

## EXCESSIVE PRICING DURING A PANDEMIC SITUATION: IS IT AN ANTI-COMPETITIVE BEHAVIOR IN INDONESIA?

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**Abstract** -During the COVID-19 pandemic, the prices of essential items like masks, hand sanitizers, and disinfectants increased. This profit-oriented pricing behavior led to excessive prices, benefiting businesses but causing losses for the community. To protect consumers' welfare, the government should employ strategies to address this issue. One approach is enforcing laws against excessive pricing behavior. When business actions create market instability, competition laws can be implemented to enhance market mechanisms. This research aims to analyze the characteristics of excessive pricing behavior exhibited by businesses and examine whether it falls under unfair competition laws. It also seeks to provide analysis on law enforcement regarding excessive pricing behavior in Indonesia.

**Keywords:** excessive pricing, competition law, excessive pricing in pandemic, pandemic disruption, competition law in pandemic

### INTRODUCTION

December 2020 was the month for the first wave of Corona Virus 2019 spread in the world. The 2019-2020 Corona Virus pandemic or had known as the COVID-19 pandemic was declared by the World Health Organization (WHO) as a global pandemic at March 11th, 2020.

In Indonesia, since the WHO determination of the corona virus as a pandemic at the end of March 2020, the Covid-19 cases had reached 1,414 spread across 24 provinces throughout Indonesia.<sup>1</sup> The increasing number of corona virus cases making people in Indonesia feel anxious and worried. That of because the process of spreading was not only through physical contact, but also through objects affixed to the virus, which can also be the cause of the spread of the virus. Not only the the virus has many dangerous thing, but also spread through the air media and can fly everywhere. Another fact is this virus also can easily transmitted, and the transmission rate is faster than other viruses. The symptoms are fell, including flu, sore throat, shortness of breath, leading to death. These facts cause people to fear the spread of the virus, which is increasingly massive.

This corona virus continues to develop rapidly to several regions in Indonesia, so at March 14th, 2020, through electronic media, President Joko Widodo declared the status of the corona pandemic as a non-natural national disaster. Non-natural disasters according to Law No. 24 of 2007 concerning Disaster Management is not the disaster that occur due to natural causes such as epidemics, disease outbreaks, failure of technology, and failure of modernization.

Until the end of March 2020, even though the government did not implement a lockdown policy, restlessness for the sake of unrest spreaded among the community. Impementing the access

<sup>1</sup> Worldometer, 'COVID-19 CORONAVIRUS PANDEMIC' (2021) retrieved from <<https://www.worldometers.info/coronavirus/>>.



restrictions in several big cities that declared as red zones for the transmission of the Covid-19 outbreak. The community purchased more daily necessities than usual to prepare for the worst conditions, namely the implementation of a lockdown policy. The prices of daily necessities had also crept up following the prices for goods relating to Covid-19, such as masks, hand sanitizers, and disinfectants, which previously increased many times over normal prices.

There are many of business actors in facing market conditions during the Covid-19 period saw it as a great business opportunity. For example, the price of masks was expensive and the availability of masks was very difficult to find, such as for handsanitizer products, disinfectants, and hand washing soap.

The condition of the rising prices of products needed by the community during the Covid-19 pandemic was very detrimental to the community. The increase in price which followed by product scarcity should get serious attention from the government.

The behavior of setting an excessively high price known as excessive pricing. In dealing with excessive pricing behavior, the government needs a special study related to this matter and requires input to provide strategic ideas to deal with this situation.

From this background, two problem formulations were obtained, that are: 1. What are the characteristics of excessive pricing behavior from business actors? and 2. Is excessive pricing behavior a form of unfair business competition behavior?

Law is a field of science that is sui generis, namely a field of science with a distinctive character that is normative. Thus, the type of research used in this research, according to its nature, that is a normative legal research (legal research). This normative nature brings legal science as a study of the existence, nature, substance, procedure and purpose of legal norms or rules. According to Peter M. Marzuki, legal research is a process to find legal rules, legal principles, and legal doctrines in order to answer legal issues at hand. This legal research conducts to produce a description of current legal issues.

