Defining Excessive Pricing in South African Competition Law: A European Comparative Analysis

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SUMMARY

Section 8(1)(*a*) of the Competition Act 89 of 1998 (Competition Act) prohibits a dominant firm from charging an excessive price to the detriment of consumers or customers. It should be noted that the concept of excessive pricing is challenging to determine in South African competition law. One reason is that there has been no consensus on what was meant by "economic value" in the old section 1 of the Competition Act. The Competition Amendment Act 18 of 2018 has since replaced the definition of excessive pricing in section 1 of the Competition Act with the concept of a "competitive price" in section 8(3). A competitive price is described as one that will prevail if there is effective or robust competition in the market. Scholars and the courts use different comparisons to determine a competitive price, including price and cost-based comparisons. These are also prevalent in the European Union (EU), where authorities use them to assist in the determination of excessive pricing. This article seeks to examine the inquiry or interpretation that the courts follow or adopt to arrive at a finding of abuse of dominance through excessive pricing, drawing on South Africa and EU case precedent. This article regards the latter question as important; it seeks to determine whether courts are able to provide effective regulation of excessive pricing to protect consumers or customers from harm caused by excessive prices. The article further examines the approaches used to assess excessive pricing under the new provisions in South Africa following the amendments to the Competition Act. The article also demonstrates the complexity of the provision in recent excessive-pricing cases and the implications of the amendments to the Competition Act.

KEYWORDS: excessive pricing, price comparison, cost-based comparison, competitive price, economic value, dominant firm, abuse of dominance, market power, relevant market

1 CONTEXTUALISATION OF EXCESSIVE-PRICING PROVISIONS UNDER SOUTH AFRICAN LAW

In South Africa, only a dominant firm may be charged with contravening the provisions of section 8(1) of the Competition Act, which relates to excessive pricing.[1] As such, competition authorities are concerned with conduct that will result in the use of market power that affects consumers negatively.[2] The Competition Act prohibits the abuse of a dominant position by a dominant firm.[3] It follows then that a firm must be dominant in terms of section 7 of the Competition Act before it can be said to have violated the excessive-pricing provisions in the Competition Act.[4] Section 7 of the Competition Act provides for instances where a firm can be said to be dominant. It provides:

> "A firm is dominant in a market if: *(a)* it has at least 45% of that market; *(b)* it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or *(c)* it has less than 35% of that market but has market power."[5]

The Competition Act prohibits a dominant firm from charging an excessive price to the detriment of consumers or customers.[6] Determination of excessive pricing is possibly the most controversial or contentious area of competition enforcement.[7] Lewis holds that one of the main concerns in relation to the prohibition of excessive pricing is that it is problematic or difficult to calculate whether a price is excessive.[8] In South Africa, the competition authorities have long held different or divergent views as to what amounts to an excessive price. The problem that the competition authorities face is how to determine an excessive price.[9] The English court in *Napp Pharmaceutical Holdings v DG of Fair Trading* held that "it is too difficult to measure whether a price is excessive, but also noted that the competition

1 McKerrow "Excessive Pricing in South African Competition Law: Elucidating the Nature and Implications of the Consumer-Detriment Requirement" 2017 29(2) *South African Mercantile Law Journal* 173 218.

2 Klaaren, Robert and Valodia (eds) *Competition Law and Economic Regulation in Southern Africa: Addressing Market Power in Southern Africa* (2018) 97.

3 S 8(1) of the Competition Act. See also *Sasol Chemical Industries Limited v Competition Commission* 2015 (5) SA 471 (CAC) par 2.

4 S 7 of the Competition Act.

5 S 7(*a*), (*b*) and (*c*) of the Competition Act.

6 S 8(1) of the Competition Act, as amended.

7 Klaaren *et al* (eds) *Competition Law and Economic Regulation in Southern Africa* 97. See also Gani "Excessive Prices: A New Analytical Approach" 2021 17(1) *European Competition Journal* 23 40.

8 Lewis *Thieves at the Dinner Table* (2012) 177.

9 *Ibid*.

authorities must not shy away from such an exercise".[10] In that case, the court observed that various comparisons were used, including:

> "(i) Napp's prices with Napp's costs, (ii) Napp's prices with costs of its next most profitable competitor, (iii) Napp's prices with those of its competitors and (iv) Napp's prices with prices charged by Napp in other markets."[11]

It was held that those methods are among the approaches that may be used to establish prices, although there could be many more.[12] It should be noted that South African case law has dealt with the assessment of excessive pricing in line with *Napp's* formulation.[13]

Previously, the definition of excessive pricing was contained in section 1 of the Competition Act, which has since been replaced by the 2018 amendments.[14] The definition, before amendment, provided that an excessive price is "a price for a good or service which– *(aa)* bears no reasonable relation to the economic value of that good or service; and *(bb)* is higher than [that value]".[15] The prohibition of excessive pricing by dominant firms followed the position adopted in Europe in the decision of *United Brands v EC Commission.*[16] The Competition Act, however, did not define economic value, and a suitable definition has been debated in the case law. Cases have concentrated on the economic costs of the respondent firm as a substitute for economic value and have compared alleged excessive prices to those cost estimates.[17] It should be noted, however, that courts have discussed but not relied on the evidence that may be regarded as *prima facie* in nature.[18] This component of the inquiry may prove to be decisive as it is now incorporated in section 8(2) of the Competition Act, as amended in 2018.

In *United Brands,* the court defined economic value "to mean a price that would prevail if there was sufficient competition".[19] An identical definition was adopted in *Napp,* where economic value was defined as a situation where there is sufficient competitive pressure.[20] Considering these cases, excessive pricing is understood in South Africa as a price above the one that would be charged if there were effective and robust competition in a

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10 *Napp Pharmaceutical Holdings v DG of Fair Trading* 2002 CAT 1 par 392.

11 *Napp Pharmaceutical Holdings v DG of Fair Trading supra* par 392.

12 *Ibid*.

13 Boshoff "South African Competition Policy on Excessive Pricing and Its Relation to Price Gouging During the COVID-19 Disaster Period" 2021 89(1) *The South African Journal of Economics* 112 123.

14 Competition Amendment Act 18 of 2018.

15 S 1 of the Competition Act.

16 *United Brands Company and United Brands Continental BV v Commission of the European Communities* 1978 1 CMLR 429 (*United Brands v EC Commission*) par 249–251.

17 *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* 2009 ZACAC 1 par 48–52.

18 Magadla "A Change in Approach to Excessive Pricing in South Africa?" (2020) https://media.thinkbrg.com/wp-content/uploads/2020/06/18135947/BRG_WP-Excessive-Pricing-South-Africa_2020-cleaned.pdf (accessed 2021-09-21) 5.

19 *United Brands v EC Commission supra* par 249 and 251.

20 *Napp Pharmaceutical Holdings v DG of Fair Trading supra* par 395.

market.[21] However, the concept of effective competition has had different meanings over time without any agreement as to what it entails.[22] It should be noted that a lack of clarity has aided the controversies around the definition of excessive pricing.[23] First, the concept of effective competition has been understood to mean conditions where there is no market power – that is, no ability or power of a firm to raise prices without due consideration to the other actors in the market.[24] Secondly, effective competition entails a situation where there is enough rivalry, such that prices are not raised above a level that is deemed competitive.[25]

Some of the difficulties or complexities in the determination of excessive pricing in South Africa that underpin abuse of dominance were highlighted in the two cases of *Mittal Steel v Harmony Gold Mining Company*[26] and *Sasol Chemical Industries v Competition Commission*.[27] In *Mittal,* the Tribunal and the Competition Appeal Court (CAC) reached different conclusions on what could amount to economic value.[28] The first excessive-pricing case brought before the Tribunal was between Harmony Gold and Durban Roodepoort Deep on the one hand and Mittal on the other, regarding the pricing of flat steel. Mittal enjoyed dominance in this sector, which resulted from its many years of state support.[29] Mittal effectively became an entrenched dominant firm, which created significant entry barriers and prevented other firms from entering this market.[30] The complaint stated that Mittal's practice of pricing at import parity levels was excessive under section 8(*a*), given that they were a net exporter and produced steel at a low cost.[31]

A structural two-step approach allowed the Tribunal to determine whether the market structure would enable Mittal to charge excessive prices and, if so, whether Mittal did indeed abuse its dominant position.[32] During the deliberation process, it was noted that Mittal limited its supply to local firms by diverting its excess steel production into international markets through an exclusive agreement with Macsteel International Holdings, which had the

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21 Ratshisusu and Mncube "Addressing Excessive Pricing Concerns in Time of the COVID-19 Pandemic: A View From South Africa" 2020 8(9) *Journal of Antitrust Enforcement* 256 259.

