

Competition law exemptions and regulations applicable during Covid-19

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The South African government has been promptly responsive in formulating ways in which to maintain business viability so as to minimise the undoubtedly crippling effects of Covid-19 and to ensure swift and effective healthcare service in the country.



Certain grocery items are protected from price gouging under Covid-19 regulations

To this end, the Minister of Trade, Industry and Competition in South Africa has issued various regulations in response to the declaration of the Covid-19 pandemic as a national disaster by the South African government and to strengthen its programmes designed to fight the virus. These regulations, which will remain effective until the national disaster status is rescinded, are:

- The Covid-19 Block Exemption for the Healthcare Sector Regulations (Exemption for the Healthcare Sector Regulations), effective as of 19 March 2020;
- The Consumer and Customer Protection and National Disaster Management Regulations and Directions (Consumer/Customer Protection and National Disaster Regulations), effective as of 19 March 2020;
- The Covid-19 Block Exemption for the Banking Sector, 2020 Regulations (Exemption for the Banking Sector Regulations), which are effective as of 23 March 2020; and
- The Covid-19 Block Exemption for the Retail Property Sector, 2020 Regulations (Exemption for the Retail Property Sector Regulations), which are effective as of 24 March 2020.

These regulations are dealt with briefly below.

Exemption for the Healthcare Sector Regulations

These regulations have been promulgated to enable healthcare players to cooperate on ensuring that there is adequate capacity and stocks at healthcare facilities throughout the country in order to respond to the Covid-19 national disaster.

The regulations are aimed at exempting a category of agreements or practices in the healthcare sector from the application of section 4 (which prohibits restrictive horizontal practices, including cartel conduct between competitors) and section 5 (which prohibits restrictive vertical practices, including minimum resale price maintenance) of the South African Competition Act. It is envisaged that the exemption will assist in ensuring that private and public healthcare service providers cooperate and provide the necessary care to citizens without fear of falling foul of the Competition Act. The cooperation envisaged between competitors in the healthcare sector should not extend to communication and agreements in respect of prices charged to the public (i.e. price-fixing), and cooperation will take place at the request of and in coordination with the Department of Health.

The healthcare players covered by this exemption include those between hospitals or healthcare facilities, medical suppliers, medical specialist or radiologists, pathologists or laboratories, pharmacies and healthcare funders. Healthcare companies who participate in any agreements or practices falling within the scope of this block exemption should keep minutes of meetings held and written records of such agreements or practices.

How the exemption will apply in practice is not yet clear. However, what is noteworthy is that it appears that the Department of Health will be central to the cooperation between the various healthcare players, in that it will issue a request for such cooperation where, presumably, specific areas of coordination are identified (on the basis of limited capacity, lack of stock, etc.) and will also coordinate with the relevant healthcare players.

Whilst these regulations have come into force, the Department of Trade, Industry and Competition has allowed for representations to be made no later than 14 days from the date of publication (calculated from 19 March 2020).

Consumer /Customer Protection and National Disaster Regulations

There have been a growing wave of concerns by the government and consumers that companies may seek to charge higher prices for goods given the tight supply-demand balance caused by Covid-19. The minister promulgated these regulations to address this concern. Accordingly, these regulations relate to, amongst other things, "excessive pricing" by dominant firms during the Covid-19 outbreak. Under the Competition Act, a dominant firm may not charge an excessive price to the detriment of consumers or customers. The regulations suggest that there will be scrutiny of material increases in price for certain goods or services, particularly where:

- the increase does not correspond to, or is not equivalent to, the increase in the cost of providing that good or service; or
- the increase inflates the net margin or mark-up on that good or service above the average margin or mark-up of that good or service in the three-month period prior to 1 March 2020.

The goods and services in question are as follows:

- Toilet paper
- Hand sanitiser
- Facial masks
- Disinfectants/cleaners

- Surgical gloves
- Surgical masks
- Disinfectant wipes
- Antiseptic liquids
- All-purpose cleaners
- Baby formula
- Disposable nappies
- Bleach
- Cooking oils
- Wheat flour
- Rice
- Maize meal
- Pasta
- Sugar
- Long-life milk
- Canned and frozen vegetables
- Canned, frozen and fresh meat, chicken or fish
- Bottled water; and
- Private medical services relating to the testing, prevention and treatment of the Covid-19 and its associated diseases.

