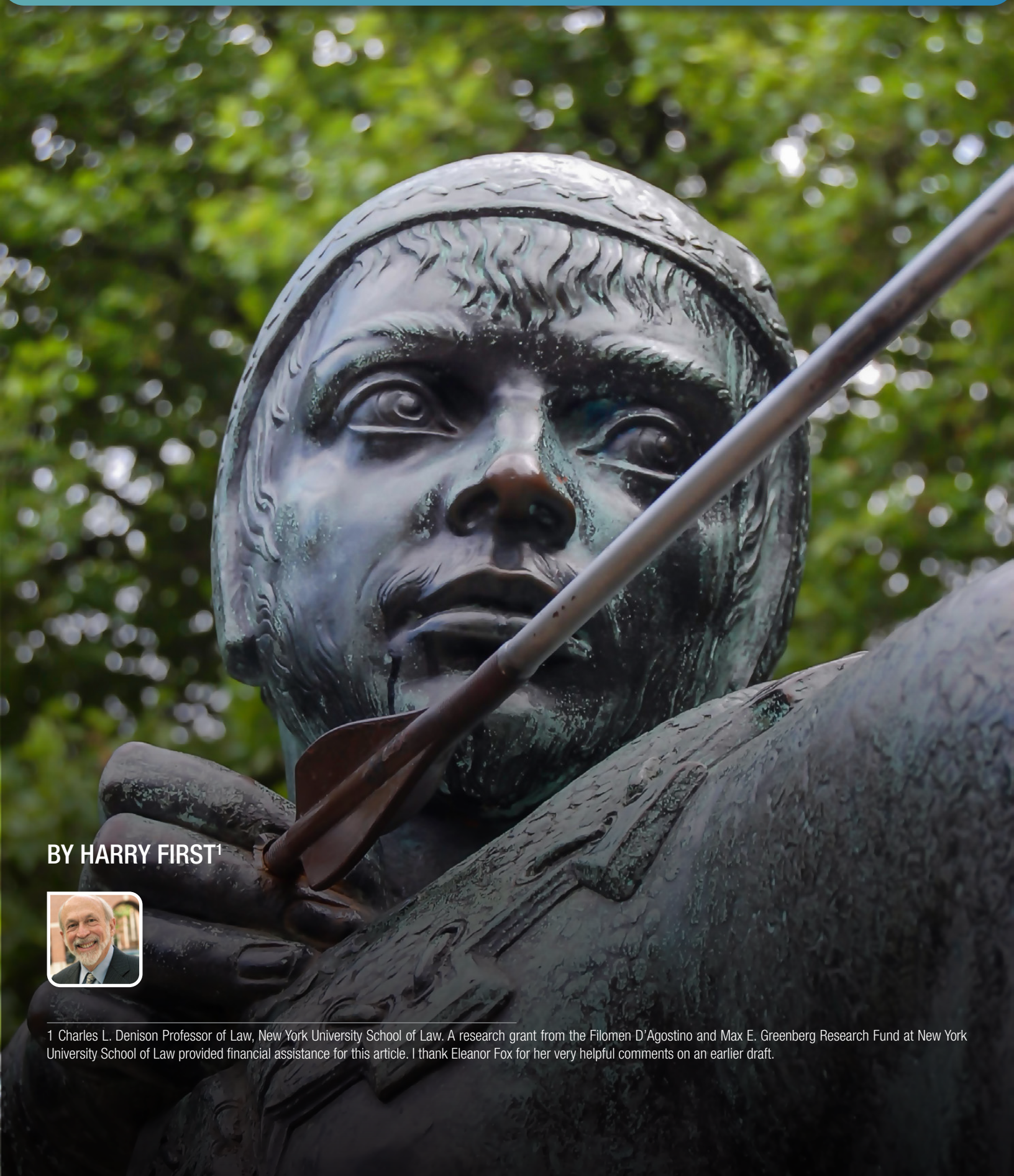
ROBBIN' HOOD



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I. INTRODUCTION

Is it an antitrust offense to sell face masks at a high price in the midst of a pandemic?

