

**ASSESSING THE OVERLAP BETWEEN PAKISTANI  
COMPETITION AND CONSUMER PROTECTION  
LAWS IN EXCESSIVE PRICING**

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**ABSTRACT**

*Consumer Protection Laws and Competition law substantially overlap in their attempts to protect consumers from excessive pricing. This article argues the position that such overlaps contribute to the difficulties involved in prosecuting excessive pricing cases, and produce contentious decisions like the South African Case of Babelegi. It begins by exploring the current competition and consumer protection laws in Pakistan. It further attempts to clarify and categorize different pricing conducts to elucidate the conceptual divide that needs to exist between Consumer Protection and Competition protection based excessive pricing regulation. After a critical analysis of the South African decision, Babelegi, it concludes by analysing the aforementioned conceptual divide in Competition Commission of Pakistan's approach to excessive pricing cases.*

## INTRODUCTION

Preventing consumer exploitation, through reasonable pricing, is a common objective of Competition law and Consumer Protection law (hereinafter CPL).<sup>1</sup> Both however employ different mechanisms for achieving this end.

The core objective of Competition Law is to maintain competitive markets and prevent abuse of market power by undertakings.<sup>2</sup> This means ensuring a level playing field between all market entities.<sup>3</sup> For excessive pricing cases, Competition law assumes that markets are self-correcting<sup>4</sup> and relies on effective competition and market forces as normalizing factors for high prices. CPL however, intervenes more directly by fixing prices of essential commodities. For instance, Pakistan's Price Control and Prevention of Profiteering and Hoarding Act 1997 allows price control authorities to fix maximum prices for meats, milks, spices, etc.<sup>5</sup> If a person charges prices higher than what has been fixed by the relevant authority, they shall be imprisoned and fined.<sup>6</sup>

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<sup>1</sup> Hetham Hani Abu Karky, 'Competition Policy and Consumer Protection Policy in Jordan' (2010) 29 Penn State International Law Review 335, 342.

<sup>2</sup> Cassey Lee, 'The Objectives of Competition Law' (2015), ERIA Discussion Paper Series, Doc No. ERIA-DP-2015-54, 10 – 12 <<https://www.eria.org/ERIA-DP-2015-54.pdf>> accessed 15 February 2021.

<sup>3</sup> Ibid.

<sup>4</sup> Omar Vásquez Duque 'Excessive Pricing: A View from Chile' (2015) The University of Oxford Centre for Competition Law and Policy Working Paper CCLP(L) 41, 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2591931](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591931)> accessed 15 February 2021.

<sup>5</sup> Price Control and Prevention of Profiteering and Hoarding Act XXIX of 1997, ss. 2, 6.

<sup>6</sup> Price Control Act (n 5), s.7.

Competition authorities are increasingly encouraged to apply different methods in unison to tackle excessive pricing.<sup>7</sup> But doing so creates an overlap between CPLs and Competition Laws regulating excessive pricing. This article argues the position that the divide between 'consumer protection based,' and 'competition protection based' excessive pricing regulation needs to be maintained in light of the South African Competition Tribunals recent judgement against *Babelegi*.

*Babelegi* was held liable for violating Competition Law by unjustifiably increasing its face masks prices during peak Covid-19 months (January – March).<sup>8</sup> The tribunal's holding hinged upon the following: *Babelegi* was dominant firm<sup>9</sup> under the South Africa Competition Act 1998 (SA-CA)<sup>10</sup> – despite factually having less than a five percent market share<sup>11</sup> – because it was able to increase its prices independently of its competitors, consumers and suppliers. This coupled with *Babelegi*'s inability to present a credible justification for its price increases rendered it liable for abusing said dominance<sup>12</sup>.

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<sup>7</sup> Organization for Economic Co-operation and Development, 'Exploitative pricing in the time of COVID-19' (*OECD Tackling Coronavirus*, 26 May 2020) <<https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf>> accessed 15 February 2021.

<sup>8</sup> *In the matter between The Competition Commission and Babelegi Workwear and Industrial Supplies CC* (April 2020), Competition Tribunal of South Africa, Case No: CR003Apr20.

<sup>9</sup> *Babelegi* (n. 8) para 152.

<sup>10</sup> The Competition Act No 89 of 1998 (South Africa), ss 7, 8.

<sup>11</sup> *Babelegi* (n. 8) para 59.

<sup>12</sup> *Babelegi* (n 8) para 153.

This decision is currently being criticized for using circular reasoning and the Covid-19 context to ‘reinterpret strict laws on what constitutes excessive pricing’.<sup>13</sup> Professor Motta says the tribunal’s irregular analysis of dominance may create the wrong precedent and questions are being raised on due process, with lawyers speculating reversal upon appeal<sup>14</sup>.

Yet, as the European Competition Network stated, it is absolutely essential that life-saving necessities remain available at competitive prices during Covid-19.<sup>15</sup> Such decisions, stated South African Commissioner Bonakele, are arguably necessary to ‘protect cash-stripped consumers from price hikes’ during trying times.<sup>16</sup> Even without the Covid-19 context, recent cases in UK and the European

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<sup>13</sup> ‘Did the Tribunal Put Its Thumb on the Scale?’ (*DispatchLIVE*, 4 June 2020) <<https://www.dispatchlive.co.za/business/2020-06-04-did-the-tribunal-put-its-thumb-on-the-scales/>> accessed 28 Oct 2020.

