Covid-19 and The Role of a Competition Authority: The CMA’s Response to Price Gouging Complaints

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I. Introduction

The Covid-19 crisis has had an exceptional and long-lasting negative impact on health and economies. One consequence has been to dramatically change the way we shop, to increase the demand for some essential products and to disrupt supply chains. It has also led to unprecedented interventions by governments around the world to save lives, to protect jobs and to sustain economies.

In the UK, the Competition and Markets Authority (CMA) set up a taskforce to monitor and respond to competition and consumer problems arising from the pandemic. From mid-March to mid-November 2020, the CMA received more than 115,000 complaints from consumers. Over 15,000 of these complaints concerned price rises, mostly related to a narrow set of food and hygiene products. In particular, some very substantial price increases were reported for hand sanitisers and for various food products and toilet rolls early in the pandemic (Figure 1). The great majority of such complaints concerned independent local shops, with many lodged by people in lower-income neighbourhoods.

Economists typically take the view that high prices reflect high demand, and that price increases incentivise producers to increase supply so as to bring prices back to equilibrium. If price gouging—charging high prices unjustified by costs for essential products during a pandemic—reflects a temporary imbalance between demand and supply, then should authorities be concerned and will interventions undermine the proper working of market incentives? How is it any different from normal situations such as higher airfares during peak seasons, where authorities do not intervene?

The concern is that the pandemic brought about significant and unexpected disruptions to both demand and supply which may have enabled the exploitation of market power, in some cases. For example, during the lockdown

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1 For brevity, we use the terms ‘Covid-19’ or ‘the pandemic’ to refer to the Covid-19 pandemic in this paper.

2 Hayter (2020) describes the principles that guide the CMA’s response to Covid-19, including the setting up of the taskforce. Tyrie (2020) takes a longer term perspective and discusses the impact of Covid-19 on the UK economy, as well as the role of the CMA to play in mitigating the problems that are arising. See Hayter, W, “Tackling the COVID-19 challenge—a perspective from the CMA” (2020) Journal of Antitrust Enforcement 8:2, July 2020, 250–252, https://doi.org/10.1093/jaenfo/jnaa033, and Tyrie A, “How should competition policy react to coronavirus?”, (2020) IPPR. http://www.ippr.org/research/publications/how-should-competition-policy-respond-to-coronavirus (accessed 27 August 2020).

3 A large proportion of the non-price related complaints related to difficulties in obtaining refunds from businesses such as wedding venues and holiday cottages.
consumers shop around less and have fewer close alternative retail outlets. Supply chain disruptions constrain the response of suppliers to bring more products to market. These distortions give some suppliers windfall market power and allow them to raise their mark-ups.

Tackling market power is at the heart of the work of any competition authority. While there is no price gouging provision in the UK’s competition legislation, excessive pricing is a form of abuse of dominance under UK and EU competition law. Past cases of excessive pricing apply exclusively to large dominant firms with substantial and durable market power. However, the exceptional nature of the pandemic has led other competition authorities, notably in South Africa, to pursue cases of short-term excessive pricing by smaller firms which would normally not be considered dominant. In some jurisdictions which do not prohibit excessive pricing (such as some USA states, and Australia), specific price gouging laws apply in emergency situations.

Other market failures exist in addition to the exercise of market power. For essential products such as food, medication, and vaccines, distribution based on market prices alone during a pandemic is not likely to be socially efficient when everybody needs these products but only the rich can afford them if panic buying drives up prices. Moreover, market prices do not account for the positive public health externalities: widespread vaccination and use of personal hygiene products such as hand sanitisers or face masks benefits everyone, not just the individual consumers.

Of course, competition authorities cannot tackle all forms of market failure. Distribution and externalities are normally addressed by taxation or subsidy, and possibly through price regulation or rationing. For example, France and Cyprus imposed price caps on hand sanitisers and face masks. Governments around the world are rationing Covid-19 vaccines by giving priority access to citizens in most need, rather than letting market demand and supply dictate who gets vaccinated: here the social benefits of rationing are obvious. For other essential goods, we consider the merits and challenges of tackling price gouging through competition enforcement, and what can be learned from the CMA’s experience for the role of national competition authorities in taking on wider market-monitoring roles and setting ‘guide-rails’ for reasonable market conduct.

Section II reviews the economic framework in assessing price gouging. Section III sets out the CMA’s approach in screening the large number of complaints received while section IV examines pricing complaints specific to Covid-19. See footnote 4.

