

EXCESSIVE PRICING: WILL THE COMPETITION COMMISSION INTERVENE?

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ABSTRACT

The concept of excessive pricing as an abuse of dominance has been considered as one of the most controversial issues in antitrust laws. On the face of it, this is paradoxical, considering the fact that consumer harm and efficiency have been considered paramount rationales behind the competition law interventions.

This article seeks to address the inherent problems associated with excessive pricing, one of the grey areas in the Indian Competition Act, 2002. It gives an overview of treatment of excessive pricing in the European Union and the US and its impact on the Indian Competition Act, 2002.

The author(s) attempt to elucidate the difficulties encountered by the Indian competition authorities in determining excessive pricing by setting a benchmark price, which is argued to be beyond the competence of competition authorities. Towards the end, the authors(s) have analysed the unsuitability of “one size fit for all” approach and suggested the need for more sector-specific measures in presence of independent sectoral regulators in India.

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I. INTRODUCTION

Excessive pricing is regarded as one of the most contentious issues in the antitrust regulations. The main objective of a competition regulation policy is to prevent unfair pricing. Nevertheless, the fact that excessive pricing is a result of some structural inefficiency of the market or an outcome of anti-competitive action of market entities, rather than an isolated and independent issue in itself cannot be belittled.

Excessive pricing per se is regulated by different methods on both sides of the Atlantic, at least in theory. While the US Competition authorities and case laws exclude the possibility of using excessive pricing actions,¹ by “*pristine monopolists*.”² Article 102 of the Treaty on Functioning of the European Union explicitly prohibits a dominant Entity from “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions” and is punishable by fine. The difference in the approaches substantiate the divide between the regulation of an exclusionary and an exploitative conduct: while the exclusionary conduct is regarded as an offense against antitrust laws on both sides of the Atlantic, the resultant exploitative abuse generally breaches the EU law.

In contrast, the Indian Competition Act, although prohibits and condemns “*unfair price*” by dominant entity, there are no judicial precedents explicitly on “*unfair price*”. The Competition Commission of India (“**Commission**”) is cognizant of the relevance and importance of an appropriate analytical framework for the determination of unfair price cases that are likely to be addressed in future. This in essence would aid to avoid the risks associated with the issue and exorbitant costs to the consumers, economy and industry. Predominantly, the challenge before Commission is to maintain a balance between static and dynamic efficiencies, in order to avoid undermining of investment incentives, while ensuring that consumers’ interest is protected.

This article analyzes these regulatory approaches in specific jurisdictions of India, EU and US. It also covers the divergent legal rules reflecting different assumptions about how the market operates in India. The first chapter of the paper intends to address the decade long Economists debate of whether or not to regulate excessive pricing. The second chapter reflects

¹ United States v. Trans-Missouri Freight Ass, 166 U.S. 290 (1897).

² Berkey photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979).

the impediments in defining the ambit of “*unfair pricing*” in India. Subsequently, the third chapter analyzes the conflicting US and EU approaches, and its influence on the Indian competition law regime. Finally, the article seeks to justify the power of the Commission to regulate “*excessive pricing*” within the Indian Competition Act, 2002.

II. TO REGULATE OR NOT? - THE DILEMMA

The competition law is perceived to enshrine “*the invisible hand*” as the most efficient tool to regulate market, it thus, in principle abnegates the possibility of any competition problem being solved by the market itself. As a result, the debate on the regulation of excessive pricing revolves around two major questions: (i) whether excessive prices can be self-correcting; (ii) whether an intervention by the competition regulators would generate benefits. The two diametrically opposite arguments form two groups from the academia: the non-interventionist and the interventionist.

A. THE NON-INTERVENTIONIST APPROACH

The non-interventionists argue against treating excessive pricing as anti-competitive. Their arguments range from a given market characteristics over properties of regulation and inherent practical difficulties and include general concerns of fairness considerations.³ The arguments are broadly based on the following grounds. *Firstly*, they believe that a dominant undertaking cannot accrue excessive profits in any market for a prolonged period because new entrants/competitors would be attracted to enter that market in absence of non-transitory entry barriers.⁴ *Secondly*, they believe in the inherent self-correcting properties of markets with respect to exploitative abuse. They elaborate that consistent intervention on the prices set by dominant undertakings does not solve the problem in the long run.

