



S A K E L I G A
SELFSTANDIGE SAKEGEMEENSKAP

Submission on proposed Covid-19 restrictions, public consultation, and regulations

Submission by Sakeliga (27 April 2020)

1. Executive Summary

1. Sakeliga's approach to consultation

- 1.1. Sakeliga accepts that a margin of error and discretion should be allowed for government for bona fide attempts to deal with apparent public health crises.
- 1.2. Sakeliga has over the course of more than a month now made submissions to the Department of Co-operative Government and Traditional Affairs, the Department of Trade and Industry, the Minister of Police, and other public offices. Most of these have remained unanswered.
- 1.3. In line with our approach to avoid litigation, Sakeliga has also assisted many businesspersons, in conflict with law-enforcement, to amicably resolve it through mediation with local law-enforcement, and has written to the South African Local Government Organisation to advise them on regulatory application of least harm.
- 1.4. Given the potential humanitarian crisis that is now unfolding from the regulations as currently applied and even as apparently envisaged, Sakeliga must reserve its rights. It will seek to avoid litigation where possible, but where measures taken by government exceed the bounds of reasonable margin of error, or where it becomes likely to lead to excessive harm to public well-being and the constitutional order of the country itself, or where meaningful consultation does not take place, litigation would become a reasonable option.

2. Sakeliga's submissions with regard to the public consultation process itself

- 2.1. Sakeliga welcomes its interaction with the DTIC on Friday 24 April.
- 2.2. Sakeliga welcomes the publication of a list of potential specifications for eventual regulations published by government on Saturday 25 April.
- 2.3. Sakeliga is concerned that – more than six weeks since the initial Declaration of a State of Disaster on 15 March – the public consultation process lacks essential elements
 - 2.3.1. No draft regulations have been published – only a long list of potential specifications for various restriction levels to be included in eventual regulations. As such, there are no draft regulations to comment on.

2.3.2.No model has been made available for moving between restriction levels, the expected benefits of public health when moving between levels, or for when restrictions and the State of Disaster will be lifted. Without benchmarks subject to public scrutiny, the restrictions exhibit a character of semi-permanency.

2.3.3.No social impact study has been made available, which makes it impossible to evaluate the trade-offs government considered between the health benefits of the restrictions proposed on the one hand and the harm to health, well-being, economy, and social stability on the other.

2.4. Sakeliga insists that a proper public consultation process should have been followed – and should still be followed – for any and all restrictions imposed, although retraction and relaxation of one-sidedly imposed restrictions can in our opinion be done without public consultation.

3. Sakeliga’s submissions on the regulatory approach, including legality and international law

3.1. The current regulatory approach, which is to regulate by proxy, is fatally flawed regarding public health, social stability, economic activity, and the principles of legality and constitutionalism. The current regulations have the characteristic of regulating by proxy such as specifying allowed products, activity, and economic sectors, rather than using the less restrictive and generally understandable approach of identifying and restricting specific risky activities.

3.2. The regulations do not have the character of negative restrictions, which would have left the public free to do as they please as long as they avoided certain specifically identified risks.

3.3. The regulations also carry no resemblance to common law or customary law and are not intuitively graspable. They are applied arbitrarily and to different businesses as if they are unequal before the law. This makes the regulations impossible to comply with for a bona fide public and gives them an arbitrary nature. This impossibility to comply, because of impossibility to understand and know, jeopardises the legality of the restrictions, while alternatives are available.

3.4. The regulations currently require that government first gives permission for activities to be resumed, making government a bottleneck through which economic and other social activity cannot pass quickly enough, and which has great risk of litigation for damages from government.

3.5. We recommend that the regulatory framework be vastly simplified so as to be comprehensible for the general public and officers of law, to become manageable for government, and to ensure the support of the general population without which the regulations cannot be sustained, otherwise risking complete breakdown of all public health measures.

- 3.6. We recommend that new regulations are aligned with the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, as supported by the *World Health Organisation*.
- 3.7. That the current lockdown approach, which entails specifying that which is permitted, should be abandoned in favour of an approach that rather specifies unpermitted risk.
- 3.8. That all businesses, operations, products, and sectors be allowed to resume and trade, as long as businesses pivot and/or innovate in order to avoid unpermitted risk as specified in regulation
- 3.9. That unpermitted risk regulations should focus on defining risky aspects of operations and activities, rather than sectors or products, specifically and only relating to curbing Covid-19 infections.
- 3.10. That the distinction between essential and non-essential business should be abandoned
- 3.11. We consider the 1-page regulatory framework proposed by leading economists, advisory firms, chambers of commerce, and others (available here and attached at the end) to be a good starting point

4. Submissions on the list of specifications, or “regulations”, as made available

- 4.1. Sakeliga maintains that no draft regulations have been published, only an incomplete list of potential specifications that could be included in future draft regulations
- 4.2. Sakeliga maintains that the attempt to specify product-by-product, activity-by-activity, and sector-by-sector, is harmful, counter-productive, and unworkable, while reasonable and obvious alternatives exist.
- 4.3. Nevertheless, given that lifting of the current lockdown regulations might in the short term only happen by way of this “specification approach”, Sakeliga offers suggestions on the draft list of specifications.
- 4.4. See “Comments on specific regulations” below for full list

