



competitioncommission
south africa

IMPACT ASSESSMENT REPORT

on

THE IMPACT OF THE COVID-19 BLOCK EXEMPTIONS AND COMMISSION'S ENFORCEMENT DURING THE PANDEMIC

DATE: March 2021

TEAM MEMBERS:

Khalirendwe Ranenyeni

Qhawe Mahlalela

Queen Khetsi

Contents

1. INTRODUCTION	3
2. IMPACT OF COVID-19 BLOCK EXEMPTIONS	5
2.1 Introduction	5
2.2 Covid-19 Block Exemptions for the Healthcare Sector	7
2.2.1 How were the exemptions used to respond to the crisis?.....	9
2.2.2 Perceived benefits of the exemptions	18
2.2.3 Perceived adverse consequences of the exemptions.....	22
2.2.4 General issues raised	27
2.2.5 Conclusion	28
2.3 Covid-19 Block Exemptions for the Retail Property Sector	29
2.3.1 How were the exemptions used to respond to the crisis?.....	31
2.3.2 Perceived benefits of the exemptions	36
2.3.3 Perceived adverse consequences of the exemptions.....	40
2.3.4 Whether the exemptions were adequate in responding to the crisis.....	41
2.3.5 Conclusion	42
2.4 Covid-19 Block Exemptions for the Banking Sector	43
2.4.1 How were the exemptions used to respond to the crisis?.....	45
2.4.2 Perceived benefits of the exemptions	50
2.4.3 Adequacy of the exemptions.....	53
2.4.4 Conclusion	54
3. DETERENT EFFECTS OF THE ANTI-PRICE GOUGING INTERVENTIONS.....	55
3.1 Introduction	55
3.2 Overview of anti-price gouging interventions.....	56
3.2.1 The Commission's initiatives.....	56
3.2.2 Price gouging complaints and settlements	59
3.3 Methodology	63
3.4 Deterrent effects of the Commission's interventions.....	64

3.4.1	Measuring Awareness	64
3.4.2	Measuring Deterrent Effects or Compliance.....	66
3.4.3	Measuring the effectiveness of the Regulations in achieving their objectives.	68
3.4.4	Measuring the value of fines and donations	70
3.5	Conclusion on deterrent effects of the Commission's intervention.....	71
4.	CONCLUSION.....	73

1. INTRODUCTION

1. This study assesses the impact of the Commission's work during the Covid-19 national disaster. The impact of two pieces of the Commission's work is assessed in this study.
2. Firstly, we assess the impact of the Covid-19 Block Exemptions that were granted by the Minister of the Department of Trade, Industry and Competition ("DTIC"), after extensive consultation with the Commission, to assist three key sectors in their response to the pandemic, namely the (i) the Healthcare Sector, (ii) the Retail Property Sector, and (iii) the Banking Sector. Effectively, these block exemptions allowed market players in these sectors to collaborate and coordinate their response to the crisis with the ultimate goal of mitigating the negative economic and social impact of the crisis. Under normal circumstances, such coordination and/ or collaboration would have been in contravention of Section 4 and/ or Section 5 of the Act. The impact study therefore seeks to understand from market participants how they utilised these exemptions, the benefits achieved, any unintended consequences and input on how the design may have been improved.
3. Secondly, we assess the deterrent effects of the Commission's advocacy efforts, investigations and prosecutions of price gouging contraventions during the Covid-19 disaster period. After the announcement of the national lockdown in March 2020, South Africa saw unprecedented spikes in demand for hygiene and healthcare products, needed to prevent the spread of the virus. Consumers also started panic-buying and stockpiling essential food stuffs. This, along with other factors provided conditions for price gouging by suppliers and retailers of these products. The Commission was then called upon to respond to price gouging in the first wave to protect consumers and customers from unconscionable, unfair, unreasonable, unjust or improper commercial practices during the national state of disaster. The Commission responded through advocacy initiatives as well as investigation and prosecution of price gouging allegations. Whilst there is a public record of actual investigations and prosecutions, what the current study seeks to assess is whether these interventions deterred further acts of price gouging during the disaster period.
4. The Commission notes that the recent amendments to the Competition Act made possible some of the Covid-19 responses. In particular, the block exemptions were enabled by the amendment to Section 78 of the Act which afford the Minister the power to exempt a category of agreements or practices from the application of the Act. The successful prosecution of price gouging cases was enabled by the amendments to Section 8 of the Act which replaced the rigid definition of '*excessive price*' with a more discretionary

approach provided for in Section 8(3) of the Amendment Act and also provided for reverse onus in Section 8(2) if there is a prima facie case of an excessive price. This required firms to justify their pricing conduct where increases were excessive, which many simply failed to do.

2. IMPACT OF COVID-19 BLOCK EXEMPTIONS

2.1 Introduction

5. In response to the declaration of Covid-19 as a national disaster on 15 March 2020, the Minister of the Department of Trade, Industry and Competition (“DTIC”), Honourable Mr. Ebrahim Patel (“the Minister”), after extensive consultation with the Commission, granted block exemptions to various sectors in terms of Section 10(10) of the Competition Amendment Act of 2018 (“the Amendment Act”), read with section 78 of the Amendment Act. Section 10(10) of the Amendment Act allows the Minister, after consultation with the Commission, to grant block exemptions in order to achieve a specific strategic purpose. The Minister triggered this section of the Amendment Act by gazetting regulations which granted block exemptions to the (i) Healthcare Sector, (ii) Banking Sector, (iii) Retail Property Sector, and the (iv) Hotel Sector.
6. Effectively, these block exemptions allowed market players in these sectors to collaborate and coordinate their response to the crisis with the ultimate goal of mitigating the negative economic and social impact of the crisis. Under normal circumstances, such coordination and/ or collaboration would have been in contravention of Section 4 and/ or Section 5 of the Act which, respectively, prohibit anticompetitive concerted practices and agreements amongst firms in a horizontal relationship in the case of the former or firms in a vertical relationship in the case of the latter.
7. It is important to note the context to these exemptions when assessing their design and impact.
 - 7.1. First, decisions on the granting and design of exemptions were typically made in a matter of days given the rapid move from a National State of Disaster to a level 5 lockdown of the economy.
 - 7.2. Second, there was considerable uncertainty at the time as to how the pandemic may play out over the initial months and in the longer term. This meant a need to identify the most likely outcomes and empower market participants to address these collectively. However, some outcomes were not realised and in some cases other unexpected issues arose. Where appropriate, exemptions were adjusted.
 - 7.3. Third, the Commission and the Ministry may design and grant the exemptions, but it is ultimately up to the market participants to coordinate their response to the crisis under the umbrella granted by the exemptions with the ultimate goal of

mitigating the negative economic and social impact of the crisis. This was far easier where market participants were already organised and where there was a common agenda. It proved more difficult where competing needs exist or where groups of firms, such as SMEs, were not organised.

8. The Commission specifically sought to design the exemptions in a manner which would permit required coordinated responses to the pandemic that was welfare enhancing, but ensure that the exemption was not so wide ranging so as to permit collaborations that may extend beyond what is required to deal with the pandemic. This was important because many applicants pushed for a broad exemption for any actions that might be required, creating substantial risk that welfare reducing collaborations would occur. This risk was real insofar as some market participants have sought to collaborate in order to reduce the negative effect the pandemic on their business rather than pursuing a broader social welfare benefit. For instance, the design elements included the following:
 - 8.1. Many of the provisions in the exemption had to be triggered by the Minister. The agreements, coordination or collaboration in these sectors would be exempted ***if*** undertaken at the request of, and in coordination with, the relevant Ministers¹.
 - 8.2. Further, the agreements would be granted for the sole purpose of responding to the Covid-19 pandemic disaster and ***specifically exclude communication and agreements in respect of prices unless specifically authorised*** by the relevant Ministers. This would permit ex-post enforcement if the industry strayed from this purpose.
 - 8.3. The requirement to record minutes for all industry meetings which could be provided to the Commission on demand.
 - 8.4. No collaboration over prices in most circumstances.
 - 8.5. The provision to expand the scope of the exemption upon motivation to the Minister rather than to leave the scope open-ended.

¹ For the Healthcare Sector Exemptions, the relevant Ministers were the Minister of Trade and Industry and the The Minister of Health. For the Banking Sector, the relevant Ministers were the Minister of Trade and Industry, and the Minister of Finance; For the Retail Property Sector the relevant Minister was The Minister of Trade and Industry; and for the Hotel Sector the relevant Ministers were The Minister of Trade and Industry and the Minister of Tourism.

- 8.6. The refusal to grant exemptions to industries where it was determined that cooperation was not required in order to respond to the pandemic or where the application to the Minister was overly broad and could not be narrowed by applicants. For instance, the Commission recommended that exemptions not be granted to the Communications industry, the petroleum industry and the steel industry.
9. As far as the Commission is aware, no material collaborative efforts took place in the Hotel Sector, hence this sector is not discussed any further in this report. The rest of this chapter discusses the block exemptions that were granted to the three sectors in which collaborative efforts occurred (and the impact of such collaborative efforts in responding to the crisis) namely, the Healthcare Sector, the Banking Sector, and the Retail Property Sector. The specific focus is on the following questions:
 - 9.1. How the exemptions were used in responding to the crisis,
 - 9.2. What are the perceived benefits of the exemptions?
 - 9.3. Whether there are any unintended adverse consequences of the exemptions, and
 - 9.4. Whether the exemptions were adequate competition measures in responding to the crisis.
10. These questions do not only assist in determining the impact in general but also whether there are some design issues which could have improved the impact of the exemptions. This may include issues around operationalising the exemptions but also reducing any unintended consequences. These additional insights will assist in improving exemption design as we move forward with the pandemic, including exemptions that may be required to promote economic recovery and not just a response to the pandemic.
11. Importantly, the impact of these exemptions are examined for the period up to October 2020 and do not incorporate the impact of the exemptions in the second wave of infections that took place in December 2020 to February 2021. It is likely that exemptions in healthcare in particular would have been far used more extensively in the second wave given the sheer number of hospitalised patients.

2.2 Covid-19 Block Exemptions for the Healthcare Sector

12. The Healthcare Sector block exemption was requested by the Hospital Association of South Africa (“HASA”) on 17 March 2020. HASA is an association of hospitals and its

constituent members are Netcare Limited, Life Healthcare Limited, Mediclinic (Proprietary) Limited, and various members of the National Hospital Network (NHN).

13. In motivating for the need for these exemptions, HASA cited a number of constitutional rights that would be protected if the exemptions were to be granted. These include the following:
 - 13.1. *“Everyone has inherent dignity and the right to have their dignity respected and protected”*
 - 13.2. *“Everybody has the right to life”*
 - 13.3. *“Everybody has the right to have access to healthcare services”*
14. In order to protect these human rights, HASA specifically requested an exemption for various hospitals to coordinate in the following areas:
 - 14.1. Being able to co-ordinate on ensuring that patients are allocated (to the extent required) between hospitals in the most efficient means possible to ensure that the respective capacities of hospitals are effectively utilized;
 - 14.2. Being able to communicate with each other in relation to capacities and utilization of facilities;
 - 14.3. Being able to coordinate on the allocation of specific types of services, medical professionals and nurses between the various hospitals; and
 - 14.4. Being able to coordinate in relation to the procurement of various consumables, pharmaceuticals and other inputs required for the optimal treatment of patients during the national disaster period in order to ensure that inputs are procured in the most efficient manner possible.
15. On 19 March 2020, the Minister granted the ***Covid-19 Block Exemption for the Healthcare Sector, 2020***.² This exemption granted HASA’s requests, but because of the uncertainty at the time as to how the pandemic would play out, the Minister in consultation with the Commission also extended the exemption to include the following areas that were identified as most likely to be affected by the pandemic in the sector:

² See Annexure A for the exemption and Annexure B for the amendment of the exemption

- 15.1. Medical suppliers are able to communicate on the availability of supplies and coordinate on procurement and distribution;
 - 15.2. Medical specialists and radiologists are able to share data on the scale of the outbreak, disease and patient profiles, capacity and utilization, and agreeing to standardise care protocol or transfer supplies;
 - 15.3. Pathologists are able to communicate on capacities and utilization; co-ordinate on procurement of inputs required for testing, and transferring medical supplies and equipment;
 - 15.4. Pharmacies are able to communicate on availability of pharmaceuticals and medical consumables, and co-ordinating on transfers and procurement; and
 - 15.5. Healthcare funders are able to agree to reduce the cost of diagnosis, tests, treatment and preventative measures, and to reach agreement with healthcare facilities to reduce these costs.
16. On 08 April 2020, the scope of the exemptions was further expanded to include competing manufacturers and suppliers of medical hygiene goods and services (such as hand hygiene and water sanitation, ethicals and consumables, disinfectants, and anti-bacterial products). The manufacturers and suppliers of these categories of goods and services were allowed to communicate with one another in relation to stock availability and to also coordinate on the procurement and distribution of these categories of goods and services.
 17. The foregoing laid an enabling framework for the Healthcare Sector to collaborate its response to the pandemic without being constrained by the Competition Act, in particular the anti-cartel provisions. The rest of this section assesses whether the block exemption was effective in enabling the sector to respond to the pandemic. The section seeks to answer the questions as set out in Section 2.1 above.

2.2.1 How were the exemptions used to respond to the crisis?

18. The table below provides a summary of how stakeholders in the healthcare sector used the exemptions to respond to the crisis under each exempted practice or area of collaboration.

Table 1: Summary of how the granted exemptions were used

Exempted Practice/Area of Collaboration	How the exemptions were used
Coordination on the allocation of patients between hospitals	Very few public sector patients were treated in private sector hospitals. Through the exemption, both private and public hospitals could collaborate on the allocation of patients and through the exemption, patients that needed care in either of the sectors could be easily transferred. That ability provided important comfort to the industry.
Communication in relation to capacities and utilization	Hospitals shared data on the capacity (measured by beds) and the utilization thereof. This enabled hospitals to know where they could move patients if and when the need arose
Coordination on the allocation of specific services, medical professionals and nurses between hospitals	Hospitals could share resources if needed. This included programmes that aimed at temporarily appointing student nurses and doctors. No submissions were received on the area of resource sharing. Although the DoH did appoint temporary healthcare professionals, this does not seem to have occurred under the remit of the exemptions.
Procurement of various consumables, pharmaceuticals and other inputs required for the optimal treatment of patients to ensure they are procured in an efficient manner	Stakeholders coordinated on the procurement of PPE. This resulted in the reduction of PPE prices and also ensured adequate supplies of PPE, although there were challenges with issues around quality and delays in the procurement of the consumables
Medical suppliers can communicate and coordinate on procurement and distribution	Coordination took place on the procurement of medical supplies
Data sharing by radiologists and specialist on scale of the outbreak, disease and patient profile	Stakeholders coordinated and shared data on the number of tests and other information that helped keep record of the results or statistics of the COVID-19 virus
Communication between radiologists on capacities and utilization, coordinate on procurement of inputs required for testing, transferring medical supplies and equipment	Stakeholders collaborated to formulate the most efficient tools for testing and utilised same across the country. Further to this, communication took place in instances where regions or areas had access to medical supplies and to coordinate the transfer to areas that did not.
Communication between pharmacies on the availability of pharmaceuticals and medical consumables, coordination and on transfers and procurement	Communication took place in instances where regions or areas had excess medical supplies and coordinated on the transfer thereof to areas with a shortage
Healthcare funders are able to agree to reduce the cost of diagnosis, tests, treatments and preventative measures and to reach an agreement to reduce these costs	Stakeholders managed to coordinate and push down the price of testing from between R1000 and R1500, down to R850 across the board

19. Below is a detailed discussion of how the exemptions were used to respond to the crisis under each exempted area of collaboration. Because some of the areas of collaboration are interrelated, the format of the discussion below does not follow the sequence in the table.

A detailed discussion of how the exemptions were used under various areas of collaboration

20. Below is a list and brief discussion of the areas of collaboration for which players in the health care sector required and/ or made use of the Covid-19 Block exemptions for the Healthcare Sector. The areas covered in these sections are: capacity and capacity utilisation; cost reductions for Covid-19 tests; Communication to ensure adequate supplies of PPE, Covid-19 tests, and Medical Equipment at lower prices; sharing data of data on the scale of the outbreak, and clinical guidelines. We discuss each of these areas in turn.