Thus, the competition authorities or courts should restrict themselves in monitoring the industry since market conditions are prone to change over time and the undertaking would

³ Lowe, P. (2003), *How different is EU anti-trust? A Route Map for Advisors*, (Oct. 16, 2003), http://ec.europa.eu/competition/speeches/text/sp2003_038_en.pdf.

⁴ A Fletcher and A Jardine, *Towards an Appropriate Policy for Excessive Pricing*, in *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC 533-545*, (Cd Ehlermann & M Marquis ed., 2008).

automatically adjust its prices accordingly. Additionally, a frequently quoted example that the US antitrust law, contrary to its European counterpart, does not prohibit excessive prices always exists.⁵

B. THE INTERVENTIONIST APPROACH

Opposite to the non-interventionist, the interventionists argue that the issue of excessive prices should ideally be included within the jurisdiction of competition law. The reluctance of the regulatory authorities to intervene against any exploitative abuse of dominance has been held to be paradoxical.⁶

They argue on the following lines: *Firstly*, excessive price can harm consumer welfare, and thus competition authorities are bound to intervene to protect consumers. This stands as a good fit between the overarching objectives of competition policy and a law restricting excessive pricing.⁷ *Secondly*, they believe that excessive prices are not always self-correcting. The non-interventionists majorly argue that high prices of a product attract competition and competition in itself can lower down prices. Conversely it is not just the pre-entry prices but post-entry prices that eventually attract entry. Therefore, it is not excessive prices by themselves but efficiency of the market that attracts competition.⁸

Thirdly, the interventionists argue that the impediments of assessing what constitutes as an excessive price cannot be overstated; there are cases where prices may be extremely high so that it is relatively simple to demonstrate that they are excessive.⁹ *Fourthly*, although they accept that price regulation can be intrusive and burdensome for competition regulating authorities, they submit that price regulation is not the only available remedy for excessive prices. If it is seen that the excessive price is owed to the strategic entry barriers, the remedy could be to prohibit

⁵ Berkey Photo, Inc. v Eastman Kodak Co., 603 F.2d 263, 294 (2nd cir. 1979).

⁶ Lyons, B., The Paradox of the Exclusion of Exploitative Abuses, *in* The Pros and Cons of High Prices 65,87 (Swedish Comp. Auth. ed., 2007).

⁷ Fletcher, *supra* note 4.

⁸ A Ezrachi & D Gilo, *Are Excessive Prices Really Self-Correcting?*, 5 Jnl. of Comp. L & Eco. 2, 249-268 (2009).

⁹ Fletcher, *supra* note 4.

such entry barriers. On the other hand, if it is due to structural entry barriers, they can be removed by the authorities.¹⁰

Interestingly, the interventionist and the non-interventionist congregate on some points. For instance, both interventionist and non-interventionist agree that excessive prices would sustain and thrive in a market with high and non-transitory entry barriers. In addition, the interventionists do not disagree with the non-interventionists on the issue of general difficulty to assess excessive prices, but argues that excessive prices can be clear and precise in some extreme cases. The controversy therefore concludes that excessive prices could affect competition to a large extent. Therefore, the interventionists admit that the prohibition should be initiated only in cases of excessive pricing like the European authorities.¹¹

On an interpretation of Section 27 and Section 28 of the Indian competition Act, 2002 that deals with the power of the commission with respect to contravention of Section 4 of the Act, it can be concluded that Section 27(d) empowers the CCI to issue orders, to modify any agreement which are in contravention of Section 4. A wide discretionary power vests with the commission to pass appropriate order as it may deem fit. Thus, on a harmonious interpretation of the provision under the Competition act it can be inferred that the CCI has the requisite competence and authority to regulate prices if the case warrants so. The dilemma thus remains to evolve an appropriate mechanism to determine what constitutes as an excessive price.

III. EXCESSIVE PRICING - THE UNDEFINED TERM UNDER INDIAN COMPETITION LAW

The term “*unfair price*” is not defined under the Indian Competition Act, 2002. Section 2 (z) of the Act states that the words and expressions used but not defined in the Competition Act, and defined in the Companies Act, 1956, 2013 would have the same meanings assigned to them in the latter statute.¹² However, neither the Companies Act 1956 or 2013 nor the Depositories

¹⁰ Motta, A. & A. de Streel, Excessive Pricing and Price Squeeze under EU Law, *in* European Competition Law Annual: 2003 -What Is an Abuse of a Dominant Position 91,125 (CD.Ehlermann & I. Atanasiu ed., 2006).