<sup>14</sup> Siphелеle Dlodla, ‘Law Experts Poke Holes in the Competition Commission’s Findings’ (*Independent Online*, 12 June 2020) <<https://www.iol.co.za/business-report/companies/law-experts-poke-holes-in-the-competition-commissions-findings-49293988>> accessed 28 October 2020.

<sup>15</sup> European Competition Network Brief, ‘The European Competition Network Issues a Joint Statement on the Application of Competition Law During the COVID-19 Crisis, Including Allowing Companies Cooperation to Meet Demand, and Reminding that Excessive Pricing Will Be Sanctioned’ (23 March 2020) e-Competitions March 2020, Art. N° 93855 <[https://www.concurrences.com/pdf\\_version.api/objet/article-93855.pdf](https://www.concurrences.com/pdf_version.api/objet/article-93855.pdf)> accessed 28 October 2020.

<sup>16</sup> Lerisha Naidu and Ryan Mckerrow, ‘South Africa: Excessive Pricing or Excessive Prosecution? An Analysis of the Competition Commission’s Attack on COVID-19-related Price Gouging’ (*Africa Analyst*, 22 May 2020) <<https://africaanalyst.com/south-africa-excessive-pricing-or-excessive-prosecution-an-analysis-of-the-competition-commissions-attack-on-covid-19-related-price-gouging/>> accessed 28 October 2020.

Union suggest an increased concern over pricing conduct across markets<sup>17</sup>.

To establish the aforementioned argument, this article is structured as follows: The first chapter presents a summary of Pakistan's current Competition Law and CPLs. It further clarifies key definitions regarding different pricing conducts. This is necessary to gain a clearer conception of what regulation mechanism and pricing conduct falls under consumer or competition protection. Chapter Two explores the *Babelegi* judgement and its criticisms. Chapter Three concludes this article by assessing the Competition Law and CPL divide in Pakistan with regards to excessive pricing, while further remarking upon the tenability of *Babelegi* in Pakistan.

## **PAKISTAN: AN OVERVIEW OF THE CURRENT LAWS**

### **1. Competition Law**

Dr Wilson<sup>18</sup> and Javed<sup>19</sup> give extensive historic overviews of Pakistan's competition law. In summary: Competition in Pakistan was first regulated under Monopolies and Restrictive Trade Practices Ordinance (MRTPO) 1970. Mainly designed to break up cartels, the

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<sup>17</sup> Hardin Ratshisusu and Liberty Mncube, 'Addressing Excessive Pricing Concerns in Time of the COVID-19 Pandemic: A View from South Africa' (2020) 8(2) Journal of Antitrust Enforcement 256, 259.

<sup>18</sup> Joseph Wilson, *Crossing the Crossroads: Making Competition Law Effective in Pakistan* (2011) 8(2) Loyola University Chicago International Law Review 105.

<sup>19</sup> Syed Umair Javed, *Origins and Challenges of Pakistan's Competition Regime* (2012) Global Antitrust Review 162.

MRTPO proved ineffective owing to ‘several legal, economic and political considerations’.<sup>20</sup> It was repealed by the Competition Ordinance (CO) 2007, which, inter alia, also established the Competition Commission of Pakistan (CCP). While CO 2007 lapsed (even upon rebirth as CO 2009) owing to extensive political and legal challenges, the CCP continues to operate under the Competition Act (CA) 2010.<sup>21</sup>

To conduct its investigations, CCP is given wide discretion under the Act<sup>22</sup> – including forcible entry for gathering evidence<sup>23</sup> and granting leniency, immunity or rewards for co-operation.<sup>24</sup> Such statutory powers have greatly influenced the Commission’s success against cartels and other anti-competitive activities. This is manifest in the cases reported in its 2018 annual report.<sup>25</sup> In fact, CCP is particularly recognized by the international competition community as a crucial entity leading Pakistan’s economy towards competition and consumer welfare-oriented markets.<sup>26</sup> But despite such accreditation, CCP’s progress towards competitive markets in Pakistan is slow. It is continuously hindered, inter alia, by ambiguity

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<sup>20</sup> Javed (n 19), 165.

<sup>21</sup> Competition Ordinance 2007 Ordinance No. LII of 2007, s. 12; Competition Act 2010, s. 12.

<sup>22</sup> Competition Act 2010, s. 37.

<sup>23</sup> Competition Act 2010, ss. 34, 35.

<sup>24</sup> Competition Act 2010, ss. 39.

<sup>25</sup> Competition Commission of Pakistan, ‘Annual Report’ (2018), 35 – 49 <[https://www.cc.gov.pk/images/Downloads/annual\\_report\\_2018.pdf](https://www.cc.gov.pk/images/Downloads/annual_report_2018.pdf)> accessed 28 October 2020.

<sup>26</sup> United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy – Pakistan Overview*, (UNCTAD/DITC/CLP/2013/4, May 2013) para 70.

in its enforcement policies.<sup>27</sup> Lahore High Court has only recently acknowledged the CA 2010 as constitutionally valid.<sup>28</sup>

The CA 2010 itself is largely similar to European Union competition legislation,<sup>29</sup> and as such incorporates, inter alia, the following key areas of liability<sup>30</sup>:

The first is anticompetitive agreements<sup>31</sup>. Liability may be established if two or more undertakings have an agreement, express or implied that has the object or effect of restricting competition. The Act provides a non-exhaustive list of such agreements, including fixing sale or resale prices, allocating customers, markets or territories. Irrespective of whether the agreement is horizontal or vertical,<sup>32</sup> liability can only be excluded for its anti-competitive effect if it is shown that said agreement (i) substantially contributes to improving production or distribution; and (ii) promotes technological or economic progress and fairly benefits consumers; or (iii) outweighs its anticompetitive effects.

