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# **The Bargaining Chamber: Compliance with the Competition Act**

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# Overview of Presentation



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- **Introduction**
- **Purpose of the Competition Act**
- **Healthcare and Competition Law**
- **Bargaining Chamber by Medical Aid Schemes**
- **Competition Law Perspective**
- **Conclusion**

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# Introduction



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## Growing recognition and shared concern by stakeholders:

- **Healthcare cost in SA significantly high.**
- **Inefficient allocation and utilisation of limited healthcare resources.**
- **Overall impact on affordable and equitable access to healthcare services.**

# Purpose of Competition Act



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- **New competition regime established in the Competition Act 1998 (“the Act”)**
- **Purpose of the Act is to promote and maintain competition in order to:**
  - **promote efficiency, adaptability and development of economy;**
  - **provide consumers with competitive prices and product choices;**
  - **ensure that SME’s have opportunity to participate in economy;...**

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# Healthcare & Competition



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- **View that competition law should not be applicable to healthcare markets.**
  
- **Healthcare does not function like a normal market:**
  - ❑ **information asymmetry**
  - ❑ **third party payors**
  - ❑ **subject only to State regulation**

# Healthcare & Competition



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## CCSA view:

- **True Competition be it on price, quality, nature and extent of service providers or other aspects, is beneficial to consumers and the same is true for healthcare services.**
- **Competition is the heart of development and economic efficiency.**

# Healthcare & Competition



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- ❑ **Competition Act applies to all economic activity within or having an effect within the Republic, with exceptions;**
- ❑ **Anomalies present in many markets, not only healthcare;**
- ❑ **Context of private health care in South Africa;**
- ❑ **Competition Act provides sufficient room to cater for health sector; and**
- ❑ **Combination of market principles and limited regulation.**

# Healthcare & Competition



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- **CCSA cases in healthcare:**
  - **Hazel Tau and others v GlaxcoSmithKline and others.**
  
  - **Price setting amongst healthcare market players: BHF, SAMA, HASA.**
  
  - **CCSA v Adcock Ingram Critical Care and others**

# Bargaining Chamber



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## Industry concern that:

- Cost containment is a challenge.
- Limited healthcare resources not always utilised effectively.

## Alleged underlying factors:

- Enforcement action by the CCSA in 2004, outlawing collective negotiations in the industry.
- Consolidation in the Private hospital market.
- Imbalance of power amongst industry players
  - Supply side has market power
  - Demand side price takers and lack countervailing power.

# Bargaining Chamber: cont.



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## Proposed solution: the "*bargaining chamber*"

- Presents an effective solution to cost containment
- Bring about transparency in the pricing of healthcare services.

## Broadly the bargaining chamber would achieve:

- More bargaining power particularly by smaller, restricted schemes;
- Collective review current medical practices, including methods of healthcare delivery, to determine if they present the most effective utilisation of healthcare resources;
- The extent to which schemes reimburse certain treatment options; and

T o w a r d s **Ability to negotiate prices down for healthcare services** f o r a l l

# Competition Law Perspective



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Notwithstanding the intended benefits, the bargaining chamber raises competition concerns associated with joint actions by horizontal competitors:

- **Platform for Collusion**
  - **Limit ability and incentives to compete independently.**
  - **Result in unlawful fixing of prices and trading conditions, market allocation etc.**
  - **May be difficult to reach unilateral decisions on activities where there is no need for collective action.**
- **Information Sharing: may facilitate**
  - **Exchange competitively sensitive information.**
  - **Signaling behavior, and reactions.**
  - **Monitoring adherence and uniformity.**
  - **Tacit or implied coordination.**

# Competition Law Perspective



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- **Any bargaining chamber is inherently anti-competitive.**
- **Scope for the CCSA to consider the pro-competitive justification.**
- **However, unlikely to outweigh the anti-competitive effect of this conduct, hence the conduct was outlawed in 2004.**
- **Exemption application by the BHF is an acknowledgement that the conduct is anti-competitive.**
- **Question is:**
  - **is the restriction on competition necessary to achieve the objectives set out in section 10(3) of the Act ??**

# Conclusion



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- ❑ **Collective actions not the solution to bring about pro-competitive outcomes.**
- ❑ **Medical Schemes:**
  - ❑ **Compete for the custom of patients;**
  - ❑ **innovate in respect of the agreements they reach with service providers;**
  - ❑ **eliminate the information asymmetries present in health care on behalf of their members; and**
  - ❑ **pass on the benefits of their efficiencies on to consumers.**

## **In conclusion:**

- ❑ **There is therefore substantial scope for greater competitive rivalry by medical schemes.**
- ❑ **A competitive process is more likely to exert downward pressure on prices and achieve efficiency in the healthcare system.**

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