Competition Commission releases impact report of the results from enforcement initiatives during the COVID-19 pandemic

By Gina Lodolo

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On the 25th of April 2021 the Competition Commission ("Commission") released a media statement pertaining to its now final report titled "*the impact of the COVID-19 block exemptions and commissions enforcement during the pandemic*" ("Report").

At the onset of the pandemic, the Minister of the Department of Trade, Industry and Competition ("DTIC") established block exemptions, which would exempt practices usually falling foul of section 4 and 5 of the Competition Act 89 of 1998 ("Act"). The block exemptions were granted to the Healthcare Sector, the Retail Property Sector, and the Banking Sector. Further, the Commission noted that the pandemic required a particular focus on potential price-gouging by enhancing the advocacy, investigation and prosecution thereof.

The DTIC was empowered to create the block exemptions by Section 78 read with section 10(10) of the Competition Amendment Act 18 of 2018 ("**Amendment Act**") which 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*". Further the Commission had a chance to test Section 8 of the Amendment Act which provides a broader discretion to the Commission in testing whether there has been a violation of the Act through excessive pricing.

The Report highlights that due to the uncertainty of the pandemic and the need to act quickly, the block exemptions created the possibility for unpredictable

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results. As such, to limit the scope of the block exemptions, collaboration needed to be at the request of the Ministers and only granted, upon motivations to respond to the pandemic.

These block exemptions showed their benefits in the Health Care Sector, which allowed cooperation and discussions regarding, *inter alia*, medical supplies, capacity for testing, sharing of resources, testing cost reduction and coordination of pharmaceuticals and other PPE resources.

Through these collaborative efforts the price of testing became a standardised R850, as opposed to ranging from R1 000-R1 500. As the pandemic started, hospital capacity became a forefront of concern. To this end, the Report states that private hospitals and public hospitals shared data which related to capacity, enabling hospital beds and staff in all the respective hospitals to be known. Accordingly, the Report states that "*South Africa managed the pandemic effectively such that the health system was not overwhelmed in the first wave of the pandemic. As such, very few public sector patients were treated at private facilities*". This cooperation will be beneficial in aiding in a potential third wave of the pandemic, which may very well require more hospital beds, of which, availability between the various hospitals is now known.

However, stakeholders with less bargaining power were bound to those with bigger bargaining power and found that they had little choice on the agreed prices by the larger players. Further, according to the Report "*certain provincial departments of health and public sector hospitals*" refused to collaborate due to the voluntary nature of the exemptions and therefore, the Report notes suggestions for compulsory exemptions in future. Further, criticism has been levied in that block exemptions could have been granted to enable medical aid schemes to participate in the COVID-19 roll out discussions through agreements on prioritisation, access, sourcing and side-effect reporting. The Report notes that in the future advocacy work will be increased to ensure that smaller stakeholders who feared a violation of the Competition Act, are informed and encouraged to participated in these collaborative efforts.

In the Retail Sector, collaborative rental arrangements were required due to Level 5 Lockdown, which necessitated the closing of non-essential retail outlets. Collaboration was allowed by limiting evictions, payments holidays and adjusted lease agreements. However, only payment holidays were utilised. These payment holidays were not uniformly agreed between landlords, but rather agreed individually between landlords and their tenants. Nonetheless, the Report notes that the block exemptions purpose of "relief" was met by creating the "platform for discussions" as opposed to landlords agreeing upon a coordinated relief. Further, all retailors were able to benefit from the payment holidays, regardless of their size.

Michael Currie, a partner with competition boutique firm *Primerio Ltd*., highlights that the Report notes criticism in that the lack of uniformity in the granting of payment holidays, created an opportunity for potential anti-competitive tactics and "cartel-like" behaviour from landlords who "*collectively decided to require 100% rental payment in one instance and to require 70% rental payment in another instance*". Accordingly, the Report notes from the minority feedback received, that in the future, frameworks for negotiation "*should have been coupled with tools for mediation between landlords and retailers, to ensure synergy*".

Similarly to the Retail Sector, in the Banking Sector the Report notes that collaboration was only found in bilateral agreements between banks and debtors in the granting of debt relief or payment holidays, as opposed to blanket relief for all debtors. Stakeholders recommended that "*future exemptions or industry solutions that target the sector must not be limited to banks only but include all lenders to ensure a level playing ground*" and further that "*some of the conditions set should be maintained post the pandemic*" as debtors may need longer to recover from the adverse economic effects of the lockdown.

Importantly, the pandemic created opportunities for price-gouging of hygiene, food and medical products. To this end, the Consumer and Customer Protection and National Disaster Management Regulations and Directions ("**Regulations**") were published by the DTIC. According to the Report, the Commissions initiatives included advocacy initiatives through

"enforcement letters" and visible enforcement, which ensured that suppliers susceptible to price-gouging were aware of the possible prosecution and penalties thereof. Further, price-gouging reporting initiatives were increased by the establishment of a consumer hotline, which created the opportunity for consumers to report via SMS/Whatsapp, which yielded a total of 1199 investigations.

Importantly, the Report highlights the precedent set by the decisions in *Competition Commission v Babelegi Workwear and Industrial Supplies CC* ("**Babelegi**") and *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* ("***Dis-Chem**")* where it was held by the Competition Tribunal ("**Tribunal**") that price-gouging in terms of section 8(1)(a) of the Amendment Act can be determined in cases where market power is not sustained over a longer period of time. The Tribunal found that firms who were seen to have temporary market power had engaged in price-gouging. The Report states that it "*established precedent for a simplified test to determine whether price gouging occurred*". Accordingly, The South African team at Primerio International is of the view that this application of Section 8(1)(a) of the Amendment Act is flawed in that the traditional economic tests in establishing excessive pricing were watered down to provide for the circumstances of the pandemic, without relying on the Regulations, but rather the legislation. Thus, as noted in the Report, creating precedent of a now simplified price-gouging test. [For an in depth discussion click here: https://academic.oup.com/jeclap/article/11/9/524/5917388]

Further, the Competition Appeal Court ("**CAC**") in Babelegi went to great lengths to emphasis the flaws in the Tribunals decision. The CAC emphasised the competition law principle of durability, which requires that for a determination of market power to be reasonable, the pricing must be sustained for a long period of time. Durability is an important factor, because it becomes inevitable that other firms will display opportunistic behaviour during a crisis such as COVID-19, which will then create a new equilibrium as competitors once again become constrained to have better prices than their competitors. Accordingly, the context of the pandemic does not warrant short cuts in decision making, such that a small firm, who sold a few masks at an excessive price, should be considered to be dominant. The CAC decided that the consumers were still capable of purchasing masks from other firms, therefore, although the pricing was excessive, consumer harm cannot be assumed simply because the excessive prices were in the context of a health crisis. Following the CAC's criticism of the Tribunal's decision, The CAC did not overturn the Tribunal's decision. This bazar decision potentially finds reasoning in the Report which states that "*A failure to uphold these judgements would have hindered the Commission's ability to respond to the conduct in question, making price gouging more widespread*". This statement is concerning as it alludes to decision making which was made to fit a desired outcome of low prices for consumers, potentially creating unnecessary intervention in competition, which would have naturally found an equilibrium. To this end, the Report states that "a total of R16 532 105 was paid in fines", which, coupled with advocacy initiatives, deterred price increases.

To conclude, although the Tribunal may have erred in its utilisation of Section 8(1)(a) of the Amendment Act instead of utilising the Regulations, as a whole, and according to the Report the block exemptions granted served their purpose and had an overall positive effect in mitigating against the harsh effects of the pandemic.

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