

# Enforcement tools and approach in a new era

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## **Abstract**

Increased economic volatility, healthcare emergencies and the rise of digital markets have all challenged the enforcement tools and approach of competition authorities globally. Successive economic shocks have required greater speed in responding and finding solutions to protect consumers. The Competition Commission of South Africa (CCSA) has used the active monitoring of critical markets, firm-level advocacy, guidance on the boundaries of acceptable conduct, accelerated investigations and consent agreements to correct behaviour rather than litigation. Examples are provided in price gouging, food markets, polymerase chain reaction (PCR) testing and airline exits. Speed is also considered important in digital markets, and given the ecosystems that characterise many digital markets, market inquiries are increasingly seen as a more effective tool to address features that adversely affect competition, along with tackling value chains in traditional markets.

## **Introduction**

Increased economic volatility, healthcare emergencies and the rise of digital markets have all challenged the enforcement tools and approach of competition authorities globally. Since the onset of the pandemic, successive economic shocks with large

immediate impacts on society, even if they may dissipate in the medium term, have required greater speed in responding and finding solutions to protect consumers from the harm upfront rather than dealing with punishment later. Competition authorities have also had to be more proactive against foreseeable shocks and conduct, such as price gouging – which is recognised as a form of excessive or exploitative pricing – and market power driving inflationary forces in many markets through ‘rocket and feather’ conduct whereby wholesalers and retailers use the pretext of known rising costs to inflate prices more quickly and by more than cost increases (the rocket), and reduce them more slowly than necessary once the shock is over (the feather) to profit from the crisis. This has required the creative use of other tools, such as guidance, advocacy and the media. The rise of digital markets has equally challenged the status quo of enforcement by competition authorities, with various issues as to why such tools are less effective having been well traversed in recent times. The effect is similar insofar as it has required authorities to be creative with the tools they have and to look at new tools for enforcement.

The Competition Commission of South Africa (CCSA) is just one such authority. From the onset of the pandemic and through subsequent economic shocks, it has used the active monitoring of critical markets, firm-level advocacy, guidance on the boundaries of acceptable conduct, accelerated investigations and consent agreements to correct behaviour. Examples are provided in price gouging, food markets, polymerase chain reaction (PCR) testing and airline exits. In digital markets, the challenge revolves around market features that tip markets towards dominance, in addition to the interrelated nature of digital ecosystems where complementary services may entrench that dominance. The CCSA recognises that market inquiries are likely to be a more effective tool to address digital market features that adversely affect competition, along with traditional markets where systemic issues through the value chain result in undesirable competitive outcomes at a consumer level. This article discusses the experience of the CCSA through this period and its adapted use of the enforcement tools at its disposal.

### **Price gouging: speed, simplicity and deterrence**

When the national state of disaster was declared following the outbreak of the Covid-19 virus, South Africa immediately experienced panic buying of essential products, such as hand sanitiser, face masks, gloves and toilet paper, and reports of price gouging by retailers. Indeed, at the start of March 2022, the CCSA began to receive complaints related to increased pricing of essential goods and services needed to cope with the outbreak of the virus. By 27 March 2020, the CCSA had received close to 400 complaints. The public outcry over the increase in

price of certain essential goods and services called for timely, novel and effective enforcement by the competition authorities. This period also necessitated collaboration and joint enforcement effort with other regulators, such as the National Consumer Commission, to act against and prevent firms from exploiting the crisis to the detriment of consumers and small businesses.

As an interim measure to deal with price gouging complaints, on 19 March 2020, the Consumer and Customer Protection and National Disaster Management Regulations and Directions<sup>1</sup> (the 'Regulations') were published by the Ministry of Trade, Industry and Competition. The Regulations were promulgated, in part, to protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national disaster. The Regulations made it clear that price gouging would be addressed under the Competition Act (the 'Act'), as well as the Consumer Protection Act. Further, the Regulations outlined what the relevant test<sup>2</sup> for assessing price gouging would be. The test was designed to be simple and straightforward for enforcement purposes, and relied on pre-existing price gouging laws, namely to examine whether margins had increased relative to their pre-pandemic levels, which would reflect competitive margins at either the wholesale or retail level. This meant that limited information would be required to determine gouging, enabling the CCSA to request information within 24 hours of the complaint and to use the simple assessment criterion of an increase of ten per cent or more to identify gouging cases within a further 24 hours, despite the high volumes of complaints.

