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# Price gouging as a species of excessive pricing during the covid-19 pandemic and beyond: has the ‘lucky monopolist’s’ luck run out? (and is price regulation on the horizon?)

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# PRICE GOUGING AS A SPECIES OF EXCESSIVE PRICING DURING THE COVID-19 PANDEMIC AND BEYOND: HAS THE 'LUCKY MONOPOLIST'S' LUCK RUN OUT? (AND IS PRICE REGULATION ON THE HORIZON?)

*by*

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I, **Jarryd Hartley**, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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*ABSTRACT*

The Covid-19 pandemic saw widespread market disruption causing extreme and sudden price increases in foods and essential goods. This paper provides a critical analysis of the response by South Africa's competition authorities to the Covid-19 pandemic. First, it discusses excessive pricing as an exploitative abuse. It argues that there is considerable overlap between excessive pricing and price gouging conceptually, which reveals why price gouging has been pursued as a species of excessive pricing.

Secondly, it traces the development of market definition in competition law. It argues that while there has been a growing strand of scholarship arguing in favour of an effects-based approach to assess market power and arguing against the necessity of market definition, that market definition is still the superior method of assessing market power and alleged anti-competitive effects, as it considers the full range of relevant factors necessary to establish the boundaries of competition and the degree of substitutability between competing firms and products.

Thirdly, it considers the traditional approach to excessive pricing in competition law to contextualise the approach adopted in the Covid-19 cases. It argues that pursuing price gouging as a species of excessive pricing represents a break with traditional excessive pricing as previous excessive pricing concerned traditionally dominant firms, many of whom were beneficiaries of former state support and/or were operating in markets with high barriers to entry. On the other hand, the Covid-19 cases were characterised by many smaller firms with low market shares, new entrants, and once-off market participants being found to be temporarily dominant firms (the so-called 'Lucky Monopolist') who were inferred to have market power.

Fourthly, it analysed the Covid-19 cases and several consent agreements. This paper argued that the approach adopted in several cases in which the market was not properly defined was incorrect and contrary to traditional South African competition law. It argued that the Consumer Protection Regulations were promulgated too late and forced the competition courts to use traditional excessive pricing provisions to evaluate these cases. Furthermore, assessing these cases under the traditional excessive pricing provisions may influence future excessive pricing cases by diluting legal precedent with less economically and competition law defensible approaches.

Fifth, this paper evaluated the response of the competition authorities to the Covid-19 pandemic. It found that the interventions of the competition authorities were able to deter price gouging conduct in response to the pandemic and agrees with the remedies and penalties imposed by the authorities as an appropriate response while arguing further that it is inappropriate to impose punitive administrative penalties on firms that are not dominant under traditional abuse of dominance and excessive pricing tests.

Finally, this paper argues that price regulation is not the ideal intervention for competition authorities and has proffered possible alternatives such as market monitoring, informal engagement with market participants; and/or a general price gouging or consumer protection law which would automatically activate upon the declaration of a state of disaster or emergency which would obviate the need to use the traditional dominance and excessive pricing provisions of the Act to assess such conduct.

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## *I. INTRODUCTION*

Competition law in the South African context is aimed at giving expression to competition economic theories as well as social objectives, which are often difficult to quantify and may at times directly conflict with traditional theories of competition economics.[1] The primary aim of competition law is to enhance consumer welfare by ensuring that firms compete fairly with each other, and thus competition authorities will intervene in the free market when competition is stifled or distorted.[2]

The Competition Act 98 of 1998 ('Competition Act' or 'the Act') recognizes these objectives,[3] and recognizes further that the legacy of Apartheid has led to South Africa's economy being characterized by 'excessive concentrations of ownership' which may impede the efficient and equitable functioning of the economy by limiting the 'free and full participation' of all South Africans.[4] Accordingly, the Competition Act thus also seeks to promote the participation of small and medium-sized enterprises ('SMMEs') and to promote a greater spread of ownership, particularly by historically disadvantaged persons ('HDPs').[5] Thus, competition law is itself an acknowledgment that 'free markets sometimes fail' and require intervention to remedy this failure and improve outcomes for consumers.[6]

This is evidenced by the outbreak of the Covid-19 pandemic which had a 'disastrous impact on the health, economic and social fabric of societies throughout the world and in particular on

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[1] Luke Kelly, David Unterhalter, Isabel Goodman, et al. *Principles of Competition Law in South Africa* (2016) at 2.

[2] Ibid at 3.

[3] Competition Act 98 of 1998 section 2.

[4] Kelly op cit note 1 at 4.

[5] Ibid. HDPs are persons forming part of a category of individuals who were disadvantaged and unfairly discriminated against on the basis of race before the Constitution of the Republic of South Africa (1996) came into operation (Competition Act supra note 3 section 3(2)).

[6] Minette Neuhoff (ed), Marylla Govender, Martin Versfeld & Daryl Dingley *A Practical Guide to the South African Competition Act* 2 ed (2017) at 6.

the normal functioning of markets'.[7] During this period free markets were unable to function normally, and in many cases failed completely.

During the Covid-19 pandemic, the prices of essential goods such as face masks rose sharply amid a massive demand for medical and Personal Protective Equipment ('PPE') which, when coupled with the serious disruption to the normal functioning of markets, caused increased demand and shortages of supply.[8] These conditions led to the prosecution of the first three successful cases of price gouging as a species of excessive pricing under section 8(1)(a) of the Competition Act.[9] These cases are *Competition Commission v Babelegi Workwear and Industrial Supplies CC*,[10] which was appealed in *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa*,[11] as well as *Competition Commission v Dis-Chem Pharmacies Limited*,[12] and most recently, *Competition Commission v Tsutsumani Business Enterprises CC*.[13] There were also over 32 consent agreements entered into between the competition authorities and parties alleged to have contravened the Act during this period.

The reason for assessing price gouging as a species of excessive pricing is that the Act has no specific price gouging provisions and the Consumer Protection Regulations were found to not be capable of retrospective application in both the *Babelegi* and *Dis-Chem* cases.[14] The Competition Appeal Court ('CAC') itself noted that 'the present case has to be determined

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[7] *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* (186/CAC/JUN20) ('*Babelegi CAC*') para 42.

[8] *Competition Commission v Dis-Chem Pharmacies Limited* CR008Apr20 para 39 ('*Dis-Chem*').

[9] Competition Act supra note 3 section 8(1)(a).

[10] CR003Apr20 ('*Babelegi*').

[11] *Babelegi* CAC supra note 7.

[12] *Dis-Chem* supra note 8.

[13] *Competition Commission v Tsutsumani Business Enterprises CC* COVCR113Sep20. This was the first case decided under section 8(1)(a) of the Competition Act read with regulation 4 of the Consumer and Customer Protection and National Disaster Management Regulations and Directions GN 350 *GG* No. 43116, 19 March 2020 ('Consumer Protection Regulations') published by the Minister of Trade, Industry and Competition ('the Minister') under the national state of disaster. The national state of disaster was terminated on 5 April 2022 by President Cyril Ramaphosa (The Presidency *Statement by President Cyril Ramaphosa on the termination of the National State of Disaster in response to the Covid-19 pandemic*, 04 April 2022, available at: https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-termination-national-state-disaster-response-covid-19-pandemic, accessed: 06 February 2023).

[14] *Babelegi* supra note 10; *Dis-Chem* supra note 8.

through the prism of an excessive pricing provision … [that] was not intended for use in the specific and unique conditions of a [Covid-19] pandemic'.[15]

This paper will critically evaluate the response of the competition authorities to the price gouging of essential goods during the Covid-19 pandemic. It will consider these issues by focussing on two distinct concepts, being market definition and excessive pricing. It will also examine the concept of the so-called 'Lucky Monopolist' who is:

> "*Not a dominant firm whose power comes from the state or from natural efficiencies, from unparalleled investment efforts or superior management ability nor as a result of anti-competitive conduct. Its dominant position comes from … luck, being events that fall outside of the knowledge of the economic actor or its ability to determine the timing thereof*".[16]

First, market definition will be defined, along with an examination of the historical approach to market definition in competition cases to establish the rationale of market definition. This will then contextualise the traditional approach to excessive pricing cases.

Secondly, this paper will examine the price gouging cases decided under the excessive pricing provisions to evaluate the suitability of assessing price gouging as a species of excessive pricing.

Thirdly, this paper will evaluate the response of the competition authorities to establish whether its interventions were successful in restoring effective competition and deterring further price gouging. I argue that its interventions were broadly successful in deterring further price gouging, despite my disagreement with some aspects of the cases.

Lastly, this paper will consider whether it is desirable for the competition authorities to engage in price regulation which seems to have increased in likelihood in the aftermath of the Covid-19 pandemic.[17] It will also proffer alternatives to price regulation.