¹¹ European Commission, *Communication From The Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* 7, 20 COM (2008).

¹² The Competition Act, 2002 (12 of 2003), §2(z).

Act, 1996 gives a definition to the term “*unfair*” or “*unfair price*”. The definitions of “*unfair trade practice*” in the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 or the Consumer Protection Act, 1986 too are not of much help in understanding the meaning of “unfair” from the perspective of pricing under the Competition Law.

“*Unfair price*”, is one which is not fair. This can be understood as price in excess of competitive price and also discriminatory pricing. The Indian Competition Regulatory Authorities in the round table organised by Organization of Economic Co-operation and Development (“**OECD**”) discussed that excessive price forms a subset of “*unfair price*” under the Indian Competition Act, 2002.¹³ Therefore, excessive prices may be scrutinized by the Commission as an abuse of dominance under Section 4 of the Act.

Excessive pricing, as the term suggests refers to the benchmark price of a product. Such price needs to be ascertained to establish whether the price in question is excessive and therefore, unfair. The Indian law explicitly recognizes “*unfair price*” as an offence by the dominant enterprise.¹⁴ Predatory price is defined to mean a selling price which is below the cost price.¹⁵ Moreover, Section 4(2) (a) of the Act uses the phrase “*including predatory pricing*” after the expression unfair pricing, hence it can be reasonably inferred that opposite is true, i.e. price beyond cost should be considered as excessive pricing and therefore, unfair price. The real issue is to decide the competitive price in the absence of competition prevailing in the market under the Indian Competition Act, 2002.

In absence of any substantial provision under the Indian law, interpretation of foreign legislations which are in *pari materia* with the Indian law should be taken into account. Article 102 of the Treaty on Functioning of the European Union (“**TFEU**”) is similarly drafted to Section 4(2)(a) of the Competition Act. Nevertheless, in the European Union, judicial guidance on exclusionary abuse is significantly more compared to the body of case law on exploitative abuse. On the other hand, the US Antitrust laws has been interpreted to prohibit exclusionary conduct

¹³ OECD, *Policy roundtables on Excessive Prices*, DAF/COMP (2011) 18, <http://www.oecd.org/daf/competition/abuse/49604207.pdf>.

¹⁴ The Competition Act, 2002 (12 of 2003), §4.

¹⁵ *Id* at Explanation b to §4(2).

rather than monopolistic status or exploitative practices. The subsequent parts of the article examines the laws governing “*excessive pricing*” in EU and US Antitrust Laws.

IV. U.S. AND EU: THE PARALLEL APPROACHES

The EU Antitrust authorities follow an interventionist approach and one of the major reasons to follow such approach is the “*gap:*” cases.¹⁶ Article 102 of TEFU does not prohibit the acquisition of a dominant position by an Entity. It merely applies to the abusive conduct of an existing entity having a dominant position. This suggests that intervention against a unilateral exclusionary conduct by an entity is legally not feasible in some cases. In these cases intervention against the exploitative conduct may be the only remedy to effectively protect consumers’ interest. In contrast, this prospect under U.S. antitrust laws to effectively intervene against the acquisition of dominant position might be an aid to explain why the opportunity to intervene against exploitative conduct is not incorporated under the Sherman Act or any other U.S. antitrust laws.

A. THE EU APPROACH: AN INTERVENTIONIST

Article 102 of TEFU, states that an abuse of dominance may consist in “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”¹⁷ and makes it apparent that exploitative conduct can be abusive. An analytical framework has been developed by the European antitrust authorities to assess whether a price can be considered as an excessive price under Article 102.

The legal standards to determine unfair prices are unspecified by the law and are left to judicial interpretation. The ECJ in *General Motors case*¹⁸ developed a test to determine unfair price,

¹⁶ L.H Roller, *Exploitative Abuses*, in European Competition Law Annual 2007: A Reformed Approach to Article 82 EC 525,532 (Cd Ehlermann & M Marquis ed., 2008).

¹⁷ The Treaty on the Functioning of the European Union, art. 102(a), May.9, 2008, OJ C 115.

