SECTION 4(1)(B) OF THE COMPETITION ACT– A NEW APPROACH TO SETTLEMENT?

By Dominique Arteiro, Director

LEGAL BRIEF APRIL 2015

The consent agreement between the Competition Commission (**"Commission"**) and Mediclinic Southern Africa (Proprietary) Limited (**"Mediclinic"**), Victoria Hospital (Proprietary) Limited (**"Victoria"**), Newcastle Private Hospital (Proprietary) Limited (**"Newcastle"**), Mediclinic Tzaneen (Proprietary) Limited (**"Tzaneen"**), Howick Private Hospital Holdings (Proprietary) Limited (**"Howick"**), Mediclinic Upington (Proprietary) Limited (**"Upington"**) and Mediclinic Hermanus (Proprietary) Limited (**"Hermanus"**) was confirmed by the Competition Tribunal (**"Tribunal"**) on 18 March 2015 (**"Consent Agreement"**) and may signify the start of a new approach by the South African competition authorities in settling perceived contraventions of section 4(1)(b)(i)[1] of the Competition Act, No. 89 of 1998 (**"Competition Act"**).

INTRODUCTION

On 11 October 2010, the Commission received a complaint in which it was alleged that Mediclinic was engaging in price fixing with Victoria and Newcastle as Mediclinic was setting tariffs for these two private hospitals. In consequence, the Commission initiated an investigation into Mediclinic, Victoria and Newcastle.

On 26 February 2013, the Commission initiated a separate investigation into Mediclinic's relationship with each of Howick, Tzaneen, Hermanus and Upington. The Commission was investigating Mediclinic's conduct of negotiating and setting tariffs on behalf of each of these hospitals[2].

According to the Consent Agreement, Mediclinic operates and manages a number of private hospitals throughout South Africa. It is involved in the financial and operational management of these private hospitals. Certain of these private hospitals are wholly owned by Mediclinic whilst, in the other instances, Mediclinic holds either a majority or minority shareholding. In respect of the managed private hospitals under investigation by the Commission (**"managed private hospitals"**), Mediclinic's shareholding in those managed private hospitals ranged from 15.1% to 49.4%[3] . In each case, the remaining shareholding in the managed private hospitals was widely dispersed among shareholders who did not individually exercise control (for competition law purposes) over the hospital in question[4].

1 Section 4(1)(b)(i) of the Competition Act provides that an agreement between, 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 it involves directly or indirectly fixing a purchase or selling price or any other trading condition.

2 See paragraph 3.1
3 See paragraph 2.2.
4 See paragraph 2.3.

COMMISSION'S FINDINGS

After investigating, the Commission was of the view that Mediclinic and each of the managed private hospitals were parties in a horizontal relationship (i.e. competitors) as they did not fall within the exclusion in section 4(5) of the Competition Act. Section 4(5) of the Competition Act provides that section 4(1) of the Competition Act does not apply to an agreement between or concerted practice engaged in by:

> a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973[5] , a wholly owned subsidiary of that subsidiary or any combination of them; or

> the constituent firms within a single economic entity similar in structure to those referred to in paragraph 2.1.1 above.

Accordingly, the Commission regarded Mediclinic's tariff determination on behalf of the managed private hospitals as a contravention of section 4(1)(b)(i) of the Competition Act[6].

A NEW APPROACH

No admission of liability

Despite the Commission's findings that the conduct in question contravened section 4(1)(b)(i) of the Competition Act, Mediclinic and the managed private hospitals did not admit to having contravened the Competition Act. Mediclinic did, however, undertake to bring the conduct in question to an end by acquiring *"control"* [7] over the managed private hospitals so as to ensure that its shareholding in the managed private hospitals and/or the resultant company structure will fall within the exclusion provided for in section 4(5) of the Competition Act.

No administrative penalty

The Commission agreed with Mediclinic and the managed private hospitals that the payment of an administrative penalty would not be appropriate. The reasons advanced in the Consent Agreement for this were, amongst other things, the circumstances in which the conduct occurred and the sanctioning of the Victoria merger by the Commission[8].

