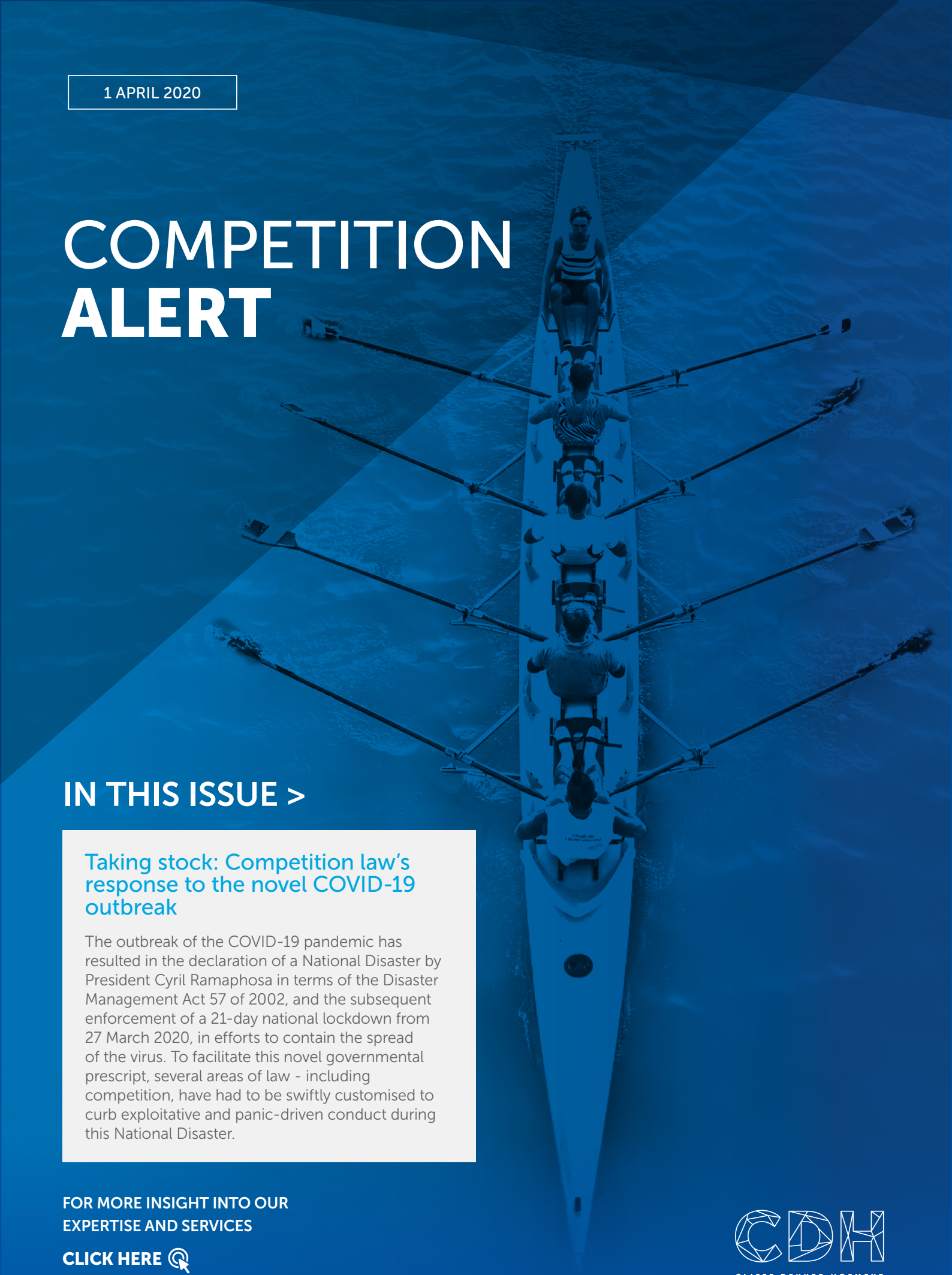
1 APRIL 2020

COMPETITION **ALERT**



IN THIS ISSUE >

Taking stock: Competition law's response to the novel COVID-19 outbreak

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Taking stock: Competition law's response to the novel COVID-19 outbreak

When the Competition Act was amended most recently last year, much criticism was brought to bear on the additional regulatory powers conferred on both the Competition Commission and the Minister of Trade, Industry and Competition.

