Excessive Pricing Regulation in China, South Africa and Other BRICS Member States

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Abstract

This paper conducts a comparative study on excessive pricing enforcement in a number of BRICS jurisdictions, with a particular focus on China and South Africa. The paper first reviews the economic framework and analytical tools that have been used in order to assess excessive pricing, and provides an overview of the relevant policy and enforcement trends relating to excessive pricing in these jurisdictions. It then draws on recent excessive pricing cases, such as the National Development and Reform Commission's investigations into the conduct of Qualcomm and the pricing of river sand in China, and the *Sasol Polymers* and *Harmony/Mittal* cases in South Africa, in order to compare and contrast how different competition authorities have sought to approach the issue of excessive pricing in practice. Finally, the paper explores the role of economic development policy in shaping how excessive pricing provisions are enforced and the sectors of the economy on which enforcement is focussed, and considers whether competition policy is the most appropriate tool with which to attempt to achieve particular development objectives.

1. Introduction

Excessive pricing generally refers to a supplier charging a price for a good or service that is substantially above the level that would prevail under conditions of effective competition. In this regard, excessive pricing provisions, which seek to address directly instances of consumer exploitation by means of high prices, can be contrasted with more commonly applied provisions against exclusionary abuses of dominance, which seek to prohibit suppliers from engaging in exclusionary conduct that may, in turn, lead to high prices, and consequently customer harm.

In this paper, we first discuss whether and how excessive pricing concerns are dealt with under competition law across BRICS (Brazil, Russia, India, China and South Africa) jurisdictions, and compare this with the stance adopted in more developed economies (and competition jurisdictions) such as the European Union (EU), the United Kingdom (UK) and the United States (US). As set out in more detail in Section 2 below, excessive pricing cases are a far more common feature of regimes outside of Europe and the US, and competition law is more likely to be used as an industrial policy tool in these development-oriented jurisdictions.

In Section 3, we provide an overview of the economic principles underpinning excessive pricing. In this regard, although economic theory provides a clear explanation for why one might be concerned about excessive pricing, the analytical framework used to assess whether prices are actually excessive in practice is relatively underdeveloped, and potentially open to a high degree of subjectivity.

Nevertheless, these issues have not prevented agencies in jurisdictions such as China, Russia and South Africa from actively pursuing numerous excessive pricing cases. We review a selection of these cases from China and South Africa in Section 4.

Finally, in Section 5 we offer some observations on the approaches adopted in the cases discussed in Section 4, and their implications for excessive pricing enforcement going forward.

2. Approaches to Enforcement

The treatment of excessive pricing abuses varies significantly across jurisdictions. For instance, in the US there are no provisions under competition law through which a firm could be found guilty of excessive pricing, while the same is true of Australia. The apparent motivation for this is the belief that competition law should be concerned with ensuring the effectiveness of the competitive process, and that if an unimpeded competitive process does not result in desirable outcomes, this should be a matter for sectoral regulation.[1]

The position in the EU is more nuanced in that, while Article 102(a) of the Treaty on the Functioning of the European Union (TFEU) incorporates the language of excessive pricing in prohibiting a dominant firm from *"directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,"* this provision has seldom been applied historically.[2] There have been signs of the European Commission and other national authorities in Europe adopting a more active stance in the enforcement of excessive pricing.[3] However, the focus has mostly remained on markets that could be

[1] Federal Trade Commission and Department of Justice, *Submission to the OECD Working Party No.2 on Competition and Regulation* (2001) <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1110excessivepricesus.pdf> Accessed March 2016, (hereafter FTC and DOJ).

[2] David S. Evans & A. Jorge Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) *Journal of Competition law and Economics* (hereafter Evans & Padilla, 'Excessive Prices').

[3] See, for example, the UK's Competition and Markets Authority (CMA) investigation into Pfizer's and Flynn Pharma's alleged excessive pricing of anti-epilepsy drugs, and the European Commission's

plausible candidates for regulation, i.e. industries that are, by their very nature, predisposed towards having a single supplier, irrespective of the market circumstances in the particular jurisdiction in question.[4]

The hesitancy of US and EU authorities to engage in excessive pricing investigations, and the limited nature of those investigations that have been pursued, can be contrasted with approaches to excessive pricing in other jurisdictions such as China, Russia and South Africa, which have been far more interventionist. For example, in China there have been investigations into excessive pricing in industries such as construction materials and telecommunication devices, while in South Africa the two most high-profile excessive pricing cases have focussed on steel and propylene. Similarly, in Russia the Federal Antimonopoly Service (FAS) has investigated excessive pricing issues in industries ranging from fertilisers to steel products.