In order to expeditiously adjudicate excessive pricing cases, the Regulations<sup>3</sup> contained rules governing the filing of complaint referrals with the Tribunal (Covid-19 Tribunal Rules) for alleged contraventions of section 8(1)(a) of the Act read in conjunction with Regulation 4 of the Consumer Protection Regulations.<sup>4</sup> In terms of section 27 of the Act and the Covid-19 Tribunal Rules, the Tribunal has the power to reduce time periods, and to determine in what way a hearing will take place and how it will exercise its function. On 9 April 2020, just two weeks after the start of the lockdown, the CCSA referred a complaint to the Tribunal against Babelegi Workwear and Industrial Supplies CC ('Babelegi')<sup>5</sup> alleging that it had contravened section 8(1)(a) of the Act. This was the first ever complaint to be brought against a firm for price gouging. The second referral by the CCSA

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1 Government Notice of No 350 of Government Gazette 43116.

2 Regulation 4.2 of the Regulations.

3 Government Gazette No 43205.

4 See Competition Tribunal Directive for Excessive Pricing Complaint Referrals.

5 *Competition Commission v Babelegi Workwear and Industrial Supplies CC* Competition Tribunal Case No CR003Apr20.

was against Dis-Chem Pharmacies Limited ('Dis-Chem')<sup>6</sup> on 23 April 2020. It was important for the CCSA to refer these matters to the Tribunal as they would be crucial for precedent setting and would provide certainty to business about how the authorities would consider matters of this nature.

It was equally important for these complaints to be heard on an expedited and urgent basis so that the competition authorities could make pronouncements against price gouging to alert and deter firms from engaging in such conduct and to minimise any opportunist business practices. Indeed, in the months following the referral of Babelegi and Dis-chem, the CCSA saw far lower levels of gouging and its rapid elimination as a result of this targeted enforcement. This held true through subsequent infection waves, as well as other economic shocks with the potential for exploitation, such as the July 2021 riots in Kwazulu-Natal province.

### **PCR tests: investigative speed, remedial action and consent agreements**

When the pandemic started, exemptions were granted to healthcare funders and providers to collaboratively negotiate to bring down the cost of healthcare products required to manage the pandemic. This exemption resulted in a substantial decrease in the cost of PCR tests administered by pathology laboratories from US\$75 to US\$53. However, as the pandemic continued, the price of testing did not decline, despite costs declining. By mid-2021, there was growing concern that tests were now overpriced, culminating in a complaint lodged by the Council of Medical Schemes (CMS) on 8 October 2021 against the private pathology laboratories alleging that the price for supplying PCR tests for Covid-19 was unfairly inflated, exorbitant and/or unjustifiable. The CCSA characterised the complaint as a possible contravention of the Regulations and section 8(1) (a) of the Act discussed above, which permitted an accelerated prosecution.

The competition authorities were again faced with an opportunity to be innovative and responsive in bringing about a timely resolution of the matter. At the outset, the CCSA decided to adopt a focused investigation strategy that involved requesting targeted information from the respondents, which the CCSA would use to ascertain whether the PCR tests were priced excessively. The CCSA gave the respondents a limited period within which to submit the information and, in turn, the CCSA was also under strict timelines to finalise its investigation given the importance of testing to the country's fight against Covid-19. During the investigation, the CCSA uncovered that the pathology laboratories had been earning significant profits since March 2020.

The CCSA used the profitability of the pathology groups pre-Covid-19 compared to post-Covid-19 as one means of assessing the fairness of pricing, given that the

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6 *Competition Commission v Dis-Chem Pharmacies Limited* Competition Tribunal Case No CR008Apr20.

PCR test was the only additional test added to their suite of products. This showed a large increase in margins and net profits for all laboratories. In addition, the CCSA called for cost build ups from the three main laboratories, in addition to securing the cost build up of the National Health Laboratory Services (NHLS), which was the public laboratory not under investigation. The benchmark of the NHLS and the comparison across the three private laboratory costing exercises enabled the CCSA to identify where costs were inflated and come to a realistic costing for an efficient laboratory. This more novel approach to excessive pricing assessment enabled the CCSA to quickly identify that there was exploitation.

In its deliberations, the CCSA considered the fact that the investigation was taking place at a time when a fifth wave of Covid-19 infections was expected, and where there was a heightened and immediate demand for testing. The CCSA also weighed the risks and challenges associated with pursuing litigation, even with the fast-tracked investigation and prosecution process under the Covid-19 regime, which was likely to delay any meaningful public interest outcome. The CCSA then decided to approach the respondents with a view to entering into settlement negotiations aimed at securing immediate price relief for consumers. On 11 and 13 December 2021, the CCSA announced that it had concluded consent agreements with the large private laboratories and, in the terms, the laboratories agreed to reduce their Covid-19 PCR test prices by 41 per cent to US\$31 (VAT inclusive) per test with immediate effect. It was also agreed that the price reduction shall remain in effect for a period of two years from the date of confirmation of the consent agreements as the order of the Tribunal. In the week following the consent agreement, the CCSA received a similar complaint about antigen test kits that resulted in the conclusion of a consent agreement within only one week for a similar 40 per cent decline in price.

