

COVID-19 NEWS OF INTEREST

Trade Regulation During the COVID-19 Pandemic: No Price Gouging or Other Exploitation!

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Price gouging, or charging excessive prices on essential supplies, is making headlines during the Coronavirus Disease of 2019 (“COVID-19”) crisis. Many states have price-gouging statutes, and several state Attorneys General, including in California, New York, Massachusetts, and Connecticut, have expressed their intent to combat price gouging vigorously during this time.¹

Although the federal government does not have a price-gouging prohibition as such,² the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) may view price gouging as the exercise of monopoly power that has been obtained in violation of the antitrust laws.

Although state price-gouging statutes share some common characteristics, their details vary and should be reviewed individually by counsel. Below are some general observations regarding price-gouging prohibitions:

- In many cases, price-gouging statutes are triggered by a declared state of emergency.³

¹ See, e.g., Statement by California Attorney General Xavier Becerra, available [here](#); see also, *Enforcers take action against COVID-19 fraud, price gouging*, TRADE REGULATION REPORTS, March 26, 2020, available [here](#).

² Several lawmakers, however, have urged the FTC to take action against price gouging; *Id.*

³ See, e.g., Cal. Penal Code § 396 (statute applies “during a state of emergency or local emergency”); N.Y. Gen. Bus. § 396-r (statute applies during “a declared state of emergency”).

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- Excessive prices are sometimes deemed to be a violation of state unfair or deceptive trade practices laws.⁴
- The statutes generally provide for civil penalties that are enforced by the state Attorney General,⁵ but some statutes also provide for criminal penalties.⁶
- The definition of price gouging varies: Some statutes prohibit a price increase over 10% as compared to the price applied before the state of emergency;⁷ others prohibit simply “unconscionable” prices;⁸ and still others state that any price increase after a declaration of emergency is price gouging.⁹
- Not all states limit their price-gouging statutes to essential goods and services, and the scope of some statutes can be relatively broad.¹⁰
- Finally, and importantly, some price-gouging statutes provide for exceptions when the price increase is justified by increases in the cost of inputs.¹¹

Price increases overseas can raise similar concerns in this time of global crisis. In the United Kingdom, for instance, the Competition and Markets Authority (“CMA”) launched a task force to address exploitative commercial conduct during the COVID-19 pandemic.¹² Businesses charging excessive prices or making misleading claims about their products are a particular focus of the CMA task force’s attention.¹³

⁴ See, e.g., Cal. Penal Code § 396 (“a violation of this section shall constitute an unlawful business practice and an act of unfair competition”); Haw. Stat. Ann. § 127A-30 (“any violation of this section shall constitute unfair methods of competition and unfair and deceptive practices”); S.C. Code Ann. § 39-5-145 (price-gouging statute within the unfair trade practices chapter of code).

⁵ See, e.g., N.Y. Gen. Bus. § 396-r (fines up to \$25,000 and possible restitution to aggrieved customers).

⁶ See, e.g., Cal. Penal Code § 396 (fines up to \$10,000 and imprisonment available as violation is misdemeanor); Miss. Code Ann. § 75-24-25 (fines from \$1,000 to \$5,000 and imprisonment available as violation can be either a misdemeanor or felony).

⁷ See, e.g., Cal. Penal Code § 396.

⁸ See, e.g., Fla. Stat. Ann. § 501.160; N.Y. Gen. Bus. § 396-r.

⁹ See, e.g., Ga. Code Ann. § 10-1-393.4; Haw. Stat. Ann. § 127A-30; Miss. Code Ann. § 75-24-25.

¹⁰ See, e.g., Cal. Penal Code § 396 (“consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels”).

¹¹ See, e.g., Cal. Penal Code § 396 (“a greater price increase is not unlawful if that person can prove that the increase in price is directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services”); Ga. Code Ann. § 10-1-393.4 (“prices may be increased only in an amount which accurately reflects an increase in cost of the goods or services to the person selling the goods or services or an increase in transporting the goods or services to the area”).

¹² *CMA launches COVID-19 taskforce*, GOV.UK (Mar. 20, 2020), available [here](#).

¹³ *Id.*

Trade Regulation During the COVID-19 Pandemic: No Price Gouging or Other Exploitation!

Price gouging also attracts the interest of the DOJ and the FTC. The U.S. federal authorities, however, typically look for accompanying anticompetitive acts that provided the relevant actor with the power to gouge because neither the Sherman Act nor the FTC Act is a price-regulating statute.

In the widely publicized enforcement action against Vyera Pharmaceuticals and Martin Shkreli, for example, Vyera Pharmaceuticals bought the life-saving drug Daraprim and immediately increased its price by 4,000%.¹⁴ The FTC and the New York Attorney General alleged that the defendants had engaged in a series of anticompetitive practices that prevented the emergence of generic competition and, as a result, unlawfully secured the power to price gouge.¹⁵ This case echoes the antitrust concerns raised by Mylan's sharp increase of the price of EpiPen, which triggered a number of lawsuits, including on antitrust grounds.¹⁶

In Europe, excessive pricing may itself constitute an illegal abuse of dominant position. While the European Commission and other European competition authorities have generally been reluctant to prosecute excessive prices without specific market conditions, some recent cases may reflect a more aggressive enforcement perspective, especially in the pharmaceutical sector.¹⁷ Price-gouging harms associated with the COVID-19 crisis may provide an appealing opportunity for European competition authorities to exercise vigorously their authority to prosecute excessive pricing.

In sum, companies that wish to increase their prices during the pandemic state of emergency should exercise caution and consult applicable statutes. Although regulators have expressed a willingness to facilitate procompetitive collaborations that may ease the COVID-19 emergency conditions, they also have affirmed their commitment to prosecute anticompetitive conduct that exploits those conditions.

¹⁴ *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim*, FTC (Jan. 27, 2020), available [here](#); see also Complaint, *FTC v. Vyera Pharmaceuticals, LLC et al.*, 20-CV-00706 (S.D.N.Y. Jan. 27, 2020).

¹⁵ *Id.*

¹⁶ Bryan Koenig, *Mylan Blasts '11th Hour' Discovery Push In EpiPen Row*, Law360.com, August 6, 2019, available [here](#); Matthew Perlmán, *Court Certifies RICO, State Antitrust Classes In EpiPen MDL*, Law360.com, Feb 27 2020, available [here](#).

¹⁷ See, e.g., *Antitrust: Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines*, EU Press Release, (May 15, 2017) , available [here](#).

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The Antitrust Practice Group is pleased to assist with your competition questions, both specific to the pandemic and in the ordinary course of business. Please contact the authors or other members of the Antitrust Practice Group, listed below:

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