### 1. Characteristics of Excessive Pricing Behaviour during the Pandemic

Before discussing excessive pricing, it is necessary to understand the concept of fair pricing. Fair Pricing is the setting of a fair price, where the price allows for a proportional return on investment in exchange for an affordable price.<sup>2</sup> In the economic theory of Marxism, a price that said to be fair if the price is equal to the value of labor involved in the production process.<sup>3</sup> For neo-classical economic theory, a price of goods or services is fair, if the price is an equilibrium price that will result from the free interaction between supply and demand in a competitive market.<sup>4</sup> For ordoliberal economic theory, a price is fair, when the price is the result of free and honest competition; in other words, even dominant business actors must set "competitive" prices, that is, they must act "as if" they are operating in a competitive market.<sup>5</sup>

Huppertz, Arenson and Evans define fair price as a price that involves a "fair distribution of profits" from the exchange between consumers and business actors.<sup>6</sup> According to Kahneman, Knetsch, and Thaler, a price can be accepted as a fair price, if the price is in accordance with the input price.<sup>7</sup> Thus, consumers will consider it fair, if a business actor increases the price of its product, when the price of its input rises.<sup>8</sup> This is consistent with the actual price fixing practice, where business actors often increase their prices, when the production costs they need increase.

Meanwhile, Excessive pricing is a condition in which business actors who have dominant power in the market set prices above a competitive price level.<sup>9</sup> According to the Organization for Economic

<sup>2</sup> World Health Organization, "Report on the Fair Pricing Forum 2017" (2017), retrieved from <[https://www.who.int/medicines/access/fair\\_pricing/FairPricingForum2017MeetingReport.pdf?ua=1worldometer](https://www.who.int/medicines/access/fair_pricing/FairPricingForum2017MeetingReport.pdf?ua=1worldometer)>.

<sup>3</sup> O'Donoghue and Padilla, 'Excessive Pricing', The Law and Economics of Article 102 TFEU, Ed. III (2019)

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Rotemberg, 'Fair Pricing' (National Bureau of Economic Research, 2004)

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Gürkaynak, 'Turkey: Excessive Pricing: A Rare Concept In Competition Law' (mondaq, 2017)

Cooperation and Development (OECD), excess prices refer to prices that are set significantly above the level of competition as the result of monopoly or market power.<sup>10</sup> Whereas modern industrial organization theorists define excess prices as the use of market forces to set prices significantly and continuously above the level of competition<sup>11</sup>, Indeed, high prices for short periods of time are a normal feature of a market economy.<sup>12</sup> Indeed, in general business actors will compete for market power and pursue cost efficiency and innovation.<sup>13</sup> High prices also need to compensate for costs incurred and as a signal to attract investment and market entry opportunities.<sup>14</sup> Therefore, limiting the ability of dominant business actors to extract the market power they have acquired will hinder investment and development of innovation, which is economically inefficient.<sup>15</sup> On the one hand, from a static point of view, such high prices can conflict with perfect competition. Therefore, that can lead to inefficiency and consumer loss.<sup>16</sup>

In the European Union (EU), excessive pricing set by a dominant business actor is considered to be breaking the law, if the price cumulatively meets the 'excessive' and 'unfair' measurements.<sup>17</sup> In the notorious United Brands case, the European Court of Justice (ECJ) said that setting excessive prices that do not have a reasonable relationship to the economic value of the products supplied would be an act of abuse.<sup>18</sup> The court then applies two basic tests, namely "whether the difference between the costs that is actually incurred and the price actually charged is excessive; and, if it actually is (2) whether the price imposed is either unfair in itself or when compared to competing products".<sup>19</sup> Thus, if a price is proven to be an excessive price, the authorized party must then prove whether the price is unreasonable and not related to the economic value of the product concerned in order to see an act of abuse.<sup>20</sup>

