International Developments

COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases

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“...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.”

I. First anticompetitive price gouging cases in South Africa

The South African Competition Tribunal (‘Tribunal’) handed down two recent decisions relating to ‘price gouging’ during the Covid-19 pandemic. The first was Competition Commission v Babelegi Workwear and Industrial Supplies CC (‘Babelegi’) and the second decision was Competition Commission of South Africa v Dis-Chem Pharmacies Limited (‘Dis-Chem’).

These decisions were, co-incidentally, also the first opportunity that the Tribunal had to evaluate an excessive pricing complaint in terms of the Competition Amendment Act (‘Amendment Act’). Although the Tribunal was at pains to point out that their decisions in relation to these two matters were assessed within the context of a global and national health crisis, the underlying legal interpretation of the excessive pricing framework and the economic principles relied on by the Tribunal may have implications for excessive pricing complaints beyond the Covid-19 pandemic.

Key Points

- In July 2020, the South African Competition Tribunal handed down two decisions in relation to contested ‘price gouging complaints’ namely, Dis-Chem and Babelegi.
- Despite being framed as excessive pricing cases under ‘anti-price gouging regulations’ published in March 2020, the price increases took place prior to the promulgation of the regulations and were ultimately assessed under the traditional ‘excessive pricing’ framework.
- This paper explores both decisions and, in particular, the Tribunal’s approach to assessing ‘dominance’ in the context of a National Disaster and what these decisions mean for excessive pricing cases post Covid-19.

II. Determining ‘dominance’ under the South African Act

A precursor to any excessive pricing complaint in terms of the Competition Act6 (‘Act’) requires a finding that the respondent is ‘dominant’. South Africa has very low thresholds for dominance. Section 7 of the Act provides that a firm with a market share above 45 per cent will irrebuttably be presumed dominant. A firm with a market share of above 35 per cent is rebuttably presumed dominant, unless it can demonstrate that it does not have ‘market power’. Firms with market shares of less than 35 per cent may, however, also be dominant where they are found to possess ‘market power’.

Market power is defined as ‘the power of a firm to control prices, to exclude competition, or to behave to an appreciable extent independently of its competitors, customers, or suppliers’.7

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1 Competition Commission of South Africa v Dis-Chem Pharmacies Limited CR008Apr20 [144].
2 The decisions were handed down on 1 June 2020 and 7 July 2020, respectively.
3 CR003Apr20.
4 Dis-Chem (n 2).
5 Competition Amendment Act 18 of 2018. (Amendment Act). The Amendment Act was passed into law on 14 February 2019. The excessive pricing provisions were effective from 12 July 2019.
6 Competition Act 89 of 1998, as amended (Competition Act).
7 Section 1 of the Competition Act.
The express wording of the Act does not contain any time frame or limit on the assessment of dominance or market power. This was highlighted by the Tribunal in what was to be the hallmark of the two price gouging cases discussed below.  

The Tribunal's assessment of dominance and market power is a departure from the existing case precedent in South Africa and stands in contrast with the international best practices and guidance provided by, inter alia, the European Commission and the Organisation for Economic Co-operation and Development (‘OECD’).

III. The amended legal framework for excessive pricing

The new test for excessive pricing contained in section 8(1)(a) of the Act has a few key components to it. Firstly, the Amendment Act has deleted the prior definition contained in the Act, which defined an 'excessive price' as a price which has 'no reasonable relation to the economic value of the product'. Instead, the Amendment Act requires a consideration of whether the price is higher than the 'competitive price', and to secondly, determine whether the price is 'unreasonable' having regard to the factors set out in section 8(3). Thirdly, section 8(4) of the Amendment Act introduces a reverse onus—once a prima facie case of excessive pricing has been established, the onus shifts to the respondent to demonstrate that the price was 'reasonable'.

In March 2020, as Covid-19 gripped South Africa, the Department of Trade Industry and Competition published ‘anti-price gouging regulations’ (‘Regulations’). These Regulations applied to a prescribed list of ‘essential goods’. Firms supplying essential goods were prohibited from implementing a price increase which was not directly proportional to an underlying cost increase. A non-justified increase is, in terms of the Regulations, considered prima facie ‘excessive’ for purposes of section 8(1)(a) of the Amendment Act.

