked at from the angle of abuse of dominance. The foundational problem here is with regards to the semantic understanding of 'excessive pricing'. The Act, to begin with, has no express mention of the term 'excessive pricing'. Any reasoning in matters of excessive pricing is done along the lines of 'unfair pricing'. It should be noted that in any given product market, excessive pricing has to be deduced based on the kind of market and kind of consumers it targets. As there cannot be a uniform measure of 'fair' prices across all markets, it becomes a task to objectively define 'excessive' prices. As the Act mandates, the Competition Commission of India (hereinafter referred to as CCI) undertakes the task to regulate such exploitative conduct in matters of excessive

⁸ Douglas H. Ginsburg, Bruce H. Kobayashi, Koren W. Wong-Erwin, Joshua D. Wright, "Excessive Royalty Prohibitions and the dangers of punishing vigorous Competition and harming incentives to innovate", George Mason University.

⁹ Michal S. Gal, "Monopoly pricing as an antitrust offence in the U.S and the EC: Two systems of belief about monopoly", New York University, Law and Economics Research Paper Series

¹⁰ Jörg Philipp Terhechte, "Excessive prices and goals of competition policy: An enforcement perspective", Hamburg University School of Law.

¹¹ Section 4(1)(a), Indian Competition Act, 2002.

pricing. With no benchmark 'fair' price to measure excessive prices against and limited knowledge of every sector, CCI might fail to hit the nail on the head in every instance. This begs the question of whether competition authorities such as the CCI are adequately equipped to grapple with the issues, economic and semantic, posed by excessive pricing. Most notably, the CCI is an executive branch of the competition regulatory framework in India. Therefore, intervening in matters such as excessive pricing, which is clearly legislative, is not warranted by the CCI. Apart from this, intervention by a Competition authority such as the CCI is also problematic on other grounds.

There are two facets to the problem of intervention – firstly, the term 'excessive' is ambiguous to the extent that there are no clear demarcations to what constitutes excessive or for that matter fair. Secondly, even if in a scenario there does exist a method to calculate such 'excess' in pricing, competition authorities like the CCI are not privy to the required information to engage in such calculation. Even if the CCI does have the requisite understanding of a given sector to engage in an analysis of excessive pricing, it will only be limited to that sector and cannot extend to all other sectors. For instance, in the in matters of alleged excessive royalty being charged by IPR holders, the competition agency would need to calculate a reasonable royalty range as a baseline against which to compare the allegedly excessive price. The term 'fair' and 'reasonable' in itself is so nebulous that it makes it almost impossible to ascertain excessiveness in pricing for every sector. Academic literature suggests that competition agencies will not possess the requisite information necessary to determine market prices generally, and royalty rates for inventions in particular. It is best to not intervene and trust the market dynamics in such matters or as a last resort, to the courts in those limited cases when the parties cannot reach agreement.¹²

CONCLUSION: WHAT SHOULD BE THE EXTENT OF REGULATION AND WHO SHOULD REGULATE?

Literature suggests that in matters that fall outside the scope of exclusionary conduct fall outside the cognizance of competition authorities. Therefore, competition authorities should lean more towards a non-interventionist approach. While this understanding can align well with the workings of mature jurisdictions like the U.S or even the EU which have advanced economies, it will not do much for smaller economies where intervention might not be the last but the only resort. In small economies (akin to the one in India) entry barriers are high and the natural conditions of the market make it easier to gain and to preserve monopoly power for long periods. Thus, a firm may hold a dominant position

¹² Douglas H. Ginsburg, Bruce H. Kobayashi, Koren W. Wong-Erwin, Joshua D. Wright, "Excessive Royalty Prohibitions and the dangers of punishing vigorous Competition and harming incentives to innovate", George Mason University

for longer period despite the lack of continuing superior performance thereby warranting a check on excessive pricing.

The upshot of looking at the trend of excessive price regulation by the CCI in India, brings to the fore the complexities involved in ascertaining excessive price at multi-market levels. Moreover, given India's fast-growing economy, the market is going to be ever-evolving. Economically, this is bound to cause shifts in the price gradients of the different sectors. This would mean looking at price shifts in every sector, which is a formidable task for one regulatory authority. Given the downsides of competition authorities meddling with determining excessive pricing, what can be lobbied for is setting up of isolated sectoral bodies for various sectors such as Telecom and Automobiles sectors, as literature suggests. This will ensure that these bodies have requisite knowledge of the workings of market dynamics in a given sector, equipping them to deal with issues such as excessive pricing in an isolated sectoral manner. In the meantime, in the absence of such a body, even if intervention by the CCI is warranted in matters of excessive pricing, it should be limited, to the extent that it should only address the causes of abuse and not delve into imposing behavioural remedies against a firm indulging in excessive pricing. This is again hinged on the fact that relying on behavioural remedies would cause the problem of forcing competition authorities and courts into acting as price regulators, which is not their prerogative.¹³ Therefore, to reiterate, the competition authorities should look at and try to correct the market conditions and circumstances that facilitated the excessive pricing rather than resorting to price regulation to address symptoms of abuse.¹⁴

¹³ Pinar Akman, Luke Garrod, "When are excessive prices unfair?", ESRC Centre for Competition Policy, University of East Anglia.

¹⁴ *ibid.*