Capacity and capacity utilisation

21. The exemptions provided for hospitals to share data on the extent of capacity/bed utilisation and to also share capacity with each other. The rationale for this provision was that there was initially a concern that the scale of the outbreak would be too large that some hospitals would be capacity constrained and would not have enough capacity to provide care to all their patients. Patients would therefore need to be sent to competing hospitals with available capacity to receive care.
22. Three medical aid schemes, including one of the largest medical aid scheme administrators in the country,³ submit that sections that applied to them that were set out in the exemptions related to agreements to support the public healthcare sector. These included agreements or practices between the private healthcare sector and the Department of Health (“DOH”) with the idea of making available additional capacity at healthcare facilities to the public healthcare sector when needed and ensuring adequate medical supplies to the public sector.⁴
23. The Commission learned that one of the largest three private hospital groups⁵ collated data on the number of hospital beds available and beds in use and this was shared with other hospitals in the private sector as well as the DoH in order to ascertain the sector’s

³ X and X

⁴ See submission from X

⁵ X

response capabilities. According to one of the largest medical aid scheme administrators, fortunately, 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.⁶

24. The smaller two schemes⁷ however submit that they did not have direct involvement in these discussions and agreements, although their members would have benefited from the agreements in place. Nevertheless, these schemes voiced their support for the greater collaboration between the private and public sector.⁸

Cost reduction for the Covid-19 Tests

25. As regards the price of Covid-19 tests, the study found that the exemptions were used to create a forum for discussions to reduce the cost to patients of Covid-19 test kits. Since public sector tests were conducted through the national Health Laboratory Services, this also led to a reduction of costs of tests for the state as well.
26. One of the largest three pathology laboratories⁹ submits that the exemptions assisted immensely in terms of setting a price for the COVID-19 PCR¹⁰ tests. This laboratory engaged in collaborated efforts with other stakeholders in the sector in setting a price for the COVID-19 PCR test after receiving permission to do so. Prior to the collaboration, laboratories were charging between R1000 and R1500 per test but this was reduced to R850, representing a 15-43% price reduction. These sentiments were echoed by one of the largest three private hospital groups.¹¹
27. Similarly, a small black-owned medical scheme¹² submits that it collaborated with its administrator¹³ in that the administrator informed them that there was a directive for the different pathology companies to charge a maximum of R850¹⁴ for the COVID-19 test, and thereafter the scheme was further provided with information on how the test would be charged.

⁶ See submission from ✂

⁷ ✂

⁸ See submission from ✂

⁹ ✂

¹⁰ PRC stands for Polymerase Chain Testing. This is the test that looks for the genetic material of the virus itself in the nose, throat, or other areas in the respiratory tract to determine if there is **an active infection** with Covid-19.

¹¹ ✂

¹² ✂

¹³ ✂

¹⁴ See submission from ✂

28. In addition, the National Pathology Group (“NPG”) negotiated with suppliers for lowest possible reagent prices and performed activity-based costing to arrive at the lowest possible price for the test.¹⁵ The NPG further negotiated with suppliers to conclude agreements on a set of essential and supplementary tests and prices for state patients referred to private facilities for COVID-19 related treatment. In this regard, the NPG negotiated service level agreements with the Western Cape Department of Health for its members to supply a list of essential tests, at a capitated rate, and a list of supplementary tests, at a discounted fee-for-service rate for these patients.¹⁶ It is not clear whether the NPG had agreements with other provinces. The Commission understands that Lancet attempted to have negotiations with each province but was unsuccessful, suggesting that negotiations at a national level might have achieved better outcomes.

Communication to ensure adequate supplies of PPE, Covid-19 tests, and Medical Equipment

29. The exemptions were also applied in negotiations around ensuring adequate supplies of healthcare equipment. A large pathology laboratory and one of the largest three hospital groups¹⁷ both submit that stakeholders communicated with each other to ensure adequate supplies of PPE and COVID-19 tests equipment and reagents for all parties. These engagements involved the NPG, Business 4 South Africa (“B4SA”), the National Health Laboratory Services (“NHLS”) and other parties and pertained to ensuring that there is improved supply from manufacturers and sharing materials between each other to ensure that there are no shortages.¹⁸
30. Under the exemptions, hospitals (both public and private) were required to conduct a continuous assessment of the amount of equipment (especially ventilators), but also anaesthetic machines and CiPAPs as per request by the DTIC to be used to determine the country’s response capabilities.¹⁹
31. A certain medical scheme administrator which administers more than ten medical aid schemes²⁰ collaborated with a wholesaler of healthcare products²¹ to bring cost-effective pricing of PPE to healthcare providers to ensure that they are protected from the risk of

¹⁵ Further see submission from X where a comparison is made for the price of the test across a few countries

¹⁶ See submission from X

¹⁷ X

¹⁸ See submission from X

¹⁹ See submission from X

²⁰ X

²¹ X. The company specializes in the wholesale and distribution of pharmaceutical, surgical and medical products and devices with a national distribution footprint

transmission while they treat patients. This initiative would ensure that healthcare workers had quality and reliable PPE at lower prices.²² On the one hand, the administrator approached the wholesaler of PPE to understand the pricing of different PPE items. On the other hand, the administrator engaged with hospital services groups to understand the expected utilisation of PPE. The administrator then used the information collected from these engagements to determine the best prices for PPE for its clients for client medical schemes.

Sharing data on the scale of the outbreak

32. Another area of collaboration for which the exemptions were granted and used was in the sharing of data on the scale of the Covid-19 outbreak. One of the largest pathology laboratories submits that the exemptions granted stakeholders a platform for the sharing of data in relation to the scale of the outbreak, the disease profile and patient profiles. Members of the NPG shared COVID-19 positivity rate data per province with each other and with the NICD.²³
33. A large private hospital group submits that, on a daily and weekly basis, it shared data on the scale of the outbreak within the healthcare workforce. In this regard, the hospital group submits that daily data updates were sent per hospital group (for both HASA and non-HASA members) and collated by a HASA representative. The data detailed the number of healthcare workers that were infected, in isolation, hospitalised or deceased to determine the impact of the pandemic on healthcare workers. The hospital group also shared data on the number of COVID-19 positive patients or patients under investigation (these are patients that were tested but still waiting for test results).²⁴ This was part of collaborative efforts such as surveillance reports, which aimed to provide updates on COVID-19 positive patients as well as patients under investigation for COVID-19. The data was sent per hospital group to the National Institute for Communicable Diseases (“NICD”) to ensure that the NICD was able to track the progress of the pandemic and thereby assist the country to better respond to the crisis.²⁵

Clinical Guidelines: Prescribed Minimum Benefit and costs of diagnostics, treatment, and care

²² See submission from ✂

²³ See submission from ✂

²⁴ See submission from ✂

²⁵ See submission from ✂

34. The study found that the exemptions provided for agreements and practices between health funders and or healthcare facilities aimed at reducing the cost of diagnosis, tests and diagnostics, treatment, and other preventative measure in addition to the cost of tests as discussed above. A small black-owned medical scheme submits that before the guidelines were issued in March 2020, there was a lot of uncertainty in the health industry on how to respond to the pandemic.²⁶ The scheme notes that the government, together with the Council for Medical Schemes (“CMS”), sought to minimize the uncertainty and provided leadership in the development of clinical guidelines by the National Institute of Communicable Diseases (“NICD”) and the declaring of Covid-19 as a Prescribed Minimum Benefit (“PMB”).²⁷ Many stakeholders,²⁸ including large medical schemes submit that this area of collaboration applied to them.
35. It appears that at the time the submissions were received the industry still had not agreed on the billing codes for the treatment of Covid-19 and the PMB thereof according to submissions from some stakeholders.²⁹ However, as we discuss in detail below, through the exemptions, discussions took place through the Health Funders Association (HFA) and strides were made in establishing certain principles for the pricing of Covid-19 care, prescription of PMBs as well as which billing code would be used for the COVID-19 tests and diagnosis code for payment. Details of these developments are spelt out under the section on benefits of the exemptions below.
36. Another area where collaboration took place relates to payments of pre-admission COVID-19 tests. In this regard, the private hospital groups tried to engage funder associations to implore them to pay for Covid-19 tests prior to a patient being admitted to a hospital for illnesses other than COVID-19. Pre-admission tests are necessary in order to protect the patients who are being admitted, other patients, as well as healthcare workers from contacting COVID-19 tests. One of the largest three hospital groups notes that even though private labs had already reduced the costs of COVID-19 tests and pre-admission testing was considered a cost-effective intervention, funder associations were still willing to have engagements with hospital groups to determine the hospital admissions that would qualify for payment of pre-admission tests and which would not.
37. For example, they needed to determine whether surgery would be covered or not and if covered, funders would still need to know if it was necessary for the patient to undergo

²⁶ See submission from X

²⁷ See submission from X

²⁸ Such as X.

²⁹ See submissions from X and X

the specified surgery or not before they can pay for the pre-admission test.³⁰ However, the hospital group submits that private hospitals are not in a position to have discussions on such matters as in their view, admissions are to the discretion of the doctor and the patient. The hospital group submits that when this message was conveyed to funder associations, it was incorrectly interpreted as the hospital groups walking away from the discussion. Nevertheless, as the hospital group submits, doctors and hospital groups continued to require pre-admission tests and funders paid for these tests.

38. It is clear from the above that the healthcare industry extensively used the block exemptions. The submissions received also suggest that the exemptions could have been used even more extensively had it not been for some challenges that were encountered in operationalising the exemptions. Below we turn to the discussion of these challenges.

Challenges in operationalising the exemptions

39. The submissions we received show that there are several aspects of the exemption that created restraint or barriers in the effective use of the exemptions. This includes challenges with the timeliness of coordinating with and getting approvals from the relevant departments, the misaligned incentives from the various stakeholders, and the inability of stakeholders to coordinate on a standard blanket approach to the cost reduction measure. These challenges resulted in some lack of synergy in the use of the exemptions and also meant that some stakeholders, particularly those with the least bargaining power, did not have a choice but to take the prices that were agreed on by larger players.
40. One of the largest medical aid schemes explains that there were constraints that stood in the way of some of the opportunities created by the exemption.³¹ In this regard, the scheme submits that they did not directly use the exemption for medical aid schemes directly, which exempted agreements between medical aid schemes. The scheme averred that this was hindered by the necessity for the Minister of Health to authorise all discussions and this authorisation was at the time of the submission not issued. Furthermore, stakeholders felt that this provision led to considerable delays for reaching agreements.³²
41. A joint appeal was submitted to the Council for Medical Schemes (CMS) by two associations that together represented the majority of medical schemes, requesting that the Registrar of the CMS (“the Registrar”) leads a process of consultation and

³⁰ See submission from X

³¹ See submission from X

³² See submission from X and X

engagement with the Minister of Health in order to motivate a process which would culminate in the speedy implementation the Block Exemption. Subsequent to discussions held with the Registrar, on 25 March 2020, a proposed framework for engagement was drafted and submitted on 2 April 2020 for further consideration. The CMS's position regarding tariff negotiations and in response to the submission was captured in CMS circular 25 of 2020 dated 26th March 2020 as follows:

41.1. *“the CM supports price and tariff negotiations between key players aimed at improving access to care, prevention of exploitation of patients and cost reduction in the health sector as reflected in Section 4 and 5 of the Regulation No.43114 published by the Ministry of Trade and Industry. Section 4 and 5 of the same regulation provides that at the request of the Department of Health, and subject to the oversight and guidance by the Department of Health, agreements must accordingly be approved and duly authorised by the Minister of Health.”*³³

42. One of the largest medical aid schemes submits that following on from the Circular, the HFA and BHF had discussions on options and developed a joint industry response which was submitted to the CMS Registrar where the CMS was requested to forward the submission to the DOH for consideration and approval.³⁴ The scheme submits that unfortunately, as at the date of their submission to the Commission, there had been no official response from the CMS. However, upon enquiry, the CMS has indicated that discussions between the CMS and the Department of Health were underway as at the time of submission.³⁵
43. It is for these reasons that industry players suggest that the requirement for agreements to be authorised by the Minister delayed the negotiations unnecessarily and effective implementations could have taken place in a much shorter space of time if this requirement did not need to be met. One medical aid scheme notes that the prolonged process is an indication that there is a need to enable communication and collaboration between sectors in an ongoing basis.³⁶
44. One of the largest three hospital groups submits that although the exemptions allowed for collaborations, certain provincial departments of health and public sector hospitals were allowed to cooperate in the implementation process of the exemptions and they refused to have engagements with them., seemingly because they did not feel compelled to do

³³ See submission from ✂

³⁴ See submission from ✂

³⁵ See submission from ✂

³⁶ See submission from ✂

so³⁷ A small black-owned medical aid scheme supplements this submission and notes that there is a need to have more inputs through public engagements with the different healthcare players, particularly on the supply side of the industry. In their view, certain players did not feel compelled to negotiate although the regulation allowed them to.³⁸ As we note later, some parties suggest that future exemptions should be made compulsory as opposed to voluntary.

45. Despite the challenges faced, industry players perceive the exemptions to have yielded substantial benefits in the sector's response to the pandemic. Below is the detailed assessment of the benefits that perceived to have been derived from the exemptions.

2.2.2 Perceived benefits of the exemptions

46. The exemptions were provided to the Healthcare sector to achieve two main objectives, namely:
 - 46.1. promoting concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimize the effects of the national disaster; and
 - 46.2. promoting access to healthcare, preventing exploitation of patients, enabling the sharing of healthcare facilities, management of capacity and reduction of prices
47. The success of the exemptions in responding to the crisis will therefore be measured based on the extent to which the exemptions were used to achieve the objectives highlighted in section 2.2. above. Section 2.2. above provides a list of the exempted practices that the sector was allowed to embark on and the reasons for which these exemptions were granted to the sector. The Block Exemptions for the Healthcare sector was largely a success in that stakeholders in the sector collaborated in a number of the exempted practices and did achieve the objectives that were sought to be achieved through the granting of the exemptions.
48. The study revealed that the block exemptions resulted in a number of benefits that can be classified into two categories, namely (i) direct benefits - these were the intended outcomes of the exemptions, and (ii) indirect benefits - these are the outcomes of the block exemptions that were not intended as a result of the exemptions but were nevertheless positive outcomes of the block exemptions. We note that these responses were surveyed prior to the second wave which has seen much higher levels of

³⁷ See submission from <

³⁸ See submission form <

hospitalisation. As such, the impact of the exemption is likely to have been greater than reflected in the discussion below.

Direct benefits of the block exemptions

49. The direct benefits flowing from the exemptions include (i) cost reductions and consumer savings, (ii) capacity sharing, and (iii) assurance of stakeholders that resources can/could be shared. Cost reductions and consumer savings are estimated for the period from the promulgation of the exemptions to November 2020 which is the last month in which we received submissions, or an eight-month period. Some of these savings, such as testing, are ongoing.

Cost reduction and consumer savings

50. As regards cost reduction and consumer savings, it is estimated that the reduction of the price of the COVID-19 test to R850, estimated savings amounting to between R500 million and R1 billion accrued to patients/funders in the first eight months of the existence of the exemptions.³⁹ It is also estimated that the exemptions made it possible for a certain group of medical schemes to source PPE at a price that was 50% lower than the price that prevailed before the exemptions, which resulted in further substantial savings (in addition to the cost of tests savings) to these medical schemes of between R100m and R150m for the 8 months to November 2020.⁴⁰
51. In addition, the exemption along with the regulations which established the principle for prohibiting price gouging as a response to increased demand due to COVID-19, aided in scheme-mandated and administrator led negotiations with suppliers, e.g., for PPE,⁴¹ thereby creating an environment conducive to price negotiation, something that would not be allowed under normal circumstances. Further, the exemptions allowed medical scheme administrators to enter into negotiations with providers in respect of the cost of PPE for both in-hospital and out-of-hospital care on behalf of their member schemes.⁴²
52. Although the industry could not accurately estimate the value of savings, based on the above, it is safe to say that the direct savings resulting from the exemptions, including reduction of the cost of Covid-19 tests and PPE prices, were substantially in excess of R1

³⁹ See submission from X

⁴⁰ These are the medical schemes X

⁴¹ See submission form X

⁴² See submissions from X dated X and X

billion of the 8 first months of the block exemptions, or substantially more than R1,5 billion on an annualised basis.

Capacity sharing

53. One stakeholder, a large medical scheme administrator, indicated that a very small number of patients were transferred from public hospitals to be treated at private hospitals during the first wave of Covid-19 infections. This is because, as the stakeholder submits, South Africa managed the pandemic effectively such that the health system was not overwhelmed.⁴³ Other stakeholders submitted that the need for capacity sharing did not arise.
54. Since these responses arrived before the peak of the second wave, these views are confined to the period before the second wave of infections. It is likely that capacity sharing occurred at a larger scale during the second wave of infections given the larger number of infected and hospitalised citizens.

Assurance that resources can be shared

55. The study also found that the exemption assisted the national health response to COVID-19 in that there was universal assurance that hospital facilities and healthcare practitioners could be shared by all patients should the need arise, at least during the disaster period.
56. One of the largest three private hospital groups for instance submits that the exemptions allowed for stakeholders to collaborate intricately on healthcare capacity challenges ensuring that all patients, whether private or public were cared for.⁴⁴ The hospital group submits that the collaborations ensured that there is adequate capacity through the health system. In instances that there are insufficient beds or short staff in the private sector, the patients would be moved over to the public sector.⁴⁵ The hospital group submits that although the need to share beds did not arise, should the numbers in COVID-19 patients increase again, the bed availability information now exists and will be important for an effective response.⁴⁶ We note that the second wave has resulted in far greater levels of hospitalisations than the first wave with many individual hospitals in certain regions under

⁴³ See submission from ☒

⁴⁴ See submission from ☒

⁴⁵ See submission from ☒

⁴⁶ See submission form ☒

pressure. The establishment of the bed availability information during the first wave period would certainly have assisted in responding to the second wave.

Indirect benefits of the Block exemptions

57. Two benefits of the exemptions that can be classified as indirect are discussed here, namely (i) the industry is equipped to be able to better plan and respond to future disasters, and (ii) industry development.