During the Covid-19 pandemic, there was a high price increase of several products that were directly related to the pandemic that is masks, hand sanitizers and disinfectants. Analysis of the price increases for the 3 products during the pandemic in Indonesia. If you put it into a line chart, it looks like this:

(Figure 1.) The Price of the 3 most wanted product during the 2020 corona pandemic



Based on Iprice's research, there are at least 6 things that might affect the price movements of these 3 items in Indonesia, that is: the first case of the corona virus on 12 January, the first case of the

<sup>10</sup> Zecchini, Glossary of Industrial Organisation Economics and Competition Law (1993), retrieved from <<https://stats.oecd.org/glossary/detail.asp?ID=>>.

<sup>11</sup> Ibid, (O'Donoghue and Padilla, 2019)

<sup>12</sup> Duque, 'Excessive Pricing: A View from Chile' (2015)

<sup>13</sup> Ibid

<sup>14</sup> Ibid, (Zecchini, 1993)

<sup>15</sup> Ibid, (Zecchini, 1993)

<sup>16</sup> Ibid, (Duque, 2015)

<sup>17</sup> Calcagno et al. 'Economics of Excessive Pricing: An Application to the Pharmaceutical Industry' (2019) Journal of European Competition Law & Practice Vol 10, No 166

<sup>18</sup> Bananas, Judgment of the Court of 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities (1978)

<sup>19</sup> Ibid

<sup>20</sup> Ibid, (Calcagno et al, 2019)

corona virus in Singapore on 23 January, the first case of the corona virus in Malaysia on 24 January, hoaxes entered Indonesia and circulated massively in the public on January 25 - March 1, Indonesian citizens from Wuhan arrived in Indonesia on February 2, the first case of the corona virus was announced by the Indonesian government on March 2. From that, an extraordinarily high price jump occurred for mask products. In a period of approximately 3 months during the pandemic, that is March-June 2020, prices are still high for masks and hand sanitizer products, even though there is a trend in prices to stagnate and then decline in the following months.

The government's appeal to the Indonesian people to use cloth masks, which has been widely adhered to by the community has not had a significant impact on the decline in the price of N95 masks, but has had a significant impact on the decrease in the price of 3ply sensi masks and 200mL of hand sanitizer dettol. However, it cannot be ascertained just because of the cloth masks, because many similar brands have emerged flooding the market.

On the other hand, there is a possibility that a market shortage has occurred. Market shortage will occur when the demand for goods are not balanced with the availability of goods, so that the price of goods increases. There was a scarcity of mask stocks in various regions due to the high demand. So that there was an extreme hike in mask prices.<sup>21</sup>

Similar to masks, sales of hand sanitizer and health products also experienced a sharp increase. E-commerce enabler companies experienced the largest increase in sales of hand sanitizer products, which reached 531% in Februarys.<sup>22</sup> This also encourages producers to increase the production volume of hand sanitizers, which will also have an impact on increasing demands on other chemicals such as ethanol, antibacterial, disinfectant, and antiseptics. According to data from the Indonesian Chemical Industry Federation (FIKI), the increase in chemical substances recorded at around 10%-15% compared to normal conditions.<sup>23</sup>

When the demand for goods not balanced with the availability of goods, business actors will increase prices in an effort to reduce the amount of demand. However, it cannot be denied that the main reason behind all of this is the natural instinct of business actors to get the maximum profit by taking advantage of this surge in demand. If this done not during a pandemic, the concept of excessive pricing behavior by business actors may still be categorized as a business strategy that may be fair.

