

# South Africa: Exemptions to aid consumers during and after riots

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On 15 July 2021, Ebrahim Patel, the Minister of Trade Industry and Competition, published a block exemption for the supply of essential goods (“Exemption”), which came into effect on the day of publication and is granted until 15 August 2021, unless extended or withdrawn.

The Exemption is aimed at allowing conduct that would usually fall foul of Section 4 and 5 of the Competition Act 89 of 1998, as amended (“Act”) due to the conduct being a restricted horizontal (conduct between competitors) or vertical (conduct between suppliers and customers) practice.

The authority to grant exemptions is derived from section 10(10) read with section 78(1) of the Act. Section 10(10) of the Act states that the “Minister may, after consultation with the Competition Commission, and in order to give effect to the purposes of this Act as set out in section 2, issue regulations in terms of section 78 exempting a category of agreements or practices from the application of this Chapter”.

These specific Exemptions were granted in light of the recent riots in South Africa, which have caused massive losses at retail level as well as supply chain shortages and disruptions. The purpose of the Exemption is to prevent a shortage of essential goods within South Africa, especially to poorer households and small businesses. These Exemptions apply to suppliers of essential goods. Essential goods are defined to mean: “basic food and consumer items, emergency products, medical and hygiene supplies (including pharmaceutical products), refined petroleum products and emergency clean-up products. Essential goods



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*include the final good itself as well as all inputs in the supply chain required for the production, distribution and retail of the essential goods” (“Essential Goods Suppliers”).*

The Exemption provides that Essential Goods Suppliers may communicate and coordinate with each other to ascertain the loss of stock, the gravity of shortages and their location as well as availability of stock in particular areas to gauge the ability of different Essential Goods Suppliers to supply to areas that are experiencing shortages and have a higher demand, including supply to smaller businesses.

Essential Goods Suppliers may also coordinate on inputs, stock expansion or capacity and equitable distribution between Essential Goods Suppliers. Coordinated distribution of essential goods to different geographical areas within South Africa will be allowed if connected to anticipated shortages of a type of essential good or an anticipated shortage of essential goods in a specific area.

The Exemption contains express provisions to monitor all conduct in terms of the Exemption. Essential Goods Suppliers must keep minutes of all meetings and communication and such minutes, as well as written records of agreements must be submitted to the Competition Commission.

The Exemption will provide welcomed relief but is not without risk. Communications between competitors as well as customers/suppliers pose various difficulties not only from a competition law perspective, but also from a commercial perspective. Conduct and exchanges of information in terms of the Exemption may have lasting consequences. It is imperative that firms are fully aware of the perils of so engaging in terms of the Exemption, particularly regarding meeting minutes and the positive duty, in terms of case precedent, to distance yourself from potentially anti-competitive conduct.

Finally, the Exemptions do not allow price-fixing and collusive tendering, nor do they authorize discussions on pricing of essential goods. Firms should be aware that price-gauging is still prohibited in terms of the Consumer and Customer Protection and National Disaster Management Regulations and Directions issued on 19 March 2020.

**Primerio** Director, **Michael-James Currie**, says that the Commission published a report following the exemptions granted during the Covid-19 State of Disaster confirming the positive effects that collaboration between competitors can have in certain instances. This calls into question whether the “characterization” test ought to be recognized as a substantive defence to hardcore cartel conduct cases in South Africa.

These Exemptions can be accessed at: [https://www.gov.za/sites/default/files/gcis\\_document/202107/44854gon616.pdf](https://www.gov.za/sites/default/files/gcis_document/202107/44854gon616.pdf)

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