

DEPARTMENT OF TRADE AND INDUSTRY**No. 417****21 May 2010****NOTICE IN TERMS SECTION 10(7) OF THE COMPETITION ACT 86 OF 1998 (AS AMENDED)****NEW NATIONAL HOSPITAL NETWORK (2008OCT4076)****EXEMPTION GRANTED**

Notice was given in the Government Gazette on 6 February 2009 (Government Notice 120 of 2009) that the National Hospital Network ("NHN") had in terms of section 10 of the Competition Act 89 of 1998, (as amended) ("the Act"), applied to the Competition Commission ("the Commission") for an exemption from the provisions of Chapter 2 of the Act.

The NHN filed the application on behalf of its members requesting to be exempted from the provisions of section 4 of the Act. Specifically the NHN had requested that it be permitted to engage in the following activities among its members with medical schemes and/or medical scheme administrators:-

- NHN's members to agree collectively to implement prices negotiated and entered into on their behalf by NHN with medical schemes and/or medical scheme administrators.
- For the NHN to promote the interests of its members and to market their services and also to provide a base for benchmarking, which would help NHN members to increase efficiencies.

The NHN made the application in terms of section 10(3)(b)(ii) of the Act, which makes provision for a firm to apply for an exemption if the purpose of their conduct is the promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive. The NHN sought the above exemption for a period of ten (10) years.

Notice is therefore given in terms of section 10(7) of the Act that the exemption application by the NHN has been granted. The exemption is granted for the collective bargaining between the shareholders of the NHN with individual medical schemes and medical scheme administrators, and the agreements that result from this bargaining between the members of the NHN. However, in terms of section 10(4A), the Commission has decided to only grant the exemption for a period of five (5) years. Our reasons are detailed below:-

- The Commission's analysis of the exemption application found that the conduct by the NHN would amount to a contravention of section 4(1)(b)(i) of the Act, a *per se* contravention which does not allow for efficiency justifications.
- The NHN provided the Commission with evidence of how the last exemption granted to the National Hospital Network¹, assisted the members of the NHN to increase their market shares and become more competitive in the market for the provision of private healthcare.
- The grounds upon which the NHN relied on for their application were met :-
 - In terms of section 10(3)(b)(ii), the purpose of the exemption must be the promotion of *small businesses* or firms controlled or owned by *historically disadvantaged persons* ("HDPs"). In this regard the Act defined small businesses

¹ Under Case no 2003Nov717, Notice 775 published in Gazette 28924 of 15 June 2006.

as having the same meaning set out in the National Small business Act 102 of 1996 ("the NSB Act"). Accordingly the Commission took into account the turnovers, asset values and number of employees of the members of the NHN to determine if they met the criteria to be considered small businesses. In this regard the Commission found that many of the members of the NHN do qualify as small businesses.

- Section 3(2) of the Act defines HDPs and in this regard the Commission found that some of the members of the NHN can be regarded as HDPs.
- The members of the NHN, as independent hospitals, many of whom are lone standing establishments and are not part of a group, the members of the NHN would not be able to negotiate prices sufficient to be able to compete within the market. Therefore through the grouping of the NHN, the members get the benefit of the negotiated prices and the resulting efficiencies.
- The Commission's investigation revealed that the existence of the NHN has provided a competitive restraint within the market and this effect would bring greater benefits that outweigh the anti-competitive effect of the conduct
- The Commission further received submissions from a number of stakeholders in the healthcare industry, many of which are in support of granting the exemption to the NHN. Although there was an objection to the exemption application, the Commission found that by granting the exemption application to the NHN would increase the chance of its members to be able to compete more effectively in the market.
- The Commission's investigation revealed that the members of the NHN have in the past five years been able to increase their collective market share and become effective competitors in the market. However their growth and the ever changing economic circumstances would require ongoing evaluation of markets and regular review by the competition authorities as to the appropriateness of the exemption. Hence the shorter period of the exemption.

Notice is further hereby given in terms of section 10(8) of the Act that any person with a substantial financial interest affected by the abovementioned decision 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, Lynwood Ridge, 0040; or at (t) 012 394 3268, (f) 012 394 4268, citing case number 2008Oct54076.