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COMPETITION

Ten things you need to know about price gouging: The state of play in South Africa

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By Paul Coetser, Director and Head of the Competition practice

1. **The Competition Commission is aggressively pursuing any company alleged to have engaged in price gouging during the COVID-19 pandemic.** It has already entered into eleven settlement agreements and is engaged in prosecutions of four more companies. One of those companies, Dischem, is a prominent retail pharmacy brand in South Africa, with branches throughout the country. These prosecutions are pursued on an urgent basis and the Competition Tribunal is expected to rule on them quicker than usual.
2. **The Competition Commission (CC) and National Consumer Commission (NCC) have reportedly received more than a thousand complaints from individuals and businesses** that believe they have paid too much for essential products during the pandemic. A sense of moral outrage fuels these complaints; people feel that they are being taken advantage of and exploited during a crisis. Similar cases are pursued in many other countries of the world. However, emotion should never be allowed to override the proper application of legal principles.
3. **The price gouging regulations relate to the sale of essential products and services, including basic foods and consumer items; emergency products and services; medical and hygiene supplies; and emergency clean-up products and services.** These categories are very broad and the CC appears to interpret them expansively. For instance, it has prosecuted companies for pricing of dust masks, even though they cannot strictly be classified as "medical supplies".
4. **Size does not matter.** It matters not whether the supplier is a small or large company and does not have a strong market position. The CC's position is that every company that was able to increase its prices to excessive levels during the pandemic, would be regarded as a dominant market participant with market power. It is also irrelevant whether there were many sales or only a few, or that the amount of the excessive profit was small.
5. **The CC will regard a company as having engaged in price gouging** if a price increase of a product or a service (a) does not correspond to or is equivalent to the increase in cost of providing the product/service, or (b) increases the net margin or mark-up of that product/service above the average margin/mark-up for the period 1 December 2019 to 29 February 2020. The CC apparently only takes actual costs into account, as opposed to future replacement cost.
6. **It matters not whether the supplier charged prices that are market related.** The CC's position is that it is no defence that the supplier charged the same as (or less than) what everyone else in the market was charging. The CC and NCC are not obliged to inform companies immediately once a complaint has been lodged against them, which means that some companies may be blissfully unaware that their pricing behaviour is under regulatory scrutiny.
7. **If the CC prosecutes a company for price gouging, it will expect the company to "disgorge" the excess profits made from the overpriced sales,** and also to pay an administrative penalty of up to 10% of its annual turnover. In recent cases, the CC has argued that the penalty should be an amount equal to three times the excess profits earned by the company accused of price gouging.
8. **The basis upon which the CC has settled certain price gouging cases** include one or more of the following undertakings:

a. to desist immediately from the price gouging conduct;

b. to reduce the gross profit margins of essential products to a percentage agreed upon by the CC, for the duration of the pandemic;

c. to pay the excess profits to the COVID-19 Solidarity Fund or to customers that purchased the excessively priced essential products;

d. to donate essential products to hospitals or charitable institutions such as old age homes;

e. to implement a competition law compliance programme ensuring future compliance with competition laws and the price gouging regulations; and

f. to communicate the contents of the settlement agreement to employees and management of the company.

9. **The NCC will regard a company as having engaged in price gouging if the price it charges for an essential product is unfair, unreasonable or unjust.** These are vague words which are difficult to apply in practice. However, the NCC will apply the same cost, net margin and mark-up tests referred to in paragraph 5 above.
10. **If the NCC prosecutes a supplier for price gouging severe penalties may be imposed**, namely, a fine of up to R 1 000 000; a fine of up to 10% of a company's turnover; and imprisonment for a period of up to 12 months (although the latter is somewhat controversial and open to legal doubt).

Suppliers of essential products and services should determine their prices with care to ensure that they don't fall foul of the price gouging regulations. Companies accused of price gouging should take this seriously and seek legal advice before it is too late.



Paul Coetser

Head of Competition

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