

A Master Class on Competition Policy and Enforcement

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INTRODUCTION

What is the purpose of competition policy??

- Origins of modern competition regulation in US Sherman Act
- Concerned with power – economic power and political power
- Evolved into a narrow economic welfare system through Chicago economics influence

The SA Competition Act

- Passed for the first time in 1998, formed part of the pool of transformative legislation within the new democratic dispensation
- 20 years on – too early to tell but progress has been made.
- Institutions – Competition Commission, Competition Tribunal, Competition Appeal Court.

INTRODUCTION (CONT..)

The Competition Commission is empowered by the Competition Act to investigate, control and evaluate restrictive business practices.

Our purpose is to promote and maintain competition in South Africa, in order to achieve efficiency in the South African economy, as well as promote public interest objectives.

The Competition Act prohibits various acts – abuse of dominance, including **excessive pricing; collusion – price fixing, allocation of markets and market shares, and bid rigging; and other forms of restrictive practices.**

Any firm found to have engaged in such acts, faces penalties of up to 10% of annual turnover for the first offence and up to 25% of annual turnover for a repeat offence.

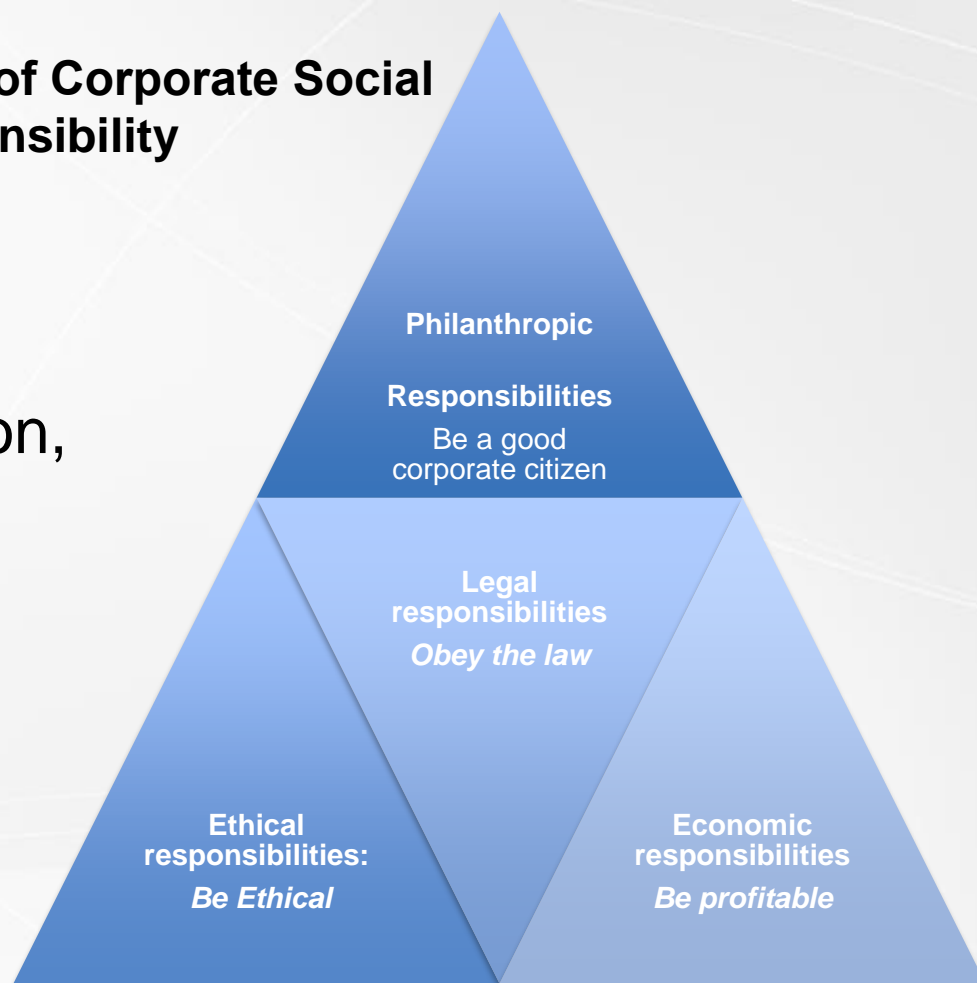
SOUTH AFRICAN ECONOMY IN CONTEXT