In the United States, this rhetorical question would be answered with another question. Why does the pandemic matter? It's not an antitrust offense regardless of when or where. Conventional antitrust wisdom is that high prices don't violate the antitrust laws so long as the high prices are set by a single seller, even by a monopolist selling at the monopoly price.

Outside the United States, the answer would be different. Most antitrust regimes around the world have provisions forbidding dominant firms from engaging in excessive pricing. Even so, the circumstance of the pricing occurring during a pandemic would not seem particularly relevant in most jurisdictions to the test applied for determining when price is "excessive."

The question I pose is not purely rhetorical. Antitrust enforcement authorities in a number of jurisdictions have expressed concern about price-gouging during the coronavirus pandemic. The European Commission, EFTA, and the European National Competition Authorities, for example, have issued a joint statement stressing that it is "of utmost importance" to ensure that products like face masks, which are "considered essential to protect the health of consumers," remain available "at competitive prices." These competition law enforcement agencies announced that they "will therefore not hesitate to take action against companies taking advantage of the current situation by . . . abusing their dominant position."[2]

By and large, however, even jurisdictions that recognize excessive pricing as an antitrust violation have not used antitrust law to go after price gouging in the sale of items such as face masks, although they have occasionally threatened to do so. There is one important exception to this antitrust indifference, South Africa. In two cases decided in June and July of 2020, the Competition Tribunal (the initial adjudicator of antitrust complaints) found that the defendants had engaged in excessive pricing of face masks in violation of South African competition law.[3] These decisions are important and interesting in themselves, but they also shed light on the utility of using antitrust law to deal with excessive pricing. These cases are about South African law, but they are not just about South Africa.

2 Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf (accessed August 24, 2020).

3 See Commission v. Dis-Chem Pharmacies, Ltd., Case No: CR008Apr20 (July 7, 2020) (Comp. Trib.), https://www.comptrib.co.za/cases-current; *Commission v. Babelegi Workwear and Indus. Supp. CC*, Case No. CR003Apr20 (June 1, 2020) (Comp. Trib.), https://www.comptrib.co.za/cases-archived.

II. EXCESSIVE PRICING IN SOUTH AFRICAN COMPETITION LAW

South Africa's competition law, as originally enacted in 1998, prohibited a dominant firm from charging an "excessive price" to the "detriment of consumers." Excessiveness was defined as a price for a good or service that "bears no reasonable relation to the economic value of that good or service."[4] The Act would be violated if the price were set above this economic value.

The 1998 provision was framed in light of European law on excessive pricing, reflected in the EC Commission's 1978 decision in the United Brands case and then developed in a number of subsequent cases.[5] The South Africa Competition Commission has made some effort to use the 1998 excessive pricing provision, but the Competition Appeal Court (which reviews the Tribunal's decisions) rebuffed the Commission in two separate cases.[6] One involved complex pricing decisions for flat steel products; the other involved the sale of propylene and polypropylene, raw material used in the production of a wide range of plastic products. In both cases the seller was dominant in South Africa and charged higher prices to buyers in South Africa than to buyers in other countries, where the firms faced strong competition. The Competition Appeal Court in these cases recognized the complexity of trying to determine the appropriate standard to apply to "economic value," as well as the difficulties of dealing with issues of costs (transfer pricing from a sister corporation was a perplexing issue in one of the cases), accounting for profits, and the amount above "economic value" that would be considered excessive or unfair.

The Court's interpretation of the law on excessive pricing was done in the context of a competition law statute whose goals included dealing with the legacy of apartheid as it affected the structure of the economy and, specifically, "to provide consumers with competitive prices," to "advance the social and economic welfare of South Africans," and to ensure that "small and medium-sized enterprises have an equitable opportunity to participate in the economy."[7] Despite "legacy" issues in both cases (one company had been state-owned since 1928), and despite the impact on South African businesses required to pay high input prices, the Court applied a rigorously economic lens to the defendants' pricing and expressed skepticism about the exercise of reviewing complex pricing decisions.