22 Oxenham, Currie and Van der Merwe "COVID-19 Price Gouging Cases in South Africa: Short-Term Market Dynamics With Long-term Implications for Excessive Pricing Cases" 2020 11(9) *Journal of European Competition Law & Practice* 524 526 529.

23 Calcagno and Walker "Excessive Pricing: Towards Clarity and Economic Coherence" 2010 6(4) *Journal of Competition Law and Economic*s 891 900.

24 Nair "Measuring Excessive Pricing as an Abuse of Dominance: An Assessment of the Criteria Used in the Harmony Gold/Mittal Steel Complaint" 2008 11(3) *South African Journal of Economic and Management Sciences* 279 290.

25 Calcagno and Walker 2010 *Journal of Competition Law and Economic*s 908.

26 *Supra*.

27 *Sasol Chemical Industries Limited v Competition Commission* [2015] ZACAC 4.

28 Sylvester "A Critical Evaluation of the Proposed Treatment of Special Cost Advantages in Excessive Prices Law" 2014 6(5) *Journal of Economic and Financial Science* 607 615.

29 *Mittal Steel v Harmony Gold Mining Company supra* par 5.

30 Competition Commission "Unleashing More Rivalry" (2020) https://www.compcom.co.za/wp-content/uploads/2020/01/Competition-Commission-20-year_V9.pdf (accessed 2021-09-12) 56.

31 *Mittal Steel v Harmony Gold Mining Company supra* par 12.

32 *Mittal Steel v Harmony Gold Mining Company supra* par 17.

effect of driving up the domestic price.[33] It was also shown that the market structure gave rise to a price level that was higher than the level expected in a competitive market.[34] In this case, the Tribunal placed emphasis on the pricing practices of Mittal and the resultant impact on the downstream manufacturing industry.[35] Mittal's history of state support also led the Tribunal to find that Mittal has an obligation to provide support to consumers of the intermediate products.[36] Following the structural analysis, it was determined that Mittal did indeed charge an excessive price for flat-steel products in the domestic market.[37] The Tribunal decided that there was excessive pricing on the basis that the firm was super dominant.[38]

On appeal, the CAC overruled the Tribunal's decision on excessive pricing owing to a lack of proper empirical analysis.[39] More specifically, the CAC stated that the Tribunal did not consider the actual wording of the Competition Act, and was bound to produce a monetary value for prices and economic value.[40] The CAC stated that "the method used by the Tribunal was not recommended since it did not use an empirical method that will compare prices with costs in the long run of a competitive firm".[41] In essence, the Tribunal and the CAC reached different conclusions about what could constitute an economic value.

Furthermore, in *Sasol Chemical Industries,* both the Tribunal and the CAC found that economic value could be determined differently. However, they reached different findings.[42] In *Sasol*, the history of state support, as part of the industrial policy at that time, afforded the firm a dominant position in the polymers market, an essential input for plastic converters in producing plastic goods.[43] The lack of proper competition in the upstream market meant that downstream firms were price-takers, while Sasol could effectively set the price of propylene and polypropylene at the highest possible price, which in this case was the Import Parity Price (IPP).[44]

The Tribunal decided that Sasol was guilty of contravening section 8(*a*) of the Competition Act.[45] In this case, it is clear that the Tribunal arrived at its finding using a "preponderance of evidence" approach, namely by analysing several available tests and benchmarks.[46] This adheres to Motta and De

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33 *Ibid*.

34 *Mittal Steel v Harmony Gold Mining Company supra* par 19.

35 *Ibid*.

36 *Ibid*.

37 *Mittal Steel v Harmony Gold Mining Company supra* par 23.

38 *Mittal Steel v Harmony Gold Mining Company supra* par 19–24.

39 The CAC stated that the Tribunal did not consider the actual wording of the Act and was bound to produce a monetary value for prices and economic value.

40 *Mittal Steel v Harmony Gold Mining Company supra* par 81.

41 *Mittal Steel v Harmony Gold Mining Company supra* par 19–20.

42 See *Sasol Chemical Industries v Competition Commission supra*.

43 Roberts and Mondliwa "Excessive Pricing and Industrial Development: The Recent Competition Tribunal Finding Against Sasol Chemical Industries" 2014 55 *New Agenda South African Journal of Social and Economic Policy* 48 50–51.

44 Roberts and Mondliwa 2014 *New Agenda South African Journal of Social and Economic Policy* 49.

45 *Sasol Chemical Industries v Competition Commissions supra* par 22.

46 *Ibid*.

Streel's approach – namely, that the analysis should not be limited to prices and costs, but needs to be supplemented by a "deep" investigation of the market and possible reasons for why prices may be above the competitive level.[47] In this vein, several country-specific factors, which are not included in the excessive-pricing clause, featured prominently throughout the case and formed an important part of the Tribunal's final judgment. For example, its analysis took into account Sasol's history of state support, lack of risk-taking and innovation, and the highly concentrated upstream industry that allowed them to price at IPP.[48]

However, the CAC overturned the Tribunal's ruling by analysing Sasol's capital assets, level of return on capital, allocation of group costs, and allocation of fixed costs between domestic and export sales.[49] The CAC determined that the markup of 12–14 per cent above the economic value for propylene would not warrant judicial intervention and could not be deemed unreasonable if all these variables were taken into account. Based on instances from the European Union (EU), the CAC concluded that judicial intervention would not be warranted for prices less than 20 per cent over economic value.[50]

These decisions suggested that South Africa had not reached clarity on how to determine excessive pricing.[51] The lack of consensus in case law on what may constitute economic value led to amendment of the section relating to excessive pricing.[52] Section 8(3) of the amended Competition Act attempts to define the concept of excessive pricing more precisely as a price higher than a competitive price.[53] The section further sets out the factors that must be considered when determining a competitive price.[54] These factors appear to be a codification of South African case law developed over the

47 Motta and De Streel "Excessive Pricing in Competition Law: Never Say Never?" in Norgren (ed) *The Pros and Cons of High Prices* (2007) 14.

48 *Sasol Chemical Industries v Competition Commissions supra* par 34.

49 *Sasol Chemical Industries v Competition Commissions supra* par 186.

50 *Sasol Chemical industries v Competition Commissions supra* par 162.

51 Lesofe and Nontombana "A Review of Abuse of Dominance Provisions of the Competition Act – Is It Necessary?" (2016) http://www.compcom.co.za/wp-content/uploads/2016/07/1.-Review-of-Abuse-of-Dominance-Provisions-of-the-Competition-Act-%E2%80%93-Is-it-Necessary.pdf (accessed 2024-03-06) 11.

52 *Ibid*.

53 S 8(3) of the Competition Act, as amended, states that "any person determining whether a price is an excessive price must determine whether that price is higher than a competitive price and whether such difference is unreasonable" by reference to a range of factors.

54 S 8(3) of the Competition Act, as amended. includes the following factors: "*(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."

years on how to assess or determine excessive pricing.[55] An excessive price is determined on the basis of comparing either cost[56] or price.[57] Section 8(2) of the amended Competition Act introduces the concept of *prima facie* proof of abuse of dominance through excessive pricing. It provides:

> "If there is a *prima facie* case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable."[58]

The amended Competition Act provisions relating to excessive pricing were first applied in the case of *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa*.[59] In this case, the dispute concerned excessive pricing charged on face masks during the COVID-19 health crisis. The Tribunal held that the "basic test is whether a price charged is higher than a competitive price or whether a price exceeds what the firm would have obtained in the world of normal and effective competition".[60] This formulation of the Tribunal was endorsed by the CAC, which observed that the relevant comparator after the recent amendments to section 8 of the Competition Act is "competitive price" and no longer "economic value"; however, the same principles apply as developed by the CAC in *Mittal*.[61]

The various approaches to excessive pricing developed by courts in South Africa have evidently been incorporated into the 2018 amendments of the Competition Act.[62] Therefore, it is imperative that the competition authorities in South Africa be equipped with a correct and consistent approach to determining excessive pricing so that they provide effective regulation and enforcement of competition law.