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[15] *Babelegi CAC* supra note 7 para 42.

[16] *Babelegi CAC* supra note 7 para 48.

[17] Price regulation are 'regulatory methods of determining and imposing controls on firms … with the aim of restricting independent price setting' and consists of setting a fixed price or rate of return, or a maximum price ceiling or floor (Penelope Giosa (2020) 'Exploitative Pricing in the Time of Coronavirus – The Response of EU Competition Law and the Prospect of Price Regulation', in Gianni de Stefano and Pablo Ibáñez Colomo (eds), *Journal of European Competition Law & Practice*, Oxford University Press 2020, Volume 11 Issue 9, 499–508 at 504). The Consumer Protection Regulations may be viewed as price regulation controls. Competition authorities have strongly argued against price regulation the past, for example the Competition Tribunal

This paper argues that there are while there are significant problems with using the excessive pricing provisions for the assessment of price gouging, these provisions can adequately assess price gouging if the test used in the Covid-19 regulations is maintained in our law, and submits that it is inappropriate to impose punitive measures on firms that may be found to have engaged in price gouging where these firms are not dominant firms under a traditional dominance assessment (Lucky Monopolists) as a matter of policy, particularly where these firms are SMMEs. I express support for the restitutory pricing remedies employed by the competition authorities to these contraventions as an appropriate remedy in the circumstances, as its focus is on preventing firms from benefitting from anti-competitive conduct rather than on punishment.

## *II. EXCESSIVE PRICING AS AN EXPLOITATIVE ABUSE*

An exploitative abuse is where a dominant firm with market power utilises its dominant position to extract higher profits from consumers by charging excessively high prices, discriminating among customers, paying overly low prices to suppliers, or related practices.[18] Excessive pricing is an exploitative abuse, and is challenging to prove, as the abuse must first be proven to have occurred and to have been anti-competitive.[19]

The theory of harm for excessive pricing is that a dominant firm with entrenched market power will inevitably charge monopoly prices — which is the highest possible price consumers would be able to pay.[20] Such prices will be excessive because they bear 'no reasonable relation to the economic value of the goods or services'.[21]

Thus, an excessive pricing abuse is similar conceptually to price gouging which is the practice of charging exorbitant and exploitative prices for a product, particularly in circumstances when

('Tribunal') stated in *Mittal* 'we eschew the role of price regulator' (*Mittal Steel South Africa Ltd and Others v Harmony Gold Mining Company* 70/CAC/Apr07 para 47) ('*Mittal*').

[18] Robert Anderson *et al.* 'Abuse of Dominance' in R. Shyam Khemani et al. *A Framework for the Design and Implementation of Competition Law and Policy* (OECD, Paris) (accessed on 6 February 2023) available at: https://www.oecd.org/regreform/sectors/aframeworkforthedesignandimplementationofcompetitionlawandpolicy.htm at 72.

[19] OECD *Exploitative pricing in the time of COVID-19* (26 May 2020) (accessed on 6 February 2023) at 6.

[20] Kelly op cit note 1 at 126.

[21] Ibid.

there is a significant and immediate need for a product by consumers, that is in limited supply.[22] This may be why price gouging has been pursued as a form of excessive pricing, as both price gouging and excessive pricing amount to an exploitative abuse of consumers by a firm with market power. Exploitative conduct without any objective justification warrants intervention by competition authorities.[23]

The Tribunal in *Dis-Chem* stated that 'a competition authority might be in dereliction of its duty if it did not intervene in a timely manner in states of natural disasters or emergencies to protect vulnerable consumers against exploitative firms'.[24] Thus, exploitative abuses are viewed sternly by South African competition authorities.

With both key conceptual aspects of this paper now discussed. We proceed into the first argument which is to establish the importance and necessity of engaging in market definition in competition law policy, and competition cases generally. Market definition is generally considered to be a preliminary step in abuse of dominance cases to 'identify and define the boundaries of competition between firms'.[25] The traditional approach to ascertain whether a firm is dominant is to define the market and calculate market shares.[26]

## *III. MARKET DEFINITION*

Boshoff notes that defining the relevant market is a 'key first step in most competition investigations in South Africa and in other jurisdictions'.[27] However, some critics argue that market definition is 'often arbitrary and should be avoided', while other scholars argue that advanced econometric models 'can provide direct estimates of competitive effects and therefore render market definition superfluous'.[28] In this respect, I align with Boshoff, a proponent of maintaining market definition as part of competition law cases, particularly in the

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[22] Spencer Williams (2022) 'Algorithmic Price Gouging'. *Forthcoming in The Cambridge University Press Research Handbook on Artificial Intelligence & the Law*, (accessed on 6 February 2023), available at SSRN: https://ssrn.com/abstract=4051982.

[23] OECD op cit note 19 at 6.

[24] Dis-Chem supra note 8 para 144.

[25] Kelly op cit note 1 at 27.

[26] Harry First 'Robbin' Hood' (2020). CPI Antitrust Chronicle September 2020, *NYU Law and Economics Research Paper No. 20–45*, available at: https://ssrn.com/abstract=3724628 at 5.

[27] Willem H. Boshoff 'Why define markets in competition cases?' (2013) *Stellenbosch Economic Working Papers*: 10/13 at 2.

[28] Ibid at 2–3.

South African context. We begin with a brief history of market definition in competition law and policy to establish the necessity of a market definition exercise which accounts not only for competitive constraints, but also for a ranking of substitutes which gives much more complete market information, as opposed to an inferential approach adopted by effects-based and econometric analyses which simply assesses effects.

*a. Historical Development of market definition*

The US Sherman Act, which was passed in 1890, and subsequently the Clayton Act, passed in 1914, were the first interventions aimed at preventing horizontal restraints, vertical restraints, abuse of dominance and price discrimination.[29] The Clayton Act was also the first Act to introduce merger control — and more significantly it 'explicitly required the definition of both a product and a geographic market'.[30] Thus, it can be argued that market definition is part of the very foundations of competition law and policy.

Initially, competition policy was developed to restrict the market power of large firms — as the larger the firm, the more market power it was thought to wield.[31] Ascertaining the size of a firm was done with the calculation of market shares, which required a relevant market definition. Thus, the US and EU courts required exact relevant market definition during the 1970s and 1980s.[32] In the US, this became the position in the *Brown Shoe* case,[33] while in the EU this stemmed from the *Continental Can* merger case.[34]

As market definition became more complex in the 1960s and 1970s due to the increased reliance on economics as a means to gain insight into markets and market processes, this required the use of qualitative and theoretical economic models, which Boshoff opines could be considered the genesis of the ascent of economics in competition policy.[35] I agree with this, as market definition is the most complex aspect of competition law due to the extensive need

[29] Ibid at 5.

[30] Ibid.

[31] Ibid at 4.

[32] Ibid.

[33] *Brown Shoe Co., Inc. v. United States* 370 U.S. 294 (1962) ('*Brown Shoe'* case).

[34] *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215 at 14 ('*Continental Can'* case).

[35] Boshoff op cit note 27 at 4.

to rely on the use of economics, and this also increased the legal complexity of market definition which had to account for these concepts.

By the 1980s, economics was an important part of competition policy, the US Department of Justice ('DOJ') and Federal Trade Commission ('FTC') released guidelines on market definition, and this approach was adopted by other jurisdictions with competition policies including the EU (Articles 81 and 82 of the Treaty of Rome).[36] The EU Commission's notice on market definition subsequently confirmed that that the focus of market definition in the EU is on substitutability.[37] In the US case of *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp*, it was held that 'without a definition of the market' there was no way to determine whether the defendant firm had the ability to lessen or destroy competition.[38] These conceptions also influenced other jurisdictions, including South Africa.

*b. The development of market definition in South Africa*

South Africa's competition policy was the result of wide consultation by policymakers who drew on the competition policies of the EU, US and Canada.[39] This resulted in a Competition Act which specifically introduced market shares as a means to assess market power.[40] Boshoff considers this to imply a significant position for market definition.[41] I agree, the fact that the drafters specifically included section 7 which would necessitate market definition to be conducted in competition cases explicitly elevates market definition to at the very least, an important starting point for competition cases.

Thus, market definition is also an important part of competition law in South Africa. Yet market definition is a complex and contested exercise, and 'if a market refers to a common space that

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[36] Ibid at 6.

[37] European Commission *Notice on the Definition of the Relevant Market for Purposes of Community Competition Law* (97/C 372/03) Official Journal C 372 09/12/1997 at 0005-0013. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 ('EU notice on market definition'). See also for an explanation of the SSNIP test and the process of market definition, along with United States Department of Justice, Federal Trade Commission (1992) *Horizontal Merger Guidelines*, Washington DC; and United States Department of Justice, Federal Trade Commission (2010) *Horizontal Merger Guidelines*, Washington DC ('US horizontal merger guidelines (2010)').