Notably, many of these industries are ones in which, in other countries, competition may be found to be extremely healthy, and are thus not intrinsically predisposed to having a single supplier. The fact that such industries have been the subject of excessive pricing scrutiny in the above countries may potentially be a consequence of factors specific to the country in question, including a historical lack of openness and the gradual development of a market economy, although such scrutiny is also consistent with the common observation that competition law is more extensively used to play a broader role in industrial policy in these countries.

investigation into allegedly excessive prices charged by Gazprom in Central and Eastern European countries.

[4] A good example is the European Commission’s 2011 investigation into Standard & Poor’s (S&P).

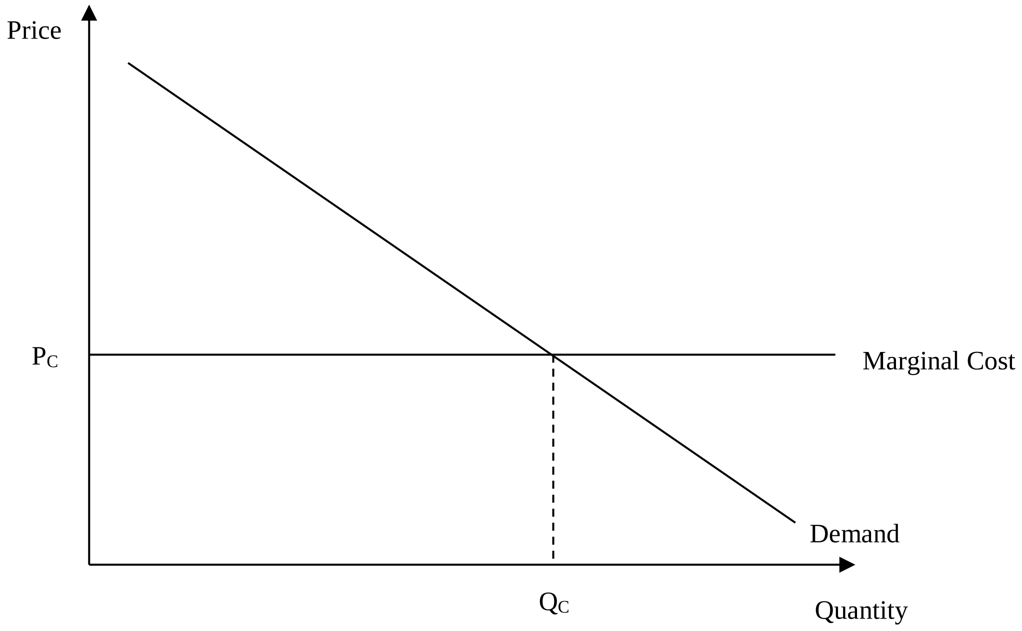
3. Economic Framework

Excessive pricing, in economic terms, is where a dominant firm exercises its market power by unilaterally raising prices to levels that may be considered significantly in excess of competitive levels, either directly, or indirectly by restricting output.[5] This naturally leads to the direct exploitation of consumers, to whom the price of the product or service in question is higher than it would have been under competitive conditions.

Concerns over excessive pricing are well grounded in economic theory. Indeed, by way of comparison, economics tells us that, in a perfectly competitive market, the market price and corresponding level of output will be determined according to where the market supply or marginal cost curve intersects with the demand curve. This is illustrated in Figure 1 below, which indicates that under perfect competition the market price will be P_C and the level of output Q_C.

[5] Output may in turn be restricted indirectly if the dominant firm deliberately under-invests in capacity. Simon Bishop and Mike Walker, *The Economics of EC Competition Law* (3rd edn, Thomson Rheuters 2010) (hereafter Bishop & Walker, *Competition Law*).

