



*competition***commission**
south africa

**DRAFT GUIDELINES FOR PARTICIPATION IN THE
MARKET INQUIRY INTO THE PRIVATE
HEALTHCARE SECTOR**

30 MAY 2014

I. INTRODUCTION TO THE GUIDELINES

1. These guidelines are released pursuant to Chapter 4A of the Competition Act 89 of 1998 as amended (“the Act”) which allows the Competition Commission (“the Commission”) to conduct a *“formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm”*. The aim of a market inquiry is to assess whether a market is working effectively from a competition standpoint, and focuses on the market holistically as opposed to focusing on a single aspect of the market or on a specific firm or number firms within a market.
2. The inquiry was initiated by the Commission because it had reason to believe that there are features that prevent, distort or restrict competition in the private healthcare sector. The objective of the inquiry is to determine whether such features exist and, if they do, what recommendations to make.
3. These guidelines essentially contain the rules of participation that will apply to all stakeholders who wish to participate in the proceedings of the market inquiry into the private healthcare sector (“the inquiry”). The guidelines seek to provide for a fair opportunity and a transparent process for all stakeholders to effectively participate in the inquiry.
4. These guidelines are intended to provide guidance and clarity on the conduct of proceedings of the inquiry. In addition, the guidelines seek to ensure that stakeholders wishing to participate in the inquiry know what to expect, how to engage with the Panel during the inquiry, and how information will be used. The guidelines also outline who may participate in the inquiry and how they may submit information; the treatment of confidential information; the administrative activities of the inquiry; the rights and responsibilities of participants; and the powers available to the Chairperson and Panel, among other issues.

5. These guidelines are issued by the Commission after consultation with the Panel. The guidelines will be published for comment and input by interested and affected stakeholders on the Commission's inquiry website (www.healthinquiry.co.za). After consideration of the comments received, the final guidelines will be published on the Commission's inquiry website and will become effective on the date of publication.
6. The guidelines may be reviewed from time to time in light of experience, to reflect any best practice that may develop. Any amendments to these guidelines will be notified to the public, and the latest version will always be that appearing on the Commission's inquiry website.

II. APPLICATION OF THE GUIDELINES

7. These guidelines only apply to the present inquiry and not to other inquiries that may be conducted by the Commission under Chapter 4A of the Act.
8. The guidelines are binding on the Commission, the Panel and the participating stakeholders in the inquiry unless the Chairperson of the inquiry directs otherwise, in which case the Chairperson will provide reasons for any deviation from these guidelines. The Chairperson may exercise flexibility in the application of these guidelines to the extent that the Chairperson considers it fair to do so.
9. The guidelines do not bind the Competition Tribunal and the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of the Act.
10. These guidelines must be read in conjunction with the Act and its Rules as well as the Terms of Reference for the inquiry, none of which are superseded by these guidelines.

III. CONDUCT OF THE INQUIRY

11. In terms of section 43B of the Act, the Commission may conduct a market inquiry at any time and in any manner, subject to the particular provisions set out in the Act. The Commission as a public body and creature of statute may only exercise its powers within the confines of the Act. Furthermore, the inquiry should be conducted fairly and openly in accordance with the Constitution and administrative law principles.

12. For the purposes of the inquiry the methods that will be used for gathering information will include (but will not necessarily be confined to) the following:

- a) **Research Studies** including research papers and literature reviews;
- b) **Direct Consultations** including focus groups, meetings, and in-depth interviews;
- c) **Public Consultations** including workshops and seminars;
- d) **Data Reviews** examining data or information obtained during the inquiry, including analysis of written submissions, and econometric modelling;
- e) **Questionnaires and Surveys** to identified participants or to the general public;
- f) **Information Requests** to particular market participants;
- g) **Site Visits** by arrangement with particular market participants, and
- h) **Formal Public Hearings** conducted by the Panel and chaired by the Chairperson of the inquiry. Prior to conducting the public hearings, written submissions by the participants must be made in order to provide information to the Panel on the issues to be addressed during the public hearing.

13. During the course of the inquiry the Panel will, subject to any legal restrictions on disclosure that may apply, aim to make public relevant information that it has received, as well as preliminary observations it has made, and which it considers appropriate to disclose at that stage in order to facilitate public participation and constructive comment.

14. Section 43B(3)(a) - (e) of the Act deals with confidentiality, the powers of the Commission in the conduct of a market inquiry and offences for non-compliance that apply to such an inquiry. There is a power of summons and interrogation, and to compel the production of books, documents and other objects for purposes of the inquiry, but the power to enter and search premises has been excluded from the manner of conduct of the inquiry in terms of section 43B(3)(b).