[38] *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp*. 382 U.S. 172 (1965) at 177.

[39] OECD *Competition law and policy in South Africa: an OECD peer review* (2003) Paris France (accessed on 06 February 2023), available at: https://www.oecd.org/southafrica/34823812.pdf at 21.

[40] Competition Act supra note 3 section 7.

[41] Boshoff op cit note 27 at 6.

includes all competitors that constrain the market power of a firm … it is necessary to consider exactly how these competitive constraints are measured'.[42] We will consider this in the next section with an analysis of the complexities involved in the market definition exercise, it will focus on the Hypothetical Monopolist test ('HM test') which is used to define the product and geographical dimensions of a market as a means to assess competitive constraints and substitutes.

*c. Complexities of market definition*

Market definition is a purposive process used to identify and assess the boundaries of competition, competitive constraints between firms, and whether firms possess market power.[43] As the South African competition authorities have not provided formal guidance for market definition, practitioners adopted an approach consistent with other jurisdictions with reliance on the HM test which originates from the US.[44]

The HM test views the market as composing a product and geographic space which could potentially be monopolised by a firm, thus focusing on identifying the firms operating within the relevant region which could act as a competitive constraint on the firm and prevent it from abusing its market power to profitably raise prices.[45] It is often phrased as a thought experiment that posits whether a firm is capable of maintaining a price increase of 5%-10% over a particular period (usually 12 months or longer) without a reduction in profits — a small but significant non-transitory increase in price ('SSNIP').[46]

The SSNIP test defines the geographic market by starting with the geographic area where the firm in question operates, if the firm's profits are negatively affected by the price increase, the geographic market is defined too narrowly.[47] Consequently, geographic markets can be broadened by including the regions where competition is likely to arise in response to the price

[42] Ibid.

[43] Simon Roberts, Catherine Corbett, & Reena Das Nair 'Countervailing power, bargaining power and market definition: a reflection on two mergers', (2010) *Fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa* University of the Witwatersrand, Johannesburg at 149; Kelly op cit note 1 at 27.

[44] Boshoff op cit note 27 at 8.

[45] Ibid.

[46] Ibid.

[47] Ibid.

increase.[48] This is repeated until the market is broad enough to define the market where the firm can profitably and sustainably raise prices.[49] This test can be used similarly to identify the product market.[50]

The SSNIP test is usually operationalised using empirical measures, at the market definition stage demand-side substitutability is most often utilised and this entails factors such as the ability and likelihood that customers would substitute from one product to another as a result of a price increase or a corresponding reduction in quality or service.[51] Supply-side substitutability (being the likelihood of new entrants), is a useful measure of market power but is less commonly used at the market definition stage.[52]

The HM test is a broad test, which leaves room for uncertainty.[53] The models used to measure substitutability are similarly associated with uncertainty as the data used to infer substitutability and the reality that these models often are based on limited information can create 'significant uncertainty about empirical assessments of substitutability'.[54]

These challenges have resulted in critics arguing that market definition should be avoided as the 'inclusion or exclusion of products may well reflect the preference of the decision-maker rather than strong empirical evidence'.[55] Econometric models have been proffered as an alternative effects-based model that is able to directly assess empirical effects without the need for market definition.[56] However, as will be shown in the next section market definition is still of significant relevance to competition analysis and is a superior methodology to pure reliance on econometric models.

*d. Why engage in market definition in competition cases?*

Boshoff argues that market definition is essential not only to calculate market shares but more importantly because it 'involves an analysis of substitutability'.[57] And substitutability is the

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Ibid, see also US horizontal merger guidelines (2010) supra note 36 at 7.

[52] Ibid.

[53] Ibid at 9.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Boshoff op cit note 27 at 3.

key to evaluating the competitive effect of a particular practice. This is confirmed by the above discussion, and by the EU notice on market definition, and US horizontal merger guidelines.[58]

While, as mentioned above market definition first developed in merger control cases, such as the *Brown Shoe* case in the US,[59] and *Continental Can* case in the EU,[60] it has also become an important part of anti-competitive conduct cases.[61] This approach was followed in *Mittal*, the first abuse of dominance case in South Africa.[62]

However, in recent years, there has been a shift to an effects-based approach in abuse of dominance cases which has prompted some to argue that dominance inferred from market shares is not an appropriate way to measure market power.[63] These proponents argue that an effects-based approach is able to better assess the effects of alleged anti-competitive conduct and therefore renders market shares superfluous.[64] They argue further that even on the construction that market shares are an appropriate way to measure market power 'there is not necessarily a causal link between dominance and the competitive effects of a particular conduct'.[65]

For example, Kaplow argues that market definition should be abandoned because there is no coherent way to define a relevant market without first coming up with your best assessment of market power, whereas 'the entire rationale' for market definition is to 'enable an inference about market power'.[66] Furthermore, he argues that a market definition conclusion will not have better information about market power than the information used to define the market initially.[67] Kaplow thus seems to align with an effects-based approach to abuse of dominance cases.

Contrastingly, those who argue in support of retaining market definition and maintaining legal precedent argue that market definition should be retained for abuse of dominance cases 'as

[58] EU notice on market definition op cit note 37, and US horizontal merger guidelines (2010) op cit note 37.

[59] Supra note 33.

[60] Supra note 34.

[61] Boshoff op cit note 27 at 10.

[62] *Mittal* supra note 17.

[63] Boshoff op cit note 27 at 10.

[64] Ibid.

[65] Ibid at 10–11.

[66] Louis Kaplow 'Why (Ever) define Markets?' (2010) 124 *Harv. L. Rev. 437* at 440.

[67] Ibid.

market shares may provide a useful screen to economise on the efforts of the courts'.[68] While they concede that market shares are a rough proxy for market power, a firm that falls below the market share thresholds for dominance has a lower likelihood that its conduct is capable of having an anti-competitive effect in the relevant market.[69] Market shares have not played a large role in South Africa's early abuse of dominance cases as these cases mostly concerned overwhelmingly dominant firms operating in markets with high barriers to entry and/or with histories of state support.[70] Nonetheless, in *Trudon* the CAC reaffirmed that:

> "*The inquiry into whether an entity is a dominant firm includes identification of the relevant market in which it is involved; its market share within that market and whether it possesses the relevant market power. The manner in which dominance must be proved under section 7 depends on the market share enjoyed by the firm alleged to be dominant*".[71]

Boshoff goes further than the proponents of market definition who view it merely as a means to screen possible anti-competitive effects of a firm's conduct to argue that there is another significant benefit of market definition, which is that it requires the identification and ranking of substitutes for the product sold by the firm in question.[72] Viewing market definition only as a means to calculate market share means that the analyst 'foregoes a large chunk of substitution information relevant to an analysis of the competitive effects of either mergers or allegedly anti-competitive business practices'.[73] He argues that the best way to address uncertainty is not to 'eschew the drawing of boundaries, but to provide more information to accompany a particular boundary choice'.[74] In other words, the best response to the difficulties of market definition is to take more information into account to arrive at a more robust conclusion.

I find this logic persuasive. In my view, market definition should be viewed as a means both for delineating the market, as well as ranking possible substitutes for the product in question as this approach will more adequately address the uncertainties that come with market definition in the first instance and I agree with Boshoff's argument in this respect as a decision

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[68] Boshoff op cit note 27 at 11.

[69] Ibid. See also Anderson *et al.* supra note 18 at 71.

[70] Reena das Nair & Pamela Mondliwa 'Excessive pricing under the spotlight: What is a competitive price?' In J. Klaaren, S. Roberts, and I. Valodia (eds) (2017) *Competition Law and Economic Regulation in Southern Africa*. Johannesburg: Wits University Press at 99.

[71] *Trudon (Pty) Ltd v Directory Solutions CC and Another*. Case No: 96/CAC/Apr10 para 27 ('*Trudon*').

[72] Boshoff op cit note 27 at 11.

[73] Ibid.

[74] Ibid.

which takes a greater number of relevant factors into account will always be superior to one which takes a lesser number of relevant factors into account — in other words, the more relevant information at the disposal of a decision-maker, the more defensible the conclusions drawn are.

In addition, it can also enhance an effects-based approach to abuse of dominance which requires a link to be established between the alleged anti-competitive behaviour and market effect.[75] Indeed, anti-competitive conduct is relevant to market definition and the two can proceed simultaneously and, in my opinion, complementarily.[76] 'Substitution patterns' provide the critical link as anti-competitive behaviour requires market power which only exists 'in the absence of meaningful competitors or their threat of entry', in other words, the efficacy of constraints.[77]

It is worth noting that the US Supreme Court in the recent *American Express* case,[78] explicitly rejected 'the assertion that, as a general matter, defining the relevant market is required only when there is a lack of evidence of actual competitive harm (often in the form of higher prices or reduced output), ruling that "we must first define the relevant market"'.[79] This is 'because of the long and deeply ingrained tradition in antitrust jurisprudence'.[80] Similarly in South Africa, it was stated in *Mittal*, 'our approach is to follow the schema of the Act and the standard approach to allegations of abuse of dominance which, as we have seen, derives dominance from specified "market shares" and the possession of "market power"'.[81] Thus, maintaining the market definition process finds support both in academic literature and in case law.

