



Comment:
Excessive pricing regulations
in the face of the Covid-19 national disaster

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1. On 19 March 2020, the Minister published regulations in the Government Gazette pertaining to the pricing and supply of certain consumer and medical products and services during the Covid-19 national disaster period.
2. From a competition economics perspective, I note the following.
3. The Minister has amended the standard against which excessive pricing is to be assessed for four broad groups:
 - a. Basic food and consumer items
 - b. Emergency products and services
 - c. Medical and hygiene supplies
 - d. Emergency clean-up products and services
4. A price may now also be deemed excessive if pricing changes do not align with cost changes or if there is a change in the mark-up compared to the mark-up over the past three months (December to February).
5. It is important to understand that the overall aim of the regulations is to avoid the price of a product being increased and/or quantities becoming unavailable to some buyers in response to the surge in demand for the product due to the national disaster.
6. To do so, the regulations seek to change how excessive pricing is to be dealt with. Conventionally, excessive pricing cases are challenging, as it is difficult to assess the appropriate levels of prices and margins that would be 'competitive'. The benchmark is not perfect competition and hence a more comprehensive assessment is required in which authorities effectively have to judge the extent to which a dominant firm is allowed to use its market power.

7. One could therefore argue that the regulations are introducing a stricter standard for excessive pricing in this crisis period as follows:
8. Firstly, the regulations want to avoid measuring excessive pricing behaviour for a particular product during this crisis predominantly by reference to pricing behaviour in *other related product or geographic markets* (as contemplated in 8(3)(b)& (c) of the Act). As the crisis is international, similar surges in demand and resultant price increases may transpire elsewhere and for related products or firms. Therefore, pricing behaviour that ‘mirrors’ experience elsewhere is not going to be a sufficient defence against an excessive pricing claim.
9. Secondly, the regulations want to avoid short-term exploitation, whereas the excessive pricing regulations usually require an assessment of the length of time over which an excessive price was apparently charged (see 8(3)(d)). If one achieves higher margins over this crisis period, which may be relatively short, one cannot necessarily rely on an argument that average profits over a longer period were not much higher.
10. Thirdly, the regulations wish to limit price increases to cost-based increases. If a 10% cost increase led to a 20% price increase in a short (say one or two-month) period, the price may now be deemed excessive. The emphasis is no longer on the *level* of the margin or price over a period, but on the *change* in the margin or price over a short period. Therefore, this a stricter test for excessive pricing.
11. As far as Covid-19 medical tests and related products and services are concerned, it is important to note the difficulties of applying an excessive pricing regulation to a comparatively new product or service:
 - a. Prices for the reference period may not be available to allow a proper comparison.
 - b. Determining the cost structure of a complex new medical service may be difficult.
 - c. Pricing complex new medical services may require a period of learning, including judging demand conditions.
12. In addition to pricing, the regulations also cover quantities (§6). No mention is made of the Competition Act in these paragraphs, but one should also consider these in the broader context of the aims of South African competition policy, which seeks to address discrimination against smaller suppliers:
 - a. These regulations are effectively attempting to ration quantities, in the face of surging demand which is not allowed to be reflected in price increases.
 - b. The regulations require suppliers to maintain “equitable distribution”. This term is not defined.

- c. One possible definition for “equitable distribution” in the context of final consumers is that each consumer of a supplier must have equal probability of obtaining the product. Retailers are effectively required to ration the quantity sold, as the normal economic mechanism, whereby suppliers sell to those parts of the demand curve with a sufficient willingness to pay, is suspended.
- d. South African competition policy is not primarily concerned with discrimination by dominant firms among final consumers (a position that economics would support), so this is relatively novel.
- e. Even so, it is potentially easier for suppliers to meet this condition when dealing with final consumers compared to non-final consumers.
- f. South African competition policy is concerned with the implications of discrimination against SMEs/SMHDIs in *intermediate* markets. One possible definition of “equitable distribution” in these markets would be that suppliers must maintain sales to all customers in such a way that the proportion of sales directed to any individual customer does not change materially and specifically that SMEs/SMHDIs are not harmed.
- g. Given the concern of competition policy with agro-food processing and grocery retailing, it will be important for manufacturers to ensure that sales under contract do not harm spot sales (especially to smaller buyers, such as spaza shops). It will also be important for manufacturers to consider the extent to which Covid-19-related disruptions to distribution networks (which may harm some buyers more than others) impact on “equitable distribution”.