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When the Competition Act was amended most recently last year, much criticism was brought to bear on the additional regulatory powers conferred on both the Competition Commission and the Minister of Trade, Industry and Competition. It was feared that this would lead to regulatory and executive overreach. Although it could not have been envisaged at the time, these stronger powers are now being brought to bear in helping to combat some of the non health-related but equally devastating effects of the pandemic. A spate of interim regulations have been published by the Minister in terms of his powers to issue them, and the Commission is showing tremendous will in executing on its expanded mandate.

This article identifies the ways in which Competition Law has been mobilised to respond to the crisis.

By way of a short summary:

The Competition Act completely outlaws certain agreements or concerted practice between competitors. This, rightly, makes competitors reluctant to engage in any cooperative conduct, even if designed collectively to mitigate potential effects of the pandemic on one another, as well as customers, suppliers and society at large. In recognising the unprecedented need for industries and value chains to pull in the same direction in implementing measures

CLIFFE DEKKER HOFMEYR

Taking stock: Competition law's response to the novel COVID-19 outbreak...*continued*

Such *laissez-faire* capitalism is of course untenable when dealing with essential goods in a time of crisis, and so regulations have been introduced to broaden and simplify the excessive pricing rubric; effectively to fast-track enforcement against price gouging.

to help alleviate economic fallout, many of the new regulations expressly encourage cooperation amongst key participants in a value chain. The sectors identified so far cover:

- Healthcare
- Banking
- Retail Property
- Hotels

However, the Minister has been careful to insinuate his guiding hand in how these measures shape up by requiring any plenary discussions to include his office.

Importantly, discussions and agreements on price and output remain strictly prohibited – so the regulations are not an invitation to cartelise, nor do they herald a general free-for-all on conduct typically prohibited. The approach adopted is measured and subject to oversight by relevant government departments.

The pandemic has also resulted in unprecedented demand, and attendant shortages in supply, for some key goods and services. Were market forces left unchecked, the normal economic mechanism would result in price hikes to curb demand from those consumers unwilling or unable to pay increased prices. Such *laissez-faire* capitalism is of course untenable when dealing with essential goods in a time of crisis, and so regulations have been introduced to broaden and simplify the excessive pricing rubric; effectively to fast-track enforcement against price gouging. Insofar as price increases ordinarily ensure efficient rationing to those parts of the demand curve that can pay higher prices, the regulations seek to achieve the same thing on a more equitable basis by requiring suppliers to develop measures to ensure that scarce supplies are distributed fairly throughout the value chain, including to small businesses. Such measures should include rationing supply at both a wholesale and retail level.

Although the new regulations are a blunt instrument and technically only apply to dominant firms, they seem to be having the desired effect when coupled with the prevailing call for social compact: no firm accused of profiteering from the pandemic and that wishes to maintain its social licence to operate is likely to raise technical defences. All indications are that most of the suppliers called out for alleged COVID-19 price hikes are voluntarily bringing themselves to heel.

In various press releases, the Commission provided a flavour of the work it has done to curb price gouging:

- Since the National Disaster was declared, the Commission had, as at 31 March 2020 received over 550 complaints. This process has been facilitated by a published hotline number and direct access to the investigatory team. The Commission has also mobilised most of its resources to address complaints as quickly as possible. Although this is likely to result in other aspects of the Commission's regulatory roles (such as merger control and other complaints) being trammelled, one can hardly accuse the Commission of getting its priorities wrong and the regulator stands to be commended for heeding the Minister's call.

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Taking stock: Competition law's response to the novel COVID-19 outbreak...*continued*

In anticipation of increased need to bolster supply chains and source supplies, the Commission has also warned firms against rigging bids, fixing prices or allocating markets. In bidding scenarios, the Commission will investigate suspiciously similar bids, bids by firms with the same shareholders, and inexplicably high bids as potential contraventions.

