

Ref: IDoW update

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IDENTIFICATION OF WORK (IDoW)

UPDATE: 28 SEPTEMBER 2018

Synopsis and contextual background:

CBE is impelled by section 21(2) of The Council for the Built Environment Act, 43 of 2000 (the CBE Act) to identify the scope of work for each category of registered persons. The process is referred to as the identification of work (IDoW) and the scoping of the work is determined after consultation with the Competition Commission (CC) and in consultation with the six Councils for the Built Environment Professions (CBEP).

The objective of the IDoW is to enhance the protection and safety of the public and the environment by ensuring that only persons registered in the relevant category of registration (and thus demonstrated the required competence and academic qualifications), perform work in the built environment or take responsibility for work so performed.

The CC rejected applications of behalf of the CBEP to have identification of work exempted from the provisions of the Competition Act, 89 of 1998. This decision by the CC obliged the CBE and CBEP to reconsider the manner in which work was initially identified for purposes of the mentioned exemption applications.

This update is a CBE endeavour to keep its stakeholders informed on the progress on its engagement with the CC regarding the CBEP' exemption applications.

1. PURPOSE

Since the previous update on the IDoW process in June 2018, the CBE received substantive reasons from the CC for its rejection of the application for exemption of IDoW from the provisions of the

Competition Act. The CC advised that the substantive reasons provided are uniform for all of the applications.

The purpose of this update is to:

- I. provide a summary of the CC's reasons,
- II. propose a way forward on the process, and
- III. invite input from stakeholders.

2. THE APPLICATION CONTAINED THE SUBSTANTIVE REASONS:

The CC found that the application embodied the following rules:

- Mandatory registration of all individuals undertaking said work (regulation of practice)
- Identification of work for the different categories of registration
- Identification of work for the different disciplines of practice.

3. A SUMMARY OF THE CC's REASONS FOR REJECTING THE IDoW EXEMPTION APPLICATION

a. The reasons

The CBE submitted applications for exemption on behalf of all six councils for the built environment. One application (that of SACAP) was withdrawn before the CC ruled on it. As indicated above, the CC advised that the reasons for rejection will be substantially the same for all applications.

The CC found that the IDoW, in its current form, is likely to harm competition in the following ways:

1. Restriction of competition between registered and unregistered professionals.
2. Restriction of competition between professionals registered with the different councils for the built environment (BE) professions.
3. Restriction of competition between professionals registered with a professional council within the built environment and professionals registered outside the built environment.
4. Restriction of competition between professionals registered with the same professional council, but in different categories.

b. The theory of harm

Competition authorities approach a competition concern by focussing on articulating the theory of harm behind such concern. The requirement to present a theory of harm imposes a logically

consistent approach to the assessment of anti-competitive behaviour (Zenger, H & Walker, M: ***THEORIES OF HARM IN EUROPEAN COMPETITION LAW: A PROGRESS REPORT***).

The CC identified the theory of harm with regard to the identification of work exemption applications submitted to it to potentially result in the:

- (1) reduction in the number of service providers in the market,
- (2) likelihood of higher prices, and
- (3) limited choice to consumers.

c. The investigative approach and outcome

The Competition Act requires of the CC to follow a two-step approach; Step 1: An assessment of whether the IDoW is likely to result in a substantial lessening or prevention of competition, and if so, Step 2: An assessment of whether the IDoW is required to maintain professional standards or ordinary function of the built environment professions. The CC found evidence of compliance with Step 1. With regard to Step 2 the CC found that:

1. In the case of BE professions (engineering for instance), there are other regulations or legislations in the professional sector that are aimed to cater for public health, safety and financial risks associated with engineering work (e.g. the National Building regulations, Mine Health and Safety Act and Electrical Installation Regulations).
2. There is insufficient evidence of incidents/accidents resulting from the incompetence of unregistered persons.

d. International best practice

The CC found that the regulation of built environment professions in a number of countries involves either the protection of title or the protection of the practice of that profession, or both (i.e. total regulation). The CC concluded that the CBE opted for the most comprehensive approach, namely the total regulation (regulation of title, practice and the identification of work). In the countries included in the CC's benchmarking sample, only Nigeria identifies work to a similar extent.

e. Other considerations

1. Resource constraints

The CC found that the sector in question viz. the built environment is already experiencing resource restraints, and that any regulation that causes further strain to the resources in the sector is unwarranted.

2. Lack of consensus

The CC found a lack of consensus between registered persons within the said professions regarding the exemption application. Professionals registered in the “highest” category were largely in favour of the exemption application, whilst professional technologists were opposed to it.

f. Less harmful methods proposed

The CC concluded that the proposed IDoW is exclusionary and will impact negatively on both registered and unregistered engineering professionals.

The CC recommended that less exclusionary regulatory methods in line with international best practice, such as the protection of titles, be considered.

4. THE WAY FORWARD

The CBE noted the CC’s concerns on the exemption application. The CBE’s statutory mandate is to, after consultation with the CC, and in consultation with the councils for the professions, **identify the scope of work for each category of registered persons** [section 20(2) of the CBE Act].

The CBE has interpreted the scope of work to mean “... **the range of work performed by a registered person in terms of a specific piece of legislation other than the legislation that created the councils for the professions, or the statutory duties which may be performed by a registered person.**”

The CBE would therefore, within the definition of scope of work, identify such scopes for each category of registered persons with due consideration of the CC’s findings and recommendations.

5. INPUT INVITED

The above information is intended to highlight the CC's essential concerns. Stakeholders are invited to input on the matter. Without limiting inputs, comments on the following will be specifically appreciated:

1. Proposed different regulatory approaches that can ensure persons undertaking built environment work are competent and accountable without unfairly restricting competition.
2. With regard to above, the possibility of self-regulation of the professions, or a combination of self- regulation and government regulation through an agency.
3. The protection of titles, as the only regulatory method or in combination with other measures.

Input must be sent to pieter@cbe.org.za or sihle@cbe.org.za.