IV. ACTIVITIES AND ESTIMATED DURATION

15. The activities to be undertaken during the inquiry will be broad ranging, and include the following:

Phase	Areas of work
1. Phase 1: Information Gathering	1.1 Research 1.2 Call for submissions and information requests 1.3 Consultations with relevant stakeholders 1.4 Receipt of written submissions
2. Phase 2: Initial analysis	2.1 Analysis of written submissions 2.2 Preparation for first round of public hearings 2.3 Analysis of oral submissions
3. Phase 3: Further submissions	3.1 Request for further information 3.2 Targeted public hearings
4. Phase 4: Report writing	4.1 Draft interim report 4.2 Receive input and comments 4.3 Draft final report

16. The administrative timetable is currently as follows:

Date	Event
31 May 2014	Statement of Issues and Guidelines for participation issued for public comment
1 - 30 June 2014	Receive comments on the Statement of Issues and Guidelines for Participation
1 – 31 July 2014	Consider comments on the State of Issues and Guidelines for Participation
1 August 2014	Publish Final Statement of Issues and Guidelines for Participation
1 August 2014	Call for submissions on subject matter of the inquiry
1 August 2014 – 30 October 2014	Receive submissions on subject matter of the inquiry
30 October 2014	Last day to register for oral submission
1 November 2014 – 31 January 2015	Analysis of information
1 March 2015 – 30 April 2015	Public hearings
1 May 2015 – 31 July 2015	Analysis and targeted public hearings and information requests
October 2015	Publish provisional findings and recommendations

17. It is expected that the inquiry will take until the end of November 2015 to be completed. The Commission may amend the time within which the inquiry is expected to be completed by notice in a government gazette in terms of section 43(5) of the Act.

V. WHO MAY PARTICIPATE IN THE INQUIRY?

18. The following persons or entities may participate in the inquiry either in person or through a representative, unless in the discretion of the Panel, such persons or

entities' interests are adequately represented by another participant or group of participants, in which case such persons or entities will be informed accordingly:

- a) **Members of the public** - any member of the public (individual or group) that has an interest in the inquiry or is affected by the subject matter of the inquiry;
- b) **Firms** - any designated representative of a business that has an interest in or is affected by the subject matter of the inquiry;
- c) **Organised groups** - organised business fora, labour unions, civil society based organisations, industry bodies or any other bodies or institutions that have an interest in or are affected by the subject matter of the inquiry;
- d) **Government** - departments, agencies, State Owned Companies and any other organ of state or statutory body that has an interest in the inquiry or is affected by the subject matter of the inquiry.

VI. METHODS OF PARTICIPATION

19. Anyone wishing to participate in the inquiry process or proceedings may do so by:

- a) making a written submission to the Commission; and
- b) registering to make an oral presentation at the public hearings.

20. Written Submissions

20.1. Anyone making a written submission is expected to provide the following information in form "HI1" or a form substantially similar:

- a) Particulars of the participant;
- b) Contact details;
- c) Summary of the issues addressed;
- d) Whether the participant is making any claim to confidentiality;
- e) Whether the participant wishes his/her identity to be protected;
- f) Where other individuals or firms are specifically affected adversely by the content of the submission, the name of that individual or firm, together with

sufficient particulars to enable the Panel to give notice to the affected individual or firm.

- 20.2. Anyone making submissions should ensure that their submissions are legible, succinct and to the point. Submissions may be made in any of the official languages. The submissions may be hand-written or typed and must be sent to the Panel by fax, email, post or hand delivery to the following addresses:

The Market Inquiry into Private Healthcare Sector

Fax:(012) 394 0166

Physical Address:

The Competition Commission,
The DTI Campus,
Mulayo (BlockC),
77 Meintjies Street,
Sunnyside,
Pretoria,
0002

Postal Address:

The Competition Commission,
Private Bag x23,
Lynwood Ridge,
Pretoria
0040

Email: health@compcom.co.za

- 20.3. Submissions that are hand delivered to the above address must be delivered between the hours of 08:30 and 15:30 on weekdays.
- 20.4. All submissions longer than 10 pages should contain an executive summary that will outline the main points and important aspects of the submissions. This executive summary should be as short as possible but in no case should it be longer than 10 pages.