Industry is better equipped to respond to future disasters

58. One of the largest pathology laboratories submits that the data sharing platform that was established during the disaster period allows the sector to be able to better plan for future crisis.⁴⁷ For example, epidemiological studies that were developed, and the electronic medical records that were created during the crisis are now available and can be used in future in case the pandemic surges again.
59. In addition, the fact that the industry is now aware that certain horizontal collaborative practices can be exempted, for example, the sharing of capacity, in future the industry will swiftly respond to disasters that will require the sharing of capacity.

Industry development

60. One of the largest medical aid schemes submits that there were further intangible benefits such as insight, knowledge, trust and the building of linkages and communication channels between private and public sectors, developing mechanisms to collaborate as well as developing trust between the sectors.⁴⁸ Moreover, a pathology laboratory submits that the lessons learned in negotiating contracts between the public and private sector facilities will assist in future. These communications, as stated by the pathology laboratory, also helped in developing working relationships between the private and public sector laboratories which can be exploited in future. Further to this, the pathology laboratory notes that data sharing enabled labs across the country to better plan and deploy resources.⁴⁹
61. Despite the challenges and delays experienced during the engagements with the CMS as highlighted under the section dealing with challenges above, some positive outcomes were achieved from the process. From the process, a proposed framework for

⁴⁷ See submission from 3<

⁴⁸ See submission from 3<

⁴⁹ See submission from 3<

engagement was drafted and submitted on 2 April 2020 for further consideration. Components of the framework include:

- 61.1. guiding principles – to ensure access for medical scheme members within a sustainable medical scheme environment and negotiate with healthcare facilities and suppliers to obtain uniform prices for both private and public sectors,⁵⁰
 - 61.2. governance structures – steering committees developed to negotiate and develop pricing recommendations based on research and analysis to ensure the implementation of the agreed tariffs,
 - 61.3. mandate – the mandate was defined as *“to constitute a platform for negotiation between healthcare funders and healthcare facilities and medical suppliers in relation to costs associated with personal protective equipment, pathology tests and hospital admissions in terms of the exemption to ensure pricing parity for the provision of goods and services procured by private public collaboration in support of social solidarity amongst sectors,”* and
 - 61.4. process – an internal process was established wherein it was decided that the steering committee (steercom) would authorise the technical committee (Techcom) to negotiate with a hospital group or supplier, with properly recorded minutes and agreements that would be made available to the CMS and the Minister of Health, and lastly
 - 61.5. duration – the framework would remain in force until the end of the National State of Disaster or until all parties agreed to terminate.⁵¹
62. We now turn into discussing the perceived adverse consequences of the exemptions in the section below.

2.2.3 Perceived adverse consequences of the exemptions

63. This section provides a detailed qualitative assessment of how the exemptions are perceived to have adversely affected individual firms, the industry as a whole and other stakeholders such as customers in the healthcare sector.

⁵⁰ See submission from 3<

⁵¹ See submission from 3<

64. One of the largest medical aid scheme administrators,⁵² also echoed by some of its member schemes,⁵³ submits that the one unintended consequence of the exemptions is the cost borne by its member schemes for the costs of treating Covid-19 patients. In this regard, the administrator submits that because of the PMB guidelines which compelled its member schemes to pay for PMB care at cost, it could not benefit from taking advantage of the exemption to lower the costs of treating Covid-19 patients. This suggests that the PMB guidelines might have reduced the scope for more price reductions than what was achieved through the imposition of the payment of PMB at cost.
65. In order to put this point into perspective, the administrator cited the example of PPE procurement under the PMB guidelines, stating that because of the PMB guidelines which included PPE as part of the PMB benefits for purposes of Covid-19 treatment, all medical schemes were compelled to pay for PPE at cost, i.e. at whatever price was charged by the PPE supplier.⁵⁴ This means that even if there was scope to negotiate a lower price with the supplier, the PMB guidelines removed this possibility. Although the administrator could not quantify the adverse effects due to paying for PMB care at cost, the administrator argued that the PPE example demonstrates the potential for adverse effects when there is one mandated price or one mandated mechanism for establishing pricing.⁵⁵
66. One of the largest three private hospital groups submits that the procurement of PPE under the B4SA banner did not work due to procurement challenges concerning quality and quantity. The hospital group further insinuated that B4SA (or the service providers used by B4SA for the procurement of PPE) lacked technical procurement capabilities which are a critical capability for procurement in the industry. The hospital group then averred that the lack of this capability by B4SA hindered the planned collective PPE procurement practices,⁵⁶ as hospitals ended up purchasing PPE individually.⁵⁷
67. In addition, the hospital group noted that the exemptions were solely developed with COVID-19 patients in mind, suggesting that patients with other conditions did not benefit from the exemptions, especially where access to care was compromised due to the high number of COVID-19 patients.⁵⁸

⁵² See submission from X

⁵³ See submission from X and X

⁵⁴ See submission from X

⁵⁵ See submission from X and X

⁵⁶ See submission from X

⁵⁷ See submission from X

⁵⁸ See submission from X

68. Two self-administered schemes⁵⁹ argued that they did not benefit from the exemptions because it is difficult to negotiate reduction of costs with healthcare providers.⁶⁰ These schemes argued that the open schemes market is overwhelmingly dominated by Discovery and Medscheme, hence self-administered schemes such as themselves, are generally faced with vigorous competition and, in most instances, are unable to have joint engagements with healthcare providers in an effort to protect the industry's competing factors such as IP, protocols, processes etc.⁶¹
69. These small schemes submit that the reality of the healthcare industry is that the lower the premiums negotiated by the large third parties on behalf of schemes under their administration, the higher the tariff the price takers must endure. They suggest that in order to balance the negotiating power of the third-party administrators, it would be ideal for self-administered schemes to be able to collectively negotiate by themselves than to be in the same pool with the large administrators. It is not clear whether these small schemes are suggesting that absent the exemptions they would have been able to negotiate better prices for themselves, but we note that the concerns they are raising appear to be general industry issues and are not resulting from the exemptions.

Areas in which the exemptions were not adequate

70. One of the largest medical aid scheme administrators noted at the time of submission that since the health sector was waiting for the availability of the Covid-19 vaccine, it would be useful to anticipate enabling block exemptions in order to; i) agree on a prioritisation framework for vaccine access, ii) facilitate collective sourcing of vaccines, iii) facilitate collective negotiation of vaccine prices for both public and private sectors and iv) collectively develop a common reporting platform for monitoring vaccine effectiveness and possible side-effects.⁶² The first batch of vaccines arrived in South Africa on 1 February 2021. We understand that the Government has centralised all logistics related to the vaccine including procurement, price negotiations with suppliers, as well as the rollout of the vaccine. The exemptions were not fortified to assist with this, but we understand that the Government issued directions compelling all medical aid schemes to cover the cost of vaccination for all their members.

⁵⁹ Medical schemes involves the provision for the obtaining of any relevant health service, granting assistance in defraying expenditure incurred in connection with the rendering of any relevant health service

⁶⁰ See submission from <

⁶¹ See submission from <

⁶² See submission from <

71. The medical aid scheme administrator further submits that there are other areas of collaboration within the private and public sector that could have been supported, such as i) a common set of national clinical guidelines, ii) a common set of facility management guidelines for optimal safety and logistical flow, iii) an electronic chat platform to support rapid learning from colleagues and rapid pivoting of safety and clinical practices, iv) allowing private hospital groups to collaborate on training to effectively manage COVID-19 patients on equipment utilisation, v) allowing health practitioners to establish multi-disciplinary teams and to train as teams in the management of COVID-19 patients, and vi) developing common care pathways for the safe management of patients at home.⁶³

Areas of improvement for future exemptions

72. As a way to better address future exemptions, one of the largest medical aid scheme administrators submits that there should be an improvement of the process to allow interested stakeholders to make formal submissions directly to the Minister of Health about how they intended to use the exemptions, and for the sake of these stakeholders to be entitled to a formal response from the Minister stating his objections, if he did not wish to activate the exemptions. In their view, the scheme administrator notes that this would establish a transparent regulatory process which could also inform health stakeholders about mutual expectations for the future.⁶⁴
73. The scheme administrator averred that the proposition of the exemptions highlights the need for regulatory reform to address some of the blockages that required exemptions in the first place.⁶⁵ The administrator suggests that the following recommendations made by the Health Market Inquiry for regulatory reform in the private health sector are expedited:
- 73.1. That Health Professions Council of South Africa (HPCSA) rules need to be amended in order to allow multi-disciplinary teams to work together in providing healthcare services;
- 73.2. There needs to be a centralised approach to licensing of healthcare facilities – this would have allowed a clear national view of the supply of health sector resources, including bed types and specialists.

⁶³ See submission from ✂

⁶⁴ See submission from ✂

⁶⁵ See submission from ✂

- 73.3. That there is a need for a Multi-Lateral Negotiation Forum to negotiate tariffs for Prescribed Minimum Benefits.
74. The scheme submits that it supports these recommendations and believes that their implementation could reduce the costs of access to private healthcare in the short term. The scheme further submits that these changes would also strengthen our health system and support better resilience when challenged with an unusual event such as a pandemic.
75. One of the major private hospital groups submits that the exemptions should have been extended to allow hospital and health professionals to offer a comprehensive all-inclusive service (which can then be accurately specified and priced). The hospital group further suggests that in future, exemptions should facilitate hospitals and professional providers to agree on an all-inclusive package of services (beds, nursing, allied disciplines, physicians, radiologist and pathologists) with risk sharing.⁶⁶
76. The hospital group adds that the existing HPCSA prohibition of employment of doctors and allied health professionals prevented hospitals from offering a comprehensive service and it is a fundamental obstacle to reducing costs and improving efficiency and clinical outcomes in the sector. The hospital group notes that because practitioners are independent and can make their own decisions on the treatment of patients, some doctors practiced outside of the guidelines provided by specialist societies when they could have followed guidelines on best practice principles and used pharmaceuticals recommended and purchased by hospitals.
77. The hospital group therefore submits that in order to maximise the application of recommended clinical protocols, hospitals should be permitted to employ registered health professionals. Lastly, the hospital group recommends that the requirement for the approval of the Minister for any negotiation on pricing should be altered to allow a more streamlined process as the Minister is at the same time managing an unprecedented health crisis.⁶⁷
78. A small self-administered medical aid scheme submits that they would have preferred to see a section in the exemptions that made provision for agreements to share test result data between funders and the pathology industry. In their view, this would have assisted in disease profiling, as well as to create a platform where the industry can gather statistics on number of cases testing positive through patient profiles.⁶⁸ The scheme submits that it

⁶⁶ See submission from ✂

⁶⁷ See submission from ✂

⁶⁸ See submission from ✂

had been able to receive such information from only three of the largest pathology companies, which suggests that the smaller pathological companies did not receive such information, indicating that it was not a legal requirement for the information to be shared. The scheme therefore suggests that there should be mandatory receipt of test results which would ensure, i) accurate reporting of COVID-19 within the private healthcare sector, and ii) prevention of over-utilisation by service providers and patients (unnecessary repeat tests and tests due to flu symptoms overlapping with COVID-19 symptoms).⁶⁹

79. A self-administered scheme submits that to balance the negotiating power between self-administered schemes and the third party administrators, it would have been ideal for self-administered schemes to collectively negotiate matters of mutual interest to them, but with fear of potentially violating the Competition Act and the potential consequences thereof, the self-administered schemes declined the offer to collaborate.⁷⁰ The Commission is of the view that this is not a deficiency in the framing of the exemptions, but a lack of understanding by these schemes of how exemptions work. The exemptions created a forum for all industry players, including the self-administered schemes, to collaborate. The exemptions were exactly the platform for collaboration that these stakeholders are arguing they did not have.

2.2.4 General issues raised

80. The Commission received a few submissions which are neither closely related to the block exemptions nor are they a subject of the current study.
81. A few medical schemes⁷¹ proposed that the Commission should investigate the pricing of Covid-19 diagnostics and surveillance testing. These schemes argue that the pricing of COVID-19 diagnostic and surveillance testing was supposed to be at cost as per a notice by the NPG dated 26 March 2020 but they were not priced as such. The stakeholders submit that since they funded large numbers of tests during the disaster period costing hundreds of millions of Rands, the lack of adherence to the pricing of these items at cost continues to have adverse financial implications for medical schemes associated with these tests.

⁶⁹ See submission from ✂

⁷⁰ See submission from ✂

⁷¹ See submission from ✂ and ✂

82. It therefore appears that when interventions of this kind are in places, there should be mechanisms in place to deal with complaints and monitoring of conditions in order to ensure compliance.

2.2.5 Conclusion

83. The study has found that the Block Exemptions for the Healthcare sector were largely a success in that the block exemptions were used extensively and a number of the intended objectives of the block exemptions were achieved. This was probably facilitated by the existing levels of organisation across different parts of the sector (funders and providers) as well as the commonality of interests around the issues being faced by the sector. In particular, all participants stood to benefit from an improved coordination around controlling the health outcomes of the pandemic, as a lack of control would negatively impact on all involved.

84. In particular, the study found that capacity was shared in so far as patients from the public sector were moved to and cared for at private hospitals in the first wave of infections, albeit to a minimal extent given that the healthcare system was not overwhelmed during this period. Since the submissions informing this finding were surveyed prior to the second wave which has seen much higher levels of hospitalisation, we are of the view that the impact of the exemption is likely to have been greater in the second wave because of the higher rates of infections.

85. The study further found that the exemptions were used as a platform for collaboration and agreements to reduce the costs of Covid-19 tests from between R1000 and R1500 to R850 as well as the prices of PPE by up to 50%. It is estimated that this intervention saved patients and medical aid schemes substantially in excess of R1 billion in the first 8 months of the exemptions, or over R1,5 billion on an annualised basis.

86. The study further found that the exemptions resulted in other benefits in that (ii) they gave assurance to stakeholders that resources can/could be shared, which is invaluable information in case of a further resurgence of the virus or in responding to future national disasters and that (iii) the industry is now better equipped to be able to better plan and respond to future disasters. It can therefore be said that the exemptions achieved the objective of promoting access to healthcare, preventing exploitation of patients, enabling the sharing of healthcare facilities, the management of capacity and reduction of prices.

87. Additional benefits such as the development of the Healthcare Industry were also derived in that the exemptions educated market players of the challenges faced by the industry. This can serve as a starting point for further discussions to improve the functionality of the sector.
88. It appears from many of the comments around the areas of opportunity which the exemptions did not realise, that a number of these relate to more general reforms to the healthcare sector including the implementation of the HMI recommendations. It seems the pandemic may have exacerbated fault lines in the industry and some forms of cooperation proved effective in overcoming these fault lines. In addition, it appears as if some smaller participants such as self-administered schemes that do not form part of the overall industry organisation may not have been involved in cooperation but are still likely to have benefitted from such cooperation.
89. It also appears that some industry stakeholders may not be fully aware of how exemptions operate given the argument by a few self-administered schemes that they could not collaborate with the fear of violating the Competition Act. The lesson learnt on this aspect is that there should be more advocacy work when exemptions are issued in future to educate stakeholders what exemptions are and how they operate.

2.3 Covid-19 Block Exemptions for the Retail Property Sector

90. The national lockdown which commenced on 27 March 2020 following the declaration of Covid-19 as a national state of disaster restricted the movement of people and goods and also regulated the activity of firms in certain industries. Only firms providing essential goods and services were allowed to trade during the hard lockdown, which was later referred to as Lockdown Alert Level 5. Many firms in the retail sector were temporarily shut down during this period including, clothing retailers, restaurants, and personal care outlets to mention just a few categories. Only firms trading in essential goods, such as grocery retailers and pharmacies, were allowed to operate during this time.
91. The temporary closure of these retailers was expected to result in severe financial impacts, which could possibly result in retrenchments and permanent shutdowns. Permanent shutdowns in turn would negatively impact on the retail property owners. As such, a mutually agreeable resolution to rental arrangements during lockdown was seen as potentially beneficial for the retail sector. For these reasons, prior to the start of the hard lockdown, as part of the measures to mitigate the economic impact of the pandemic,

on 24 March 2020, the Minister issued the ***Covid-19 Block Exemption for the Retail Property Sector, 2020***⁷² regulations to exempt a category of agreements or practices between designated retail tenants⁷³ and the retail property landlords from the application of sections 4 and 5 of the Act.

92. The Covid-19 Block Exemption for the Retail Property Sector were meant *to enable the retail property sector to minimise the negative impact on the ability of designated retail tenants (which includes small independent retailers) to manage their finances during the national disaster period as well as to continue “normal” operations beyond the national disaster period.* The agreements or practices that are exempted related to relief programs that were meant to be provided by retail property landlords to their retail tenants falling under the designated group.
93. Property owners and landlords as well as tenants were exempted from the application of Section 4 and 5 of the Act in order to collaborate and coordinate their efforts with the objective of:
 - 93.1. Granting of payment holidays and/or rental discounts for designated retail tenants;
 - 93.2. Limitations on the eviction of designated retail tenants; and
 - 93.3. The suspension 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 period.
94. For the purposes of the application of the exemptions, designated retail tenants referred to retailers of goods and services that were deemed non-essential and were out of operation during the hard lockdown as per the lockdown regulations, namely retailers of:
 - 94.1. Cinema exhibition industry;
 - 94.2. Clothing, footwear, and home textile;
 - 94.3. Personal care services; and
 - 94.4. Restaurants.

