Addressing excessive pricing concerns in time of the COVID-19 pandemic—a view from South Africa

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I. INTRODUCTION

In South Africa, like in many other countries around the world, the COVID-19 pandemic is first and foremost a public health crisis. To address the public health crisis, government has taken extraordinary measures to curb the spread of infections, including requiring people quarantine at home and non-essential businesses to close. On 15 March 2020, South Africa declared the COVID-19 pandemic a national disaster in terms of the Disaster Management Act No 57 of 2002 (as amended). As part of a broader response to the COVID-19 pandemic, on 19 March 2020, the Minister of Trade and Industry published Consumer and Customer Protection Regulations and National Disaster Management Regulations and Directions, which establish factors for assessing excessive pricing cases during the national disaster period. These regulations respond to the COVID-19 pandemic panic buying increase in demand and the corresponding spike in prices, for particular goods and services.

II. FACTORS TO DETERMINE COVID-19 EXCESSIVE PRICES

The regulations published in South Africa state that during the period of the national disaster, a material price increase in a listed good or service which either: (i) does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or (ii) increases the net margin or markup on that good or service above its average margin or markup in the three-month period prior to 1 March 2020, is a relevant and critical factor for determining whether a dominant firm’s price is excessive and indicates prima facie that the price is excessive in terms of the Competition Act No 89 of 1998, as amended (the ‘Competition Act’). The regulations specifically relate to dominant firms supplying basic food and consumer items, emergency products and services, medical and hygiene supplies, and emergency

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clean-up products and services. Furthermore, the regulations state that price increases that have the just mentioned features will be considered unconscionable, unfair, unreasonable, and unjust in terms of the Consumer Protection Act (CPA). Note that under the CPA, a firm does not need to be dominant.

The regulations are appropriate in this immediate period of the COVID-19 national disaster, where market conditions are such that very high prices are unable to stimulate effective entry allowing the market to properly self-correct in a reasonable time frame. The COVID-19 restrictions entrench entry and expansion barriers in the immediate period. This means that prices will not be competed down, meaning that firms alleged to be excessively pricing have a captive customer base.

III. COVID-19 EXCESSIVE PRICING CASES
In the two weeks following the declaration of the State of National Disaster, the Competition Commission (the ‘Commission’) received a total of 559 complaints. Approximately 250 of these relate to matters that fall outside the scope of the Competition Act as well as the applicable regulations. The balance of the complaints was against retailers and suppliers for charging excessive prices for products related to COVID-19 essentials. The majority of the complaints related to hand sanitizers and face masks, followed by toilet paper, flu medication, and other products.

The Commission has embarked on an expedited preliminary investigation process. Respondent firms are given 48 hours to confirm or rebut the allegations. Some of the large national retailers have instituted pricing discipline across their branches, including Massmart (owned by Walmart), who have decided to freeze their prices in all its stores for the duration of the nationwide lockdown. Others have chosen to share information on promotional pricing with the Commission.

On 9 April 2020, the Commission referred its first case of the COVID-19 pandemic excessive pricing to the Competition Tribunal (the ‘Tribunal’) for adjudication. The case alleges excessive pricing for the supply of facial masks against Babelegi Workwear Overall Manufacturers & Industrial Supplies CC (‘Babelegi’).1 Babelegi is a manufacturer of industrial workwear and supplier of protective clothing and equipment. As shown in Table 1, the Commission alleges that Babelegi significantly increased its prices of facial masks following the outbreak of the COVID-19 pandemic in South Africa, with prices increasing over 10-fold.

In Competition Commission v Babelegi, the Commission alleges that Babelegi contravened the Competition Act by charging excessive prices for facial masks from 31 January 2020 to 5 March 2020. With markups earned topping 1120 per cent, it is a case of extreme exploitation of consumers in times of a pandemic.

IV. ASSESSING COVID-19 EXCESSIVE PRICING CASES
The Competition Act prohibits dominant firms from pricing excessively to the detriment of customers or consumers. An excessive price is determined by reference to whether the price concerned is higher than a competitive price, and whether such difference is unreasonable, considering all relevant factors. The excessive pricing

1 Competition Commission v Babelegi Workwear Overall Manufacturers & Industrial Supplies CC (Competition Tribunal Case No: CR 003Apr20).
prohibition in the Competition Act provides an open list of these relevant factors including, the respondent’s price cost margin and the prices charged (by the respondent or relevant comparator firm) in similar but competitive markets. It also makes provision for the Minister of Trade and Industry to publish regulations regarding the calculation and determination of excessive prices as an additional factor. The excessive pricing prohibition in the Competition Act provides that, if there is a prima facie case that a price charged by a dominant firm is excessive, the onus shifts to the respondent to prove that such is reasonable.