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[75] Ibid.

[76] John Clark & R. Shyam Khemani 'Market Definition and Assignment of Market Shares' in R. Shyam Khemani et al. *A Framework for the Design and Implementation of Competition Law and Policy* (OECD, Paris) (accessed on 6 February 2023), available at: https://www.oecd.org/regreform/sectors/aframeworkforthedesignandimplementationofcompetitionlawandpolicy.htm.

[77] Ibid at 11–12.

[78] *Ohio v. American Express Co*. 585 U.S. 138 S. Ct. 2274 (2018) (*'American Express'* case).

[79] Elai Katz 'Not So Fast, You Still Have to Define the Relevant Market: The Less Debated Yet Vital Teaching of Ohio V. American Express' (June 2019) *CPI Antitrust Chronicle* 1–5 at 2.

[80] Ibid at 5.

[81] *Mittal* supra note 17 para 19.

I furthermore submit that these arguments rebut Kaplow's argument against the need for market definition as it highlights another important rationale for market definition, that the information which the market definition exercise will reveal, being the identification and ranking of substitutes and the efficacy of constraints is superior to the information used to define the market in the first place. I submit that assessing substitutes without the benefit of a market definition exercise is a less rigorous approach and increases the likelihood of an incorrect conclusion, and that this is why market definition is necessary.

Boshoff argues that markets should be defined formally and explicitly, but this may be done flexibly — that is by defining sets of closer and less close substitutes instead of simply defining competitors as being within a market or outside it.[82] This was the approach followed in *Primedia Ltd, Capricorn Capital Partners Pty Ltd, New Africa Investments Ltd v Competition Commission and African Media Entertainment Ltd*.[83] Such an approach allowed for market share calculation, as well as information on constraints and substitutability, thereby allowing the assessment of effects.[84]

Effects-based proponents of econometric models argue that these models provide cross-price elasticity estimates that allow an analysis of substitutability, however as Boshoff points out, these will run into significant empirical challenges in a country like South Africa which would prevent their widespread use in practice.[85] Furthermore, an 'approach that seeks to shun market definition in favour of a direct estimation of competitive effects is an empirically inferior strategy, [no matter] how sophisticated the econometric modelling'.[86] This is because a combination of models usually outperforms any single model.[87] Similarly, the likelihood of unobserved variables leading to the incorrect classification of a particular practice as pro- or

[82] Boshoff op cit note 27 at 12.

[83] 39/AM/MAY06. This case involved the partial acquisition of Kaya radio station by Primedia, in the initial decision of *Primedia Ltd & Others and Competition Commission* (39/AM/MAY06) [2007] ZACT 13 (12 February 2007), the Tribunal approved the merger without formal market definition. This led to a successful appeal to the CAC, after which the case was remitted back to the Tribunal. In the second decision the Tribunal explicitly embarked on market definition but did so flexibly due to the various difficulties with using a rigid market definition. Notably, the Tribunal also categorized competitors based on the strength of their substitutability instead of simply listing them.

[84] Ibid.

[85] Ibid at 13.

[86] Ibid.

[87] Ibid.

anti-competitive is decreased where market definition occurs incorporating 'different types of quantitative and qualitative evidence'.[88]

Thus, competition analysis with a rigorous market definition that applies various tools and evidence is superior to a narrow econometric approach. Boshoff also discusses various limitations of econometric models, and the increased likelihood of the cellophane fallacy arising when relying on price elasticity estimates for market definition.[89]

Considering these difficulties along with the above discussion, the importance of market definition becomes more apparent. While market definition is 'often contested' and a strict form of market definition is also problematic, this can be countered by a flexible market definition which has 'both a well-defined market and enough information about the relative strength of substitutability'.[90] Defining markets considering a range of tools which includes econometric models (what Boshoff terms an '*eclectic approach*') is the best method of reducing uncertainty and is superior to any single model.[91] As Roberts et al. state 'the point is that the overall analysis is coherent and integrated, bringing together relevant theories and the necessary data'.[92]

Thus, market definition remains pivotal to a rigorous competition analysis that can arrive at theoretically and legally defensible conclusions. This is why we should continue to maintain market definition in competition cases.

With the conclusion of our discussion of the importance of market definition, we proceed now to discuss excessive pricing. We will focus on the rationale for regulation, and the development of excessive pricing cases in South Africa as a background to our assessment of the enforcement of price gouging as a species of excessive pricing during the Covid-19 pandemic.

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[88] Ibid.

[89] Ibid at 15–17. See also for an explanation of the cellophane fallacy.

[90] Ibid at 18.

[91] Ibid.

[92] Roberts op cit note 43 at 148.

## *IV. EXCESSIVE PRICING*

### a. *Rationale for regulation*

Das Nair and Mondliwa consider excessive pricing to be 'arguably the most contentious area of competition enforcement in many jurisdictions'.[93] This is due to diverging views which have led to different approaches in various jurisdictions.[94] Some argue against intervention as prices that are excessively higher than a 'competitive level' will invite new entrants who will compete with incumbents and drive down prices, while others point to difficulties with calculating a competitive price and the fact that excessive pricing enforcement may 'deter or chill investment'.[95]

However, analysis has shown that arguments that the market will correct itself does not hold up in certain situations such as 'in small economies with highly concentrated markets and high barriers to entry'.[96]

On the one hand, the US has no prohibition on excessive pricing and accepts monopoly prices as being part of the competitive process and part of promoting innovation.[97] Justice Scalia, in the US Supreme Court's *Trinko* case, held:

> "*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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct*".[98]

The European Commission ('EC'), on the other hand, advocates a limited intervention approach and displays 'legitimate reluctance' to act as a price regulator, however, it will intervene when it views it necessary and justifiable.[99] Article 102 of the Treaty on the

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[93] das Nair & Mondliwa op cit note 70 at 97.

[94] Ibid.

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 U.S. (2003) ('*Trinko*').

[99] das Nair & Mondliwa op cit note 70 at 100. For example, the EC intervened in resale restrictions between markets which resulted in the excessive pricing of gas in certain countries by Gazprom.

Functioning of the European Union prohibits excessive pricing by firms with market power.[100] This is consistent with the nature of their markets — both the US and EU have 'large markets where it is unlikely for a single firm to be able to act truly independently and unconstrained by the threat of new entry'.[101]

Contrastingly, South Africa and similar economies are characterised by 'overwhelmingly dominant firms' and if barriers to entry exist, it is possible for these firms to use their dominance to charge monopoly prices.[102] As Lewis argues, where these barriers to entry were created by historical reasons or by technological and commercial considerations it has an effect at least equal to legal barriers.[103] Therefore, excessive pricing regulation should be applied to pricing conduct that is not a result of a monopoly position obtained as a result of investment, innovation or efficiency, as such prices could be the result of the exploitation of market power resulting from 'state support, or current or past exclusive rights'.[104]

Thus, the rationale for excessive pricing is to regulate the pricing conduct of dominant firms who can abuse their market power to extract monopoly rents from consumers where they are not threatened by the possibility of attracting new entrants to challenge them. This is more likely in developing countries like South Africa,[105] and hence why excessive pricing is prohibited under the Competition Act.[106]

*b. The South African approach to excessive pricing*

Section 8(1)(a) of the Act, prohibits a firm that is found to be dominant from abusing its dominant position by charging excessive prices.[107] Section 8(1)(a) initially prohibited a dominant firm from 'charging an excessive price to the detriment of consumers', the amended

[100] European Commission (OJC 326) *Consolidated version of the Treaty on the Functioning of the European Union* (2012) art. 102.

[101] das Nair & Mondliwa op cit note 70 at 99.

[102] Ibid.

[103] David Lewis 'Exploitative Abuses – A Note on the Harmony Gold v Mittal Steel Excessive Pricing Case' in *International Antitrust Law & Policy: Fordham Competition Law* (Online document).

[104] das Nair & Mondliwa op cit note 70 at 100.

[105] Ibid.

[106] Competition Act supra note 3 section 8(1)(a). Under section 8(2), the allegedly dominant firm may rebut the allegation by showing that the 'price was reasonable'.