## 2. Excessive Pricing and Business Competition Law

The word fair competition refers to a free and open market condition, where there exists competition between undertakings with similar business fields parameterized by a number of benchmarks such as price, quality, number of undertakings, and etc. Competition itself is essential for a market economy. It is reflected by rivalry between undertakings upon the production and sales of similar or substitutable goods and services in the most advantageous form for them.<sup>24</sup> Therefore, it can be stated that business competition is an absolute requirement for the implementation of market economy, although there are times that a competition is carried out in a fair and unfair manner.<sup>25</sup> Fair business competition is closely related to the concept of a perfect competition market.

In a perfect competition market, there are a high number of undertakings who sell products with similar characteristic.<sup>26</sup> Their ability to set the market price is determined by the supply and demand mechanism that can be achieved by the market (price equilibrium), which means that when an undertaking decided to increase the cost of its product, it probably will open up the possibility to

<sup>21</sup> Ibid, (Calcagno et al, 2019)

<sup>22</sup> Ibid

<sup>23</sup> Machmud and Minghat, 'The Price Dynamics of Hand Sainitizer for Covid-19 in Indonesia: Exponential and Cobweb' (2020) Indonesian Journal of Science & Technology 5, 176

<sup>24</sup> Urziceanu, R. M. and Popa, A. G. 'The importance of the fair competition in the market economy' (2015) AGORA International Journal of Juridical Sciences No 4, 2015

<sup>25</sup> Nugroho, S. A. Hukum Persaingan Usaha di Indonesia: Dalam Teori Dan Praktik Serta Penerapan Hukumnya, Ed. I (Prenadamedia Group, Jakarta, 2012).

<sup>26</sup> Sugiarto, I. 'Perspektif Ilmu Ekonomi And Unandg-Unandgnomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat Terhadap Diskriminasi Harga' (2015) Jurnal Wawasan Hukum Vol 33, No 154



lose a number of buyers who prefer to look for another undertaking with less expensive price. To avoid such condition and to generate the highest profit, it is not uncommon for undertakings to adopt a strategy by entering into a price fixing agreement with the other undertakings.<sup>27</sup>

Based on Industrial Organization Economics and Competition Law, price fixing agreement is an agreement between undertakings to raise or fix prices in order to restrict competition between undertakings (interfirm) and earn higher profits.<sup>28</sup> Similarly, Haan and Overvest also define price fixing as an agreement that will increase the ability of undertakings to raise profits, however it will lower both consumer and social welfare.<sup>29</sup> With the existence of price fixing agreement, there is no competition in terms of prices for products sold or offered in the market by the undertakings, which enable them to enjoy the surplus that supposed to be enjoyed by the consumers.<sup>30</sup> Undertakings who involved in price fixing agreement may unilaterally dictate or impose prices that are above the reasonable level to consumers.<sup>31</sup> If such condition conducted by every undertaking in the same relevant market, it may cause consumers to have no other alternative options other than to accept the products and prices offered by those undertakings who have entered into a price fixing agreement.<sup>32</sup>

The existence of direct harm perceived by the consumer makes price fixing agreement is prohibited under competition law in various jurisdictions. During the pandemic situation, the market structure for mask and hand sanitizer could be changed. When undertakings make market adjustments, during this transitional period, the existing undertakings in the market have become stronger. Such condition could lead those undertakings to become dominant player and conduct an abuse of dominant position by increasing prices as high as possible, which commonly known as excessive pricing strategy. Those existing undertakings are fully aware and realize that soon the potential new competitors are about entering the market, hence they have to make several adjustments in the market which include market share and price adjustment. They realize that they will not able to implement such excessive pricing strategy when there are high number of competitors entering the relevant market. Therefore, it is indicated that the excessive pricing strategy is carried out purposely, and with full of calculations by undertakings of mask and hand sanitizer products in the beginning of pandemic situation.