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<sup>27</sup> Nigel Parr, Waqqas Mir et al., *Cartels Enforcement, Appeals & Damages Actions*, (8th edn, Global Legal Insights 2020), Chapters 4 and 5

<sup>28</sup> *LPG Association of Pakistan v. Federation of Pakistan etc.* (2020), Lahore High Court (Pakistan), WP No.9518/2009, para 42.

<sup>29</sup> Javed (n 19) 167.

<sup>30</sup> Competition Act 2010, ss. 3, 4, 10.

<sup>31</sup> Competition Act 2010, s.4.

<sup>32</sup> Vertical agreements take place between ‘businesses operating at different levels of the supply chain’. Horizontal agreements take place at the same level of supply chain. – Competition Commission of Pakistan, ‘The Guidance on Competition Compliance’ (2016) 13, 17.



An illustrative example is the CCP's *suo motu* action against the Pakistan Poultry Association (PPA)<sup>33</sup> for publishing their pricing details as advertisements on several local newspapers. PPA claimed that since local governments set poultry rates, it was not liable. Yet CCP held that by issuing those advertisements under its own name, PPA presented tacit approval of those prices to consumers and suppliers. And its standing as an association denoted implicit authority over other market entities, thus opening the way towards collusive pricing strategies<sup>34</sup>. PPA was therefore held liable and fined PKR 100 million.

The second area covered by the CA 2010 is deceptive marketing practices<sup>35</sup>, under which an undertaking may be liable if it advertises products falsely or with misleading information. Like its EU counterpart, CCP requires that all advertising be based on 'competent and reliable scientific evidence, particularly if the product involves health and safety claims.'<sup>36</sup> In 2017, a PKR 10 million penalty was imposed on Colgate Palmolive Pakistan for advertising its surface cleaner as being '99.9% bacteria free' without sufficient scientific evidence.<sup>37</sup> More recently, the CCP fined Options International PKR

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<sup>33</sup> In the matter of show cause notice issued to Pakistan Poultry Association (2016), File no.42/PPA/C&TA/CCP/2015 (CCP v PPA).

<sup>34</sup> CCP v PPA, paras 13, 14.

<sup>35</sup> Competition Act 2010, s.10.

<sup>36</sup> CCP Annual Report 2018 (n 25) at 39-40.

<sup>37</sup> In the matter of show cause notice issued to M/S Colgate-Palmolive for deceptive marketing practices, File no.173/OFT/COLGATE/CCP/2014 (2017).

5 million and directed it to publicly declare its misleading use of ‘Starbucks Marks’ without being authorized by Starbucks.<sup>38</sup>

For our purposes, the main area of liability under CA 2010 is abuse of dominance.<sup>39</sup> Here establishing liability requires two conditions to be simultaneously fulfilled: there must be an undertaking with significant market power – typically more than 40% market share; and such an undertaking should have engaged in activities such as exploitative abuse – including, inter alia, excessive pricing.<sup>40</sup>

In 2014, the CCP dismissed a complaint by Wise Communications Ltd. (WiseCom) against Pakistan Telecommunications (PTC) for alleged abuse of dominance.<sup>41</sup> WiseCom was not only PTC’s competitor with a minute market share, but was also the latter’s consumer. It was argued that PTC had used its dominant position to exclude WiseCom from the fixed local loop market by cancelling WiseCom’s services. This complaint was dismissed because PTC had cancelled WiseCom’s services owing to the latter’s previous illegal conduct and other contractual disputes, rather than as a means of restricting competition.<sup>42</sup>

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<sup>38</sup> In the matter of show cause notices issued to M/S Options international (SMC-PVT.) limited on complaint filed by M/S Starbucks Corporation, USA, File no.282/STARBUCKS/OFTICCP/2017 (2018).

<sup>39</sup> Competition Act 2010, s 3.

<sup>40</sup> CCP Guidance on Competition Compliance (n 32) 8 – defines any business engaged in economic activity, such as providing goods or services, as an undertaking.

<sup>41</sup> In the matter of Complaint Filed by M/S Wise Communications Systems (Private Limited) File no.03/WISE/TA/CCP/2013, 28.

<sup>42</sup> WiseCom v PTCL (n 41), paras 23 – 25.

## 2. Consumer Protection Laws

CPL in Pakistan is governed by provincial statutes rather than a single legislation like the Competition Act 2010.

The Islamabad Consumers Protection Act creates a consumer protection council<sup>43</sup> to enforce consumer rights, which, for our purposes, includes the right to access goods at competitive prices and the right for redress against exploitative unfair trade practices.<sup>44</sup> Arguably then, if certain goods are sold at higher than competitive prices, the seller can be held liable for imprisonment of up to two year or a PKR 40,000 fine, or both<sup>45</sup>. A similar council is created and penalties are imposed by the Punjab Consumer Protection Act<sup>46</sup> which protects consumers from defective products, faulty services, and unfair practices.<sup>47</sup> The latter term includes false representation and bait advertisements<sup>48</sup>, but apparently does not cater to excessive pricing. The Sindh Protection Act, being mostly similar to the Punjab Act in its areas of liability and creating a council<sup>49</sup>, also does not appear to address excessive pricing.