5. Further matters

- 5.1. CIPC: Scrap CIPC process and inform police that no certification is required
- 5.2. Competition and Consumer Protection: Cease all prosecution, referrals, investigations, and/or any intimidation of any company with regard to unlawful promulgation of comp and consumer protection regulations + withdraw relevant promulgated regulations

6. Further requirements

- 6.1. Please note that Sakeliga request the following on an urgent basis
 - 6.1.1. Model: The model, including all assumptions and calculations, on which you plot potential scenarios and the ways in which they vary depending on response level.

6.1.2. Impact study: Your estimations of side-effects of the measures you are taking, including civil unrest, unemployment, poverty, closing of businesses, loss of tax, etc.

6.1.3. CIPC: Confirmation of whether the CIPC process is scrapped, and otherwise reasons for deciding anything other than scrapping the essential services registration process, whether by CIPC or otherwise, and other than instructing police accordingly.

6.1.4. Restrictions on trade by other regulations

Confirmation of whether the regulations promulgated hastily and without public consultation (under the Competition Act and/or the Consumer Protection and/or other acts), which restrict trade and economic freedom and the ability of businesses and consumers to adjust to the extreme demand and supply shocks imposed on it, will be withdrawn.

Confirmation of whether the attempts to prosecute, investigate or otherwise discourage freedom of trade with regard to these unlawfully promulgated regulations will be ceased, reversed, or otherwise what their status will be.

1. Submissions on the regulatory approach

1.1. The proposed policy fails to take economic realities into account

1.1.1. The proposed policy regulates by proxy

A key weakness in the proposed regulatory framework is how it goes about in regulating risk. While the attempt to draft a risk-based framework, in the first instance, is laudable – it misses the mark.

Ultimately, what the current framework requires is that government determines what the risks are which are associated with a particular industry, in terms of commutes, social distancing and other associated health risks. This strategy is problematic as it relies on regulation by proxy and merely relies on happenstance – in that some industries tend to be higher or lower risk. This strategy may, however, be dangerous for a number of reasons.

- By restricting vast swathes of the economy at a time, this approach fails to account for the fact that risks may be dependent on the particular circumstances in a particular firm. Risks will differ, based on geography, building layouts, demographics and, most importantly, adaptations brought about by firms which seek to continue operations. **The ultimate of this effect may, accordingly, be to prohibit economic activity that is low-risk and which places no vulnerable populations at risk.**
- In addition, the opposite might be true as well. A failure to account for how risks may differ in a particular sector could have the effect of failing to properly regulate risky activities and behaviour. This might not only happen by sheer happenstance, but also due to the fact that a firm might have little to no incentive to improve safety, as its operations are allowed by mere merit of the fact that it is part of a particular sector.

Apart from the dangers of this strategy, it also presents an extensive challenge from a regulatory perspective. Before an industry can, in fact, be allowed to operate, government needs to first do a detailed analysis of the typical risks that are particular to that industry, broadly speaking. **This process can be made largely superfluous by, instead, directly identifying and regulating risky behaviours.**

Recommendation: Adopt a system of risk-based regulation. Identify risky behaviours and practices and regulate them directly, without necessitating an investigation on the side of government to determine likely risk levels.

1.1.2. The proposed policy is far too complex

In a matter of weeks, the lockdown regulations expanded from one solitary declaration of the state of disaster into a 50-document, 500-page regulatory system which – after only a month in operation – requires specialist legal knowledge to navigate.

While the initial regulations, as drafted, were relatively simple, the need to regulate more specific economic activity quickly broadened their scope and, with it, necessitated a number of expansions, addendums, directives and modifications. This happened in spite of the fact that these regulations had the modest aim of only regulating a few, key sectors in any kind of detail.

Considering the ambition of the new regulations – which, in essence, aim to do exactly the same as the present regulations, if on a larger scale – it is not unreasonable to suppose that a similar expansion is all but inevitable. This situation is exacerbated by the fact that the new regulations provide ample room for particular ministers or particular departments to promulgate more specific rules for given sectors.

This complexity is far from an academic problem and, in fact, represents some very serious difficulties on the part of the public, businesses and law enforcement.

- In the first instance, it is very difficult – if not impossible – to educate the public on all the measures which are intended to be announced and how they function in relation to particular commercial activities. This will have several consequences, of which the most worrying are that, despite government's best efforts, public safety in many areas may not be improved by any meaningful amount.
- Regulatory complexity also makes compliance more difficult. Even law-abiding businesses may, even during the course of conducting entirely legal business, be unsure as to their legal status. Others may, inadvertently, conduct business activities which are illegal. It is also to be expected that this uncertainty is likely to constrain many small businesses and dissuade them from participating economically, even where they are allowed to do so. In all likelihood, large businesses (which can afford to hire the requisite legal expertise to ascertain what their status is) will benefit disproportionately from this legal uncertainty.
- The voluminous contents of the present regulations have, furthermore, complicated the exercise of enforcement tremendously. Sakeliga is aware of a number of cases where law enforcement has, inadvertently, scuppered entirely legal (and essential) businesses due to misunderstandings on the exact contents of the regulations. Considering the relatively small scope of the previous regulations, this situation is likely to worsen as the list of permitted industries are expanded.

