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ALERT

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Crouching dragon, paper tiger? Casting light on the powers of the Competition Commission in market inquiries

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The Competition Commission of South Africa (Commission) has significantly increased the number of market inquiries in the past year, with one recently completed and a further three underway. This accounts for at least a quarter of all inquiries conducted by the Commission since its establishment.

The increase in inquiries, which are both costly and resource-intensive, gives the impression that the Commission views them as a potent regulatory tool in its arsenal.

This perception is understandable. The Competition Act 89 of 1998 (Act) was amended in 2018, introducing section 43D(1) which mandates that if the Commission identifies adverse effects on competition during a market inquiry, it is empowered to "***take action***" to address, mitigate, or prevent such effects, within the confines of the law. In text, the wording of the amendments mirror the ability of the Public Protector, which is empowered by section 182(2) of the Constitution, 1996, to "*take appropriate remedial action*".

The extent of the Commission's permissible action is sure to come under scrutiny in the coming months. It has recently released its Online Intermediation Platform Market Inquiry (OIPMI). In the report, the Commission imposes far ranging remedies, from requiring platforms to clearly indicate which of its results are paid for or organic, to the establishment of funds to support small and medium enterprises.

The legality of the of the Commission's remedial actions will require an exercise in delimiting the scope of what the Act considers "*action*" which the Commission is empowered to exercise as well as the assessment of the impact of the remedial action – Does it overstep the separation of powers? Does it unduly infringe on a particular party's rights, or amount to an unjustified delegation of rule-making powers?

We think that although the wording of the section providing for the Commission's remedial powers shares linguistic similarities with the powers afforded to the Public Protector, they differ in certain fundamental respects.

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The Commission's powers in terms of the Act

As an unfortunate starting point, the Commission's remedial powers in market inquiries are poorly defined in the Act and lack any enforcement mechanisms.

The text of section 43D empowers the Commission to *"take action"* to remedy, mitigate or prevent the adverse effect on competition. The vagueness of the provision is stark when compared to the text regulating its general abilities throughout the rest of the Act. Take, for instance, its ability, after considering intermediate mergers, to *"approve, prohibit, or approve subject to conditions"* the transaction; or the binary power to refer or non-refer a complaint of a prohibited practice to the Competition Tribunal (Tribunal).

Further, the Act does not make it an offense to ignore the Commission's findings as to remedial action in a market enquiry. Neither does it make refusing to abide by remedial action a ground for the imposition of an administrative penalty. Throughout the OIPMI remedial actions, the Commission threatens that, where parties do not comply with the remedial actions, it will approach the Tribunal for *"an appropriate order"*. In the absence of any legislated enforcement actions, it is unclear what this appropriate order might be, or under what section of the Act this will be done.

Finally, the amendments seem to single out remedial action relating to divestiture, requiring that an application be made to the Tribunal for an order of divestiture. Principally, there is little difference in ordering a party to sell a component of its business and requiring such a party to fundamentally alter the way it engages with its customers, for instance, through a mandated amendment to contractual relationships. Both forms of intervention implicate rights enshrined in the Bill of Rights in the Constitution.

Interpreting Parliament's intentions

Detractors of an empowered Commission would argue that this vagueness and tooth-lessness should prove that Parliament did not intend the Commission to assume far reaching and deep cutting powers; that the Act does not – and cannot – grant the Commission the authority to function as a prosecutor and judge, even within the context of market investigations. They might argue that what the Act envisions as *"action"* is either referring certain conduct to the Tribunal for prosecution, where the actions of the parties fall foul of Chapter 2, or recommending that certain key regulators impose regulation through executive or legislative channels.

Advocates for finding broader powers for the Commission would argue in response that the empowerment to *"take remedial action"* must be read to give the Commission more powers than it had before. It cannot be that the legislature sought to

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amend the Act substantially around market inquiries, only to require the Commission to assume its conventional role as prosecutor before the Tribunal or advisor to the legislature and regulators. The amendments certainly seem to envision that these are roles the Commission's inquiry **can** fulfill, but do not seek to limit the Commission's inquiries to these functions only.

Further, section 43D(4) establishes a framework for remedial action, requiring it to be reasonable and practicable, considering several relevant factors, which include:

- the nature and effect of the adverse effect on competition;
- the nature and extent of remedial action;
- the relation between the adverse effect on competition and the remedial action;
- the likely effect of the remedial action on competition in the market;
- the ability of less restrictive means to remedy, mitigate, or prevent the adverse effect on Competition; and
- any other relevant factors.

In the face of such a vast array of relevant factors guiding the exercise of its powers, the Commission would argue that this demonstrates the legislature's clear intent to grant it any and all power it requires (assuming of course, it falls within the defined guard rails above). Why else, would the legislature define how conduct should be performed if it only intended the Commission to perform pre-defined functions?

The Commission and the Public Protector

In support of their case, the Commission would likely invoke the similarities in wording between its remedial powers and the Public Protector's. In the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others*; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, the Constitutional Court considered the scope of the Public Protector's remedial power. It held that:

> *"Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. It connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint."*

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The Commission would, undoubtedly, look to this definition and the presence of section 43D(4) in defining what action it's empowered to take.

However, this look should not be too eager. Even after accounting for the respective legislative constructions, there are certain key differences in the Public Protector's remedial powers and the Commission's.

First, the Public Protector's empowerment to take remedial action is derived from the supreme law, the Constitution of 1996; the Commission's power is derived only from the Act. Where an errant president ignores the order of the Public Protector, the Constitutional Court has found that they breach the Constitution. The same cannot be said about the Act.

Second, the Public Protector, as a Chapter 9 institution, enjoys a greater level of independence from the executive and legislature than the Commission does. As a Chapter 9 institution, the Public Protector is accountable only to the National Assembly. In terms of the Act, important appointments are made by, or on recommendation of, the Minister of the Department of Trade, Industry and Competition, a department with greater policy stakes in the decisions of the Commission than the comparative Department of Justice and Corrections has with the Public Protector. A court would thus be wise to interpret the remedial actions of the Commission more restrictively and contextually than it would the Public Protector.

Third, the Public Protector has a clearer mandate, which is less susceptible to policy interference than the Commission. It's clear what constitutes "*incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles*". As such, these objectives are far less malleable to the machinations of policy than action which "*distorts competition within a market*".

The interpretation of what constitutes "*action*" in the Act is bound to be a battleground between the Commission and parties seeking to avoid the obligations brought about by the Commission's remedial actions.

Layered onto this battleground are considerations around whether the Commission's remedial actions should be interpreted to afford it the ability to engage in rulemaking. The Commission's overtures in its OIPMI report are that it believes it does. Take for example, the cross-cutting "*leading platform*" remedial actions proposed, which require the likes of Google and Property24 to clearly indicate to users which of its results are organic, and which are paid for, as well as which of the results are South African, as opposed to international results. These remedies materially impact the way firms interact with their users and the nature of this obligation is clearly regulatory in nature.

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This remedy raises questions around whether the Commission is empowered to make subordinate regulation through the process of market enquiries. If it does, parties now need to treat every market inquiry as a quasi-legislative process, a fact which in and of itself begs certain questions regarding the propriety of such wide powers in the hands of a regulator.

Conclusion

Delimiting the scope of the Commission's market inquiry remedial power is bound to be a fraught exercise. The Commission will undoubtedly pursue a broad interpretation of its powers, with affected parties seeking to limit the scope at every turn.

Where parties underestimate the Commission's powers, they run the risk of having onerous obligations placed on the manner in which they conduct business. Where the Commission overreaches, it creates fertile ground for judicial intervention and the unfavourable limitation of the scope of its power.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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