The circumstances in which the conduct occurred is summarised in paragraph 2 of the Consent Agreement. In this regard it is recorded that, amongst other things:

> Mediclinic only started negotiating and setting tariffs on behalf of each of the managed private hospitals after it had concluded a management agreement, and after it had a minority shareholding, in each of those managed private hospitals. It was contended that such management agreement, together with Mediclinic's minority shareholding, was a form of *"control"* over the managed private hospitals as envisaged in section 12(2) of the Competition Act[9];

> the Commission was aware that upon the implementation of the Victoria merger, Mediclinic would be negotiating tariffs with healthcare funders on behalf of Victoria. According to Mediclinic, the Commission's unconditional approval of the Victoria merger gave rise to an assumption by Mediclinic that the same conduct in respect of all of the managed private hospitals was lawful[10] ;

> Mediclinic had negotiated tariffs on behalf of the managed private hospitals with full knowledge of other participants in the healthcare industry;

> from the time that Mediclinic concluded separate management agreements with each of the managed private hospitals, Mediclinic regarded the managed private hospitals as being operationally and financially integrated with it;

> the respondents did not regard each other as competitors; and

> the respondents contend that they were *bona fide* in their intentions and actions.

Mediclinic to notify its intended acquisition

Even though the Commission viewed the conduct in question as a contravention of the Competition Act, the remedy agreed to (and confirmed by the Tribunal) was that Mediclinic would notify the Commission of Mediclinic's intended acquisition of control in respect of the managed private hospitals by way of separate merger notifications.

Wits University Donald Gordon Medical Centre

The Consent Agreement records that the Wits University Donald Gordon Medical Centre (Proprietary) Limited ("WDGMC") is a legitimate and *bona fide* public private partnership between Mediclinic and Wits University, which transaction had received the Competition Tribunal's unconditional merger approval [11].

It is expressly recorded in the Consent Agreement that the Commission and Mediclinic agree that Mediclinic's tariff determination on behalf of WDGMC does not amount to price fixing as contemplated in section 4(1)(b)(i) of the Competition Act, despite Mediclinic's minority shareholding in WDGMC amounting to 49.9%.

Future Conduct

Mediclinic undertook not to conduct tariff negotiations or otherwise involve itself in tariff negotiations on behalf of firms that are not its wholly owned subsidiary or constituent firms in a single economic entity with Mediclinic. This undertaking does not, however, apply to *bona fide*, legitimate joint ventures and public private partnerships or conduct which is otherwise authorised in terms of the Competition Act [12].

In this regard, it is recorded that the Commission recognises that forbidding *bona fide*, legitimate joint ventures and public private partnerships between competitors could result in the loss of significant technological, efficiency, pro-competitive and/or public interest gains where those arrangements do not contravene section 4(1)(b)(i) of the Competition Act[13].

CONCLUSION

The contents of the Consent Agreement read differently from consent agreements concluded in relation to price fixing contraventions. In the latter, there is usually an assertion that the offending conduct has ceased, an admission of liability, an undertaking to pay an administrative penalty, etc. This is not, however, how the Consent Agreement reads. It remains to be seen whether the Consent Agreement is a once-off situation based on the unique facts of the case or whether it heralds a new approach to agreeing settlement terms with the competition authorities.

5 Subsidiary relationships are now described in section 3 of the Companies Act, No. 71 of 2008.
6 See paragraph 3.3.
7 In terms of section 12(2)(a), (b) and (c) of the Competition Act. See paragraph 4.2 of the Consent Agreement.
8 According to paragraph 1.15 of the Consent Agreement, the Commission unconditionally approved Mediclinic's acquisition of control of Victoria on 17 October 2003 (case number 2003Oct666).
9 See paragraph 2.4.
10 See paragraph 2.4.3.
11 Mediclinic's acquisition of, amongst other things, 49.9% of the issued share capital of WDGMC was unconditionally approved by the Tribunal on 12 October 2005 (case number 75/LM/Aug05).
12 See paragraph 5.1.
13 See paragraph 5.1.

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