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4 Ratshisu and Mncube (2020) discusses the South African experience in enforcing competition law against price gouging behaviour during Covid-19. Kigwiru (2020) explains the findings of the Competition Authority of Kenya against a supermarket which increased prices of sanitisers. OECD (2020) provides further examples investigations by other competition authorities, including in Spain, Greece, Romania, Italy, Indonesia, Thailand and Brazil. See Ratshisu, H. and L. Mncube, ‘Addressing excessive pricing concerns in time of the COVID-19 pandemic—a view from South Africa’ (2020) Journal of Antitrust Enforcement 8:2, July 2020, 256–259, https://doi.org/10.1093/jaenfo/jnaa030; Kigwiru, V.K. ‘Enforcing Competition Law and Consumer Protection During the COVID-19 Pandemic in Africa: The Competition Authority of Kenya’, (2020) Competition Policy International, available at https://www.competitionpolicyinternational.com/enforcing-competition-law-and-consumer-protection-during-the-covid-19-pandemic-in-afri-ca-the-competition-authority-of-kenya/ (accessed 18 August 2020); and OECD, ‘Exploitative pricing in the time of COVID-19’, 26 May (2020), available at http://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf.

5 OECD (2020) provides a summary of the price gouging laws in the USA, as well as those in Australia and Portugal which were adopted due to Covid-19. See footnote 4.

6 See Penelope Giosa, Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation, Journal of European Competition Law & Practice 11:9, November 2020, 499–508, https://doi.org/10.1093/jeclap/lpa029.
hand sanitiser, which stood out in terms of the number of complaints and the steepest price hikes by local retailers being complained of. Section V concludes by discussing the challenges for a competition authority in responding appropriately, swiftly and flexibly, and the wider lessons which can be drawn.

II. Framework for assessing pricing gouging behaviour

Standard microeconomics predicts that in a market economy, when demand increases, prices go up and products are allocated to the consumers who value them most. High prices in turn incentivise suppliers to expand, which brings prices down through the force of competition. Where firms cannot readily adjust capacity in response to predictable seasonal demand fluctuations (e.g. an airline cannot change its fleet size every month), high prices in peak periods and lower prices in off-peak is likely to be a competitive market outcome. And, lower prices persuade people to consider travelling out of season. Economists generally refer to this framework in arguing that government action regarding price gouging is counterproductive because it disrupts market responses. 7

There are, however, fundamental differences between price gouging of essential goods in a pandemic and normal market functioning (including firms charging high prices in peak seasons). 8

A. Price gouging as exploitation of market power

1. The pandemic reduced consumer engagement on the demand side

There were sudden surges in demand for essential goods at the start of the pandemic in the UK, around late March 2020. The widely reported shortages of essential goods—and related government social distancing guidance—changed consumer behaviour in fundamentally different ways from normal situations for broadly three reasons.

First, local shops became one of the few options available to some consumers due to strict lockdown rules at the beginning of the pandemic. Consumers who rely on public transport, particularly vulnerable people with mobility difficulties, were less able to travel to supermarkets (which have generally maintained stable prices) outside their neighbourhoods. Moreover, public transport services have been reduced, and infection risks have deterred people from using the reduced services. These limited the alternative outlets accessible by consumers.

Second, the pandemic has increased search costs for all consumers, including those with the means to travel independently. Social distancing rules required retailers to limit customer access and created long queues outside retail outlets. Access to online groceries and delivery slots has also been severely limited. This further reduced consumers’ ability to shop around and weakened the constraint of supermarkets on smaller local shops.

Third, the uncertainties created by scarcity of essential goods could inflate consumers’ willingness to pay. 9

Retailers could exploit consumers’ fear of shortage and command higher prices than normal situations. Uncertainties may even induce consumers with more disposable income to buy-up goods beyond their day-to-day needs (e.g. food and toilet rolls). Such stock-piling behaviour exacerbates the scarcity problem, and as we discuss later, leads to more regressive distributions of essential goods.

These changes can undermine the competitive forces of consumer switching and increase retailers’ market power.

2. Product shortages reduced competition on the supply side

The pandemic can reduce the intensity of competition between retailers. When demand for essential goods suddenly far outstrips supply, retailers that run out of stock

7 In 2012, the University of Chicago Booth School of business did a poll of a panel of eminent academic economists and asked whether Connecticut, USA should pass a proposed price gouging legislation. Of the 32 responding economists, 20 disagreed with the price gouging legislation, 6 were uncertain, 3 expressed no opinion, and only 3 agreed. Notably, two Nobel Prize laureates expressed strongly opposing views: Angus Deaton strongly agreed with the legislation and reasoned that ‘Efficiency is less important than distribution under such transitory conditions’, whilst William Nordhaus strongly disagreed because ‘At best, symbolic. At worst, would return to price controls of the 1970s’. See http://www.igmchicago.org/surveys/price-gouging (retrieved 2 July 2020)

8 A number of economists have pointed to these issues, including the contributions of Fletcher, A, “What should we do about price gouging?” (2020) Economics Observatory, Questions and answers about coronavirus and the UK economy, Available at https://www.coronavirusandtheeconomy.gov.uk/question/what-should-we-do-about-price-gouging; Davies, J, ‘Excessive Pricing and COVID-19: Is Article 102 Europe’s Price-Gouging Law?’ (2020) transcript of Concurrences webinar on ‘Antitrust: Price Fixing, Excessive Prices, Crisis Cartel’, available at https://www.concurrences.com/IMG/pdf/concurrences_transcript_200421.pdf (retrieved 17 August 2020); Jenny, F, Opening Keynote Speech, Concurrences Quarantine Webinar Series, 21 April (2020) available at (accessed 17 August 2020), Motta, M, ‘Price regulation in times of crisis can be tricky’, (2020) Daily Maverick, available at https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-trick y/;and Fabra, N., Motta, M. and M. Peitz ‘Preparing for the next crisis: How to secure the supply of essential goods and services’ (2020) CEPR Policy Insight No. 106.

