

21 APRIL 2020

COMPETITION ALERT

IN THIS ISSUE

No cutting corners: The enforceability of competition law during COVID-19

Competition law aims to regulate business conduct in the value chain, for the ultimate benefit of consumers. This objective remains relevant as individuals, firms and the economy suffer at the hand of the COVID-19 crisis.

No cutting corners: The enforceability of competition law during COVID-19

Our competition regulators had to rapidly implement temporary measures to, on the one hand, curb exploitation of the state of disaster and on the other hand, facilitate cooperation amongst key market participants so as to ensure an effective response to the crisis.

Competition law aims to regulate business conduct in the value chain, for the ultimate benefit of consumers. This objective remains relevant as individuals, firms and the economy suffer at the hand of the COVID-19 crisis.

Globally, competition authorities have demonstrated flexibility by granting temporary exemptions from competition laws with the aim of enhancing efficiency and consumer welfare, as well as shifting focus to opportunistic excessive pricing and stock holding practices. This has been coupled with a plethora of warnings that, despite lockdowns, competition authorities will remain vigilant and will intervene in unscrupulous conduct.

Similarly, South Africa's declaration of a national state of disaster swiftly triggered a wave of legal amendments in an attempt to combat the sudden onset of this tumultuous pandemic. Thrust into uncharted waters, our competition regulators had to rapidly implement temporary measures to, on

the one hand, curb exploitation of the state of disaster and on the other hand, facilitate cooperation amongst key market participants so as to ensure an effective response to the crisis.

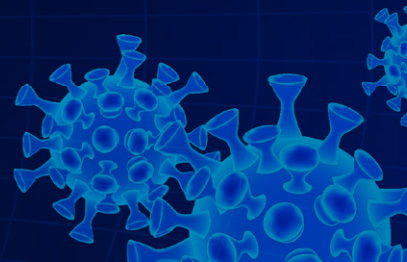
These developments were realised through excessive pricing and stock holding regulations coupled with new procedural regulations for the fast-tracked prosecution of such complaints, and block exemptions for the healthcare, banking, retail property and hotel industries. These have been discussed in detail in previous CDH articles (publications of [1-April-2020](#) and [8-April-2020](#)) and our recent webinar (accessible [here](#)).

Block exemptions are not boundless

Businesses face compelling reasons to collaborate, for example, in order to adequately meet short-term societal demand or long-term economic stability. However, unless conduct falls within the strict scope of the temporary COVID-19 block exemptions, anti-competitive

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



No cutting corners: The enforceability of competition law during COVID-19 ...continued

If exempted competitors are legitimately working together to try and help consumers or the public interest, as opposed to trying to garner a competitive advantage, then that will likely shift the scales in their favour.

agreements or practices between competitors and among customers and suppliers, as well as abuses of dominance remain prohibited. These include (but are not limited to): price fixing arrangements; market allocation; collusive tendering; limiting production; excessive pricing; or unbridled exchanges between competitors of competitively sensitive information.

Accordingly, whilst the COVID-19 block exemptions signal the competition authorities appetite to temporarily allow certain conduct that would ordinarily be offensive under the Competition Act, with this freedom comes added responsibility. For example, exempted coordination must be for the sole purpose of responding to the COVID-19 disaster, the exemptions apply only to certain industries, concerted action requires the consent or oversight of government departments and ministries, monitoring obligations must be complied with and the exemptions apply only for the duration of the national state of disaster (or earlier if they are withdrawn).

These exemptions are a welcome reassurance that competition law will not unreasonably stand in the way of legitimate measures to respond to the COVID-19 crisis. However, in some cases, there may be a need to navigate a very narrow path

of "healthy cooperation" and meeting the purpose of the exemptions, while also carefully avoiding any coordination that slides into illegal collusion.

Practically, if exempted competitors are legitimately working together to try and help consumers or the public interest, as opposed to trying to garner a competitive advantage, then that will likely shift the scales in their favour. Once firms have decided to cooperate in terms of the block exemptions, they should limit their interactions and the exchange of information to what is strictly necessary to serve the public interest and meet the stated objective of the relevant exemption. Businesses should aim to ensure that any coordinated conduct is strictly proportionate to what is needed to provide solutions to the current crisis.

Despite lockdown, the competition authorities remain armed

The competition authorities have recently enhanced their monitoring functions. For example, the Competition Tribunal (Tribunal) approved the first consent agreement relating to COVID-19 excessive pricing on 20 April 2020 concerning a Boksburg pharmacy allegedly charging excessive prices for face masks, a

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

No cutting corners: The enforceability of competition law during COVID-19 ...continued

Businesses must be careful not to be seen to, even inadvertently, manipulate the socio-economic fragility imposed by the pandemic by abusing their market power or otherwise exploiting consumers.

product not offered by it before the crisis. Generally, excessive pricing cases are notoriously protracted due to the often complex economic issues at play. The expediency of this case is remarkable insofar as there was only a one-month lapse between the Competition Commission (Commission) receiving information against the pharmacy alleged to have inflated prices and the Tribunal approving the consent order. The Commission remains inundated with pricing complaints from consumers in respect of essential goods.

The Commission also recently announced its first referral to the Tribunal of a contested case of excessive pricing against Babelegi Workwear Overall Manufacturers & Industrial Supplies CC regarding alleged price gouging of facial masks, which is set to be heard by the Tribunal – again, in record time - on 24 April 2020.

In addition to anticompetitive price hikes, a fake price list for essential goods has been circulated and criminals purporting to be Commission investigators have

been interacting with businesses with the intention of soliciting bribes. The Commission confirmed it has not issued any price guidelines and the necessary criminal authorities have been alerted.

Greater freedom brings added responsibility

While the COVID-19 crisis provides increased scope for legal collaboration in the public interest, the floodgates have not been opened for unhindered cooperation. Despite nuanced modifications, competition law remains operative. Businesses must be careful not to be seen to, even inadvertently, manipulate the socio-economic fragility imposed by the pandemic by abusing their market power or otherwise exploiting consumers. Should there be doubt as to the compatibility of conduct with the Competition Act and the COVID-19 amendments, it would be best to seek up front guidance.

Susan Meyer, Preanka Gounden and Charissa Barden

OUR TEAM

For more information about our Competition practice and services, please contact:



Chris Charter
National Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com



Albert Aukema
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com



Naasha Loopoo
Senior Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com



Lara Granville
Director
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com



Kitso Tlhabanelo
Senior Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@cdhlegal.com



Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com



Preanka Gounden
Associate
T +27 (0)21 481 6389
E preanka.gounden@cdhlegal.com



Susan Meyer
Director
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com



Duduetsang Mogapi
Associate
T +27 (0)11 562 1068
E duduetsang.mogapi@cdhlegal.com



Veronica Cadman
Executive Consultant
Competition
T +27 (0)11 562 1131
E veronica.cadman@cdhlegal.com



Craig Thomas
Associate
T +27 (0)11 562 1055
E craig.thomas@cdhlegal.com

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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2019 8825/APR