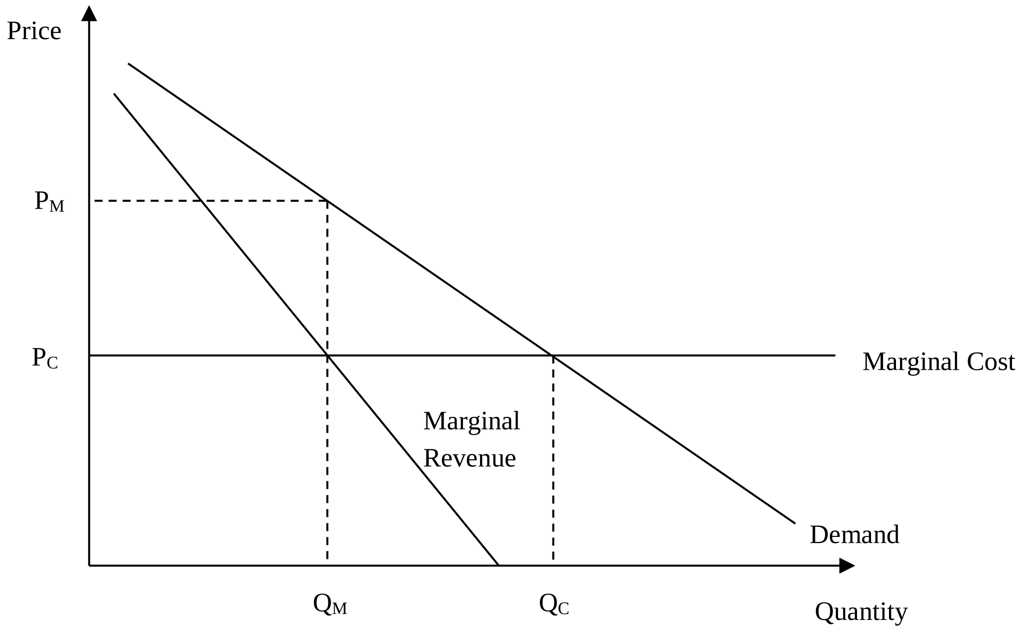
Caption: **Figure 1 Market prices and quantities under perfect competition**



However, under conditions of monopoly, the market price and corresponding level of output will be determined by where the supply or marginal cost curve intersects with the monopolist’s marginal revenue curve, which in turn results in a higher market price P_M and lower market output Q_M (see Figure 2). This is because, unlike firms active in a perfectly competitive market, it is apparent to a firm with market power that an expansion in output will place downwards pressure on prices, which in turn makes the firm relatively less inclined to expand output.

Under this situation, those customers that continue to purchase the good or service in question naturally pay a higher price, but notably there is also a group of customers that would have purchased at the competitive price level, but do not purchase at all at the higher monopoly price. The net utility that this latter group of customers would have gained from purchasing the product/service in question, had it been priced at the competitive level, is what is commonly termed “deadweight loss”.

Caption: **Figure 2 Market prices and quantities under monopoly**



While this analysis involves only a static assessment, and does not consider the dynamic incentives for firms to invest, it nevertheless illustrates that economics provides a clear line of reasoning as to why competition authorities might be concerned about excessive pricing. However, the process of establishing whether prices are excessive in practice is far more complex. This is evident from the way that various competition regimes have sought to capture excessive pricing under competition law.

For instance, Section 8 of the South African Competition Act (No. 89 of 1998) defines an excessive price as one that bears no reasonable relation to, and is higher than, the *"economic value"* of the good or service in question.[6] This is then further expounded in

[6] Reference to the South African Competition act can be found using this link: https://www.comptrib.co.za/assets/Uploads/The-Act/Competition-Act.pdf.

the *Harmony/Mittal* judgement, where economic value is defined as the price that would prevail under long-run competitive equilibrium, with conditions of free entry and exit.[7]

This is similar to the wording used in Article 6 of the Russian Federal Law "On Protection of Competition", which explains that an excessive price (termed a "monopolistically high price") is one that *"exceeds the price formed under competitive conditions."*[8] Article 17(1) of the Anti-Monopoly Law (AML) of the People's Republic of China, in contrast, defines excessive pricing as a situation in which goods are sold at "unfairly high" prices, language that is similar to that used in Article 102(a) of the TFEU.[9]

However, while each of these definitions of excessive pricing may resonate with the underlying economic motivations for authorities' concern with excessive pricing, they provide little insight into how to determine whether a given price for a given product/service at a given point in time is excessive. Indeed, while the actual price charged will typically be easy to observe, the same is unfortunately not true of the hypothetical competitive price, and accordingly the authority must make an attempt to estimate it.

The process of estimating a competitive price level is rendered particularly complex by the fact that, in the real world, few markets could adhere to either the text-book perfect competition paradigm (see Figure 1), or indeed the true monopoly paradigm (see Figure 2). This means that costs, which are often readily observable and would suitably approximate the competitive price level under a situation of perfect competition, are

[7] *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009) (hereafter *Mittal Steel SA v Harmony Gold & other*)

[8] On Protection of Competition (Endorsed by Federal Council 14 July 2016) No.135 Russian Federal Law (hereafter RFL Competition).

[9] Anti-Monopoly Law of the People's Republic of China 2007, 102(a) (hereafter AML China).

unlikely in practice to serve as reliable indicators of what prices in a particular market would be under competitive conditions.