9 The scarcity can be real (e.g. based on a consumer’s personal experience) or perceived (e.g. reports of empty shelves in social media). Kuruppu and De Zoysa (2020) found that information circulated through social and news media had played a significant role in the unprecedented panic buying observed during Covid-19. See Kuruppu, G. N. and De Zoysa, Anura, ‘COVID-19 and Panic Buying: An Examination of the Impact of Behavioural Biases’ (2020) Available at SSRN: https://ssrn.com/abstract=3396101 or http://dx.doi.org/10.2139/ssrn.3396101.
no longer impose a constraint on retailers with stock remaining. In other words, some retailers gain windfall market power from unexpected supply shortages.\textsuperscript{10}

In more extreme situations, sellers may even create artificial shortages through hoarding or buying up products from other shops for re-sale at higher prices subsequently. The incentives of such resellers are to induce high prices by restricting supply, rather than expanding production to bring prices down. These situations are clearly harmful to consumers.

3. Is market self-correction quick enough?

If high prices can incentivise suppliers to expand quickly, there is probably little cause for concern as market corrections mean that the consumer harm is short-lived. The appropriate action by authorities therefore depends on the expected speed of market adjustment: how long-lasting and substantial must any harm inflicted on consumers be to warrant action? Conversely, what is the risk that intervention would delay market correction?

Regarding the duration of harm, the pandemic caused supply chain disruptions which likely prolonged market corrections for certain products. For example, some countries imposed export bans on essential products (e.g. personal protection equipment) or raw materials (e.g. ethanol for hand sanitiser production), which hindered supply expansion in other countries that do not produce these products. Local shortages were possibly further worsened by logistic delays.\textsuperscript{11} Meanwhile the harm caused by price gouging, in potentially denying vulnerable consumers access to essential products, can be very material even if high prices were sustained just for a few weeks (Jenny, 2020).

Regarding the risk of intervention, some economists have pointed out that price regulation can discourage entry and stifle innovation generally.\textsuperscript{12} However, one must be sceptical about applying these general arguments against intervention on price gouging in a pandemic for two reasons.

First, upstream suppliers respond to wholesale prices rather than retail mark-ups. Price gouging by downstream retailers (i.e. charging high retail mark-ups)\textsuperscript{13} is unlikely to provide an incentive for upstream suppliers to expand production or import.\textsuperscript{14} In other words, intervention against excessive retail mark-ups, and not against price increases that reflect higher production or import costs, is unlikely to undermine producers’ incentives to expand.

Second, while economic theory suggests that price provides a signal for suppliers to respond, it does not mean that any arbitrarily high price is necessary to induce efficient entry and/or expansion of production. If suppliers expect substantial demand growth (e.g. increased usage of face masks or hand sanitisers), normal margins on much larger volumes will be sufficient to induce expansion. This can be illustrated using a simple and stylised example in Figure 2 below. It shows that when demand increases (from D to D') in a market with short-term capacity constraint (represented by the vertical supply curve S), the market price which equates demand and supply can increase from P to P\textsubscript{ST}.\textsuperscript{15} However, a price increase to P\textsubscript{1,T} would be enough to induce efficient supply expansion to a long term equilibrium (S').\textsuperscript{16} The consumer welfare loss (i.e. the rent captured by producers in the short-term) is shown in the shaded area.\textsuperscript{17}

The above suggests that policies to prevent retailers from spiking mark-ups to exploit temporary market power can be justified within a standard microeconomics framework. The cost of false conviction (i.e. misplaced intervention undermining efficient market response) seems low, while the cost of false acquittal (i.e. inaction leading to consumer harm uncorrected by market forces)

\textsuperscript{10} Retailers can also raise mark-ups because of changes in consumer behaviour described in the preceding section.

\textsuperscript{11} During localised disasters, such as hurricanes or forest fires, markets and supply chains outside of the affected areas will be undisrupted, allowing an efficient response—supply will be able to be diverted to the affected area in response to small price changes and other forms of planning.

\textsuperscript{12} These arguments are often raised in objection of excessive pricing enforcement. For a summary of these arguments, see, for example, Evans, D. and Padilla, A. J., ‘Excessive Prices: Using Economics to Define Administrable Legal Rules’ (2005) Journal of Competition Law & Economics 1:1, March, 97–122, https://doi.org/10.1093/joclec/nhi002; Motta, M., & De Streef, A. ‘Excessive pricing in competition law: Never say never: in The pros and cons of high prices, 14–46 (2007) Konkurrensverket.