This article seeks to examine how the courts determine or define excessive pricing in South Africa. A comparative analysis of the EU is provided. The EU has been specifically chosen for comparison: first because its regulation of excessive pricing is just as established as that of South Africa; secondly, the *United Brands* case, which is the landmark case on excessive-pricing regulation in South Africa, emanates from the EU's jurisdiction; and thirdly, the courts in South Africa have tended to lean on EU jurisprudence when adjudicating excessive-pricing cases. This makes the EU a suitable comparator for South Africa.

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55 Competition Commission "Unleashing More Rivalry" (2020) https://www.compcom.co.za/wp-content/uploads/2020/01/Competition-Commission-20-year_V9.pdf (accessed 2024-03-02) 47.

56 S 8(3)(*a*) of the Competition Act, as amended.

57 S 8(3)(*b*) and (*c*) of the Competition Act, as amended.

58 S 8(2) of the Competition Act, as amended.

59 2020 ZACAC 7. See also *Dis-Chem Pharmacies Limited v The Competition Commission* 2020 CT CR008.

60 *Babelegi v Competition Commission supra* par 101.

61 *Babelegi v Competition Commission supra* par 34.

62 Boshoff 2021 *South African Journal of Economics* 135.

2 THE THREE STEPS TO DETERMINING EXCESSIVE PRICING

To determine whether a price is excessive, that price should be compared with a competitive benchmark.[63] Under the Competition Act, before the 2018 amendment, this competitive benchmark was the concept of "economic value".[64] As a result of the 2018 amendments, this benchmark has been replaced with "competitive price". However, the same principles applicable to determining excessive pricing under the old provision still apply to the new provision. The first abuse-of-dominance case in relation to excessive pricing was *Mittal,* decided in 2006; both the Tribunal and the CAC grappled with the concept of economic value.[65] *Sasol Chemical Industries* was the next case,[66] which followed the principles set out in *Mittal*. It should be noted that the law relating to excessive pricing was not entirely settled in *Mittal* and *Sasol,* as it remained unclear what "economic value" entailed since the Tribunal and CAC differed in their approaches.[67]

Lack of agreement or consensus in case law on what may constitute economic value led to amendment of the provision relating to excessive pricing.[68] The definition of "excessive price" in section 1 was deleted and section 8(3) took its place.[69] The amended Competition Act defines an excessive price as a price higher than a competitive price and sets out a list of factors that must be considered in relation to determining the reasonableness of the price differential.[70] The factors mentioned above appear to be a codification of South African case law on how to assess excessive pricing.[71] A competitive-price benchmark is determined either based on cost[72] or on a comparative basis.[73] The new section 8(2) of the

63 Jenny and Katsoulacos (eds) *Excessive Pricing and Competition Law Enforcement* (2018). See also Lewis *Thieves at the Dinner Table* 173 for a discussion on competitive benchmarks.

64 S 1 of the Competition Act, pre-amendment. The section provided that an excessive price is determined in relation to the economic value of a good or service.

65 *Mittal Steel v Harmony Gold Mining Company supra*.

66 *Sasol Chemical Industries v Competition Commissions supra* par 1.

67 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 260.

68 *Ibid*.

69 S 1 of the Competition Act.

70 S 8(3) of the Competition Act, as amended. The factors include various comparisons – among others, profits, pricing in other markets, other firms' pricing and profits in competitive markets, and many others as contemplated in the section.

71 Competition Commission https://www.compcom.co.za/wp-content/uploads/2020/01/Competition-Commission-20-year_V9.pdf (accessed 2024-03-02) 47–48.

72 S 8(3)(*a*) of the amended Competition Act refers to " the respondent's price-cost margin, internal rate of return, return on capital invested or profit history".

73 In this regard, s 8(3) of the amended Competition Act refers *inter alia* to "*(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".

Competition Act introduces the concept of "a *prima facie* case of abuse of dominance because the dominant firm charged an excessive price".[74]

Gilo[75] has recently noted in relation to the anti-trust regimes that, as a rule, the determination of excessive pricing involves three steps.[76] The initial step is to assess the competitive price. This step is followed by the determination of whether the price charged by a dominant firm is considerably above a level that is deemed competitive. The last step is the efficiency defence. In this step, the dominant firm is given an opportunity to show that the prices charged were necessary in the circumstances for technological gain or any other pro-competitive gain.[77]

2 1 Step 1: The competitive price

One of the difficult considerations in excessive-pricing cases is how to assess or determine a competitive benchmark price.[78] Two approaches are generally agreed upon, even at the international level. These are used to obtain a competitive benchmark in cases of determining an excessive price.[79] The two approaches include a price-comparison approach (or comparative approach) and a cost-based approach. A price comparison is a comparison of the market price under consideration with prices established by the firm under consideration or similar enterprises in other markets.[80] A cost-based method, on the other hand, entails analysing a company's cost structure to estimate the average cost for the product under consideration and determining a suitable profit margin.[81]

2 1 1 Comparative price benchmarks

A competitive price prevails more in perfect competition than in imperfect competition.[82] Proving that a price is excessive is easy if the person alleging it has a good comparative benchmark. This entails that the plaintiff, the court, or the competition authority must possess or have knowledge about the price that the dominant firm would charge in a more competitive market.[83]

When there is a comparison with a competitive market, the competition authorities are not required to determine the best or most attractive competitive price. The task is simply to see if the prices charged by a dominant firm are significantly above or higher than the prices that will

74 S 8(2) of the Competition Act, as amended.

75 Gilo "A Coherent Approach to the Antitrust Prohibition of Excessive Pricing by Dominant Firms" in Jenny and Katsoulacos (eds) *Excessive Pricing and Competition Law Enforcement* 99.

76 *Ibid*.

77 *Ibid*.

78 Boshoff 2021 *South African Journal of Economics* 122.

79 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 99.

80 Gilo and Spiegel "The Antitrust Prohibition of Excessive Prices" 2018 61(C) *International Journal of Industrial Organisation* 503 520.

81 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 97.

82 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 112.

83 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 113.

prevail in a more competitive market.[84] The prices charged before the dominant firm entered the market may be compared to those charged after it entered the market. If the price difference is excessive, it may be construed as a violation, but the efficiency defence may apply.[85]

If a dominant firm competes in multiple areas, and it is discovered that its prices are lower in one of its markets, then that lower price will be used as a more competitive price and as a benchmark to determine the excessiveness of a price.[86] It is noted that once authorities find that prices charged are significantly different, then liability may arise, although subject to an efficiency defence.[87] Another possible competitive benchmark can involve prices that are prevalent in other firms in more competitive markets.[88] The challenge in sustaining an allegation of excessive pricing occurs when another firm, with lower prices, has lower costs compared to those incurred by the dominant firm. The comparison would be more effective if the other firm had higher costs than the dominant firm that is allegedly charging excessively.

Using a price-comparator test comes with the challenge of selecting an appropriate comparator. This was evident in a new excessive-pricing case in the pharmaceutical sector, *Competition and Markets Authority v Flynn Pharma*[89]*(British CMA v Flynn and Pfizer)*. The United Kingdom (UK)'s Competition and Markets Authority (CMA) used a price comparison of Flynn and Pfizer over time and concluded that they were charging an excessive price compared to prices before the sale of distribution rights. However, on appeal, the Competition Appeals Tribunal (CAT) concluded that the CMA's analysis of the comparator evidence was insufficient.[90] The CAT reasoned that the CMA should have conducted a more intense evaluation of comparable products. Factors to consider in the assessment include the price increase, the selective change of prices in the UK but not elsewhere, the impact on the buyer, the lack of any independent or objective justification, and alternative product prices.[91] Therefore, the CMA had failed to ascertain a hypothetical benchmark price in "normal and sufficiently effective competition" conditions.