¹⁸ General Motors v. Commission (1975) ECR 1367.

which defined “*a price as abusive when it has no reasonable relation to economic value*”. This is still considered as the fundamental definition of unfair pricing today.¹⁹

The ECJ in the landmark judgment of *United Brands*²⁰ laid down the test for applicability of unfair pricing and gave some insights into the nature of its prohibition. The Court stated that a price is considered as unfair “*when a dominant firm has exploited its dominant position so as to set prices significantly higher than those which would result from effective competition.*” Therefore, a price is regarded as unfair when it is considerably above the effective competitive level, or the economic value attributed to the product.²¹

The decision in *United Brands*, while leaving being open to the inclusion of other methodologies, formulated a *cost price test* as to establish an abuse. This stated that the Commission should make a comparison between the selling price of the product in question and its total costs of production. The rationale behind such comparison is that there should be a threshold price which guarantees an appropriate margin with respect to its costs, and any price charged above this would be termed excessive.²²

Excessive pricing can also be proved by comparing between prices charged by the dominant entity in different markets.²³ Alternatively, excessive pricing can be established by assessing the benchmark price. This method makes a comparison between the prices charged by the dominant entity and the other entities in the same relevant market,²⁴ or it compares the price charged by the dominant entity in the relevant market with prices charged by it in other markets operating in existing competitive conditions.²⁵

Post the *United Brands* case, the EU Commission adapted a restrained approach in deciding upon the cases on unfair price per se. A majority of the cases on the issue of unfair

¹⁹ European Commission, *Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector Framework, Relevant Markets and Principles*, OJ 1998 C 265/2.

²⁰ *United Brands Co. v. Commission*, (1978) E.C.R. 207, 252.

²¹ *Id.* at 252.

²² Case 298/83 *CICCE*, (1985) ECR 1105, 24-25.

²³ Case 226/84 *British Leyland*, (1986) ECR 3263, 28.

²⁴ Case 24/67 *Parke, Davis* (1968) ECR 55, 67.

²⁵ Case 78/70 *Deutsche Grammophon*, (1971) ECR 487.

price were the cases referred by the National authorities for preliminary findings. Notably, the rationale behind the Commission's approach is of a pragmatic nature rather than a fundamental one. The Commission did not apply the prohibition more determinedly because of lack of precision in legal provisions i.e. if the difference between unfair price and a fair price was easily discernible.

This restricted approach of the Commission has been appreciated by the European scholars, who are against the direct control over prices and believed that it was beyond the scope of legal determination and competence of courts. They strongly support the non-interventionists approach of rendering importance to price signalling and the self-regulating tendencies of the market.²⁶ Consequently, the Commission has been facilitating market entry rather regulating "unfair" prices. Interestingly, irrespective of the existence of cases on exploitative abuse allegations, particularly when price differences disseminate market divisions, the emphasis has shifted from a "fair" competition to a "free" competition.

It can be seen that the Commission's practical treatment of excessive pricing is comparable to that of the U.S. than what a linguistic comparison would imply. However, there exists a significant conceptual difference between these two approaches: the EC's restricted approach to intervene is based on practical reasons, while in the U.S. it is more on ideological and theoretical lines.

B. THE U.S. APPROACH: A NON-INTERVENTIONIST

The U.S. antitrust law has been interpreted to prohibit exclusionary conduct rather than monopolistic status or exploitative practices. This is not solely for economic reasons, but for political and social motives as well.²⁷ The Sherman Act was initially interpreted to have prohibited exclusionary conduct that resulted in the creation or sustenance of a monopolistic status by an Entity, rather than the monopolistic position or its exploitation. The Federal Trade

²⁶CHRISTOPHER BELLAMY & GRAHAM D. CHILD, *THE EUROPEAN COMMUNITY LAW OF COMPETITION* 9-073 to 9-075 (5th ed., 2001).

²⁷ M. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly*, 49 *Antitrust Bulletin* 343, 350 (2004).

Commission Act that incorporates the notion of fairness into the antitrust arena is restricted to the “unfair methods of competition.”

