

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 1977

1 April 2022

COMPETITION COMMISSION SOUTH AFRICA

NOTICE IN TERMS OF SECTION 10(7) OF THE COMPETITION ACT 89 OF 1998, (AS AMENDED): DAY HOSPITAL ASSOCIATION – CONDITIONAL EXEMPTION GRANTED

1. On 10 February 2021, the Day Hospital Association (“DHA”) and its members, hereinafter jointly referred to as (“the Applicants”) filed an application for an exemption (“the Application”) in terms of Section 10(3)(b)(ii) of the Competition Act No 89 of 1998, as amended (“the Competition Act”). The exemption was requested for a period of five (5) years.
2. The DHA is a representative body of independent, registered, and private day hospitals across South Africa. Its’ members currently form part of the National Hospitals Network exemption (“NHN exemption”). The DHA independently submitted the current exemption application to the Commission for the same conduct exempted under the NHN exemption i.e.: (1) Collective Bargaining, (2) Centralised Procurement and (3) Alternative Reimbursement Models. According to the DHA, the reason for this separate application, is that the NHN exemption which permits the NHN to bargain collectively with medical schemes on behalf of its members in relation to tariffs and other matters, is not sufficient for members of the DHA since the business model of a day hospital requires a unique approach.
3. In their Application, the Applicants have relied on the objectives set out in Section 10(3)(b)(ii) of the Competition Act which allows an exemption of agreements and/or practices that promote the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons.
4. The scope of the application for exemption is in terms of a commercial agreement and/or practices in the industry as they relate to:

Collective Bargaining

- 4.1. According to the DHA, should the exemption be granted, it will be able to negotiate prices with medical schemes enabling its members to collectively implement such prices.

Centralised Procurement

- 4.2. The DHA has submitted that should the exemption be granted, it will be able to engage in centralised procurement through a 'request for proposal' to suppliers for the surgical cost basket in exchange for participation in the preferred provider list.
- 4.3. According to the DHA, suppliers adding value will be instrumental to the success of the DHA. This will ensure the highest standards of goods, at the lowest possible prices and will essentially support its' objective to deliver the highest quality of care, at the most cost-efficient price.

Alternative Reimbursement Models

- 4.4. The DHA is of the view that alternative reimbursement model ("ARM"), which is a form of payment restructuring that incorporates quality and total cost of care into reimbursement rather than a traditional fee-for-service structure, could pertain to a specific clinical condition, a care episode, or a population group. If allowed, the DHA will also be able to engage in global fee negotiations with medical schemes and the state.
5. The exemption application was brought in terms of section 10(1) in conjunction with sub-sections 10(2) and 10(3) of the Competition Act. Section 10(1) of the Competition Act allows a firm to apply to the Commission to exempt an agreement, a practice and a category of agreements from the provisions of Chapter 2 of the Competition Act. The DHA relied on the objective set out in Section 10(3)(b)(ii) of the Competition Act, which allows an exemption of agreements and/or practices that promote the effective entry into, participation in or expansion within a market by small and medium businesses or firms controlled or owned by historically disadvantaged persons.

6. The Commission's investigation revealed that:
 - 6.1. the conduct of DHA's members would result in a contravention of Section 4 of the Competition Act, as the application relates to information exchange agreements and/or practices between parties in a horizontal relationship;
 - 6.2. the sought conduct will contribute to *"the promotion of the effective entry into, participation in or expansion within a market by small and medium businesses or firms controlled or owned by historically disadvantaged persons"* within the private healthcare sector.
7. After consideration of the exemption application, the Commission has decided to grant DHA a conditional exemption for a period of 5 years (five) years, commencing from 1 June 2022. The DHA will use the period between the approval date and 31 May 2022 to set up infrastructure, operations, and strategy required to implement the conduct exempted by the Commission. The exemption will be subject to monitoring mechanisms which the Commission has put in place to ensure that the objectives set out in the application are met by the exemption. The Conditions and Monitoring Mechanisms are attached below as **Error! Reference source not found.**
8. Notice is hereby given in terms of Section 10(7) of the Competition Act regarding the Commission's decision to grant this exemption. The Applicants and any other person with a substantial material interest affected by this decision may lodge an appeal to the Competition Tribunal in the prescribed manner in terms of Section 10(8) of the Competition Act. Further queries should be directed to:

Mr Tlabo Mabye/ Mr Derrick Bowles / Ms Priya Reddy

Competition Commission South Africa

Market Conduct Division

Private Bag X23

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In correspondence kindly refer to the following case number: 2021Feb0013

ANNEXURE 1: EXEMPTION CONDITIONS

The Exemption is granted for a period of five (5) years effective from 1 June 2022 up to and including 31 May 2027, subject to the following conditions:

Definitions

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

“ARM” means Alternative Reimbursement Model; a form of payment reform other than a traditional fee-for-service structure i.e. Global Fee Negotiations

“DHA” means the Day Hospital Association or the Applicants in the current exemption application

“Approval date” means the date referred to in the Competition Commission’s Clearance Certificate

“Commission” means the Competition Commission of South Africa a statutory body established in terms of section 19 of the Competition Act 89 of 1998 (as amended) with its principal place of business at Block C, Mulayo Building, the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria

“Competition Act” means the Competition Act 89 of 1998, as amended

“Effective Date” means the date on which these conditions shall become effective, being 1 June 2022

“Exemption” means to pardon conduct otherwise prohibited if it is required to achieve identified socio-economic aims

1. Preamble

The conditions below only apply for the purpose and duration of the Exemption. The Exemption is in respect of a collective agreement between the members of the DHA and individual medical schemes and administrators, as well as agreements that result from the collective bargaining process, and agreements relating to centralised procurement and Alternative Reimbursement Models.

The DHA has requested an exemption in terms of section 4(1)(b)(i) of the Competition Act for a period of five (5) years. The exemption permits the DHA to engage in the following activities on behalf of its members with medical aid schemes and/or medical scheme administrators:

- 1.1. The members of the DHA shall agree to collectively implement the prices negotiated and agreed on their behalf by the DHA, with medical schemes and medical scheme administrators.
- 1.2. Engage in centralised procurement through a request for proposal to suppliers for the procedure related surgical cost basket in exchange for participation on the preferred provider list.
- 1.3. Engage in global fee / bundled fee negotiations with medical schemes, medical scheme administrators and the State.

2. Conditions

2.1. Transformation Conditions – Ownership; Enterprise and Supplier Development; and Skills Development

- 2.1.1. The DHA Members shall commit to taking active steps in achieving overall transformation including, but not limited to, the transformation of ownership structures to enhance participation of HDIs in the market for Day Hospitals.

2.1.2. The DHA members shall commit to procuring a proportion of their centralised procurement spend from BBBEE entities in line with the targets set out in Table 1 below.

2.1.3. The DHA members shall mobilise resources for expanding the existing human capital pool through investing in people, employment equity, skills development and institutional transformation in line with the targets set out in Table 1 below.

Table 1: Transformation Targets for DHA Members

Element	Indicator	Measurement Criteria	Compliance Target	Target for Year 1	Target for Year 2	Target for Year 3	Target for Year 4	Target for 5
Enterprise & supplier development	Preferential Procurement	Procurement Spend on the BBBEE entities as a percentage of Total Measured Procurement Spend	50%	10%	20%	30%	40%	50%
		Procurement Spend on the BBBEE entities owned by black females as a percentage of Total Measured Procurement Spend	15%	5%	10%	15%	15%	15%
Skills Development	Skills Development Expenditure	Skills Development Expenditure ((learning programmes) on black people as a percentage of total expenditure on Learning Programme	6%	2%	4%	6%	6%	6%
		Skills Development Expenditure (learning programmes) on black female employees	2%	1%	1.5%	2%	2%	2%

		as a percentage of total expenditure on Learning Programme						
		Number of black people participating in learnerships, apprenticeships and internships as a percentage of total employees.	2%	1%	1.5%	2%	2%	2%

2.2. Dual Membership

2.2.1. Each member of the DHA participating in the Exemption as granted, must cease all affiliation and membership from the NHN by 31 December 2022.

2.3. Collective implementation of prices, collective bargaining and global fee negotiations

2.3.1. There shall be no co-ordination or information exchange in relation to prices charged or price increases between DHA members. All information required to be shared will be submitted individually and directly to DHA.

2.3.2. When entering into global fee arrangements the DHA will ensure that:

2.3.2.1. All carve-outs or exclusions in relation to this ARM method shall be limited and global fees are to be negotiated on the premise of full risk sharing between the medical aid schemes and administrators and the providers of healthcare services.

2.3.2.2. The negotiation of global fees agreements shall specifically incorporate clearly defined quality and performance metrics which shall be transparent, and evidence based.

