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COMPETITION

Some more exemptions from Competition Law during the pandemic

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Competition Law during the pandemic

We have previously reported on the various block exemptions issued by the Minister of Trade, Industry and Competition ("**DTIC Minister**") which allow the banking, hospitals, healthcare, retail property and hotel industries to coordinate their activities, to a certain extent, without fear of falling foul of the Competition Act 89 of 1998 ("**the Act**").[1] Since then, the severe effects of the COVID-19 pandemic ("**the pandemic**") on the economy, businesses and ordinary citizens are increasingly being experienced. It is clear that Government is utilising various tools in an attempt to alleviate those effects. We report on some developments below.

Amended exemption for banking industry

On 5 May 2020 the DTIC Minister expanded the block exemption for the banking industry by amending the original block exemption. The exemption now also covers financial institutions registered in terms of the Financial Sector Regulation Act of 2017. This Act covers the following financial institutions:

(a) a financial product provider;

(b) a financial service provider;

(c) a market infrastructure;

(d) a holding company of a financial conglomerate; and

(e) a person licensed or required to be licensed in terms of a financial sector law;

In terms of the amended exemption, these financial institutions are allowed to enter into agreements regarding payment holidays and debt relief measures, limitations on asset repossessions and the extension of credit lines to individuals and business that are faced with financial stress due to the pandemic. These agreements and practices are limited to the development of industry policies and monitoring in relation to the above. At first glance, the exemption seems quite broad as it appears to apply *inter alia* to institutional asset managers, insurance companies, retirement fund providers, medical funders, stock exchanges and central securities depositories. However, it is restricted in three important respects:

- The coordinated actions can only be engaged in if undertaken at the request of, and in coordination with, the DTIC Minister or the Minister of Finance.
- It excludes communications and agreements in respect of prices unless specifically authorised by the DTIC Minister or the Minister of Finance.
- The sole purpose of the agreements or practices must be to respond to the pandemic.

The inclusion of financial institutions in the banking exemption can be seen as a mechanism used by Government to achieve financial stability of both businesses and ordinary South Africans that are negatively impacted by the pandemic, for instance, persons unable to pay

their monthly pension fund contributions or insurance premiums due to the effects of the pandemic.

The amended exemption adds the Association of Savings and Investments of South Africa (ASISA) and the above financial institutions to the categories of bodies which must keep minutes of all meetings, agreements or practices that fall within the scope of the exemption.

Amended exemption for healthcare industry

On 8 April 2020 the DTIC Minister amended the block exemption for the healthcare industry. The amended healthcare exemption firstly tightens the scope of the exemption. It is now clear that the exempted agreements or practices must be at the request of or in coordination with the Department of Trade, Industry and Competition ("**DTIC**") or the Department of Health ("**DH**") for the purpose of responding to the pandemic. The original exemption referred only to the DH. Furthermore, these agreements or practices may be subject to conditions stipulated by the DTIC or DH. Importantly the exemption is not applicable to practices or agreements in relation to prices unless authorised by the DTIC Minister or Minister of Health.

Secondly, the amended exemption expands the exemption to include agreements or practices between manufacturers and suppliers of medical and hygiene supplies used in the testing, prevention and treatment of the pandemic and any other associated disease. The exemption applies if these agreements or practices communicate the availability and coordinate the procurement and distribution of medical and hygiene supplies. Such communication could be important to ensure that the supply chain works efficiently and that essential health products which contain the spread of the pandemic reach consumers swiftly.

The exemption also contains an indication of the goods and services that fall within the scope of 'medical and hygiene supplies'. These are defined as goods and services that are used to maintain hygiene to preserve one's health and prevent the spread of diseases. These items include, but are not limited to, goods and services used in the sterilisation of equipment, safe disposal of medical waste, hand hygiene and water sanitation, prescription and non-prescription medications, bandages, gauze, isopropyl alcohol, ethyl alcohol, disinfectants and antibacterial products. It is interesting that ventilators, surgical masks and vaccines are not mentioned specifically; however, since the definition does not constitute a closed list, these products can probably be included in the wider genus.

Lastly, the amended exemption directs manufacturers and suppliers of goods and services used in the production of medical and hygiene supplies (in addition to hospitals and healthcare facilities, medical suppliers, medical specialists and radiologists, pathologists and laboratories, pharmacies and healthcare funders) to keep minutes of meetings and records of any agreements of any practice related to the exemption.

Property retail sector

According to press reports, the major representative bodies for real estate in South Africa – the SA REIT Association (SA REIT), SA Property Owners Association (SAPOA) and SA Council of Shopping Centres (SACSC) – formed a collective, with the name Property Industry Group, which has been coordinating the response of the real estate industry to the COVID-19 pandemic, and specifically the economic effects of the lockdown. On 7 April 2020 the group announced an assistance and relief package for the retail sector. In particular, retail landlords will for the months of April and May 2020, offer relief in the form of rental discounts to retail tenants where rental will be waived partially or fully and interest-free rental deferments where the deferred rental will be recovered later over six to nine months from 1 July 2020 onwards. A few points are notable in respect of the package:

- Since the retail landlords (or at least some of them) are competitors of each other, agreeing on such a package would, under normal circumstances, have risked being in contravention of section 4 of the Act (horizontal prohibited practices). However, the block exemption in respect of the property retail sector covers this conduct provided it was done at the request of, and in coordination with the DTIC.
- The same would apply where tenants who are competitors of each other collectively negotiate rental discounts and other terms with their landlord(s).
- The block exemption in question covered a limited number of retail tenants, namely, clothing, footwear and home textile retailers, personal care services and restaurants. It is not clear whether the above relief package is restricted to those tenants.
- The package was apparently designed to avoid retail tenants relying on force majeure or similar provisions in their leases in order to avoid paying rent. Whether it had the intended effect, remains to be seen.[2]

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[1] See https://werksmans.com/legal-updates-and-opinions/exemptions-from-competition-law-in-the-banking-retail-and-hotel-sectors-amidst-covid-19-pandemic/ and https://werksmans.com/firm-news/use-of-competition-law-in-response-to-covid-19-emergency-government-actions-taken/

[2] It has been reported that Dischem, a large tenant in many shopping centres, is refusing to pay its full rental to various landlords. See https://www.businesslive.co.za/fm/money-and-investing/2020-05-07-dis-chem-goes-to-war-with-landlords/



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