- **High inequality and unemployment, and lack of inclusivity – Impact of Covid-19 ??**
- Low levels of investments: Intrinsically, what is it that enables firms to hoard cash? Why lack invest in the economy??
- We must think about how the structure of ownership and concentration.
- The most important point is that firms have market power which allows for high profitability levels but investment remains weak.
- Both the OECD (2013) and IMF (2017) have noted that South Africa has maintained among the highest levels of corporate profitability compared to other emerging market economies, while fixed investment levels have been poor.
- The claims by some that concentration reflects the efficiency of large firms is difficult to square with poor productivity performance and low investment in the economy as a whole.
- The patterns of ownership, concentration, competition and orientation of large firms are thus critical to understanding the low levels of fixed investment and the failure to move towards more inclusive growth.

THE ROLE OF BUSINESS IN SOCIETY

Carrol's Pyramid of Corporate Social Responsibility

- What about COVID – 19?
- State bailouts – private and public sector – transformation, failing SOEs
- The Solidarity Fund
- Social security safety net – UIF, informal market
- Rethinking the economic model?



Competition Interventions



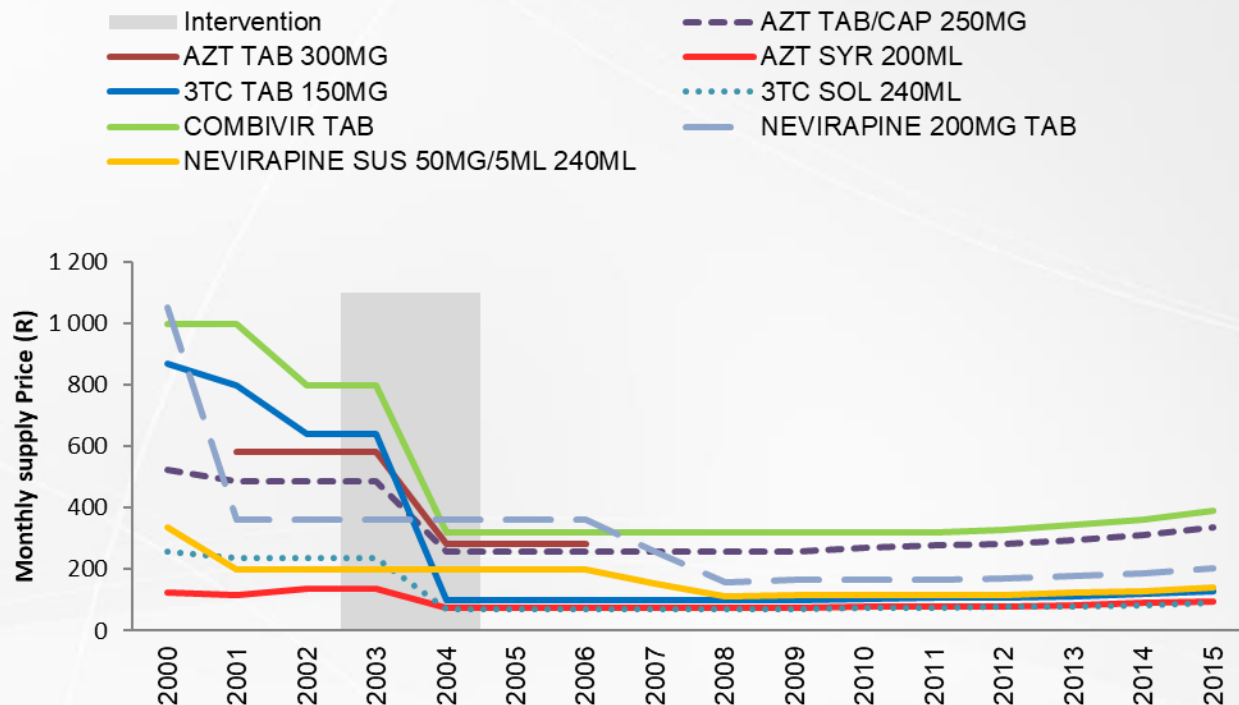
competition commission
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competition regulation for a growing and inclusive economy

