

COVID-19: PRESSURE POINTS: NAVIGATING THE COVID-19 REGULATIONS AND THE ROLE OF COMPETITION LAW IN COMBATting THE IMPACT OF THE PANDEMIC (AFRICA)

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Legal Briefings - By **Stewart Payne and Natasha Rachwal**, with supervision by **Nick Altini and Leana Engelbrecht**

Following the declaration of a national state of disaster in terms of the Disaster Management Act No. 57 of 2002 (as amended), the concerning escalation in the number of confirmed COVID-19 infections in South Africa prompted the National Coronavirus Command Council to enforce a nationwide lockdown for 21 days which came into effect from midnight on Thursday, 26 March 2020.

These developments have been accompanied by the expedited publication of numerous regulations aimed at combatting the outbreak of COVID-19 and mitigating its anticipated impact on the already strained economy. In particular, emphasis has been placed on enabling both the public and private sectors to act swiftly in responding to the healthcare crisis.

In the midst of these unprecedented circumstances, competition law has taken on a crucial role in temporarily reworking the rules of play to facilitate efficient and coordinated industry-wide responses to the threat of COVID-19, as well as reinforcing protections against exploitative market conduct. In this regard, the Minister of Trade, Industry and Competition (**Minister**) has issued the following regulations in terms of the Competition Act No. 89 of 1998 (as amended) (**Competition Act**):

1. Consumer and Customer Protection and National Disaster Management Regulations and Directions (**Excessive Pricing Regulations**);
2. Regulations on Competition Tribunal Rules for COVID-19 Excessive Pricing Complaint Referrals (**Excessive Pricing Rules**);
3. COVID-19 Block Exemption for the Healthcare Sector, 2020 (**Healthcare Block Exemption**);
4. COVID-19 Block Exemption for the Banking Sector, 2020 (**Banking Block Exemption**);
5. COVID-19 Block Exemption for the Retail Property Sector, 2020 (**Retail Property Sector Block Exemption**); and
6. COVID-19 Block Exemption for the Hotel Industry, 2020 (**Hotel Industry Block Exemption**).

The contents of these regulations are considered in greater detail below, together with the practical implications of the national disaster for the operations of the competition authorities and their enforcement priorities during this period.

While this article addresses the role that competition law has played in South Africa's response to the COVID-19 pandemic to date, the situation continues to evolve and it is likely that there will be further developments on this front in the coming weeks. Moving forward, it is essential that firms keep abreast of fast-moving changes to the regulatory framework governing South Africa's response to COVID-19. It is anticipated that the Competition Commission will strictly enforce the applicable competition legislation and, in respect of complaints relating to inflated prices for essential goods or alleged collusive behaviour, will respond swiftly - the Competition Commission and the Competition Tribunal have acknowledged this as their primary focus during this time, allocating most resources to focus on cases related to the COVID-19 pandemic. As such, firms ought to be cautious of engaging in conduct which, absent clear guidance in the form of an industry-wide block exemption, may constitute a violation of competition law. The Commission has also encouraged retailers and suppliers of essential goods and services to proactively engage with it in respect of price increases that may be implemented during this period, so as to promote transparency and avoid suspicions of non-compliance.

EXCESSIVE PRICING REGULATIONS

The Excessive Pricing Regulations deal primarily with (i) excessive pricing in terms of the Competition Act, (ii) unconscionable, unfair, unreasonable and unjust pricing in terms of the Consumer Protection Act No. 68 of 2008, as well as (iii) the equitable distribution and maintenance of adequate stock of certain goods and services. Of particular interest from a competition law perspective are the excessive pricing provisions which prescribe the manner in which one may determine whether the prices of certain goods or services are excessive or unfair during the national disaster period (as opposed to the conventional approach to excessive pricing in terms of the ordinary provisions of the Competition Act).

In order to establish excessive pricing under the Competition Act, one may consider whether, during any period of the national disaster, a material price increase in certain goods or services 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. According to the Regulations, the existence of either of these factors is relevant and critical in determining whether the price in question is excessive or unfair and, indeed, their existence alone indicates prima facie that the price is excessive or unfair.

It is crucial to recognise that the Excessive Pricing Regulations make the same stipulations in relation to unfair prices under the Consumer Protection Act and the effect of this is to extend the prohibition on “price gouging” to all suppliers of essential goods and services, including those which are not dominant for purposes of the Competition Act. A contravention of these Regulations may attract penalties under the Competition Act and Consumer Protection Act.