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- 20.5. Where possible participants are requested to provide an electronic version of their submission.
- 20.6. All submissions should be provided in language that is accessible to readers, avoiding the use of obscure jargon and, in as far as reasonably possible, without technical terms. If necessary, participants making submissions should provide in their executive summary an abridged account describing the contents of the technical information submitted. Where submissions contain technical data, this should be presented in a format that is easily understandable to all readers.
- 20.7. Anyone wishing to have his or her identity protected must indicate so in form HI1 and should attach a motivation therefor.
- 20.8. If the submission contains information that specifically adversely affects another or other parties, this should be noted clearly in the submission and form HI1 to enable the Panel to give the affected party an opportunity to respond to the submission or to be heard on the issues raised about them in the submission.
- 20.9. All submissions should be properly indexed and paginated, and should also be securely bound where they contain more than 10 pages.
- 20.10. The Commission will acknowledge receipt of the submissions upon receipt.

21. Public Hearings

- 21.1. The Chairperson of the Panel will preside over public hearings.
- 21.2. Hearings will be conducted formally in public through an open process. Where appropriate, the Chairperson may allow some flexibility in the process in order to achieve the desired purpose and to avoid any infringements of the

rights of any participant in the hearing, and to ensure that the hearings are conducted expeditiously and in accordance with the rules of natural justice.

- 21.3. The Panel enjoys inquisitorial powers and will be central in examining and interrogating the information that is placed before it. The Panel will be guided by the need to conduct proceedings fairly.
- 21.4. The public hearings will mainly take place in Pretoria. However, where the Panel considers it appropriate in order to ensure access to the hearings, such as where participants and witnesses are in remote areas, or where it would be conducive to saving costs, the Panel may decide to hold hearings at other venues across the country.
- 21.5. Participants wishing to make oral presentations at the public hearings must express their interest with the Commission by the date set out in the administrative timetable published from time to time on the inquiry website; by filing form “HI2”. Such parties should estimate the time required for the oral presentation. The time allocated will remain at the discretion of the Chairperson.
- 21.6. Because the time available for public hearings will be limited, it is not possible to guarantee that everyone registering to make an oral presentation will be able to do so. The Panel will in the exercise of its discretion determine which participants may participate in public hearings in support of their written submissions. One of the factors that will be taken into consideration in the exercise of this discretion is the extent to which oral presentation will help to clarify or resolve any issues raised by written submissions.
- 21.7. A hearing notice detailing the date, venue and the intended participants in the public hearing will be published on the inquiry website within a reasonable period prior to the hearing, and the relevant participants will also receive such notice.

- 21.8. There is no charge for making a written submission or for attendance or participation at the public hearings.
- 21.9. The public hearings will be conducted mainly in English. However, to cater for the other official languages, an interpretation service will be made available if a request has been made for such service in the registration form HI2.
- 21.10. All proceedings will be recorded in audio format. These recordings will be the property of the Commission, subject to the provisions of the Act.
- 21.11. The inquiry proceedings will also be transcribed and the transcripts will be the property of the Commission, subject to the provisions of the Act.
- 21.12. The Panel may make available a running transcript of the proceedings subject to the requirements of confidentiality, verification and the payment of a reasonable cost of providing the transcript.
- 21.13. Any party or media representative who wishes to film the proceedings must request permission from the Chairperson to do so at least seventy-two (72) hours prior to the commencement of the proceedings. The Chairperson has the discretion to grant or deny such a request.

22. Administrative arrangements for Public Hearings

- 22.1. A written submission is a pre-requisite for making an oral presentation at the public hearings.
- 22.2. Parties who fail to register with the Commission by submitting form HI2 prior to the closing date for registration may be permitted to make an oral presentation, subject to time availability and at the Chairperson's discretion; provided that such a party complies with other pre-hearing requirements set out in these guidelines.

- 22.3. Electronic copies of the visual presentations and/or copies of such material to be introduced at a hearing must be submitted at least twenty (20) business days prior to the hearing, unless the Chairperson has agreed to relax this requirement in any particular case.
- 22.4. Each party making an oral presentation will only be permitted to do so once, and at one designated public hearing venue, unless the Panel, in its discretion, determines that a party needs to be allowed a further opportunity at another time or venue.
- 22.5. In general only one representative of a group or entity, either personally or through a legal representative, will be permitted to make oral submissions at the public hearings, other than witnesses the parties may wish to call in support of their submissions.

