

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 2067

6 May 2022

Date: 13 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 – AMENDMENT OF EFFECTIVE DATE IN RESPECT OF CONDITIONAL EXEMPTION

1. The Competition Commission (“**Commission**”) published a Notice granting the Day Hospital Association (“DHA”) a conditional exemption in the Government Gazette on 1 April 2022 (Gazette No. 46164 of 2022), as provided for by section 10(7) of the Competition Act No 89 of 1998, as amended (“**Act**”) read with Rule 19(5) of the Rules of Conduct of Proceedings in the Commission.
2. The Commission granted the DHA the exemption in terms of section 10(3)(b)(ii) of the Act for exemption from certain provisions of Chapter 2 of the Act. The conduct for which the exemption was sought related to (1) Collective Bargaining, (2) Centralised Procurement and (3) Alternative Reimbursement Models, the same conduct exempted under the NHN exemption. However, 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. As reflected in the Notice dated, 1 April 2022 - the Commission’s investigation in respect of the exemption application, revealed that agreements and/or practices which the Applicants sought to be exempted from, would likely result in direct contraventions of Section 4 of the Act, as the agreements and/or practices relate to co-ordination between parties in a horizontal relationship.
4. However, it was the Commission’s view that granting the exemption would be beneficial in that, it may enable the Applicants, to enhance their competitiveness, through structures that are specific to their business operations, thereby promoting 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. Moreover, the exemption can be used as an instrument for transformation in the private healthcare sector and also facilitate entry and participation of SMMEs and firms owned by HDIs, in line with the objectives of the Act.
5. In light of the above, the Commission **granted** the DHA and its’ members a conditional exemption, **for a period of five (5) years, effective from 1 June 2022 up to and including 31 May 2027**, subject to a set of conditions which included the ‘Dual Membership’ clause. According to this clause, each member of the DHA participating in the Exemption as granted, must cease all affiliation and membership from the NHN by 31 December 2022.

6. Subsequently, due to recent developments in the Western Cape High Court (*Case No. 7776/2022*), the Commission has decided to amend the 'Effective Date' of the exemption, as granted, as well as, the conditions attached thereto. Accordingly, the exemption is **granted** for a **period of five (5) years, now effective from 12 April 2022 up to and including 11 April 2027**, subject to Conditions and Monitoring Mechanisms, which **now excludes the 'Dual Membership' clause**.
7. In this regard, the applicable Conditions and Monitoring Mechanisms, as amended, are attached hereto as
8. ANNEXURE 1.
9. Any person with a substantial financial interest affected by this decision may appeal to the Competition Tribunal in the prescribed manner in terms of Section 10(8) of the Competition Act.
10. Any queries should be directed to:

Mr Tlabo Mabye / Mr Derrick Bowles / Ms Priya Reddy

Competition Commission of SA

Market Conduct Division,

Private Bag X23,

Lynnwood Ridge,

0040

or by email: TlaboM@compcom.co.za / DerrickB2@compcom.co.za / PriyaR@compcom.co.za

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

ANNEXURE 1: CONDITIONS AND MONITORING MECHANISMS

The Exemption is granted for a period of five (5) years effective from 12 April 2022 up to and including 11 April 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 Models; 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 12 April 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 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 Year 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	15%	5%	10%	15%	15%	15%

		as a percentage of Total Measured Procurement Spend						
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 as a percentage of total expenditure on Learning Programme	2%	1%	1.5%	2%	2%	2%
		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. Collective implementation of prices, collective bargaining and global fee negotiations

2.2.1. 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.

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

2.2.2.1. 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.

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

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

2.3. Annual Submission of Information

2.3.1. The DHA is required to submit a report to the Commission by the end of April annually, commencing at the end of April 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:

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

2.3.1.2. 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, percentage of (i) SMMEs; and (ii) firms owned by HDIs appointed as part of centralised procurement in line with the Transformation Condition in 2.1 above.

2.3.1.3. 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;

2.3.1.4. The number and identity of new members who joined the DHA within the preceding year;

2.3.1.5. The annual turnover of each DHA member, accumulated within the preceding year;

2.3.1.6. The number of employees of each DHA member;

- 2.3.1.7. The number of DHA members that qualify as Historically Disadvantaged Persons (“HDP”) in terms of section 3(2) of the Act
- 2.3.1.8. 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;
- 2.3.1.9. The steps taken and achievements towards attaining the overall transformation goals as set out in 2.1.1 above.
- 2.3.1.10. Full details on the number on the achievements attained and objectives reached in line with the targets for Skills Development as set out in 2.1.3 and Table 1 above.
- 2.3.1.11. The number of new facilities opened by each DHA member and / or expansion through an increase in the number of hospital beds;
- 2.3.1.12. The number of DHA members that are part of any Designated Service Provider arrangements concluded with medical schemes / administrators; and
- 2.3.1.13. The expansion of product / service offerings to patients by each DHA member and the name of the product or service.
- 2.3.2. 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:
- 2.3.2.1. High level feedback providing insight into industry trends and economic factors which may affect the operation of the member facilities;
- 2.3.2.2. 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;

- 2.3.2.3. Feedback and training on the tools available to assist in managing facility(ies) optimally;
- 2.3.2.4. Assistance and training on submission of claims and support on technical claims issues;
- 2.3.2.5. Detailed feedback and training on managing cost efficiencies and quality control measures including benchmarking; and
- 2.3.2.6. 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.
- 2.3.2.7. 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.
- 2.3.3. 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 April 2023.
- 2.3.4. 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.