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Our Ref: Case no: 2012Oct0634/N ALLY/ MERVIN DORASAMY

Your Ref: T MALATJI/BC 01684744

13 December 2012

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ADVISORY OPINION: DETERMINATION AND PUBLICATION OF FEES IN TERMS OF THE HEALTH PROFESSIONS ACT: IMPLICATION OF PROVISIONS OF THE COMPETITION ACT, 1998

INTRODUCTION

1. We refer to your letter to the Competition Commission (“the Commission”) dated 20 October 2012, in terms of which you request an advisory opinion on section 53 of the Health Professions Act 56 of 1974 (“the HP Act”) on behalf of the Health Professions Council of South Africa (“HPCSA”).

BACKGROUND

2. According to your letter the HPSCA is engaged in consultations to determine and publish fees to be used by its Professional Board as a guideline for the determination of amounts which in the opinion of the Professional Board should have been charged by health professionals should a member of the public complain to the Professional Board about an account received from such health practitioner.

3. The HPCSA contends that a void exists within its regulatory framework since July 2010 as a result of the Ebersohn¹ judgment. The HPCSA submits that the judgment affected its publishing of an ethical tariff and that the last of these tariffs were published in November 2006.
4. In terms of Section 49 of the HP Act 56 of 1974, (“the HP Act”), the HPCSA is required “*in consultation with the professional boards concerned, to make rules from time to time specifying the acts or omissions in respect of which a professional board may take disciplinary steps under chapter IV of the HP Act*”. Your letter explains that the rules referred to in Section 49 are the ethical rules of conduct for practitioners registered under this Act (“ethical rules”) and according to Rule 2(1) of the ethical rules, “*failure by a practitioner to comply with any conduct determined in the ethical rules constitutes an act or omission in respect of which the board concerned may take disciplinary steps in terms of Chapter IV of the HP Act*”.
5. Your letter states that ethical Rule 27A, requires a practitioner to, amongst others things, provide adequate information about the patient’s diagnosis, treatment options and alternatives, costs associated with each such alternative and any other pertinent information to enable the patient to exercise a choice in terms of treatment and informed decision-making pertaining to his or her and that of others.
6. In so far as it is related to the aforementioned, your letter makes reference to requirements set out in Section 53 of the HP Act, which provide:

“(1) Every person registered under this Act (in this section referred to as the practitioner) shall, unless the circumstances render it impossible for him or her to do so, before rendering any professional services inform the person to whom the services are to be rendered for any person responsible for the maintenance of such person, of the fee which he or she intends to charge for such services-

¹ Hospital Association of South Africa Ltd v Minister of Health & Another, ER24 EMS (Pty) Ltd & Another v Minister of Health & Another, South African Private Practitioners’ Forum & 22 others v Director-General of Health [2010] ZAGPPHC 69; 2010 (10) BCLR 1047; [2011] I All SA 47 (GNP)

- (a) *when so requested by the person concerned; or*
- (b) *when such fee exceeds that usually charged for such services,*

and shall in a case to which paragraph (b) relates, also inform the person concerned of the usual fee.

- (2) *Any practitioner who in respect of any professional services rendered by him or her claims payment from any person (in this section referred to as the patient) shall, subject to the provisions of section 32 of the Medical Schemes Act ("MSA"), 1998, furnish the patient with a detailed account within a reasonable period.*

- (3)(a) *The patient may, within three months after receipt of the account referred to in subsection (2), apply in writing to the professional board to determine the amount which in the opinion of the professional board should have been charged in respect of the services to which the account relates, and the professional board shall, as soon as possible after receipt of the application, determine the said amount and notify the practitioner and the patient in writing of the amount so determined: Provided that before the professional board determines the said amount, it shall afford the practitioner concerned an opportunity to submit to it in writing his or her case in support of the amount charged.*

- (d) *A professional board may from time to time determine and publish the fees used by the professional board as norm for the determination of amounts contemplated in paragraph ..."*

- 7. It is submitted in your request that, the HPCSA and the Professional Board are in terms of Part B of Schedule 1 to the Competition Act 89 of 1998 ("the Competition Act")- *professional associations* as contemplated in the Act.

8. Your letter thereafter goes on to discuss the issue of concurrent jurisdiction between separate regulatory bodies in terms of section 3(1)(a) of the Act. Your request indicates:

“there needs to be a mutual respect, statutory bodies constituted under different legislation, of different regulatory roles that the Commission and the HPCSA fulfills. Of course section 3(1A)(a) of the Act was enacted so as to ensure that two regulatory bodies exercising in concurrent jurisdiction should seek to obtain a consensus as regards the exercise of the aforesaid concurrent jurisdiction. The HPCSA is of the view that, acting under section 53, it fulfills a completely different public function sanctioned by its own legislation as opposed to that which may possibly concern the Competition Commission as contemplated under the Competition Act.”