\textsuperscript{13} Most price complaints received by the CMA concerned retailers rather than upstream suppliers. See section III.

\textsuperscript{14} In principle, producers can raise wholesale prices to capture some of the rents as a result of downstream market power. However, in the current pandemic producers are much more likely to respond to strong signals of demand growth (e.g. increased usage of hand sanitisers and face masks) rather than mark-ups of individual retailers. Moreover, producers face other constraints in increasing wholesale prices as we further discuss below.

\textsuperscript{15} As noted above, sellers with market power may even restrict output and charge a higher price than P\textsubscript{ST}.

\textsuperscript{16} If demand is actually expected to fall right back then suppliers will not expect higher future prices and there is no incentive to increase supply, regardless of the short-term price spike. It also means current market capacity—without relying on high prices to provide an incentive for expansion—is sufficient to satisfy demand once panic buying is over. Ezrachi and Gilo (2009) set out reasons why excessive prices may more generally not be self-correcting, including where possible entrants have reason to believe the prevailing high prices do not reflect the prices they would face after entry. See Ezrachi, A. and D. Gilo, ‘Are Excessive Prices Really Self-Correcting?’ (2009) Journal of Competition Law & Economics 5:2, June, 249–268, https://doi.org/10.1093/joclec/nhn033.

\textsuperscript{17} These rents can be captured by the retailers which increase prices if producers kept wholesale prices unchanged.
seems much higher.\textsuperscript{18} This is particularly the case in a situation where demand increases quickly and panic buying could be exacerbated by the price increases.

B. Price gouging can lead to a socially undesirable allocation of goods

Standard economics recognises other market failures in addition to the exercise of market power discussed above. In relation to essential products supplied during a pandemic, there are two main reasons price-based allocation according to the greatest willingness to pay can fail to deliver socially desirable outcomes.

First, the willingness to pay high prices is not necessarily a fair reflection of the value of essential goods.\textsuperscript{19} For basic items such as food, medication and hygiene products, consumers are likely to vary little in the utility derived from the goods—everybody needs to eat and values good health and hygiene, after all. However, some consumers are more willing to pay for essential goods because they are richer, not because they have greater needs for these goods. Moreover, richer consumers tend to have better access to alternative retail outlets such as online groceries, resulting in a more uneven distribution of goods.

The second reason is that market outcomes are socially inefficient when there are externalities. In a pandemic, richer consumers can stockpile and buy far in excess of their own needs, but they ignore the fact that such stockpiling would overwhelm market supply and deny others’ access. Moreover, for products with positive externalities there will be an even greater mismatch between market and socially desirable outcomes. For example, widespread use of hand sanitiser and face masks benefit all consumers, not just those who can afford to pay high prices, because these products dampen the virus’s spread.

For public health reasons, therefore, it would be far more desirable to ensure as many people have access to these products, especially for key workers who are unable to work from home, rather than to allocate them based on high prices thus limiting access to richer consumers. An obvious example where it is far superior to ration a product by need rather than by price is Covid-19 vaccines: the elderly and the clinically vulnerable people should be given priority over the young and the healthy.

Quantity rationing is often also practised by private businesses. Indeed, most large UK retailers applied quantity rationing of essential items or exclusive shopping

\textsuperscript{18} Motta and De Streel (2007) considered that excessive pricing actions present high risk of false condemnation and false acquittal. The authors highlighted the high cost of false condemnation which undermines innovation and investment, compared to the low cost of false acquittal which undermines allocative efficiencies. They advocated that competition policy should set strict conditions and a high standard of proof for intervention. See footnote 12.

\textsuperscript{19} Davies (2020) noted in relation to price gouging during Covid-19 that ‘it is quite clear that the public, in general, does not share the view of a kind of naive economics 101 first-year textbook, […] People can and do object very vigorously to what they perceive as exploitative price increases unto what they perceive as the fairness, the unfairness of such actions, particularly in a time of crisis.’ See footnote 8.
hours and delivery slots for NHS workers and the elderly to ensure their access during the pandemic. Similarly, online marketplaces have rules against price gouging by sellers on their platforms. Private firms do not just maximise short-term profits for every individual product; some firms such as large grocery chains also care about reputation, which prevents them from exploiting any short-term gains. However, given the issues discussed in II.A above, these firms may not exert effective competitive discipline over others which have market power in a pandemic.

C. Using competition policy tool to tackle price gouging

Price-setting by firms is an ordinary part of the competitive process. The economic and legal framework for assessing excessive pricing is therefore only designed for exceptional cases where dominant firms exploit positions of substantial and persisting market power. Following Motta and de Streel (2007), such cases are typically pursued in markets characterised by high barriers to entry and the lack of possible self-correction, where the firm does not gain dominance on the merits of its investment and innovation, and there are no other regulatory or structural remedies available to the competition authority.