1. COMPETITION AND HEALTH CARE

The Battle for access to drugs: Price Movements for ARVs in Hazel Tau Case

- Access to HIV Aids Drugs
- Millions of people affected
- Commission received complaint from Treatment Action Campaign, and patients and HIV/AIDS activists
- Case of abuse of dominance investigated



Health Market Inquiry

INEQUITABLE STRUCTURE

Dual system of healthcare provision:

Population coverage

Public sector – 84%

Private sector – 16%

HIGH COST OF HEALTH CARE

Cost of care higher and increasing faster than overall inflation

Total spend is 8% of the GDP

Each sector account for half of the total spend (4%)

Significant cost of medicines:

Approximately R 48.6 billion (€2,5b) pharmaceutical output 69% is absorbed by the private sector and 31% by the public sector (2017)

DECLINING BENEFITS – NO QUALITY OUTCOMES

Significant expenditure and overutilization -
burden of disease high
No measures of quality

COVID -19

COVID-19 – inequalities undoubtedly heightened

Overall impact on the health system – reprioritisation of resources

Excessive pricing of PPEs

The pharmaceutical process towards the development and access to vaccines, medicines and treatment regimens – **Patent Regime to enable universal access??**

2. BREAD PRICE FIXING CASES

- Sasko (Pioneer Foods), Blue Ribbon (Premier Foods) and Albany (Tiger Brands) had increased prices of basic brown and white bread (700g) by 30c a loaf.
- This took place one week before Christmas, all at the same time
- Respondents also prohibited distributors from switching suppliers **at the same time**
- **Together the three** respondents accounted for majority of the bread market in the Western Cape: some estimate 90%.



2. BREAD PRICE FIXING CASES (CONT...)

Investigation

- Commission investigated price fixing and market allocation – section 4(1)(b)(i) and (ii) of the Competition Act.
- Investigation found that the cartel was nationwide and spanned through the value chain thus uncovering a wheat milling cartel as well, involving these and many more respondents.
- Conduct dated back to 1999.
- In 2007 Premier Foods applied for leniency for the bread cartel in terms of the Corporate Leniency Policy (CLP) and it was granted.

2. BREAD PRICE FIXING CASES (CONT...)

Impact

- Conduct was anti-poor!
- To date millions have been paid by respondents in the bread and wheat milling cartels. Tiger Brands paid **R98 million**.
- Penalties go to the National Revenue Fund.
- Commission also imposed creative remedies such as:
 - R250 million fund to support new entrants and small businesses in the bread value chain;
 - Pioneer agreed to reduce its gross profit by R160 million
 - Pioneer reduced price of bread by 30c
 - Pioneer reduced price of flour by R350 per ton
- Subsequent Commission impact assessment found the overcharge on wheat flour had been between 7% and 42%.

3. DATA MUST FALL!!: DATA MARKET INQUIRY

- **Key findings:**

- Lack of price-based competition: high and anti-poor pricing
- Many concerns on market dynamics and how smaller operators struggle to challenge the larger players
- Pricing concerns in fixed line wholesale Telkom product (IP Connect) - Internet Service Providers need this product to provide internet

- **Key Outcomes:**

- Large operators to reduce prices and gap between low volume (poorer) and high volume (richer); and reductions on IP Connect pricing
- Lifeline Data and Zero Rating of Data to provide free data and zero rating for public interest organizations, such as education, healthcare etc. by all MNOs (Vodacom, MTN, Cell C and Telkom)
- The commitments by mobile data service providers to reduce data costs in South Africa will save consumers over **R3 billion annually**.
- Important in this time where economies are transitioning to operate digitally.
- Various legislative and regulatory changes to enhance competition

4. COVID-19 REGULATIONS

- 1) Shortly after the declaration of COVID-19 as a national disaster, the Minister of Trade, Industry and Competition published regulations addressing price gouging in terms of excessive pricing provisions of the Competition Act.