9. You conclude that, an ethical tariff determined by the Professional Board in terms of section 53(3)(d) is used to determine the amount which, in the opinion of the Board, should have been charged by a practitioner for his services, where an application is brought by the practitioner’s patient for determination before the Board and you expound the view that the ethical tariff so determined, read with section 53(3)(a) of the HP Act, is a *professional rule* as contemplated in the Competition Act. The question is therefore, whether the tariff, in the context of section 53(3)(a) of the HP Act, contains a restriction that has the effect of substantially preventing or lessening competition in the market? You argue that the tariff does not tell practitioners what to charge and that its object is to provide a reference point to determine a complaint by a patient after the fact (and after hearing the practitioner on the point) whether the appropriate fee was charged.
10. According to information obtained from the HPCSA website, there is a difference between the guideline tariffs and upper ethical tariffs. The guideline tariff serves as a guide to practitioners on what they can expect to charge for their professional services. Practitioners may charge above the guideline tariff provided that they have obtained an informed consent from the patient/client or from the next of kin. The upper ethical tariff, are fees that provide a financial and ethical ceiling with regard to amounts charged by practitioners. The ethical tariffs

were scrapped in 2008. Your request does not expound on this difference as these phrases seem to be used interchangeably.

11. You further conclude, that if the tariff should have the effect of lessening competition in the market, then the question that next arises, is whether there are technological, efficiency or other pro-competitive gains resulting from the practice which outweigh the effect.

ADVICE

12. Kindly note that this advisory opinion does not constitute a decision or a finding of the Commission it merely serves as a non-binding guide on the approach that is likely to be taken by the Commission in assessing the matter. A finding can only be made after an extensive investigation and analysis of the matter has been conducted, with substantially more information as to the activities of the parties and the relevant markets in which they operate.

Historical Developments

13. The historical developments that led to the HPSCA scrapping its ethical tariff can be summarised as follows:

- 13.1 The HPCSA had been determining the annual ethical tariff to guide professional conduct committees (“conduct committees”) in assessing whether or not there has been overcharging, in relation to a complaint. The last of these tariffs was published by the Professional Board in November 2008.

- 13.2 Prior to this, on 23 July 2007, the Minister of Health, acting in terms of section 90(1)(V) of the National Health Act No. 61 of 2003, published *“Regulations relating to the obtainment of information and the processes of determination and publication of Reference Price List, 2007 (‘the RPL Regulations’)”*².

² Published under GN R. 681 in GG 30110 of 23 July 2007

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13.3 On 16 November 2008, acting in terms of regulation 10 of the RPL Regulations, the Director-General for Health (“the DG”), determined the reference price list for 2008.

13.4 At a meeting on 24 November 2008, the Executive Committee of the HPCSA, resolved to scrap the HPCSA ethical tariff effective from date of publication of the RPL. One of the issues relevant to the said decision at the meeting was:

“(IV) that in view of the comprehensive and participative nature of the Department of Health’s NHRPL process, the outcome thereof would suffice for purposes of establishing an appropriate benchmark thereby rendering it unnecessary for the HPCSA to set its own ethical tariff”

A further issue was the confusion and discontent in the industry. Because the ethical tariff was pitched at a level almost three times higher than the rate at which medical schemes were prepared to reimburse their members, practitioners started using the ethical tariff as the rate at which they could pitch their billing practices.

13.5 On 24 December 2008, the DG for Health, acting in terms of regulation 8 of the RPL Regulations, determined the RPL for 2009.

13.6 In the interim, several parties approached the North Gauteng High Court, for an order reviewing and setting aside the RPL Regulations and national price reference lists published thereunder, as well as an order interdicting the DG from publishing the 2010 reference price list pending determination of the review application.

13.7 On 28 July 2010, Ebersohn AJ delivered judgment in the matter³. The judgment reviewed and set aside the RPL regulations, as well as all national reference price lists published thereunder.

³ Ibid

Jurisdiction

14. Section 3 (1A) (a) of the Competition Act provides:-

“In so far as this Act applies to an industry or sector of an industry that is subject to the Jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.”