The investigation into excessive pricing of PCR tests again shows the value of the CCSA's flexibility and agility in its use of enforcement tools, such as consent agreements, where urgent action is required.

### **Airline collapse: proactive guidance and investigative stick**

The CCSA has been closely monitoring developments in the domestic airline industry since the start of the pandemic when many airlines came under financial strain due to travel restrictions that were imposed to curb the spread of Covid-19. During this period, state-owned SA Express and Mango airlines were grounded, leading to a substantial decrease in seat demand on key routes. While there were fewer airlines operating domestically and internationally, the limited demand meant that there were no concerns over abuse of market power. As demand picked

up, more airlines resumed flights and capacity grew faster than demand, which continued to keep a cap on pricing and abuse of market power.

However, in March 2022, the South African Civil Aviation Authority suspended Comair (Pty) Ltd ('Comair') from flying. Comair's subsidiaries Kulula.com ('Kulula') and British Airways accounted for almost 40 per cent of seat capacity and all flights were immediately cancelled. The CCSA made known its intention to intervene in the market should the remaining airlines use this situation to hike airfare prices and cause harm to consumers. The CCSA specifically warned that it would not hesitate to 'act swiftly and decisively if there is evidence of price gouging'. The CCSA also provided strict guidance to the airlines of what would constitute gouging, given that the last seats on remaining flights would already be priced higher. Such guidance was that adding new high-priced fare buckets or reallocating seats to the higher fare buckets on existing flights would be considered as exploiting the situation. The suspension lasted only five days, after which Kulula and British Airways were able to operate again.

Two months later, Comair announced that, due to funding difficulties, it was suspending all its flights with immediate effect, removing the seat capacity from the market once more. The CCSA met with the leadership of the major airlines shortly after the announcement to engage with them regarding appropriate behaviour to avoid price gouging emanating from the supply shock (including reiterating the guidance that was provided previously) and to explore means to bring more capacity into the market quickly.

This is only one example where the CCSA has exercised its discretion to proactively engage the industry in an effort to address and prevent market distortion. The CCSA will continue to intervene in markets and pick the most appropriate and effective enforcement tools from its arsenal to deal with economic shocks.

### **Food markets: monitoring, guidance, firm-level advocacy, consent agreements and a market inquiry**

Since the onset of the pandemic, food markets have become considerably more volatile and subject to severe short-term price increases, as well as long-term inflation. The immediate impact of the pandemic caused panic buying early on as countries entered lockdown regimes, exacerbated by export bans invoked by key exporting countries of key crops, such as rice, wheat and maize. However, volatility continued beyond the initial shock, driven by supply chain disruption from high infection rates and massive crop failures due to extreme weather events, impacting on crops from ginger to cooking oil and fresh produce. More recently, the Ukraine war has provided another shock, and rising fuel prices are driving underlying food inflation.

The combination of the economic shock to income and employment globally because of the pandemic coupled with rising food inflation has placed low-income households in particular under considerable pressure, resulting in growing malnutrition.

The CCSA began monitoring food prices at the retail, wholesale and commodity level at the onset of the pandemic due to widespread complaints of price gouging on food products. Indeed, basic food products constituted 40 per cent of all price gouging complaints.<sup>7</sup> Monitoring commodity prices and wholesale markets was necessary to understand some of the causes of food price increases, and to explain them to a public calling for enforcement action, as well as to establish expectations around the level of increase expected at the retail level for enforcement action. While the CCSA cannot prevent the impact of currency depreciation or global market turmoil, it can prevent the so-called ‘rocket and feather’ effect. Proactive information gathering was necessary to enable more proactive enforcement in a speedy and timely fashion, rather than being reactive to concerns gathering speed among society.

