

COVID-19 block exemption for the healthcare sector - South Africa

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Acting swiftly to try to contain the spread of Covid-19 in South Africa, on 15 March 2020 President Cyril Ramaphosa declared a National State of Disaster. Now the government has gone further - on 19 March 2020 regulations issued by the Minister of Trade and Industry (the "Regulations") were published in the Government Gazette granting certain block exemptions to the healthcare sector in an effort to combat spread of the COVID-19 virus.

The purpose of the Regulations is to exempt a category of agreements or practices in the healthcare sector from conduct which would otherwise contravene the provisions of the Competition Act 89 of 1998 (the "Act") with respect to agreements between competitors as well as between suppliers and customers. . This exemption allows concerted conduct between industry players which would otherwise be prohibited, to prevent an escalation, and alleviate the effects, of the COVID-19 disaster, and is aimed at preventing exploitation, sharing healthcare facilities, managing capacity and reducing prices.

The categories of agreements or practices which are exempted are those agreements which are undertaken at the request of, and in coordination with, the Department of Health, and aimed at responding to the COVID-19 pandemic. They specifically exclude communication and agreements in respect of prices unless authorised by the Minister of Health. The exemption applies to various participants in the healthcare sector, namely hospitals and healthcare facilities; medical suppliers; medical specialists and radiologists; pharmacies and healthcare funders.

In order to achieve the intended aim of the Regulations, agreements and practices amongst each of the above healthcare sector participants are exempt if they meet the criteria and purpose as set out in the Regulations. These may vary depending on the participant in the healthcare sector involved, but commonly include agreements and practices for the purpose of communicating capacity and utilisation, procurement of inputs for testing and treatment, allocation of patients between hospitals, sharing facilities, standardisation of quality care protocols and distribution and transfer of medical supplies and equipment.

As regards hospitals and healthcare facilities, a notable purpose for which agreements and practices would be exempted is coordination in relation to procurement of various consumables, pharmaceuticals and other inputs required for optimal treatment, to ensure that inputs are procured in the most efficient manner. This is very wide and may encompass sharing sensitive information on hospital supply chains. The Regulations also make provision for agreements and

practices between medical specialists or radiologists which have the purpose of communicating and sharing data in relation to the scale of the outbreak, disease profile and patient profile. The Regulations, however, do not define medical specialists and this may find wide application. Pharmacies may be party to agreements or practices for the purpose of communicating in respect of availability of pharmaceuticals and medical consumables. This is important to address shortages of key hygiene supplies required to prevent the spread of COVID-19.

The Regulations also make provisions for measures to reduce costs. The Regulations allow for healthcare funders to enter into agreements or engage in practices with each other for the purpose of cost diagnosis, tests and diagnostics, treatment and other preventative measures. The Regulations also allow for healthcare funders to conclude agreements or engage in practices with healthcare facilities, as well as other healthcare providers with the sole purpose of reducing the cost of diagnosis, tests and diagnostics, treatment and other preventative measures.

The Regulations allow for agreements and practices to be concluded between the private healthcare sector and the Department of Health for the sole purposes of reducing cost of diagnosis, testing, treatment and other preventative measures, including vaccines. However, such agreements and practices may only be undertaken at the request of the Department of Health and subject to oversight and guidance by the Department of Health. Further, any discussions or agreements on pricing must be authorised by the Minister of Health.

The Regulations call for any person to make representations to the Department of Trade and Industry within 14 days of its publication.

The Regulations come at a time when the healthcare sector is anticipating taking tremendous strain, if the COVID-19 virus is not successfully contained. It is a breath of fresh air that they may have needed in order to bolster efforts to combat the spread of COVID-19. It is an encouraging sign of co-operation between the public and private sectors, and it is to be hoped that they will be successful. The healthcare sector participants will nevertheless need to be wary that they do not engage in any conduct that is going beyond the scope of these Regulations, and thus fall foul of the Act despite their well-intentioned efforts.

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