- Worth noting is that the regulations do provide for increases that are commensurate with an increase in costs, provided that the mark-up remains the same as in the preceding three months from 1 March 2020. However, some suppliers have been able to demonstrate that recent increases in net margin were not in reaction to the surge in demand but rather an ordinary course adjustment after the traditional promotional period of December to February, which coincides with the benchmark comparator set out in the regulations to determine whether there has been a material price increase. This shows that the regulator is still applying its mind to facts and circumstances, such that the regulations are not being applied mechanistically as a form of price regulation. A less sanguine approach is taken by the Communications Minister, who in separate COVID-19 regulations has simply imposed a price freeze on licensed service providers.
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The issues facing the Commission are by no means unique. From Croatia to the Caribbean, antitrust regulators are swiftly having to come to terms with wildly distorted market forces as a result of the pandemic. It has been reported that in some countries hand sanitisers are being sold on eBay and Amazon for more than 1000 Euros. In Italy, the anti-trust authority is requiring firms to adopt measures to eliminate disproportionately high prices. In Poland, suppliers of protection equipment are being taken to task for diverting supply from hospitals to the more lucrative private sector. And in the UK, the Competition and Markets Authority is contemplating price regulation. Many other countries, including Australia, are relaxing rules to encourage collaboration between competing suppliers to ensure logistical supply challenges are met.

Under the circumstances and in a world gone mad, the relative speed with which Minister Patel and the Competition Commission have taken meaningful and proactive steps to cater for these unprecedented times commends them as being in many ways at the forefront of a new era of flexible and fleet-footed competition regulation. Mistakes will be made, no doubt, but in the face of a global crisis such as this one, inaction is the worst possible error.

Taking stock: Competition law's response to the novel COVID-19 outbreak...*continued*

The Regulations apply to the supply of a range of itemised goods and services.

A more detailed account of the regulations to date follows:

Price controls on certain products

On 19 March 2020, the Minister of Trade and Industry (Minister) introduced the Consumer and Customer Protection and National Disaster Management Regulations and Directions (Regulations) under the auspices of the Competition Act and the Consumer Protection Act. The aim of the Regulations is to promote concerted conduct to prevent an escalation of the COVID-19 pandemic (by alleviating, containing and minimising its effects); and to protect consumers from unfair, unreasonable, improper or unjust commercial practices in response to a surge in demand during the National Disaster.

The Regulations apply to the supply of a range of itemised goods and services. These include: (i) basic food and consumer items, emergency products and services, medical and hygiene supplies; and emergency clean-up products and services (Annexure A); and more specifically, (ii) toilet paper, hand sanitiser and antiseptic liquids, facial masks, disinfectants cleaners and wipes, surgical gloves and masks, baby formula, disposable nappies, cooking oils, bottled water, and non-perishables such as rice, maize meal, pasta and sugar as well as canned and frozen meats, fish and vegetables; and services relating to the testing, prevention and treatment of the COVID-19 and its associated diseases (Annexure B).

The Regulations present a variety of consumer and customer protections, including: (i) treating unjustified price increases as supplier conduct that is regarded as unconscionable and pricing that is unfair, unreasonable or unjust in terms of the Consumer Protection Act 68 of 2008 (CPA); and (ii) obligations on suppliers to develop and implement reasonable measures to ensure equitable distribution to consumers and customers of all goods and services in Annexure A, and to maintain adequate stocks of those goods (which may include limiting the number of items of Annexure B goods a customer may purchase in a defined period of time).

From a competition law perspective, the Regulations seek to codify excessive pricing by dominant firms. It provides that, during any period of the National Disaster, a material price increase in respect of the specified goods and/or services which (a) does not correspond to or is not equivalent to the increase in the cost of providing that good/service; or (b) increases the net margin or mark-up on that good/service above the average margin or mark-up for that good/or service 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 Regulations posit that this conduct alone will be sufficient to establish a *prima facie* case and is not merely another factor to be taken into account (in addition to those already enumerated under the Competition Act) in making an excessive pricing determination.

Taking stock: Competition law's response to the novel COVID-19 outbreak...*continued*

"Price increase" means a direct increase or an increase as a result of unfair conduct such as false or misleading price practices, covert manipulation of prices, and manipulation as a result of raising or reducing grade levels of goods and services.

Although *"materiality"* is not defined, *"price increase"* means a direct increase or an increase as a result of unfair conduct such as false or misleading price practices, covert manipulation of prices, and manipulation as a result of raising or reducing grade levels of goods and services.