⁷² See Annexure C for the exemption and Annexure D for the amendment of the exemption

⁷³ Such designated retailers included clothing, footwear and home textile retailers, personal care services and restaurants

95. These regulations were accompanied by directives that served to guide how business should be operated during the disaster period. This includes, for example, the export control regulations which served to restrict the exportation of certain essential products such as PPE and hand sanitisers. The regulations were further amended and used to guide the industry on the gradual reopening of the economy when lockdown regulations were relaxed and the country moved to Lockdown Alert Level 4 and 3. For example, the regulations were used as a guide for the reopening of certain call centres and car dealerships in Alert level 4 and 3 of the lockdown. The current study does not discuss the directives, but only focusses on the exemptions part of the regulations.
96. Against this background, we sought to establish whether the exemptions provided relief to players in the retail property industry following the effects of the pandemic. The rest of this section assesses whether the block exemptions were effective in enabling the sector to respond to the pandemic. The section seeks to answer the following specific questions:
- 96.1. How were the exemptions used to respond to the crisis?
- 96.2. What are the perceived benefits of the exemptions?
- 96.3. What are the perceived adverse consequences of the exemptions, and
- 96.4. Whether the exemptions were adequate in responding to the crisis
97. We turn to an assessment of these questions in below.

2.3.1 How were the exemptions used to respond to the crisis?

98. The table below provides a summary of how stakeholders in the retail property sector used the exemptions to respond to the crisis under each exempted practice or area of collaboration.

Table 2: Summary of how the granted exemptions were used

Exempted Practice/area of collaboration	How were the exemption was used
Granting of payment holidays and/or rental discounts for designated retail tenants	The exemptions were used to create a forum for the discussions on payment holidays and rental relief. Following deliberations between landlords and tenants, rental reliefs and discounts were granted to tenants on a bilateral basis. A general relief package for SMEs was also agreed by property groups.

Limitations on the eviction of designated retail tenants; and	No submissions were received on how the exemptions were used to limit evictions.
The suspension 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 period.	No submissions were received in this area.

99. Below is a detailed discussion of how the exemptions were used to respond to the crisis under each exempted area of collaboration.

A detailed discussion of how the exemptions were used to respond to the crisis

100. Submissions received from stakeholders suggest that most of the collaborative efforts and discussions that took place were centred around payment holidays and rental relief. However, as suggested by the submissions, there was ***no agreement that was reached by landlords to collectively provide rental relief to tenants***, but ***individual landlords agreed bilateral terms with tenants*** wherein some tenants were granted relief on an individual basis. In essence, the submissions show that the exemptions created a forum for discussions between competitors which led to these bilateral agreements to be reached. These discussions would not have been possible without the exemptions. Below is a qualitative synthesis of the responses received from market participants in this regard.

A collective or industrywide solution to rental relief and payment holidays was not achieved

101. The majority of submissions received from retailers indicate that retailers mainly required rental reliefs and payment holidays from retail property owners, the landlords, during alert level 5 and 4 of the lockdown as the lockdown regulations did not allow them to operate during these periods. These rental reliefs would allow them to stay afloat and to be able to continue paying salaries to employees.

102. Many stakeholders argued that because collective deals or an industrywide solution was not achieved, the exemptions were not successful. In most instances, each tenant would negotiate terms of relief individually with individual landlords. We are of the view that this is not the correct way to interpret the outcome. Our view is that because the exemptions

created a forum for the discussion that yielded relief to happen, whether on a bilateral basis or otherwise, then the exemptions were successful in achieving the intended outcome, which is relief. This is because the negotiations that resulted in the bilateral agreements on rental relief and payment holidays could not have been achieved without the exemptions. For completeness, we discuss some of these submissions in turn.

103. One medium sized book retailer for example,⁷⁴ through the Mid-sized Independent Retailers Group (“MIR”), which served to speak as a consolidated voice on behalf of its members in discussions with landlords around rental reliefs,⁷⁵ sought collaboration in order to find ways to a solution that would guarantee its stores’ survival.⁷⁶ The retailer had hoped that negotiating as a collective through the MIR group would yield more benefits than negotiating as individual retailers.⁷⁷ However, as the retailer notes, the landlords were not willing to deal with the MIR as a collective but instead opted to negotiating conditions with retailers independently.⁷⁸

104. By the same vein, larger national retailers under the National Clothing Retailers Federations of South Africa (NCRF) also averred that no industrywide solution was achieved through the exemptions. One of the clothing retailers submits that following the engagements held between retailers and landlords on the terms of relief, landlords brought forward a proposal, which each retailer sought independent counsel on.⁷⁹ Following various engagements, as the retailer submits, retailers and landlords could not reach common ground. The retailer therefore sought to negotiate separately with landlords to reach an agreement on the approach to rentals during the lockdown.⁸⁰ These sentiments were echoed by another retailer under the NCRF who submits that a collective consensus between retailers and landlords could not be reached due to vast differences in the needs of different stakeholders.⁸¹

105. According to one the clothing retailers under the NCRF, the reason for the industry’s failure to reach collective consensus on rental relief and payment holidays did not stem from the exemptions themselves but was a result of the very divergent commercial positions of the retailers and landlords which meant that an overarching industrywide

⁷⁴ See submission from ☒

⁷⁵ See submission from ☒

⁷⁶ See submission from ☒

⁷⁷ See submission from ☒

⁷⁸ See submission form ☒

⁷⁹ See submission from ☒

⁸⁰ See submission from ☒

⁸¹ See submission from ☒

solution was not feasible.⁸² This resulted in discussions on relief programs and payment holidays to occur on an individual basis between tenants and landlords.

Relief programs and payment holidays were negotiated on an individual basis

106. As stated above, no single industrywide relief package was achieved under the block exemptions in the retail property sector, but bilateral agreements between retailers and landlords occurred. The submission revealed that in most instances' relief was granted to the retailers, although some retailers complain that that the relief was not to the extent they required. Larger retailers under the NCRF were generally satisfied with the relief they received while mid-sized retailers under the MIR generally submit that they could have received more relief.

107. By way of example, a mid-sized book shop submits that the exemption did not provide relief or assistance to the MIR group members or business in general, except UIF and deferment of tax payments.⁸³ Similarly, a specialty furniture retailer under the MIR submits that landlords insisted on the rental payments and further refused to grant any discounts on the rental amounts.⁸⁴ Similarly, a mid-sized retailer of affordable clothing submits that landlords unilaterally offered a 70% relief for April whilst retailers did not trade for 100% of the period. The retailer further submits that they experienced unreasonable landlord demands around this time in that landlords in the Property Industry Group ("PIG") demanded 100% rental payment and failure to pay resulted in the premises being chained.

108. Another mid-sized retailer of affordable clothing submits that they requested 100% relief for the shutdown period, relief during the various levels as well as payment holidays.⁸⁵ Furthermore, the retailer had requested other forms of reliefs from landlords including a proposal for landlords to draw funds from their deposit guarantee, but these relief forms were refused.⁸⁶ Although the retailer received some relief, they submit that it was not to the extent requested.

109. On the other hand, some retailers including a JSE listed clothing retailer under the NCRF as well as other retailers under the MIR were generally satisfied with the outcomes of the agreements with landlords and the benefits flowing from them. The listed retailer for

⁸² See submission from ☒

⁸³ See submission from ☒

⁸⁴ See submission from ☒

⁸⁵ See submission from ☒

⁸⁶ See submission from ☒

example submits that it engaged landlords to negotiate relief from rental payments during the stage 4 and 5 of the lockdown and these engagements resulted in the curtailing of rental costs in level 5 as well as the protections of their cash flow.⁸⁷ In addition, the listed retailer was able to cover operational costs in full,⁸⁸ which enabled them to use their cash resources to implement COVID-19 compliance practices.

110. Two mid-sized retailers under the MIR were satisfied with the relief they got. One of them submits that the bilateral approach was beneficial to them in that each retailer needed to negotiate with a landlord for every site they occupied.⁸⁹ The other one submits that as a firm, they were able to find common ground with most of their landlords on short-term solutions and assistance.⁹⁰

111. On the basis of the above, we found that, through the exemptions, industry participants were able to negotiate relief programs on an individual basis. The submissions suggest that individual bargaining, as opposed to industrywide coordination, became the *modus operandi* across the board as needs varied from one tenant to the other. Some retailers were not satisfied with the reliefs received as such relief was not to the extent required.

112. On the contrary, retail property owners submitted that through the exemptions they were able to offer rental relief to retailers. SA REIT⁹¹ and SAPOA⁹², constituent members of the Property Industry Group ("PIG"), stated that rental assistance was given to retailers, irrespective of their size although, as they submit, the focus was on SMME retailers as they were the hardest hit by the disaster.⁹³ As stated above, all the relief that was granted to tenants was not coordinated but occurred bilaterally between tenants and landlords. Therefore, although a coordination and common relief package did not materialise, the exemptions did create a platform for discussions of the reliefs to happen, which ultimately led to reliefs being granted.

113. The section below provides a detailed discussion of all the benefits, both direct and indirect, that were derived from the block exemptions as submitted by retailers and property owners.

⁸⁷ See submission from X

⁸⁸ They were able to pay salaries, merchandise orders etc

⁸⁹ See submission from X

⁹⁰ See submission from X

⁹¹ SA REIT stands for South African Real Estate Investment Trust

⁹² SAPOA stands for South African Property Owners Association

⁹³ Although there was no discrimination between large and SMME retailers in terms of relief packages, the PIG seems to suggest that they extended the relief to more SMME retailers compared to larger retailers.

2.3.2 Perceived benefits of the exemptions

114. The success of the block exemptions in assisting the retail sector response to the crisis can be measured by the extent to which the collaborative initiatives in the sector achieved the objectives for which the exemptions were granted. As stated above, the exemptions *“were meant to enable the retail property sector to minimise the negative impact on the ability of designated retail tenants (which includes small independent retailers) to manage their finances during the national disaster period as well as to continue “normal” operations beyond the national disaster period.”* This was meant to be achieved through collaborative efforts and concerted practices aimed at:

114.1. Granting of payment holidays and/or rental discounts to designated retail tenants;

114.2. Limitations on the eviction of designated retail tenants; and

114.3. The suspension 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 period.

115. We found that the discussions that occurred under the remit of the block exemptions did yield positive benefits for the industry.

116. Firstly, they created a platform for retail groups to negotiate with property groups to identify the contours of possible relief. This in turn facilitated individual negotiations between landlords and retailers on rental reliefs which did yield tangible benefits to some retailers even though a number of the retailers believed these did not go far enough. Secondly, a number of unexpected intangible benefits were derived from the discussions that happened under the block exemptions. We discuss each of these categories of benefits in turn below.

Tangible benefits derived from bilateral negotiations between tenants and landlords

117. As stated above, the property owners stated that the exemptions were beneficial as, they were able to offer rental relief to retailers. SA REITS and SAPOA stated that rental assistance was given to retailers, irrespective of their size although the focus was on SMME retailers as they were the hardest hit by the disaster. These associations argue that had the exemption not been granted, the implications would have been dire for property owners, retailers and tenants in that, inter alia, at the time that the exemption was granted, the sector had come to a standstill and the industry needed to come together to protect and maintain the economic activity of the sector. One property company

submits that through its rental relief program, it was able to assist tenants with rental relief especially smaller tenants that required the assistance for continuation of business and claims that several jobs were saved in the process.⁹⁴

118. One large JSE listed clothing retailer and a mid-sized clothing retailer both testify to the receipt of rental reliefs, although the latter bemoans the inadequacy thereof. The listed retailer⁹⁵ submits that it, and the textile industry at large, benefitted from rental concessions in alert levels 4 and 5 of the lockdown. The listed retailer further submits that the curtailing of rental costs in level 5 protected their cash flows and they were hence able to cover their operational costs⁹⁶ in full. This allowed them to use their cash resources to implement COVID-19 compliance practices.⁹⁷

119. A JSE listed investment company and property owner also notes that although they had limited use of the exemptions, apart from one-on-one engagements, they were able to give substantial relief.⁹⁸ Without providing any figures, a mid-sized retailer of affordable clothing submits that it derived benefits from rental relief and delayed rental payments to protect its cash flows, although it did so without agreeing with Landlords. The retailer achieved this by making short payments to landlords without consulting with the landlords in every case while negotiations under the exemptions were on-going.⁹⁹

Intangible benefits derived from the Block Exemptions

120. One JSE listed investment company and property owner submits that in their view, above all, the exemptions facilitated the flow of communication and exchange of views between parties during an unprecedented time.¹⁰⁰ According to SA REITS and SAPOA, the exemptions prevented devastating consequences of the pandemic to the industry, including property owners, retailers and tenants in that, the exemptions led to the formation of the PIG through which members could collectively collaborate to save the property industry. This was supported by an investment company that is a member of the REITs which submits that the exemptions calmed concerns of investors in both property

⁹⁴ See submission from ☒

⁹⁵ See submission from ☒

⁹⁶ They were able to pay salaries, merchandise orders etc

⁹⁷ The listed retailer submits that ☒

⁹⁸ Investec estimates that ☒

⁹⁹ See submission from ☒

¹⁰⁰ See submission from ☒

funds and respective tenants and provided clarity to financiers, especially banks, on the possible impact the lockdown could have on covenants.¹⁰¹

121. In particular, SAPOA and SA REIT submit that had the exemption not been granted, the implications would have been dire for property owners, retailers and tenants in that:

121.1. at the time that the exemptions were granted, the sector had come to a standstill and the industry needed to come together to protect and maintain the economic activity of the sector;

121.2. the PIG could collectively collaborate on issues facing the property industry together and deal with those issues as it was a challenging time for the property sector;

121.3. the PIG entered into a mutual agreement with the Banking Association of South Africa (“BASA”) to ensure that the BASA members acted appropriately in terms of the agreements;

121.4. the PIG worked with the NCRF and the DTIC to ensure the efficient opening of all retail facilities during the pandemic, and;

121.5. the PIG interacted with ASISA to ensure the transparent flow of information to the ASISA members and the continued functioning of the Corporate Bond market as it pertains to Issuers from the property industry.¹⁰²

122. One property owner under the REITs also commends the existence of the exemptions although they thought the exemptions were broad or too wide. This property owner submits that, through the exemptions, the various stakeholders in the retail sector were able to meet and through these meetings, they were able to quickly rule out the caveats of the broad exemption itself and focus on creating platforms for the case-by-case applications for covenant exemptions.¹⁰³ The property owner further submits that through the exemptions, the PIG was pointed in the right direction to seek amendments to their bonds, which meant that they did not waste time and some of the firms in question had been able to achieve covenant relaxations from their bond holders in time to avert

¹⁰¹ In real estate, covenants are transactions, restrictive covenants are binding legal obligations written into the deed of a property contract, usually by a seller. See submission form 38

¹⁰² See submission from SAPOA and SA REIT

¹⁰³ See submission from 38

default.¹⁰⁴ Further, the company submits that to the extent that one business was given an opportunity to avoid failure is an aggregated benefit to the sector.

123. Another property owner under the REITs similarly submits that the benefits that came with the exemptions is that the exemptions calmed concerns of investors in both property funds and retailers. Further, financiers (particularly banks) were provided with clarity on the possible impact the lockdown could have on covenants.¹⁰⁵

124. Despite some retailers, mostly the smaller retailers under the MIR-Group, complaining about not receiving adequate relief, a number of them submit that there were considerable intangible benefits that resulted from the exemptions.

125. A particular gaming store and the MIR Group for example both submit that the exemptions allowed stakeholders to meet and discuss the impact of the pandemic on various players in the market.¹⁰⁶ Similarly, two retailers of affordable clothing that are under the MIR Group submit that they were able to realize that the challenges faced by their businesses are not unique but they are common across the board.¹⁰⁷ Another mid-sized retailer submits that through rental remissions and deferments that retailers received it can be said that certain businesses were able to avoid business rescue proceedings.¹⁰⁸

126. A large retail group under the NCRF is of the view that the exemption enabled competing firms to meet with each other and with suppliers to discuss and attempt to agree on an approach to a matter of mutual interest. Another retailer noted that the collaborations resulted in the formation of a “broad rental framework” to negotiate from.¹⁰⁹ This is an outcome highly commended by one larger JSE listed clothing retailer who submits that the exemptions afforded them a platform to be able to have these discussions, which would ordinarily not be allowed.¹¹⁰

127. In addition to this, the listed retailer submits that due to the exemptions, which were initially granted with firms in textile market in mind, there was a spill over effect to other retailers outside the textile market that were also able to benefit from the exemptions.¹¹¹

¹⁰⁴ See submission from X

¹⁰⁵ See submission from X

¹⁰⁶ See submission from X and submission from MIR group dated 06 November 2020

¹⁰⁷ See submission from X and X

¹⁰⁸ See submission from X

¹⁰⁹ See submission from X

¹¹⁰ See submission from X

¹¹¹ See submission from X

2.3.3 *Perceived adverse consequences of the exemptions*

128. This section provides a detailed qualitative assessment of the unintended consequences suffered by industry players as a result of the exemptions. The main adverse effect of the exemptions as argued by one gaming store¹¹² and a mid-sized retailer of affordable clothing¹¹³ is that it might have created a platform for anti-competitive coordination among retail property owners. Other adverse consequences that were claimed by retailers are not a result of the exemptions as such, but a result of the pandemic or lockdown in general.