Recommendation: Regulations should not seek to regulate specific industries, or actions – but should instead take a broad and simplified principle-based approach.

1.1.3. The proposed policy lacks nuance

Ironically enough, despite the aforementioned complexity of the regulations, they have largely been perceived as being unnuanced and out of touch with economic reality. A short – but far from exhaustive – list of examples serves to illustrate this point:

- For much of the lockdown, new parents were unable to buy clothing and basic supplies for their new-borns.
- Those faced with severely damaged homes and accommodation were unable to perform repairs – either by hiring in contractors, or by buying the supplies themselves.
- Soup kitchens for the poor and destitute were unsure on their status and are, in terms of present contents of the regulations, strictly prohibited from operating.

It should be clear that this represented an untenable situation. If, however, this regulatory system is replaced by another, which seeks to regulate which *specific* products and services may be offered, such difficulties are not only likely to continue – but, in all likelihood, grow worse. It is important to keep in mind that the present scheme for the phased recovery of the economy, in this instance, attempts to do exactly the same thing as the present system of regulation – only on a much grander scale.

On an economic level, the cause for these problems lie in government's use of a categorical distinction between different sectors of the economy. While this may seem an appropriate strategy, it quickly runs into problems on the level of an individual firm.

- While distinguishing between different sectors of an economy may be suitable for the purposes of gaining a rough statistical understanding, it quickly becomes difficult when applied as a regulatory measure. This is, in essence, due to the fact that firms very rarely fall entirely within the scope of a given “sector”, with many conducting activities which may span very different areas of the economy.
- Furthermore, it must be borne in mind that many firms may, in fact, change their economic activities due to the new regulations which may be imposed upon them. This means that firms, facing restrictions in one area of the economy, may pivot their business model to participate in less regulated areas.
- Finally, even should government succeed in developing a framework that a.) adequately distinguishes between all possible permutations of business activities and b.) provides ample space for businesses to easily shift between such categories, it is still faced by another intractable problem. Ultimately, regardless of the particular “sector” a given firm happens to find itself in, it will ultimately rely on a number of firms outside of that particular sector.

Should these firms be allowed to operate, they, themselves, likely rely on a number of other businesses, in turn, to conduct their operations. This process may well continue – for all intents and purposes – indefinitely, as the economy represents a complicated whole with many moving parts.

Recommendation: Instead of distinguishing based on an arbitrarily assigned industry, regulations should focus on what activities a business is, in fact, engaging in.

1.2. The regulations are likely in violation of the principles of legality and the rule of law
Quite apart from practical and economic considerations, the provisions, as proposed, may well be in violation to a number of core principles of the South African legal system, such as legality and the rule of law. If this is the case, it would constitute a fatal breach of not only the South African Government's domestic legal obligations, but of its international legal obligations as well.

It bears mentioning that this would not only mean that the proposed regulations may ultimately be of no legal effect, but may, in addition, open serve to incur liability on the part of the South African government – both for general damages and, more particularly, to constitutional damages.

1.2.1. Legality in South African law

Legality represents the principle that, in carrying out its duties, the state, or any of its subsidiary bodies are themselves bound by law. In this spirit, the state is precluded from using its powers in an arbitrary manner – and this principle applies to crimes brought into life by statute. This principle is derived from the South African common law, in the form of the precept “*nulla crimen sine lege*” and has been recognised by the Constitutional Court as constituting a key value in our constitutional dispensation¹.

A key part of this general principle is the fact that a legal precept must be drafted in clear, understandable terms. This does not, however, merely refer to the language used in drafting such a provision – but the fact that such a provision does, in fact, constitute a reasonable, understandable legal rule that may be adhered to.

1.2.2. Legality in International Law

The principle of legality is, however, also enshrined in the precepts of International Law and, accordingly, this represents another source of this obligation to the South African state.

¹ S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642.

It is beyond contention that the proposed regulations necessarily limit a number of rights which are enshrined in international legal obligations. A short, non-exhaustive, list includes the right to work², the right to an adequate standard of living³, the right to education⁴, the right to the security and liberty of one's person⁵ and the right to freedom of movement⁶.

Despite the fact that these rights may be limited by mechanisms similar to those found in section 36 of the Constitution of the Republic of South Africa, a state party may still be in violation of its obligations by failing to adhere to the strict conditions set out for said limitations.

In the case of the aforementioned rights, such limiting clauses are to be found in Articles 4 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which state clearly that such limitations are subject to a number of conditions. To this end, the Siracusa Principles have long served to illustrate the scope and meaning of the contents of this class of provision – and has been applied in that capacity within the context of international as well as South African law.