[107] Ibid section 8(1)(a).

section 8(1)(a) added consumers to the section. An excessive price was also defined previously in section 1 of the Act. Section 8(1)(a) in its current form states:

> *"(1) It is prohibited for a dominant firm to—*
>
> *(a) charge an excessive price to the detriment of consumers or customers".*[108]

Prior to the deletion of the definition of an 'excessive price' after the most recent amendments,[109] the Act defined an excessive price as 'a price for a good or service which bears no reasonable relation to the economic value of that good or service' and 'is higher than the value'.[110] Put differently, the price at which the service or good is sold is not equal (or reasonably equivalent) to the costs of production plus reasonable profit.

The concept of 'economic value' was given subsequent content in case law, and Boshoff notes that the factors which were included in the amended Act are broadly like the factors which were developed to give content to this concept.[111] These factors include:

> "*(i) price-cost margins and other profitability measures; (ii) prices charged by the respondent in other markets and over time; (iii) prices and profits of comparator firms in competitive markets; (iv) duration of pricing at that level; [and] (v) structural characteristics of the relevant market, including market share, contestability, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment*".[112]

These factors are used to assess whether an allegedly excessive price is higher than a competitive price and whether the difference between the two prices is unreasonable.[113] Notably, this section shifted the onus to prove that the price was reasonable once a prima facie case is established to the firm alleged to have charged excessive prices – a clear rejection of the CAC's approach in the previous cases of *Mittal* and *SCI*.[114]

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[108] Ibid.

[109] Ibid section 1. The definition of 'excessive price' was deleted by section 1(b) of Act 18 of 2018.

[110] das Nair & Mondliwa op cit note 70 at 100. The definition of an excessive price comes directly from the EU case *United Brands v EC Commission* [1978] 1 CMLR 429.

[111] Willem H. Boshoff 'South African Competition Policy on Excessive Pricing and its relation to Price Gouging during the Covid-19 Disaster Period' (2021) *South African Journal of Economics Vol. 89*: 1 March 2021 112 at 117–118 ('*Boshoff (2021)*').

[112] Ibid; Competition Act supra note 3 section 8(3).

[113] Competition Act supra note 3 section 8(3).

[114] *Mittal* supra note 17; *Sasol Chemical Industries Ltd v Competition Commission* 131/CACJun14 ('*SCI*').

I expect that this may increase the success rate for prosecution of excessive pricing cases. However, it remains to be seen if this reformulation will increase the success rate of excessive pricing prosecutions in practice.

*c. Price gouging as a species of excessive pricing: a break with tradition?*

South Africa reported its first case of Covid-19 on 5 March 2020.[115] On the 23rd of March a national lockdown was imposed.[116] However, even before the first case was announced, stores were running out of face masks.[117] Following the declaration of the Covid-19 national disaster, the Minister introduced regulations on determining excessive pricing during the national disaster under section 8(3)(f) of the Act.[118]

Excessive pricing was defined in the regulations as a price increase that:

> "*(i) does not correspond to increases in costs or (ii) results in an increased markup relative to the average markup achieved over the three-month period from December 2019 to February 2020*".[119]

The regulations applied to certain categories of goods and services including basic food and consumer items, emergency products and services, medical and hygiene supplies and emergency cleaning products and services.[120]

As noted above, excessive pricing is aimed at preventing monopoly prices which exploits the willingness (or desperation) of consumers to pay prices that would not prevail in a market with effective competition.[121] The first method to do this is by establishing a competitive price benchmark which compares the prices of the firm or similar firms in other markets; Where the markets are sufficiently comparable, a significant price difference may be evidence of excessive pricing.[122] The second approach is by assessing the firm's costs to determine average costs for the product and identifying an appropriate profit margin.[123] Boshoff notes that South

[115] First op cit note 26 at 4.

[116] Ibid.

[117] Ibid.

[118] Boshoff (2021) op cit note 111 at 118.

[119] Ibid.

[120] Ibid.

[121] Ibid at 119.

[122] Ibid.

[123] Ibid.

Africa is a front runner in developing the latter approach.[124] While both approaches can be complementary, they also both entail their own challenges.[125] Boshoff argues that a benchmark which compares prices in the market in question before and during the period under investigation (termed an 'intertemporal benchmark') is the appropriate benchmark for the Covid-19 period after controlling for demand and cost differences between periods; And this is the approach adopted by the regulations.[126]

I agree with this as Boshoff further notes that the difficulties of accounting for prices in other markets may be challenging as many of these features may not be observable.[127] Similarly, rival prices may also be less useful as rivals may also have raised their prices in response during the same period.[128] I submit however, that if rival prices are higher, that this should be considered.

Comparing similar markets is also complicated by the fact the very same increases in market power could have occurred in those markets.[129] I find this convincing as many of the market distortions observed during the Covid-19 pandemic occurred internationally in other markets. Thus, comparing prices in the same market prior and during the period under investigation appears to be the more appropriate approach for the period.

In considering the effect of the Covid-19 pandemic on consumers, it may be concluded that lockdowns probably reduced the ability of customers to respond to price increases, similarly the health concerns occasioned by the pandemic probably reduced the willingness of consumers to search for substitutes.[130] Furthermore, the value that consumers placed on certain products (i.e. face masks or sanitisers) was altered dramatically which reduced the set of substitutes for certain products (i.e. a sanitiser with low alcohol content would not have been substitutable for a sanitiser with high alcohol content).[131] As a result of this market definition may be narrower under such conditions. Similarly, limitations on movement and the relatively

[124] Ibid.

[125] Ibid. Boshoff discusses these challenges at 119–120.

[126] Ibid at 119 and 127.

[127] Ibid.

[128] Ibid.

[129] Ibid.

[130] Ibid at 122.

[131] Ibid at 123.

short duration on the pandemic may also have limited new entry which is a relevant factor for excessive pricing.[132]

Boshoff found that firstly, price gouging can be pursued as a form of excessive pricing in cases involving demand spikes as both price gouging and excessive pricing benchmarks 'produce similar price forecasts, provided that a sufficient forecast interval is allowed'.[133] This is because without a long enough period to account for dynamic price behaviours 'a transitory price response to a demand spike would be easily confused with a price response to elevated demand'.[134] This would necessitate an understanding of the demand response in a particular case.[135] This approach is consistent with the approach to price gouging cases in other jurisdictions.[136]

Secondly, in the case of elevated demand rather than a demand spike and where the price falls between the benchmarks for excessive pricing and price gouging, it must be justified why price responses to an elevated demand for a sustained period should be treated differently.[137] This focuses the evaluation on abuses of market power and harm to competition.[138]

From this discussion we can conclude that while excessive pricing is not usually the mechanism for assessing price gouging conduct, it is not necessarily inappropriate to use an excessive pricing framework so long as it is bolstered by tools sensitive to the sudden demand spikes and compressed time frames that characterise price gouging. I submit that the approach advocated by Boshoff is consistent with the Consumer Protection Regulations, and that the regulations were an adequate and appropriate response to constrain price gouging abuses during the pandemic.

However, as will be detailed below the regulations have been 'widely applied' against many small firms and Lucky Monopolists in narrower geographic markets, which is a clear break with past practice wherein the enforcement of alleged excessive pricing was usually limited to traditionally dominant firms such as Sasol and Mittal and where those markets had particular

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[132] Ibid.

[133] Ibid at 133.

[134] Ibid.

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] Ibid.

characteristics such as a history of state support.[139] The key justification for this relied on by the competition authorities was on the basis of 'temporary' or transitory market power which these firms were found to enjoy in these circumstances of market distortion.[140] We will analyse this in the next section.

## *V. ENFORCEMENT OF PRICE GOUGING AS A SPECIES OF EXCESSIVE PRICING: HAS THE LUCKY MONOPOLIST'S LUCK RUN OUT?*

The Lucky Monopolist is a firm that obtains market power they would not usually enjoy because of economic circumstances outside their control.[141] Their dominance, so the reasoning goes, is therefore inferred from market power which is evidenced by an ability to raise prices independently of competitors, customers, and suppliers.[142]

This concept did not receive much attention previously but rose to prominence in South African competition law because of the Covid-19 pandemic. There have been three cases that have made it to the competition courts thus far. We proceed to analyse and critique these cases.

### *a. Babelegi*

*Babelegi*,[143] was the first case dealing with price gouging as a species of excessive pricing in South Africa. It was also the first excessive pricing case since the amendments to section 8.[144] Babelegi, a small company that manufactures industrial workwear was alleged to have charged excessive prices for dust masks it had purchased from suppliers.[145] Over a period of three months, Babelegi increased the prices of its masks on 31 January 2020, then on 10 February 2020 and then on 5 March 2020.[146] During the period its profits on a box of masks increased

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[139] Ibid at 113.

[140] Ibid. This concept was imported from the *ABG Oil Companies* IV/28:241, 77/327/EEC (19 April 1977) where the EC found oil companies to be temporarily dominant during an oil shortage as their customers were completely dependent on them for scarce products and due to the shortage, the companies were unable to effectively compete by supplying a rival's customers.