The Tribunal also published a directive to facilitate urgent and expedited hearings of matters arising out of the Regulations (‘Tribunal Directives’). The Tribunal Directives require a respondent to file its answering affidavit, in response to a complaint referral, within a period of 72 hours. The South African Competition Commission (‘Commission’) has a further 24 hours to file a reply, where after the matter would be set down for hearing within 48 hours.

Although the Commission found, in both the Dis-Chem and Babelegi complaints, that the alleged excessive price increases occurred prior to the Regulations being promulgated, the Commission referred both complaints to the Tribunal in terms of the Tribunal Directives. It was conceded in both Dis-Chem and Babelegi that the Regulations do not have retrospective application and, accordingly, were not (at least not formally) relied on for purposes of the Tribunal reaching its respective decisions.

The principles set out in the Tribunal's price gouging decisions will, therefore, be relevant to cases beyond the Covid-19 pandemic.

The Babelegi  and Dis-Chem  cases are in many respects very similar. Both cases related to the respondents having increased the prices of facemasks during (or even before) the Covid-19 pandemic. Both cases were heard at approximately the same time (within approximately two weeks of each other) and in both cases the Tribunal ultimately determined the matter without directly relying on the Regulations.

Both parties disputed that they were dominant, it appeared common cause that Babelegi had a market

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8 Babelegi (n 4), Para 52.
9 See: Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ [2009] C 45/07, [10].
10 See: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (14 January 2011) [39]; and Directorate for Financial and Enterprise Affairs Competition Committee: Market Concentration (20 April 2018) [11] and [15].
11 Competition Act, Chapter 1.
12 Competition Act, s 8(3)(a)–(f) sets out the following factors that must be considered:
(a) the respondent’s price–cost margin, internal rate of return, return on capital invested or profit history;
(b) the respondent’s prices for the goods or services:
(i) in markets in which there are competing products;
(ii) to customers in other geographic markets;
(iii) for similar products in other markets; and
(iv) historically;
(c) relevant comparator firm’s prices and level of profits for the goods or services in a competitive market for those goods or services;
(d) the length of time the prices have been charged at that level;
(e) the structural characteristics of the relevant market, including the extent of the respondent’s market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent’s own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and
(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.
13 Consumer and Customer Protection and National Disaster Management Regulations and Directions (GN 350 of 19 March 2020).
14 Tribunal Directives for covid-19 excessive pricing complaint referrals (GN 448 of 3 April 2020)
15 Babelegi (n 4).
16 Dis-Chem (n 2).
17 Babelegi was heard on 24 April 2020 while Dis-Chem was heard on 4 and 6 May 2020.
share of less than 5 per cent pre-Covid 19. Dis-Chem is a multi-chain pharmaceutical retailer with a large footprint across South Africa. Dis-Chem also disputed that it was ‘dominant’ in any properly defined relevant market.

Although the Dis-Chem decision was handed down after the Babelegi decision, the Tribunal’s written reasons in Dis-Chem provide a more structured approach to its assessment. Accordingly, we first discuss the Dis-Chem decision before highlighting a few additional remarks and observations from the Babelegi decision.

### A. Dis-Chem

On 14 July 2020, the Tribunal published its written reasons in relation to its decision to penalise Dis-Chem for contravening section 8(1)(a) of the Act by charging excessive prices for a variety of surgical facemasks.

The price increases at play for the three different categories of facemasks were 261 per cent, 43 per cent, and 25 per cent, respectively, and were found to have occurred around 9 March 2020. Accordingly, the complaint period was ‘the month of March 2020’.

In providing its first interpretational guidance on the Amendment Act, the Tribunal held that, in order to demonstrate a prima facie ‘excessive price’, a complainant must show that the price ‘on the face of it was utterly exorbitant’. A respondent would then be required to demonstrate that the increase was ‘reasonable’.

The crux of the case largely turned on whether Dis-Chem was in fact ‘dominant’ during the complaint period. For purposes of this assessment, the Commission argued that defining the relevant market was not necessary. Rather, the fact that Dis-Chem was able to materially increase its prices in the context of a global health crisis independently of its competitors, customers or suppliers, meant that Dis-Chem was able to exert ‘market power’ and was, therefore, ‘dominant’.