In 2018 the South African legislature passed a sweeping amendment to the Competition Act, acknowledging that the 1998 Competition Act had not led to hoped-for "radical economic transformation" and greater inclusion.[8] Among the changes adopted was a revision of the excessive pricing provision.

The amendments to the Competition Act kept the prohibition of excessive pricing as an "abuse of dominance," but changed both the statutory definition of excessive pricing and the allocation of the burden of proof. With regard to definition, gone is the language of "no reasonable relation to economic value," replaced with the definition of an "excessive price" as being "higher than the competitive price" and "unreasonbl[y]" so. The revision adds that "all relevant factors" should be taken into account in making this determination, including price-cost margins and internal rates of return, a number of comparative benchmarks (prices at which the dominant firm sells the product in other markets, prices and profits of other firms selling the product in competitive markets), market structure characteristics, and the length of time the high prices have been charged.[9] With regard to the burden of proof, the revision provided that once a *prima facie* case is made that the dominant firm charged an excessive price, the burden then shifts to the dominant firm to prove the price was reasonable.[10] These changes thus rejected the Competition Appeal Court's approach in the two earlier cases, which had sought a more objective approach rather than a multi-factor approach and which, of course, had put the burden fully on the complaining party.

4 See Competition Act No. 89 of 1998, Secs. 1(1)(ix), 8 (a), http://www.compcom.co.za/wp-content/uploads/2017/11/pocket-act-august-20141.pdf.

5 *United Brands Co. v. Commission*, Case 27/76, 1978 E.C.R. 207 (CJ).

6 See *Competition Comm'n v. Sasol Chem. Inds. Ltd.*, 2015 (5) SA 471 (CAC); *Harmony Gold Mining Co. v. Mittal Steel S. Afr. Ltd.*, 2007 ZACT 21 (CAC).

7 See Competition Act of 1998, *supra* note 4, Preamble, Sec. 2 (b), (c), (e).

8 For a full account of the 2018 revisions, see Eleanor M. Fox, South Africa, Competition Law and Equality: Restoring Equity By Antitrust In A Land Where Markets Were Brutally Skewed, CPI Antitrust Chronicle (Dec. 2019).

9 See Act No. 18 of 2018, Competition Amendment Act, Sec. 5, https://www.comptrib.co.za/Content/Documents/Competition-Amend-Act-18%20of%202018%20(9).pdf.

10 See Competition Act Sec. 8(1)(a), (2), (3).

III. THE CASES

On March 5, 2020, South Africa reported its first case of COVID-19; on March 23 a 21-day national lockdown was announced. Even before the first case was reported, though, stores were running out of face masks. On January 31, for example, one major chain reported that "there's been a bit of a panic" over masks and that they were "practically sold out."[11]

The first case the Competition Tribunal decided involved Babelegi Workwear, a small company located in a suburb of Pretoria that manufactures industrial workwear. Babelegi also sells dust masks that it purchases from suppliers. It claimed to have about 5 percent of the mask market. Between January 31 and March 5, 2020, Babelegi sold approximately 10,000 masks (another competitor, by contrast, sold more than 60,000 masks per day during that period). On January 31, the day the World Health Organization declared COVID-19 to be a worldwide public health emergency, Babelegi increased its price for a box of twenty masks from R50.60 per box to R91. From then through March 5, it raised its price in a series of steps until it was charging R500.00 per box, almost ten times its pre-pandemic price. During this entire time its costs did not change, but its profits sure did. Its profit rate on a box of masks increased from about 20 percent to almost 92 percent and its mark-up rose from 23 percent to 1100 percent.[12] Its total excess profit was about R37,000 (about $2200).[13]

The second case involved a much larger company, Dis-Chem, a publicly-held pharmaceutical retailer with 165 stores located throughout South Africa. Dis-Chem holds itself out as a "low-price destination store" and positions itself as a "discount brand."[14]

