

NOTICE 1370 OF 2009**Date: OCTOBER 2009****COMPETITION COMMISSION****NOTICE IN TERMS OF SECTION 10(7) OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED):****BOARD OF HEALTHCARE FUNDERS (2007SEP3176)****EXEMPTION REJECTED**

Notice was given in the Government Gazette on 18 January 2008 (Government Notice 40 of 2008) that the Board of Healthcare Funders ("BHF") had, in terms of section 10 of the Competition Act, No 89 of 1998, as amended ("the Act"), applied to the Competition Commission ("Commission") for an exemption from certain provisions of Chapter 2 of the Act.

In particular, the BHF filed the application on behalf of its members requesting to be exempted from the provisions of Section 4 of the Act, to enable medical aid schemes to engage collectively in relation to the following collective and concerted practices between medical schemes:-

- Prevention of switching by members between schemes (i.e. membership 'churn')
- Interpretation of Prescribed Minimum Benefits ("PMBs");
- Standardisation of Coding Systems;
- Forensic investigation against over-servicing by providers;
- Sharing and publication of information, including price, cost etc;
- Collective submissions to the State;
- Collective interpretation of the national Health Reference Price List;
- Obtaining and accessing information on medical technology, devices and medicines; and
- Collective bargaining for medical materials, devices and medicines.

In the application, the BHF relied on section 10(3)(b)(iii) and section 10(3)(b)(iv) of the Act, which make provision for a firm to apply for an exemption if the purpose is for a change in productive capacity necessary to stop decline in an industry, and to attain the economic stability of any industry designated by the Minister after consulting the Minister responsible for that industry.

Notice is therefore given in terms of section 10(7) of the Act that the exemption application by the BHF has been rejected. Our reasons are detailed below:-

- The Commission's analysis of the exemption application found that the proposed conduct by the BHF could amount to a contravention of sections 4(1)(b)(i) and/or section 4(1)(b)(ii) of the Act, and could also have the effect of substantially preventing or lessening competition in the medical aid market.
- The Commission was provided with no evidence as to how the exemption would yield benefits which would outweigh the proposed restriction in competition.

- The grounds upon which the BHF relies on for the exemption do not meet the requirements of the Act:-
 - With regard to the declining state of the industry, the BHF fails to provide any evidence of an industry in a decline; the information largely reflects an industry which is relatively healthy and not facing any catastrophic decline, although possibly characterized by some inefficiencies.
 - With regard to BHF's reliance on Section 10(3)(b)(iv) i.e. *designation of the industry by the minister*, this aspect fails on legislative and procedural requirements. The fact that no designation had taken place, and that this requirement of the Act has not been met, the Commission would have no legal authority to grant/deny an exemption under this particular section of the Act.
- The Commission also considered international experience on the aspect of collective bargaining in the healthcare industry. The research (although limited) generally indicates that there is a general avoidance of collective bargaining in healthcare markets largely owing to anti-competitive concerns, and where the conduct is allowed it is the state that plays the key role (not industry players) and such actions may be limited to certain activities.
- The Commission further received submissions from a number of stakeholders in the healthcare industry objecting to the exemption application. Most of the submissions argue that the conduct by the BHF is anti-competitive and does not meet the requirements of granting the exemptions in terms of section 10(3) of the Act, as the industry is not in decline and has not been designated.

Notice is further hereby given in terms of section 10(8) of the Act, that the BHF, or any other person with any interest or affected by the abovementioned decision of the Commission, may appeal the decision to the Competition Tribunal in the prescribed manner.

Any queries in this regard should be directed to: The Principal Analyst, Mapato Rakhudu Enforcement and Exemptions Division, Private Bag X23, Lynnwood Ridge, 0040; or at telephone 012 394 3268; facsimile 012 394 4268, citing case number 2007Sep3176.