

Covid-19 and competition law: clothes, coffee shops, care services & more

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Businesses are facing uncertainty worldwide as a result of the Covid-19 pandemic. Their rights and obligations have come into question, with competition authorities worldwide moving swiftly to provide clarity and guidance.



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Over the past few weeks, the minister of trade, industry and competition has issued various regulations, seeking to address the difficulties facing South African businesses during the national disaster and lock-down. These regulations govern various facets of the South African economy, including healthcare, consumer goods, banking, hospitality and retail.

Safe harbour

On 24 March, Minister Ibrahim Patel issued a block exemption to the retail property sector. The block exemption creates a "safe harbour" for firms in the sector to co-ordinate particular activities to ensure the survival of tenants of retail properties during the Covid-19 national disaster.

This means that certain retail tenants and retail property landlords are free to reach agreements between and among one another in relation to payment holidays and/or rental discounts for tenants, limitations on the eviction of tenants and the suspension of or adjustment to lease agreement clauses that restrict the designated retail tenants from undertaking reasonable measures required to protect their viability during the national disaster. These agreements, provided they meet certain conditions, will be exempt from the provisions of sections 4 and 5 of the Competition Act which prohibit anti-competitive agreements between competitors (section 4) and anti-competitive agreements between suppliers and customers (section 5).

Carve-outs

However, as the block exemption includes a number of carve-outs and specific requirements, businesses in the retail property sector need to be extremely careful that their activities do not fall foul of the Competition Act. For example, the agreements and practices may only be implemented for the sole purpose of responding to the Covid-19 national disaster. Furthermore, the exemption does not apply to any communication or agreements relating to pricing (unless specifically

authorised by the Department).

It is also important to note that the exemption only applies to retailers involved in clothing, footwear and home textiles, personal care services, and restaurants. It is unclear why the department has limited the exemption to such a narrow category of businesses when a plethora of other retail businesses who rent property from landlords will undoubtedly also be affected, not only by the national disaster, but in particular by the 21-day lock-down.

It is also concerning that any businesses seeking to apply the exemption may only do so at the request of and in co-ordination with the Department. The Department should not be surprised if it receives a tidal wave of concerns, not only from the designated retailers, but also other retailers who have not been identified.

Does the exemption go far enough?

Similar questions are emerging in the UK, following Boris Johnson's much anticipated "stay-at-home" order. The UK Government has since announced that commercial tenants who cannot pay their rent because of Covid-19 will be protected from eviction. These emergency measures, included in the Coronavirus Act, will mean that no businesses can be forced out of their premises if they miss a payment in the next three months. This clear and unequivocal declaration of support will be welcomed by UK retailers.

Comparing the South African government's measures with those of the UK government, we doubt whether Patel's exemption goes far enough in supporting all participants in the retail sector from the drastic effects which the South African lock-down will have on their businesses.

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