15. The HPCSA accepts that in terms of section 53 of the HP Act it fulfills a completely different public function to that which may possibly concern the Commission. It must be emphasised that the Competition Act is a law of general application which established the Commission to regulate competition matters in all sectors irrespective of whether the sector or industry is regulated in terms of statute. The Commission has jurisdiction to investigate and evaluate the competition aspects of a statutory association’s rules.
16. Furthermore, the fact that Schedule 1 of the Competition Act makes provision for *professional associations* to apply to the Commission for their respective rules to be exempted if they meet certain requirements is supportive of the Commission’s jurisdiction over the rules governing statutory associations such as the HPCSA. The HPCSA did in fact apply for such an exemption.⁴
17. Any conflict or tension between the provisions of the Competition Act and legislation regulating various health professions does not remove the jurisdiction of the Commission nor does it give rise to any concurrency between the Commission and the HPCSA.⁵ In *Competition Commission v Telkom*⁶, the SCA held that, “the term jurisdiction in section 3 (1A) refers to the power or competence to hear and determine matters concerning the conduct regulated in terms of chapter 2 and 3 of the Competition Act. Section 3(1A) (a) applies only where the other regulatory authority has jurisdiction in respect of conduct

⁴ Competition Commission case no:2008Jan3456.

⁵ In accordance with section 3(1A)(a) of the Competition Act, concurrent jurisdiction only exists instances where a industry/sector regulator is statutorily mandated to regulate a competition matter similar to one that is supposed to be regulated by the Commission in terms of chapter 2 or 3 of the Competition Act.

⁶ (623/2008) [2009] ZA SCA 155 (27 November 2009).

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regulated in terms of chapter 2 or 3 of the Competition Act, i.e. restrictive horizontal and vertical practices and abuses of dominance and mergers.” The Commission is empowered to assess the manner in which tariffs are determined, namely whether it gives rise to a contravention of section 4(1) of the Act or whether the tariff (price) is excessive.

18. Schedule 1 of the Competition Act defines professional rules as “*rules regulating a professional association that are binding on its members*”⁷. The HPCSA is thus correct in asserting that the proposed ethical tariff, read with section 53 (3) (a) is a “*professional rule*” as contemplated in the Act. Furthermore, the HPCSA meets the definition of a *professional association* as defined under Part B of schedule 1. The question that then arises is whether or the aforesaid rule has the effect of substantially preventing or lessening competition in the market.

Section 4 of the Competition Act

19. Section 4(1) provides:-

“An agreement, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

⁷ Schedule 1 of the Act define “rules” as including *public regulations, codes of practices and statements of principle*. Section 1 of the Act defines ‘public regulation’ as “*national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority*”.

- (ii) *dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
- (iii) *collusive tendering.*

20. Section 4(1) (a) allows for a rule of reason analysis,⁸ which means that firms which are party to these agreements or concerted practices may advance reasons to justify their conduct. In other words, such firms can raise the defence of technological efficiencies or other pro-competitive gains which outweigh the anti-competitive effect of the conduct. Any contraventions emanating from Section 4(1)(b) are *per se* prohibitions. The Act outrightly prohibits such practices and allows for no defence or justification of such conduct. The anti-competitive effect of these agreements is assumed and need not be proved by a competition authority prosecuting parties to such an agreement.
21. In *Competition Commission and two others v United South African Pharmacies and others*⁹ the Tribunal stated, what the Act means by “*parties in a horizontal relationship*”, is an allegation that they are in the same line of business. The formation of industry associations or representative bodies is not in itself, anti-competitive. Indeed there are many benefits to be derived from such associations such as information about market conditions, the volume of demand and the level of capacity that exists in an industry. Access to such information make it easier for firms to make rational and effective decisions regarding their production and marketing strategies¹⁰. It must be noted, however, that industry associations are often utilised as a platform for outright collusion and/or exchange of competitively sensitive information. Through facilitating the exchange of competitively sensitive information, a trade association may aid competitors in reducing or removing the uncertainties that are an inherent feature of the competitive process.

Determination and Publication of Tariffs in the Health Sector

⁸ *Antitrust Guidelines for Collaborations among Competitors* issued by the Federal Trade Commission and the U.S. Department of Justice April 2000.

⁹ Case Number 04/CR/Jan02.

¹⁰ Richard Whish, *Competition Law* 6th edition, page 525.