The Regulations prohibit dominant suppliers from charging excessive prices for certain specified goods and services – mainly basic food and consumer items, medical and hygiene supplies, and other emergency products and services

- 2) Regulations for Block Exemptions were further published to enable business to coordinate in order to respond to the COVID-19 pandemic.

The Block Exemption regulations exempt categories of anticompetitive agreements or practices in respective industries from the application of Sections 4 and 5 of the Competition Act.

- 3) Special Tribunal Rules which have enabled COVID-19 price gouging matters to be heard on an expedited basis were also published.

4. COVID-19 REGULATIONS (CONT...: BLOCK EXEMPTIONS

The Exemption Regulations published include the following key sectors:

- 1) **Healthcare sector** – relating to coordinating a supply response for essential health services and products.
- 2) **Banking sector** – relating to debt relief measures.
- 3) **Retail Property Industry** – to collectively negotiate for rental relief measures.
- 4) **Hotel industry** – coordinating on supply of space for potential quarantine premises.

Business has been encouraged to take advantage of these where applicable to avoid falling foul of the Competition Act.

4. COVID-19 REGULATIONS (CONT...): COVID-19 EXCESSIVE PRICE INVESTIGATIONS

The Commission has since the beginning of the National Disaster on 17 March 2020, over of **2000** complaints and tip offs from the public.

The volumes of complaints received by the Commission since are equivalent to five-year's worth of complaints.

The complaints relate to the allegations that retailers, traders, suppliers and pharmacies are charging excessive prices for COVID-19 related products including:

- Masks and sanitizers,
- Protective gear (PPEs), and
- Certain essential goods and basic food items

The complaints have been investigated in terms of Section 8 of the Competition Act, alongside the published regulations, which prohibit excessive pricing.

COVID-19 EXCESSIVE PRICE INVESTIGATIONS

Cont..

Excessive pricing is prohibited in terms of section 8 of the Competition Act, and the Published regulations.

Essentially a price may be considered **excessive** or unfair if:

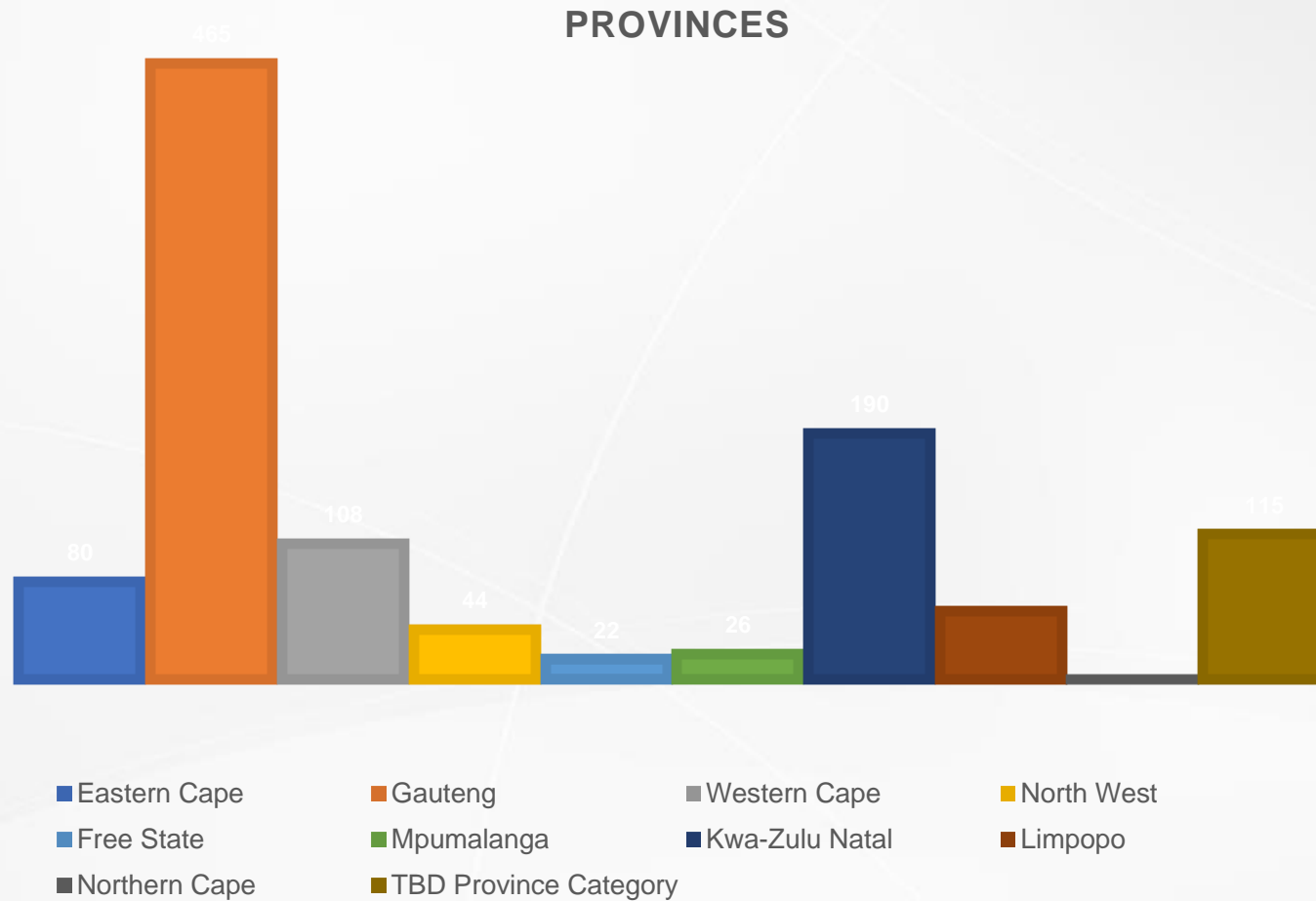
- the price increase does not correspond to, or is not equivalent to, the increase in the cost of providing those goods or services; or
- results in an increase in the net margin or mark-up above the average margin or mark-up for those goods or services in the three-month period prior to March 2020.

It is prohibited for a dominant firm to charge an excessive price to the detriment of consumers.

The threshold for dominance is turnover of over R5 million and the possession of market power.