The Competition Act requires an adjudicator to consider ‘all relevant factors’ when determining whether a price is unreasonably higher than the competitive price. The Commission, as the prosecutor, has discretion to choose its approach to assessing when a price is excessive. To the extent that the Commission only establishes a prima facie case through the factors set out in the regulations, the Commission is not obliged to consider in all cases the other factors identified in the open list set up in the Competition Act. On the other hand, the Tribunal, as the adjudicator, is not bound by the Commission’s discretion. Even when this discretion does exit. The Tribunal is entitled to find, given the available evidence, that if the Commission establishes a prima facie case for excessive pricing using the factors set out in the regulations, given the exceptional circumstances of the COVID-19 pandemic, such an analysis is sufficiently rigorous to establish a prima facie case.

The excessive pricing regulations allow dominant firms to defend price increases if they can show that they are related to an increase in costs, which includes raw material costs. For example, if the index price for grain (wheat) increases over the COVID-19 national disaster period, due to increased demand, millers can implement corresponding price increases in the price of flour. Similarly, if a medical supplier is suddenly forced to import products, rather than purchase them locally because local supplies run out it can pass the transport and other costs of doing so on to its customer.

The excessive pricing prohibition in the Competition Act also shifts the burden to firms alleged to be charging high prices to justify why the price is not excessive. Some firms are currently operating in an environment where other costs (e.g. servicing debt)
have increased dramatically because of the weakening Rand (exchange rate), and the
investment implications of the ratings downgrade, such firms could adjust their prices
to respond to these changes, even though these increases are not tied directly to cost
increases as conceptualized by the regulations.

Demand is a relevant factor to the assessment of when prices are excessive
because customers are generally willing to pay more for features they consider
valuable. Those specific features do not necessarily imply higher production costs, but
they increase the economic value of the product. For example, the economic value of
hand sanitizers and face masks in the COVID-19 crisis period cannot be measured by
any reliable cost-price formula. Prices for hand sanitizers and face masks may increase
in this immediate period of the COVID-19 crisis because demand has risen relative to
the immediately available supply. In normal times, such price increases would signal
to other firms that they should increase their production and where to sell. The
problem with the COVID-19 pandemic period is that such attempts by other firms to
re-position are limited by government actions that restrict movements. As a conse-
quence, conventional tools to assess the abuse of market power may not be as useful,
as restrictions on movement of people to contain COVID-19 infections could confer
market power to firms that did not previously hold such a position in the market—
meaning stricter enforcement rules may have to be applied.

V. TRIBUNAL RULES FOR COVID-19 EXCESSIVE PRICE COMPLAINT

On 3 April 2020, the Minister of Trade and Industry published regulations dealing
with Tribunal rules regulating complaint referrals for alleged COVID-19 excessive
pricing. The rules specify an expedited process for adjudicating COVID-19 excessive
pricing cases. The rules have dispensed with the ordinary time frames for the
exchange of pleadings provided for in terms of the Competition Act. Instead, once a
COVID-19 excessive pricing complaint has been referred to the Tribunal, the re-
respondent has 72 hours to file its answering papers, with the complainant’s reply
(if any) due within 24 hours thereafter. Any factual and/or expert testimony is to be
incorporated in this time frame, unless the Tribunal directs otherwise. Within 48
hours from the close of pleadings, the Tribunal will set the matter down for hearing.
Hearing will take place remotely, via audio or video conferencing.

VI. CONCLUSION

Whereas some jurisdictions do not have provisions to tackle excessive pricing in their
competition laws, cases such as the Competition Commission v Babelegi in South
Africa do validate the need for competition regulation scrutiny over pricing conduct.
It is the COVID-19 crisis in this instance, but recent cases on excessive pricing in
pharmaceuticals in the UK, Italy, South Africa, and the European Commission point
to the increasing need to assess the pricing conduct of firms. The recent COVID-19-
related cases in South Africa point to the usefulness of competition legislation that
not only responds to cartels, mergers, and exclusionary conduct but also recognizes
that markets may yield less optimal outcomes resulting to excessively high prices of
products and services.