On the face of it, the price gouging scenarios under Covid-19 meet some but not all of these conditions. It is the case that the ability by shops to charge high (resale) prices is not linked to the firm’s investment or innovation, but instead is a windfall from the outbreak. Price gouging occurs mostly at the local retail level which is not regulated and where barriers to entry are sufficiently high in the short-term. However, local shops do not normally appear to be dominant, at least not in a durable way.

The pandemic situation may warrant a novel approach in assessing dominance. In normal situations (for example, grocery merger investigations) local retail markets are defined based on a geographic area within certain distances. Local shops typically have small market shares and are not deemed to be dominant in these markets. The question is whether the demand and supply distortions caused by the pandemic hand significant market power even to smaller retailers. Indeed, dominance assessment based on short-term market power is not unprecedented in the EU: for example in the ABG Oil case the European Commission relied on the concept of ‘transitory market power’ to establish dominance in relation to the supply of crude oil during the oil crisis in 1973–1974.

Dominance and market definition assessments are, after all, a means to the end of identifying market power and likely consumer detriments. In exploitative abuses, the real proof of market power is in the firm’s conduct. If the evidence shows that the firm can price without effective competition constraints, for example, by successfully selling products at very high and sustained mark-ups, then it would seem unnecessary to infer dominance from a formalistic market definition exercise. This exceptional approach was applied by the South African Competition Commission and confirmed by the South African Competition Tribunal in their seminal cases on excessive pricing of face masks during the pandemic.

Finally, there are practical challenges of competition enforcement too. Excessive pricing investigations in the UK and EU are very lengthy processes and can only be targeted at a small number of firms at a time, while a pandemic requires swift policy actions across sectors.

The ways in which the CMA evaluated the many complaints it received provides insights into the responsive role that competition authorities are being asked to play in monitoring market outcomes and assessing firm conduct.

20 See, for example, Amazon and eBay.
21 See, for example, Cabral, L and L Xu, ‘Seller Reputation and Price Gouging: Evidence from the COVID-19 Pandemic’ (2020) NYU and Bank of Canada.
22 The economic reasoning is also recognised by UK Courts. The Court of Appeal judgment in The Competition and Markets Authority v. Flynn Pharma Limited and Pfizer (Phentoin excessive pricing case) summarises the economic literature and states that ‘Where there are no material barriers to entry high prices can act as a magnet to entry which, in due course, drives prices down. Many markets are thus self-correcting. In the absence of entry barriers regulatory intervention can risk prolonging a monopoly situation by blocking efficient signals which would otherwise promote market entry’.
23 For example, in assessing the Tesco/Booker merger in 2018, the CMA assessed geographic markets for convenience store using 1-mile catchment around each store.
24 Motta (2020) notes that firms that may be accused of price gouging might not necessarily be dominant in ordinary times, but may well be in exceptional times due to changes in consumer shopping behaviour, and when demand is much higher than capacity, even small firms may be endowed with significant market power. See footnote 8.
25 See Gioia (2020). The author argues that the application of Article 102 (a) TFEU to coronavirus profiteering is possible by acknowledgement of a ‘transitory market power’.
26 See: The Competition Commission of South Africa v. Babeleki Workwear and Industrial Supplies CC; 1 June 2020, and Competition Commission of South Africa v. Dis-Chem; Ratshisusu and Mncube (2020); First, H. ‘Robbin’ Hood’; (2020) Competition Policy International, 22 September 2020. https://www.competitionpolicyinternational.com/robbin-hood/.
27 Gioia (2020) explains the conceptual and practical difficulties in excessive pricing cases in the EU from a legal perspective. We note that the same challenges apply in the UK as its excessive pricing provisions are essentially the same as those under TFEU Article 102.
III. Evaluation of the price complaints reported to the CMA during covid-19

In this section, we review the price complaints received by the CMA during Covid-19 and compare them with other market data. We first briefly describe how the CMA collected and screened the complaints data, and then examine features of the data that emerge from this evaluation.

In mid-March 2020, the CMA set up a webform to allow consumers to lodge complaints online against business behaving unfairly during the pandemic. The webform, built with the in-house capability of the CMA’s Data, Technology and Analytics unit, allowed consumers to report businesses and the information required for an initial evaluation by the CMA. This included on the type of unfair business behaviour they are reporting (such as high prices, problems with cancellation and refunds), the specification of the products/services concerned, the prices before and after the reported increase, and details of the business being complained of. This standardised online format allowed the CMA to handle and categorise large volume of complaints swiftly. From mid-March to mid-November 2020, the CMA received more than 15,000 complaints concerning price increases.

Using the precise product information collected in the complaints, the CMA was able to compare them against other market benchmarks. The CMA carried out initial screens of the data to identify whether further actions are warranted against any types of products or retailers. We highlight several observations from this initial evaluation below.