In our view, any investigation into whether the price of a particular product or service is excessive should at the very least start with a detailed assessment of the prevailing competitive conditions of the market in question, in order to determine whether those conditions are likely to be consistent with a situation in which excessive pricing could, at least in principle, arise. For example, if barriers to entry to the market in question are low, then it is highly implausible that a firm would be able to profitably sustain prices substantially in excess of competitive levels. By the same token, the existence of strong buyers or suppliers can be expected to guard against prices being materially increased above competitive levels.

Nevertheless, we acknowledge that such an assessment is best suited to differentiating between cases where excessive pricing is unlikely, and those instances that merit further investigation, and is not suitable to positively demonstrate the existence of excessive pricing. Hence in many cases an assessment will still need to be conducted in order to establish what the competitive price level for (or the “economic value” of) the product or service in question is likely to be, and whether any difference between the actual price charged and the notional competitive price is sufficient to constitute excessive pricing.

As explained above, the competitive price level may be thought of as the price that would prevail under long-run competitive equilibrium, but this, in and of itself, provides little guidance as to how the competitive price level should be estimated. This has led to the development of various benchmarks against which to compare the actual price, which can broadly be grouped into two categories.

The first is to seek to directly estimate the competitive price level through the use of comparators, which may include (but are not limited to) the price of the relevant product or service in other geographic markets, in the same geographic market but offered to different customers, or cost metrics such as production costs. However, as Bishop & Walker (2010: 239 - 244) note, comparators will only be valid to the extent to which the alternative markets/transactions identified are suitably comparable to the market in question, an issue which is, in practice, often likely to render a comparator-based approach inappropriate as a means of examining excessive pricing.[10]

An alternative approach, as set out in Motta & de Streel (2003), is to attempt to infer whether an excessive price is being charged by identifying whether the firm in question is able to earn "excess" profits, i.e. profits in excess of what a firm must be able to earn for it to remain in business in the long term (referred to by economists as "normal" profits).[11] This approach is not subject to the same criticisms as a comparator-based approach, but it nevertheless possesses its own complexities and potential drawbacks.

For instance, as Motta & de Streel (2003) themselves point out, defining the maximum level of acceptable profitability before profits (and hence prices) can be deemed excessive is a very subjective (and potentially arbitrary) exercise.[12] Moreover, determining the level of profitability of the firm in question is likely to be complicated by numerous difficulties in calculating the true economic cost of production, which will

[10] Bishop & Walker, Competition Law (n 5) pg. 239-244.

[11] Massimo Motta & Alexandre De Streel, 'Exploitative and Exclusionary Excessive Prices in EU Law' (2003) Paper presented at the 8th Annual European Union Competition Workshop in Florence. <http://professorgeradin.blogs.com/professor_geradins_weblog/files/excessiveprices18122003.pdf> accessed March 2016 (hereafter Motta & De Streel, 'Prices in EU Law').

[12] Motta & De Streel, 'Prices in EU Law' (n 11).

typically require various assumptions concerning, for example, the allocation of common costs to different business activities.

Both approaches also face the common problem that even if a difference between either actual prices and a relevant comparator, or between actual profits and normal profits is found to exist, the question of whether the difference is sufficiently large to constitute excessive pricing is one that is inherently highly subjective.

Bearing in mind these various difficulties in determining whether or not a given price is excessive, we now turn to how excessive pricing provisions have been enforced in different jurisdictions in recent years, with a specific focus on China and South Africa.

4. Enforcement Trends

4.1. South Africa

In South Africa there have been two prominent excessive pricing cases, namely *Harmony/Mittal* and *Sasol Polymers.*[13] [14] These cases were first assessed by the South African Competition Commission (the Commission), and subsequently referred to the South African Competition Tribunal (the Tribunal).[15] Notably both cases were also appealed from the Tribunal to the Competition Appeal Court (the CAC).

[13] *Mittal Steel SA v Harmony Gold & other* (n 7).

[14] *Sasol Chemical Industries Limited v Competition Commission* (131/CAC/Jun14) [2015] ZACAC 4; 2015 (5) SA 471 (CAC) (17 June 2015) (hereafter *Sasol v Competition Commission*).

[15] The Commission opted not to refer *Harmony/Mittal* to the Tribunal, and as such this matter was referred to Tribunal by Harmony itself.

4.1.1. ***Harmony/Mittal***

The first major excessive pricing complaint in South Africa was brought by Harmony Gold ("Harmony") against Mittal Steel ("Mittal") in 2002.[16] In its complaint, Harmony alleged that Mittal was engaging in excessive pricing in respect of its flat steel products sold domestically. At the time, it was argued that Mittal possessed an essentially uncontested and incontestable position in the supply of flat steel in South Africa, and that it was abusing its dominant position by using export sales to withhold supply from the domestic market. This was claimed to have had the effect of allowing Mittal to maintain the domestic price of flat steel at an import parity level (i.e. the cost of landing imports of flat steel from overseas markets into South Africa), even though, at the same time, it was exporting the same product at significantly lower prices.