The Tribunal confirmed that the assessment of ‘market power’ may be conducted with reference to the prevailing market conditions only, without having to specifically define the market.  

In conducting its analysis, the Tribunal held that, at the time of the relevant price increase, the public were encouraged to wear surgical facemasks. The Tribunal rejected, therefore, the argument raised by Dis-Chem that cloth facemasks were a suitable substitute from a demand side, and that barriers to entry were low as facemasks were easy to produce from a supply-side perspective. The Tribunal, therefore, limited its assessment to the market for surgical facemasks.

Turning to the geographic market, the Tribunal suggested that the geographic market must be narrow (based on customers’ reluctance to travel far during the pandemic and their reluctance to find alternative cheaper products). This was despite Dis-Chem applying a national pricing strategy. It was not considered necessary to define the geographic market even though there was evidence suggesting that there were many suppliers of surgical facemasks within a very small geographic radius of Dis-Chem’s largest outlets.

Accordingly, and without pronouncing on what constitutes a specific geographic market, the Tribunal asked ‘whether a supplier, who had stock of face masks, would be able to increase its prices by 5 per cent or more during the complaint period without facing competitive constraints from other firms even if such firms were situated within the same narrow geographic market (i.e. a shopping centre)?’

After concluding that Dis-Chem was able to raise its prices by more than 5 per cent, the Tribunal considered it unnecessary to delineate the geographic market.

Notably, the Tribunal expressly rejected Dis-Chem’s argument that its prices, when compared to rival pharmaceutical chains, were in fact lower than its rival’s prices. We submit that the Tribunal erred in not taking rival’s prices into account. If the evidence stacked up demonstrating that a large competitor in a narrow geographic market (i.e. let us say a shopping mall) priced the exact same products higher than Dis-Chem, then it can hardly be said, at least in terms of traditional economic principles, that Dis-Chem possessed sufficient market power to act unconstrained by competitors.

Turning to the economic tests utilised or considered by the Tribunal, we note the following:

(i) the relevant ‘benchmark’ price used was the price immediately before the Covid-19 pandemic compared to the ‘increased price’;
(ii) the relevant complaint period was held to be 1–31 March 2020;
(iii) that the empirical evidence assessed pointed to an increase in prices in March (compared to prices prevailing in January and February) without a direct link to cost increases. Consequently, the Tribunal found that the gross margins increased ‘exponentially’ during the complaint period; and

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18 Anderson R et al ‘Abuse of Dominance’ in Khemani R. S et al A Framework for the Design and Implementation of Competition Law and Policy (OECD, Paris) available at http://www.oecd.org/regreform/sectors/aframeworkforthedesignandimplementationofcompetitionlawandpolicy.htm p71 as in Dis-Chem (a 2) [103].

19 Dis-Chem (a 2) [116]–[121].

20 Dis-Chem (a 2) [122]–[146].

21 Dis-Chem (a 2) [128].
(iv) the Tribunal rejected the argument that for multi-product retailers, profit margins ought to be assessed with reference to ‘net’ as opposed to ‘gross’ margins. In other words, the Tribunal precluded any cross-subsidisation type defences.

The Tribunal held that, had it not been for the surge in demand for surgical facemasks as a result of the health crisis posed by Covid-19, Dis-Chem would not have been able to increase the prices to the extent it did. Further, the Tribunal found Dis-Chem enjoyed and exerted market power by substantially increasing its prices and profit margins for facemasks and therefore the Commission had established a prima facie case of excessive pricing which shifted the burden of proof to Dis-Chem to show that its price increases were ‘reasonable’.

In determining whether a price increase is ‘reasonable’, the Tribunal intimated that any price increase (presumably irrespective of the percentage increment) in relation to ‘essential goods’ is unreasonable. This was held with little regard to the additional statutory factors listed in Section 8(3). Following its earlier finding that the price increases were substantial, the Tribunal held that Dis-Chem’s price increases during the pandemic were ‘utterly unreasonable and reprehensible’.

