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COMPETITION ALERT

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The side effects of solutions: Quandaries in adapting competition laws to combat COVID-19

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The swift enactment of these decisive measures had many enamoured at first glance, especially given the laudable aim of combatting the debilitating effects of price gouging. In practice, however, the temporary measures have resulted in some ambivalence. This article discusses several of the unforeseen side effects of the 'new normal'.

Price Gouging Regulations

On 19 March 2020, the Customer Protection and National Disaster Management Regulations and Directions (Regulations) introduced COVID-19 specific provisions to target pandemic-related excessive pricing, also known as price gouging. South Africa's forerunner status in this regard is evidenced by, for example, the United Kingdom's Competition and Markets Authority recent lobbying for emergency time-limited legislation to better combat price gouging, which has not yet been enacted. However, our Regulations are by no means a perfect solution, as illustrated by the below reflections.

Firstly, the South African Competition Commission (Commission) has attempted to apply the Regulations to conduct which occurred before the Regulations were in force. There is a general presumption against the retroactive application of legislation, given the inherent unfairness in requiring compliance with obligations which had no force at the time of historical actions. Although some have suggested that retroactive application is acceptable as excessive pricing has been an enduring prohibition in terms of the Competition Act 89 of 1998, as amended (Act), there remains an opposing view that the Regulations should not be invoked at all in cases where the alleged conduct predated the Regulations. This is an especially pertinent issue, given the harsh punishment contemplated in the Regulations, namely from a competition law perspective, fines of up to 10% of a firm's turnover (administrative penalties imposed to date have ranged from R300 to R5,9 million), and a novel amalgamation of other remedies, such as interdicts, treble damages, donations of essential items, and donations to the Solidarity Fund.

Another conundrum is that the Regulations provide for no force or effect when the COVID-19 outbreak is no longer declared a national state of disaster. This is practically troublesome insofar as the economic effects of COVID-19 will likely linger long after the declared state of disaster ends, and an abrupt termination of the force of the Regulations, in the face of ongoing price gouging conduct, may raise questions of arbitrariness.

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Dominance is a prerequisite to excessive pricing under the Act, whether pursued in terms of the Regulations or not. Small firms who do not have market power may be charging prices according to what they think customers are prepared to pay, and which prices they consider to be legal. But, based on the Commission's approach to policing the Regulations, it appears that even small or family-owned businesses can be prosecuted as dominant firms. Legally, this requires an acceptance that a pandemic can trigger temporary dominance and override existing approaches to market definition, propositions which the Act does not cater for.

In addition, the Regulations prescribe a three-month comparator lens to determine whether an increased price is excessive (i.e. by assessing raises in net margin/mark-up against the average thereof in the three-month period prior to 1 March 2020). However, the economic rationality of this approach in some cases has been questioned. For example, this period is often a peak promotional pricing season. Also, prior to COVID-19, certain firms experienced economic challenges and a low pricing base (from which prices would reasonably be expected to increase), such that if a longer comparative period were to be used, the price increases may not appear as significant.

Businesses cannot rationally be expected to trade without earning a reasonable margin, solely to avoid contravening the Regulations. The Regulations, from a competition law perspective, only apply to 'material' price increases, but lack any particularity as to what is considered a reasonable mark-up.

Digitisation

COVID-19 ushered us all, without much warning, into the digital arena. Our competition authorities were accustomed to processing electronic merger notification filings prior to the pandemic. However, the adoption of virtual formats for hearings, whilst offering welcome cost and time savings, present new challenges. In the Competition Tribunal COVID-19 Directive issued on 26 March 2020, the Competition Tribunal (Tribunal) affirmed that it would continue to hear certain proceedings through facilitated online hearings via video conferencing.

The obvious difficulty with preparing for and holding virtual hearings is that technology does not necessarily serve all parties equally in terms of access, as well as the reliability and stability thereof. Practical challenges arise with remote hearings, such as cyber security concerns in respect of confidential exchanges, audio delays, misplaced unmuting of participants, unexpected interruptions, and restrictions on the ease of team collaboration, all ordinarily absent in a brick and mortar setting. The Tribunal Directive for COVID-19 Excessive Pricing Compliant Referrals issued on 6 April 2020 prescribes a significantly truncated timeline for pleadings and hearings. Viewed collectively, and in the light of the high stakes for a guilty finding, the preparation for and attendance of certain matters, in terms of the Regulations, may impact procedural fairness.

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It will be necessary to decrypt which of the pandemic's effects are temporary and which will have long-term consequences.

Merger Control Procedures

It is anticipated that the pandemic will trigger a surge of M&A activity in due course as industries consolidate and acquirers pursue failing firms (see our previous article on the failing firm defence [here](#)). As a result, the Commission's Chief Economist has unofficially indicated that the Commission is considering boosting its merger control procedures. What this means in practical terms, and whether the envisaged measures will be temporary or permanent, still remains to be seen.

Conclusion

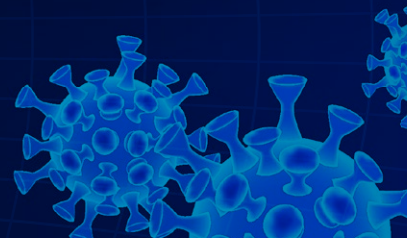
Our competition authorities have expeditiously adopted temporary measures, in commendable efforts to mitigate the effects of the COVID-19 pandemic. There is no doubt that certain abhorrent price gouging was aptly caught in the net.

However, to avoid these measures serving as blunt instruments, its effectiveness should be monitored on an ongoing basis. It will also be necessary to decrypt which of the pandemic's effects are temporary and which will have long-term consequences. To this end, the side effects of any 'new normal' should not hinder the promotion of fair competition for all.

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CDH'S COVID-19 RESOURCE HUB

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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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