COVID-19 EXCESSIVE PRICE INVESTIGATIONS

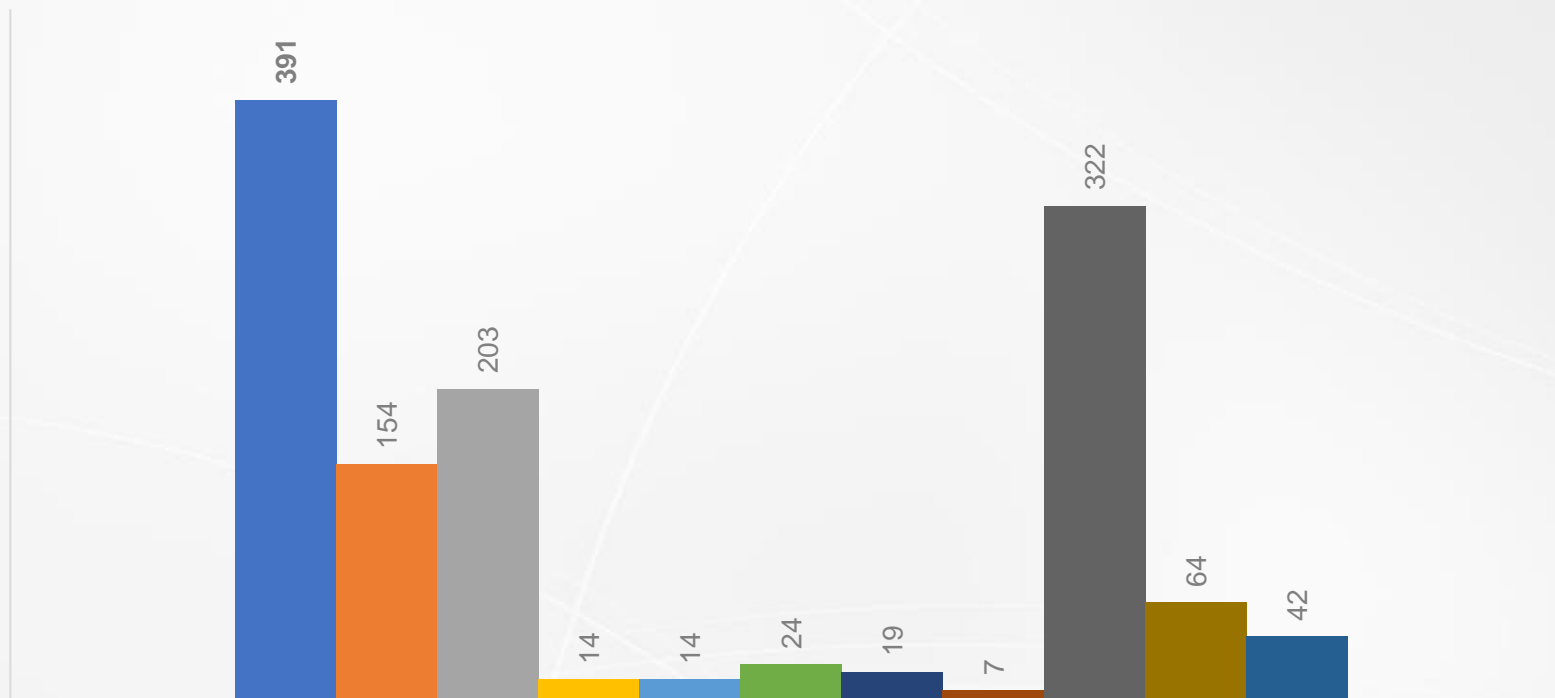
Cont.. Trends



COVID-19 EXCESSIVE PRICE INVESTIGATIONS

Cont.. Trends

PRODUCT CATEGORY



TOTAL

- Basic Food Products
- Sanitizer & wipes
- Masks
- Toilet Paper
- Gloves
- Medicine and vaccination
- Gas/Ethanol
- Cleaning agents
- Ginger & Garlic
- Overlaps
- TBD Product Category

COVID-19 EXCESSIVE PRICE INVESTIGATIONS

Cont..

Not all complaints received raise competition issues or are relevant.

Our approach is to first screen cases to sift those that require a follow up, or raise competition concerns.

We observed the following key trends from screened cases:

- 1) **Retailers, traders or suppliers who have increased prices and margins in response to increases in:**
 - Public demand and panic buying
 - Input costs
 - Cost of imports, Rand depreciation and/or supply disruptions because of COVID-19.
- 2) **Firms who have increased prices despite no significant increase in input costs (price gouging).**
- 3) **Opportunistic trading:** through various platforms, such as existing retail channels, direct sales to the public or online platforms of items that were not previously traded with huge mark-ups.

MULTIPRONGED APPROACH TO CASES

1) Advocacy

- Proactive advocacy steps taken to reach out to business to understand their business model, encourage adequate supplies and limit panic buying.
- Dissuade profiteering from the crisis.
- Advocacy processes also entail communicating investigations and processes to educate and raise public awareness.
- Encouraging the public to report cases through various programs, including press conferences, media releases and social media.

2) Enforcement

- All COVID-19 related cases have been prioritised for expedited investigation and referral to the Competition Tribunal
- Investigations conducted in collaboration with the National Consumer Commission.
- A Joint Operations Team has been established to streamline investigations and avoid duplication in investigations.

3) Settlements

- Where contraventions have been found, respondent firms are approached to reach settlements with corrective measures to the conduct.

OUTCOMES OF COMPLETED INVESTIGATIONS

The complaints were investigated on an expedited basis, average 4 – 12 weeks. Competition Act allows for 1 year to complete investigations.