In the economic point of view, dominant position is a place for undertaking who own the largest market share. With such large market share, undertakings have market power which enable them to carry out actions or strategies without being influenced by their competitors.<sup>33</sup>

In Indonesia, the definition of dominant position is clearly determined under the article 1 number 4 Law No. 5/1999 which stipulated that dominant position is a condition where an undertaking does not have any significant competitor in the relevant market with regard to the market share being controlled, or the undertaking is in the highest position among its competitors in the relevant market with regard to its financial capability, ability to have access to the suppliers or sales, and ability to adapt to the supply and demand of certain goods or services. Furthermore, under the article 25 paragraph (2) Law No. 5/1999, it is stated that a dominant position can be obtained if an undertaking or group of undertakings control 50% (fifty percent) or more of the market share on one type of goods or service; or 75% (seventy five percent) or more of the market share on one type of certain goods or services.

Based on the Industrial Organization Economics and Competition Law, a dominant undertaking is a business actor that contributes a significant market share and has a much larger market share than the next largest competitor. A dominant undertaking is usually considered to have 40% (forty percent)

<sup>27</sup> Ibid

<sup>28</sup> Khemani, R. S. and Shapiro, D. M. Glossary of Industrial Organisation Economics and Competition Law (1993)

<sup>29</sup> Haan, M. A. and Bastiaan M. Overvest, 'Price Fixing and Non-Price Competition' (2018) retrieved from [https://www.researchgate.net/publication/228960958\\_Price\\_Fixing\\_and\\_Non-Price\\_Competition](https://www.researchgate.net/publication/228960958_Price_Fixing_and_Non-Price_Competition)

<sup>30</sup> Lubis, A. F. Hukum Antara Teks & Konteks Persaingan Usaha (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, 2009)

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Ibid



market share or more.<sup>34</sup> A dominant undertaking will be able to increase the concern in a competition when it possesses power to independently set the price. Indeed, one of the characteristics of an undertaking that has a dominant position is it can conduct unfair business competition in the relevant market independently / individually without taking into account its competitors since it has a large market share, technological knowledge skills, and even raw materials or capital.<sup>35</sup> Therefore, similar with European competition law, Law No. 5/1999 also does not prohibit the existence of dominant position if it is obtained from the result of fair competition. On the contrary, what is prohibited by Law no. 5 of 1999 is when the undertaking abuses its dominant position.

Thus, excessive pricing action can be categorized into several forms of business competition law violation in Indonesia. If it is conducted by an undertaking that possesses dominant position in the market, then it can be categorized as a violation of article 25 Law No. 5/1999. Further, if it is conducted by a number of undertakings who committed to coordinate and raise the price collectively, then it can be categorized as a violation of article 5 Law No. 5/1999.

However, it is easier to determine an act of excessive pricing if the investigation process includes not only relevant product and geographic market factors, but also add another factor, which is time factor. In Indonesia, KPPU only recognizes the first two factors to conduct the investigation of relevant market.

Relevant market is a concept to define the market size of a product (KPPU, 2009).<sup>36</sup> Relevant market comprises a group of products which mutually substitutable in accordance with the characteristic, price, and function of those products as well as the geographical aspect (Benazić, 2009).<sup>37</sup>

According to Gerasymenko and Afendikova, when the goods are substitutable, in terms of demand or supply, and the market is balanced enough to support its members to keep certain equilibrium parameters of interplay, it means there exist relationships of competition or monopoly between undertakings (Gerasymenko dan Afendikova, 2018).<sup>38</sup> In opposite, if those products are independent products or products that unable to substitute each other, then such relationships do not exist between the undertakings. Therefore, it means that the first step of any antitrust investigation is a definition of the relevant market (Lubis, 2009).<sup>39</sup> Indeed, relevant market is principally an indicator for identify and determine the limit of competition between undertakings. The determination of the relevant market also allows to calculate the market share so that information on market forces can be obtained to determine the dominant position. Hence, relevant market is then being used as the basis for assessing whether or not in a particular market occur a possibility of anti-competitive action. There are two factors that being taken into account to determine relevant market, which are product relevant market and geographic relevant market.