2 1 2 A cost-based benchmark

If no comparative price benchmark exists, then it is agreed by both commentators and the courts that a comparison of costs can be a good

84 Gilo and Spiegel 2018 *International Journal of Industrial Organisation* 503 532.

85 In the efficiency defence, the onus rests on the defendant dominant firm to prove that prices charged were reasonable. This defence is entrenched in s 8(2) of the Competition Act.

86 Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 126.

87 Ezrachi and Gilo "Excessive Pricing, Entry, Assessment, and Investment: Lessons From the Mittal Litigation" 2010 76(3) *Antitrust Law Journal* 875.

88 Ezrachi and Gilo 2010 *Antitrust Law Journal* 877.

89 2020 EWCA Civ 339.

90 *British CMA v Flynn and Pfizer supra* par 86.

91 Killic and Komninos "Excessive Pricing in the Pharmaceutical Market – How the CAT Shot Down the CMA's Pfizer/Flynn Case" 2018 9(8) *Journal of European Competition Law & Practice* 530 533.

alternative method to establishing the excessiveness of a price.[92] This benchmark involves examining a dominant firm's relevant costs, although this process can be marred by problems related to accounting.[93] In the event that the dominant firm has costs that are shared by a few products, the examination must determine how much of the shared costs should be allocated to the allegedly overpriced product. Allowing the dominant firm to determine the portion that should be allocated may lead it to allocate a disproportionate portion of these common costs to the product for which it wants to charge an exorbitant price, making the profit margin on this product appear lower than it is.[94] Furthermore, there are situations when the costs of a dominant firm are excessively high compared to other similar firms. The finding may be that the prices charged were *prima facie* excessive, even though the profits may not be.[95]

Economic theory states that economic value is best captured under conditions of perfect competition.[96] The price is equal to the marginal cost of manufacturing the product, where the marginal cost is equated to the economic value.[97] Any price above marginal cost may then potentially reflect a price that is excessive. However, in some markets, a price greater than the marginal cost does not imply an unreasonable price.[98] As previously stated, the equation of competitive pricing and marginal cost is a long-run connection. This indicates that once a firm's actions have been adjusted to the market environment and the process of entrance and exit has run its course, a competitive price equals marginal cost.[99] A price that is greater than the marginal cost may indicate that there are either competition failures or that companies are in the process of adapting to the long-run competitive equilibrium.[100] Therefore, comparing the price charged and the marginal costs may not deliver a definitive conclusion on whether the price is excessive.[101] For example, the *United Brands* excessive-pricing judgment notes that the mere fact that revenues exceed the actual cost incurred is not sufficient to conclude that the firm is engaged in excessive-pricing conduct.[102]

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92 Motta and De Streel in Norgren *The Pros and Cons of High Prices* 45.

93 Motta and De Streel in Norgren *The Pros and Cons of High Prices* 14.

94 Nair 2008 *South African Journal of Economic and Management Science* 282.

95 Gilo "Excessive Pricing as an Abuse of Dominant Position" 2015 45(1) *Mishpatim Law Review* 761.

96 Mncube and Ngobese "Working Out the Standard for Excessive Pricing in South Africa" in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 15.

97 Roberts "Assessing Excessive Pricing: The Case of Flat Steel in South Africa" 2008 4(3) *Journal of Competition Law and Economics* 871 888.

98 Gilo "Excessive Pricing: Can Experience Be Drawn From Tnuva (Israel)?" 2016 7(9) *Journal of European Competition Law & Practice* 620 621.

99 Mncube and Ngobese in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 15.

100 Gilo and Spiegel 2018 *International Journal of Industrial Organization* 503 527.

101 Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 124.

102 *United Brands v EC Commission supra* par 255.

2 2 Step 2: What is excessively above the competitive price?

The second step proposed in the assessment of the excessiveness of a price is whether the price charged by the dominant firm is excessively above the competitive price.[103] Currently, what constitutes excessiveness of a price above a competitive level is still not predictable in South Africa.[104] The decision of *Sasol Chemical Industries*[105] came closer to explaining the excessiveness of a price when it was decided that the threshold for excessive pricing should be at least 20 per cent higher than the competitive price. In other cases decided in South Africa, there has been no definite conclusion on the percentage to be used to determine the excessiveness of a price.[106] In *Napp,* the court appeared to support the idea that a price that was more than 40 per cent higher than the pricing of rival enterprises could result in liability, drawing on several benchmarks.[107]

2 3 Step 3: The efficiency defence

According to this step, a firm accused of charging an excessive price may present an efficiency defence.[108] The defence comprises an argument that the price was necessary because of some pro-competitive gain, and that in the end, consumers were not harmed.[109] The burden to show such efficiency lies with the dominant firm or the firm that is accused of charging, or allegedly charging, an excessive price. It is noted that this is not new in competition law, as the defendant party normally claims an efficiency defence. As a result, when a firm considers charging an excessive price or a price that does not reflect the trend in a more competitive market, it must be convinced that such a price is justified, given pro-competitive gains that offset potential harm.[110]

3 THE LEGAL TEST FOR EXCESSIVE PRICING IN SOUTH AFRICA

Gilo[111] has suggested a prescriptive structure for a determination of excessive pricing, emanating from an understanding of the paths followed by other antitrust jurisdictions around the world.[112] This article establishes that a determination of excessive pricing is best described as a three-stage

103 Gilo and Spiegel 2018 *International Journal of Industrial Organization* 503 540.
104 Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 124.
105 *Sasol Chemical Industries v Competition Commission supra* par 175.
106 Ezrachi and Gilo 2010 *Antitrust Law Journal* 873 877.
107 *Napp Pharmaceutical Holdings v DG of Fair Trading supra* par 392.
108 Klaaren *et al Competition Law and Economic Regulation in Southern Africa* 112.
109 This is found in s 8(2) of the Competition Act, as amended.
110 S 8(2) of the Competition Act, as amended.
111 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 101.
112 *Ibid*.

process.[113] The initial determination is of a competitive benchmark, which is assessed against the actual price of a good or service. Such an assessment is an economic analysis, and involves a comparison based on price and on cost. Secondly, a determination on excessive pricing assesses the degree to which the allegedly excessive price has deviated from the competitive price.[114] This is a legal analysis. The final stage is that the respondent firm may present an efficiency defence against the *prima facie* case against it.[115]

In line with the approach suggested by Gilo when determining a competitive price in South Africa, there are two approaches followed by the competition authorities; these are cost-based and comparative-based.[116] Indeed, the list of factors in the Competition Act may be seen as offering a summary of the approaches adopted in EU jurisdictions and South African case law over the years.[117] As such, a competitive benchmark price is determined either based on costs or on a comparative basis.[118] Although the two approaches are complementary, a cost-based approach faces additional practical challenges. To begin with, determining a firm's cost structure necessitates a bottom-up approach, which includes translating accounting costs into economic costs.[119] Secondly, a cost-based approach must calculate a competitive profit margin. Price does not approach cost under imperfect competition, implying that a benchmark competitive price is not a perfectly competitive price. Since a price range is consistent with imperfect competition, a cost-based approach must identify an upper bound for the competitive price.[120]

It should be noted that excessive-pricing determinations, in most instances, resort to a comparative basis so as to find whether the price charged is above or below a competitive price.[121] The comparative approach looks at prices set by the firm under consideration or by similar firms in identical markets to the market being investigated with different competitive conditions.[122] If it is discovered that the cost, demand and other conditions are similar to the market under investigation, it may be concluded that price differences are due to differences in competition.[123]

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113 *Ibid*.

114 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 112.

115 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 115.

116 S 8(3) of the Competition Act, as amended.

117 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 259.

118 S 8(3) of the Competition Act, as amended provides: "Any person determining whether a price is an *excessive price* must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include– *(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 and *(c)* relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services."

119 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 99.

120 Killick and Komninos 2018 *Journal of European Competition Law & Practice* 536.

121 Ayata "A Comparative Analysis of the Control of Excessive Pricing by Competition Authorities in Europe" 2020 *Tulane European & Civil Law Forum* 102.

122 Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 69.

123 Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 70.