The goods and services in respect of which these provisions apply include basic food and consumer items, emergency products and services, medical and hygiene supplies and emergency clean-up products and services. As mentioned, this does not mean that the prices of other (non-essential) goods and services cannot be the subject of scrutiny by the competition authorities during this period as the Competition Act contains a general prohibition against excessive pricing by a dominant firm.

Special rules have been issued to govern the manner in which COVID-19 related excessive pricing complaints will be dealt with by the Tribunal. According to the Excessive Pricing Rules, such complaints may be heard on an urgent basis with substantially expedited procedural time periods. The exchange of pleadings are to be completed within 4 business days and hearings before the Tribunal are similarly to be dealt with on an expedited basis. In addition, where the Tribunal so directs, proceedings may be conducted wholly as video or audio proceedings. Upon finding that a party has contravened the prohibition against dominant firms engaging in excessive pricing, the Excessive Pricing Rules empower the Tribunal to impose pricing remedies that will direct the pricing of a firm that engaged in excessive pricing of essential goods. Should the respondent wish to appeal or review the pricing order, he may apply to the Competition Appeal Court on an urgent basis (although the pricing order will remain in effect unless subsequently set aside).

BLOCK EXEMPTIONS

Subsequent to the declaration of a national state of disaster, various industries have been granted block exemptions that exempt certain categories of agreements or practices from the application of sections 4 and 5 of the Competition Act (which prohibit restrictive horizontal and vertical practices). These block exemptions are intended generally to facilitate and promote a coordinated response to the COVID-19 pandemic and to mitigate and manage its consequences for certain industries. The exemptions will persist for as long as the declaration of a national state of disaster is in place.

HEALTHCARE SECTOR

The Healthcare Block Exemption is specifically targeted at promoting access to healthcare, preventing exploitation of patients, enabling the sharing of healthcare facilities, management of capacity and reduction of prices. The exemption relates to agreements or practices that are aimed at facilitating greater coordination and communication in respect of capacity, utilisation and the transferring of practitioners, supplies and equipment in light of the COVID-19 pandemic. Hospitals, healthcare facilities, medical suppliers, medical specialists, radiologists, pathologists, laboratories, pharmacies and healthcare funders are covered by the exemption and, in light of this exemption, can coordinate their conduct to ensure swift access to healthcare by the public in a manner that reduces the cost and any barriers to obtaining access to healthcare (for example, pathology laboratories may coordinate in order to establish mobile testing sites or laboratories for COVID-19 testing specifically in areas where there is limited access to pathology services).

Such agreements or practices will, however, only fall within the scope of the exemption where they are undertaken at the request of, and in coordination with, the Department of Health for the sole purpose of responding to the pandemic. Specifically excluded from the exemption are communications or agreements in respect of prices, unless they are specifically authorised by the Minister of Health.

In addition, the Healthcare Block Exemption applies in respect of agreements or practices between the private healthcare sector and the Department of Health (i) in order to ensure that public healthcare facilities have additional capacity available and are adequately stocked with necessary medical supplies, and (ii) which are solely intended to reduce the costs of diagnosis, tests, treatment and other preventative measures and which are undertaken at the request of the Department of Health and subject to its oversight and guidance.

BANKING SECTOR

The Banking Block Exemption applies to certain categories of agreements or practices that may be entered into between various banks, the Banking Association of South Africa and the Payments Association of South Africa. More specifically, the Banking Block Exemption will apply in respect of agreements or practices intended to ensure the continued functioning of essential payment systems during the national disaster. This is limited to the creation of policies and plans which seek to secure the continued availability of bank notes to ATMS, bank branches and businesses as well as the continued provision of certain essential banking services and electronic payments systems.

In order to alleviate the negative impact of the pandemic on banking customers' ability to manage their finances, the Banking Block Exemption covers agreements or practices which ensure the continued management of debtors and extension of credit, specifically in respect of developing policies and monitoring mechanisms for payment holidays and debt relief, limitations set on asset repossessions and the extension of credit as they relate to individuals and businesses which are experiencing financial distress. The major banks have been quick to implement such measures in order to assist clients.

Agreements under the Banking Block Exemption may however only be undertaken at the request of, and in coordination with, the Minister or the Minister of Finance and may not extend to communication or agreements in respect of pricing except where specifically authorised by the Minister or the Minister of Finance.