Potential for anti-competitive coordination amongst retail property owners

129. As stated above, retail property owners submitted that through the exemptions rental assistance was given to retailers, irrespective of their size although the focus was on SMME retailers as they were the hardest hit by the disaster. However, one gaming retailer under the MIR-Group submits that the exemptions created a platform for landlords to organize themselves in such a way that made it possible for them to make collective decisions in a potentially collusive (anticompetitive) manner.¹¹⁴ This view was supported by a clothing retailer, also under the MIR-Group, which submits that through the exemption, larger REITs could make coordinated decisions as the platform allowed for them to do so.¹¹⁵

130. These retailers argue that the members of SAOPA and REITS might have, at least in some instances, used the exemptions as a platform for coordination to gain collective bargaining power against their tenants in order to demand full rental payments instead of offering the rental relief as envisaged in the granting of the exemptions. So, there is a risk that coordination seemingly worked for in favour of the property owners' side of the market more than it did for the retailers' side of the market.

General adverse consequences experienced by the industry (not resulting from exemptions)

131. A specialist furniture retailer, who is generally of the view that the exemptions were not beneficial, submits that interest bearing accounts¹¹⁶ incurred a lot of interest that had to be paid. The retailer submits that ultimately, the disrupted payment record affected their

¹¹² See submission from ☒

¹¹³ See submission from ☒

¹¹⁴ See submission from ☒

¹¹⁵ See submission from ☒

¹¹⁶ Accounts such as debit order, bank overdrafts as well as interest on rentals

credit rating which in-turn feeds into their future growth. The retailer further stresses that the lack of income during the COVID-19 pandemic meant that they had to apply for a substantial additional overdraft facility.¹¹⁷

2.3.4 Whether the exemptions were adequate in responding to the crisis

132. This section examines if the block exemptions were adequate in responding to the crisis with the purpose of learning from any mistakes made and improving on future exemptions decisions. Overall, industry players do not criticise the form of the block exemptions and are of the view that the exemptions were adequate. The major challenge that made it difficult for the exemptions as identified by some stakeholders is that the landlords were not forthcoming in the engagements with retailers¹¹⁸ and that the legislation in place was not applied consistently by landlords, nor have landlords fully supported the notion of payment holidays.¹¹⁹

133. Nevertheless, some stakeholders identified gaps in the exemptions and areas for development in future exemption decisions.

Areas of improvement for future exemptions

134. According to a gaming store under the MIR-Group, the exemptions should have been coupled with tools for mediation between landlords and retailers, to ensure synergy.¹²⁰ This view was concurred by the MIR Group as well as a book retailer. According to book retailer, due to the absence of mediation, in the end, each retailer was forced to negotiate their leases one-on-one with landlords,¹²¹ which suggested that the guidelines brought forward by the MIR Group were not of any use in the negotiations. The MIR Group then suggests that there should be a framework to drive engagement in future.¹²²

135. In addition to this, a large JSE listed clothing retailer suggests that in future, there should be guidance on how various players should have been grouped to form appropriate sub-sets of the industry and to also specify what representation may indicate a binding decision for a sub-set of industry players.¹²³

¹¹⁷ See submission from Ƴ<.

¹¹⁸ See submission from MIR dated 06 November 2020

¹¹⁹ See submission from Ƴ<

¹²⁰ See submission from Ƴ<

¹²¹ See submission from Ƴ<

¹²² See submission from MIR group dated 06 November 2020

¹²³ See submission from Ƴ<

136. Some stakeholders propose that different tools could have been implemented in the place of the exemptions and could have achieved better results than the exemptions. One mid-sized retailer of affordable clothing for examples is of the view that an outright 100% rental waiver for the lockdown period could have provided clarity for all the parties involved as opposed to a rental provision.¹²⁴ The JSE listed clothing retailers supports this submission and notes that although the intention and principle of the exemption was clear, it is essential to make way for collaboration in the retail industry to navigate an unprecedented and complex environment. This retailer submits that discussions proved to be tricky as there were alliances and segregations such as "big" retailers and "big landlord". In addition to this, the listed retailer submits that there were also other players¹²⁵ who did not want to participate in these collaborations.¹²⁶

2.3.5 Conclusion

137. The study found that the collaborative efforts and discussions that took place under the guise of the exemptions were centred around payment holidays and rental relief. In this regard, industry stakeholders engaged each other and attempted coming up with collective agreements on rental relief and payment holidays. These provided both groups with a clearer conception of the challenges faced by each other and the potential contours of an agreement, even if no agreement was reached. However, given the diverse nature of the retail property landlords and retail property tenants, after deliberation, it became apparent that an industrywide coordination could not be achieved. As such, bilateral agreements were reached between individual landlords and individual tenants wherein many tenants were granted some payment holidays and payment reliefs.

138. Therefore, the exemptions assisted the industry in responding to the crisis by creating a platform through which negotiations occurred for rental relief and payment holidays to be granted to retailers. Despite complaints from a number of the retailers that the reliefs granted were not enough, the information we received shows that on aggregate the reliefs were substantial and many jobs were saved. It is always difficult to determine the precise contours of what is a fair outcome where both parties stood to lose and the distribution of those losses is what was up for negotiation. In general, the element of competing interests between the participants meant that a universal agreement would be more difficult to reach.

¹²⁴ See submission from ☒

¹²⁵ The stakeholder did not mention the names of these players

¹²⁶ See submissions from ☒

139. The study further found that the exemptions yielded a number of unexpected intangible benefits. For example, as the PIG submits, the exemptions mitigated the overall financial implications of the pandemic for both retailers and tenants in that the industry was in a stand-still at the time but through the exemptions, the industry came together to work out solutions to ensure that economic activity continues after the crisis. Other intangible benefits include giving assurance to retailers and tenants that the difficulties they faced during the crisis were common across the industry, as well as maintaining investors calmness during the difficult time.
140. On the downside, the study found that there is a risk that the platform created amongst landlords may also provide the basis for cooperation around denying more extensive benefits to tenants. This emanates from submissions from some stakeholders who allege that property owners, particularly the REITs, might have engaged in ‘cartel-like’ behaviour when they collectively decided to require 100% rental payment in one instance and to require 70% rental payment in another instance. As such, there is a risk that coordination might have worked in favour of the property owners’ side of the market more than it did for the retailers’ side of the market.
141. Although the industry generally considered the exemptions were adequate in responding to the crisis, some stakeholders pointed to possible areas of improvement for future exemptions. In particular, it was suggested that the exemptions should have been coupled with tools for mediation between landlords and retailers to ensure synergy. One other submission suggested a different tool altogether stating that an outright 100% rental waiver for the lockdown period could have provided clarity for all the parties involved as opposed to a rental provision under the exemptions. These were considered at the time but rejected in favour of industry participants finding the appropriate balance through negotiation rather imposing a particular solution.

2.4 Covid-19 Block Exemptions for the Banking Sector

142. The ***Covid-19 Block Exemption for the Banking Sector, 2020*** was granted by the Minister to the banking sector as part of a broad plan “*to strengthen Government’s programs designed to fight COVID-19 following the declaration of a National State of Disaster on 15 March 2020.*”¹²⁷ It was envisaged that granting of these exemptions, would

¹²⁷ See Annexure E for the exemption and Annexure F for the amendment of the exemption

allow the banking sector to respond to the crisis by providing the sector, both business and private individuals, the ability to:

142.1. manage their finances during the national disaster and be able to continue normal operations beyond the national disaster, as well as;

142.2. enable the banking sector to manage the banking infrastructure, including the payment infrastructure, ATMs and branches.

143. A variety of agreements were exempted under these regulations. The first one related to **payment systems**. The exemptions relating to payment systems were created with the purpose of ensuring essential payment systems continue to operate during the COVID-19 national disaster, which are limited to the development of industry monitoring, operational policies and contingency plans in respect of:

143.1. the continued availability of bank notes to ATMs, branches, and businesses;

143.2. the continued provision of essential ATM, branch, and corporate banking services;
and

143.3. the continued provision of electronic payments systems.

144. We understand from submissions received from stakeholders that a need did not arise for stakeholders in the banking sector to employ the exemptions related to payment systems. This is because banking services were deemed essential during the lockdown and they continued to operate at all levels of the lockdown. As such, there was no disruption on the availability of bank notes, and payment systems continued to work. We will not discuss this area any further in this report.

145. The second category of exempted agreements related to **debtor and credit management**. These agreements were created to manage debtors and the provisions of any extension of credit during the disaster period. These are limited to the development of industry policies and monitoring in respect of:

145.1. Payment holidays and debt relief for business and individual debtors subject to financial stress;

145.2. Limitations set on asset repossessions of business and individual debtors subject to financial stress; and

145.3. The extension of credit lines to individuals and businesses subject to financial stress.

146. On 5 May 2020, the Minister published further amendments to the Covid-19 Block Exemption for the Banking Sector. As opposed to the first set of regulations which only targeted banks, the new sub-regulations included other financial services providers, in particular investment companies that are members of the Association for Savings and Investment South Africa (ASISA). We collectively refer to these stakeholders as the banking sector in this report.

147. The foregoing laid an enabling framework for the banking sector¹²⁸ to collaborate its response to the pandemic without being constrained by the Competition Act, in particular the anti-cartel provisions. The rest of this section assesses whether the block exemptions were effective in enabling the sector to respond to the pandemic. The section seeks to answer the following specific questions:

147.1. How were the exemptions used to respond to the crisis?

147.2. What are the perceived benefits of the exemptions?

147.3. What are the perceived adverse consequences of the exemptions, and

147.4. Whether the exemptions were adequate in responding to the crisis.

148. We turn to an assessment of these questions below and analyse the impact of the exemptions in the banking sector.

2.4.1 How were the exemptions used to respond to the crisis?

149. The table below provides a summary of how stakeholders in the banking sector used the exemptions to respond to the crisis under each exempted practice or area of collaboration. The table focusses only on the three exempted areas under the debtor and creditor management exemptions package as no collaborative efforts took place under the other package relating to payment systems.

Table 3: Summary of how the granted exemptions were used

Exempted practice/area of collaboration	How the exemption was used
---	----------------------------

¹²⁸ Comprises of financial institutions that accept deposits and creates a demand deposit while making loans. The Banking sector is also known as the financial sector

Payment holidays and debt relief for business and individual debtors subject to financial stress	The exemptions were used as forum for the discussions on debt relief and payment holidays in principle. Debt relief and payment holidays were granted to debtors on a bilateral basis by banks and financial services companies.
Limitations set on asset repossessions of business and individual debtors subject to financial stress	No submissions were received in this area.
The extension of credit lines to individuals and businesses subject to financial stress	No submissions were received in this area.

150. Below is a detailed discussion of how the exemptions were used to respond to the crisis under each exempted area of collaboration.

A detailed discussion of how the exemptions were used to respond to the crisis

151. The way in which the block exemptions for the banking sector were used is similar to the retail property sector. Submissions received from stakeholders in the banking sector suggest that most of the collaborative efforts and discussions that took place were centred around debt relief and payment holidays. We did not receive submissions regarding the other exempted practices under the debtor and credit management relief package.

152. We also note that, similar to the retail property, there was no overarching agreement reached by creditors to collectively provide debt relief and payment holidays to debtors, but individual creditors agreed bilateral relief terms with debtors wherein some debtors were granted relief on an individual basis. In essence, the submissions show that the exemptions created a forum for these bilateral agreements to be reached because it permitted an exchange around the extent of action required and the principles for such relief. Below is a qualitative synthesis of the responses received from market participants in this regard.

Collaborative efforts did not result in collective agreements or concerted practices

153. By way of background, we note that the Banking Association of South Africa (“BASA”)¹²⁹ played a pivotal role in the engagements with authorities around the block exemptions for

¹²⁹ BASA is an association of 25 Banks, including the largest 4 banks in South Africa

the banking sector. BASA served to represent banks in the interactions with authorities with the aim of finding solutions that would assist its members in responding to the pandemic. In its response to the Commission's information request for this study, BASA stated that, in the banking sector, there are no specific circumstances that arose which required BASA or its members to make use of the banking exemptions, but members of BASA continued to operate their businesses in the normal course of business operations.

154. BASA also encouraged its customers who were able to meet their financial obligations to continue to do so. For those customers who couldn't meet their financial obligations, BASA members on an individual basis, embarked on programs to assist customers during the disaster period, such as voluntary relief measures¹³⁰ and the Covid-19 load guarantee scheme for example. BASA also notes that the relief provided by the banks did not envisage any debt write-off, but rather leniency in terms of the repayment of loans.
155. Similarly, the Association for Savings and Investment of South Africa ("ASISA"), stated that there was no instance where its members coordinated their efforts in responding to the crisis although members individually and voluntarily assisted customers who sought some form of relief during the disaster period. ASISA stated that it required the Exemptions on behalf of its members because it was approached by the Real Estate Investment Trusts ("REITs") to offer its members financial relief such as payment holidays as members of REITs were financially stressed during the lockdown.
156. Members of REITs are major property owners listed on the JSE. REITs operate in such a way that they must distribute all their net income to shareholders and as such cannot build cash reserves on the balance sheet. They fund their activities by either placing shares in the market and/or raising debt from the financial sector – Banks and/or ASISA members. Because of the lockdown many of their tenants could not operate and as such could not pay rent. As a result, the REITs were experiencing cash flow problems.
157. After collective deliberations, it was decided that there cannot be an industrywide solution or exemption that can be used to help the REITs because ASISA members have different terms and conditions ("covenants") in their contracts with each of the REITs. ASISA submits that there were therefore no collective deals that its members made to assist the REITs, but members have, on an individual basis, provided debt finance or debt relief to the REITs.

¹³⁰ These measures included credit life insurance claims, instalment reductions, payment holidays etc.

158. The Commission notes the submissions made by these associations and would like to highlight that a common package was not necessarily an envisaged outcome when the exemptions were drafted as these associations seemingly interpret. The exemptions were simply meant to grant a forum for all industry players to come together and have discussions around issues of debtor and creditor management during the crisis period, and develop a principle approach to managing debtors in this period which might inform individual relief programmes. This kind of cooperation would not ordinarily be allowed under the Act.

159. The Commission submits that the fact that members of these associations did meet to discuss these issues and use those discussions to frame principles around relief management, means that the exemptions were used. For example, BASA submits that “...member banks moved quickly within the auspices of BASA to discuss and agree the types of voluntary relief measures that banks could, individually, implement to where possible assist their customers who experienced financial difficulties due to the COVID-19 pandemic and national lockdown.”¹³¹ By the same vein, ASISA members met and from the meetings they learnt about the different covenants of clients and that different relief packages could be applied to different clients on an individual basis.

160. The Commission therefore submits that the exemptions created a platform for members of these associations to meet and discuss and to reach agreement on the approach to debtor management even if there was no common universal package agreed. Agreement on the need for relief and the approach constitute agreements that would otherwise fall foul of the Competition Act and which were facilitated by the exemption.

161. Below is a detailed discussion of what transpired in the discussions around collaboration. The submissions show that essentially, the discussions centered around a single broad exemption, i.e. payment holidays and rentals payment relief. The submissions further show that where payment holidays and rental reliefs were granted, this was achieved through bilateral agreements between financiers and their clients.

Collaborative efforts on payment holidays and debt relief

162. Various stakeholder member of ASISA submit that they were able to meet and collectively review relief terms and the viability of the exemptions set out through their industry

¹³¹ Submission by BASA dated 13 November 2020. Table A.

representative ASISA.¹³² ¹³³ One of the ASISA members submits that they directly received requests from tenants¹³⁴ ¹³⁵ who requested indulgences on certain aspects of their agreements considering the impact of the pandemic on their cashflows.

163. BASA supplements this view by submitting that through the various interactions with authorities as well as interactions between banks and clients (particularly retailers) which was afforded by the exemptions, stakeholders were able to interact and have discussions around the common principles of (i) alleviating, containing and minimising the effects of the disaster (ii) ensuring the ability of customers to manage finances and to continue business operations as needed, (iii) to manage banking infrastructure within South Africa, iv) to ensure the continuation of payment systems in SA and (v) debtor and creditor management.¹³⁶

164. Two member of ASISA submitted that they did not engage in any collaboration nor did they make use of the exemptions.¹³⁷ For one of these stakeholders, this was despite receiving requests from certain entities to which it is exposed to relax the covenants (terms and conditions of loans) for a certain period of time as a result of the impact of the lockdown.¹³⁸ Some stakeholders submit that they only made use of the exemptions in a single instance for the purposes of discussions with the Property Industry Group (“PIG”).¹³⁹

165. From the above, it can be said that through the platform, the stakeholders were able to engage and come up with certain solutions to respond to the crisis. In particular, the industry agreed that the granting of relief was necessary and also agreed that such relief should be granted on a bilateral basis given the differing financial interests of industry players. A number of challenges were however encountered in the process as discussed below.

Challenges in the exemptions

166. Following engagements, the general views from stakeholders in the banking sector was that the exemptions were too broad for the sector to operationalise, even with the aid of associations where collective bargaining could take place. ASISA explained that its

¹³² ASISA was the body that arranged a meeting between the investors in the property sector and representatives of the PIG on 11 May 2020.