It should be noted that the Tribunal held that section 8(3) only requires that the ‘price is higher than a competitive price and whether such difference is unreasonable’. Thus, the legal test in section 8(3) is that the price must be higher than a competitive price, without qualifying the size of that difference.

Although decided under the previous ‘excessive pricing’ regime, the Competition Appeal Court (‘CAC’) held that a price which was not more than 20 per cent of the economic value of the product cannot be considered ‘excessive’. Although this was not a hard and fast rule, it provided quantifiable guidance as to when a price might be considered ‘excessive’.

The Tribunal ultimately imposed a penalty of R1.2 million (which was calculated based on approximately twice the turnover which Dis-Chem derived from facemasks during the complaint period).

In finding that Dis-Chem had engaged in excessive pricing, the Tribunal stated that ‘material price increases of life essential items such as surgical masks, even in the short run, in a health disaster such as the Covid-19 outbreak, warrants our intervention’.24

B. Babelegi

Not too dissimilar to the Dis-Chem decision, the Tribunal’s decision in Babelegi focused on the assessment of dominance and, more particularly, whether section 7 of the Act places any timeframe limitations for purposes of assessing a firm’s dominance.25 Unsurprisingly, the Tribunal held that there is no such limitation.

The Commission argued that during the complaint period, Babelegi was able to ‘affect material price increases over the complaint period, suddenly, over a short period of time . . . ’ and, therefore, Babelegi exerted market power and was ‘dominant’ during the complaint period.26 The Commission argued that Babelegi ought to be considered ‘dominant’ on this basis, despite having less than 5 per cent market share under ‘normal market conditions’.

Babelegi argued that market power must be understood as ‘the ability to raise prices consistently and profitably over competitive levels’. As detailed above, this was the test set out by the CAC in Sasol Chemical Industries Limited v Competition Commission (‘Sasol’).27

The Tribunal, however, held that Babelegi failed to account for the ‘particular circumstances’, which include the abnormal conditions of supply and demand which existed during the Covid-19 pandemic and, accordingly, limited its assessment of market power to the complaint period, constituting just over one month (i.e. temporary market power).28 The Tribunal referred to a statement by the UK Competition & Markets Authority in support of this conclusion, wherein it was noted that a dominant position may be conferred on an entity by the particular circumstances of this crisis.29

The Tribunal further held, as in Dis-Chem, that one can infer market power by considering only the behaviour of the firm in question and that a delineation of the relevant market is not necessary. Further, that the Covid-19 crisis removed what would otherwise be an effective

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22 As an aside, the Tribunal suggests that the price increase of any good in South Africa between 47 per cent and 261 per cent would affect the public’s interest adversely. In the context of a health crisis where those increases related to essential goods, the price increase has a particular impact on poorer customers.

23 Dis-Chem (n 2) [70].
The Tribunal and access to the National Court of Cassation was granted in July 2020.

Although it is widely accepted that any price increase above the benchmark price should be considered excessive, the Tribunal endorsed the CAC's decision in Sasol that a price is prima facie excessive where a dominant firm substantially raises its prices without a corresponding increase in costs. This substantiality requirement is important and we submit that it should be preferred rather than the approach adopted by the Tribunal in Dis-Chem which suggested that any price increase regardless of size, above the competitive price is prima facie excessive.

IV. Commentary and critique

The Tribunal in Babelegi made another important remark which is perhaps at odds with the Tribunal's decision in Dis-Chem. In relation to determining whether a price is prima facie excessive, the Tribunal endorsed the CAC's decision in Sasol that a price is prima facie excessive where a dominant firm substantially raises its prices without a corresponding increase in costs. This substantiality requirement is important and we submit that it should be preferred rather than the approach adopted by the Tribunal in Dis-Chem which suggested that any price increase regardless of size, above the competitive price is prima facie excessive.

In the case of the former, it is a matter of policy that, following a certain event (i.e. state of national disaster), there is a limitation on any price increase beyond a certain threshold (i.e. 10 per cent), not justified by associated cost increases to avoid exploitative price increases which harm consumers. Implementing price hikes of products considered essential during a national health crisis may, from a policy point of view, warrant regulatory intervention in order to protect consumers from exploitative behaviour. It also provides certainty as to what price increases are permissible during such periods and places all firms on notice that non-cost associated price increases are prohibited during that period.