The core-implication of the contents of these provisions, as read with the Siracusa Principles, makes it clear that law – even if properly promulgated and drafted – may yet constitute illegality where they fail to unambiguously and understandably set out specific legal provisions. Siracusa principle 7, for instance, determines that “[n]o limitation shall be applied in an arbitrary manner”. Similarly, Siracusa principle 17 determines that “[l]egal rules limiting the exercise of human rights shall be clear and accessible to everyone”.

Another implication of these principles is one of proportionality. Limitations may be illegal where they are, in light of the circumstances, overly broad or overly prejudicial to the rights of affected parties. Siracusa Principle 25, for instance, makes allowances for the limitation of rights in the interest of public health or reducing the spread of disease, but makes it clear that such “[...] measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.”

Accordingly, if states intend to derogate from rights, they are limited in doing so to the extent that is necessary to deal with the particular crisis being faced. This conclusion is further strengthened by the

² Article 6, the International Covenant on Economic, Social and Cultural Rights.

³ Article 11, the International Covenant on Economic, Social and Cultural Rights.

⁴ Article 13, the International Covenant on Economic, Social and Cultural Rights.

⁵ Article 9, the International Covenant on Civil and Political Rights.

⁶ Article 12, the International Covenant on Civil and Political Rights.

more general contents of the Principles, which state that “in applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”

Accordingly, we may make two deductions concerning South Africa’s international legal obligations – and its ability to derogate from them in the face of this crisis:

- a) Any limitation of rights must be drafted in terms of clear, accessible, predictable and understandable legal precepts.
- b) Any limitation of rights must be constrained to what is strictly necessary to contain the Covid-19 epidemic.

1.2.3. The illegality of the proposed regulations

The regulations which are currently being mooted do not, in fact, meet these standards. This is largely due to a combination of their structure (which seeks to authorise only particular economic activities) and their contents (which fail to make allowances for the economic realities involved in such activities). Accordingly, it is next to impossible to determine with any certainty whether a number of activities are, in fact, actually allowed – even disregarding the ways in which these provisions may be interpreted by law enforcement on the ground.

Even should the contents of the provisions be vastly expanded, it is doubtful whether this would cure this defect. It goes without saying that, even at present, it is unreasonable to expect law-abiding citizens to keep track of an ever-amended 500-page collection of regulations.

As discussed within the economic portion of Sakeliga’s submission, it is eminently clear that this situation is only likely to worsen in the case of the new regulations. The provisions currently being mooted would, by their very nature, be ever-changing, overly long and difficult to navigate.

Furthermore, these regulations are likely to be misunderstood through the course of the legal procedures which seek to apply them. This is vividly illustrated by the misunderstandings surrounding the modest scope of the previous regulations – misunderstandings even by the very bodies which issued them. This, ultimately, is likely to cause these rules to be applied in a contradictory and irregular manner. The resultant prejudice to the interest of right-bearers will inevitably be inconsistent, unpredictable and arbitrary.

Furthermore, it is clear that the regulations go far above and beyond what is strictly necessary to contain the spread of the Covid-19 outbreak. This tendency was present from the very start, as the regulations sought to limit economic activity which presented little to no harm. In this way, there was

no reasonable correlation between the prohibition on cigarette sales and attempting to halt the spread of the disease. This was the case in *legio* other matters, from warm foods to limiting the sale of clothing for new-borns.

The regulations currently being mooted do not seem to improve upon this situation. Why, for instance, is e-commerce prevented from carrying out its activities? This despite the fact that this sector has been recognised internationally as representing remarkably low risk for Covid-19 transmission.

1.2.4. Conclusions and recommendations

Sakeliga is aware that a number of arguments have been made publicly relating to what is stated to be “fairness and equity”. **There is no allowance for such arguments in terms of international law**, no more than it would be morally or legally justified to leave a person in a burning building, just because one is unable to rescue all who are in danger.

In addition, due to the way in which the regulations are drafted, they will, by necessity, exclude all economic activities which are not explicitly included. It goes without saying that it is a statistical certainty that low- or no-risk activities will be prohibited by this general ban – and all without scientific or economic justification.

The very way in which the regulatory structure is designed will cause the South African government to violate its legal obligations. Essentially, they are so far removed from economic realities as to fail to regulate them at all. Furthermore, these regulations do not meet the test for legal certainty required to be of any effect and represent a severe violation of the rule of law and principle of legality.

A risk-based approach, however, will by its very nature, ensure that only specific risky activities are limited or regulated. This will serve to satisfy South Africa’s legal obligations insofar as they

- a) Will be drafted in concrete, limited and clear terms.
- b) Be tailored exactly to the applicable risks and, in so doing, avoid the risk of regulatory overstep.