The Competition Act, as amended in 2018, has introduced a further step to the determination of excessive pricing in South Africa. According to section 8(2) of the Competition Act, the applicant must establish *prima facie* proof that the dominant firm has engaged in prohibited excessive pricing.[124] The dominant firm must then show that the prices charged were reasonable.[125] Lastly, section 8(1) of the Competition Act adds an additional requirement that an excessive price must be to the detriment of the consumer.[126]

3 1 A *prima facie* case and the concept of reasonableness

The Competition Commission has a duty to establish a *prima facie* case against the defendant dominant firm for excessive pricing.[127] A question that immediately arises is what evidence the Commission needs to bring to establish a *prima facie* case. As a matter of legal onus, it is important to have certainty about what the Commission must show to establish its *prima facie* case.[128] The addition of section 8(2) appears to be in line with the CAC's decision in *Sasol Chemical Industries* – that a price is *prima facie* excessive where a dominant firm raises its prices substantially without a corresponding increase in costs.[129] It is clear from the stance taken in the amendments that a mere difference in price is insufficient to conclude that the higher price is excessive. Establishing the unreasonableness of this difference is still required.[130]

In *Babelegi v Competition Commission,* the Tribunal held that repeatedly, and without good reason, increasing prices during the COVID-19 period without a corresponding increase in costs from the suppliers was a violation of section 8(1)*(a)* of the Competition Act.[131] It noted that Babelegi did not justify the rapid increase in prices, and even if they had tried to do so, there was no rationale for doing so. On this basis, the Tribunal held that the price charged by Babelegi did not reflect the competitive price and was therefore exploitative; as such, consumers were harmed and that amounted to a *prima facie* case of abuse of dominance through excessive pricing. On appeal the CAC held that Babelegi failed to discharge the burden of proof in terms of section 8(2) of the Competition Act, that the prices charged were reasonable.[132]

124 S 8(2) of the Competition Act, as amended.

125 S 8(2) of the Competition Act, as amended.

126 S 8(1) of the Competition Act, as amended.

127 S 8(2) of the Competition Act, as amended It provides that "if there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable".

128 Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 99.

129 *Sasol Chemical Industries v Competition Commission supra* par 32.

130 Ayata 2020 *Tulane European & Civil Law Forum* 102.

131 *Babelegi v Competition Commission supra* par 51.

132 *Babelegi v Competition Commission supra* par 82.

In *Dis-Chem v Competition Commission,* the Tribunal reached the same conclusion as the one reached in *Babelegi* – that the price increase was not informed by any substantial increase in costs and was unreasonable and reprehensible.[133] So, Dis-Chem failed to meet the requirements of section 8(2) of the Competition Act, which requires a party to provide a justification for charging excessive prices. The Tribunal held that a price increase of between 47 per cent and 261 per cent without a corresponding increase in cost has a detrimental effect on consumers. Therefore, Dis-Chem was fined an administrative penalty of R1 200 000.[134]

Once a *prima facie* case has been established, that a dominant firm has charged an excessive price, the next stage is for the dominant firm to prove that the price charged is not unreasonable. Reasonableness involves a rule of reason. The Competition Act does not explicitly define what may be considered reasonable, as reasonable profit margins differ across industries.[135] Section 8(3) covers factors to be taken into account both when determining whether a price is excessive and the validity of a defence that must be produced in terms of section 8(2) to the effect that the prices charged were reasonably justifiable.[136] It is noted in the language of the Competition Act that both the determination of whether a price is excessive and the question of reasonableness are to be determined through the factors set out in section 8(3) of the Competition Act.[137] The case of *Sasol Chemical Industries* is helpful in understanding the reasonableness of a price. In this case, it was held:

> "Where the real price is shown to surpass the normal price for substantially related products to a degree that appears to be extravagant, the necessity to quantify economic value more accurately before finding that the actual price bears no reasonable relationship to it may be abolished. A *prima facie* case would have been made in this fashion, leaving it up to the respondent firm to produce evidence to the contrary to prevent the case against it from being conclusive."[138]

In *Mittal,* the CAC indicated that prices charged must be substantially higher than the defined economic value before an adverse finding on excessive pricing is made.[139] This is indicative of the subjectivity in the evaluation of reasonableness. For instance, in the reasonableness inquiry, the CAC recommended including the origins of dominance and referred to the historical state support enjoyed by the dominant firm. In its decision, the CAC gives leeway to include in the reasonableness assessment arguments that the dominant position in the relevant market was not the result of any innovation or risk-taking on its part.[140] This makes the reasonableness test

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133 *Dis-Chem Pharmacies v Competition Commission supra* par 174.

134 *Dis-Chem Pharmacies v Competition Commission supra* par 204.

135 McKerrow 2017 *South African Mercantile Law Journal* 173 176.

136 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 257.

137 *Babelegi v Competition Commission supra* par 59. See also McKerrow 2017 *South African Mercantile Law Journal* 175 for a discussion of the consumer detriment requirement in excessive pricing.

138 *Sasol Chemical Industries v Competition Commission supra* par 167.

139 *Mittal Steel v Harmony Gold Mining Company supra* par 68.

140 *Mittal Steel South Africa v Harmony Gold Mining Company supra* par 69.

complex, particularly if the analysis consists of the intangible value of assets and relevant opportunity costs.[141]

3 2 Detriment to consumers

There is an additional requirement in section 8(1)(*a*) of the Competition Act, which adds that, after prices have been found to be high and unreasonable, it must be established whether they were detrimental to consumers or customers.[142] In *Mittal,* the Tribunal took the position that the provision's reference to consumer detriment was "simply a superfluous description of an excessive price rather than a qualifier of its likely effects".[143] The CAC in *Mittal* seemed to suggest that the phrase "detriment to consumers" must not be construed to mean effects, but was a subordinate phrase.[144] It is observed that, indeed, in some cases, prices may be excessive but not have negative effects on the consumer.[145] The Tribunal in *Babelegi* held that excessive prices and the timing of excessive pricing were misdirected.[146] It was a time when the nation, or even the world at large, was going through a health pandemic. Exorbitant prices had a detrimental effect on consumers who needed to wear face masks, which are considered essential for protection against the deadly virus. Charging excessive prices on such critical goods was a violation of the Competition Act, and was detrimental to consumers.[147]

It is worth noting that before the amendments, the Competition Act only referred to detriment to consumers. The 2018 Competition Amendment Act introduced a new leg to the criterion that an excessive price is detrimental to the ultimate consumers by including "customers" such as intermediary enterprises.[148] The interpretation of "consumers" was a contentious issue in earlier decisions on excessive pricing, such as *Sasol Chemical Industries*,[149] where it was argued that consumers included only a product's end-users and consequently did not consider harm caused to downstream manufacturing.[150] However, post-studies revealed that the downstream (manufacturing)_industry was more negatively affected by excessive-price conduct since downstream products are frequently components of more complicated products.[151] Including "customers" in the assessment of an excessive price has provided certainty on the assessment of harm in excessive-pricing cases.[152]

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141 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 259.
142 See McKerrow 2017 *South African Mercantile Law Journal* 174.
143 *Ibid*.
144 *Mittal Steel v Harmony Gold Mining Company supra* par 55.
145 *Harmony Gold Mining and Durban Roodepoort Deep v Mittal Steel SA* 70/CAC/Apr07 par 55.
146 McKerrow 2017 *South African Mercantile Law Journal* 174.
147 *Babelegi v Competition Commission supra* par 67.
148 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 258.
149 *Sasol Chemical Industries v Competition Commissions supra* par 174.
150 *Sasol Chemical Industries v Competition Commissions supra* par 175.
151 *Ibid*.
152 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 259.

