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COMPETITION LAW ALERT

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"Act fast! Stocks are limited!" – Block exemption allows competitor co-ordination to ensure essential supplies

In the tragic aftermath of the civil unrest wracking parts of the country, many have accused those in power of fiddling while South Africa burns. That cannot be said of the Minister of the Department of Trade, Industry and Competition (DTIC), however, who has moved quickly to issue a new block exemption aimed at clearing the way for fast, co-ordinated action to stabilise value chains for essential goods and ensure equitable distribution of resources in the meanwhile.

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“Act fast! Stocks are limited!” – Block exemption allows competitor co-ordination to ensure essential supplies

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In the tragic aftermath of the civil unrest wracking parts of the country, many have accused those in power of fiddling while South Africa burns. That cannot be said of the Minister of the Department of Trade, Industry and Competition (DTIC), however, who has moved quickly to issue a new block exemption aimed at clearing the way for fast, co-ordinated action to stabilise value chains for essential goods and ensure equitable distribution of resources in the meanwhile.

It is clear that managing the disruptions to supply chains and the shortages likely to be experienced in essential goods such as basic food, medical and hygiene supplies, pharmaceuticals, fuel and cleaning products, will require a concerted effort by all involved in their production, distribution and sale. The problem is, many of those involved are competitors, and competitor co-ordination is anathema under the Competition Act 89 of 1998 (Competition Act) which prohibits, amongst other things, market division. Accordingly, sharing information on capacity, stock availability and demand can fall foul of competition law, as can attempts to co-ordinate the allocation of inputs and allocating customers or geographic areas for supply.

The purpose of the block exemption is to grant a temporary dispensation allowing for deviation from competition laws (specifically, sections 4 and 5 of the Competition Act) with the aim of ensuring that essential goods are equitably distributed and that there are no shortages.

The new exemption is an improvement on those published last year in response to the COVID-19 pandemic. The previous exemptions were very difficult to implement as they required agreement with the DTIC and Competition Commission on the manner and extent of co-ordination, with a bureaucratic penchant for micro-management making decision-making impossible. The new exemption grants far greater autonomy to those who know best. All that is required is to notify the DTIC and the Competition Commission of the need to co-ordinate, and to be prepared to keep and share records of communication and co-ordination efforts.

Any firm participating in the value chain for essential goods (i.e. throughout the production, distribution and retail chains for essential goods, including the inputs into these various levels of the chain) may, in order to respond to actual or potential shortages, communicate with their suppliers or competitors regarding stock losses, stock availability and demand for essential goods. Further, these firms may even co-ordinate with their suppliers and competitors in respect of allocating and distributing inputs to address actual or potential supply shortages and to ensure that essential goods are equitably distributed. The exemption is an extraordinary step for extraordinary times.

“Act fast! Stocks are limited!” – Block exemption allows competitor co-ordination to ensure essential supplies...*continued*

If prices are not discussed, and tenders remain competitive, there is a great deal of leeway and any firm involved in the supply chain for essential goods is being encouraged by the DTIC to take whatever measures necessary to co-ordinate and communicate with its partners and competitors to ensure that all have access to essential goods in these difficult times.

It is not an “*open sesame*”, however: any co-ordination or discussion of pricing between competitors or attempts to collude on tenders remains strictly outlawed. But if prices are not discussed, and tenders remain competitive, there is a great deal of leeway and any firm involved in the supply chain for essential goods is being encouraged by the DTIC to take whatever measures necessary to co-ordinate and communicate with its partners and competitors to ensure that all have access to essential goods in these difficult times.

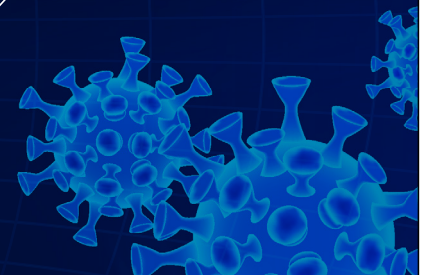
For good measure, the exemption also reminds firms of the excessive pricing regulations still in force, which prohibit increasing prices of essential goods without a corresponding increase in input costs.

The exemption will, for now, only be in force until 15 August 2021, unless withdrawn earlier by the minister. The exemption may also, however, be extended. Given the fluid nature of the situation, the exemptions are open to amendment.

Chris Charter and Craig Thomas

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