2. Comments on specific regulations

2.1. General comments

We propose the following relaxations with proper risk mitigation strategies:

The following comments relate to pages 6 to 10 of the draft specifications released on 25 April:

- D1-9: It is recommended to allow all construction activities with proper risk mitigation strategies.
- E10: Allow all stakeholders in residential properties, including owners, to acquire hardware and other supplies for essential home maintenance in order to avoid damage to properties.
- E12: In addition, also allow component sales for all owners of vehicles to ensure repairs and self-repairs, not just to sales essential services providers.
- E14: Relax requirements to allow textile sales to individuals for their own production of clothing and winter clothes. Many people make their own clothes and should be allowed to do so. Also, allow people to purchase any clothing where good cause can be shown for replacing necessary items of clothes.
- E20: It is recommended to allow for the controlled sale of liquor for offsite consumption during business hours. This will support businesses and employment in the liquor industry and assist consumption of liquor within reasonable restrictions.
- E21: allow the exportation of liquor in support of wine and other liquor suppliers and to increase South Africa's export earnings.
- F3: Allow all postal services and eCommerce at level 4 where Ecommerce firms can show, on a reasonable basis, the implementation of measures to reduce the risk of Covid-19 transmission to acceptable and reasonable levels of risk. Not only will this support eCommerce companies with reduced requirements of state support, but it could also allow consumers access goods they deem to be of value without going to physical stores.
- H6: In addition, also allow the rental of motor vehicles where a person can show a reasonably justifiable case for renting a vehicle.
- I2: Remove the requirement to apply a national curfew. See comment on point R14.
- J3: It is recommended not to restrict the operating hours for eHailing services. As a broad principle, we deem time limits as illogical for Covid-19 mitigation. Why crowd proportionately more people into taxis, E-hailing services, and other public transport during reduced operating hours? It is likely that an extension of operating could see proportionally fewer people using such services per hour. A restriction of hours appears to be an irrational policy from the perspective of Covid-19 transmission mitigation.

- J5: It is recommended to ensure as little restriction possible for importation of any goods as this would reduce the risk of currently undesignated but still essential goods falling into short supply in future.
- K5: It is recommended to allow for the upscale of mining operations up to 100%, where mining firms can show, on a reasonable basis, the implementation of measures to reasonably reduce the risk of Covid-19 transmission to an acceptable and reasonable level of risk.
- L2: Also include an allowance for self-repair work by allowing public purchases of essential repair inputs for the reasons of essential maintenance.
- P3. How would a 50% capacity for informal recycling work? Since there is no obviously unfair non-discriminatory way to select between informal recyclers (who works and who sits out?), it may be better to allow full employment to avoid discrimination given the structure of the industry and consider other Covid-19 mitigation methods.
- R1: It is recommended to relax interprovincial travels rules in order to explicitly allow for compassionate visits with close family members. It is also recommended to allow for an easier online (or otherwise improved) approval process for such travel.
- R3: We strongly recommend that a more lenient policy be considered for local recreational or emotional health visits with close family members in order to mitigate social harms arising from loneliness and to provide social support and in-person assistance for example to family members in need.
- Clauses R6, R7 and R8 are not clearly specified. Add a clause to specify that Personal movement is allowed for ...
- R10: We recommend that the “2m requirement” be relaxed when appropriate for stores and other public spaces with a smaller floorspaces where the 2m requirement is not practical.
- R13: These requirements seem somewhat unpractical and will add cost to business operations. Added cost will reduce the viability of many marginally profitable operations. Losses of enterprises will reduce the efficiency of the economy. It is recommended to consider relaxing these requirements, or, if relaxations are not considered, to provide an analysis of the impact of additional measures on firm viability, employment and marginal business losses compared with realistic scientific data on the extent of risk reduction.
- R14: We fail to see any logic of application of a national curfew and we recommend that a curfew rule should not be implemented. However, before a curfew is implemented, government should explain, with scientific data, how a restriction on the hours of movement of people would not add to proportionally more people being in public during the unrestricted curfew hours. An unreasonable curfew, moreover, would likely open government to civil rights challenges on many fronts, which, we think, is best to be avoided.

We propose the following general additions to Level 4 as well as to Levels 3 through to Level 1.

- Allow any manufacturing, production and distribution up to 100% where any firm can show, upon reasonable request, on a reasonable basis, the implementation of measures to reduce the risk of Covid-19 transmission to acceptable and reasonable levels.
- Allow employment up to 100% where firms can show, on a reasonable basis, implementation of measures to reasonably reduce the risk of Covid-19 transmission to acceptable and reasonable levels.