On appeal from the Tribunal, the CAC ruled in paragraph 32 of its decision that an actual comparison of two prices (one putative and one actual) is required to establish the existence of an excessive price. In order to perform this test, the CAC explained that it would first be necessary to determine the economic value of the good in question, which according to the CAC is the price that would prevail under long-run competitive equilibrium, including normal profits and abstracting from any firm-specific cost advantages. The second step, which the CAC acknowledged involves a clear value judgment, is then to assess whether the actual price charged bears any reasonable relation to this notional competitive price, taking into account any relevant market circumstances.

[16] *Mittal Steel SA v Harmony Gold & other* (n 7).

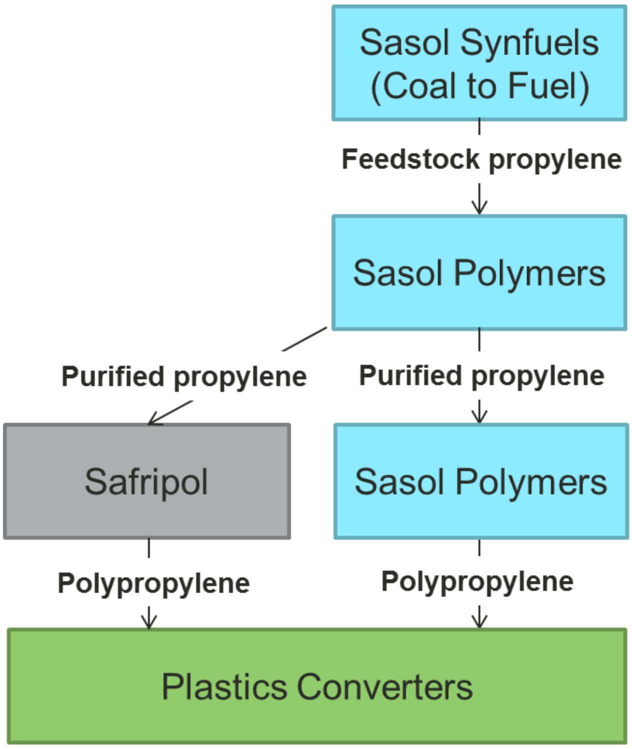
The CAC’s judgement is thus consistent with the position that we have set out in Section 3, in that an examination of market conditions and market structure, while having the potential to rule out instances of excessive pricing, cannot be used to make a positive finding of the existence of excessive pricing. It also confirms that, in order to reach such a finding, it is necessary to construct a credible estimate of the competitive price level, against which prevailing prices can then be compared.

4.1.2. *Sasol Polymers*

Sasol is a South African firm that produces a diverse range of chemical products and liquid fuels. A relatively unique aspect to Sasol’s business is that it engages in the conversion of coal and/or gas to liquid fuel. As part of this conversion process, Sasol Synfuels, one of Sasol’s subsidiaries, also produces feedstock propylene, which it supplies, in turn, to Sasol Polymers, which uses this feedstock to produce purified propylene (P).

P is then supplied by Sasol Polymers both internally, and to a third party called Safripol, as in input in the production of polypropylene (PP). Sasol Polymers and Safripol, in turn, supply PP to plastics converters, which convert PP into a range of plastic products. This supply chain is illustrated in Figure 3 below.

***Caption:* Figure 3 Propylene and polypropylene supply chain in South Africa**


Sasol Synfuels
(Coal to Fuel)
Feedstock propylene
Sasol Polymers
Purified propylene
Purified propylene
Safripol
Sasol Polymers
Polypropylene
Polypropylene
Plastics Converters

Source: Compiled by the authors from the Tribunal and CAC Sasol Polymers decisions.

The Commission's case against Sasol, referred to the Tribunal in August 2010, was that it had charged an excessive price for both purified propylene and polypropylene.[17] The Commission's reasoning was that, as a consequence of Sasol's particular production process, its cost of feedstock propylene was lower than it would have been had it been sourced from a third party, while despite this Sasol Polymers was charging prices for P and PP based on an import parity methodology.

The Commission also emphasised that Sasol was previously owned by the South African government, and that it was the government that had invested in the technology required to convert coal to liquid fuel. On this basis, the Commission argued that Sasol's cost

[17] *Sasol v Competition Commission* (n 14).

advantage in obtaining feedstock propylene was not the result of legitimate competitive behaviour. This raises the possibility that the Commission may not have viewed Sasol's price as excessive if it had found that Sasol itself had incurred some risk and innovated in order to acquire the relevant technology.

