



# Increasing prices for COVID-19 relevant products and certain pharmaceuticals may violate competition law



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The COVID-19 pandemic has resulted in a significant increase in the demand for COVID-19 relevant products like hand sanitizers, face masks and certain pharmaceuticals. The increase in demand may lead to an increase in prices for these products.

A price increase because of an increase in demand, is the very basis of a market-based economy. However, companies may violate competition rules, if the price reaches an unfair level or if the price increase is coordinated with other companies.

## **Price increases are in the cross hairs of the competition authorities**

Several competition authorities across Europe – including the Danish Competition and Consumer Authority – have declared that they will monitor price increases on COVID-19 relevant products and prioritize enforcement in this area to ensure that these products remain available at competitive prices. The competition authorities in the United Kingdom, France, Greece, Italy and Spain have already started investigations into certain price increases.

## **Price increases may violate competition rules**

It is important for companies that produce, distribute or sell COVID-19 relevant products to take the competition rules into consideration when they determine the prices of their products and services.

There are essentially two ways in which an increase in prices may violate competition rules.

Firstly, an increase in prices may violate the competition law, if it is agreed between competitors (price fixing). The term “agreements” include both explicit agreements as well as concerted practice. On 15 October 2019, the Danish Competition and Consumer Authority published an article on “Price signaling and transparency”. In this article, the authority noted that signaling prices through news media may be a way to enter into an agreement or establish concerted practice in violation of the Competition Act.

Secondly, price increases of a company holding a dominant position may violate competition rules, if it results in unfair prices. A company is dominant if it has the economic power to prevent effective competition being maintained on the market. The price would be excessive and unfair if it has no reasonable relation to the economic value of the product.

The Danish Competition and Consumer Authority has previously sanctioned unfair and excessive prices. In a decision from 31 January 2018, the Danish Competition Council ruled that the pharmaceutical distributor CD Pharma had abused its dominance by increasing the prices of Syntocinon, a labor pain stimulating drug, with 2,000 pct. The authority found that CD Pharma held a dominant position despite CD Pharma’s relatively small turnover of DKK 16.5 million (EUR 2.2 million) in 2014. The decision has subsequently been upheld by Danish Competition Appeal Tribunal and the Maritime and Commercial High Court of Denmark.

## **Violation of the Danish Competition Act may have adverse consequences**

An investigation by the Danish Competition and Consumer Authority of price increases of COVID-19 relevant products may have serious consequences, including:

1. An investigation typically lasts several years and can be *resource demanding* for the involved company.
2. An investigation carries with it a substantial risk for *negative press coverage*.
3. An infringement of the Danish Competition Act can be sanctioned with a *fine* of DKK millions.
4. An infringement of the Danish Competition Act can lead to *claims for damages*.

As an example, CD Pharma has been reported to the State Prosecutor for Serious Economic and International Crime to be criminally prosecuted and CD Pharma’s customer Amgros (a wholesale buyer for hospitals) has brought a claim for damages against CD Pharma.

## **Tips for companies when pricing COVID-19 relevant products**

Companies considering the price for COVID-19 relevant products should be aware of the following:

- Increasing prices for COVID-19 relevant products is not necessarily a problem; however, it is important to consider the competition rules.

- An increase in prices for COVID-19 relevant products must not lead to unfair and excessive prices. During a crisis like the COVID-19 pandemic, the assessment of when prices are unfair and excessive is likely to be more stringent.
- Companies must never increase prices via agreements or concerted practice with competitors.
- Several European competition authorities – including the Danish Competition and Consumer Authority – have announced that they will prioritize cases where companies exploit the crisis to increase their prices to a level which is unfair and excessive.

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