[141] *Babelegi CAC* supra note 7 para 48.

[142] *Babelegi* supra note 10 para 152.

[143] *Babelegi CAC* supra note 7.

[144] Ibid para 40.

[145] First op cit note 26 at 4.

[146] Ibid.

from approximately 20 percent to almost 92 percent and its markup rose from 23 percent to 1100 percent prior to its costs increasing on 18 March 2020.[147]

Despite it being common cause that Babelegi had less than 5 percent market share, the Competition Commission ('Commission') argued that because Babelegi was able to raise prices by a material extent over the short period of time that spanned the complaint period, it had exerted market power and was therefore dominant during the period.[148]

The Tribunal held that the Covid-19 pandemic led to an abnormal relationship between supply and demand and that the pandemic also removed competitive constraints which could confer market power on even a small firm.[149] The Tribunal held further that market power could be inferred from the conduct of the firm and accordingly did not regard it necessary to define the relevant market.[150]

The Tribunal held that Babelegi's prices were *prima facie* excessive as they occurred without a corresponding increase in costs. Accordingly, it was found that Babelegi had charged excessive prices for face masks during the complaint period, and a penalty of R76 040 was imposed, being an amount that exceeded Babelegi's 'improper gains' from its conduct (which was between R30 416 and R37 817).[151]

The case was appealed to the CAC; however, the Tribunal's ruling was upheld except for the penalty which was set aside. The CAC also took the fact that Babelegi was a small firm into account in making its determination.[152]

*b. Dis-Chem*

In *Dis-Chem*, the Commission returned to its traditional practice of prosecuting large firms for excessive pricing.[153] The allegation was of excessive pricing of surgical face masks during the complaint period of March 2020, wherein Dis-Chem increased prices for various types of face masks by 261 percent, 43 percent, and 25 percent respectively around 9 March 2020.[154]

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[147] Ibid.

[148] Ibid.

[149] Ibid.

[150] Ibid.

[151] Ibid paras 153, 177–189.

[152] Ibid.

[153] Boshoff (2021) op cit note 111 at 135.

[154] Dis-Chem supra note 8 paras 6–7.

The Tribunal provided its first interpretation of what was required to establish a price that was *prima facie* excessive post-amendment of the Act, which was to show that the price 'on the face of it was utterly exorbitant'.[155]

The Tribunal did not define a specific geographic market even though Dis-Chem had adduced evidence that there were a variety of other stores selling surgical face masks within a 5 km radius of Dis-Chem's top 10 stores; that Dis-Chem stores are predominantly located in malls wherein there were other competitors; and that Dis-Chem had deliberately priced its masks lower than Clicks (its closest competitor).[156]

Rather, it assessed whether a supplier of face masks would be able to increase its prices by 5 percent or more during the complaint period without facing competitive constraints from other firms within the same mall or 5 km radius.[157] The Tribunal found in the affirmative, and accordingly dismissed Dis-Chem's argument that its prices were lower when compared to its rivals.[158]

Oxenham et al.,[159] argue that the Tribunal erred in not taking Dis-Chem's rivals' prices into account as if it could be demonstrated by evidence that its prices when compared to a large competitor in a narrow geographic market such as a shopping mall, priced the exact same product at a higher price than Dis-Chem, then it cannot be said that Dis-Chem was able to act unconstrained by competitors.

I agree with this critique. However, the Tribunal argued that when deciding to increase its prices, Dis-Chem was not constrained by Clicks because it increased its prices instead of decreasing them.[160] I struggle to agree with this logic, as if the products were identical or sufficiently closely related to be substitutable, then the fact that Dis-Chem priced lower than Clicks should certainly have been considered in deciding whether Dis-Chem possessed sufficient market power to act independently of competitors. The fact that the difference

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[155] Ibid paras 70–72.

[156] Ibid paras 91–93; 122–140.

[157] Ibid para 128.

[158] Ibid 128–141.

[159] John Oxenham, Michael-James Currie, and Charl van der Merwe *COVID-19* 'Price Gouging Cases in South Africa: Short Term Market Dynamics with Long-term Implications For Excessive Pricing Cases' (2020) *Journal of European Competition Law & Practice*, Vol. 11, No. 9 524 at 526.

[160] Dis-Chem supra note 8 para 137.

between Dis-Chem and Clicks' prices for the same product remained during the complaint period could in fact point towards effective competition functioning in this market during the complaint period as Dis-Chem still had regard to the pricing of its competitors. The Tribunal concluded that but for the conditions prevailing because of Covid-19, Dis-Chem would not have been able to implement these price increases and that the Commission had established a *prima facie* case of excessive pricing.[161]

When considering the reasonableness of the price increase the Tribunal perplexingly held that *any* price increase in relation to essential goods during the Covid-19 pandemic was unreasonable.[162] It thus found Dis-Chem's price increases to be 'utterly unreasonable and reprehensible'.[163] It should be noted that the test for purposes of section 8(3) is whether the price is higher than a competitive price and whether the difference is unreasonable.[164] The Tribunal unnecessarily muddied the waters by blurring the legal test in this regard. Oxenham et al.,[165] note that prior to the amendments to the excessive pricing provisions the CAC held that a price that was not more than 20 percent of the economic value of a product could not be considered excessive. Similarly, in *Babelegi*, the Commission, relying on price gouging laws elsewhere, offered the threshold of 10 percent beyond which a price or markup increase would be indicative of unreasonableness.[166] It is thus accepted that not every price increase is automatically excessive.

Ultimately, the Tribunal imposed a penalty of R1.2 million — approximately twice the amount of Dis-Chem's overcharge.[167]

*c. Tsutsumani*

*Tsutsumani* was the first Covid-19 case in which the Consumer Protection Regulations were applied.[168] Tsutsumani was alleged to have charged excessive prices to the South African Police Services ('SAPS') for the bulk supply of surgical face masks during the complaint

[161] Ibid.

[162] Ibid paras 219–223.

[163] Ibid.

[164] Oxenham et al. op cit note 159 at 527.

[165] Ibid.

[166] Babelegi supra note 10 para 157.

[167] Dis-Chem supra note 8 para 257.

[168] *Tsutsumani* supra note 13 para 3.

period of 5 April 2020 and 29 April 2020 in a tender to provide masks to SAPS during the Covid-19 lockdown.[169]

The matter was decided on the papers as much was common cause between the parties.[170] Tsutsumani is a general trader which supplies goods to the government through tenders.[171] Due to the need for SAPS personnel to wear face masks to respond to the pandemic, SAPS required more than 9 million masks per month.[172] As no single supplier could provide this, SAPS sent out tenders on a daily basis.[173] Tsutsumani responded to such a tender and quoted R16 250 000 for 500 000 masks which SAPS accepted that same day.[174] Tsutsumani supplied these masks to SAPS at a markup of 87% per mask and a gross margin of 46% per mask.[175]

It was common cause that the relevant market was the supply of masks which was an essential listed product in the Consumer Protection Regulations.[176] Regarding the relevant geographic market, the tenders were issued nationally and were required by SAPS' force nationwide.[177] This was conceded by Tsutsumani and further considered incontrovertible by the Tribunal – thus the relevant market was the national supply for masks on an urgent basis.

Regarding the dominance assessment, Tsutsumani argued that as this was a once-off transaction, a finding that it had market power would mean that any firm which took advantage of a shortage of supply could be found dominant; It argued further that this could have a chilling effect on new entrants into a market which could lead to supply shortages and higher prices in the long run.[178] It also argued that as 18 firms responded to the tender, SAPS had bargaining power *vis-à-vis* the suppliers and that market power should not be seen as isolated to a once-off transaction.[179]

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[169] Ibid paras 4–5.

[170] Ibid para 7.

[171] Ibid para 17.

[172] Ibid paras 19–30.

[173] Ibid.

[174] Ibid.

[175] Ibid.

[176] Ibid paras 48–53.

[177] Ibid.

[178] Ibid paras 54–87.

[179] Ibid.