Competition law objectives are designed to evaluate whether the market can rectify itself to restore prices to competitive levels. Competition law is not traditionally associated with short-term market distortions. Dynamic and highly competitive markets often display different price points at different junctures.

Adopting too rigid an approach to market power may result in small firms suddenly, due to a demand shock, being held liable under the abuse of dominance provisions.

In our view, the Regulations may well have provided the appropriate balance between assessing excessive pricing cases during a period of national disaster and ensuring the fundamental principles of a traditional excessive pricing case are not compromised. Had the case been assessed in terms of the Regulations, this may have precluded many of the conceptual difficulties that the Tribunal's decisions present for future excessive pricing cases. The Tribunal's approach was very much a case of 'fumbling a square peg in a round hole' as it effectively rendered the Regulations nugatory as any price increase of an essential good during Covid-19 may be considered excessive.

While there can be little quibble that facemasks and respirators are indeed essential healthcare products required during the pandemic, how does one define (economically or legally) what goods are 'essential' during the pandemic? It is worth noting further that the Commission also recently prosecuted a retailer for increasing the price of ginger during the pandemic and held that ginger was also an 'essential product'. The case was settled after the Tribunal confirmed the settlement agreement by way of a Consent Order. The Tribunal and Commission's approach to excessive pricing is, therefore, not reserved for emergency medical items only.

Turning to the Tribunal's approach to 'market power', the Tribunal in our view adopts too conservative a view. Although the Tribunal stressed that the assessment was conducted in the context of a global health crisis, the economic assessment of market power caressed not what caused the 'market shock'. The Tribunal further noted that temporary market power is justified in competition

30 Babelegi (n 2) [99]. See also Massimo Motta 'Price regulation in times of crisis can be tricky' Daily Maverick (22 April 2020) <https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/> accessed 27 July 2020.

31 Dis-Chem (n 1) [53]. The Tribunal referred to the European cases of United Brands Company and United Brands Continental BV v EC Competition [ECLI:EU:C:1978:22] [251] and Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities [ECLI:EU:C:1985:150] [24-25].

32 Babelegi (n 2) [100].

33 OECD reference: OECD Policy Roundtables: Excessive Prices (2011) available at <https://www.oecd.org/competition/abuse/49604207.pdf>(OECD Roundtable) [61]; OECD reference: OECD Exploitative pricing in the time of Covid-19 (26 March 2020) available at <http://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf>[7].

34 See the Consent Order between the Commission and Food Lovers Holdings case no: CO065Jal20.
Accordingly, and following the Tribunal’s reasoning, any firm which takes advantage of even a short-term demand shock possesses ‘market power’ and, therefore, is ‘dominant’.

There are a number of factors which the Tribunal is obliged to take into account when determining whether a price is excessive (assuming that the firm’s dominance has already been established) including the length of time of the price increase; the firms’ market shares; the price of competing products; barriers to entry and so forth. It is unfortunate that the Tribunal did not expand more fully why it placed less weight on these factors as these would seem to point against a finding of excessive pricing in a situation where a firm with less than 5 per cent market share increases its prices for a very short period due to increased demand, and the prices of competitors during the same period may have been on par or even higher than the respondent firm. Another factor which the Tribunal must consider is whether the Minister has published any ‘Regulations’. As noted above, Regulations were published but only after the price increases in Dischem and Babelegi were implemented.

The Tribunal err in our view in not properly defining the market. In terms of European precedent, the market must be properly defined in abuse of dominance cases. When considering a very short complaint period (which is itself unusual in excessive pricing cases), it is even more important to conduct a proper market definition assessment. Otherwise, any and all market shocks effectively result in market power for all firms in the market as a result of an overall increase in market demand and hence all firms in that market during that market shock might be considered ‘dominant’. Such an outcome would not be tenable. Excessive pricing cases and indeed the assessment of market power should not be conducted with reference to the overall demand shock in the market but with reference to the firm’s ability to act independently of other competitors in the same prevailing market conditions.