Balochistan and Khyber Pakhtunkhwa however provide more comprehensive definitions of ‘unfair trade practices’ in the Balochistan Consumers Protection Act and The Khyber Pakhtunkhwa

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<sup>43</sup> Islamabad Consumers Protection Act III of 1995, s. 3.

<sup>44</sup> Islamabad Consumers Protection Act 1995, ss. 5(c), 5(d).

<sup>45</sup> Islamabad Consumers Protection Act 1995, s. 9(1).

<sup>46</sup> Punjab Consumer Protection Act 2005, Part VII and s. 32.

<sup>47</sup> Punjab Consumer Protection Act II of 2005, Parts II, III, IV.

<sup>48</sup> Punjab Consumer Protection Act 2005, ss. 21, 22.

<sup>49</sup> The Sindh Consumer Protection Act No. XVII of 2015, Parts VII and VIII.

Consumers Protection Act.<sup>50</sup> This includes charging prices higher than those set by an authorized body. Like the previous two, these acts also establish provincial consumer protection authorities and provide for similar penalties.<sup>51</sup>

The only legislation made for the sole purpose of regulating prices is the Price Control and Prevention of Profiteering and Hoarding Act 1997. A more comprehensive list of consumer protection legislations and their analysis<sup>52</sup> is beyond the scope of this article. For our purposes, it is sufficient to note that though most of them do not explicitly mention ‘price gouging’, the price regulating methodology here appears to be similar to price gouging laws explored in the next chapter: sellers cannot set prices higher than those mandated by law.

### **3. Key Definitions: Pricing Conducts**

#### **3.1 Predatory Pricing**

This conduct, prohibited under the CA 2010 as part of an abuse of dominant position,<sup>53</sup> has been analysed at length by the Organization

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<sup>50</sup> Balochistan Consumers Protection Act IX of 2003, s.2(o); The Khyber Pakhtunkhwa Consumers Protection Act No. VI of 1997, s.2(o).

<sup>51</sup> Balochistan Consumers Protection Act 2003, Part II and s.17; The Khyber Pakhtunkhwa Consumers Protection Act 1997, Part II and s.16.

<sup>52</sup> Abdus Samad Khan and others, ‘Understanding and Analysis of Consumer Protection Laws in Pakistan’ (2014), *Journal of Applied Environmental and Biological Sciences* 92, 96 – 97.

<sup>53</sup> Competition Act 2010, s. 3(3)(f).

on Economic Cooperation and Development (OECD)<sup>54</sup> – and involves dominant firms (predator) lowering their prices for a period of time. Competitors follow this pricing behaviour to maintain competitiveness. Naturally, both the predator and its competitors incur losses – but the predator, being a dominant market entity, can make up for such losses through future gains. This is something its competitors cannot do, having incurred more losses than they can bear. Competitors thus exit the market. Such results not only discourage further market entry, but according to Scherer, can affect competition in other markets the predator may be involved in<sup>55</sup>.

### 3.2 Price Gouging

This occurs when a firm takes advantage of crisis situation and demand spikes to unreasonably raise their prices to consumers disadvantage.<sup>56</sup> This is not a term used in Pakistan's Competition Act<sup>57</sup> or the EU treaties.<sup>58</sup> In fact, 'price gouging' is the term used to prosecute exploitative excessive pricing under consumer protection law in jurisdictions such as US, Australia, Canada and Mexico – where exploitative excessive pricing is not illegal absent a crisis.<sup>59</sup> Price gouging laws, particularly in some US states, are defined using

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<sup>54</sup> Organization for Economic Co-operation and Development, 'Predatory Pricing' (1989), page 7 <<https://www.oecd.org/competition/abuse/2375661.pdf>> accessed on 15 February 2021.

<sup>55</sup> Frederic Scherer, *Industrial Market Structures and Economic Performance* (2nd Edition 1980) 338.

<sup>56</sup> 'Price Gouging Laws by State' (*FindLaw*, 24 March 2020) <<https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>> accessed 11 November 2020 (*FindLaw*).

<sup>57</sup> Competition Act 2010, s. 3(3)(a).

<sup>58</sup> Treaty on the Functioning of European Union 2009 (TFEU), Article 102(a).

<sup>59</sup> OECD exploitative pricing (n 7) 3.

a threshold that tells businesses how much of a price increase is legal within crises. A comparison is then drawn between crisis and pre-crisis prices to determine liability.<sup>60</sup> The presence of a disaster situation is crucial for successful prosecution.<sup>61</sup>

This concept seems to apply in Pakistan, where seller of facemasks was arrested for excessive pricing during COVID-19 under Pakistan Penal Code.<sup>62</sup> Sellers of sanitisers have also been prosecuted under Sindh Registration of Godowns Act 1995 rather than CA 2010.<sup>63</sup>

### 3.3 Excessive pricing

According to the European Court of Justice (ECJ), if a price has no reasonable connection to the product's economic value, it is excessive.<sup>64</sup> Motta and Streebopine that excessive pricing can cover two different types of conduct: the first is 'exploitative excessive pricing' – where the dominant firm increases prices for its consumers and the second is 'exclusionary excessive pricing' – where the dominant firm increases prices of input materials, making it harder

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<sup>60</sup> FindLaw (n 56).