2.3.2.3. The DHA shall, as part of its general annual reporting condition below, report on all global fees that were negotiated annually.

2.4. Annual Submission of Information

2.4.1. The DHA is required to submit a report to the Commission by the end of June annually, commencing at the end of June 2023. This will enable the Commission to monitor the impact of the measures taken to meet the objectives relied upon and to assess whether the DHA is meeting those objectives on an on-going basis. The information to be submitted to the Commission in respect of each member of the DHA may be in table format and must include the following:

2.4.1.1. Prices negotiated and agreed with medical schemes and medical scheme administrators;

2.4.1.2. Data regarding centralised procurement of products and/or service. The data must include *inter-alia*, products and/or service procured, list of service providers utilised including the percentage of service providers which are (i) SMMEs; and (ii) firms owned by HDIs appointed as part of the centralised procurement leg of the exemption and in line with the Transformation Condition in 2.1 above;

2.4.1.3. Full details on the number of global fee arrangements the DHA has entered into. This must include but not be limited to the following: the parties to the agreement; the structure of the agreement; details on risk sharing between medical schemes and service providers; the carve-outs or specific exclusions from the global fee arrangement as well as justification for why the carve-outs are necessary; clearly defined quality metrics which are applicable to the agreements; and copies of all agreements;

- 2.4.1.4. The number and identity of new members who joined the DHA within the preceding year;
- 2.4.1.5. The annual turnover of each DHA member, accumulated within the preceding year;
- 2.4.1.6. The number of employees of each DHA member;
- 2.4.1.7. The number of DHA members that qualify as Historically Disadvantaged Persons ("**HDP**") in terms of section 3(2) of the Act;
- 2.4.1.8. The number of DHA members that qualify as small businesses in terms of the National Small Business Act 102 of 1996 ("**NSB**"). This includes DHA members who meet each individual requirement and DHA members who meet the collective requirements;
- 2.4.1.9. The steps taken and milestones achieved towards attaining the overall transformation goals as set out in 2.1.1 above;
- 2.4.1.10. Full details on the number on the milestones achieved and objectives reached in line with the targets for Skills Development as set out in 2.1.3 and Table 1 above;
- 2.4.1.11. The number of new facilities opened by each DHA member and / or expansion through an increase in the number of hospital beds;
- 2.4.1.12. The number of DHA members that are part of any Designated Service Provider arrangements concluded with medical schemes / administrators; and
- 2.4.1.13. The expansion of product / service offerings to patients by each DHA member and the name of the product or service.

2.4.2. In addition to the above, DHA must during the period of the exemption, implement competitive strategies aimed at providing additional services to its members outside of the collective bargaining process. The purpose of this condition is to provide ongoing support to members, in order to improve their competitiveness in the market. The services to be provided to the aforementioned members must include but not be limited to:

2.4.2.1. High level feedback providing insight into industry trends and economic factors which may affect the operation of the member facilities;

2.4.2.2. Detailed feedback on Alternative Reimbursement Models (“**ARMs**”) entered into with the medical aid schemes and the constitution of such ARMs enabling member facilities to better manage the costs of the procedure and maximise profits;

2.4.2.3. Feedback and training on the tools available to assist in managing facility(ies) optimally;

2.4.2.4. Assistance and training on submission of claims and support on technical claims issues;

2.4.2.5. Detailed feedback and training on managing cost efficiencies and quality control measures including benchmarking; and

2.4.2.6. Operational meetings held with medical schemes and/or administrators in which problem areas and / or trends are identified and discussed and approaches to resolve any issues are concluded.

2.4.3. The above mentioned services are to be provided to members through one or combination of the following platforms:

- i. Regular workshops hosted by the DHA;

- ii. Information manuals provided to members;
- iii. Onsite training sessions held at the facilities of the members;
- iv. Newsletters produced by the DHA; and
- v. Email and telephonic support made available to members and their staff members.

2.4.4. The DHA must implement measures to track the number of members whose competitiveness has improved as a result of the implementation of the aforementioned exemption and conditions. These documents and/or information must be submitted to the Commission by the end of June annually, commencing at the end of June 2023.

2.4.5. The compliance report(s) must be submitted to the following email address exemption.conditions@compcom.co.za

3. Variation Clause

- 3.1. Notwithstanding the aforementioned conditions, the Commission may at any time upon good cause shown decide to vary or revise any condition during the period of the exemption.