

COMPETITION

Competition Commission's Report on the effects of the Covid-19 Block Exemption for the Retail Property Sector, 2020

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Background

On 23 April 2021, the Competition Commission ("**Commission**") published a notice in the Government Gazette in which it, *inter alia*, indicated that it had published its final non-confidential report of the Commission's findings on the impact of the Covid-19 Block Exemptions and the Commission's advocacy and enforcement work ("**Report**").

The Covid-19 Block Exemptions were issued by the Minister of Trade, Industry and Competition ("**DTIC**") in terms of section 10(10) read with section 78(1) of the Competition Act^[1] to assist three key sectors in responding to the Covid-19 pandemic: (i) the healthcare sector, (ii) the retail property sector (including the hotel sector), and (iii) the banking sector.

The Report assessed the deterrent effects of the Commission's advocacy efforts, investigations and prosecutions of price gouging contraventions during the Covid-19 pandemic. The Report notes that whilst there is a public record of the actual investigations and prosecutions by the Commission, it seeks to assess whether these interventions deterred further acts of price gouging during the so-called "disaster period".

The Report also considers the impact of the COVID-19 Block Exemption for the Retail Property Sector, 2020 regulations ("**Retail Property Block Exemptions**") for the period up to October 2020^[2]. This article summarises the aspect of the Report which considered the Retail Property Block Exemptions. In this regard, the specific questions which the Report focused on answering were:

1. How the Retail Property Block Exemptions were used in responding to the crisis?
2. What are the perceived benefits of the Retail Property Block Exemptions?
3. Whether there are any unintended adverse consequences of the Retail Property Block Exemptions; and
4. Whether the Retail Property Block Exemptions were adequate competition measures in responding to the crisis.

Role of the amendments to the Competition Act

The Commission's Report notes that the amendments to the Competition Act made some of the Covid-19 responses possible. In particular, the Report indicates that the Retail Property Block Exemptions were enabled by an amendment to section 78 of the Competition Act which afforded the DTIC the power to exempt a category of agreements or practices from the application of the Competition Act, and amendments to section 8 of the Competition Act which amended the definition of excessive pricing.

The Retail Property Block Exemptions principally enabled firms in the identified sectors to collaborate and coordinate their response to the Covid-19 pandemic with the intended goal of mitigating the expected adverse economic and social effects of the pandemic. But for the Retail Property Block Exemptions, the envisaged collaboration and coordination might have resulted in contraventions of sections 4 and/or 5 of the Competition Act.

Synopsis of the Retail Property Block Exemptions

By virtue of the nationwide lockdown which commenced on 27 March 2020, following the declaration of Covid-19 as a national state of disaster, the movement of people and the business activities of firms were regulated. Thus, only trade in essential goods and services (such as the sale of groceries and pharmaceutical products) were permitted during the so-called “hard lockdown” in South Africa. The temporary closure of businesses not involved in providing essential goods or services were, thus, likely to experience adverse financial effects since they were not trading at that time. In consequence, employees of businesses who did not provide essential goods or services also stood to be adversely affected economically.

On 24 March 2020, the DTIC issued the Retail Property Block Exemptions^[3] to exempt a category of agreements or practices between so-called “South Africa retail tenants”^[4] and the “retail property landlords” from the application of sections 4 and/or 5 of the Competition Act. Property owners and lessors, as well as retail tenants, were exempted from the application of section 4 and 5 of the Competition Act, if they strictly complied with the requirements contained in the Retail Property Block Exemptions.

Any collaboration and coordination had to be with the objective of:

- i) granting payment holidays and/or rental discounts for designated retail tenants;
- ii) agreeing to limitations on the eviction of designated retail tenants; and
- iii) the suspension or adjustment to those provisions in a lease agreement that restrict the designated retail tenants from undertaking reasonable measures required to protect their viability during the national disaster.

In assessing the effectiveness of the Retail Property Block Exemptions, the Commission received a number of submissions. Based on those submissions, the Report records that:

- 3.1 most of the collaborative efforts and discussions that took place were centred around payment holidays and rental relief;
- 3.2 all the relief that was granted to tenants was not coordinated but occurred bilaterally between tenants and lessors. Therefore, although a coordination and common relief package did not materialise, the Report states that the Retail Property Block Exemptions created a platform for discussions of the relief to occur, which ultimately led to relief being granted;
- 3.3 the Commission found that, through the Retail Property Block Exemptions, industry participants were able to negotiate relief programs on an individual basis. The submissions received by the Commission suggested that individual bargaining, as opposed to industrywide coordination, was the *modus operandi* because tenants’ needs varied;
- 3.4 certain retailers submitted that they were not satisfied with the relief received from lessors as the relief received was not to the extent they required; and
- 3.5 retail property owners submitted that through the Retail Property Block Exemptions they were able to offer rental relief to retailers. Constituent members of the Property Industry Group (“**PIG**”), a voluntary organisation formed in response to the Covid-19 pandemic, stated that rental assistance was given to retailers, irrespective of their size, although the focus was on small, medium and micro-enterprise (SMME) retailers as they were the hardest hit by the disaster.

Ultimately, the Commission found that the discussions which occurred under the Retail Property Block Exemptions yielded positive tangible and intangible benefits for the industry, when measured by the extent to which the collaborative initiatives in the property sector achieved the objectives for which those exemptions were granted. In support of this conclusion, the Report states that:

- 3.6 the information received by the Commission shows that on aggregate, the relief received was substantial and many jobs were saved;
- 3.7 the study found that the Retail Property Block Exemptions yielded a number of unexpected intangible benefits. For example, as the PIG submitted, members of the PIG could collectively collaborate on issues that were facing the property industry and deal with those issues;
- 3.8 although the industry generally considered the Retail Property Block Exemptions to be adequate in responding to the crisis, certain stakeholders pointed to possible areas for improvement for future exemptions.

The Report also notes that some of the submissions received by the Commission indicated that there were certain perceived adverse consequences arising from the Retail Property Block Exemptions. One responder reportedly submitted to the Commission that the Retail Property Block Exemptions might have created a platform for anti-competitive coordination among retail property owners.

Conclusion

The insights gained by the competition authorities in answering the questions posed in the Report do not only assist in determining the impact of the block exemptions in general but will reportedly assist in improving exemption design going forward, including exemptions to promote economic recovery and not just a response to the pandemic. Accordingly, it is possible that we might see expanded block exemptions being issued in order to facilitate South Africa's economic recovery and/or amendments to the current block exemptions.

However, caution must be exercised because the Retail Property Block Exemptions are linked to a specific purpose; there are also other requirements which must be complied with if retail tenants and lessors wish to rely on those block Exemptions. Importantly, the Retail Property Block Exemptions expressly state that they remain in operation for as long as Covid-19 is declared a national disaster in terms of the National Disaster Management Act or until those block Exemptions are withdrawn.

In light of the above, it would be prudent to involve your competition law advisor in your team when preparing your annual or three year business plan, or your businesses economic recovery and expansion plan, if you are involved in the property sector as a retail tenant or a property owner.

[1] Competition Act, No. 89 of 1998.

[2] The Report, thus, does not include the period of the second wave of Covid-19 infections that took place during December 2020 to February 2021.

[3] These regulations were amended on 11 June 2020 to include the cinema exhibition industry, being establishments specializing in motion picture or videotape projection in cinemas, in the open air or in other projection facilities, under the Retail Property Block Exemptions.

[4] These included retailers of clothing, footwear and home textiles, retailers of personal care and restaurants.



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