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COMPETITION

Exemptions from competition law in the banking, retail and hotel sectors amidst covid-19 pandemic

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Since the issue of our briefing note on 20 March 2020, the Minister of Trade, Industry and Competition ("**DTIC Minister**") acted speedily by issuing three further sets of exemptions from the Competition Act, 89 of 1998 ("the Competition Act"), related to the COVID-19 pandemic national disaster ("**the pandemic**"). These exemptions apply to the Banking Sector, the Retail Property Sector and the Hotel Industry.

Broadly speaking, the Regulations provide block exemptions to agreements or practices in specified banking, retail and hotel sectors, which would in the ordinary instance be prohibited in terms of section 4 or 5 of the Competition Act. As indicated in our note of 20 March 2020, section 4 of the Competition Act prevents firms that are competitors or potential competitors from co-ordinating their activities where it involves price-fixing, the fixing of other trading conditions or market division, and other agreements and practices that involve the sharing of competitively sensitive information or which otherwise result in a substantial lessening of competition in the absence of efficiencies or pro-competitive effects that outweigh the anti-competitive effect.

In terms of section 5(1) of the Competition Act, agreements between customers and suppliers (vertical agreements) that result in a substantial lessening of competition (in the absence of countervailing efficiencies or pro-competitive effects) are also prohibited. In terms of section 5(2), the practice of minimum resale price maintenance is also prohibited.

Block exemption for the banking sector ("the Banking Exemption")

The purpose of the Banking Exemption is to provide an exemption to certain agreements or practices between South African-registered banks, the Banking Association of South Africa and/or the Payments Association of South Africa which would ordinarily be prohibited in terms of section 4 and 5 of the Competition Act. The Regulation is of limited application, as it applies only to agreements/practice undertaken at the request of, and in coordination with, the DTIC Minister or the Minister of Finance for the sole purpose of responding to the pandemic. Very importantly it specifically excludes communication and agreements in respect of prices. Therefore, it appears that in the (unlikely) event that either Minister requests the banks to agree on a lower rate of interest on mortgage loans assist businesses or consumers to overcome the deleterious impact of the pandemic, this would not be allowed. However, given the nature of the pandemic and its probable severe economic effect, it is likely that the Banking Exemption will in due course be amended as circumstances require. The Banking Exemption states expressly that the areas of collaboration exempted may be expanded or reduced by the DTIC Minister by notice published in the Government Gazette. In addition, the banking sector may request the DTIC Minister to expand the scope of the exemption if it identifies additional agreements or practices which are impacted by the pandemic.

Agreements or practices will only be exempted if their object is to minimise the negative impact experienced by businesses and private individuals to manage their finances during the pandemic and to continue their operations in an effective manner post the pandemic. In addition, the Banking Exemption also applies to agreements/practices which will enable the banking sector to manage the banking infrastructure, including the payment infrastructure, ATMs and branches.

In relation to essential payment systems and facilities, the Banking Exemption applies to the provision of essential services by ATM's, branch and corporate banking services, the availability of bank notes to ATM's, banks and businesses, and the continuous provision of electronic payment systems. The banks would therefore be able to coordinate their activities, to ensure that cash is readily available throughout the country and that payments can continue without interruption.

With regard to debtor relief, the Banking Exemption also applies to the development of industry policies and monitoring relating to debtor and credit management with particular reference to (a) "payment holidays" and debt relief measures, (b) limitations placed on asset repossessions, and (c) the extension of credit lines, to individuals and businesses that are subject to financial stress during the pandemic.

The banks, Banking Association of South Africa and Payments Association of South Africa must keep minutes of meetings and written records of any agreements entered into by them or practices in which they engage in respect of which they claim exemption. This is presumably to ensure that a paper trail exists in the case of a dispute as to whether an agreement or practice is covered by the Banking Exemption.

Although the Banking Exemption took effect immediately, any person may comment thereon in writing until 6 April 2020, which may lead to amendments.

Block exemption for the retail property sector ("the Retail Exemption")

The purpose of the Retail Exemption is to exempt certain agreements or practices between specified retail tenants[1] and retail property landlords[2] in terms of section 4 and 5 of the Act in their response to the pandemic. The exempt category comprise agreements/practices which (a) promote concerted conduct preventing the pandemic and alleviating, minimising and containing the economic and social effect of the pandemic, and (b) allow the retail property sector to minimise the negative impact that the pandemic has on certain retail tenants to manage their finances and be able to continue operating as usual after the pandemic.