It should be noted that the inclusion of customers incorporates intermediate firms, which means that the assessment of consumer harm will focus on both final consumer and intermediate firms.[153] This is linked to consumer-welfare standards and the total-welfare-standard debate. The wording of the Competition Act's Preamble clarifies that South African competition policy is concerned with total welfare. The inclusion of customers emphasises the protection of customers, including small, medium and micro enterprises (SMMEs).[154] This inclusion also means that the assessment of the detrimental effect of future excessive prices focuses on both final consumer and intermediate firms.[155] Ngobese argues that if the courts emphasised the detriment-to-consumers requirements, then the determination of excessive pricing would be much easier.[156]

4 EU APPROACH ON EXCESSIVE PRICING

Article 102(a) of the Treaty on the Functioning of the European Union (TFEU) provides that an abuse of a dominant position may consist of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".[157] This prohibition against imposing unfair prices is generally understood to cover conduct such as charging excessive prices and other prohibited conduct.[158] Unfair pricing seems to mean the exploitation of excessive profits through charging high prices to customers.[159] The prohibition in article 102(a) of the TFEU applies to any product or service, including pharmaceutical products.[160] It is, therefore, acknowledged that the EU prohibition covers a much wider target than does the regulation of section 8(1) of the Competition Act, since the prohibition of unfair prices may mean more than charging excessive prices.[161]

4 1 Decisions of the EU Commission

The case of *General Motors Continental v Commission* was the first EU decision to deal at length with the concept of excessive pricing.[162] It was noted that General Motors charged different prices for the services that they provided, which included the inspection of certificates of conformity with technical and safety standards as required by domestic law.[163] The prices charged for certificates for a vehicle manufactured by a member of General Motors were not the same as for those manufactured by other dealers. It appears that for General Motors vehicles the price was much cheaper than

153 Gani 2021 *European Competition Journal* 23 35.
154 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 257.
155 Boshoff 2021 *South African Journal of Economics* 130.
156 Ngobese "Excessive Pricing to the Detriment of Consumers" 2018 *De Rebus* 36 17.
157 Art 102(a) of the Treaty on the Functioning of the European Union (1958) (TFEU).
158 Gani 2021 *European Competition Journal* 30.
159 *Ibid*.
160 OECD "Excessive Prices in Pharmaceutical Markets" (3 October 2018) https://one.oecd.org/document/DAF/COMP(2018)12/en/pdf (accessed 2024-03-06).
161 Gilo and Spiegel 2018 *International Journal of Industrial Organization* 517.
162 See *General Motors Continental NV v Commission* 1975 ECR 1367; 1976 1 CMLR 95.
163 *General Motors Continental NV v Commission supra* par 5.

for vehicles from parallel manufacturers.[164] The Commission assessed the costs incurred and the prices charged, which led only to one conclusion: that the prices charged were excessive and to the detriment of consumers.[165] The decision was appealed, and was successfully overturned. However, the Appeal Court attempted to explain the meaning of excessive pricing, saying that it relates to a price that is higher than the economic value of the goods or services provided.[166] However, the court did not elaborate on how the excessiveness of a price, or the concept of economic value, could be assessed in the circumstances.[167]

The landmark case for excessive pricing for both South Africa and the EU is *United Brands,*[168] which dealt with the imposition of excessive pricing.[169] United Brands Company (UBC) was the main supplier of bananas in Europe, using the Chiquita brand. UBC forbade its distributors/ripeners from selling bananas that UBC did not supply. The Commission viewed UBC's action as a breach of article 86 of the Treaty of Rome (now article 102 of the TFEU). Article 86 prohibits "abuse of a dominant position in a relevant market". It was decided that UBC had adopted a marketing policy aimed at excluding other competitors. The prices of bananas were accordingly excessive in that they were not exposed to effective competition.[170] It was, therefore, the Commission's conclusion that the prices charged for the bananas were excessive in relation to the economic value of the bananas in question.[171]

4 2 The test for unfairly excessive price in the *United Brands* case

The European Court of Justice's ruling in the *United Brands* case is regarded as having established the standard for pricing that is unfairly high.[172] It had to decide:

> "whether the dominant firm has exploited the opportunities presented by its dominant position in such a way that it has reaped trading benefits that it would not have reaped in the absence of normal and sufficiently effective competition."[173]

The test, as formulated in the case, comprises two elements: first, whether the price is excessive and secondly, whether the price is unfair.[174] To deal with the dispute before it, the court reasoned that if a firm charges a price

[164] *General Motors Continental NV v Commission supra* par 10.
[165] *General Motors Continental NV v Commission supra* par 16.
[166] *General Motors Continental NV v Commission supra* par 17 and 21.
[167] Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 105.
[168] See *United Brands v EC Commission supra* par 252 and 253 for a discussion of the excessive-pricing test.
[169] Valgiurata "Price Discrimination Under Article 86 of the EEC Treaty: The United Brands Case" 1982 31(1) *International and Comparative Law Quarterly* 36 40.
[170] *United Brands v EC Commission supra* par 15.
[171] *United Brands v EC Commission supra* par 15–16.
[172] *United Brands v EC Commission supra* par 249 and 253.
[173] *United Brands v EC Commission supra* par 249.
[174] *United Brands v EC Commission supra* par 250 and 253.

that is excessive in that the price does not have a reasonable relation to the economic value of the product, it constitutes an abuse of a dominant position.[175] Furthermore, the court was of the view that the economic value of the product could be determined by making a comparison between the selling price of the product in question and its cost of production.[176] The court went further to say that once it is established that the price charged is excessive, the next question is whether such a price is unfair in itself or when compared to other products.[177] It is noted that these two methods of assessing an excessive price do not come without practical difficulties.[178] The confusion of the test is that there are two components. The test refers to the excessiveness of the price as an abuse without mentioning unfairness. However, it implies that the unfairness part of the test has already been referred to in the part of the test dealing with excessiveness.[179] The first of these issues is explained in *Competition and Markets Authority v Flynn Pharma Ltd*[180] as follows:

> "[T]he Court in paragraph 250 equates a price that is 'excessive' with one that is abusive but then in paragraph 252 says that if a price is "excessive" that is not the end of the analysis since it must in addition be decided whether the price is fair by reference to the 'in itself' or 'competing products' tests".[181]

The second issue in *United Brands* is stated as follows:

> "The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."[182]

The word "therefore" is problematic in this instance because it implies that the unfairness question has already been covered in the paragraphs that come before it. In other words, it implies that there is a separate question about the fairness of a price, even though the previous section of the test only addressed excessiveness.[183]

One of the challenges with the test is the strict division of the test into two sections, the excessiveness aspect and the unfairness part, which may be an oversimplification.[184] However, it can be argued that this interpretation of the test is the most accepted and rational one. As an example, the EU Commission conducted one of the most thorough and meticulous evaluations of the *United Brands* test in its ruling in *Scandlines Sverige v*

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175 *United Brands v EC Commission supra* par 250.
176 *United Brands v EC Commission supra* par 251.
177 *United Brands v EC Commission supra* par 252.
178 Valgiurata 1982 *International and Comparative Law Quarterly* 47.
179 Ezrachi and Gilo 2010 *Antitrust Law Journal* 889.
180 *Supra* par 66.
181 *Competition and Markets Authority v Flynn Pharma supra* par 68.
182 *United Brands v EC Commission supra* par 252.
183 Stirling "The Elusive Test for Unfair Excessive Pricing Under EU Law: Revisiting United Brands in the Light of Competition and Markets Authority v Flynn Pharma Ltd" 2020 16(2) *European Competition Journal* 368 370.
184 Stirling 2020 *European Competition Journal* 381.