U.S. antitrust law accepts a lawful monopolist, to set their prices as high as they choose. This central principle of U.S. antitrust law is well reasoned by court decisions that have held that “*pristine monopolist...may charge as high a rate as the market will bear*”²⁸ and that “*natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of “monopolizing” in violation of the Sherman Act...and can therefore charge any price that it wants,... for the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute.*”²⁹

This concept of dominant undertakings and their abuse of dominance are covered under the concept of monopolization under Section 2 of the Sherman Act and it broadly covers the issue on unfair pricing. Notably, the US Supreme Court puts it bluntly in *Linkline Communications case*³⁰ “*simply possessing monopoly power and charging monopoly prices does not violate S. 2*”

The reasons that U.S. law does not deem “excessive pricing” to be an antitrust violation is the general belief towards the self-correction tendency of the market³¹. “*Why fix what ain’t broken*” approach is mirrored in the early decision of *American Can*,³² in which the U.S Supreme Court noted that “*perhaps the framers of the Anti-Trust Act believed that, if such illegitimate attempts were effectively prevented, the occasion on which it would become necessary to deal with size and power otherwise brought about would be so few and so long postponed that it might never be necessary to deal with them at all.*”³³ They believe that higher prices in the absence of significant barriers to entry may actually entice new entrants to the market leading thus to an increase rather than a decrease in competition.

The later judgments and opinions of the Scholars and Jurists also recognized the relevance of monopoly pricing for the dynamics of the market mechanism. Justice Hand in the landmark judgment of the *ALCOA case*, stated that “*a strong argument can be made that, although the*

²⁸ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d cir. 1979).

²⁹ *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995).

³⁰ *Pac. Bell Tel Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 447-448 (2009).

³¹ Opinion 1/14: Prohibition of Excessive Pricing by a Monopolist (Apr.9, 2014), <http://www.antitrust.gov.il/subject/177/item/34133.aspx>.

³² *United States v. American Can Co.*, 230 F. 859, 901-902 (D. Md. 1916), appeal dismissed, 256 U.S. 706 (1921).

³³ *Id.*

result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. “³⁴ The law should not condemn the “natural behaviour of the monopoly.”³⁵

The current legal regime under the US Anti-Trust law is emphasized by the Supreme Court in its recent *Trinko* decision, that “*The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free -market system. The opportunity to charge monopoly prices-at least for a short period-is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.*”³⁶

Question regarding the significance of the disincentive effect is generally brought into the picture, the answer to which depends principally on the nature of the market and the position of the entity in it at the time. It can hence be concluded that US Antitrust regulators strongly believe in giving an unregulated market to a lawful monopolist and thus in spirit follows non intervention.

V. THE INDIAN PERSPECTIVE

The Competition Commission of India has time and again realized the extent of intervention is to be guided by an economic rationale. The economic principles on which the Indian competition law is premised are specifically, the provisions relating to abuse of dominance. Such provisions contain an in-built checks and balances system to ensure a thorough evaluation of the market conditions prior to the assessment of the impugned actions.

Section 4 of the Act lays down the test of establishing the dominance of the firm, is reasonably stringent, which mandates the consideration of various factors such as entry barriers including regulatory, technical, capital cost related barriers, market structure,³⁷ monopoly or dominant position that is acquired as a consequence of any statute or by virtue of being a Government company or a public sector undertaking or otherwise, commercial advantages etc.

³⁴ United States v. ALCOA, 148 F. 2d 416 (2nd Cir., 1945).

³⁵ *Id.*

³⁶ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004).

³⁷ The Competition Act, 2002 (12 of 2003), §19(4).

The Commission should set high threshold for intervention in cases of excessive price cases in comparison to other cases pertaining to abuse of dominance, known the downside risks it may pose to dynamic efficiencies.

The Act empowers the Commission to lay down the thresholds by considering all or a subset of inclusive factors enlisted in Section 19(4). The Commission has the discretion to consider any other factor that may be regarded as relevant for the purpose of inquiry. Equipped with these enabling provisions in the law and international jurisprudence on this issue, the Commission has the power to design appropriate in intervention criterion for excessive pricing cases that may arise in future.

Analysing the same, the Competition Regulatory Body in India has given conflicting approaches on its powers and scope on regulating excessive pricing. In the recent case of *Manjit Singh Sachdeva v. Director General, DGCA*,³⁸ CCI dealt with the issue of arbitrary high airfares being charged by various airlines. The informant here highlighted the lack of any pricing policy evolved by the Aviation regulatory bodies. The Commission explicitly held that “*The Commission can neither go into the issue of MRP i.e. what should be the MRP for any product or service and fix the MRP,... In fact that will be contrary to the spirit of competition law.*” In contrast, in *Kapoor Glass Ltd. v. Schott Glass Ltd*³⁹ when it held rather cryptically held that a piece a customer is willing to pay depends upon the value he ascribes to a product, and nothing can be said to be excessive as long as there are buyers for the product.