Based on product relevant market. The determination of relevant market based on the product would be useful to assess whether or not the related undertaking is in the position that would hinder the effective competition (Lubis, 2009).<sup>40</sup> If the products have been determined to be in the same or similar product market or can be used as substitute products, then it can be concluded objectively that the market share of these products is categorized in the one relevant market. Consequently, the market share of similar products or substituted products will be taken into account to determine whether the relevant market share has a dominant position or not (Lubis, 2009).<sup>41</sup> There are a several assessments to determine the relevant market based on the product, which are:

<sup>34</sup> Ibid. (Zecchini, 1993)

<sup>35</sup> Ibid. (Lubis, 2009)

<sup>36</sup> KPPU, 'Lampiran Peraturan Komisi Pengawas Persaingan Usaha Nomor 3 Tahun 2009' (2009) retrieved from [https://www.kppu.go.id/docs/Pedoman/pedoman\\_pasal\\_1\\_angka\\_10\\_pasar\\_bersangkutan.pdf](https://www.kppu.go.id/docs/Pedoman/pedoman_pasal_1_angka_10_pasar_bersangkutan.pdf)

<sup>37</sup> Benazić, D. 'Defining the Relevant Market in Function of Managing Competition Policy' (SSRN, 2009)

<sup>38</sup> Gerasymenko, A. and Afendikova, S. 'The Relevant Temporal Market Definition In Antitrust Analysis' (2018) *Baltic Journal of Economic Studies* Vol 4, No 69

<sup>39</sup> Lubis, A. F. *Hukum Antara Teks & Konteks Persaingan Usaha* (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, 2009)

<sup>40</sup> Ibid

<sup>41</sup> Ibid



- a. Physic and Nature of the Product. The physical shape and the nature of product is the first key reference to objectively identify that the products originate from one same market, since it is obviously can be seen whether products are physically and naturally similar or not.
- b. Function of Products. The function of products will show that whether between one product and another are having the same function for consumer.
- c. Price. Price is one of the most important elements to determine whether between one product and another are similar or substitutable. The price of a product will definitely be the basis for consumer in making the decision to purchase it, since generally in the same or relevant market, the price between similar products would be competitive.
- d. Flexibility of Products for Consumer (Interchangeable). The flexibility of products for consumers indicates that these different products are able to replace one another. In other words, this factor will determine whether or not consumers can switch from one product to another, if the first product cannot be found in the market.

Based on Geographic. Geographic relevant market is a term use to describe a particular region which being the area for undertakings to sell their substitutable products. The determination of geographic relevant market is based on how wide the coverage area an undertaking sells its product, then that particular area will be taken into account to determine how many undertakings sell their products therein. Therefore, the function of geographic relevant market is to calculate the relevant market objectively within a particular area where products are being sold.<sup>42</sup>

Beside the product and geographic factors, there is actually another factor that can be used as a basis to determine the relevant market, which called the time factor.<sup>43</sup> This can happen since in some cases, competitive conditions in the market can change over a certain period of time as a result of fluctuations in supply and demand that occur due to time variations from day to day or year to year. Thus, it may be necessary to consider the time dimension when the relevant market is defined.<sup>44</sup> In time factor, the determination of relevant market happens when the substitutability of products depends on the time.<sup>45</sup> Guidelines made by UK Office Fair Trading (OFT) describes several examples on how time can affect the changes in the market.<sup>46</sup> One concrete example of the effect of time factors is the peak and off peak of a particular service, such as public transportation services or electricity supply services which have different intensity during the day and night.<sup>47</sup> Another example is the seasonal variations, where the demand and supply of a product change according to seasonal variations in the market,<sup>48</sup> for instance products which being sold in summer are different from those which usually sold in the winter. In addition, the existence of innovations in inter-generational products can also be an example of the influence of time factor. It can be happen due to technological progress, consumers may delay the purchase of a certain product for their belief that a newer version will be launched soon.<sup>49</sup>

Time factor of in the relevant market should be considered from the perspective of both consumers and suppliers.<sup>50</sup> For example, the time factor will be taken into account by a consumer when thinking that the train tickets he bought during peak season and off peak season are two things that cannot

<sup>42</sup> Ibid

<sup>43</sup> United Kingdom Office of Fair Trading Guidelines, "Market Definition" (2004) 18, retrieved from <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284423/oft403.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf)>.

