

COMPETITION

Joint ventures – once competition law’s ugly sister, now beloved Cinderella?

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As the global economy is gripped by the Covid-19 pandemic, world leaders appear to be in the unenviable position of having to make tough decisions which strike a balance between, on the one hand, *life* (by enforcing long-term, hard, stay-at-home lockdowns to curb the spread of infection) and, on the other, *livelihoods* (by easing up restrictions and allowing people to return to economic activity). In addition, the world is in a dire need of timely solutions to protect her nations and its prosperity.

Throughout the Covid-19 pandemic, we have seen law makers, both locally and abroad, move swiftly to enact rules and regulations in an attempt to safeguard their natural and corporate citizens and furthermore attempt to remove restrictive laws to assist in this effort.

In South Africa, the Ministry of Trade, Industry and Competition, has issued several block exemptions from the application of the Competition Act to the healthcare sector^[1], the retail sector^[2], the banking sector^[3] and to the hotel industry^[4]. The block exemptions allow competitors within these sectors to engage in conduct, which is usually considered to be illegal and problematic, in order to combat the harmful effects of the Covid-19 pandemic.

There has also been a pro-active and rare response from large competing international corporates which have stepped forward in order to combine their efforts to assist governments and health agencies reduce the spread of the virus. Notable competitor collaborations include those between Apple Inc. and Google LLC with both companies agreeing to enable interoperability between Android and iOS devices using apps from public health authorities. Furthermore, these firms have indicated that they intend to roll out a Bluetooth-based contact tracing functionality for users who chose to opt-in, while still recognising that privacy, transparency, and consent are of utmost importance in this effort. In a joint statement^[5], Apple and Google recently stated that –

All of us at Apple and Google believe there has never been a more important moment to work together to solve one of the world's most pressing problems. Through close cooperation and collaboration with developers, governments and public health providers, we hope to harness the power of technology to help countries around the world slow the spread of COVID-19 and accelerate the return of everyday life."

There have also been numerous pharmaceutical companies that have teamed up in order to develop or conduct research and development on Covid-19 vaccines. A recent example includes the joint venture between Pfizer Inc. and BioNTech SE who are working together on the development and distribution of a Coronavirus vaccine^[6].

Joint ventures, often a catch-all phrase for competitor collaboration, are often viewed with suspicion by competition authorities. Concerns arise when the collaboration increases the ability or incentive to raise price or reduce output, quality, service, or innovation, to the detriment of competition and consumers. Due to the risks and penalties which can be imposed on firms, by competition law authorities, found to have participated in anticompetitive joint ventures, firms tend to shy away from such opportunities. Furthermore, competition authorities often consider joint ventures to facilitate explicit or tacit collusion through the exchange or disclosure of competitively sensitive information.

But today, under the attack of COVID-19, the world needs innovation and development, at a scope and pace, never seen before. This calls for significant investment, strong balance sheets and massive intellectual capital. COVID-19 highlights the need and importance of joint ventures, bringing about solutions that would not have been possible if companies had to conduct operations on a stand-alone basis.

The Covid-19 pandemic is demonstrating that competitor collaboration can lead to significant benefits. The sharing of information can be used to drive innovation and development within an industry in a condensed timeframe. It can also be used to effectively adjust to changing

circumstances to address capacity concerns. In addition, the ability to share the cost of development encourage participation. In this regard, it raises the question of what opportunities may have previously been missed due to tentative concerns about competitor collaboration.

As the world is bracing for the overwhelmingly negative, long-term impact caused by COVID-19, one wonders if joint ventures or competitor collaboration may become more palatable in the future. We are certainly not suggesting that competitor collaboration cannot give rise to anticompetitive effects nor are we suggesting that all forms of competitor collaboration should be permitted. However, we are asking if, in this changed world we now find ourselves in, whether the rules that were previously designed to curb competitor collaboration ought to be rethought or then the application thereof re-aligned in order to ensure that firms are empowered to make the best of difficult economic circumstances.

If so, the thinking, that joint ventures resembles the fairy-tale ugly sister, may have to transform and recognise that competitor collaboration could very well be the stunning Cinderella who is the envy of the ball.

[1] In the healthcare sector, the exemption is intended to promote access to healthcare, prevent exploitation of patients, enable the sharing of healthcare facilities, manage capacity and reduce prices.

[2] In the retail sector, the exemption is intended 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.

[3] In the banking sector, the exemption is intended to minimise the negative impact on the ability of customers, including both business and private individuals, to manage their finances during the national disaster, and be in a position to continue normal operations beyond the national disaster and to enable the banking sector to manage the banking infrastructure, including the payment infrastructure, ATMs and branches.

[4] In the hotel industry the exemption is intended to enable the hotel industry to collectively engage with the Department of Health and the Department of Tourism in respect of identifying and providing appropriate facilities for persons placed under quarantine, as determined by the Department of Health.

[5] [Apple and Google partner on COVID-19 contact tracing technology](#)

[6] [Pfizer Joins Forces With BioNTech For COVID-19 Vaccine Co-Development](#)



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