Port of Helsingborg,[185] a dispute involving the fees assessed to two ferry companies by the Swedish authority in charge of the Port of Helsingborg for their admission to the port. The Commission asserted that the questions to be asked were first,

> "whether the difference between the costs actually incurred and the price actually charged is excessive and, if the answer is in the affirmative; (ii) whether a price has been imposed which is either unfair in itself or when compared to the price of competing product."[186]

What is clear is that for there to be unfair excessive pricing (in the sense of an abuse of unfair pricing), there would need to be a price that

> "has no reasonable relation to the economic value of the product supplied."[187]

The economic value of the product could be assessed by reference to the profit margin.[188] But even where it is established that the price has no reasonable relation to the economic value of the product, the price must be "unfair". The price could be deemed to be unfair either "in itself" or when compared to competing products.[189]

4 3 Interpretation and application of the *United Brands* test by the EU courts

It should be noted that the test developed in *United Brands* has not been adequately analysed by the courts.[190] Although a few cases decided by the Commission have related to excessive pricing, it has been only on preliminary decisions of member states relating to copyright.[191]

In *François Lucazeau v Sacem*,[192] the dispute pertained to the owners of nightclubs and a group of managers who owned copyrights for musical works. The copyright owners charged 8,25 per cent to the nightclub owners in royalties. It was held that such pricing was excessively high and, as such, was an unfair trading condition. The basis for such a finding was that the prices charged were higher than those charged in other member states by copyright-right-managing directors who operated at the same level as those in France.[193]

In a dispute involving another nightclub and the same copyright management society (SACEM),[194] the ECJ decided that although a significant difference in fees from those charged by equivalent organisations

185 *Scandlines Sverige AB v Port of Helsingborg* 2006 4 *CMLR* 1298.
186 Stirling 2020 *European Competition Journal* 384.
187 *Ibid*.
188 Ezrachi and Gilo 2009 *Antitrust Law Journal* 873 876.
189 Stirling 2020 *European Competition Journal* 385.
190 Gani 2021 *European Competition Journal* 40.
191 Gani 2021 *European Competition Journal* 43.
192 See *François Lucazeau v Société des auteurs, compositeurs et éditeurs de musique* (*SACEM*) 1989 ECR 2811.
193 *François Lucazeau v SACEM supra* par 23.
194 *Ministère Public v Jean-Louis Tournier* 1989 ECR 2521.

in other member states "must be regarded as indicative of an abuse of a dominant position", such an assumption could be rebutted "by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States".[195]

In *Corinne Bodson v SA Pompes Funèbres des Régions Libérées*,[196] the concern was the abuse of dominance perpetrated by a group of companies with concessions to provide various funeral services for thousands of French communes, comprising a considerable proportion of the population. The issue was that the prices charged by the concession holders were excessive. Since they provided services to a large group of people, they were in a dominant position. The court suggested that the best way to find out whether the prices charged were excessive was by comparing the prices they charged with those that were charged elsewhere. It was further decided that such a comparison was necessary because it would highlight whether or not the prices charged were fair.[197]

The appeal in *CMA v Flynn Pharma Ltd* related to unfair, excessive pricing by two pharmaceutical groups.[198] Flynn Pharma and Pfizer were fined approximately £84.2 million and £5.16 million respectively, for contravention of article 102 of the TFEU and Chapter II of the UK Competition Act 1998. It was held that they had infringed these provisions by charging excessive prices for primary products such as medicine.[199] The appeal was brought on the basis that the CMA had not applied the law correctly in terms of the interpretation of, or the test to be applied in, excessive pricing.[200] It should be noted that the decision emanates from the UK's jurisdiction, and it is important to note that the UK, as of 2020, is no longer part of the EU following Brexit (the withdrawal of the UK from the EU).[201] However, this change has not affected excessive-pricing regulation much.[202] The reason is that the underpinning ideologies for the EU and UK competition-law prohibitions are globally accepted; so even without the formal commitment that has ultimately been included in the EU-UK Trade and Cooperation Agreement (TCA),[203] there was expected to be a reluctance to amend the core rules.[204]

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195 *Ministère Public v Jean-Louis Tournier supra* par 38.

196 1998 ECR-2479.

197 *Corinne Bodson v SA Pompes funèbres des regions libérées supra* par 58.

198 *Competition and Markets Authority v Flynn Pharma Ltd supra* par 86.

199 *Competition and Markets Authority v Flynn Pharma Ltd supra* par 86–87.

200 Kianzad and Minssen "How Much Is Too Much? Defining the Metes and Bounds of Excessive Pricing in the Pharmaceutical Sector" 2018 2(3) *Eur Pharm L Rev* 15 20–21.

201 Norton Rose Fulbright "The Impact of Brexit on Antitrust and Competition" (2021) https://www.nortonrosefulbright.com/en/knowledge/publications/e8d5744d/the-impact-of-brexit-on-antitrust-and-competition (accessed 2024-03-06). See also Whish "Brexit and EU Competition Policy" 2016 7(5) *Journal of European Competition Law & Practice* 297 298.

202 Shalchi and Mor "The UK Competition Regime" (2021) https://commonslibrary.parliament.uk/research-briefings/sn04814/ (accessed 2024-03-06).

203 Rodger, Whelan and MacCulloch (eds) *The UK Competition Regime: A Twenty-Year Retrospective* (2021) 26.

204 Davison "Envisaging the Post-Brexit Landscape: An Articulation of The Likely Changes to the EU-UK Competition Policy Relationship" 2018 39(1) *Liverpool Law Review* 99 111.

The question in this case was whether dependency on a particular drug by consumers could be labelled "economic value". The court decided that, indeed, such dependency was well within the meaning of economic value.[205] The judgment indicates that the competition authority must evaluate evidence when dealing with the *United Brands* test in excessive-pricing cases. However, it should be noted that the competition authority needs to exercise discretion and is even entitled to rely only on cost-based comparators to find that a price is excessive if the other factors are considered. The competition authority need not rely on a hypothetical benchmark that would prevail if there were enough and sufficiently effective competition.[206]

5 RECOMMENDATIONS ON THE INTERPRETATION OF EXCESSIVE PRICING IN SOUTH AFRICA

It should be noted that the lack of a definition in the South African Competition Act on what constitutes an excessive price has created challenges in the determination of excessive pricing.[207] The definition of excessive pricing was developed first from the English case of *United Brands v EC Commission*.[208] In that case, excessive pricing was to be determined in relation to the economic value of goods or services.[209] This definition was followed verbatim in the original section 1 of the Competition Act. However, the Competition Act did not define what was meant by economic value, and it was left to the courts to debate the meaning. Section 8(3) of the amended Competition Act now provides a new definition that relates to a competitive price,[210] but the Competition Act still does not define what a competitive price is, except by reference to a list of factors that must be used for the determination of excessive pricing. Although the use of the "competitive price" benchmark appears to be much more flexible and broadly in line with case precedence, similar challenges and complexities to those observed in the determination of economic value may manifest in the determination of a competitive price.[211] These may include challenges concerning the selection of an appropriate comparator and identification of an appropriate measure of costs in determining price-cost margins, among other challenges that have been discussed in this article.[212]

Section 8(3) of the Competition Act, as amended, provides a list of factors to be considered, including the respondent's price-cost margin and the prices charged by the respondent or relevant comparator firm in similar but

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[205] *Competition and Markets Authority v Flynn Pharma Ltd supra* par 67.

[206] Waksman "A High Price to Pay? CMA Must Reconsider Pfizer/Flynn Case" (2020) https://www.ashurst.com/en/news-and-insights/legal-updates/competition-law-newsletter-march-april-2020/cn16-a-high-price-to-pay-cma-must-reconsider-pfizer-flynn-case/ (accessed 2024-03-06) 6–7.

[207] Boshoff 2020 *South African Journal of Economics* 117.

[208] *Supra*.

[209] *United Brands v EC Commission supra* par 250.

[210] S 8(3) of the Competition Act, as amended.

[211] Boshoff 2020 *South African Journal of Economics* 119.

[212] Boshoff 2020 *South African Journal of Economics* 121.

competitive markets.[213] Furthermore, the section makes reference to regulations published by the Minister of Trade and Industry as an additional factor to take into account in the determination of excessive pricing.[214] It should be noted that the courts in South Africa could not agree on the correct approach to use when determining excessive pricing. As such, the determination of excessive pricing has not been clearly and consistently executed in South Africa.[215] In the case of *Mittal*[216] and *Sasol Chemical Industries,*[217] the Competition Tribunal and the CAC each gave different interpretations of how to determine excessive pricing. Different approaches were suggested that made the law unclear and the approach to excessive pricing uncertain.[218] The factors provided in section 8(3) of the amended Competition Act appear to be open-ended, which could be another source of challenge and uncertainty in the determination of excessive pricing.

Another important aspect brought about by the amended Competition Act is the concept of a *prima facie* case in terms of section 8(2).[219] This section provides that once there is a *prima facie* case to the effect that a price charged is excessive, then the burden of proof shifts to the respondent firm to convince the court that such pricing is reasonable.[220] The cases have referred to, but not relied on, evidence that is *prima facie* in nature.[221] Although now incorporated in the Competition Act, too few cases have been decided to provide the required clarity on the usefulness of evidence that is *prima facie* in nature.