<sup>61</sup> 'How to Spot and Report Price Gouging' (Ken Paxton Attorney General of Texas) <<https://www.texasattorneygeneral.gov/consumer-protection/disaster-and-emergency-scams/how-spot-and-report-price-gouging>> accessed on 11 November 2020.

<sup>62</sup> Our Correspondent, 'Four shopkeepers arrested for mask price gouging' The News (Karachi, 17 March 2020) <<https://www.thenews.com.pk/print/630163-four-shopkeepers-arrested-for-mask-price-gouging>> accessed on 11 November 2020.

<sup>63</sup> Our Correspondent, 'Hoarding and price-gouging: SHC issues show-cause notice to Bureau of Supply and Prices official' The Express Tribune (Karachi, 19 March 2020) <<https://tribune.com.pk/story/2178999/hoarding-price-gouging-shc-issues-show-cause-notice-bureau-supply-prices-official>> accessed on 11 November 2020.

<sup>64</sup> Case 27/76 *United Brands v Commission of the European Communities* [1978] ECR 207 (United Brands), para 250.

for smaller businesses to operate profitably, thereby increasing or maintaining its own dominance.<sup>65</sup> Regardless of what an undertaking intends or causes when increasing prices, it is clear that ‘dominance’ is a necessary prerequisite for establishing this breach of EU<sup>66</sup> or Pakistani Competition law.<sup>67</sup>

The ECJ defines ‘dominance’ as an undertaking’s ability to ‘behave to an appreciable extent, independent of its competitors, customers and ultimately of its consumers.’<sup>68</sup> This definition was adopted by SA-CT in *Babelegi* – but the nuances of its application will be explored in the next chapter.

The key difficulty in this area is establishing excessive pricing itself and that it was abusive.<sup>69</sup> It has been argued that a product’s economic value is a vague reference point for assessing excessive pricing.<sup>70</sup> According to Motta’s assessment of *United Brands* case, ‘economic value’ is a reference to ‘normal competitive pricing levels’ – which is the minimum average cost.<sup>71</sup> Motta’s analysis of ECJ’s varying approaches to proving excessive pricing is summarised below:

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<sup>65</sup> Massimo Motta and Alexandre de Streel, ‘Exploitative and Exclusionary Excessive Prices in EU Law’ (2003), 1 <[https://www.researchgate.net/publication/251745586\\_Exploitative\\_and\\_Exclusionary\\_Excessive\\_Prices\\_in\\_EU\\_Law](https://www.researchgate.net/publication/251745586_Exploitative_and_Exclusionary_Excessive_Prices_in_EU_Law)> accessed on 15 February 2021.

<sup>66</sup> TFEU, Article 102(a).

<sup>67</sup> Competition Act 2010, s. 3(3)(a).

<sup>68</sup> *United Brands* (n 64), para 65.

<sup>69</sup> OECD exploitative prices (n 7), page 6.

<sup>70</sup> Dr Penelope Giosa, *Exploitative pricing in the Time of Coronavirus – The Response of EU Competition Law and the Prospect of Price Regulation* (2020) *Journal of European Competition law and Practice* 1 (Giosa), page 1.

<sup>71</sup> Commission Guidelines on Vertical Restraints, O.J. 200 C 291/1, para 126.

*The United Brands* approach is a two-fold test, whose first prong requires comparing actual prices (selling price) with actual costs<sup>72</sup> (production costs etc.), while the second is considering whether the price is unfair in itself or when compared to prices of competing products.

In the *CICCE*<sup>73</sup> approach, where similar products have considerably different costs and hence different selling price, average minimum costs cannot be considered. Instead the cost analysis must be drawn out for each product.

The *SACEM II*<sup>74</sup> case shows another approach holding that cost analysis must be done with reference to production costs of an efficient firm rather than the defendant firm's whose costs were inflated because of its dominance.

According to Motta's interpretation of the *Renault*<sup>75</sup> case price comparisons between products with different levels of intellectual property rights protections attached to them cannot be used to

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<sup>72</sup> 'Price' is what a firm charges and what consumer is willing to pay for a product. 'Cost' is what the firms incurs in producing the product; 'Boundless Business: Pricing Products' (Lumen Learning) <<https://courses.lumenlearning.com/boundless-business/chapter/pricing-products/>> accessed on 12 November 2020.

<sup>73</sup> Case 298/83, *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities* [1985] ECR 1105, para 24-25.

<sup>74</sup> Cases 110/88, 241/88, 242/88 *Lucazeau/SACEM (SACEM II)* [1989] ECR 2811, para 29.

<sup>75</sup> Case 53/87 *Renault* [1988] ECR 6039, paras 16-17.



establish excessive pricing, as this reduces incentives to safeguarding such intellectual property.<sup>76</sup>

Arguably, the ECJ's approach (which includes more than is presented herein) is riddled with vague general rules that have multiple exceptions and qualifications that exacerbate the assessment of excessive pricing. Giosa remarks that difficulties further arise when actually conducting those cost analyses. For instance, how are production costs to be calculated for dynamic and static markets with varying fluctuations of supply and demand – especially when such variances occur during normal circumstances? What is the acceptable profit margin?<sup>77</sup> Does a product's high economic value, even if caused by crisis induced demand fluctuations, not justify high prices?<sup>78</sup> Which of the many considerations a company takes into account when deciding its prices makes its excessive prices justifiable?<sup>79</sup>

Owing to such difficulties OECD argues that competition authorities should consider using different tests developed by the European Court of Justice in unison.<sup>80</sup> Additionally, Giosa argues the use of a historical or geographical benchmark. This would involve comparing defendant firm's pre and post crisis prices. Alternatively,

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<sup>76</sup> Motta and Streeck (n 65) 10.