Given the size and adverse social impact of the food inflation shocks, the CCSA also could not wait to investigate after the fact and prosecute at some point in the future as this was socially undesirable given it would not relieve the immediate pressure. As a result, the CCSA engaged in alternative enforcement strategies. One was to offer clear guidance to both retailers and food processors on how the conduct would be assessed to try and prevent gouging from the start; another form of proactive enforcement. For processors, this included how stock at different prices would be assessed and the use of gross or net margins for gouging assessments. However, enforcement also requires transparency of information to be effective, and so initiations or complaints were used to gather this information on an ongoing basis to prosecute non-adherence as was inevitably the case with some firms. In this respect, the rapid Tribunal hearing processes, along with truncated and simplified investigative processes, were critical in ensuring speedy enforcement without compromising on the accuracy of decision-making. A final tool was to use the media to create public pressure on food companies to comply lest their reputation be tarnished. In this respect, the food price monitoring reports provided an effective means of getting information into the public domain to inform and potentially mobilise consumer action on specific products, even if this was to warn them of gouging by some retailers and to be more selective in their shopping journeys.

The growing escalation in ginger and garlic prices in early 2021 due to crop failure in China and the consumer response to the second wave of infections resulted in numerous complaints and growing media interest. While the CCSA did establish

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7 CCSA 2021 Impact Assessment Report on the Impact of Covid-19 Block Exemptions and Commission’s Enforcement through the Pandemic, figure 2, p 57.

quickly that some retailers were exploiting the situation through the persistent use of high percentage margins resulting in astronomical absolute margins, the preference was to bring about an immediate price reduction through consent agreements rather than pursuing prosecution, which would only yield results by the time the infection wave was over, the domestic crop harvested and prices had reduced. These consent agreements brought about an immediate reduction in the absolute retail margin for the immediate period until wholesale prices declined, in exchange for no litigation. Aside from the benefits for retailers of no litigation, such agreements also assured their customers that any prices going forward were cost-justified, which relieved public pressure.

The additional benefit of the monitoring of food prices along the value chain throughout this period was that it exposed market features indicative of poor competitive outcomes, including the lack of resilience to shocks. Such features included the ‘rocket and feather’ effect of retail margins expanding in periods of price shocks;<sup>8</sup> growing farm-gate-to-shelf space spreads over sustained periods, along with a squeeze on farmer margins;<sup>9</sup> the dearth and decline of smaller commercial farming units resulting from the squeeze;<sup>10</sup> unusual regional price differences in wholesale fresh produce markets, along with more extreme volatility in smaller markets;<sup>11</sup> and imported versus domestic food inflation,<sup>12</sup> as well as the impact of these market anomalies on inequality.<sup>13</sup> This market intelligence gathering has been beneficial in proactively identifying potential areas of enforcement concern despite the lack of specific complaints, almost highlighting some systemic issues. This has ultimately culminated in a market inquiry being initiated into fresh produce markets drawn around the issues identified through these reports. The use of market inquiries as an enforcement tool is discussed next.

### **Market inquiries: ecosystems, value chains and common issues**

Market inquiries are not a tool that many competition agencies have at their disposal. It is not a new enforcement tool for the CCSA, but recent amendments to the Act have resulted in the findings and remedial action being binding unless otherwise reviewed before the Tribunal. This has made the tool more effective in addressing features that adversely affect competition in particular markets. The relevant question for an authority is when is this enforcement tool preferred to

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8 CCSA Essential Food Price Monitoring Report, June and December 2020.

9 *Ibid*, December 2020.

10 *Ibid*, August 2021.

11 *Ibid*, September 2020.

12 *Ibid*, March 2022.

13 *Ibid*, March 2021.



other tools, including investigation and litigation under the abuse of dominance and advocacy, or in the case of digital markets, regulation.

A market inquiry asks a different question to an abuse of dominance investigation, namely whether there are market features that have an adverse effect on competition, defined as impeding, distorting or restricting competition.<sup>14</sup> As such it looks beyond single-firm conduct in assessing features that may be impacting on competition,<sup>15</sup> although such conduct can be a market feature,<sup>16</sup> and hence, it does not require dominance nor does it use the typical substantial prevention or lessening of competition (SPLC) test.

The fact that an inquiry looks beyond single-firm conduct, more than the legal standard for liability, indicates the fruitful instances in which this can be a more effective enforcement tool. In particular, market inquiries are typically more effective than abuse of dominance investigations in circumstances in which there are a range of factors contributing to an adverse effect on competition, the product of which may be a multitude of firms or regulations at different points in the value chain or ecosystem. By being able to address this broader set of market features, an inquiry is more likely to undertake a holistic approach to resolving competition within a market and come up with more comprehensive and effective solutions. By contrast, single-firm abuse of dominance cases may address one feature but still fail to stimulate competition if other factors continue to inhibit entry or expansion.