¹³³ See submission from ✂

¹³⁴ ✂

¹³⁵ See submission from ✂

¹³⁶ See submission from BASA dated 13 November 2020

¹³⁷ See submission from ✂ and submission from ✂

¹³⁸ See submission from ✂

¹³⁹ PIG comprises of listed property companies and REITS

members were not able to agree on an industry wide solution for all property developments. As such, each individual developer concluded agreements with their respective tenants as the exemptions were too wide.¹⁴⁰ One ASISA member concurred with the sentiment that the exemptions were too broad.¹⁴¹

167. These submissions are in line with what was said by tenants in the retail sector. A landlord / property developer for instance supports the submissions made by tenants on the failure to reach an industry wide approach.¹⁴² For instance, according to the property developer, there were 56 different asset managers and several small bond holders who were not immediately identifiable. As such, an industry wide agreement would require a unanimous agreement from all the bond holders, irrespective of the number of bonds held.¹⁴³

168. However, the test of whether a once-size-fits-all industry wide agreement was concluded as the test for an exemption is not correct. The exemption did not necessarily envisage for a single industry solution to be achieved, but only sought to create a forum for the industry players to discuss possible solutions and the principles for an industry approach for responding to the crisis, an outcome which has clearly been achieved. The point made in numerous submissions was that the client circumstances varied considerably making a one-size-fits-all approach impossible. The same problem surfaced in the retail property exemptions.

169. We now turn to a discussion of the benefits that are perceived to have been derived from the exemptions.

2.4.2 Perceived benefits of the exemptions

170. Through the engagements that occurred under the exemptions, a number of benefits were reaped, which we classify as direct and indirect in the discussion below. The direct benefits are those that assisted in achieving the objective of the exemptions, i.e. debtor and creditor management. The indirect benefits are those over and above the objectives of the exemptions.

Direct benefits derived from the exemption

¹⁴⁰ See submission from ☒

¹⁴¹ See submission from ☒

¹⁴² See submission from ☒

¹⁴³ See submission from ☒

171. BASA ¹⁴⁴ submits that whilst its members did not use the exemptions to achieve a common package of relief, the exemptions granted BASA members an appropriate degree and scope of understanding, comfort, and latitude to explore potential areas of collaboration, interaction, and solutions with the aim of contributing to addressing the Covid-19 crisis. In this regard, BASA submits that its members were able to discuss and agree on the types of activities that they could, individually, embark on to assist clients during the disaster period, such as voluntary relief measures and the Covid-19 loan guarantee scheme for example. It can therefore be said that the exemptions provided the basis for the principles of an industry response which ensured that participants in the sector remained afloat amidst the pandemic
172. Through the various engagements, ASISA, sought to protect the interests of its members by recognizing that such members may need to collaborate in ways that are similar to that of banks in order to deal with the financial impact or challenges of the COVID-19 pandemic. One of the members of ASISA highlights that they sought the same protection afforded to banks under the exemption only so far as not to be prejudiced in discussions as and when they arose, and only in relation to the transactions in which this member was a lender. The member further submits that through this platform, ASISA members were able to be included into the relief programs afforded to other stakeholders in the sector.
173. Another member of ASISA, who received requests from certain entities to which it is exposed to relax the covenants (terms and conditions of loans) for a certain period of time as a result of the impact of the lockdown,¹⁴⁵ submits that it concluded bilateral engagements with some borrowers following which it agreed to relax the covenants to provide the needed financial relief to the borrowers.
174. Similarly, another stakeholder, also a member of ASISA, submits that it benefitted from the exemption in that it was able to swiftly point the PIG towards their best course of action to manage problems on a case-by-case basis.¹⁴⁶ This stakeholder further notes that primarily the objective for both the industry regulators and its participants, which was ultimately achieved through the exemptions, was to reduce the risk of business failures in the industry which could have a knock-on effect in that one failing firm would potentially depress the property market, leading to further failures.¹⁴⁷

¹⁴⁴ See submission from BASA dated 13 November 2020

¹⁴⁵ See submission from ㄨ<

¹⁴⁶ See submission from ㄨ<

¹⁴⁷ See submission from ㄨ<

Indirect benefits derived from the exemptions

175. One of the members of ASISA submits that if its business was affected to the extent that a collaborative discussion was necessary, the exemptions would have granted it an opportunity to be part of joint discussions alongside banks (which was not initially envisaged by the regulations).¹⁴⁸ The stakeholders elaborate that this platform was to the benefit of non-banking financial institutions as opposed to being at the behest of decisions taken by banks unilaterally.
176. Another member of ASISA argued that prior to the disaster or before the exemptions were issued, in their experience, there was a lack of understanding of the detailed mechanics of bonds and the best mechanisms within bonds to address the problems faced by the PIG and tenants. This stakeholder notes that through the exemptions, they were able to meet to be able to explain how bonds work so as to ensure that each issuer manages their situations on an individual basis.¹⁴⁹
177. We also found that the exemptions created an opportunity for stakeholders to also develop individual benefits. One ASISA member for example submits that the sessions or collaborative efforts assisted them to be able to understand the impact (potential) of the pandemic on the property sector, which allowed them to better prepare for and make more informed decisions during the course of the independent engagements with borrowers and other parties on a bilateral basis.¹⁵⁰ By way of example, when a request was made in the context of a syndicated loan facility, this ASISA member submits that they engaged with the request through the ordinary decision-making mechanisms¹⁵¹ provided for in the context of the facility.¹⁵²
178. In addition, stakeholders such as the South African Reserve Bank (“SARB”) and the National Treasury were able to propose a variety¹⁵³ of endeavours and measures to try and afford relief. By way of example, one of the outcomes was a loan guarantee scheme (“the scheme”). The scheme was developed to assist small and medium-sized businesses

¹⁴⁸ See submission from Old ✕

¹⁴⁹ See submission from ✕

¹⁵⁰ See submission from ✕

¹⁵¹ In terms of these mechanisms, the facility agent conveys the request to the lenders in the facility and each of those lenders then assesses the request and communicates the outcomes.

¹⁵² See submission from ✕

¹⁵³ See submission from BASA for more details on the measures and outcomes from BASA dated 13 November 2020

that may not be able to meet their financial obligations during the lockdown. According to BASA, the exemption assisted in facilitating the interactions related to the scheme.¹⁵⁴

2.4.3 Adequacy of the exemptions

179. None of the submissions we received pointed to any adverse effects of the exemptions in the banking sector. We further examined if the block exemptions were adequate in responding to the crisis with the purpose of learning from any mistakes made and improving on future exemptions' decisions. Most stakeholders highlighted gaps and areas of improvement that may need to be considered for future exemptions decisions. These are discussed in detail below.

Gaps in the exemptions

180. Stakeholders represented by ASISA submit that the exclusion of non-bank financial services providers, which was later amended to include ASISA members represented a gap in the initial versions of the block exemptions. BASA concurs and submits that the exemption was initially limited to banks and it may well have been appropriate to have extended its ambit to other sub-sectors such as credit providers. The inclusion of these stakeholders at a later stage is testimony to the fact that the process was a learning and adaptive process.

181. Further to this, BASA notes that consideration should have been given to whether the exemption covers a sufficient scope of conduct in order to address imperatives facing the banking sector such as credit availability, whether on a syndicated basis or otherwise, and in a fashion which apportions risk so as to avoid systematic outcomes.¹⁵⁵

Areas of development in the exemptions

182. Given the gaps identified in the exemptions, stakeholders made proposals on improvements that could potentially be made in the development of future exemptions.

183. To ensure inclusivity in future, Competition Authorities are requested to recognize the role played by non-banking financial service providers in the lending market in South Africa, and afford such entities the same protections and exemptions as are currently afforded the banks.¹⁵⁶ This view is motivated by a recognition that the different treatment of entities which provide the same products or services makes for an unequal playing field, and

¹⁵⁴ See submission from 3<

¹⁵⁵ See submission from BASA dated 13 November 2020

¹⁵⁶ See submission from 3<

prejudices non-banking financial institutions in some material regards, such as step-in rights¹⁵⁷ which a bank can do without applying for a merger clearance, but a non-banking financial institution cannot act upon.¹⁵⁸

184. BASA suggests that the exemption should further include clarity on certain terms such as a provision which states that it applies to “*agreements, practices or conduct which have been undertaken at the request of and in co-ordination with the Minister.*” BASA is of the view that the current wording of the exemptions as it stands, introduced a degree of ambiguity and potential impracticality in the sense that arguable approval from the Minister was required thereby potentially limiting the benefits of the exemption (in some cases that approval may have been subjected to a waiting period).¹⁵⁹

185. Lastly, BASA is of the view that once the national state of disaster is no longer in place, the exemption will no longer be applicable as its operative provisions relate to the pandemic. Accordingly, the banks will no longer be able to rely on the exemption once this occurs whereas the measures required to address the challenges may be required beyond the that timeframe. In their view, some of the conditions set should be retained post the pandemic.

2.4.4 Conclusion

186. Our study found that cooperation under the debtor and creditor managed block exemptions were used. In particular, the collaboration efforts were centred around payment holidays. The ultimate objective of this category of exemptions was to reduce the risk of business failures due to businesses failing to meet their financial obligations during the disaster period but also to help individual clients manage debt through the granting of debt payment holidays for example.

187. Banks, under the banner of BASA and financial service providers in the investment space, under the banner of ASISA, used the block exemptions as a forum for discussions to seek solutions on how the banking and creditor sector should respond to the crisis. The companies were able to discuss and agree on the types of activities that they could, individually, embark on to assist clients during the disaster period, which would not ordinarily be allowed in the Act absent the exemptions.

¹⁵⁷ Step-in rights enable one party (beneficiary) to step into the shoes of another party in relation to the rights and obligations of a contract, normally when there is a breach of contract.

¹⁵⁸ See submission from 3<

¹⁵⁹ See submission from BASA dated 13 November 2020

188. The one outcome of such discussions is the recognition by the lending institutions that payment holidays were necessary and could be used to help the industry's response to the crisis. The other outcome was the approach to the granting of these payment holidays. In this regard, both banks and ASISA members decided that a single relief package was not feasible because of the vast differences between the terms and conditions of the loans between individual lenders and their individual clients. Hence, the approach taken by the industry was that each company should agree relief terms with each client on a bilateral basis. This was then the approach taken in the industry. That agreement also assisted in avoiding a potential free-rider problem where the prospect of some lenders holding back of relief may result in others doing likewise.
189. The study found that indeed, some creditors received requests from clients regarding debt payment relief and payment holidays, and these were assessed on an individual basis and granted where feasible. This is said to have had the benefit of reducing the risk of business failures in the industry which could have a knock-on effect in that one failing firm would potentially depress the property market, leading to further failures.
190. Other benefits derived from the exemptions include the learnings by industry participants about the overall challenges faced by the sector during the crisis. For non-banking lenders such as ASISA members, the exemptions allowed them the chance to be included in discussions around industry solutions that involve banks. They argue that this is good for the industry as it can level the playing field between banks and non-banking lenders. They further recommend that future exemptions or industry solutions that target the sector must not be limited to banks only but must include all lenders to ensure a level playing ground. BASA is of the view that once the national state of disaster is no longer in place, the exemption will no longer be applicable. Hence, the banks will no longer be able to rely on the exemption whereas the measures required to address the industry's challenges may be required beyond that timeframe. In their view, some of the conditions set should be retained post the pandemic.

3. DETERENT EFFECTS OF THE ANTI-PRICE GOUGING INTERVENTIONS

3.1 Introduction

191. After the declaration of Covid-19 as a national state of disaster on 15 March 2020, just like most countries across the globe, South Africa saw unprecedented spikes in demand for hygiene and healthcare products needed to prevent the spread of the virus. This

demand far outstripped supply and hence resulted in widespread shortages, conferring market power on those holding stock. In addition, there was panic-buying and stockpiling of essential food products such as dry foodstuffs and hygiene products. These factors provided the economic conditions for potential widespread price gouging by suppliers and retailers of products to the detriment of consumers.

192. In response to the emerging news of price gouging and panic buying, on 19 March 2020, the Minister of Trade, Industry and Competition published the Consumer and Customer Protection and National Disaster Management Regulations and Directions¹⁶⁰ ("**Regulations** ") which sought to, *inter alia*, protect consumers and customers from price increases on essential products that were not cost justified and ensure the equitable distribution of such products during the national state of disaster. This was part of the overall initiatives taken by the government to prevent an escalation of the disaster or to alleviate, contain and minimise the effects of the disaster in terms of the Disaster Management Act.

193. The Commission responded to price increases in two ways, namely advocacy initiatives directly with large retailers and suppliers, as well as public announcements and the investigation / prosecution of price gouging complaints received from the public. These were essentially the Commission's initiatives to enforce the Regulations that were put in place by Government to fight price gouging. Whilst the investigations and prosecutions are a matter of public record, what is not known is the extent to which advocacy and visible enforcement deterred retailers and suppliers from engaging in price gouging during the disaster period. If it did, then the deterrent effect would have provided a far broader protection of consumers beyond pure investigation and prosecution. The primary purpose of this section is to assess the deterrent effect. Before we get to the assessment, we provide a brief overview of these interventions below.

3.2 Overview of anti-price gouging interventions

3.2.1 The Commission's initiatives

194. Panic buying of essentials and reports of price gouging by retailers raised serious concerns around the availability and affordability of food/hygiene essentials for lower income South Africans in entering the crisis, which demanded a shift in agency and government focus. Specific actions taken by the Commission were as follows:

¹⁶⁰ Government Notice No. 350 of GG 43116.

195. The Commission worked with Dept. of Trade, Industry & Competition (DTIC) to promulgate Consumer Protection Regulations making clear that price gouging would be addressed under the Competition Act and Consumer Protection Act, and what the relevant test would be.

195.1. Importantly, the Regulations provided a strong signal that price gouging would not be tolerated and gave all business certainty as to what behaviour constituted price gouging. The Regulations also required rationing of essential products to ensure stock for low income households on a weekly paid wage.

195.2. The test was deliberately simple for enforcement purposes yet appropriate and modeled on price gouging laws. The Commission also assisted with additional Regulations which were drafted to also provide for quick prosecution procedures before the Competition Tribunal. This was important to ensure enforcement could be rapid before price gouging got out of control.

196. The Regulations were complemented by active advocacy with retail and food/hygiene suppliers to reinforce the message that anti-price gouging measures would be strongly enforced.

196.1. The Minister and Commissioner called CEOs of all major retailers and pharmacy chains to warn them of the regulations and seek support for restraint.

196.2. Letters were then sent to these same retailers detailing the enforcement approach and to establish points of contact for quick resolution of complaints. The same was done for major wholesalers and oil company forecourts.

196.3. This was followed by letters to the major food companies and suppliers of hygiene products and upstream chemicals. Enforcement letters also reached every fresh produce market nationally.

197. The immediate refocusing of the Commission staff to enforce the Regulations and coordination with the National Consumer Commission (NCC) to pursue complaints. This would add the enforcement arm to advocacy, ensuring deterrence by providing widespread and visible enforcement.

197.1. A consumer hotline was established and publicized widely. Most complaints were received via SMS/WhatsApp with photos attached of products priced excessively.

- 197.2. Complaints were channeled to either the Commission or NCC. Investigation coordination was established to move complaints to the appropriate forum.
- 197.3. Teams from cartels, market conduct and even some merger teams were organized to follow up on complaints, with up to 70 investigators active within 2 weeks fielding over 100 complaints per day.
- 197.4. Investigator toolkits were put together to ensure consistency and a rapid response.
- 197.4.1. For screening, this included a list of essential product items based on consumer basket in order to focus the enforcement effort on essentials
- 197.4.2. For investigators, template investigator letters to respondents of different types requiring specific information to assess the complaint, practice note to investigators to enable them to make an informed assessment of the facts, a template referral affidavit and supporting economic affidavit, and a practice note for settlement terms including the maximum margin on goods going forward.
- 197.5. The investigation of complaints also involved the identification of suppliers that may have increased prices and may be gouging themselves. There was a deliberate strategy to chase up the value chain quickly to stamp that out.
198. Importantly, the Commission focused its price gouging efforts primarily at importers, distributors, wholesalers and retailers of essential food and health products, rather than the manufacturers, with the test primarily focused on margins rather than price levels. The rationale was that manufacturers may require price signals to expand capacity quickly and incur investments that may not have long-term use. In that context, suppressing prices may be counterproductive. In contrast, resellers of such products still have an incentive to stock and sell these products even if they cannot inflate their own margins.
199. The focus of the enforcement effort was primarily on ensuring that margins were not inflated. The focus on margins meant that if the manufactured cost increased then this could be passed through, but it prevented exploitation of any shortage or movement-restricted consumers by resellers.
200. An important element of the Commission and NCC effort was to provide a strong deterrent to firms in the economy from price gouging.

- 200.1. Consumers were mobilized quickly to lodge complaints and be active against gougers
- 200.2. Rapid prosecutions taking 3 weeks from complaint to court hearing conclusion ensured that the threat of enforcement was demonstrated to firms quickly. This led other gougers to enter consent agreements rather than waste prosecutorial resources.
- 200.3. Organized retail and larger suppliers cooperated to ensure that their brand was not damaged, working to resolve complaints quickly and bringing their store managers and sales people into line.

