



## FIGHTING CORONA

# Block exemption for the Healthcare Sector in SA

**The Department of Trade and Industry (DTI) moved rapidly last week to join the fight against Covid-19, by publishing Block Exemption Regulations for the Healthcare sector, in the Government Gazette on 19 March 2020. This comes only days after the National State of Disaster was declared on 15 March 2020.**

More detail about the ambit of the Block Exemption becomes clear when one notes that it is an exemption from only certain sections of the Competition Act (sections 4 and 5). In plain terms this means that several players in the healthcare sector – including hospitals, pharmacies, medical aid funds, laboratories, pathologists, etc – will not be in contravention of the Competition Act if they have to coordinate an emergency response to the imminent threat of Covid-19.

Sections 4 and 5 of the Competition Act prohibit general agreements that could be concluded between competitors (firms in horizontal relationships), or e.g. between suppliers and their customers (broad category of vertical relationships). Under normal circumstances competitors are not allowed to coordinate their behaviour, such as collectively determining which patients are treated at which hospitals, as this is deemed anti-competitive.

This swift move from the DTI should be welcomed by all and is indeed exemplary. It means that the DTI, in consultation with the Competition Commission, realised almost immediately that the National State of Disaster would require healthcare

stakeholders, such as hospitals and pathology firms, to coordinate their behaviour in order to collectively fight the Coronavirus. If such pro-active coordination mechanisms were to fall foul of the Competition Act, that would be contrary to government's intention of providing quality access to healthcare for all citizens, and even more so in the face of the current Covid-19 threat.

Indeed, section 10 of the Competition Act explains that one basis for exemption is public policy goals. Such an exemption is used to exempt conduct that would be otherwise prohibited, if it is required to achieve identified socio-economic aims. There can be little doubt that coordination of the healthcare

response to Covid-19 is an example of socio-economic benefits. Importantly, the block exemption also makes provision for coordinated responses between the private healthcare sector and the Department of Health, with the sole purpose of:

***“making available additional capacity at healthcare facilities to the public healthcare sector, and ensuring adequate medical supplies to the public healthcare sector”.***

Clearly, if some of the worst case scenarios were to materialise, coordination between the private and public sectors will be key to an efficient response.

While an exemption is clearly justified in the current circumstances, it is not a routine measure and exemptions are only granted in specific circumstances. An example is the National Hospital Network that currently has an exemption from coordinated behaviour, as small hospitals want to bargain collectively with large medical schemes. Another example – more akin to the current block exemption – is the exemption that was granted to the South African Petroleum Industry Association (SAPIA) for the joint operation of a range of supply chain infrastructure, leading up to and during the 2010 FIFA

World Cup. At that stage coordinated behaviour was required to ensure that all forms of fuel (including jet fuel) would be available in sufficient quantities and locations at all times.

It is important to emphasize that the Block Exemption Regulations published on the 19th of March, do not allow healthcare competitors to negotiate prices collectively. The exemption applies only to the coordination of logistics and other necessary measures and does not automatically extend to prices. Any communication and agreements in respect of prices would have to be authorised by the Minister of Health.

The use of the exemption clause in the Competition Act is clearly justified on the basis of socio-economic stability and to ensure an efficient and coordinated response from the healthcare sector. This is an important part of government's effort to be prepared for an increase in Covid-19 cases. The swift move by the DTI in this regard seems to form part of a well-coordinated and timely response by government to date and one hopes that this specific exemption will pave the way for efficient coordination between the public and private healthcare sectors. The country will certainly require a coordinated approach in the face of the Covid-19 threat.



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