The commission has engaged with retailers, amongst other stakeholders, in the healthcare sector and agreed that the commission would be advised of "unusual increases of prices" by suppliers. A dominant firm that contravenes or fails to comply with the regulations may be investigated by the Commission on charges of excessive pricing and if found to have contravened the regulations, may be liable to an administrative penalty.

Dominant firms should guard against inflating prices beyond acceptable standards (raising prices to a level where there is no reasonable relation between the price charged by a firm and the firm's input costs) during the Covid-19 period to minimise any risks of competition law investigations based on excessive pricing.

Whilst these regulations have come into force, the Department of Trade and Industry has allowed for representations to be made no later than 14 days from the date of publication (calculated from 19 March 2020).

Exemption for the Banking Sector Regulations

The president indicated that commercial banks have been exempted from provisions of the Competition Act to enable them to develop common approaches to debt relief and other necessary measures during the Covid-19 crisis.

Accordingly, these regulations have been enacted for the purpose of exempting a category of agreements or practices between banks, the Banking Association of South Africa and/or Payments Association of South Africa from the application of sections 4 and 5 of the Competition Act at the request of and in coordination with the minister of finance. The exemption is underpinned by the imperative to:

1. promote concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster;
2. enable the banking sector to minimise the negative impact on the ability of customers, including both business and private individuals, to manage their finances during the national disaster, and be in a position to continue normal operations beyond the national disaster; and
3. enable the banking sector to manage the banking infrastructure, including the payment infrastructure, ATMs and branches.

The cooperation envisaged between the banking sector players should not extend to communication and agreements in respect of prices (price-fixing).

The block exemption covers payments system and debtor and credit management:

- Payments system: the agreements or practices covered are limited to the development of industry monitoring, operational policies and contingency plans in respect of: (i) the continued availability of bank notes to ATMs, branches and businesses; (ii) the continued provision of essential ATM, branch and corporate banking services; and (iii) the continued provision of electronic payments systems.
- Debtor and credit management: the agreements or practices covered are limited to the development of industry policies and monitoring in respect of: (i) payment holidays and debt relief for business and individual debtors subject to financial stress; (ii) limitations set on asset repossessions of business and individual debtors subject to financial stress; and (iii) the extension of credit lines to individuals and businesses subject to financial stress.

Whilst these regulations have come into force, the Department of Trade and Industry has allowed for representations to be made no later than 14 days from the date of publication (calculated from 23 March 2020).

Practically, it appears that the trade minister and finance minister will jointly play a key and central role in the implementation of this block exemption.

Exemption for the Retail Property Sector Regulations

Ensuring business survival and continuity, particularly for designated retail tenants, including small and independent retailers informed the promulgation of these regulations.

These regulations are aimed at exempting a category of agreements or concerted practices between designated retail tenants and retail property landlords from the application of sections 4 and 5 of the Competition Act at the request of and in coordination with the Department of Trade, Industry and Competition. The exemption promotes concerted conduct in the retail sector to prevent an escalation of the national disaster and to alleviate, contain and minimise the economic and social effects of the national disaster and enables the retail property sector to minimise the negative impact on the ability of designated retail tenants, including small independent retailers, to manage their finances during the national disaster and be in a position to continue normal operations beyond the national disaster.

Important to note is that the envisaged concerted conduct should not extend to communication and agreements in respect of prices unless specifically authorised by the Department of Trade.

The block exemption applies only to agreements or concerted practices in respect of:

1. Payment holidays and/or rental discounts for tenants;
2. Limitations on the eviction of tenants; and
3. The suspension or adjustment to lease agreement clauses that restrict the designated retail tenants from undertaking reasonable measures required to protect viability during the national disaster.

The above list of agreements may be augmented by the Minister. It is also noteworthy that

- To qualify for exemption, such agreements must extend to all South African retail tenants in the designated retail lines, including small and independent retailers.
- The designated retail tenants covered by this block exemption are identifiable by the designated trading lines, namely:
 1. Clothing, footwear and home textile retailers;
 2. Personal care services (i.e. hairdressers, health and beauty salons); and
 3. Restaurants.

Practically, it appears that the Department of Trade, Industry and Competition will be the main driver of the implementation of this block exemption.

Retail property landlords and designated retain tenants who participate in any agreements or practices falling with this the scope of this block exemption should keep minutes of meetings held and written records of such agreements or practices.

ABOUT THE AUTHOR

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