The Tribunal proceeded to apply the steps set out in *Harmony/Mittal* for evaluating whether or not the prices set by Sasol for P and PP were excessive.[18] Its primary consideration was therefore to arrive at an estimate of the economic value of the product in question. In effect, this means that the Tribunal was required to envision a long-run competitive counterfactual, and then evaluate what price would have resulted under this counterfactual.

However, the nature of the appropriate counterfactual was complicated by Sasol's cost structure, and in particular the issue of whether the specific cost advantage that Sasol was alleged to enjoy by virtue of being a coal to fuel converter (and possessing the relevant technology) should also apply under the relevant counterfactual. In other words, when one hypothesises as to the existence of a putatively competitive market structure, should Sasol's notional competitors be assumed to enjoy the same cost advantage that it does, or should they be assumed to face the higher costs associated with a "normal" propylene producer?

According to paragraph 34 of the CAC decision, the Tribunal ultimately found that this cost advantage should not be disregarded in the counterfactual, since it found that it did not arise as the result of innovation or risk-taking on Sasol's part. The notional competitive prices of P and PP relied on by the Tribunal in reaching its decision were

[18] *Mittal Steel SA v Harmony Gold & other* (n 7).

therefore based on Sasol's cost of feedstock propylene (and its other relevant costs) plus a risk-adjusted normal margin. On this basis the Tribunal found that Sasol had engaged in excessive pricing in contravention of the excessive pricing provisions in the South African Competition Act.

However, it is evident from the above that the Tribunal's finding would have been materially different had it found that Sasol's cost advantage could be disregarded from the relevant counterfactual. This is, in our view, inherently a question of policy, which clearly requires a value judgment, particularly since it appears to be common cause that Sasol had made subsequent investments to its production process after its state support had ended.[19]

This serves to highlight that specifying the nature of the relevant "competitive" counterfactual may, in many cases, be beset by questions that, due to their normative nature, economics cannot definitively answer. This is exacerbated by the fact that, in real-world markets, it is often unreasonable to expect long-run equilibrium prices to approach cost (plus some reasonable margin). Moreover, firms active in the same market do not always face the same cost structures, and can thus reasonably be expected to exhibit different levels of profitability. Extrapolating from the costs of a single firm is therefore unlikely to be a reliable method to attempt to identify "economic value", or, by the same token, a "counterfactual" cost structure.

On appeal from the Tribunal, the CAC appears to have dismissed the discussion of whether or not Sasol's special cost advantage was relevant to the excessive pricing assessment. Instead, the CAC found in paragraph 109 of its decision that the

[19] This is likely to be a relevant factor in most instances since government involvement can range from relatively small industrial policy incentive schemes to complete ownership of the firm in question.

counterfactual competitive price should be calculated based on the price at which Sasol Polymers purchased feedstock propylene from Sasol Synfuels. Adopting this approach led to a finding that, contrary to the Tribunal's decision, Sasol had not engaged in excessive pricing.

While the CAC's decision is commendable in that it seeks to abstract from one issue that is inherently subjective (for the reasons explained above), in our view it nevertheless replaces one value judgement with another. This is because Sasol Synfuels and Sasol Polymers form part of the same economic entity, meaning that, in principle, Sasol would be able to set the transfer price between its Synfuels subsidiary and its Polymers subsidiary at an entirely arbitrary level without affecting Sasol's overall profitability.

The Commission was not granted leave to appeal the CAC decision to the Constitutional Court.

4.2. China

Article 17 of the AML prohibits a dominant firm from selling commodities at unfairly high prices.[20] The agency responsible for investigating such conduct (along with other abuses of dominance) is the National Development and Reform Commission (NDRC), although such conduct can also be challenged in front of the Chinese courts.

Despite being widely discussed in China, there have been relatively few excessive pricing matters before the NDRC or the courts since the enactment of the AML. It remains to be seen whether the trend of gradually removing price controls from various

[20] AML China (n 9).

industries in China since 2015 may give rise to a more active role for the NDRC in investigating excessive pricing conduct.

Below, we briefly discuss the most prominent excessive pricing investigations that have already taken place in China.

4.2.1. ***Huawei/InterDigital***

In December 2011, Huawei filed two complaints against InterDigital before the Shenzhen Intermediate People's Court in China (the Shenzhen Court), in which it alleged that InterDigital had abused its dominance by engaging in certain forms of conduct in relation to the licensing of its patents, and through its failure to negotiate on fair, reasonable and non-discriminatory (FRAND) terms with regard to several standard essential patents (SEPs) for 2G, 3G and 4G telecommunication technologies.[21]

InterDigital appealed the lower court's ruling that it had abused its dominance to the Guangdong Higher People's Court (the Guangdong Higher Court) in October 2013. The Guangdong Higher Court upheld the first-instance decision by the Shenzhen Intermediate Court and ruled that InterDigital had engaged in excessive pricing by charging licensing fees to Huawei for essential 2G, 3G and 4G patents on terms deemed not to be FRAND. It also found that InterDigital had sought to tie the licensing of essential patents with non-essential patents and had engaged in various other forms of potentially exclusionary conduct.