A dominant firm that contravenes or fails to comply with the Regulations must be investigated by the Competition Commission and, if found to be in contravention, is liable for the penalties imposed upon it as provided for in the Competition Act. The penalties for excessive pricing offences are severe, including a fine of 10% of a firm's annual turnover for a first-time offence and 25% of annual turnover for a repeat offence. Further, for collusive behaviour, the directors and management of companies which engage in such acts face potential imprisonment for a period of up to 10 years. In terms of the Regulations, because they invoke the requirements of both the Competition Act and the CPA, a penalty of either a fine up to R1 million, a fine of 10% of a firm's turnover or imprisonment for a period not exceeding 12 months could be for price gouging.

Several block exemptions

In response to the declaration of the National Disaster and in an effort to mitigate the negative impact of the national lockdown, the Minister has granted limited-time block exemptions to the healthcare, banking, retail property and hotel sectors in respect of certain categories of agreements or practices between participants within the respective industries from the application of section 4 (restrictive horizontal practices between competitors) and section 5 (restrictive vertical practices between participants at various levels of the supply chain) of the Competition Act. These block exemptions were previously unprecedented in South Africa and were issued under a new provision of the Competition Act which came into effect on 12 July 2019.

The rationale of the block exemptions is to promote concerted conduct to prevent an escalation of the National Disaster and to alleviate, contain and minimise the effects of the National Disaster on the exempt industries as well as the customers thereof. A notable caveat to the operation of each block exemption is that the identified categories of agreements and/or practices must be undertaken at the request of, and in coordination with, the relevant government department and excludes communication and agreements in respect of price unless specifically authorised by the prescribed minister.

All participants to the agreements or practices provided for in terms of the block exemptions must keep minutes of meetings held and written records of such agreements or practices. Given the capricious nature of this pandemic, the agreements and practices provided in the block exemptions may be expanded or reduced by notice published in the Government Gazette. The block exemptions will remain in operation only for so long as the declaration of COVID-19 as a National Disaster

Taking stock: Competition law's response to the novel COVID-19 outbreak...*continued*

On 19 March 2020, the Minister granted an exemption to the healthcare industry.

subsists, or until they are withdrawn by ministry (whichever is earlier). Engaging in conduct which falls outside the ambit of these exemptions, risks constituting a contravention of the Competition Act.

(i) Healthcare sector

On 19 March 2020, the Minister granted an exemption to the healthcare industry.

The exemption applies to agreements involving: hospitals and healthcare facilities; medical suppliers; medical specialists and radiologists; pathologists and laboratories; pharmacies; and healthcare funders. In terms hereof, agreements or practices will be exempt if the sole purpose thereof is (as the case may be):

- *co-ordinating* the allocation of patients between hospitals; the allocation of specific types of services, medical professionals and equipment; the procurement of various consumables, pharmaceuticals and other inputs required for the optimal treatment of patients; the procurement and distribution of medical supplies; the procurement of inputs required for testing; the procurement of pharmaceuticals and medical consumables;
- *communication* in relation to capacities and utilisation; the availability of medical supplies, pharmaceuticals and medical consumables;
- *sharing data* in relation to the scale of the outbreak, the disease and patient profile;
- *transferring* nurses, medical practitioners, medical supplies and equipment; pharmaceuticals and medical consumables;
- *standardising* quality of care protocols; and
- *reducing the cost* of diagnosis, tests and treatment and other preventative measures.

In addition, agreements or practices between the private health care sector and the Department of Health, with the sole purpose of: making available additional capacity to the public healthcare sector; or ensuring adequate medical supplies to the public sector, also fall within the exemption.

Finally, at the request of and subject to oversight and guidance by the Department of Health, agreements and practices between the private healthcare sector and the Department of Health with the sole purpose of reducing the cost of diagnosis, tests, treatment and other preventative measures including vaccines form part of this exemption.

(ii) Banking sector

On 23 March 2020, the Minister granted an exemption to the banking sector. This exemption seeks to minimise the negative impact on the ability of private individuals and businesses to manage their finances during the National Disaster. The exempt agreements or practices specifically relate to payment systems and/or debtor and credit management in the banking sector.

Taking stock: Competition law's response to the novel COVID-19 outbreak...*continued*

"Retail property landlords" is defined as those businesses that are involved in the supply of rentable space in the retail property sector such as retail shopping centres, among others.