The Tribunal was unconvinced by Tsutsumani's arguments, it held that the size of the transaction was significant, and that excessive pricing was possible in respect of a product forming a small part of a firm's business.[180] The Tribunal held that the number of suppliers who responded to the tender was not a defence either as multiple firms could be found dominant in a crisis and have market power *vis-à-vis* its normal customers (relying on *ABG Oil*).[181] Furthermore, the size of firms supplying PPE in the Covid-19 context could not exempt them from an excessive pricing contravention if they met the minimum asset/turnover threshold for dominance, as this was specifically the conduct the regulations were promulgated to address.[182] Accordingly, it was held that Tsutsumani was dominant as it had market power *vis-à-vis* SAPS as it could price independently of any other supplier and still secure an order with SAPS, whereas SAPS was a price taker and required the masks urgently.[183]

In assessing the excessiveness of the price, the parties agreed that the economic test was whether the prices charged had a corresponding cost justification from the supplier up the value chain, and that the Consumer Protection Regulations had set a benchmark of 10 percent for assessing these prices.[184] As Tsutsumani had not previously sold masks, it was not possible to use pre-pandemic prices as a benchmark.[185] Margin levels of 10-15 percent were observed prior to the pandemic for PPE, accordingly Tsutsumani's mark-up and margin (87% and 46% respectively) was significantly higher than the competitive price benchmark of the 10-15 percent margin.[186] These prices were thus found to be *prima facie* excessive.[187] The Tribunal also did not accept any of Tsutsumani's justifications for its pricing.[188]

Finally, the prices caused detriment both to SAPS as a customer who 'had to ensure the safety of its staff and the public that they served', consumers and the public at large as SAPS needed the masks to fulfil a public function by protecting citizens and keeping the peace, Tsutsumani had thus exploited SAPS when it was desperate and this increased the financial burden of

[180] Ibid.

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] Ibid paras 88–100.

[185] Ibid.

[186] Ibid paras 101–110.

[187] Ibid.

[188] Ibid paras 119–146.

dealing with the pandemic and could have left frontline workers without adequate protection if there were insufficient funds to procure the required PPE due to their excessive price.[189]

Accordingly, Tsutsumani was found to have charged excessive prices to SAPS for the bulk supply of surgical face masks during the complaint period. The Tribunal imposed an administrative penalty of R3 441 689.10, the maximum fine of 10% of the firm's annual turnover, because Tsutsumani had sought to exploit its temporary market power and (perhaps more precisely) because Tsutsumani did not cooperate with the Commission or Tribunal in the investigation.[190] Tsutsumani has appealed the Tribunal's decision to the CAC.[191]

There were also many consent agreements entered into between the Commission and firms alleged to have charged excessive prices. We will briefly consider these below.

*d. Covid-19 Consent Agreements*

As noted above there have been over 32 Covid-19 consent agreements to date. We will not discuss every Covid-19 consent agreement. However, we highlight a few notable agreements that are produced in *Appendix 1. Selected Covid-19 excessive pricing consent agreements* below.

What we can glean from a brief cross-section of Covid-19 consent agreements is that the competition authorities deployed the Consumer Protection Regulations widely against short-term market conduct by Lucky Monopolist firms, inferring market power from conduct and intervening even against the pricing conduct of smaller firms for amounts as little as R300 (*Competition Commission and Mandini Pharmacy*),[192] time periods as short as one week (*Competition Commission and Cambridge Food (Pty) Ltd.*),[193] and even for products not explicitly named in the Consumer Protection Regulations (*Competition Commission and Food Lovers Holdings (Pty) Ltd.*,[194] in respect of raw ginger which was still termed an essential food product).

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[189] Ibid paras 147–153.

[190] Ibid paras 10; 154–164.

[191] Mark Heywood *Hand Sanitiser price gouging – it's been almost two years and still no judgment* (24 August 2022) Daily Maverick. Available at: https://www.dailymaverick.co.za/article/2022-08-24-hand-sanitiser-price-gouging-its-been-almost-two-years-and-still-no-judgment/), accessed: 06 February 2023.

[192] *CO013Apr20.*

[193] *CO066Jul20.*

[194] *CO065Jul20.*

However, to the credit of the competition authorities, the remedies imposed were not overly burdensome and mostly amounted to the equivalent of the overcharge. The remedies imposed on these firms included administrative penalties, orders to make donation to the Solidarity Fund and to donate essential goods to members of the public, or a combination of the three.[195]

*e. Commentary and critique of the Covid-19 cases and consent agreements*

Oxenham et al.,[196] note that in *Babelegi* the Tribunal relied on pure price gouging laws from other jurisdictions to justify the use of pre- versus post-Covid-19 prices as the economic test. They argue that there is a distinction between price gouging-specific legislation as opposed to price gouging cases assessed under competition law in that the former as a matter of policy regulates prices by limiting price increases beyond a specific threshold which are not justified by concomitant cost increases and thus harm consumers.[197] Competition law objectives on the other hand are concerned with considering whether the market can self-correct and restore competitive prices, it is thus not usually concerned with market distortion in the short-term and dynamic and highly competitive markets can display variable price points at different times.[198] It is important to keep this distinction in mind when addressing market distortions in the future to ensure there is not a conflation of the tests in our law.

In this vein they continue to argue that an overly stringent approach to market power can have an undesirable result where small firms 'suddenly, due to a demand shock, find themselves being held liable under the abuse of dominance provisions'.[199] I agree with this, as noted from both *Babelegi* and the consent agreements discussed above, this period saw many small firms being found dominant and held liable for an abuse of dominance. Furthermore, Tsutsumani was found to have abused dominance in a single transaction.

While I do not dispute the importance of addressing market abuses during the Covid-19 pandemic, I do dispute the correctness of the Covid-19 cases' approach of assigning market power and dominance to all and sundry. This is particularly true in respect of *Babelegi* and

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[195] Competition Commission *Impact Assessment Report on the Impact of the Covid-19 Block Exemptions and Commission's Enforcement During the Pandemic*. South Africa, March 2021. Available at http://www.compcom.co.za/wp-content/uploads/2021/04/Impact-Assessment-Report-Final-Draft_-Non-confidential-29032021.pdf (accessed 06 February 2023) at 59.

[196] Oxenham et al. op cit note 159 at 528.

[197] Ibid.

[198] Ibid.

[199] Ibid.

*Dis-Chem* as these cases were decided under the excessive pricing provisions and could therefore creep into and cause a weakening of the traditional excessive pricing tests with decisions that are less economically sound and that in some respects conflict with traditional competition law.[200]

Both Oxenham et al.,[201] and Boshoff,[202] argued that the regulations were an appropriate method to assess excessive pricing cases during the pandemic while preserving the principles of excessive pricing. I agree, however as they were only applied in one case so far, they may have been promulgated too late to have the desired effect.

As noted by Oxenham et al.,[203] many of the conceptual difficulties facing the competition authorities in these cases could have been avoided had the regulations been applicable, additionally the competition authorities may inadvertently have created difficult precedent for future excessive pricing cases which will need to be reconciled with traditional excessive pricing. The unfortunate conflation of the test in *Dis-Chem* also was in direct conflict with the regulations as it held that *any* price increase to the listed goods during the pandemic might be considered excessive, effectively rendering the regulations nugatory.[204]

With respect to the approach to market power, it may similarly have unintended consequences for the assessment of dominance and market power, though it should be noted that the authorities tried to limit these assessments to the circumstances occasioned by the pandemic.[205] However, the economic assessment of market power is not specific to what may have caused the market distortion, and while it is correct that temporary market power is a recognised concept in competition law it may be taking it too far to conclude that 'any firm which takes advantage of even a short-term demand shock possess "market power" and is therefore "dominant"'.[206] The dominance requirement exists as an important limitation of the excessive pricing provisions, and this approach effectively obliterates this limitation in times of market distortion.

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[200] Ibid at 530.

[201] Ibid at 528.

[202] Boshoff (2021) op cit note 111 at 119 and 127.

[203] Oxenham et al. op cit note 159 at 528.

[204] Ibid.

[205] Ibid.

[206] Ibid at 528–529.

It is also unclear why factors such as a firm having (at most) 5 percent market share, or a competitor firm to the firm under investigation having higher prices for the same product during the same period were not given more weight.[207] It is submitted that the Tribunal should have considered these factors more fully during the assessment of market power and not only when imposing the penalty (as in the case of *Babelegi*). Had these factors been given more weight, the outcomes of these cases may have been different.

Furthermore, as we have highlighted above in part III, a proper market definition exercise remains the best method to assess market power and alleged anti-competitive effects, it is thus submitted that the authorities should have properly defined the market in the cases to properly define the boundaries of competition and consider substitutes. Where we deal with extraordinarily short, alleged periods of abuse, it is even more important to properly define markets, otherwise we find ourselves in a reality where any sufficient market shock confers market power on all firms (be they established competitors, new entrants, or simply concluding a once-off transaction).[208] A rigorous market definition exercise can also more accurately assess how a market distortion can affect market power and elucidate on the features of supply and demand prevailing during that period.[209] A failure to do so seems at odds with competition law principles and precedent.