It can thus be seen that the Commission has found it difficult to explicitly address itself as a price regulatory body. The reasons argued by the non-interventionists are attributable for the same, one of which significantly impacting the Indian Antitrust law is *sector specific regulation of prices*.

A. EXCESSIVE PRICING – SECTOR SPECIFIC REGULATION?

One of the important debate with respect to unfair pricing is that it is to be regulated in a sector specific way rather than by antitrust regulators. In India, sectors such as, Electricity,

³⁸ *Manjit Singh Sachdeva v. Director General, DGCA*, CCI Case no. 68/2012 (2013).

³⁹ *Kapoor Glass Ltd. v. Schott Glass Ltd.*, CCI Case No. 22/2010 (2012).

Telecommunication, Petroleum and Natural Gas, Insurance, Airlines, etc., are regulated by their respective sectoral regulators. The general principles of competition are promoted in each of these sectors by creating an enabling environment for competition and the cases of direct price intervention are restricted to monopolies through a cost-plus method. It would thus be immature to define a rigid division of jurisdiction between competition and sector specific regulators with respect to the issues of unfair pricing.

India, in its report submitted to OECD agreed to an approachable solution that sectoral regulation is the key to identify unfair pricing in India contrary to the express need of completion authorities to intervene. Many sectors in India are subjected to regulated prices, being based on a price range or ceiling. In such cases, although the competition authority's jurisdiction is not precluded, any intervention will lead to undesirable outcome. The firm charged with excessive pricing will put up a robust defence of abiding by the instructions of the sector regulator. In order to avoid this conflict the completion authorities may voluntarily refrain from dwelling into the realms of price regulation. Recourse to section 21A of the Competition Act, 2002 is not desirable as the sector regulators seldom change their decisions on price regulation. Although the Competition authorities have the option of affecting their decision on persuasive level.⁴⁰

VI. CONCLUSION

Regulatory intervention in cases of unfair or excessive price is a onerous task, considering the issues of estimation and the trade-offs between static efficiency and dynamic efficiency. As addressed above "*one size fits all*" is not an appropriate approach to deal with unfair pricing. Instead, the focus should be to determine the appropriate test for deriving unfair prices or to formulate a workable method applicable to specific industries, pursuant to the facts of the cases under investigation.

As per the ideal interventionist approach, in cases of excessive pricing the competition authorities should primarily deal with the causes of the excessive price. Amongst the few competition cases that deals with excessive pricing, direct price intervention has not been viewed as the appropriate response to the anti-competitive act.

⁴⁰ Amitabh Kumar, EXCESSIVE PRICING - AN ABUSE OF DOMINANCE, *in* COMPETITION LAW REPORTS 88, 89 (Jan-Feb 2011).

The object and scope of the Indian legislation demands that the Indian Competition authorities investigating cases of excessive pricing should strike a balance between incentivizing investors and preventing consumer harm. Section 4 of the Act empowers the CCI to intervene in cases of abuse of dominance with respect to “unfair pricing” and issue relevant orders under Section 27 of the Act. It can thus be objectively seen that the Commission has the relevant powers under the scheme of the Act to regulate prices and to penalise for the contravention of provisions relating to “*unfair price*”.

However, no case explicitly pertaining to the issue of excessive price has been brought before the CCI. Nevertheless, there is prohibition on imposition of an unfair price under the Indian competition law. The Act mandates a rigorous analysis of dominance of any Entity before investigating into the unfair price. This allows for an assessment of essential conditions, for instance market structure, entry barriers including regulatory, technical, capital cost related barriers, for intervention in excessive price cases.

The commission should be equipped with data both at industry and company level to understand the competitive dynamics of the industry and to determine unfair or excessive price. This Therefore, the Commission should work with other relevant government departments, organisations with special domain expertise to develop industry wise comprehensive databases and private research organisations of international repute.⁴¹ The Indian Competition law is benefitted from international jurisprudence in excessive pricing. Now, the real challenge before the Indian Competition authorities remains to maintain a balance between incentivizing investors and preventing consumer harm.

⁴¹ OECD, *supra* note 13.