Specifically:

- Allow commercial building projects up to 100% where firms can show, upon reasonable request, on a reasonable basis the implementation of measures to reasonably reduce the risk of Covid-19 transmission to acceptable and reasonable levels.
- Allow private building projects up to 100% where firms can show, upon reasonable request, on a reasonable basis the implementation of measures to reasonably reduce the risk of Covid-19 transmission to acceptable and reasonable levels.
- Allow restaurants up to 100% where firms can show, upon reasonable request, on a reasonable basis the implementation of measures to reduce the risk of Covid-19 transmission to acceptable and reasonable levels.
- Allow other personal services like hair salons, spas and beauticians up to 100% where such businesses can show, upon reasonable request, on a reasonable basis, the implementation of measures to reasonably reduce the risk of Covid-19 transmission to acceptable and reasonable levels.
- Allow limited domestic air travel for essential workers and compassionate visits of close family members (e.g. where family members are terminally ill).
- Implement easy online application processes for essential travel and compassionate family visits.
- Allow the sales of motor vehicles where necessary for travel for essential or level appropriate services or to enable access essential services, goods, and compassionate visits as well as where firms can, upon reasonable request, show on a reasonable basis the acceptable and reasonable implementation of measures to reduce the risk of Covid-19 transmission to reasonable and acceptable levels.
- Allow commercial real estate services where necessary to support business models or investments.

2.2. E-Commerce, logistics and delivery

Ultimately, it is imperative that as much of the economy that can restart itself safely be allowed to do so. Fortunately, we need not only rely on the ability of businesses only to conduct their former business activities safely – as the possibility exists that former business models can be adjusted to reflect new realities. In the process of doing so, a number of sectors are of particular importance, as they represent key components to doing low-risk business.

E-commerce represents one such key sector, as it may enable businesses to reach their customers, even in an environment where retail stores are heavily regulated, or in which customers may be hesitant to visit public places. Encouraging the use of e-commerce will, furthermore, serve to make the public less likely to experience the need to leave their home unnecessarily.

Naturally, for E-commerce to represent a significant factor in the amelioration of risk, it is necessary that other companies operate as well – such as those involved in transport and logistics, whether domestically or internationally.

Recommendation – allow firms involved in e-commerce to function as they would under normal circumstances.

3. Further matters

3.1. CIPC certification

Sakeliga is heartened by the fact that the Government is in agreement with the fact that the CIPC-certification as essential service is an entirely voluntary enterprise on the part of participating businesses and that, in itself, such certification does not have legal effect. Sakeliga is, however, concerned by the fact that the impression has been created that said certification is a necessary procedure required before essential services may be rendered – and that this impression, furthermore, seems to be prevalent amongst law enforcement. Sakeliga notes that many of its members, as well individuals acting on behalf of NGO's and similar bodies, have been prevented from providing essential services for this reason.

Sakeliga also notes with concern that the CIPC, apparently by means of the Bizportal Twitter-account, has taken to “referring” certain applications of said certificates to the NPA for prosecution, as well as asserting that certain businesses will be deregistered as essential service providers due to a perception that they may not be providing “essential services”. Sakeliga wishes to remind the DTI that businesses may well pivot from providing non-essential services to providing essential services in this time. Sakeliga believes that, ultimately, the final determination of whether or not a business is an essential service should be based upon the actual nature of the commercial activity being conducted.

Recommendation – the CIPC-certification process is to be abandoned and the police are to be instructed accordingly. Furthermore, the newest iteration of the regulations is to be drafted to leave decision-making power with the particular firm seeking exemption.

3.2. Competition regulation

Sakeliga, furthermore, notes that it believes that retailers should be free to adjust prices to reflect changes in supply and demand. Ultimately these market mechanisms serve a vital role, not only in rationing scarce goods in high demand (and, in doing so, dissuade hoarding), but also in motivating other market participants to supply goods which may be sorely needed and in short supply. Sakeliga is also of the opinion that price-gouging regulations promulgated in terms of the Competition Act may not be entirely legal, considering that no process of public participation was followed and the Competition Act, in contrast to prescripts issued in terms of the Disaster Management Act, has no implied urgency in its processes dealing with the issuance of subsidiary legislation.

Recommendation – Withdraw all competition regulations passed since the end of March, since it was not subject to public participation. Cease all attempts at prosecution under those regulations and allow the market to adjust to the unprecedented supply and demand shocks from which businesses and consumers have to make sense.



SAKELIGA
SELFSTANDIGE SAKEGEMEENSKAP

Memorandum

From: Piet le Roux, CEO, Sakeliga

To: The Department of Trade, Industry and Competition (for attention: Mr. Harald Harvey)

Re: Proposals and requests by Sakeliga regarding lockdown regulations

Date: 24 April 2020

Summary: This document lists and extends proposals and requests made by Sakeliga to the Department of Trade, Industry and Competition (DTIC) at their meeting on 24 April 2020, from 10:00 to 11:30. The document deals with points only briefly, since elaboration was provided during the meeting. The Department is welcome to request further information on any specific point.

Regarding the publicly known matter of possible legal proceedings by Sakeliga against the DTIC, Sakeliga reiterates that it wishes to avoid litigation. Sakeliga accepts the DTIC's invitation to consult on amending the current regulations and will provide these and further comments on draft regulations as received before finalisation and promulgation of the amended lockdown regulations next week. Given the magnitude of possible harm in the event of defective regulations, Sakeliga must however reserve its rights for when regulations are finalised, even as it will continue to seek alternatives to litigation.