Dis-Chem sold surgical face masks sourced from two South African suppliers and one South African manufacturer. The Commission's complaint charged that price increases taken in March 2020 on two types of surgical face masks, the standard blue masks and blue "foliodress" masks, were "excessive." In February Dis-Chem had raised the price of a pack of fifty standard masks from R47.78 to R78.22 and then in March to R173.87; a pack of fifty foliodress masks was raised from R78.22 in February to R81.70 in March. Comparing overall February prices against the increases in March the Tribunal found an increase in price per pack of 261 percent for 50 blue masks (43 percent for 5) and 25 percent for a pack of 50 foliodress masks.[15] Without giving exact figures (they were redacted from the Tribunal's opinion), the Tribunal concluded that mark-ups increased "exponentially" from mid-February and "more than doubled" in the March period.[16] The excess profit (or overcharge) for the March period was R671,083 (approximately $42,000).[17]

Both cases included charges under the Competition Act and under the consumer protection regulations that the Minister of Trade, Industry, and Competition had issued. Those regulations applied to "excessive pricing" and to "unconscionable, unfair, unreasonable and unjust prices."[18]

The Tribunal found that the regulations could not be applied (they were issued after the conduct in question), but drew an interesting distinction between the prohibition on "excessive" pricing and the prohibition on "unfair" prices. Cases involving the former, the Tribunal wrote, are "competition cases"; cases involving the latter, "consumer protection cases." The former involved only dominant firms, the latter included non-dominant firms.[19] The former are tested by economic criteria (under the regulation, the relation of price to cost), but the latter are the result of "unfair conduct," "misleading" practices, or "manipulation."[20]

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11 Eyewitness News, Dis-Chem running out of face masks as South Africans prep for coronavirus, https://ewn.co.za/2020/01/31/surgical-face-masks-fly-off-shelves-at-dis-chem-stores-in-wake-of-coronavirus (accessed Sept. 1, 2020).

12 *Babelegi, supra* note 3, ¶ ¶115-118.

13 *Id.* ¶ 187.5.8.

14 *Dis-Chem, supra* note 3, ¶ 140 and n.59.

15 *Id.* ¶¶ 184, 185.

16 *Id.* ¶¶ 205, 249. The exact figures are redacted in the public version of the Tribunal's opinion.

17 *Id.* ¶ 243.

18 See *Id.* ¶ 42.

19 *Id.*

20 *Id.* ¶¶ 43, 44.

Required to take the Competition Act route, the first important question was whether these two firms were "dominant." The normal approach would be to answer this question by defining the market and calculating market share (at least as a start). In neither case, however, did the Commission or the Tribunal define the market or calculate market shares. Indeed, had they done so, the cases against the two firms would have been over. Babelegi asserted that it had less than 5 percent of the market; even if not accurate, it seems doubtful that its market share could have been nine times that amount (45 percent is the line for showing dominance solely by market share).[21] Dis-Chem made a more elaborate argument, identifying the pharmacies and retail chains with which it competed, and using Google Maps to show the number of competitors located within 5km of their top ten stores.[22] Thus, neither firm would seem to be dominant.

Under South Africa law, however, dominance can be found where a firm has less than 45 percent of the market if the complainant shows that the firm has "market power." Can this showing be made without defining the market within which that power is exercised? Yes, the Tribunal found, because market power can be proved by inference from the economic behavior of the firm.[23] The Competition Act itself defines market power as "the power of a firm to control prices or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers."[24] Thus, the Competition Commission argued that it could prove market power inferentially by proving that the defendants were able successfully to increase their prices even though their costs did not increase.[25] Or, as the Tribunal put it in *Babelegi*, Babelegi "successively and boldly increases its mask prices during this period, thus behaving to an appreciable extent independently of its competitors, customers or suppliers."[26]

The respondents argued that the market power requirement, even if approached through proof of economic behavior, implies some degree of durability. As the parties pointed out, many firms are able to exercise some degree of pricing independent of competitors, and without regard to changes in costs, but such conduct is likely transitory, not durable. Markets will soon catch up with this behavior and, presumably, do a better job of disciplining the firm than judicial enforcement ever could (unless, of course, there is something that would prevent market discipline within a reasonable time).[27] Dominance, you might say, is not a sometime thing.