The Commission referred four cases to the Competition Tribunal including the investigation of Dis-Chem Group.

We found in some cases that Prices increased:

- excess of between 43% and 261%.
- mark ups in excess of 500%

To date the Commission has finalised a number of cases with penalties/settlements or donations amounting to **R17 083 631,93**.

Corrective action to prices/margins – **reduction of up to 20%**,

Penalty or donation that bears some relationship to the excess profits earned to Public Interest Organizations (Police Stations, Old Age Homes etc) and the Solidarity Fund.

ONGOING ENFORCEMENT OF COVID REGULATIONS

- Each wave of infections results in new areas of exploitation and price-gouging in the market. Third wave expected!!
 - Recent price gouging on items in high demand including **ginger and garlic**. The Commission moved fast to reach settlements with all retail chains to reduce pricing immediately
 - As part of the Fusion centre, priority has been placed on finalising cases in public procurement of PPE – several cases have been referred to the Competition Tribunal.
- The Commission also continues to monitor essential food product pricing and the functioning of those markets in order to act swiftly where prices surge or where the markets seem to be failing.
- We will also follow the developments around the vaccine programme to ensure that procurement processes and the supply of the vaccines are compliant with Competition laws.

These initiatives are important for Consumer Protection and assisting government in managing the Rand spend on COVID-19 related expenditure.

5. ADVOCACY INITIATIVES

- Strategy for the regulation of Digital Markets competition published <http://www.compcom.co.za/wp-content/uploads/2021/02/Digital-Markets-Paper-2021-002.pdf>
- Part of the Intergovernmental Fintech Working Group to promote Fintech company development to the benefit of new business opportunities, greater financial market competition and financial inclusion
- Secured the appointment of black-owned firms to panels of the major banks (conveyancing work)
- Research into eliminating barriers to emerging farmers and barriers to increased SME & community participation in the Forestry value chain.
- Signing of MOU with School Governing Bodies to enable pro-competitive pricing and practices relating to all procurement undertaken by schools, particularly school uniform for Generic uniform choices which are easily accessible at affordable prices.

– The health of the economy is more critical during the harsh economic climate

6. LOOKING FORWARD

- The Economic Recovery Plan places considerable emphasis on re-industrialisation and export promotion in key local sectors to promote investment, output and job creation.
- The primary means through which this will occur are social compacts with business and labour around sectoral Masterplans and localization initiatives for specific products as announced in SONA.
- The Commission will be supporting the industrial policy masterplan processes through appropriate Section 10 Exemption provisions required to develop or implement the masterplans.
- On localisation, the Commission will also be issuing Guidelines to assist industry in promoting localization without risk of contravening the Act.

6. LOOKING FORWARD (CONT...)

Online Intermediation Platforms Market Inquiry

- The rapid shift to online trading during the pandemic has highlighted the dependency of many domestic businesses, especially SMEs, on online intermediation platforms for the sale of goods, services and software.
- It is recognised that market features and conduct by the leading platforms can create barriers to other platforms emerging and enable the exploitation of businesses dependent on these platforms.
- To support the objective of a larger more dynamic online economy, a market inquiry has been initiated on these markets – **Draft Terms of Reference** published on February for Stakeholder engagement - <http://www.compcom.co.za/wp-content/uploads/2021/02/OIPMI-Draft-ToR-19-02-2021.pdf>

Fresh Produce Markets

- Commenced a scoping study for an inquiry into these markets to promote greater production across different regions nationally, address wide variations in pricing that hurts poorer rural areas and stimulate participation by SMEs and HDIs in the agricultural value chain.

CONCLUSION

- The Commission has played a vitally important role in the growth and transformation of the economy given its mandate and instruments. Competitive markets with low barriers to new entry and expansion are essential elements to deliver on inclusive growth.
- We came from different backgrounds, but we have one destination.
- Covid – 19 should renew our patriotism and solidarity – a nation born perhaps.
- We should build South Africa ourselves; and we should all contribute towards rebuilding our economy.

THANK YOU!

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