<sup>77</sup> Motta and Streeck (n 65) 6; Giosa (n 70) 5.

<sup>78</sup> Friso Bostoen, 'Corona and EU economic law: Antitrust (Articles 101 and 102 TFEU)' (Lexxion 16 March 2020)

<<https://www.lexxion.eu/en/coreblogpost/corona-and-eu-economic-law-antitrust/>> accessed on 12 November 2020.

<sup>79</sup> Duque (n **Error! Bookmark not defined.**) 7.

<sup>80</sup> OECD exploitative pricing (n 7) 7.

under normal conditions, it may involve comparing prices with similar products within the same market.<sup>81</sup> This approach was approved in *Deutsche Grammophon* where price comparisons of sound recordings in France and Germany successfully showed unfair pricing.<sup>82</sup>

It is not clear why competition law around the world has developed such differences in what is effectively the same conduct – pricing a product exorbitantly more (or less) than it is actually worth. It is then perhaps no wonder that competition law regarding excessive prices is regarded as ‘underdeveloped conceptually and practically’.<sup>83</sup> Concurrently, it must also be admitted that such difficulties arise because of the delicate balance that must be struck between consumer and undertaking’s interest to develop effective competition in the first place. Not least important is the fact that successful excessive pricing litigation risks deterring market entry<sup>84</sup> – something that runs contrary to the fundamental aims of competition law.

Motta and Streel suggest the courts assign priority to methods gauging excessive pricing.<sup>85</sup> Building on the above, it is submitted that the aforementioned types of excessive pricing need to be conclusively categorised as part of either consumer law or competition law, despite their common elements. This will perhaps introduce some certainty in literature as well as in judicial

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<sup>81</sup> Giosa (n 70) 6.

<sup>82</sup> Case 78/70 *Deutsche Grammophon* [1971] ECR 487, page 502.

<sup>83</sup> Giosa (n 70) 3.

<sup>84</sup> OECD exploitative pricing (n 7) 4.

<sup>85</sup> Motta and Streel (n 65) 5.

pronouncements to the necessary elements of both. As such, the differences between ‘consumer sensitive pricing’ (price gouging) and ‘competition sensitive pricing’ (predatory and excessive pricing) need to be noted in the following respects:

i) Context of application: price gouging can only occur during crises and appears to be limited to absolutely essential commodities in a given crisis. Predatory and excessive pricing, on the other hand, can occur without requiring disaster as a necessary backdrop and are not limited to certain types of products – though having a dominant firm engaged in such conduct is presently necessary for liability.

ii) Sphere of application – the difference is essentially between consumer law and competition law, even though one of their common aims is protecting the end consumer. Price gouging is normally prosecuted under consumer law, excessive and predatory under competition law. A detailed analysis of the differences between consumer and competition law is beyond the scope of this article.

Why these differences between the two concepts are necessary will become apparent in the next chapter, when the *Babelegi* reasoning is picked apart.

### **CRITICAL ANALYSIS OF THE *BABELEGI* APPROACH**

As stated in the introduction, the respondent firm drastically increased its prices during peak Covid-19 months, arguing that it did

so in anticipation of higher purchase prices from its suppliers. The suppliers did not however increase their prices.<sup>86</sup>

The SA-CA prohibits dominant firms from charging excessive prices.<sup>87</sup> Under this provision, a price is excessive if it is higher than the ‘competitive price’ and such difference is unreasonable, taking into account a list of factors that includes cost considerations and duration of excessive pricing. This establishes a *prima facie* case, and it is then up to the dominant firm to show its pricing was reasonable.<sup>88</sup>

The tribunal began by assessing *Babelegi*’s dominance. SA-CA, s.7 requires either a 45% market share or market power to establish dominance<sup>89</sup>. ‘Market power’ is then defined as a firm’s ability to behave to an appreciable extent independently of its competitors, customers or suppliers<sup>90</sup>. A comparable definition is applied by the CCP, whereby dominance is established either by conduct based on market power or a 40% market share.<sup>91</sup>

As stated in the introduction, the tribunal’s assessment of dominance is being heavily criticized. This analysis was based on a contextual analysis of *Babelegi*’s ‘temporary market power’. This is not a new concept. The OECD mentions a few decisions that consider the time-dimensions of markets to establish dominance, especially when it is circumstantial and temporary. An example is the European

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<sup>86</sup> *Babelegi*, para 132.

<sup>87</sup> Competition Act 2013 (South Africa), s 8.

<sup>88</sup> *Babelegi*, para 41.

<sup>89</sup> *Babelegi*, para 52.

<sup>90</sup> *Babelegi*, para 54.