[21] Decision of the Guangdong Higher Court (*Huawei v Interdigital*) (Judgement in Chinese) [2014] <http://www.mlex.com/China/Attachments/2014-04-17_BT5BM49Q967HTZ82/GD%20verdict.pdf> accessed March 2016 (hereafter *Huawei v Interdigital*).

To conclude that the royalties that InterDigital sought from Huawei were not FRAND, the Guangdong Higher Court referred to the approach adopted by the Shenzhen Court, which compared the licence fees that InterDigital charged other mobile device suppliers, including Apple and Samsung, with the royalty rates that InterDigital sought from Huawei. Despite being a small player in the mobile devices market, it was found that the fees that Huawei was charged substantially exceeded the royalties that InterDigital was seeking from these other suppliers.

InterDigital claimed that licence fees paid by Apple, Samsung and other suppliers were not comparable to those charged to Huawei, since the former were fixed while the fees paid by Huawei varied with volume. However, while the Guangdong Higher Court acknowledged this issue, it concluded that the comparator adopted by the Shenzhen Court was reasonable, particularly given that InterDigital failed to provide sufficient information to support its case.

As a remedy, the lower court set a maximum licence fee at 0.019% of the actual sales price of each Huawei product making use of the relevant InterDigital patent, although it is unclear from the publicised decision to what extent this constituted a reduction in the original fee. InterDigital filed a retrial request to the Supreme People's Court (marking the first time that the highest court in China has been required to deliberate on an antitrust case involving excessive pricing), with the hearing having taken place in 2015, although the final decision is still pending.

4.2.2. *River sand*

In 2013 two river sand suppliers in Shaoguan Guangdong, which accounted for 75% of the market share in the Quijiang District, were found to have engaged in excessive pricing by the Guangdong Price Bureau (GPB).[22] The GPB also found that the two firms had deliberately stockpiled river sand in order to restrict the supply available to customers and to force up prices.

It was determined by the GPB, following consultations with the NDRC, that the two firms had raised prices for river sand by percentages that materially exceeded changes in production costs (i.e. a 54.5% increase in prices versus a 20% increase in production costs). The Bureau also compared the prices charged by the two firms with the prices charged for river sand in other geographies, and identified that their prices were materially higher.

As such, it appears that the general approach adopted in this case is consistent with a comparator-based analysis. However, it is difficult to opine on the validity of these comparators since there is limited information available on the exact methodology undertaken by the authority. The wider applicability of the approach followed by the Chinese authorities in this instance also appears to be complicated by the fact that the investigation related to two separate firms, while excessive pricing concerns generally relate to a single dominant firm.

As part of the remedy imposed, the GPB ordered the offending firms to process and sell the stockpiled river sand (a total of around 200 thousand cubic meters) to end-customers within six months, and at a price not exceeding RMB70 per cubic meter, but did not seek to impose any remedy on pricing applicable further into the future. Indeed, it was simply

[22] Guangdong Price Bureau press release (in Chinese) (2013) <http://www.gdpi.gov.cn/jgzf/419599.jhtml> accessed March 2016 (hereafter GBP press release).

noted that the GBP (and its sub-divisions in local offices) would enhance its price supervision activities in respect of the supply of river sand in the province.[23]

4.2.3. *Qualcomm*

Another landmark case in China is the NDRC's investigation of Qualcomm's alleged anti-competitive conduct.[24] [25] Notably, the NDRC did not adopt any benchmark against which to compare Qualcomm's royalty rates, and did not seek to establish what a competitive royalty rate would be.

Instead, it considered that Qualcomm charged unreasonable royalties based on a number of other factors, namely that 1) Qualcomm had refused to provide customers with a list of all patents included in its comprehensive licensing package, which resulted in customers being charged for patents that had already expired; 2) Qualcomm had forced customers to grant Qualcomm free licenses for their own patents whilst refusing to lower the royalties for its patents; and 3) the royalty rate had been applied to the total net wholesale price of the mobile devices concerned.

Such a focus on the fairness of the negotiation process is clearly at odds with the economic framework set out in Section 3, and is likely to be subject to considerations that are clearly subjective and non-economic in nature.