The Tribunal tried to meet this argument by stressing that the Commission's case was not about market power "in ordinary times" but about market power in the context of COVID-19. "This context is the prism" through which the parties' pricing conduct must be assessed.[28] In a crisis like the pandemic — or some other civil emergency or disaster — markets are "disrupted," allowing parties to "take advantage" of the crisis by charging excessive prices, commonly referred to as "price gouging."[29] Indeed, this was a time when even the normal discipline imposed through shopping around for lower prices was impaired because of the fear of contracting COVID-19 and social distancing measures.[30] Disruption can allow for the exercise of dominance.

The second critical issue in the two cases was whether the price was excessive. Judging "excessiveness" has proven to be a difficult issue in whatever jurisdiction it has been litigated, including in South Africa. But it turned out to be not very difficult in these two cases because they involved retail pricing, not pricing of manufactured inputs sold to intermediate buyers.

The Competition Act defines excessive prices as prices that are "higher than the competitive price" and the difference is "unreasonable." The Tribunal decided that the relevant prices against which to compare the parties' price increases was the parties' own prices prior to the

21 See *Babelegi, supra* note 3, ¶ 59. Babelegi included imports in its estimate.

22 See *Dis-Chem, supra* note 3, ¶ 91. The 5km radius is presumably the area within most shoppers will go for alternate sources of pharmaceutical supplies.

23 See *Id.* ¶ 82.

24 See Competition Act section 1, 7. This definition tracks U.S. and EU law, see *United States v. DuPont*, 351 U.S. 377, 391 (1956); *United Brands Co v. Commission* [1978] ECR 207.

25 See *Dis-Chem, supra* note 3, ¶ 82.

26 *Babelegi, supra* note 3, ¶ 145.

27 See *Id.* ¶¶ 61-63.

28 *Id.* ¶ 67.

29 *Id.* ¶¶ 70, 71. In ¶ 74 the Tribunal lays out the parameters of a disrupted market in broader terms than just the COVID-19 pandemic.

30 See *Dis-Chem, supra* note 3, ¶ 87 ("women were limiting the number of shops visited to buy food owing to the nature of the pandemic").

increases; these prior prices, the Tribunal felt, could reasonably be considered to have been the "competitive price."[31] The Commission could then determine whether the difference between the competitive before-price and the higher after-price was unreasonable by seeing whether the higher after-price was justified by an increase in the costs of the products or by some other factor. This, the Tribunal said, was a "relatively simple yet instructive test."[32]

Using this test, the Tribunal had little trouble condemning the prices. Babelegi's costs had remained unchanged but its prices were almost ten times higher and its price-cost margins increased by about 1100 percent. Dis-Chem's increases were not quite as spectacular, but certainly large enough. Its costs appear to have increased slightly, but the increases in its prices ranged from 25 to 261 percent and its mark-ups increased "exponentially."

These prices were not only clearly above the "competitive price." The difference was also "unreasonable." Although the Tribunal hinted that in the circumstances of the COVID-19 pandemic, any price increase in excess of a cost increase might be considered unreasonable, the Tribunal did not need to go so far.[33] Instead, it chose ten percent as the line between a reasonable price increase and an unreasonable one, relying on the use of the ten percent figure in many U.S. state price gouging laws.[34] The increases in both cases were far in excess of that amount.

IV. FOUR TAKE-AWAYS

The two cases raise important issues for South African competition law. The Tribunal's approach comes close to making the issue of market dominance irrelevant by stressing the fact that the two sellers were able to get away with substantial price increases, at least for a short period of time. If the price increase itself shows market power and hence dominance, it would seem that the market power/dominance requirement no longer limits the prohibition on excessive pricing.