It is important to note that excessive pricing, the assessment of market power and dominance is not concerned with how a demand shock may affect the market overall, but specifically with respect to a firm's ability to act independently of competitors in 'the same prevailing market conditions'.[210] As collective dominance is not prohibited under South Africa's traditional excessive pricing analysis if, in a narrow market where all firms have similar market shares and all increase their prices without a corresponding increase in cost as a response to a market distortion, this should not automatically lead to the conclusion that every one of these firms was charging excessive prices.[211] Contrastingly, if only one firm sustainably and profitably was able to increase its prices, it would be more justifiable to conclude that that firm was dominant and was charging excessive prices.[212] In other words, the approach adopted by the authorities

[207] Ibid.

[208] Ibid.

[209] Boshoff (2021) op cit note 111 at 115 and 117.

[210] Oxenham et al. op cit note 159 at 529.

[211] Ibid.

[212] Ibid.

greatly increases the risk of false positives, by creating an overbroad prohibition that both catches pro-competitive and anti-competitive conduct.[213] A proper market definition exercise would have at the very least countervailed this risk.

It is also trite in South African competition law that to establish an abuse of dominance it must be established that the firm alleged to have abused its dominance must be established to be dominant in respect of 'some market',[214] thus also favouring market definition.

Furthermore, with respect to the economic tests used, while in *Babelegi* and *Dis-Chem* the tests used was a comparison of prices before and during the pandemic it is not always clear from the consent agreement which tests or benchmarks were used given the presence of many first time sellers and the associated absence of previous price or margin data.[215] In *Tsutsumani* the economic test was whether the prices charged had a corresponding cost justification from the supplier up the value chain, and the Consumer Protection Regulations set a benchmark of 10 percent for assessing these prices.[216]

Boshoff also notes that from an economic perspective simple-cost based price comparisons in cases dealing with demand spikes by small retailers are consistent with excessive pricing, however where cases involve persistently high demand, cases against larger retailers and wholesalers must account for elevated demand in competitive prices.[217] However, in *Dis-Chem* the Tribunal did not consider whether it faced sustained higher demand for face masks rather than simply a demand spike, and thus did not account for the effects of sustained elevated demand in the price increases.[218] I submit that the Tribunal should have also considered how the pandemic may have affected demand and therefore a competitive price, particularly in a case like *Dis-Chem* which bears more similarity to a traditional excessive pricing case.

Another factor that the Tribunal neglected to adequately address in its decisions was the fact that the higher prices were a result of a shortage in supply amid elevated demand which led to

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[213] Kelly op cit note 1 at 119.

[214] *Competition Commission and South African Airways (Pty) Ltd* 18/CR/Mar01) [2005] ZACT 50 (28 July 2005) para 33.

[215] Boshoff (2021) op cit note 111 at 135.

[216] *Tsutsumani* supra note 13 paras 88–100.

[217] Boshoff (2021) op cit note 111 at 135.

[218] Ibid at 136.

supply shocks.[219] However, in order to encourage new entry into the market, traditional competition law would allow the firms to earn short-term profits in order to incentivise new entry to the supply-side of the market.[220] However, the cases and consent agreements discussed above essentially remove that incentive and may thus chill new entry during periods of market distortion generally.

Without incentives to encourage entry, the competition authorities are only able to intervene as a quasi-price regulator to constrain abuses in the market — a contradictory position for competition authorities which have always argued against taking a price regulator role that in many ways runs contrary to competition law.[221]

We will now evaluate the interventions of the competition authorities in responding to the Covid-19 pandemic and proffer some suggestions to deal with similar market distortions in the future.

## *VI. EVALUATION OF COMPETITION LAW RESPONSES TO THE COVID-19 PANDEMIC AND SUGGESTIONS FOR THE FUTURE*

### a. *Evaluation of responses*

The Commission's *Impact Assessment Report* found that its work had a significant positive impact during the pandemic.[222] Its investigations and advocacy efforts to intervene against price gouging conduct were found to have a broader deterrent effect on price gouging as retailers and wholesalers of essential products and food products became aware of the Consumer Protection Regulations through either direct advocacy, word-of-mouth, or consumer activism fuelled by its advocacy work.[223] A survey by Nielsen found that as respondents became aware or affected by the Commission's interventions, they refrained from price increases by either not increasing prices at all or only increasing prices when suppliers increased prices, or by keeping profit margins at pre-disaster levels.[224]

I agree that the Commission's interventions were successful in deterring price gouging, both in terms of soft enforcement and hard enforcement. And indeed, it is laudable that the

[219] Oxenham et al. op cit note 159 at 529.

[220] Ibid.

[221] Ibid.

[222] Op cit note 195 at 73.

[223] Ibid.

[224] Ibid.

Commission was able to undertake the number of investigations and prosecutions that it did over such a short period of time. However, through our above analysis of the cases and consent agreements, I caution that the Commission's venture into the realm of price regulation is not the ideal state of affairs as it weakens the legal and economic rigor and rationale of competition law. This is especially true as several cases assessed price gouging under the traditional excessive pricing provisions instead of under the Consumer Protection Regulations.

I thus propose that some of the interventions mentioned below may be more appropriate to deal with such significant market distortions in the future.

*b. Recommendations*

Excessive pricing cases are often very difficult to build and prosecute.[225] These challenges are more pronounced during short complaint periods and times of widespread market distortion. These alternative interventions may thus be preferable to pursuing excessive pricing cases in the first instance, and price regulation in the second.

*Market Monitoring and Advocacy*

Instead of formal prosecutions, competition authorities may make it clear that they are monitoring the market and send informal warnings and announcements to companies to incentivize them to cease or avoid such anti-competitive practices.[226]

*General Price Gouging or Consumer Protection Laws*

The response to Covid-19 was to rely on temporary regulations, but these regulations were promulgated after many of the alleged abuses had already occurred and were thus rendered inapplicable. This led to much of the difficulties of interpretation and intervention that faced our authorities during the period, and which led to assessing price gouging under the traditional excessive pricing provisions. Thus, a general price gouging or consumer protection law that activates immediately upon the declaration of a state of disaster or emergency may avoid similar issues in the future.[227]

[225] OECD op cit note 19 at 9–10.

[226] Ibid.

[227] Oxenham et al. op cit note 159 at 529.

## *VII. CONCLUSION*

This paper evaluated the response of South Africa's competition authorities to the Covid-19 pandemic. It argued that the interventions of the competition authorities had a deterrent effect on price gouging conduct and that where the authorities prosecuted these cases, it did not in most cases impose onerous penalties on firms, many of whom were small firms and first-time entrants into the market. In many cases these remedies were aimed at removing the gains from the overcharge and not on punishment. It also argued that it is inappropriate to impose punitive administrative penalties on firms who fall below the traditional thresholds for dominance as a matter of policy.

It also argued in favour of the importance of rigorous market definition for excessive pricing assessments and for competition law cases generally. It highlighted many issues which have been raised by the Covid-19 excessive pricing cases and consent agreements which run the risk of weakening traditional market definition, excessive pricing tests, and competition law generally. The risks occasioned by price regulation may also stifle new entrants in future market distortions amid fears of prosecution. These issues will need to be reconciled in our law. However, for the moment … it seems that the Lucky Monopolist's luck has run out.

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*Appendix 1*. Selected Covid-19 excessive pricing consent agreements

| Case | Product | Temporary Market Power Inferred | Margin / Mark-up | Complaint period | Penalty amount / Remedy |
|---|---|---|---|---|---|
| *Competition Commission and Mandini Pharmacy.* CO013Apr20 | Face masks | Yes | 20% | March 2020 | R300 |
| *Competition Commission and Main Hardware (Pty) Ltd.* CO007Apr20 | Surgical Gloves | Yes | 19.75% | March 2020 | R170 per box sold exceeding 10% net margin |
| *Competition Commission and Evergreen Fresh Market (Pty) Ltd.* CO009Apr20 | Hand Sanitisers | Yes | 50.1% mark-up; 33. % gross profit margin | March 2020 | Reduction of margin to 25% and donation of hand sanitiser to the value of R1 800 |
| *Competition Commission and Crest Chemicals (Pty) Ltd.* CO176Dec20 | Purity isopropanol (IPA) and N-propanol (NPA) (intermediate inputs into hand sanitisers and disinfectants) | Yes | Not disclosed | April 2020 to June 2020 | R98 536.92 and contribution of R60 000.00 worth of hand sanitisers to charity. |
| *Competition Commission and Food Lovers* | Raw Ginger | Yes | Average mark-up of 92% and gross profit margin of 47% | May 2020 | Reduction of gross profit margin to maximum of 25% and donation of essential |

| | | | | | |
|---|---|---|---|---|---|
| *Holdings (Pty) Ltd.* CO065Jul20 | | | | | goods to the value of R18 579.00 |
| *Competition Commission and Cambridge Food (Pty) Ltd.* CO066Jul20 | Maize Meal | Yes | Price increase from R129.99 to R159.99. | 22 April 2020 to 29 April 2020 | Reduction of gross profit margin to maximum of 6% and donation of essential goods to the value of R24 947.00. |