23. Conduct of Public Hearings

- 23.1. The Chairperson may, upon request, direct that a matter be heard:
- a) in private or in camera on aspects pertaining to confidential information; or
 - b) that oral submissions be made at the hearing by telephone or video conference, if it is in the interests of fairness and expediency to do so.
- 23.2. The Chairperson may exclude members of the public, specific persons, or categories of persons, from attending the proceedings:
- a) if the information to be presented is confidential information;
 - b) if the proper conduct of the hearing requires it; or
 - c) for any other reason that would be justifiable in proceedings of the Competition Tribunal and Competition Appeal Court or in terms of the Act.
- 23.3. At a hearing the Chairperson may:
- a) require any person to answer questions under oath or affirmation;

- b) accept oral submissions from any participant;
- c) accept any other information that is submitted by a participant, and
- d) perform any other act contemplated by the relevant sections in the Competition Act.

- 23.4. Confidential information presented during the hearing may not be published.
- 23.5. The Panel may conduct joint hearings in terms of which any number of persons may be combined as participants in the same proceedings if their respective submissions or responses seem to the Panel to involve substantially the same question of law or facts.
- 23.6. The allocated time will be guided by the simplicity or complexity of the subject matter and the number of witnesses that will give evidence. The Chairperson will also afford sufficient time as he deems appropriate for questions and answers from other Panel members.
- 23.7. The Chairperson may call upon an Evidence Leader or other person designated for the purpose to assist the Panel with the examination of information on issues at the public hearings.
- 23.8. The Chairperson may allow participants, upon request, to call their own witnesses to deal with issues. Where reasonably possible, advance notice will be given by the Panel, through the Evidence Leader or otherwise, of the names of witnesses to be called and the summary of their expected testimony. Participants wishing to call witnesses of their own should provide similar advance notice as well as a summary of the expected testimony to the Chairperson and/or the appointed Evidence Leader in sufficient time before the relevant hearing to enable the Panel to prepare. Where it is intended that a witness will refer to a document or audio-visual presentation in the course of his or her testimony, that fact, as well as the content of the document or presentation, or the means of readily identifying it among previous

submissions to the inquiry, must be included with the advance notice provided.

23.9. At any hearing, the Chairperson may call upon the Evidence Leader or other person designated for the purpose to question witnesses, and afford a similar opportunity to members of the Panel. The Chairperson may also allow participants to question witnesses, directly or through the chair as the Chairperson considers appropriate in the circumstances, in order to allow for proper ventilation of information on contested issues. Leave to question a witness, where the need to do so could reasonably be appreciated prior to the hearing, must be sought on sufficient and reasonable notice to the Chairperson, stating the reasons for the request.

23.10. The Panel will make available a program of the day's proceedings for the public hearings, indicating the intended order of oral presentations for the day and their allocated timeframes. Except in circumstances beyond the Panel's control, this will be done a reasonable time prior to the day of the public hearing in question.

23.11. If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the Chairperson –

- a) may give directions on how to proceed; and
- b) for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Guidelines, the Chairperson will determine the procedure to be followed and, in doing so, may have regard to the Tribunal or Competition Appeal Court rules for comparative guidance.

24. Pre-Hearings

24.1. The Panel may decide, at its own discretion, to conduct pre-hearing consultations with participants, in order to:

- a) establish procedures for protecting confidential information, including the terms under which participants may have access to that information;
- b) establish who will represent the participants at the hearings and the language in which each witness will testify;
- c) determine the procedure to be followed at the hearing, and its expected duration;
- d) establish a date, time and schedule for the hearing;
- e) give directions in respect of technical or formal amendments to correct errors in any documents filed by participants;
- f) identify issues in dispute and those that are common cause as between particular participants;
- g) clarify and simplify the issues;
- h) obtain admissions or confirmations of particular facts, documents or issues by particular participants;
- i) determine when documents will be produced or delivered, whether formally or informally, if applicable; and
- j) otherwise assist in expediting the inquiry proceedings.

24.2. After concluding a pre-hearing consultation, the Panel will issue minutes recording any agreements arising from matters considered at the pre-hearing consultation.

24.3. Members of the Panel may request that a further pre-hearing conference take place, if they deem it necessary to clarify any further issues prior to the proceedings. The provisions of these guidelines on pre-hearings shall similarly apply to a further pre-hearing conference.

25. **Summons**

25.1. The Commission may make use of its powers in terms of section 49A of the Act to summons people and/or firms to appear before the Panel and/or to produce any relevant book, document or other object specified in the summons.

