

# COVID-19: GOVERNANCE: SOUTH AFRICA USES COMPETITION LAWS TO FACILITATE ITS RESPONSE TO COVID-19 (AFRICA)

20 March 2020 | South Africa  
Legal Briefings

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Following our recent [post](#) on COVID-19 and its impact on competition law in Europe, South Africa has added its name to the list of countries using competition laws as a tool both to facilitate the healthcare response to the pandemic and protect consumers from exploitation.

On 15 March 2020, the COVID-19 pandemic was declared to be a national disaster in terms of the Disaster Management Act No. 57 of 2002 (as amended), from which followed on 18 March 2020 an extensive set of regulations made in terms of that Act. Shortly thereafter, and as part of the broader response to the pandemic, the Minister of Trade and Industry on 19 March 2020 issued regulations under two separate provisions the South African Competition Act No. 89 of 1998 (as amended):

- The [first](#) establishes a block exemption for the healthcare sector in order to facilitate its response to COVID-19.
- The [second](#) establishes a special set of criteria by which excessive pricing will be assessed during the national disaster period.

## HEALTHCARE BLOCK EXEMPTION

The block exemption exempts a category of agreements or practices in the healthcare sector from the application of sections 4 and 5 of the Competition Act (which prohibit restrictive horizontal and vertical practices respectively) in response to the declaration of COVID-19 pandemic as a national disaster, solely with the purpose of:

- promoting concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster; and
- promoting access to healthcare, preventing exploitation of patients, enabling the sharing of healthcare facilities, management of capacity and reduction of prices.

A number of agreements or practices involving hospitals and healthcare facilities, medical suppliers, medical specialists and radiologists, pathologists and laboratories, pharmacies, and healthcare funders are listed as falling within the scope of the exemption. These primarily relate to interactions required in order to coordinate capacity, utilisation and availability of supplies in response to the pandemic. The agreements and practices involving these parties are however only exempt if undertaken at the request of, and in coordination with, the Department of Health for the sole purpose of responding to the COVID-19 pandemic national disaster. The exemption also excludes communication and agreements in respect of prices, unless specifically authorised by the Minister of Health.

In addition, the block exemption covers coordination between the private and public healthcare sectors in order to better capacitate and make supplies available to the public healthcare sector. Notably, engagements between the Department of Health and the private healthcare sector in order to reduce the cost of diagnosis, tests, treatment and other preventative measures (including vaccines) are also covered by the block exemption provided that: (i) these engagements are at the request of the Department of Health and subject to oversight and guidance by the Department of Health; and (ii) any discussion and/or agreement on pricing between private healthcare companies or providers must be specifically authorised by the Minister of Health.

This block exemption is the first of its kind in South Africa, issued under the newly-introduced section 10(10) of the Competition Act (which came into effect on 12 July 2019). Block exemptions were not previously catered for in the Act.

## **EXCESSIVE PRICING**

The second set of regulations published by the Minister covers a variety of consumer and customer protection measures, including in relation to: (i) conduct that will be regarded as unconscionable and prices that are unfair, unreasonable or unjust under the Consumer Protection Act No. 68 of 2008 (as amended); and (ii) obligations on suppliers to ensure equitable distribution of goods to customers and maintain adequate stocks of certain goods (which may include restrictions on the numbers of items purchased by a customer in a certain time period). From a competition law perspective, regulations are also made in terms of the excessive pricing provisions of the Competition Act.

Under the Competition Act, the Minister is empowered to make regulations regarding the determination and calculation of an excessive price. The Minister has invoked these powers to prescribe that, during any period of the national disaster, a material price increase in a listed good or service which either: (i) does not correspond to or is not equivalent to the increase in the cost of providing that good or service; or (ii) increases the net margin or mark-up on that good or service above its average margin or mark-up in the three month period prior to 1 March 2020, is a relevant and critical factor for determining whether the price is excessive or unfair and indicates *prima facie* that the price is excessive or unfair.

The listed goods and services subject to these regulations include basic food and consumer items, emergency products and services, medical and hygiene supplies, and emergency clean-up products and services.

The regulations are a creative use of the Minister's powers to make regulations regarding the test for excessive pricing, which traditionally would not have been anticipated to prohibit conduct in specific and temporary circumstances such as those now arising from the COVID-19 pandemic. The relevant provision of the Act appears to position the regulation-making power as a means to add to the list of all relevant factors to be taken into account in an excessive pricing determination (in addition to those already enumerated in the Act). However, these regulations now prescribe that the specific conduct identified is a relevant and critical factor in establishing excessive pricing, and that their existence alone will be enough to establish a *prima facie* case.

Furthermore, the regulations made under the Competition Act refer to excessive and unfair pricing, while the prohibition in the Act refers only to excessive pricing. Unfairness in pricing has only recently been introduced as a concept in South Africa competition law in the context of the new buyer power provisions.

## **EXPEDITED PROCESS**

A final noteworthy aspect of both sets of regulations is the process by which they have been promulgated. The regulations have been introduced with immediate effect, which is not strictly compliant with the Minister's powers to make regulations under the Competition Act (which requires a notice and comment period). Nevertheless, the regulations do indicate that parties can make representations within 14 days and that the regulations may be amended following consideration of these.

If you would like further information on any of the above, please do get in touch with your usual contact in the HSF competition team.

[More on navigating the COVID-19 Outbreak](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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