Agenda discussed

1. Framework for consultation
2. Regulatory framework and approach
3. Specific regulatory aspects
4. Background to the meeting

t. 012 880 1951 | diens@sakeliga.co.za
109 Gerhard Street / Gerhardstraat 109, Centurion, SA

Sakeliga NPC (Reg. nr. 2012/043725/08)

www.sakeliga.co.za

1. **Consultation**

1.1. Sakeliga requested that

- 1.1.1. the requirements of constitutionality, such as due process, legality, and the rule of law be respected in developing legislation and regulations, which we are advised by senior counsel has so far in several instances during the State of Disaster not been the case
- 1.1.2. proper public consultation be conducted with all affected parties before extending lockdown or issuing further lockdown regulations
- 1.1.3. its submissions on both the lockdown regulatory framework as well as specific lockdown regulations be taken into account before the promulgation of lockdown extensions or further lockdown regulations

1.2. Sakeliga accepted

- 1.2.1. the DTIC's invitation to supplement the points made during discussion with this memorandum

2. **Proposals by Sakeliga regarding the regulatory framework**

- 2.1. That the current lockdown approach, which entails specifying that which is permitted, should be abandoned in favour of an approach that rather specifies unpermitted risk
- 2.2. That all businesses, operations, products, and sectors be allowed to resume and trade, as long as businesses pivot and/or innovate in order to avoid unpermitted risk as specified in regulation
- 2.3. That unpermitted risk regulations should focus on defining risky aspects of operations and activities, rather than sectors or products, specifically and only relating to curbing Covid-19 infections.
- 2.4. That the distinction between essential and non-essential business should be abandoned
- 2.5. (See the attached 1-page position paper that outlines the above approach, as supported by financial firms, economists, and chambers of commerce.)

3. **Requests by Sakeliga on specific regulatory aspects**

(irrespective of "risk levels", "risk stages", or "lockdown stages", etc., should an approach that attempts to define what is allowed be maintained)

3.1. CIPC certificates

- 3.1.1. That the CIPC registration process be abandoned since it has no basis in the regulations and serves only to complicate compliance at a time when compliance should be as easy as possible
- 3.1.2. That the police and the public and all business who have so far applied for a CIPC certificate be informed that a CIPC certificate is not a requirement for doing business
- 3.1.3. That all referrals for prosecution by the CIPC as such to law-enforcement be withdrawn, since the CIPC is not in a position to determine whether or not a business conducts essential operations or not

3.2. Food

- 3.2.1. That no distinction be drawn between the kind of food that may or may not be sold
- 3.2.2. That regulations, where necessary, focus on defining risky aspects of food related operations, without limiting businesses' ability to innovate around the risk
- 3.2.3. That no distinction be drawn between the kind of business that may or may not prepare food, especially not given that small and medium-sized enterprises are currently being treated unequally before the law by limiting their ability to prepare food much more than with retail chains.
- 3.2.4. That no business that formerly operated as a restaurant or similar public food serving enterprise, but then altered its business model to become a bona fide food provider within the scope of the regulations and not serving the public for consumption at its premises, will be obstructed or prosecuted for such operations and alterations to its business model

3.3. Deliveries

3.3.1. That all deliveries be allowed, subject where necessary to limitations of hygiene and other risk mitigation factors, but without limiting businesses' ability to innovate around the risk

3.4. E-commerce

3.4.1. That all e-commerce be allowed, subject where necessary to limitations of hygiene and other risk mitigation factors, but without limiting businesses' ability to innovate around the risk

3.5. Government agencies such as the deeds office

3.5.1. That all government agencies, such as the deeds office, that present a bottleneck to economic activity be re-opened

3.6. Competition regulations

3.6.1. That several recent regulations published in the Government Gazette without proper public consultation, be withdrawn (including, but not necessarily limited to Regulation Gazette 11057 on 19/3 and 11080 on 3/4)

3.6.2. That all investigations and prosecutions for alleged contraventions of the objectionable regulations be halted and abandoned, not least because it will allow the market to adjust to the extraordinary shocks experienced with the least shortages, most additional supply, and greatest downward pressure on prices

3.7. Opening of borders to all imports and exports of goods

3.7.1. That all importing and exporting of goods be allowed, subject where necessary to limitations of hygiene and other risk mitigation factors, but without limiting businesses' ability to innovate around the risk

3.7.2. That this includes the importing and exporting of wine and other alcoholic beverages

3.8. Construction

3.8.1. That all construction be allowed to continue, subject where necessary to limitations of hygiene and other risk mitigation factors, but without limiting businesses' ability to innovate around the risk

3.9. Personal, professional, and medical services

3.9.1. That all personal, professional, and medical services, ranging from hairdressers to accountants to surgeons, be allowed to resume, subject where necessary to limitations of hygiene and other risk mitigation factors, but without limiting businesses' ability to innovate around the risk