By way of example, if pre-Covid there were ten firms in a narrow geographic market, each of which held a 10 per cent market share (based on the pre-Covid ‘competitive price’), and post-Covid each of the ten firms increased their prices above their pre-Covid prices, without underlying cost increases, and maintained their market share during the Covid-19 period, is it economically and legally justified to conclude, with regard to the pricing of each individual firm, that all ten firms are ‘dominant’ and priced excessively? Absent a prohibition against ‘collective dominance’, we suggest not (at least not under a traditional excessive pricing analysis).

The context may be different if nine of the ten firms maintained their prices at the pre-Covid levels while only one firm was able to sustainably and profitably increase its prices. In such circumstances it would appear that a credible argument could be made that the firm raising prices has (and is able to) raise prices independently of competitors, consumers, and suppliers in a manner which confers substantial ‘market power’ on that firm.

The Tribunal does not deal with another important aspect relating to principles of supply and demand more generally. The Tribunal recognised that there was (and is) a shortage of supply for facemasks. It was the shortage of supply (be it actual or potential) which in fact led to ‘panic buying’ and higher demand and therefore higher prices. To suggest that the poorest customers are most likely to be harmed due to price increases following demand shocks is probably true. However, all customers (including the poorest) are likely to be harmed if the supply shortage cannot be addressed and is perpetuated by the ongoing health crisis. The most sensible way to encourage entry into the supply-side market for facemasks is to allow all firms to earn short-term profits which it would not otherwise enjoy. Without the upside incentive, new entry into the supply-side market is unlikely and the only disciplining safeguard left in the market is quasi-price regulation (a function which should ideally not be left to competition authorities). Traditional elements of competition in those instances are precluded from operating to restore the market to new competitive levels.

As an aside, by increasing prices, consumers are less likely to ‘panic buy’ (or may reduce the amount of excessive purchases). This will ensure a more equitable spread of supply of products to all consumers. The Regulations themselves require firms to limit or place a ‘per customer’ quota for essential goods to ensure a fair spread of supply. While the objective is of course sensible, throttling supply runs contrary to most fundamental principles of competition law. This again points to the fact that in circumstances of national emergency, dedicated legislation to protect consumers should be preferred rather than trying to utilise competition law to regulate pricing.

35 See Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities. (29 June 1978) [ECLI:EU:C:1978:141] (‘ABG oil’) and generally Ramos ‘The Lucky Monopolist’, in Ramos ] Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power International Competition Law Series, Volume 83 (Kluwer Law International 2020) [223]–[244] as in Dischem (n 1) [109].

36 See Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities [ECLI:EU:C:1973:22] [32].
V. Conclusion

South Africa’s recent price gouging cases send a stark warning to any firm seeking to take advantage not only of demand shocks caused by Covid-19 but any demand shock. Regardless of the size of the firm, a firm able to unilaterally increase prices by more than 5 per cent could well be found to possess sufficient market power so as to be considered dominant.

It is unfortunate that both the Babelegi and Dis-Chem decisions were referred to the Tribunal in terms of the Regulations but even after concluding that the Regulations did not apply to the conduct in question, the Tribunal nevertheless concluded the assessment under the normal excessive pricing framework.

We do not express views on the evidence underpinning the two cases. Further, had the Tribunal conducted a more robust economic analysis akin to traditional excessive pricing complaint, and fully assessed each of the factors that it ought to take into account, the Tribunal may have arrived at the same outcome. By constantly referring to the Covid-19 pandemic, the Tribunal significantly lowered the threshold for establishing ‘dominance’; adopted a very limited ‘complaint period’; did not define a relevant market and rejected a comparison between prices of the respondent firm and other competitors during the same period. Further, this assessment was conducted on an urgent basis with limited economic evidence.

Despite emphasising that context matters and that the Tribunal’s primary objective was to protect consumers from exploitative prices during a national disaster, the Tribunal’s approach to the excessive pricing framework is to some degree at odds with traditional competition law objectives and lacks sufficient economic soundness which may lead to a watering down of the test for excessive pricing which is not legally or economically sensible or justified.

The unintended consequences highlighted in this paper could have been avoided had the cases been assessed in terms of the anti-price gouging regulations which were subsequently published. This would have safeguarded the traditional tests for excessive pricing remain intact and advanced the rule of law.

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