The Tribunal tried mightily to restrict its approach to the excessive pricing prohibition to markets affected by "abnormal disruptions," although it indicated that such crisis periods were not limited to the COVID-19 pandemic. Whether an "abnormal disruptions" limitation can appropriately be read into the Competition Act is not clear. Even if permissible, could this approach be extended to other disruptions, say, a spike in demand for electricity on a hot summer day or a shortage of basic metal inputs for producing electric vehicle batteries? Finally, it is not clear whether the Tribunal's "simple yet instructive test" for excessive pricing can be applied in the manufacturing context where pricing is more complicated than simple mark-ups over input costs.[35]

As important as these issues are for South Africa, the two cases have deeper implications for competition law and enforcement generally, but particularly for antitrust law and enforcement in the United States. I see four take-aways: the importance of price; the importance of justice; the willingness to rely on markets; and the culture of government antitrust enforcement.

1. Price. Antitrust's focus on price has come under attack in recent years in the United States, crystallized by Lina Khan's compellingly-argued 2017 article in the Yale Law Journal, "Amazon's Antitrust Paradox."[36] This critique has correctly noted that a focus on price may lead to a failure to pay attention to other effects of antitrust enforcement (at least effects on innovation and product quality, but also effects on political power, workers, small business, and income inequality). On the other hand, some who are concerned about the broadening of antitrust's mandate now urge a clearer focus on output rather than price, as a better way both to maximize consumer welfare (even the welfare of labor) and to contribute to a well-functioning economy.[37]

31 See *Id.* ¶ 161

32 *Babelegi, supra* note 3, ¶ 99.

33 See *Dis-Chem, supra* note 3, ¶ 221.

34 See *Id.* ¶ 220, Babelegi, ¶ 157. In Sasol, the Competition Appeal Court noted that Sasol's price increase was less than the 16.67 percent increase in profit that the Talmud considered excessive. See *Sasol, supra* note 6, ¶ 175.

35 As of September, 2020, Babelegi's case was under review by the Competition Appeal Court; Dis-Chem withdrew its appeal to the Court.

36 Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 710 (2017).

37 See Herbert Hovenkamp, Antitrust's Borderline, https://ssrn.com/abstract=3656702 (August 2020).

My first take-away from *Babelegi* and *Dis-Chem* is that antitrust law should not abandon its focus on low price in our desire to chase other policy goals. Price may not be everything, but it's an important thing. Lower price is the most understandable benefit of competition, hence the greatest support for competition law.

Beyond the political appeal, lowering price is also an important part of antitrust law's effort to be sure that the benefits of competition are widely distributed, that they go to the broad group of consumers and not to a narrower group of producers. Indeed, we assume that consumers are entitled to keep the consumer surplus in their pockets and not to have it taken by producers, without regard to what happens to output. When a robber takes your money, we aren't indifferent to this act because output isn't affected. We condemn the improper redistribution from the party entitled to keep the money to the party who is not entitled to get it. Antitrust's focus on price effects performs a similar role.

Finally, low prices are of particular importance to those who need low prices the most, the least wealthy in our society. The rise of discount retailers, the innovations of online distribution, the prevention of collusive pharmaceutical patent settlements — in one way or another, antitrust rules have fostered competition that lowers price to the benefit of those of our citizens who are the least well-off. Income distribution is a problem in our society. Antitrust's focus on price can help.

2. Injustice. Antitrust seems to have no sense of outrage over injustice. As my mentor, Louis B. Schwartz, once lamented, "I miss in [our usual antitrust] analysis any reference to that venerable non-economic goal of government, namely justice."[38]

My second take-away is that the concern for injustice comes through clearly in the Tribunal's opinions in *Babelegi* and *Dis-Chem*. The Tribunal called Dis-Chem's price raises "utterly unreasonable and reprehensible," pointing out their impact on poor individuals who were already vulnerable. It condemned the exploitation done when customers were "desperate to lay their hands on an essential item in the fight against a pandemic of global proportions."[39] Similarly, the Tribunal condemned Babelegi's prices as "reprehensible," exploiting customers "amidst a crisis when these customers are at their most vulnerable and their choices limited."[40]

I find nothing wrong, and something salutary, in making justice part of our antitrust thinking. Like all fundamental concepts (efficiency is a good example), it provokes arguments over definitions and core meaning. But whatever the scope of those arguments might be, I have little trouble in looking to antitrust to deal with the injustice in these cases — extremely large and unjustified price increases for face masks that people need in the midst of a pandemic. Moral condemnation can have its place in antitrust.