Section 8(1)(*a*) of the Competition Act, as amended, underlines the fact that after a price has been found to be high, and unreasonably so, it must be established whether it is detrimental to consumers or customers.[222] McKerrow posits that in South Africa, the consumer-detriment requirement has not been considered when dealing with excessive-pricing cases.[223] As such, cases have proved difficult to determine because the authorities have been ignoring this important aspect of the determination.

It should be noted that the 2018 amendments to the Competition Act attempted to address some of the challenges in the determination of excessive pricing, but some areas still need attention and clarity. To address the challenges that have been highlighted above, the article proposes several recommendations.

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213 S 8(3)(*a*), (*b*) and (*c*) of the Competition Act, as amended.

214 S 8(3)(*f*) of the Competition Act, as amended, includes in the list of factors "any regulations made by the Minister, in terms of section 78, regarding the calculation and determination of an excessive price".

215 Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 99.

216 *Mittal Steel v Harmony Gold Mining Company supra* par 19–20.

217 *Supra*.

218 Debra "Price Gouging, Construction Cartels, or Repair Monopolies? Competition Law Issues Following Natural Disasters" 2014 1(20) *Canterbury Law Review* 53 57.

219 S 8(2) of the Competition Act, as amended, provides that "if there is a *prima facie* case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable".

220 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 258.

221 Boshoff 2020 *South African Journal of Economics* 123.

222 See McKerrow 2017 *South African Mercantile Law Journal* 177.

223 McKerrow 2017 *South African Mercantile Law Journal* 179.

5 1 Lack of definition

The original definition of excessive pricing contained in section 1 of the Competition Act was a source of uncertainty in the determination of excessive pricing.[224] This was because the concept of economic value was not defined in the Competition Act, and it was left to the courts to provide meaning,[225] resulting in divergent interpretations of excessive pricing. The present concept of a competitive price is also not defined in the Competition Act, except with reference to the factors that should be considered.[226] Without a statutory definition of "competitive price", inconsistencies in interpretation are inevitable. Thus, it is recommended that the legislature should define "competitive price" to avoid inconsistency in the determination of excessive pricing. The article further recommends that South Africa learn from the EU, as that jurisdiction (despite relying on the *United Brands* test, which refers to the economic value of a price)[227] has managed (unlike South Africa) to give meaning to the concept of economic value in subsequent cases. The EU has defined it to mean effective competition, and this has assisted EU courts in determining excessive pricing with more consistency.[228] Case law decided long before *United Brands* was already referring to effective competition as a definition for economic value.[229]

5 2 Relevant factors or benchmarks

In South Africa, the list of factors to be considered in section 8(3) of the Competition Act is non-exhaustive, and this is in line with what has been said in the EU decisions, which have emphasised that several factors can be used in assessing excessive pricing.[230] EU courts have held that they are not confined to using comparator and cost-based approaches as the only methods for assessing excessive pricing.[231] The relevant facts of the case must determine which test is appropriate. While it is commendable that section 8(3) provides factors for the determination of excessive pricing, it is submitted that these factors should be a closed list. The fact that it is open-ended foreshadows continued uncertainty as to which factors may be considered. Again, the factors seem to have no hierarchy. This is a gap in our law, as it may be unclear which factor should be considered first. It is suggested that a closed list of factors with a clear hierarchy should be provided in the Competition Act to solve this dilemma. The EU case law provides lessons for South Africa by showing that there are many benchmarks that can be used; in EU competition-policy practice, there are two acceptable approaches that have been followed to obtain a competitive

[224] Boshoff 2020 *South African Journal of Economics* 114.
[225] Gilo in Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 99.
[226] Boshoff 2020 *South African Journal of Economics* 118.
[227] Boshoff 2020 *South African Journal of Economics* 207.
[228] Calcagno and Walker 2010 *Journal of Competition Law and Economic*s 897.
[229] *General Motors Continental NV v Commission supra* par 16.
[230] Boshoff 2020 *South African Journal of Economics* 118.
[231] *Autortiesību un Komunicēšanās Konsultāciju Aģentūra / Latvijas Autoru Apvienība v Konkurences Padome* C-177/16, ECLI:EU:C:2017:689 par 41–44.

benchmark in excessive-pricing cases – namely, the comparative and cost-based benchmarks.[232]

5 3 Concept of *prima facie* proof

Prima facie evidence of excessive pricing has been discussed in the case law, although it has not been relied upon.[233] It is submitted that South Africa should learn from the EU, where several cases on excessive pricing have been dealt with through evidence of a *prima facie* nature.[234] This kind of evidence suggests that if, on the face of it, prices charged appear to be excessive, then there is no need to go further with an enquiry into whether or not the price charged was excessive. It is noted that case law in South Africa has discussed but not relied on evidence that may be deemed *prima facie* in nature.[235] This component of the inquiry is now provided for in terms of section 8(2) of the Competition Act, as amended in 2018.[236]

There have, however, been few cases decided in South Africa under section 8(2) of the Competition Act.[237] Therefore, the section has not been adequately evaluated. However, the inclusion of section 8(2) is important in that it will make a determination of excessive pricing easier. The onus is thus on the Commission to show a *prima facie* case of an excessive price in the first leg.[238] If successful, the evidential burden shifts to the respondent firm to show that the price was reasonable.[239] The dominant firm now bears the burden of proving the contrary. The evidential onus shift may shorten the time of investigations, since the dominant firm has all the relevant information required to prove that the price charged is reasonable in relation to the competitive price.[240] It is recommended that the competition authorities use this component of the inquiry in new cases more actively, as it has proved helpful in the EU.

5 4 Consumer detriment

Lastly, section 8(1) of the Competition Act provides that charging excessive prices to the detriment of consumers is prohibited. This suggests that a prohibited price should not only be excessive, but must be shown to be detrimental to consumers. The EU put more emphasis on this two-stage inquiry into excessive pricing – namely, it must be shown that the price is excessive, and that it is unfair.[241] In South Africa, the unfairness of a price is

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232 Jenny and Katsoulacos *Excessive Pricing and Competition Law Enforcement* 99.

233 McKerrow 2017 *South African Mercantile Law Journal* 180.

234 Hou "Excessive Prices Within EU Competition Law." 2011 7(1) *European Competition Journal* 47 53. See also *British Leyland Plc v Commission of the European Communities* (C226/84) EU:C: 1986:421 par 26.

235 See also *British Leyland supra* par 26.

236 S 8(2) of the Competition Act, as amended.

237 Boshoff 2020 *South African Journal of Economics* 116.

238 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 257.

239 Ratshisusu and Mncube 2020 *Journal of Antitrust Enforcement* 256.

240 Boshoff 2020 *South African Journal of Economics* 136.

241 Ngobese 2018 *De Rebus* 36.

found in the consumer-detriment requirement.[242] It is noted that this requirement has not been prioritised by the competition authorities in South Africa, and it is submitted that this is a source of difficulty in the determination of excessive pricing.[243] It is acknowledged that the incorporation of a consumer-detriment requirement into section 8(1)(*a*) not only safeguards dominant firms from prejudice, but also gives rise to a contextually appropriate consumer-welfare standard.[244] Therefore, it is recommended that the courts take an active role in deciding excessive pricing along the EU two-state approach, which first looks at the excessiveness of a price, and secondly, the consumer detriment or unfairness of a price.

6 CONCLUSION

In conclusion, it is worth noting that determining an excessive price remains challenging and this should be resolved to provide effective regulation of dominant firms in South Africa. This article has looked at determination of excessive pricing in South Africa and compared it with the EU approach. The study concludes that the problem is the lack of definition of what constitutes an excessive price in the Competition Act. Furthermore, section 8(3) provides a list of factors to determine a competitive price that is non-exhaustive, which leaves a wide discretion to the courts and thus creates legal uncertainty. Also, there have been too few cases decided under the new provisions of the Competition Act to provide clarity on the concept of a *prima facie* case in section 8(2) and the consumer-detriment requirement in section 8(1). This article has made recommendations to address these shortcomings.

[242] *Ibid*.
[243] Boshoff 2020 *South African Journal of Economics* 138.
[244] Boshoff 2020 *South African Journal of Economics* 140.