3.2.2 Price gouging complaints and settlements

201. Since the beginning of the National Disaster on 17 March 2020, the Commission received a total of 2069¹⁶¹ price gouging complaints through telephone calls, SMSs, CC1 forms, general emails and initiations. Of these cases, a total of 1199 cases were relevant to price gouging insofar as they related to the Consumer and Customer Protection and National Disaster Management Regulations and Directions of 19 March 2020.¹⁶² These are the cases that were investigated by the Commission. The table below summarises the status of the cases that had been or were being investigated as at 12 March 2021.

Table 4: The status of Covid-19 cases investigated by the Commission as at 12 March 2021

Status of cases	Number of Cases
Under Investigation	183
Recommended for non-referral	955
Recommended for referral or settlement	61
Total Investigated cases	1199

Source: Internal Weekly Statistics Report dated 12 March 2021

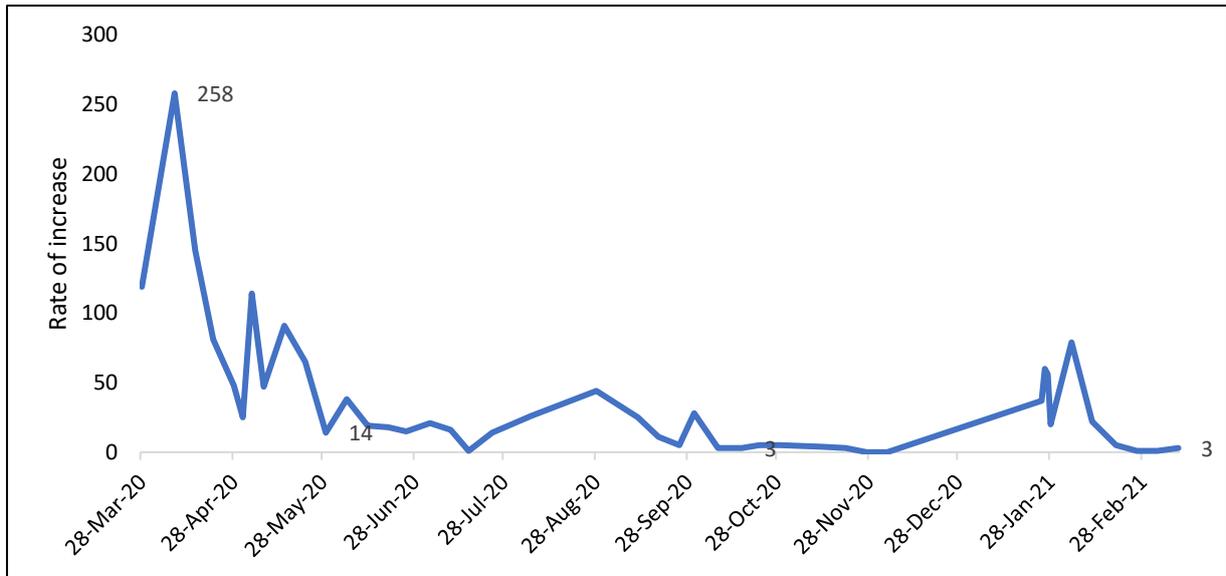
202. The table shows that out of the 1199 cases that were investigated, 61 were referred to the Tribunal for adjudication. Where a finding of a contravention of the anti-price gouging laws was made, the Tribunal either imposed an administrative penalty on the firms, ordered them to make donations to the Solidarity Fund, ordered them to donate essential goods to members of the general public, or ordered a combination of the three.

¹⁶¹ As at 12 March 2021

¹⁶² Cases that are considered irrelevant are those that do not relate to price gouging or competition issues.

203. Soon after the authorities started tightening enforcement, there was a sharp decline on the number of reported cases as shown in the figure below. As shown in the figure below, the number of new reported cases was very high in the first three weeks ended 15 April 2020 but decreased sharply afterwards.

Figure 1: Rate of increase in the number of cases received weekly



Source: Internal Weekly Statistics Report 12 March 2021

204. The majority of the cases that were investigated by the Commission related to basic food products, face masks, and hand sanitisers. About 54% of these cases were against retailers with a national footprint, including grocery retailers such as Spar, Checkers and Shoprite, as well as pharmacies such as DisChem and Clicks.

Figure 2: Number of investigated complaints per product category



Source: Internal Weekly Statistics Report 12 March 2021

205. The Commission initially brought the Babalegi and Dischem cases on face mask price gouging to the Tribunal, which ruled in favour of the Commission. This set the precedent against which future referrals were settled. The cases were also the first under the analytical framework of the newly amended section 8(1)(a) of the Act. The precedent was ultimately upheld in the Competition Appeal Court. These were important milestones as it confirmed the ability of the Commission to act against firms engaged in price gouging in times of crisis despite the fact that market power may be temporary or the firms were small. It also established precedent for the simplified test to determine whether price gouging had occurred. 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.

Box 1: Competition Commission vs Babalegi Workwear and Industrial Supplies CC

The Complaint

The complaint was that soon after the declaration of Covid-19 as a health emergency, Babalegi effected significant price increases on FFP1 face masks. By February 2020, the cumulative increases on face masks were as high as 592% and increased to 987% by March 2020.

Findings

The Commission found that Babelegi raised prices of facial masks from R41 per box up to a price of R500 per box or by mark-ups in excess of 500%. The Commission found that with each successive price increase, mark-ups on the masks sold increased significantly, suggesting that the price increases were not justified by cost increases. The Commission found that Babalegi was enabled to do this by the temporary market power conferred to it by the market conditions that were prevailing at the time due to the disaster.

The Main Arguments

In its defence, Babelegi argued that they were increasing their prices in mind of anticipated cost, in that the cost structure of the relevant masks had changed drastically over the relevant period, and were expected to further increase, which necessitated Babalegi to increase prices to cover the expected rise in replenishment cost.

The Commission refuted these arguments and argued that the prices charged as well as the anticipated costs brought forward by Babelegi were not justified. The Commission argued that during the complaint period, Babelegi did not have an increase in costs, but they were in a position of a 'lucky monopolist', having the power to control prices afforded to them by panic buying during the disaster period and not worry about the countervailing power of its customers.

Tribunal Ruling

The Tribunal concurred with the Commission's analysis and Babalegi was found to have contravened the Act and was ordered to pay a penalty of R76 040.

Competition Appeal Court (CAC)

Babelegi took the Tribunal decision on appeal to the CAC. The CAC also found for the Commission, upholding the Tribunal decision that Babelegi had a form of temporary market power and abused this power through the excessive pricing of face masks which lacked a cost justification.

206. Overall, it was expected that the advocacy efforts coupled with the investigations of price gouging would have a deterrent effect on price gouging. This is because there was extensive publicity around the investigations and the reach of the investigations to over 800 firms nationally in a short period of time. The objective of this part of the impact study is to assess the extent of deterrent effects of these interventions on price gouging.

3.3 Methodology

207. In assessing the deterrent effects of the price gouging initiatives, the Commission commissioned a survey of retailers and suppliers through the services of Nielsen to understand the extent to which firms knew about the price gouging regulations and the enforcement thereof (through advocacy and investigations) and whether this awareness deterred them from engaging in price gouging conduct. See Annexure H for the survey report from Nielsen.

208. The respondents to the survey were mainly retailers and wholesalers of essential goods as defined in the Regulations for the purposes of responding to the Covid-19 crisis. The individuals responsible for the responses are mainly in the middle and top management. The table below provides a detailed distribution of the 124 responses received.

Table 5: Distribution of responses by respondent class

Description of Respondent	Percentage of Responses
Retailer of Basic Food and Consumer Items	28
Wholesaler of Basic Food and Consumer Items	24
Medical/Healthcare products	13
Food Manufacturing	8
Retailer of Medical and hygiene supplies	3
Manufacturing	3
Wholesaler of Emergency Products	3
FMCG	3
Telecommunications	3
Retailer of Emergency Products	2
Retailer of Emergency Products	1
Educational Services	1
Wholesaler of Medical and hygiene supplies	1
Wholesaler of Emergency Products	1
Other	6

209. We then followed a two-step process in measuring the deterrent effects of the interventions;

209.1. Firstly, we measured awareness, i.e. the proportion of surveyed stakeholders that are aware of the regulations and enforcement thereof;

209.2. Secondly, we measured deterrent effects as the proportion of respondents who are aware of the regulations and did not increase prices during the disaster period. This is also interpreted as compliance in that stakeholders who are aware of the regulations and enforcement thereof complied by not unreasonably increasing prices.

210. The Commission also sought to gauge the level of effectiveness of the Regulations in achieving their deterrent objectives by asking respondents to indicate if the regulations were effective and if the regulations catered for the challenges they faced during the pandemic. Because the investigations also led to firms being penalised and making donations to the solidarity fund and donations of essential goods to the general public, we also estimated the value of these fines and donations to understand the magnitude of these contributions to the economy. The data on fines and donations was collected from the Tribunal's website.

3.4 Deterrent effects of the Commission's interventions

3.4.1 *Measuring Awareness*

211. The objectives for engaging in advocacy initiatives by the Commission was to drive awareness of the price gouging laws in the economy. Whilst some companies may comply with the law, it is important to back advocacy with visible enforcement so that companies realise that they may get caught and be fined if they were not to comply. Visible enforcement also drives awareness in its own right. Successful deterrence requires both elements.

212. Assessing deterrence required us to first measure awareness and thereafter we can measure compliance by estimating the proportion of respondents who are aware of the price gouging laws who refrained from engaging in price gouging activities. In order to measure awareness, respondents were asked a number of questions that would help the Commission understand if the respondents were aware of the Regulations.

213. Respondents were first asked directly to indicate if they were aware of the Regulations where investigations took place on large price increases for essential health and food products during Alert Level 4 and 5 of the lockdown.

214. The stakeholders were also asked to indicate the specific things they are aware of regarding these laws, such as the challenges faced by businesses and customers during Alert Level 4 and 5 of the lockdown, e.g. panic buying and unreasonable price increases,

as well as the types of interventions they know to have been undertaken by the Commission, e.g. protection of customers against unreasonable price increases by retailers. The results are summarised in the table below.

Table 6: Proportion of surveyed firms that are aware of the anti-price gouging laws and enforcement thereof

Percentage of surveyed firms who are aware of advocacy and regulations	
Respondents aware of Consumer and Customer Protection regulations	96%
Respondents Aware of Competition Commission's advocacy and investigations	94%

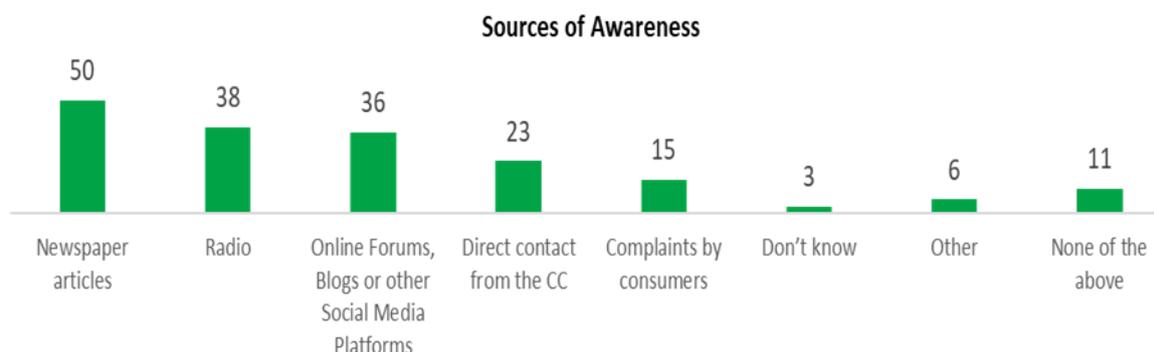
215. To verify if stakeholders were indeed aware of the regulations, they were further asked to indicate the specific details of the regulations they are aware of. Both true and false statements were included in order to limit false positives. The results showed that the majority of respondents were aware of the correct details of the regulations. In particular, 90% of these respondents were aware of the specific laws that protected consumers from unreasonable price increases from retailers.

Table 7: Percentage of 'aware' firms who are aware of details of the regulations

Percentage of 'aware' firms who are aware of the specific regulations, enforcements, and consumer protection	
Protection of consumers from unreasonable price increases by retailers	78%
Protection of customers from unreasonable price increases by suppliers	60%
Price increase should be cost justified	58%
Aware of fines	38%
Margins should not increase	31%
Maintaining adequate stocks of goods	27%

216. The main source of this awareness as per the responses is newspaper articles, followed by Radio and online forums as shown in the figure below.

Figure 3: Percentage of aware stakeholders by source of awareness



Source: Report provided by service provider

3.4.2 Measuring Deterrent Effects or Compliance

217. In order to measure the ultimate deterrent effects, respondents who indicated that they were aware of the Consumers & Customers Protection regulations, the Commission's advocacy work as well as the Commission's investigation to enforce these regulations were asked to indicate how they responded to the awareness of the Regulations. The result are summarised in the table below.

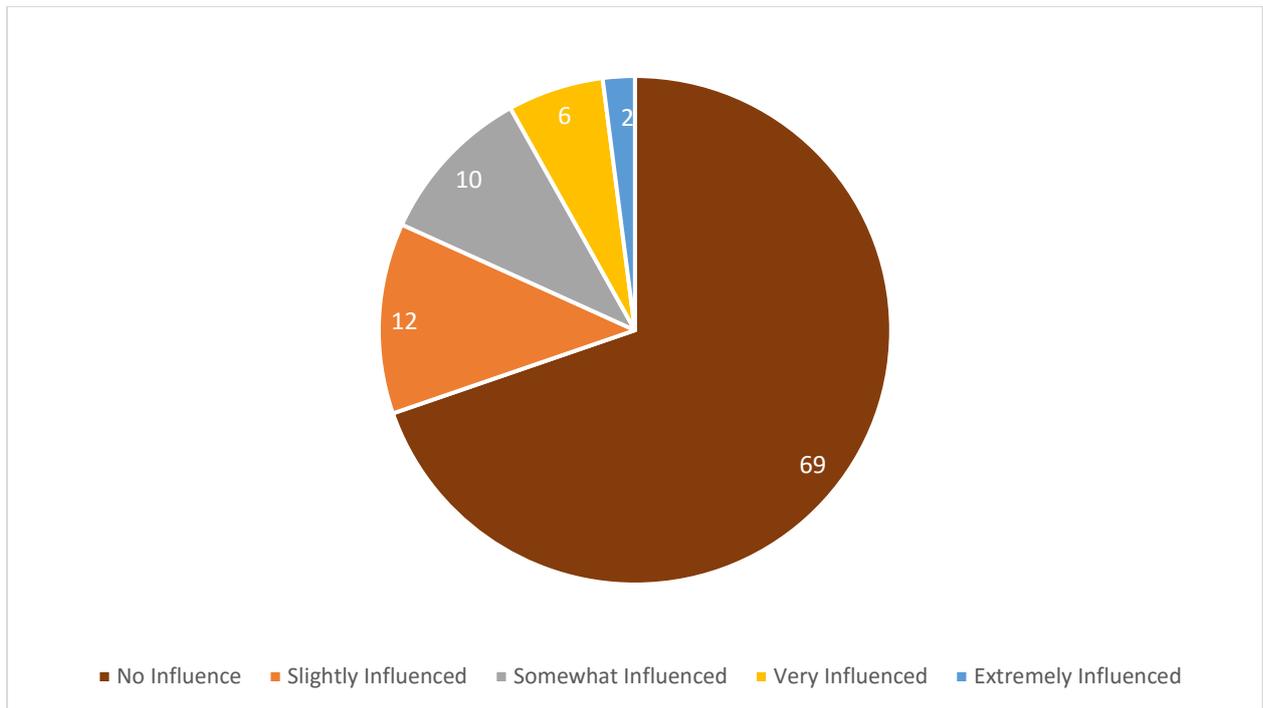
Table 8: Ways in which respondents who are aware of regulations refrained from increasing prices

Percentage of aware' firms that were deterred from increasing prices	
Tried to avoid price increases	54%
Only Increased prices if the suppliers' costs went up	41%
Sought to ensure that gross margins remained the same as before the crisis	35%
Pushed back at suppliers that raised their prices	29%
Used regulations in bargaining better cost prices with suppliers	16%
Refused to buy from suppliers that raised their prices	15%

218. The results revealed that respondents who are aware of these regulations used various techniques to refrain from price gouging. To mention just a few of these techniques, the results show for instance that 54% of these respondents tended to avoid price increases, 41% only increased prices if suppliers increased costs and 35% sought to ensure that gross margins remained the same as before the crisis. The study further revealed that the majority of the 54% who tried avoiding price increases are those who are aware of the Commission's advocacy and enforcement work.