25.2. Firms or people summonsed may allow their legal representatives to make representations on their behalf.

25.3. A representative acting on behalf of any person or entity in any proceedings must notify the Panel in advance of the following particulars:

- a) the representative's name;
- b) their designation or formal authority;
- c) their postal address and physical address of employment or business;
- d) if a fax number, email address and telephone number are available, those particulars.

VII. HANDLING OF INFORMATION AND DATA

26. Voluntary Disclosure

26.1. It is the Commission's aspiration to solicit information from parties voluntarily, through written submissions, questionnaires, requests for information, testimony and other such means.

27. Testimony during Hearings

27.1. Every person giving oral testimony in the public hearings will either be sworn in or required to make an affirmation.

27.2. Every person testifying should answer any question fully and to the best of that person's ability.

27.3. Provisions of the Act, such as sections 49A(3); 72; 73(2)(d) and (f) are applicable to information given by a witness during the inquiry proceedings.

28. Confidential Information & Information Disclosure

28.1. Information management during the inquiry is guided and bound by procedures related to confidentiality in Sections 44, 45 and 45A of the

Competition Act and Rules 14 and 15 of the Competition Commission Rules to the extent applicable.

28.2. Parties have the right *bona fide* to claim confidentiality over information submitted to the inquiry. Any confidentiality claim must be supported by a written statement in the prescribed form “CC7”. The parties must identify the confidential information and provide a full explanation to the Panel as to why the information is considered confidential. It is important in this regard to bear the following in mind:

- a) Trade, business or industrial information that belongs to a firm, that has a particular economic value and is not generally available to or known by others is entitled to protection as confidential information in accordance with the Act.
- b) A claim of confidentiality is binding on the Panel during the conduct of the inquiry, subject to Section 44. If the Panel is of the view that the information is not truly confidential as defined in the Act, it may, at any time, refer the claim to the Competition Tribunal to determine whether or not the information is confidential.
- c) The Chairperson and/or the Panel may request a party to submit two versions of their submissions: one confidential version for the Panel and the Commission only, and a non-confidential version which omits any confidential information, which may be disclosed to the public.

28.3. Access to confidential information and/or documents submitted to the inquiry shall be in accordance with the provisions stipulated in section 45 of the Act and Commission Rules 14 and 15.

28.4. Where information is subject to a claim of confidentiality, the Panel may with the written consent of the owner of such information, allow specified third parties such as legal representatives and/or independent experts appointed by stakeholders to view and assess the confidential information subject to confidentiality undertakings by the parties concerned.

28.5. Any party who seeks access to information that is subject to a confidentiality claim may apply in the prescribed manner and form to the Competition Tribunal, as stipulated in section 45 of the Act. Equally, the party with confidentiality claims may appeal an unfavourable ruling at the Competition Appeal Court.

28.6. The Commission may use confidential information in making decisions, in a manner that does not prejudice a party's claim to confidentiality as provided for in Section 45A of the Act.

VIII. CONCLUSION OF THE INQUIRY

29. The Panel will submit a report to the Commission. The Panel will produce a confidential and non-confidential final report with the findings of the inquiry.

30. The Panel may periodically produce progress reports in the course of the inquiry in order to inform the public of progress and direction of the inquiry. Such progress reports shall be published on the inquiry website.

31. Prior to the final report, a provisional report will be published for comment. Stakeholders will be required to engage meaningfully with the provisional report. The Panel will review the comments, and if necessary request further interviews, information or data before finalising the report.

32. In accordance with section 43C(1) the inquiry may produce any number of recommendations, including but not limited to the following:

- a) Publication of information to help consumers;
- b) Encouragement of firms to take voluntary action;
- c) Promotion of a customer or industry code of practice;
- d) Recommendations to Government or other regulators on new or amended policy, legislation or regulations; or

e) Initiation of further investigations or of immediate enforcement actions against a particular firm or firms.

33. In terms of section 43B(6) the Commission must issue a report in accordance with section 43(C) within the time frame stipulated in the Terms of Reference, unless amended in terms of section 43B(5). Based on the information obtained during the inquiry, and after considering the Panel's report, Commission may of course decide not to take any further action as contemplated by section 43C(3)(e).
34. Submissions on these Guidelines for Participation must be received no later than 30 June 2014. To make submission, email health@compcom.co.za or write to:

The Inquiry Director
Market Inquiry into Private Healthcare
The Competition Commission
Block C (Mulayo), the dti Campus
77 Meintjies Street
Sunnyside
Pretoria