4. Background to the meeting

- 4.1. Like virtually all business groupings, Sakeliga's intent is one of assistance. Its proposals and contributions over the past several weeks have been made with a view to aiding public health efforts, while averting the looming economic crisis concomitant with its own and even more serious consequences in terms of public health, social stability, and destitution.
- 4.2. With more than 12 000 active members, another 4000 users of its platforms, and several affiliated chambers of commerce, Sakeliga is one of the largest business groups in South Africa. It is a not-for-profit, independent business organisation that seeks to promote economic growth in the public interest. To this end its safeguards and develops a conducive environment for business, to promote the well-being of all communities where its members do business. It seeks to uphold and develop a constitutional order, market economies, and a variety of economic institutions.
- 4.3. In general, businesses and the public have acted with commendable goodwill toward the President and Government during this state of disaster. Unfortunately, this goodwill is rapidly deteriorating amid a lack of consultation, regulatory complexity, arbitrary changes, unreasonable law-enforcement, and growing economic crisis. Sakeliga believes that adopting the proposals above would go a long way to restoring goodwill, aiding all health efforts as well.
- 4.4. Sakeliga reiterates that it has sought to avoid litigation and will continue to do so. Sakeliga noted during the meeting its disappointment that several letters to the

Department, sent over the course of several weeks, went unanswered until Sakeliga threatened legal action in public. Sakeliga prefers consultation.

- 4.5. Sakeliga expressed its frustration with government's response to its letter of 17 April warning of impending legal action regarding the alleged ban on warm and/or cooked and/or prepared food. While requesting extensions and consultation from us, Government at the same time urgently amended the lockdown regulations in order to undermine Sakeliga's legal case without solving the underlying problem. This complicates the relationship with the DTIC, and we express our desire that such a response should not be repeated.
- 4.6. Sakeliga expressed its appreciation of the fact that the Department and its officials operate and develop regulations under strict and compressed timeframes. This requires that the Department be afforded a margin of error. Sakeliga has and will continue to grant this margin but must – as it and businesses in general are under similarly acute pressures – reserve its rights with respect to challenging the forthcoming amended regulations should they have serious defects, especially with regard to the points outlined in this memorandum.
- 4.7. Sakeliga would seek further information from the DTIC when regulations are announced or promulgated, as applicable, in cases where the regulations differ significantly from the amendments as discussed between Sakeliga and the DTIC, or where aspects of the regulations otherwise justify further scrutiny.
- 4.8. Sakeliga wishes the Department great wisdom in this time.

END

A position paper regarding business lockdown regulations in South Africa during the COVID-19 epidemic

Chief Sponsor: ETM Analytics – Financial market and economic intelligence specialists

Amending lockdown: request for a risk-based approach

This is a proposal for urgent changes to lockdown regulations in South Africa, in the interest of sustainable management of the COVID-19 situation. It identifies general principles that should allow all companies to reopen their doors while limiting risky operations, instead of trying to reopen sector-by-sector and thousands of businesses on a case-by-case basis. The latter would be a regulatory nightmare with harmful economic consequences, but without health benefits. A better way must be found.

Since:

1. We are committed to ensuring public well-being and respect for law and order.
2. Our society risks catastrophe if businesses – from the smallest to the largest – cannot find ways to provide the material basis on which public health and well-being rests.
3. All goods and services deemed “essential” depend on supply, support services, scale, and revenues that in turn, depend on trade with businesses currently deemed “non-essential”.
4. The distinctions between “essential” and “non-essential” businesses are practically impossible to understand and abide by for owners, managers, staff, law enforcement, and the public.
5. Many currently prohibited businesses deemed “non-essential” can safely be opened, while some businesses now declared “essential” may need to diminish operational health risks further.

We request the urgent consideration of the government of the following proposals for an amended regulatory framework under the present State of Disaster:

- a. **Replace** the current **essential services approach** (which prohibits activity except where deemed essential) with a **risk-based approach** (which allows all activities except those specifically identified as risky)
 - i. **Repeal** regulations that list **essential** and prohibit **non-essential businesses**.
 - ii. **Promulgate** where necessary **regulations limiting** specifically defined business **operations and activities deemed too risky for the spread of COVID-19**, rather than prohibiting businesses, end-products, services, or transactions themselves.
- b. **Allow companies to innovate for safe operations** and **request them** to **introduce health measures** on a case-by-case basis.
- c. **Declare that no business requires essential services certification or any other special licensing** from the CIPC, municipalities, or any other authority, given that all businesses would, in any case, be bound by the COVID-19 risk limitation regulations.
- d. **Instruct law-enforcement to not interfere with business activities unless there is a prima facie case that specific** business activities amount to a contravention of the limitations to **business operations** deemed risky, subject to standard law-enforcement procedures and review in a court of law.

We foresee that a regulatory framework such as the above would greatly simplify compliance and law-enforcement, and at the same time allow businesses room to innovate for safe production, sales and employment. It will do much to prevent economic collapse, social instability and destitution in South Africa and the greater Southern African region while allowing on-going vigilance toward COVID-19.

This position statement is supported by various organisations who wish to see good health and economic outcomes for South Africa ([see website for details](#)).