3. Markets. Antitrust law expresses an institutional preference for markets over private arrangements or government control. As my colleague Eleanor Fox and her co-author Mor Bakhoum argue, our goal should be "making markets work for people," whether in the United States or in less developed economies.[41]

But markets don't always work to produce the outcomes we would like or expect. Nevertheless, in the United States we have become exceedingly reluctant to use government intervention to fix market failures. If anything, we seem more willing to allow private actors to fix what they consider to be market failures and then to allow such behavior as a defense to an antitrust claim.[42]

My third take-away is the debate in *Babelegi* and *Dis-Chem* over whether we should take a long-enough view of the conduct so that market forces will correct things or whether government should intervene now to fix the failure. The question is not whether markets work but when will they work. Indeed, this is a critical aspect of the debate over monopoly conduct in the United States (including excessive pricing): Is antitrust intervention necessary or will the problem self-correct.

38 Louis B. Schwartz, "Justice" And Other Non-Economic Goals Of Antitrust, 127 U. Pa. L. Rev. 1076 (1979).

39 See *Dis-Chem, supra* note 3, ¶¶ 143, 222, 226, 246.

40 *Babelegi, supra* note 3, ¶ 174.

41 See Eleanor M. Fox & Mor Bakhoum, Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa 4 (2019).

42 See John M. Newman, Procompetitive Justifications in Antitrust Law, 94 Ind. L.J. 501 (2019).

The Tribunal in these cases was willing to take a short-term view, not requiring that the firms have anything close to durable market power. As the Tribunal wrote in *Dis-Chem*,

> it is recognised in competition law that special conditions exist when markets can fail and are not able to deliver the theoretical benefits associated with well-functioning market economies. This is why competition regulators are mandated to regulate markets either through merger control (*ex ante*) or the conduct of firms (*ex post*) to rectify such failures."[43]

Many in the developing world are overly-skeptical of markets, a point that Fox and Bakhoum emphasize in their book,[44] but I think U.S. antitrust law has become too enamored of market self-corrections and too willing to tolerate short-term market failures on the assumption that things will be fine in the end. The two South African cases are a challenge to U.S. law to rethink the balance that we have struck.

4. The culture of government antitrust enforcement. There is a long-running global debate over the goals of antitrust law, but there is also a debate over how antitrust enforcement resources should be used. For example, as a general matter we don't like monopoly pricing, but in the United States we also don't seem to think it's a good idea to use antitrust enforcement to go after such pricing unless we can find some exclusionary behavior to tie our enforcement to. Similar assumptions hold for "price gouging." To use the distinction the Tribunal offered in *Dis-Chem*, price gouging is thought of as unfair behavior, best left to "consumer protection," not worthy of antitrust enforcement resources.

My fourth take-away is to ask why antitrust enforcers turn away from dealing with temporary price gouging. There may be good policy reasons, but I think that an important part of the answer is the culture of antitrust enforcement. Antitrust enforcement, as it has evolved over time, has focused much attention on major manufacturing industries, industries with power and economic importance — the railroads, the oil industry, steel, aluminum, chemicals, mainframe computers, telecommunications networks and equipment. Merger policy focuses on large asset mergers and then only in fairly concentrated markets. Antitrust enforcement looks for economic impact. Individual instances of price-gouging, temporary in nature, do not seem to present a substantial enough impact to warrant antitrust attention.

There is nothing wrong with paying attention to the impact of antitrust enforcement, but it may turn out that the desire for big impact has been more hope than achievement, that all that attention paid to large mergers has accounted for too little and ignored too much. For an enforcement effort concerned with "big," the results may not be big enough.