<sup>91</sup> CCP Guidance on Competition Compliance (n 32) page 9.

commission's decision during the world oil crisis in the 1970s.<sup>92</sup> Although the commission's decision was annulled on appeal, the ECJ did not comment on the commission's understanding of temporary dominance, which, OECD argues, still remains applicable.<sup>93</sup> The UK's Competition & Markets Authority (CMA) agrees that crisis situations can confer temporary dominance which gives rise to excessive pricing.<sup>94</sup> Professor Motta also agrees, with specific reference to groceries markets, and states that temporarily dominant firms 'take advantage of consumer's inability to shop around, rather than raising prices because of insufficient supply'.<sup>95</sup> Noting these developments, the tribunal stated that crisis situations and abnormal disruptions in supply-demand can constrict consumers buying power, and thus confer market power on firms that would not be dominant in ordinary circumstances.<sup>96</sup>

Note that the tribunal explicitly excluded consumer protection law from its analysis at the outset<sup>97</sup>. But then it appears to be the

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<sup>92</sup> Case 77/327/EEC *Commission Decision relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG oil companies operating in Netherlands)* [1997] Official Journal of the European Communities, No L117/1.

<sup>93</sup> OECD exploitative pricing (n 7) 5 – 6.

<sup>94</sup> Competition and Markets Authority, 'CMA Approach to Business Cooperation in Response to Covid-19', (25 March 2020) para 2.4(c) <<https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19>> accessed on 17 November 2020.

<sup>95</sup> Massimo Motta 'Price Regulation in Times of Crisis Can Be Tricky' (Daily Maverick, 22 April 2020), <<https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/>> accessed on 17 November 2020; Massimo Motta, 'South Africa: Price Regulation in Times of Crisis Can Be Tricky' (AllAfrica, 22 April 2020) <<https://allafrica.com/stories/202004220492.html>> accessed on 17 November 2020.

<sup>96</sup> *Babelegi*, para 75, 89.

<sup>97</sup> *Babelegi*, para 38.

‘temporary dominance analysis’ which blurs the lines between consumer sensitive and competition sensitive excessive pricing.<sup>98</sup> This is because after defining market power and price gouging<sup>99</sup> the tribunal applies the benchmark analysis<sup>100</sup> to determine their basic economic test to confirm *Babelegi*’s dominance. The test is then to compare *Babelegi*’s pre and post crises price mark-ups<sup>101</sup> – another approach the tribunal cites as being adopted by USA price gouging laws.<sup>102</sup> The preceding discussion therefore appears to be more of a price gouging analysis rather than excessive pricing liability under competition law.

Another problem appears to be the alleged circular reasoning.<sup>103</sup> The *Babelegi* decision portrays the following two points: (i) only a dominant firm can charge excessive pricing, (ii) a firm charged excessive prices, it is therefore dominant. This reasoning may be justifiable based on the factual analysis conducted on *Babelegi*’s mark-ups: (i) *Babelegi* increases its profit by 23% before Covid-19, (ii) this rises to 122% when WHO declares Covid-19 a pandemic, (iii) and there are subsequent rises following major Covid-19 events, such as closing of borders, till it eventually reaches 1120% ‘on the day SA announces its first Covid-19 case’.<sup>104</sup> These increases took place

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<sup>98</sup> *Babelegi*, paras 70, 71.

<sup>99</sup> Defined as excessive pricing that takes place in the context of a disaster; *Babelegi*, para 71.

<sup>100</sup> A test traditionally applied in the context of competition law rather than national law; See part I (3) above n 68 - 70.

<sup>101</sup> The profit margin a seller attaches to costs of the product before selling.

<sup>102</sup> *Babelegi*, para 101 – 103.

<sup>103</sup> DispatchLIVE (n 13).

<sup>104</sup> *Babelegi*, para 119.2 – 119.6.

solely with reference to Covid-19 facts, and *Babelegi* never actually incurred any increased prices from its suppliers. These facts, together with *Babelegi*'s inability to justify its price increases, led the tribunal to find all three elements of liability.<sup>105</sup> Such facts probably justify a harsher approach – but arguably within the context of consumer protection that is under price gouging laws, which is what the tribunal appears to have relied upon under the guise of competition law. This is further supported by the criticism that the *Babelegi* analysis may only hold during a crisis situation, not normal market conditions.<sup>106</sup>

The tribunal applied the same approach in *Dis-Chem*<sup>107</sup> where the respondent firm was held liable for variable price increases<sup>108</sup> in its facemasks not on the basis of their market share (despite being a large pharmaceutical retailer) but their ability to exert market power. Like *Babelegi*, *Dis-Chem*'s market power was established based on the circular reasoning surrounding 'the ability to raise prices' rather than defining the particular product and geographical market where dominance was to be established.<sup>109</sup> This creates further uncertainty:

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<sup>105</sup> *Babelegi*, para 176.

<sup>106</sup> Mark Griffiths, 'South Africa: Taking stock of enforcement of COVID-19 price regulations' (Inside Africa, 4 June 2020) <<https://www.insideafricalaw.com/blog/south-africa-taking-stock-of-the-enforcement-of-covid-19-price-regulations>> accessed on 17 November 2020.

<sup>107</sup> *In the matter between Competition Commission of South Africa and Dis-Chem Pharmacies limited* (April 2020), Competition Tribunal of South Africa, Case No: CR008Apr20.

<sup>108</sup> Dis-Chem had three types of face masks, prices for which were increased by 261%, 43% and 25% respectively; *ibid*, para 7.