[23] The Guangdong Price Bureau imposed a fine of RMB 527,950, which represents 2% of both parties' total sales revenue in the previous year.

[24] NDRC Administrative Sanction Decision No. 1 (in Chinese) (2015) <http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html> accessed March 2016 (hereafter NDRC Decision No.1).

[25] NDRC press release summarising its decision (in Chinese) (2015) <http://www.sdpc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html> accessed March 2016 (hereafter NDRC press release).

5. Observations and Policy Implications

It is understandable that regimes with a strong development agenda and a history of highly concentrated markets would be inclined to continue with the strict enforcement of excessive pricing provisions, and potentially even become more interventionist. However, the above discussion illustrates that this is unlikely to be an easy task, and that there are numerous difficulties associated with applying excessive pricing provisions in practice.

In particular, in order to deter firms from engaging in excessive pricing, mere *ad hoc* sanctions imposed on specific dominant firms are highly unlikely to be effective. This is because, as is evident from the discussion above, none of the approaches to assessing excessive pricing in the examples provided above are likely to be suitable for more general application.

For instance, apart from *River sand*, examples from China chiefly concern the licensing of SEPs, which are unlikely to provide reliable insights into excessive pricing thresholds more broadly. This is the case because the economic framework applicable to SEP licensing is specific to the field of intellectual property, and diverges significantly from the economic framework set out in the literature and case law of excessive pricing more generally.

As an illustration of this, *Huawei/InterDigital* required the authorities to consider various ancillary actions on the part of InterDigital, such as the tying of non-essential patents with essential patents, and to take into account that license fees were structured differently in respect of different licensees.[26] Similarly, *Qualcomm* was concerned chiefly with the fairness of the negotiation process by means of which licensing terms were agreed, instead of a comparison of an actual and a notional price level.

By the same token, it is also likely to be very difficult to properly apply the principles established in South African jurisprudence more broadly. For instance, attempts to adhere to the two-step test laid down in *Harmony/Mittal* in *Sasol Polymers* resulted in a series of subjective value-judgments, not only in assessing whether the difference between the actual price charged and the notional competitive price was unreasonable, but also in arriving at a notional competitive benchmark price in the first place.[27] Specifically, the decision whether or not to take Sasol's unique cost advantage into account in establishing the notional competitive price is clearly dependent on policy considerations.

In our view, there is a need for a rigorous analytical framework for evaluating excessive pricing complaints in order to ensure the consistency of decision making and adherence to economic principles, as well as to provide appropriate guidance to firms as to how to set prices to avoid falling foul of the relevant antitrust provisions. Indeed, it bears remembering that one of the key roles of competition law is to deter anticompetitive conduct from occurring in the first place, and not just to provide a means of imposing punitive measures on firms that have engaged in such conduct.

However, the normative questions inherent in evaluating excessive pricing mean that establishing such a framework is extremely difficult. This means, in turn, that in the absence of clear guidance (or at least safe harbours), the continuation of certain

[26] *Huawei v Interdigital* (n 21).

[27] *Sasol v Competition Commission* (n 14).

authorities' aggressive stance to excessive pricing poses a material risk of chilling business activity. This is because, as illustrated by Evans & Padilla (2005), sanctions imposed on a firm for excessive pricing do not only affect the incentives of that firm to invest and expand on an *ex post* basis, they also influence the *ex ante* decisions of other firms which, by virtue of the absence of a coherent regulatory framework, cannot determine with any degree of certainty whether they themselves face the risk of sanction for excessive pricing.[28]

To avoid such deleterious effects, we are of the view that excessive pricing investigations should be limited to markets that are obvious candidates for regulation and meet certain pre-established screening conditions. These conditions should include the existence of high and non-transitory barriers to entry (that cannot reasonably be eliminated), the existence of current or past exclusive or special rights (i.e. the dominant firm has not reached its position largely or entirely as a consequence of its own innovation or investment) and clear evidence of prices materially exceeding total costs. In addition, there must be a limited prospect for intervention to have material chilling effects on investment or innovation, and a material prospect that the conduct at issue is stifling investment and innovation in adjacent markets (examples in this regard include those set out in Motta & de Streel (2007) and Evans & Padilla (2005)).[29] [30]

Better still would be to use competition law tools to identify markets that adhere to these conditions, and then, if further investigation reveals that there is a very strong prospect of excessive pricing having occurred, transparently subjecting these markets to direct

[28] Evans & Padilla, 'Excessive Prices' (n 2).

[29] Motta & De Streel, 'Prices in EU Law' (n 11).

[30] Evans & Padilla, 'Excessive Prices' (n 2).

regulation that will allow for meaningful and ongoing engagement with all industry stakeholders.

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