Demarcation between medical schemes and health insurance

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A van den Heever

National Treasury has established the opportunity for exemptions to the Medical Schemes Act for insurance products regulated in terms of both the long- and short-term insurance acts. This is permitted through enabling provisions in both acts, implemented in 2008, which are however constrained by the requirement that they do not undermine the purposes and objectives of the Medical Schemes Act. They must also not undermine open enrolment, community rating, and risk pooling within medical schemes. Only products which are exempted through regulations to these acts will be permitted to operate. The Medical Schemes Act (section 8h) also provides wide discretion to the Council for Medical Schemes to exempt any person from any part of the Act. Although not specifically stated, any such exemption should only be permitted where it promotes rather than diminishes the purposes and objectives of the Act.

A key distinction between the frameworks is that the Council for Medical Schemes exempts specific persons from specific parts of the Act, while the insurance acts allow for an exemption to whole product classes from the "business of a medical scheme". Whereas the former may still require compliance to some parts of the Medical Schemes Act and not others, the latter exempts a product class from every part of the Medical Schemes Act. The risks posed for the social protection offered through medical schemes is consequently far greater via the exemptions driven through the insurance acts than through the Medical Schemes Act.
Objections to the draft regulations have arisen not on the principle of exempting classes of insurance business, but on the exemptions themselves and their compliance with the enabling provisions of the insurance acts. Whereas it is reasonable to establish classes of business that do the business of a medical scheme which do not require registration as a medical schemes, it is not reasonable for exemptions which openly permit and incentivise regulatory arbitrage between medical schemes and insurance companies.

This risk is particularly high when administrators, insurance companies, and brokers are all networked through holding companies that determine the strategies of each. It is exactly this kind of risk that has been created through the "shortfall" or "gap" cover and hospital cash plan arrangements exempted in the draft regulations. Permitting such insurance will allow schemes to deliberately create gaps in cover to drive medical scheme members into insurance products that discriminate on the basis of health status. If permitted, all medical scheme coverage in general will be harmed as benefits are converted into combined medical scheme and insurance products – specifically designed to circumvent the social protections of the Medical Schemes Act and to syphon off profits from the non-profit schemes. These products will therefore undermine the purposes and objectives of the Medical Schemes Act and therefore ultra vires.

A coherent use of the exemptions, for instance in the case of dentistry, would seek to create space for dental insurance for those not on a medical scheme and for certain benefits not adequately covered by medical schemes. This would not undermine the Medical Schemes Act. However, very little thought has gone into the current framework and no such arrangement has been proposed or evaluated. The risks posed for the system of medical schemes by a specific exemption for dental care is far lower than from a blanket arrangement that in essence allows for wide-ranging anti-selection against medical scheme cover and regulatory arbitrage.

The failure of the National Treasury to demonstrate consistency with the enabling provisions of the insurance acts through technical analysis, or even a policy document of some sort, is indicative of a vested-interest-driven process rather than a transparent pursuit of public policy objectives. At risk is the coverage principally provided through open schemes, which are particularly vulnerable to regulatory arbitrage. Were the regulations to proceed as drafted the consequence will be the elimination of lifetime coverage for any person dependent for their coverage on an open scheme. It is therefore important that a more considered approach be adopted going forward – with careful consideration given to narrow, and manageable, rather than open-ended exemptions.

A van den Heever: Chair: Social Security. Wits School of Governance, University of the Witwatersrand