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22. A recent PriceWaterhouseCoopers survey¹¹ of medical schemes revealed that medical inflation is greater than the consumer price index (CPI) and that the average increase in medical aid tariffs was above the average increase in projected salary inflation, making concerns about healthcare costs well founded. The absence of the NHRPL as well as the absence of a reference or guiding price system is often cited as one of the causes responsible for the rising costs in health care.
23. The proposed implementation of the ethical or guideline tariff in terms of Section 53 of the HP Act, may have implications on competition in that even though in the HPCSA's view the guideline is not meant to "*tell practitioners what to charge*", the effect of its existence may form the basis of practitioners pricing decisions.
24. You state in your letter that the previous ethical tariff published by the Council, "*was pitched at a level almost three times higher than the rate at which medical schemes were prepared to reimburse their members ("the scheme reimbursement rate")*". This resulted in confusion and discontent in the industry as practitioners started targeting the ethical tariff as the rate which they could pitch their billing practices. From a competition perspective, the concern surrounding the use of any reference price list is that it could lead to coordinated pricing and therefore anti-competitive conduct.
25. In 2004 the Commission was alerted to the fact that associations within the health industry, such as the BHF participated in the process of collective determination and publishing of tariffs. Consequently, the Commission initiated an investigation against the BHF and its constituent members with regard to the above conduct. In particular, the Commission was concerned that the recommended and published tariffs and collective actions by BHF members could constitute a contravention of section 4(1)(b) of the Act, in that it amounted to an agreement between or concerted practice by firms, or a decision by an association of firms, that involved directly or indirectly fixing a purchase or selling price or any other trading condition.

¹¹ PricewaterhouseCoopers 'Designing a Healthy Future'(2012)
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26. The Commission relied on international precedent which clearly indicated that the European and the United States competition authorities view the conduct by an association, of recommending tariffs to its members, to be price fixing under competition law. The Commission took the view that these practices were anti-competitive in that they had an effect of harmonising the pricing behavior of firms in the market. The circulation by a trade association of recommended tariffs is likely to prompt firms (Professionals) to align their charges, irrespective of their costs. Such an approach dissuades firms whose costs are lowest from lowering their prices and thus creates an artificial advantage for firms which have the least control over their production costs.
27. The BHF at the time confirmed that the publication of recommended tariffs served a purely informational function, in that they were intended only as a reference or guide to medical schemes and members of the public. While the BHF maintained that its tariffs served only as a benchmark, it also acknowledged that the BHF tariffs were widely adhered to. The Commission accordingly found that the conduct by the BHF was in contravention of section 4 (1) (b) because the publication of such standardised tariffs resulted in a limitation in price competition in the healthcare market. However, the matter was not referred to the Competition Tribunal for adjudication but was resolved amicably through a settlement agreement.
28. On the other hand, the availability of information to the consumers regarding standards, charges/tariffs and industry norms can result in a more effective competitive environment. Some may argue that the introduction of a guideline tariff might provide certainty to medical schemes and their members on charges related to healthcare, and will address the ongoing cost escalation in the private healthcare sector. The effect of the guideline tariff will be positive on patients who are vulnerable at the point of service as it will ensure that they are aware upfront of the fees of services to be rendered. The patient will receive a written quotation of the fee to be charged as well as the HPCSA guideline tariff. The critical question is how does the HPCSA ensure compliance with this rule?
29. After the abolishment of the NHRPL regulation by the High Court, the healthcare sector was left with no guideline for tariffs. This created uncertainties for medical

schemes and members regarding what is to be covered by medical schemes and what members are required to pay.

30. The ethical guideline if used in the manner that is envisioned may fill the information void that consumers and industry stakeholders are currently undergoing and would create certainty.

CONCLUSION

31. The absence of guideline tariffs is viewed as a contributing factor to the ever increasing costs of private healthcare – with the ability of hospitals and specialists to increase their prices without any apparent competitive constraint being of particular concern.
32. The application of standards, norms or particular criteria by conduct committees instead of guidelines or ethical tariffs may ultimately serve the objective and purpose of assessing complaints from patients. The Commission was not informed in the request as to manner in which the conduct committees operated in the “void” or tariff-less environment.
33. The HPCSA may fulfill its mandate to determine and publish ethical tariffs. The Commission is of the view that a cap or maximum tariff(s) must be so determined. The HPCSA must arrive at a determination of the tariffs in an objective manner taking into account any competition concerns such as gravitation towards this cap by practitioners and protection of consumers. The entire process for such determination of a cap (of tariffs), referred to, must be defensible and rational.
34. Despite a requirement in terms of section 6 of the National Health Act, 2003, and Consumer Protection Act, 2008 that all healthcare practitioners are required to inform patients of the cost of services they intend providing, before services are rendered, this does not happen in reality. This may be the first hurdle to pass.
35. Kindly note that this opinion is provided entirely on the basis of the information provided to the Commission, in order to provide guidance for compliance with the

Act, and is not binding on the Commission or the parties requesting it. Should the information provided for purposes of this opinion change, this opinion shall not apply to such changed facts.

Yours faithfully

(not signed due to electronic transmission)

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