RETAIL PROPERTY SECTOR

The Retail Property Sector Block Exemption exempts certain agreements or practices involving designated retail tenants and retail property landlords from the application of sections 4 and 5 of the Competition Act if undertaken at the request of, and in coordination with the Department of Trade, Industry and Competition, for the sole purpose of responding to the COVID-19 pandemic. This would exclude, unless specifically authorised by the Department of Trade, Industry and Competition, any communication or agreements in respect of pricing. This exemption is aimed at providing some relief to retail tenants in circumstances where many retail tenants (especially those not offering essential goods or services) are prohibited from operating their business during the lockdown period.

The Retail Property Sector Block Exemption applies to agreements or practices in respect of (i) payment holidays or rental discounts for tenants, (ii) limitations on the eviction of tenants, or (iii) the suspension or adjustment of particular clauses in lease agreements which restrict the ability of designated retail tenants to take reasonable measures to protect viability during the pandemic.

The following retail tenants are designated to benefit from the Retail Property Sector Block Exemption: clothing, footwear and home textile retailers, personal care services and restaurants. An additional qualification is that, in order to operate under this Exemption, these agreements or practices must extend to all South African retail tenants in the designated retail lines (including small, independent retailers), unless otherwise authorised by the Minister or the Competition Commission.

HOTEL INDUSTRY

The Hotel Industry Block Exemption specifically exempts certain agreements and practices in the hotel industry to ensure that hotel facilities that cannot be conventionally operated during the lockdown period may be utilised to provide quarantine accommodation required in light of the pandemic. Its primary purpose is to facilitate engagements between the hotel industry, the Department of Health and the Department of Tourism in order to (i) identify appropriate facilities for persons placed under quarantine during the COVID-19 pandemic and (ii) communicate amongst each other in relation to respective capacities and how best to utilise the facilities available.

In addition to identifying appropriate quarantine facilities, the Hotel Industry Block Exemption extends to agreements or practices in the hotel industry aimed at securing the reduction of the costs of providing such facilities which may be undertaken at the request of the Department of Health and the Department of Tourism and subject to their respective oversight and guidance. Any such discussions or agreements relating to pricing for the purposes of organising quarantine facilities must be specifically authorised by the Minister of Health and the Minister of Tourism.

IMPLICATIONS FOR THE PROCEDURAL FUNCTIONING OF THE COMPETITION COMMISSION AND COMPETITION TRIBUNAL

In light of the exceptional challenges facing businesses and regulatory institutions alike, both the Competition Commission and the Competition Tribunal have issued statements outlining the manner in which they will operate during the nationwide lockdown.

The Competition Commission has indicated that it will significantly scale down its operations and primarily focus on COVID-19 related complaints. The Commission has been proactively engaging with retailers and suppliers of essential goods and services in order to facilitate compliance during this period and has further undertaken to collaborate with the National Consumer Commission to create a team dedicated to dealing with complaints regarding abuses of dominance or other exploitative practices related to COVID-19.

Since the declaration of the national state of disaster, the Commission has received an unprecedented amount of complaints, of which approximately 300 (at the time of writing this article) are potentially actionable under South African competition legislation. These complaints primarily relate to alleged excessive pricing in respect of COVID-19 essentials such as hand sanitisers and face masks. Investigations in respect thereof are being undertaken on an expedited basis and cases against national retailers and suppliers are being prioritised. Should firms be found to have engaged in excessive pricing, they may receive penalties of up to 10 per cent of annual turnover for a first offence and up to 25 per cent of annual turnover for a repeat offence.

Because of this shift in focus, the Competition Commission has discouraged parties from filing mergers (except where the proposed transaction involves a failing firm or firm in distress) as well as complaints in respect of behaviour which is unrelated to COVID-19.

In order to prioritise COVID-19 related complaints, the Competition Tribunal has directed that hearings in respect of unopposed, non-complex mergers as well as unopposed, complex mergers be held via teleconference. Hearings in respect of opposed, complex mergers, by contrast, will not be set down during the lockdown period. In respect of complaints already enrolled as well as pre-hearings and hearings for interlocutory proceedings, the Competition Tribunal has indicated that they will be postponed. This will not, however, affect urgent matters as well as complaints relating to COVID-19 which may still be heard by arrangement between the relevant parties and subject to appropriate social distancing measures. In respect of COVID-19 related excessive pricing complaints, the Excessive Pricing Rules have established special processes to enable the Tribunal to deal with such complaints in an expedited manner (as discussed above).

[More on COVID-19](#)

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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