First, most complaints concerned essential products. The top 20 product categories reported were all food, medicines and personal hygiene products (Figure 3). The first two product categories (meat and hand sanitisers) stood out with over 1,800 complaints related to each category. Notably, consumers often complained about a given retailer overcharging prices on a basket of goods. This suggests that any investigation should consider concerns not just specific to a product category but also to a local retailer or geographic area.

Second, independent retailers including convenience stores and local pharmacies received substantially more complaints than national grocery chains. All of the top 20 outlets by number of complaints were independent retailers and convenience stores. Consistent with this pattern, our analysis of market data from Nielsen and Retail Data Partnership (RDP) confirmed that average prices for certain products had increased sharply during the outbreak in the independent retail channels, but to a much lesser extent in the national groceries or national chemist channels. This finding supports the proposition that larger sellers, which face a greater risk of reputational loss, engage in less price gouging than smaller sellers. The CMA wrote to 277 businesses who received repeated complaints to ask for more information or express concern about unjustifiable price rises generally. The CMA also engaged with symbol group owners, some of which took actions to prevent or to stop their member convenience stores from hiking prices unjustifiably.

Third, price hikes for most products subsided relatively quickly but not for hand sanitisers. Our analysis of Nielsen data showed that high prices for independent channels were sustained from mid-March until well into May 2020. During this period, the CMA received many complaints of hand sanitiser prices being reportedly double or triple that of the already inflated market prices. The sustained higher prices for hand sanitisers, together with their strong expected demand growth and the societal benefits they bring about in reducing Covid-19 transmission, led the CMA to open further investigations into this product, as we discuss further in section IV.

Fourth, the retail outlets most complained of appeared to serve customers in the most deprived areas of the UK. We analysed the top 20 outlets being complained of, which operate in 18 local areas (each area defined around a 10-minute walk radial centred on the outlet). We found that these local areas comprise predominantly residents in the two lowest ‘IMD’ deciles (1 and 2), i.e. the most deprived in England. This suggests that the exploitation of local market power is particularly likely to harm less well-off consumers, many of whom are presumably also vulnerable consumers.

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28 Further details can be found in Fung, S.S. & Roberts, S ‘The economics of potential price gouging during Covid-19 and the application to complaints received by the CMA’ (2021) CCP Working Paper 23-2.
29 The form can be accessed on: https://www.coronavirus-business-complaintservice.gov.uk/.
30 For example, of the 873 complaints reported of the top 20 outlets, 54 per cent concerned more than one product, and 15 per cent concerned four or more products.
31 The analysis of market prices by channel was carried out for eight of the top product categories in the consumer complaints: toilet roll, eggs, flour, pasta, rice, disinfectant, paracetamol, and hand sanitiser. See Fung and Roberts (2021), footnote 28.
32 Cabral and Xu (2020), footnote 21.
33 CMA, ‘Update on the work of the CMA’s Taskforce, 3 July 2020’ (2020). Available at http://www.gov.uk/government/publications/cma-coronavirus-taskforce-update-3-july-2020-update-on-the-work-of-the-cma-taskforce.
34 Index of multiple deprivation (IMD) decile. The IMD is calculated for each small area in England based on seven domains of deprivation. The IMD values are ranked from the most deprived decile (1) to the least deprived decile (10).
Notably, in a third of the 18 local areas the local shop being complained of is the only grocery store in the neighbourhood and could be characterised as a local monopoly. However, in half of the 18 local areas there was also at least one outlet of a national supermarket chain. In the remaining local areas there were several stores with clusters of complaints against them raising questions about possible common factors at work or coordination. The CMA did not further investigate whether such market features can explain the prevalence of the complaints in these local areas, as the complaints subsided relatively quickly.

Our evaluation of the CMA’s complaint data indicated that authorities should take price hikes during Covid-19 seriously given that they related to essential goods and were more likely to affect deprived local markets.

IV. The case of hand sanitiser pricing

One product that stood out from the complaints was hand sanitiser—not just because of the volume of complaints, but also the scale of the price increases (Figure 1 and CMA, 2020), the growth in demand for this product, and its importance in reducing transmission of the virus.

The CMA received over 1,800 complaints related to high prices of hand sanitiser between March and June 2020. The complaints were dispersed widely across the UK, with the large majority of retailers receiving a single complaint. As a matter of priority, the CMA focused on cases where precise information on price and pack-size was provided, as well as retailers about which there were multiple complaints. The great majority of these concerned independent retailers including local chemists and convenience stores.35

A. Comparison of complaints and price trends

Figure 4 compares prices about which a complaint was made with market average price trends (Nielsen data) using the top-selling pack size (50 mL) of hand sanitiser. Each cross in the figure represents a complaint, showing the price level reported and the date of the complaint. The lines show average price (weighted by volume across all

35 Of the 563 complaints which contained precise price and pack size information for analysis, 160 related to independent chemists and 219 related to convenience stores (including symbol stores).
brands) in different retail channels. The figure shows that prices reported in most complaints were substantially higher than market average prices.