South Africa's effort to fight the unjustified price increases of face masks in the midst of a pandemic is a challenge to the culture of antitrust enforcement. The cases aren't big in the way that we are accustomed to. Babelegi is a small company, but even Dis-Chem, an important retailer, isn't so large that it dominates the South African retailing economy. MassMart, owned by Wal-Mart, is far larger. But the complaints about price-gouging behavior are numerous. The Commissioner for the Competition Authority reported in May of 2020 that there had been over 1500 complaints about excessive pricing of food products, masks, and sanitizers and that 35 firms were then in some stage of settlement negotiations.[45] The Commission's enforcement effort against price gouging behavior clearly takes significant enforcement resources. Are we willing to recognize that it also produces benefits for the consumers who need these masks?

The Tribunal addressed the issue whether investigating price-gouging was an appropriate job for the Competition Commission. In *Babelegi* the Tribunal wrote that "competition authorities are, at times of crisis and instances of exploitative price abuse, duty-bound to act."[46] In *Dis-Chem* the Tribunal elaborated a compelling view of what should be of concern to competition law enforcement:[47]

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43 *Dis-Chem, supra* note 3, ¶ 142.

44 See Fox & Bakhoum, supra note 41, at 201.

45 See Remarks by the Commissioner for Competition, Mr. Tembikose Bonakele, May 29, 2020, http://www.compcom.co.za/wp-content/uploads/2020/05/Press-Statement-COMPETITION-COMMISSIONS-RESPONSE-TO-THE-COVID-19-PANDEMIC-Final.docx_1590759485810.pdf.

46 *Babelegi, supra* note 3, ¶ 104.

47 *Dis-Chem, supra* note 3, ¶ 144.

> [A] competition authority might be in dereliction of its duty if it did not intervene in a timely manner in states of natural disasters or emergencies to protect vulnerable consumers against exploitative firms. Take for instance a natural disaster such as a severe drought in South Africa. How long should a competition authority wait until the market "settles" or reaches equilibrium before it intervenes to protect consumers against pricing abuses by the suppliers of fresh or bottled water?

I don't have a ready answer to the Tribunal's hypothetical, but I do know that the implicit answer of U.S. antitrust enforcers is, "not our job." That's our competition enforcement culture.

V. CONCLUSION

At about the same time that Babelegi and Dis-Chem were raising their prices of face masks in South Africa, the United States was having its own challenge in getting face masks. As the Wall Street Journal reports, in March of 2020, the spread of the coronavirus in the United States was becoming clear, "stoking panic about shortages of medical supplies." What was the U.S. response? Did we try to clamp down on excessive pricing by suppliers? Did we try to use the government to correct for short-term market failures? No, we left it to a nationwide market free-for-all in which medical providers tried to get needed supplies "any way they could," thereby making it "harder to protect health-care workers, treat infected patients and slow the spread of the virus."[48]

I don't want to contend that all would have been fine if only the U.S. had been able to use the antitrust laws to deal with short-run excessive price gouging in face masks and other necessary medical supplies. Presumably, all hasn't been fine in South Africa either. But I do want to argue that our failure to use antitrust tools against excessive pricing is an antitrust blind-spot, one that South African enforcement lets us see more clearly. Antitrust could help the exploited, even if it can't cure COVID-19.

South Africa's enforcement effort to stop excessive pricing of face masks in a time of a pandemic teaches us that we need to direct our enforcement resources to cases that will help people more. More broadly, I think it is time to change the culture of our antitrust enforcement, to listen to the problems of the disadvantaged, to those who need the protection of antitrust enforcement. Perhaps we should redirect Justice Scalia's observation and say that today, the "supreme evil" of antitrust is not collusion, but our failure to pay attention to how antitrust can advance justice.

48 Michael C. Bender & Rebecca Ballhaus, 'Try Getting It Yourselves': How Administration Sowed Supply Chaos, Wall St. J., Sept. 1, 2020, p.1.

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