<sup>44</sup> Cunha, A. E. E. 'Art. 102 TFEU - market definition - relevant temporal market' (Freie Universität Berlin, 2017)

<sup>45</sup> Jackson, D. 'Defining the Relevant Market in EU Concentration Cases - Applied to the plate heat exchanger industry' (Lund University, 2010)

<sup>46</sup> United Kingdom Office of Fair Trading Guidelines, "Market Definition" (2004) 18, retrieved from <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284423/oft403.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf)>.

<sup>47</sup> Ibid (Cunha, 2017)

<sup>48</sup> Ibid. (United Kingdom of Fair Trading Guidelines, 2004)

<sup>49</sup> Ibid

<sup>50</sup> Ibid (Cunha, 2017)



substitute each other. On the other hand, the time factor can also be taken into account if the supplier feels that it is not possible for him to supply seasonal fresh fruit throughout the year because the capacity to produce fruit can vary between certain time periods and it is impossible to store fruit from one period to another.<sup>51</sup>

The application of the time factor is quite influential in determining the relevant market in certain conditions or events. However, such application is still uncommon as time factor is usually considered as part of relevant product market factor and not as an independent factor.<sup>52</sup> Time factor is also still unregulated under the EU commission regulation, however there are a number of competition cases under EU which examine that particular issue. For instance, *United Brands v. Commission* case also discussed the effect of summer time on banana prices and its substitutability with other seasonal fruit. The purpose of the said examination is to determine whether or not banana is in the same relevant market with other seasonal fruits. The court then decided that the presence of seasonal fruits in summer time does not necessarily mean that bananas can be substituted by these fruits, and even if the presence of these other seasonal fresh fruits does affect the price and consumption of bananas, it will only have an effect within a certain period of time as mentioned there “... *even the personal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability*”.<sup>53</sup> In addition, EU commission has also applied time factor in deciding issues in *ABG Oil* case, where in that case the EU commission decided to only assess the facts that occurred during the oil crisis time in 1973-1974 as a consideration for making decision.<sup>54</sup> In determining the relevant market during a pandemic, it is possible to add the time factor to provide an analysis of the market share at a more specific time period. Indonesian competition authority (Komisi Pengawas Persaingan Usaha/KPPU) is able to provide an analysis on whether or not an excessive pricing act conducted by an undertaking is a form of business strategy carried out immediately during the pandemic. Apart from that, the point that needs to be taken into account is that excessive pricing action during the pandemic is clearly not on the side of consumer welfare.

### CONCLUSION

Based on the above explanation, it can be concluded that, the act of excessive pricing has happened in Indonesia for certain products in the beginning of pandemic situation. The products mainly consist of masks and hand sanitizers. Such action can happen as there was an increasing demand and limited products available in the market. However, there is also a strong indication that the action of excessive pricing was conducted with a motive to gain maximum profits by utilizing the advantage of pandemic momentum. Also, in Indonesian business competition, there is no specific regulation on excessive pricing strategy action, however it may be subjected to violations of articles concerning price fixing and abuse of dominant position. The use of the time factor element is needed to analyze the relevant market in order to specifically determine the time span for excessive pricing action during a pandemic. That can be used to obtain evidence of an action which shows that an undertaking has consciously, deliberately and as best as possible committed violations of articles regulated in the competition law.

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<sup>51</sup> Ibid

<sup>52</sup> Ibid. (United Kingdom of Fair Trading Guidelines, 2004)

<sup>53</sup> Bananas, Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (1978)

<sup>54</sup> European Competition Law & Practice Vol 10, No 166



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