Agreements with the sole purpose of ensuring essential payment systems continue to operate during the COVID-19 National Disaster, limited to the development of industry monitoring, operational policies and contingency plans, in respect of the continued (i) availability of bank notes to ATMs, branches and businesses; (ii) provision of essential ATM, branch and corporate banking services; and (iii) provision of electronic payments systems are exempt.

Further, agreements or practices with the sole purpose of ensuring the management of debtors and extension of credit continue during the COVID-19 National Disaster, limited to the development of industry policies and monitoring, in respect of (i) payment holidays and debt relief; (ii) limitations on asset repossessions; and (iii) the extension of credit lines for businesses and individuals, subject to financial stress, fall within the ambit of the exemption.

(iii) Retail property sector

On 24 March 2020, the Minister granted an exemption to the retail property sector. The exemption applies to agreements or practices between designated retail tenants and retail property landlords and seeks 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.

"Retail property landlords" are defined as those businesses that are involved in the supply of rentable space in the retail property sector such as retail shopping centres, among others. The categories of landlords may include, among others, real estate investment trust companies, property developers who own or operate retail shopping centres and other intermediaries through whom the letting of rentable space in the retail property sector is facilitated.

The designated retail tenants fall within the following designated trading lines: (i) clothing, footwear and homeware textile retailers, including (among others) retailers of wearable garments and products including menswear; ladieswear; children's clothing; clothing for infants; (ii) personal care/grooming services, including hairdressers, health and beauty salons; and (iii) restaurants that prepare and serve food and drinks to customers.

The exemption is limited to agreements or practices, with the sole purpose of ensuring the survival of tenants of retail properties during the National Disaster, in respect of: payment holidays and/or rental discounts for tenants; limitations on the eviction of tenants; and 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.

However, the prerequisite to qualifying for this exemption is that such agreements must extend to all South African retail tenants in the designated retail lines, including small and/or independent retailers, unless otherwise authorised by the Minister or the Commission.

Taking stock: Competition law's response to the novel COVID-19 outbreak...*continued*

The COVID-19 pandemic has underlined the vulnerability of the vast majority of South African consumers who remain prey to exploitation during times of national crisis.

(iv) Hotel industry

On Friday 27 March 2020, the Minister granted an exemption to the hotel industry. The exemption seeks to enable collective engagement between the hotel industry and the Departments of Health and Tourism respectively to identify and provide appropriate facilities for persons placed under quarantine.

The exemption applies to agreements or practices with the sole purpose of identifying and providing appropriate facilities for the accommodation of persons placed under quarantine; and communicating with each other in relation to capacity and utilisation of facilities for such a purpose. Further, at the request of and subject to oversight and guidance by the Departments of Health and Tourism respectively, agreements or practices in the hotel sector with the sole purpose of communicating and agreeing on reducing the cost of providing appropriate facilities for the accommodation of persons.

Conclusion

The COVID-19 pandemic has underlined the vulnerability of the vast majority of South African consumers who remain prey to exploitation during times of national crisis. Competition Law has been moulded to more aptly address this concern through the imposition of several block exemptions and pricing regulations.

The Commission is adopting a zero tolerance stance in respect of excessive pricing on the part of suppliers and retailers who engage in the opportunistic inflation of prices (to the detriment of consumer welfare) in response to the heightened demand pursuant to the COVID-19 National Disaster and lockdown. Further, while the block exemptions aim to better enable the healthcare, banking, retail and hotel industries to (*inter alia*) cooperate on ensuring there is adequate capacity to respond to the National Disaster, the Competition Act remains in full force and effect in respect of all agreements or practices falling outside the confines of the temporary regulations and exemptions.

Competition Law has undergone a series of balanced modifications in terms of increasing exemptions to provisions of the Competition Act on the one hand, while remaining the channel through which egregious prohibited conduct (such as excessive pricing) is prosecuted on the other hand.

What remains to be seen is how competition regulation around the world will proceed after the clouds part and the pandemic dissipates. It may be that many regulators, having tasted the power to shape conduct through more deliberate action will feel confident to adopt more pointed strategies to address other perceived economic malaise where antitrust has so far only dabbled – such as platform markets, oligopolies, data commoditisation and that most nebulous concept: "*fairness*". Some in society may welcome this. But proponents of a free market economy may yet see the COVID-19 pandemic as the watershed for more draconian competition law regulation around the world. Ultimately, what works in war may not be necessary, or desirable, in times of peace.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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