The Retail Exemption applies only to clothing, footwear and home textile retailers, restaurants and personal care services[3] and their landlords. It is interesting that Government exempted only these retail categories. Whilst one understands that these stores will have to close during the lockdown period applicable from 26 March 2020 to 16 April 2020, there are also many other stores which would have to close during this period, for instance, cinemas and theatres as well as stores that sell books, stationery, newspapers and magazines, electronics and gadgets, furniture and "white goods", sports equipment, toys, candy and confectionery, perfume and other cosmetic goods, etc. This may be due to the Retail Exemption being issued under exigent circumstances. Indeed, the Retail Regulations expressly provide that the exempt retail tenant list may be expanded or (reduced by) the DTIC Minister by notice in the Government Gazette.

Another important restriction is that the agreements/practices must have been undertaken at the request of, and in coordination with, the DTIC for the sole purpose of responding to the pandemic. It also does not relate to communications and agreements/practices in respect of prices (i.e. rentals) unless specifically authorised by the DTIC.

The exempt agreements/practices between the designated retail tenants and retail property landlords are those that have as their sole purpose the survival of tenants of retail properties. These agreements/practices could make provision for (a) "payment holidays" and/or rental discounts of tenants, (b) limitations on the eviction of tenants, and (c) suspending or amending clauses of lease agreements that may restrict tenants from implementing reasonable measures to protect themselves during the pandemic. However, retail property landlords and tenants are invited in the Retail Exemption to request the DTIC Minister to exempt other agreements/practices which are necessary to achieve its purpose.

Similar to the Banking Exemption, retail property landlords and tenants are obliged to keep detailed minutes of meetings and written records of any agreement or practice undertaken in terms of the Retail Exemption.

Block exemption for the hotel industry ("the Hotel Exemption")

The most recent exemption is applicable to all businesses providing short term accommodation and related services to members of the public. Its main purpose it enable the hotel industry to collectively engage with the Department of Health and the Department of Tourism with a view to identifying and providing quarantine sites for COVID-19 patients, as determined by these government departments. The Hotel Exemption is therefore of very limited application.

Agreements and practices in the hotel industry are exempted if undertaken at the request of, and in coordination with, these government departments and include accommodation providers communicating with each other (a) in relation to the capacities and utilisation of accommodation facilities for COVID-19 quarantining, and (b) on the reduction of the cost of providing of such facilities. However, discussions and/or agreements on pricing of such facilities are not automatically exemption; they are only exempted if specifically authorised by the Minister of Health and the Tourism.

Similar to the Banking Exemption and the Retail Exemption, companies making use of this exemption are obliged to keep detailed minutes of meetings and written records of any agreement or practice undertaken in terms of the Hotel Exemption.

Although the Hotel Exemption took effect immediately, any person may comment thereon in writing until 11 April 2020, which may lead to amendments.

Commentary

All three exemptions appear to be a concerted effort by Government to minimise the negative financial implications of certain businesses during the pandemic. It facilitates that the banking sector can continue providing payment and ordinary banking services, it enables financial relief to certain designated retail tenants and other banking customers and it allows hotels to provide their facilities as quarantine sites.

Whilst these measures assist businesses during the pandemic, it also seeks to mitigate the enduring financial impact that businesses may experience after the pandemic.

It is clear from the Regulations that the DTIC Minister has carefully limited the block exemptions, so as not to promote unbounded coordination and collaboration between competitors which can have long lasting anti-competitive effects in the economy. However, it is not clear why retail property landlords and tenants have been selected for special treatment. After all, the tenants of commercial and industrial properties that will have to be closed during the lockdown period will equally suffer from reduced or no income during the lockdown period. The same applies to many other businesses. However, these are early days in the pandemic and it is impossible at this stage to predict its duration and economic effects. We therefore expect that many amendments to these Regulations may be forthcoming in the next days and months, and possibly also other block exemptions.

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[1] Note that the term retail tenant is defined as including only companies which is registered in South Africa and whose place of effective management is within South Africa.

[2] Note that the term retail property landlord include REITs, property developers who own or operate shopping centres and other intermediaries that facilitate the letting of rentable retail property.

[3] Note that each of these terms are given an expanded meaning in the Property Retail Regulations.



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