We draw the following specific observations from Figure 4. First, prices at large national grocery and chemist chains (the dark line) remained broadly stable at around £1. Second, prices at other retail channels, especially the independent chemist channel (the dashed line), saw some significant increases: from around £1.50 at the end of February, before the outbreak and government advice on handwashing, to a peak of around £5 in the third week of March 2020, shortly before lockdown. Prices gradually trended down but remained well over the pre-Covid level of around £2. Even when compared with the higher market averages in non-supermarket shops, the prices reported in most of the complaints were much higher.

B. Assessment of the hand sanitisers supply chain
As part of its market monitoring, the CMA carried out a review of the hand sanitisers supply chain in May 2020. It gathered information from the following industry participants: (a) major UK upstream suppliers of hand sanitisers to the retail market; (b) national chemist chains; (c) brand-owners of symbol groups (given a significant number of complaints were reported against symbol stores); and (d) retailers including independent chemists or convenience stores, which received repeated complaints. Such information enabled an assessment of whether the high retail prices of hand sanitisers appeared

36 See Fung and Roberts (2021), footnote 28, for further details on the data referred to.
37 This is shortly before the lockdown rule came into effect on 26 March 2020 in the UK.
38 A more granular analysis of the Nielsen data reveals that such price increases were in part driven by smaller or new brands, which were typically sold at higher prices than those large brands supplied mainly in the national grocery and chemist channels.
39 These suppliers of main hand sanitisers brands together account for over 50 per cent of the retail sales in the UK.
justified by higher input costs and whether they were necessary to attract entry.

1. Were hand sanitiser price increases explained by raw material cost increases?

Some media reports ascribed the retail price hikes to shortages of—and hence cost increases in—ethanol, which is a key ingredient in hand sanitiser. Had this been the case, the price of all hand sanitisers across all types of retail establishment would have increased. As Figure 4 shows, this was not the case.

In addition, the main upstream suppliers told the CMA that ethanol cost increases would only account for a relatively small price increase, and would not justify a doubling or tripling of retail prices, because other cost components such as filling fees, thickeners, caps and bottles, fragrances and so on remained broadly unchanged. According to their estimates, they would have to increase wholesale prices by around 20 per cent to recover the ethanol cost increases.

2. Were high prices necessary to attract entry?

As it became clear that hand washing was essential to limiting the spread of the virus, demand for hand sanitiser grew substantially, as did the incentive to supply it. All large upstream suppliers indicated to the CMA that they had expanded local production and increased imports of hand sanitisers to meet the expected sustained growth in demand. Similarly, national chemist chains (which kept prices broadly unchanged) told the CMA that they had actively looked for new suppliers to expand their retail stock. Moreover, new suppliers such as breweries and distilleries in the UK responded to supply shortages by shifting production of ethanol for use in hand sanitiser.

Higher producer prices did provide incentives for new producers and importers to expand as they may otherwise face higher short-term logistics and sourcing costs. This was consistent with anecdotal indications provided by market participants and our analysis of the Nielsen data that showed 16 per cent of revenue from hand sanitiser in March to May 2020 was related to brands that were not supplied in the UK pre-Covid, and which tended to be more expensive than the existing brands. The increases in the average retail prices in the non-supermarket channels covered the higher costs of smaller suppliers, and reinforced the concern that complaints reflected unjustifiably high retail mark-ups in local markets.

C. Actions taken to tackle retailers potentially charging excessive mark-ups

The CMA requested data from retailers that received the most repeated complaints to evaluate their prices and mark-ups. These were then compared with a reasonable range of retail mark-ups estimated based on information: from producers on their pricing to different channels and their recommended retail prices (RRPs); pricing by major wholesalers; and, from the retailers including responses to the CMA. The CMA also made ‘mystery shopping’ calls in mid-May to these retailers to verify the prices reported in the complaints, so as to make a priority of retailers that continued to charge high prices.

On this basis, the CMA opened four antitrust investigations of suspected excessive pricing to obtain further information from retailers, and it also assessed the information obtained from a wider set of retailers which received the most complaints.

The CMA found that a small number of pharmacies charged high prices that were not justified by costs, with some extremely high mark-ups. These retailers voluntarily agreed to reduce prices to levels based on either the pre-Covid mark-ups, normal mark-ups of other products, and/or the RRP set by the wholesalers.

The mystery shopping exercise confirmed that a number of retailers had already reduced their prices since the complaint was reported. In addition, one retailer reduced its price on the day after it received the CMA’s information request, and another retailer reduced its prices later, around mid-May. The prices for the remaining retailers were high relative to market benchmarks but were due to high wholesale costs and they typically sold a new product brand, in several cases only supplied on a one-off basis after the outbreak.

In the light of these findings, the CMA closed all its investigations on hand sanitiser products by September 2020. It determined that the prices the retailers were charging did not, nor were likely to, infringe competition law. The investigations had demonstrated that the CMA was willing to use its powers to obtain information, in a very limited way, and this ensured that businesses were held to account for their pricing decisions. The CMA could monitor developments effectively and explain to the public what factors lay behind the pricing observed.