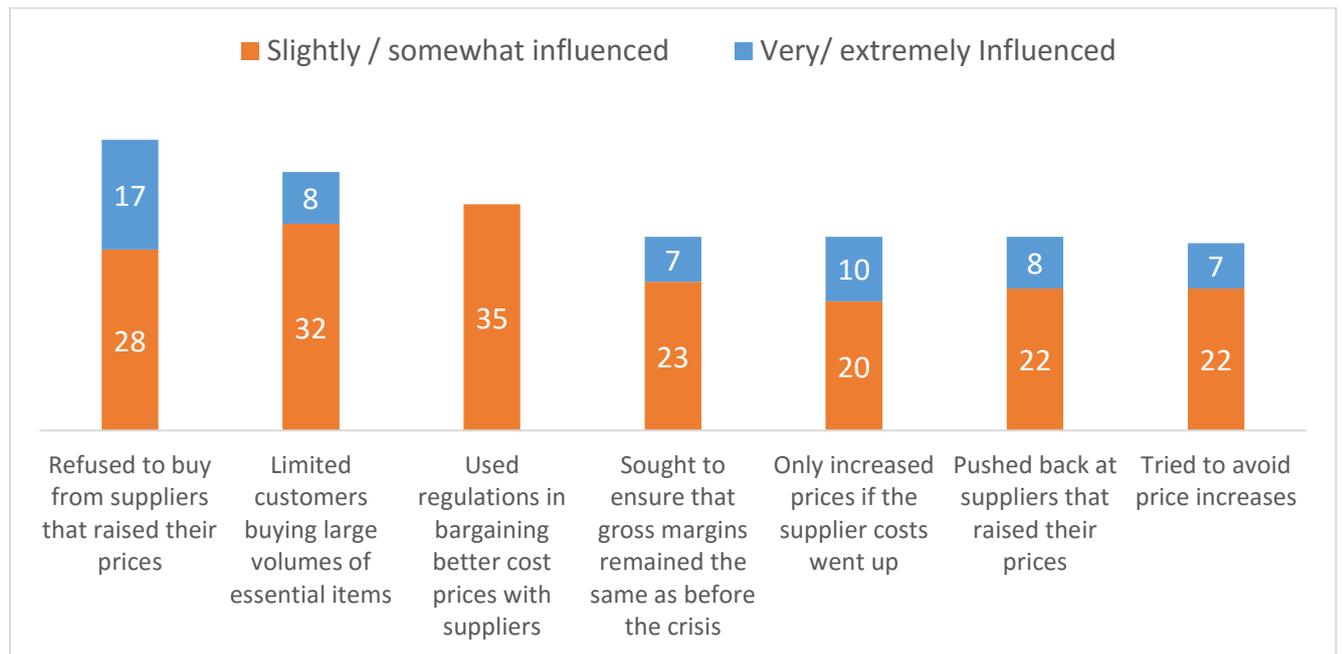
219. Another source of deterrence was considered in the study, namely consumer activism. Because consumers were mobilized quickly to lodge complaints and be active against gougers, it was expected that their complaints and activism would have a deterrent effect on price gouging. The survey results revealed that some respondents, although small in number, were affected by consumer activism and this influenced their pricing decisions during the pandemic. The figure below shows the extent to which respondents were affected by consumer activism.

Figure 4: Percentage of respondents influenced by Consumer Activism



220. As the figure shows, only 18% of the respondents indicated that they received price increase complaints from consumers, 45% of which cited the enforcement activities of the Commission in their complaints. These complaints impacted the behaviours of the firms against which the complaints were lodged. As the figure below shows, the firms that received customer complaints changed their pricing behaviours in a number of ways.

Figure 5: Ways in which firms responded to consumer activism against price gouging

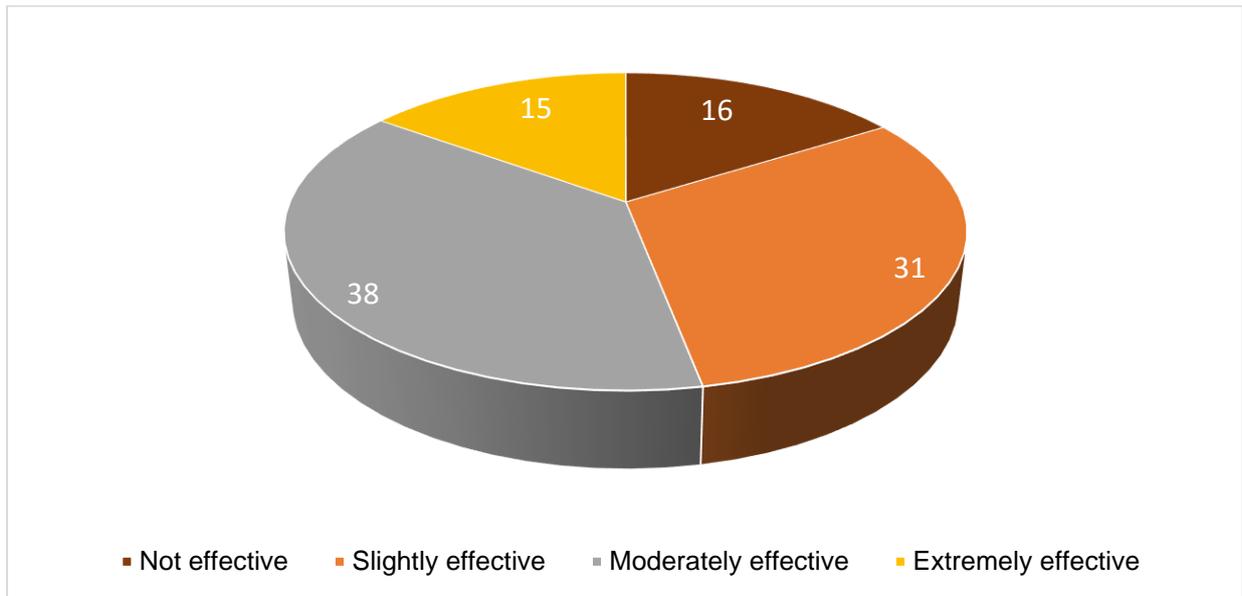


221. For example, the first bar of the graph shows that 17% and 28% of the firms who were ‘very/extremely influenced’ and ‘slightly/somewhat influenced’ by consumer activism responded to consumer activism by refusing to buy from suppliers that raised their prices. The fourth bar shows that 7% and 23% of respondents who were ‘very/extremely influenced and ‘slightly/somewhat influenced’ sought to ensure that gross margins remained the same as before the crisis.

3.4.3 *Measuring the effectiveness of the Regulations in achieving their objectives*

222. The Commission also sought to gauge the level of effectiveness of the Regulations. In doing, the Commission asked respondent to the survey to indicate whether the regulations were effective in achieving their goals in a scale of between 1-4 where 1 meant ‘Not effective’ and 4 meant ‘Extremely effective.’ 53% of the responses to this question indicated that the regulations were effective. This is split between the responses who indicated that the regulations were moderately effective (38%) and those who indicated that the regulations were extremely effective (15%) in achieving their goals.

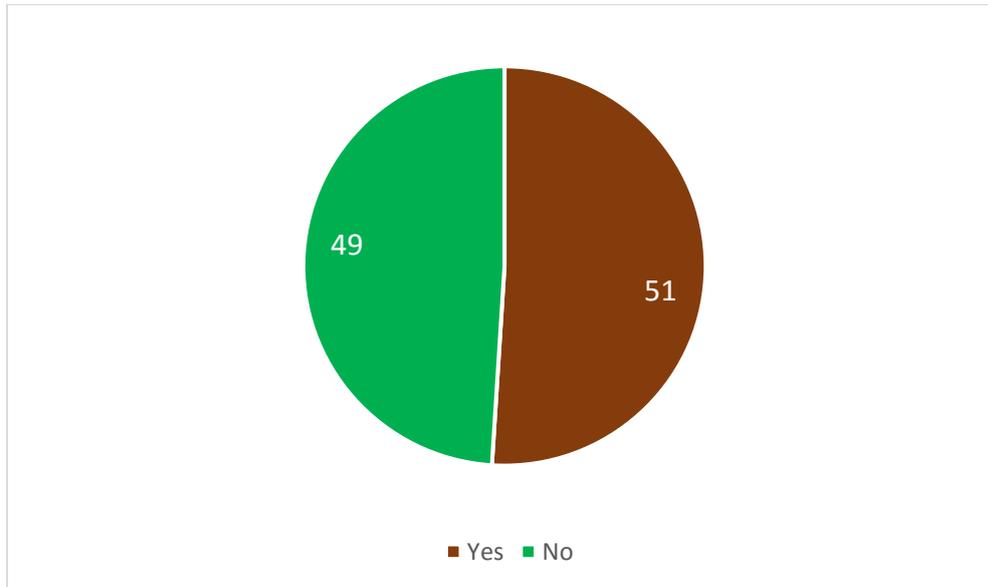
Figure 6: Proportion of stakeholders who believe regulations were effective



223. Just below a third of the respondents (31%) indicated that the regulations were slightly effective in achieving their objectives. Interestingly, the 16% of respondents who indicated that the regulations were not effective tend to be those that are not aware of the Regulations.

224. The Commission also sought to gauge the effectiveness of the regulations by estimating the extent to which the Regulations were relevant to respondents in so far as the Regulations took into account the specific challenges faced by respondents. The figure below shows that 49% of the respondents felt that their needs or challenges were not taken into account by the Regulations, while 51% felt that the Regulations took their challenges into account.

Figure 7: Proportion of stakeholders who think their business challenges were catered for by the Regulations VS those who think their challenges were not catered for



225. Some of the reasons cited by respondents as to why they felt their challenges were taken into account include that during the pandemic, there were no improvements in prices and product availability, yet prices increased. This suggests that the Regulations might have helped keep prices down during the times of shortages of essential products. Some of the respondents noted that the regulations protected the end consumers who were also severely impacted by the lockdown restrictions.

226. Overall it can be concluded, based on survey results, that the regulations were effective since 84% of respondents indicated that the regulations were at least slightly effective in achieving their intended objectives and 51% of respondents felt that their challenges were taken into account by the Regulations.

3.4.4 Measuring the value of fines and donations

227. During quarter one and three (Q1-Q3)¹⁶³ of the 2020/21 financial year, the Tribunal confirmed a number of Covid-19 consent orders and settlements. The team collected and collated data from the Tribunal's website on fines paid by firms who were found to have contravened the anti-price gouging laws as well as donations that were paid to the solidarity fund by firms who settled with the Commission following investigations of price gouging cases.

¹⁶³ Q4 data was not available on the Tribunal's website at the time this report was finalised

228. As shown in section 4.2.2 above, a total of 58 cases were referred to the Tribunal for adjudication or for settlements. Many of the respondents in these cases were not ordered to pay administrative fines as they are very small in size and the conduct took place in a very short period. However, some agreed to make donations related to the overcharge received. For these reasons, out of the 58 cases, only 22 were ordered to pay administrative fines as per the records in the Tribunal’s website. 28 of them agreed to pay donations to the solidarity fund and 24 made donations of PPE and food stuffs to members of the general public.

229. The table below presents the value of the penalties and donations paid by stakeholders in the first three quarters of 2020/21.

Table 9: The value of penalties, donations to the solidarity fund, and donations to the public per quarter

Period	Penalties	Solidarity Fund	Donations
2020/21 Q1	R8 755 582	R5 333 822	R212 312
2020/21 Q2	R550 000	R303 002	R383 937
2020/21 Q3	R300 000	R300 000	R353 639
Total	R9 605 582	R5 946 345	R974 398

Source: Competition Tribunal case site

230. The table shows that between Q1 and Q3, firms paid approximately R9 605 582 in penalties, R5 952 420 was contributed to the Solidarity Fund, and R974 398 worth of essential products such as food items and PPE were donated to the public. This amounts to a total of R16 532 105 that was returned to the pockets of South Africans in the first three quarters since the start of the pandemic. This is equivalent to R22 0442 806 on an annual basis.

3.5 Conclusion on deterrent effects of the Commission’s intervention

231. It was expected that the advocacy efforts coupled with the investigations of price gouging cases would have a deterrent effect on price gouging. Based on a survey of wholesalers and retailers of essential goods, this section assessed the deterrent effect of the interventions in two steps, namely (i) measuring if respondents were aware of the anti-price gouging regulations and the enforcement thereof, and (ii) measuring the proportion

of respondents who were aware of the regulations and were deterred from engaging in price gouging.

232. The survey results revealed that 96% of the respondents knew about the consumer protection regulations and 94% knew about the Commission's advocacy work and investigations in enforcing these regulations and this awareness mainly came from newspaper articles, radio and online forums.

233. The study further revealed that large proportions of the respondents who knew about the regulations were deterred from engaging in price gouging conduct and used many techniques to do so. For instance, 54% of these respondents tended to avoid price increases, 41% only increased prices if suppliers increased costs, and 35% sought to ensure that gross margins remained the same as before the crisis. In addition, the study found that firms were deterred from price gouging by consumer activism and employed similar strategies to refrain from increasing their prices. This consumer activism was in response to the awareness of consumers of the Regulations and their enforcement, as well as being empowered to easily lay complaints. Civil action of this nature is clearly important in support of compliance with the regulations given that citizens are able to alert the Commission to instances across the country immediately, promoting widespread investigations and deterring retailers from taking chances in pushing up prices where they could.

234. The study also sought to gauge the effectiveness of the Regulations in achieving their goal and found, based on survey results, that the regulations were effective since 84% of respondents indicated that the regulations were 'slightly effective' (31%), 'moderately effective' (38%) or 'extremely effective' (15%) and that 51% of respondents felt that their challenges were taken into account by the Regulations.

235. The section also collected data on fines and donations that were paid by firms in consent orders and settlements after being investigated by the Commission for price gouging allegations. We found that a total of R16 532 105 was paid in fines, donations to the solidarity fund, and donation of essential goods in the first three quarters since the start of the pandemic. This is equivalent to R22 0442 806 on an annual basis.

4. CONCLUSION

236. Overall, we find that the Commission's work had significant positive impact in the country during the pandemic, especially during Alert level 4 and 5 of the lockdown. Some of this impact was made possible by the recent amendments to the Competition Act which made possible some of the Covid-19 responses, particularly the amendments to Section 8 and Section 78 which respectively paved the way for successful prosecution of price gouging cases and the granting of block exemptions by the Minister.
237. The Commission's work especially played a vital role in the framing of the Covid-19 Block Exemptions which were granted by the Minister of the DTIC to three key sectors, namely the Healthcare Sector, the Retail Property Sector, and the Banking Sector, to assist participants in these sectors in their response to the pandemic.
238. The study has found that the Block Exemptions for the Healthcare Sector were largely a success in that the block exemptions were used extensively, and several of the intended objectives of the block exemptions were achieved. For example, patients were moved across from public hospitals to private hospitals to ensure care was provided to them when public hospitals were capacity constrained. Further, the cost of Covid-19 tests was reduced from between R1000 and R1500 to R850, saving patients and medical schemes over R1,5 billion per year in the process.
239. It appears from many of the submissions received that there is an opportunity for general reforms to the healthcare sector including the implementation of the HMI recommendations. It seems the pandemic may have exacerbated fault lines in the industry and some forms of cooperation proved effective in overcoming these fault lines.
240. Similarly, the Retail Property Sector and the Banking Sector exemptions were successful in so far as they were used as a forum for negotiations that led to landlords in the case of the former, and lenders in the case of the latter, providing the financial relief that was much needed to assist tenants and debtors that were struggling to meet their financial obligations during the pandemic.
241. As the impact and success of exemptions depends not just on the design but also on how effectively market participants cooperate in mutual efforts to address the negative impact of the pandemic, it is evident that such cooperation is easier and can be more rapidly deployed where there are existing structures, such as BASA, ASISA and HASA. Similarly, it is evident that market participants that are not part of these structures may also be left out of the cooperative effort. Whilst they may still benefit from some of the outcomes, such

as a reduction in covid testing pricing, they may also be at risk of exclusion from the benefits, such as the mid-sized retail groups.

242. Furthermore, cooperation may be more effective where there is a common objective without competing agendas. For instance, in healthcare there was a clear common agenda to ensure the sector as a whole was prepared for the potential onslaught of cases. This included funders and providers of healthcare. In contrast, retailers and retail property owners may have somewhat competing objectives given that both were negatively impacted by the pandemic and reducing the impact on one group would be at the expense of the other. Cooperation within each group is no guarantee of cooperation between each group.

243. The Commission also played a significant role, not only in the framing of the anti-price gouging Regulations, but also in enforcing them through advocacy work and investigations of price gouging allegations. More than 900 cases of price gouging were investigated by the Commission in the first three quarters since the start of the pandemic. 58 of these cases were referred to the Tribunal and approximately R16,5 million (approximately R22 million on an annualised basis) was paid by these firms as settlement amounts in the form of fines, donations to the solidarity fund, and donations of essentials goods to the general public.

244. As expected, these interventions had much broader deterrent effects on price gouging across the economy as many retailers and wholesalers of essential products and basic food products were made aware of the laws that prohibit price gouging either through direct advocacy programs, word-of-mouth reaching them about the Commission's enforcement activities, or consumer activism that was fuelled by the Commission's advocacy work.

245. Based on a survey conducted by Nielsen, the study revealed that respondents who were aware of or were affected by these works of the Commission refrained from increasing prices by either avoiding increasing prices, increasing prices only when suppliers increased cost prices or sought to keep profit margins at pre-disaster levels. The survey results further revealed that the Regulations were effective in achieving the objective of deterring price gouging. This was also facilitated by consumer activism in this period, which itself was in response to the awareness of consumers of the Regulations and their enforcement, as well as being empowered to easily lay complaints. Civil activism of this nature is clearly important in support of compliance with the regulations given that citizens are able to alert the Commission to instances across the country immediately, promoting

widespread investigations and deterring retailers from taking chances in pushing up prices where they could.