<sup>109</sup> Micheal-James Currie and John Oxenham, 'South Africa's Second Price Gouging Case: Dis-Chem Penalised for Excessive Pricing re Face Masks' (African Antitrust & Competition Law, 15 July 2020) <<https://africanantitrust.com/2020/07/15/south-africas-second-price-gouging-case-dis-chem-penalised-for-excessive-pricing-re-face-masks/>> accessed on 17 November 2020.

What is the acceptable mark-up raise during a crisis situation if three different masks with different mark-ups are being used to establish excessive pricing liability?

*Babelegi* and *Dis-Chem* have both been appealed by the relevant parties. It is expected that the tribunal's application of consumer protection under the guise of competition law and dominance will be overruled.<sup>110</sup> In view of the above, it is no wonder excessive pricing litigation in competition law is excessively criticized for interfering with regular market functions.<sup>111</sup>

## **ASSESSING THE CPL AND COMPETITION LAW DIVIDE IN PAKISTAN**

Despite being notorious for unsuccessful prosecution, particularly when brought under competition law,<sup>112</sup> excessive pricing's control is an essential public and consumer interest that must be protected.<sup>113</sup> The above sections have alluded to comparable concepts between South African, EU and Pakistani competition law on excessive pricing. Particularly notable is the CCP's explanation of dominance in its 2018 annual report which is the same as the one given in

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<sup>110</sup> Katherine Child, 'Pandemic pricing politics' (*Trade Intelligence*, 10 September 2020) <<https://www.tradeintelligence.co.za/News/Read/505/pandemic-pricing-politics>> accessed on 17 November 2020; DispatchLIVE (n 13); Dlodla (n 14).

<sup>111</sup> Motta (n 95).

<sup>112</sup> OECD exploitative pricing (n 7) 2 – 3.

<sup>113</sup> *Babelegi*, para 26.



*Babelegi*: a firm is dominant if it can behave independently of its consumers – and it can so behave if it charges excessive prices.<sup>114</sup>

Yet, the practical application of this definition in Pakistan is focused on a more detailed economic analysis than what was followed in *Babelegi*. The commission conducted a recent enquiry into the abuse of dominance by international airlines handling mango exports.<sup>115</sup> Complainants alleged that airlines charged greater prices for Pakistani exports than Indian exports for the same destination. This was despite the distance between Pakistan and its import regions being shorter compared to India. Additionally, unfair price increases were alleged during mango seasons, which impeded Pakistani producers' ability to compete in international markets.<sup>116</sup> The Commission's analysis under s.3 CA 2010 followed the steps below:

(1) Define the relevant market

Analysing mangoes as a product, and the relevant facilities utilized to keep them on the market, which ultimately resulted in the market for air transport of mangoes from Pakistan to international destination.<sup>117</sup> It is interesting to see CCP distinguish between the same market under sea transport, as this arguably means cost and product conservation considerations are not excluded from the

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<sup>114</sup> CCP Annual Report 2018 (n 25) at page 27.

<sup>115</sup> Competition Commission of Pakistan Enquiry Report, 'In the matter of complaint filed for alleged abuse of dominant position by international airlines in the handling of mango cargo exports' (30 December 2019).

<sup>116</sup> Airlines enquiry report (n 115), para 2.

<sup>117</sup> Airlines enquiry report, (n 115), paras 17 – 27.

analysis.<sup>118</sup> This in turn arguably ensures a more effective balancing of industry and consumer interest if followed in other markets as well.

(2) Establish dominance

This involved an in-depth analysis of the relevant airlines' market shares.

(3) Establish abuse of dominance

(4) Compare airline prices and distances between Pakistani and Indian exports.

The above tests involve complicated economic analyses that fall outside the scope of this paper, and the author's abilities. CCP's approach is centred on a stricter economic analysis than the benchmark approach applied in *Babelegi*. And a comparison with *Babelegi* does clarify what critics mean when they say the SA-CT used the Covid-19 context to re-interpret strict laws on excessive pricing.<sup>119</sup>

On the one hand, complicated data-intensive economic analysis presents a time and resource draining hurdle to establishing excessive pricing cases.<sup>120</sup> Yet, setting price caps or limits to acceptable profit margins bring about their own anti-competitive effects.<sup>121</sup> CCP

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<sup>118</sup> See also CCP's recommendations on pricing regulations in the Sugar sector, which presents a more in-depth consideration of costs, pricing and regulation thereof: *CCP Opinion: Competition Concerns in the Sugar Sector of Pakistan*.

<sup>119</sup> See the introduction to this article.

<sup>120</sup> OECD exploitative pricing (n 7) 4.

<sup>121</sup> Competition Commission of Pakistan, 'Opinion on Fixing of Minimum Price in the Cigarette Industry' (2 June 2009), para 30.

suggests developing a uniform price determination formula to deter excessive pricing during normal times, and applying price gouging restrictions only in times of emergency.<sup>122</sup> Though this appears to develop the conceptual divide between ‘consumer sensitive’ and ‘competition sensitive’ excessive pricing regulation – it also means suspending competition laws during crisis situations to the sole application of price gouging laws. Doing so arguably develops the conceptual divide, that is the subject of this article, to an appreciable extent. It is humbly submitted that this approach should be further developed while maintaining the divide, rather than blurring the boundaries between CPL and competition law as was done in *Babelegi*.

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<sup>122</sup> Competition Commission of Pakistan Policy Note, 'Amendments in laws relating to essential commodities to create a level playing field and enhance economic efficiency' (27 August 2019), para 16 (A).

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