For instance, prior inquiries have sought to address either some systemic problems, such as the high costs of banking,<sup>17</sup> private healthcare<sup>18</sup> and public transport<sup>19</sup> in South Africa, and high costs of a particular product examined through the value chain, such as the liquefied petroleum gas (LPG)<sup>20</sup> and data services<sup>21</sup> market inquiries; or the competition challenges of specific market participants, such as those of domestic spaza shops in the Grocery Retail Market Inquiry.<sup>22</sup> These inquiries were also able to make recommendations on regulatory or legislative

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14 Competition Act of South Africa, s 43A(1) and (2).

15 *Ibid*, ss 43A(1), and 43A(3)(a) and (b). This also includes pure structural features, such as a high degree of concentration.

16 Competition Act of South Africa, s 43A(3)(c).

17 CCSA Banking Market Inquiry report [www.compcom.co.za/banking-enquiry](http://www.compcom.co.za/banking-enquiry) accessed 5 September 2022.

18 CCSA Health Market Inquiry report [www.compcom.co.za/healthcare-inquiry](http://www.compcom.co.za/healthcare-inquiry) accessed 5 September 2022.

19 CCSA Public Passenger Transport Inquiry report [www.compcom.co.za/public-passenger-transport-market-inquiry-2](http://www.compcom.co.za/public-passenger-transport-market-inquiry-2) accessed 5 September 2022.

20 CCSA LPG Market Inquiry report [www.compcom.co.za/lpg-inquiry](http://www.compcom.co.za/lpg-inquiry) accessed 5 September 2022.

21 CCSA Data Services Market Inquiry report [www.compcom.co.za/newsletter/data-market-inquiry](http://www.compcom.co.za/newsletter/data-market-inquiry) accessed 5 September 2022.

22 CCSA Grocery Retail Market Inquiry report [www.compcom.co.za/retail-market-inquiry](http://www.compcom.co.za/retail-market-inquiry) accessed 5 September 2022.

changes that removed governmental restrictions on competition, although such recommendations were not always acted upon.

Since the amendment to the Act, the first market inquiry initiated by the CCSA was into online intermediation platforms.<sup>23</sup> Enforcement in digital markets has challenged competition authorities globally for various reasons, including the tendency for first movers to tip towards dominance, the ecosystem of complementary services that may serve to reinforce and entrench that dominance, and relatively unique mechanisms of exclusion. Market inquiries are particularly well suited to addressing these issues. Their ability to examine the entire ecosystem means that the overall business model of different platforms along with the inter-relatedness of different market features can be assessed to understand how certain conduct or market features may entrench leading platforms within the ecosystem. In addition, the ability to look at market features, such as multi-homing or network effects, rather than just conduct, broadens the basis for potential intervention to address a lack of contestability. As a result, a broader set of remedial actions that may focus on the cause and not just the symptom of the adverse effect on competition are possible, and likely to be more effective. The liability standard is also a relevant factor, as the open-ended nature of the adverse effect test permits a broader range of theories of harm and the ability to be proactive before markets tip, given that one does not need to wait for dominance or an SPLC.

More recently, the CCSA announced a Fresh Produce Market Inquiry stemming from the food price monitoring work conducted during the pandemic. An inquiry was deemed preferable as an enforcement tool, given the need to focus on the entire value chain and ecosystem of markets involved to address the potential features adversely affecting competition, and to enable a focus on the competition challenges of particular market participants, namely small and medium-sized enterprises, as well as those owned and controlled by historically disadvantaged persons.

## Conclusion

The onset of the pandemic required a degree of urgency from competition authorities, and creativity in how they utilised the various enforcement tools at their disposal. As is evident from the experience of the CCSA, it required radical changes in how conduct was investigated to enable rapid prosecution or settlement on urgent matters immediately affecting society, even if they may pass with time. The CCSA also needed to take proactive preventative measures using tools such as firm-level guidance and advocacy. The continued economic shocks that have

<sup>23</sup> CCSA Online Intermediation Platforms Market Inquiry, with the Terms of Reference and Provisional report at [www.compcom.co.za/online-intermediation-platforms-market-inquiry](http://www.compcom.co.za/online-intermediation-platforms-market-inquiry) accessed 5 September 2022.

occurred since the first days of the pandemic have meant that this was not a temporary phenomenon, but rather has required changes to how authorities should now think about enforcement and the tools at their disposal.

At the same time, the rise of digital markets and the acknowledgment by many jurisdictions of the inadequacy of their enforcement toolkit has similarly raised debates as to what tools should be at their disposal, and given rise to a creative and experimental approach to the use of existing enforcement toolkits. This too is likely to change enforcement tools and their application by competition authorities moving forward. The CCSA has the benefit of market inquiries, which may be well suited to enforcement in the digital era, given the ecosystem approach and a focus on market features and not just conduct.

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