Outside the retailers with repeated complaints, there were also a significant number of single complaints concerning individual pharmacies. Rather than investigate

40 For example https://www.bbc.co.uk/news/stories-52126847 (retrieved 3 August 2020)

41 https://www.gov.uk/cma-cases/hand-sanitiser-products-suspected-excessive-and-unfair-pricing
each one, the CMA engaged with the General Pharmaceutical Council, the regulator of pharmacies, to send a joint letter to over 4,000 pharmacy owners and superintendent pharmacists across Great Britain. This letter provided guidance for pharmacies and encouraged them to set prices for essential products (including hand sanitiser, face masks, and paracetamol) that did not include higher than usual mark-ups.42

The CMA also carried out advocacy work through symbol groups. Symbol stores (i.e. independent retailers that carry the brand of the symbol group) is another category of retailers that had been repeatedly complained about. The CMA’s public announcements and excessive pricing investigations appear to have directly influenced behaviour here. For example, two symbol groups communicated with their retailers, making direct mention of the CMA’s role in enforcing against unreasonable behaviour and highlighting the need to protect their brand image in local communities.

V. Conclusions

The unprecedented nature of Covid-19 led the CMA to decide to play a ‘market observatory’ role, even while competition tools may not be well-suited to tackling short-term price hikes in the absence of price gouging powers.

The capacity to collect and analyse a large volume of consumer complaints and other market data is critical to this role. Such capacity enabled the CMA to identify and focus on the types of product and retailers where price hikes were most prevalent, where the scale of such increases were out of line with market benchmarks, and where they are not justified by cost.

Based on these market facts, better judgments can be made in balancing the risks of over- and under-enforcement. Finding supra-competitive prices where these prices reflect higher costs, and where they incentivise upstream supply expansion, would be a false positive. However, not addressing high prices of essential goods, where they are due to increased mark-ups from the exercise of windfall market power created by market distortions during a pandemic, would be a false negative; any inaction here can cause substantial consumer detriments even just in the short-term.

Market distortions can affect vulnerable consumers disproportionately—identifying these is an important part of the observatory role. The Covid-19 pandemic undermined consumers’ ability to shop around and reduced their choice, and this was likely to have a greater impact on lower-income households without cars or access to online groceries. Indeed, the CMA’s analysis shows that most complaints of price hikes related to essential goods, sold by local independent shops which tend to operate in more deprived neighbourhoods. If the high prices had persisted, the possible exploitation of local market power would have warranted further attention.

Another important element of the monitoring role is wider engagement with industry participants. The CMA’s public statements on its willingness to take actions against excessive pricing had led major symbol groups to communicate with their members to prevent opportunistic price hikes. In the case of hand sanitiser, the CMA reached out to large producers and retailers to better understand the supply chain and to avoid any intervention chilling supply responses. It also worked with the pharmacy regulator to influence behaviour of pharmacies selling these products.

Overall, the CMA’s experience indicates an important role for national competition authorities as observers of markets—to assess firm conduct and maintain public trust by analysing market outcomes, without necessarily opening investigations, and preventing the most severe abuses. This contrasts with the alternatives of direct price regulation which could disrupt supply responses, or of doing nothing which could cause substantial consumer detriments.

However, existing competition policy tools have limitations. To respond flexibly and quickly during a pandemic, competition authorities need timely data on market developments and on specific firms, including their prices and costs. Digitalisation means that data on market prices and sales is readily available (from electronic point of sale devices) yet it is privately held and has to be purchased at taxpayers’ expense. The absence of price gouging legal provisions and the associated information gathering powers in the UK meant that the CMA was required to open excessive pricing investigations against firms to formally require relevant information from them. Each of these hampers the ability of the CMA to be responsive. Most European national competition authorities and the European Commission are likely to face similar challenges, should they need to tackle abuse of short-term market power in any future emergency situations. The issuance of commitment decisions is an option for the European Commission (as suggested by Giosa, 2020); however, the CMA experience reviewed here suggests concerns may well be local rather than falling under the ambit of the European Commission. As with the CMA,
national authorities are likely to be restricted in their ability to gather necessary data.

While the Covid-19 pandemic is unprecedented, the challenges it posed and the lessons learned from it have more general relevance. A competition authority’s actions should be guided by understanding how markets work in practice, not by textbook assumptions about market efficiency. At the centre of this understanding is how a pandemic can distort demand and supply, and how these distortions can reduce consumer engagement and hand market power to suppliers. Similar concerns have been at the heart of the CMA’s recent actions in other areas such as tackling ‘loyalty penalties’ and misleading contract terms in the leasehold housing sector. To prepare for any similar crisis in future, a competition authority will need better tools to access real-time data and to take the appropriate and quick actions against exploitation of market power.

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