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SECTION 27 SUBMISSION ON THE DRAFT GUIDELINES FOR PARTICIPATION IN THE MARKET INQUIRY INTO THE PRIVATE HEALTH CARE SECTOR

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INTRODUCTION

1. SECTION27 is a public interest law centre that seeks to influence and use the law to protect, promote and advance human rights. One of our priority areas is the right of access to health care services as guaranteed by section 27 of the Constitution. As an organisation that acts in the public interest, we are concerned about pricing and the drivers of the high cost of health care in the South African private health care sector. SECTION27 and its partners welcome the publication of the draft guidelines for public comment.

2. We welcome the initiation of a market inquiry into the private health sector by the Competition Commission and the opportunity it presents to better understand the private health care market, which serves approximately 8.7 million people in South Africa.

3. The right to access health care services places a responsibility on the state to regulate the private health care sector so as to ensure that it is affordable and accessible. The Constitutional Court held in the *New Clicks* case that the "[g]overnment is entitled to adopt, as part of its policy to provide access to health care, measures designed to make medicines more affordable than they presently are".[1] This is part of the state's duty to take reasonable and other measures to progressively realise the right to health. This obligation must be fulfilled "diligently and without delay".[2] We submit that the same is clearly of application to health care services more broadly. Moreover, the state's obligation to respect, protect, promote and fulfil the right to health care services extends to all state institutions,[3] including the various regulators within the private health care sector, and crucially the Competition Commission itself and the Market Inquiry Panel. We submit that in the context of the market inquiry into the private health care sector, both the Panel and the Commission are required to interpret their mandate and powers in

[1] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC) (30 September 2005) at para 32.
[2] Constitution of the Republic of South Africa, 1996, s 237.
[3] Constitution, s7(2).

terms of the Competition Act in light of the spirit, purport and objects of the Bill of Rights and most particularly the right to access health care services.[4]

4. In addition to the consistent acknowledgement of the state's obligations in terms of the right to access health care services it is crucial that the Panel confront the constitutional obligations placed directly on participants in the market inquiry by the Constitution.[5] Though the nature and extent of any constitutional obligations that participants in the market carry will vary, they at the very least bear a "negative constitutional obligation not to impair" patients' rights of access to healthcare services.[6] Private health care providers are not just offering ordinary goods and services, but are involved in an area with clear constitutional significance. We would urge the Commission to bear this in mind throughout the market inquiry process.

5. We agree that the market inquiry is an appropriate tool to analyse the various explanations put forward for the costs, prices and expenditure increases in the private health care market, and allows the Panel to make evidence-based recommendations that serve to promote competition and that are grounded in enhancing affordable, accessible, innovative and good quality private health care in South Africa.

6. The draft guidelines are intended to provide guidance and clarity on the process that will be followed in the inquiry and the underlying principles that will guide it. We broadly agree with the contents of the draft guidelines. These comments are aimed at ensuring a transparent, fair and open process that allows for the wide and meaningful participation of the public in the inquiry. This is particularly important given that the inquiry is to be conducted within the context of a constitutional right of access to health care services.

7. We make this submission in response to the Competition Commission's call for public comment on the Draft Guidelines for Participation for the market inquiry into the private

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[4] Constitution, s 39(2).
[5] Constitution, s 8(2).
[6] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) at paras 54-65.

health sector. We begin by emphasising the constitutional and public interest context of the inquiry. We then make some specific comments in respect of the Draft Guidelines.

THE CONSTITUTIONAL AND PUBLIC INTEREST CONTEXT OF THE MARKET INQUIRY

8. We would like to emphasise at the outset the important constitutional context of the market inquiry. Section 27(1) of the Constitution of South Africa recognises as fundamental the right of all South Africans to access health care services. Section 27(2) requires the state to take reasonable measures to achieve the progressive realisation of this fundamental right. As emphasised above, the private health care sector, which provides health care services for 17% of the South African population, also bears constitutional obligations in relation to the right of access to health care services.

9. Given this important constitutional context, we believe that the key principles that should underpin the process include the following:

9.1. Openness;[7]
9.2. Transparency;[8]
9.3. Responsiveness;[9] and
9.4. Promotion of the public interest and most particularly the right to access to health care services.[10]

10. All the above principles are required by the Constitution and by the Competition Act, as amended. In our view, these principles should be explicitly stated in the text and structure of the Guidelines and in the Statement of Issues. <u>In other words, the way the inquiry is conducted as well as the substantive work of the inquiry must reflect a commitment to these principles</u>.

[7] Constitution, s 1.
[8] *Ibid*.
[9] *Ibid*.
[10] Competition Act 89, 1998, s 2.

11. Openness and transparency are essential principles in a public process as they ensure good governance, fairness, access to information and meaningful participation in the formulation of outcomes.

12. Some examples of concrete steps to ensure that the above principles are imbued in the process include the following, which we deal with in more detail below in our discussion on some provisions:

12.1. Flexibility in the procedures;

12.2. An approach to confidentiality that is cognisant of the nature of the inquiry as a truth-seeking and public interest oriented exercise;

12.3. Extensive public awareness and engagement;

12.4. Sufficient opportunity for involvement of the public; and

12.5. Open access to the media.

13. We welcome the statement that the guidelines are binding on the Commission, the Panel and the stakeholders. While sticking to the guidelines is important, the discretion afforded to the chairperson of the Panel to depart from the guidelines will provide a balance between compliance with a structured set of guidelines and the need to achieve a meaningful outcome for stakeholders, particularly the users of the private health system who are the bearers of a constitutional right of access to health care services. This kind of balance is in keeping with a rights-based approach that we will continue to advocate for.

14. This approach is also in line with the flexibility envisaged in the market inquiry provisions found in the Competition Amendment Act. For example:

14.1. the Commission may amend its terms of reference, including the scope of the inquiry or the time within which it is expected to be completed, simply by notice to the public[11]; and

[11] Competition Act, s 43B(5) as amended by Competition Amendment Act 1, of 2009, s 6.

14.2. the provisions on the right to claim confidentiality over information relating to investigations and adjudicative procedures must be applied in the particular context of a market inquiry, which is not an ordinary investigation or adversarial proceeding, but rather a truth-seeking exercise.[12]

15. In our view, these provisions indicate that form should not triumph over substance both in the procedural and substantive aspects of the inquiry. Again, we emphasise that the inquiry takes place within the context of the constitutional right of access to health care services. The public interest in securing the progressive realisation of this right should always be borne in mind. We emphasise that the Competition Amendment Act specifically allows the Commission to initiate a market inquiry "to achieve the purposes of this Act", which include the broad public interest aims listed in section 2 of the Act.[13]

16. Below we make comments on specific provisions within the context of the themes highlighted above.

COMMENTS ON SPECIFIC PROVISIONS IN THE DRAFT GUIDELINES

Para 13 (disclosure of information)

17. This is a critical paragraph and sets the tone by stating how important public participation is for the integrity of the inquiry and its findings. We welcome this and encourage the Commission to facilitate the distribution of information that is of interest to the public.

Para 12 (methods of participation)

18. The Commission will gather information through various means, including direct consultations, public consultations and formal public hearings. However, these

[12] Competition Act, s 43B(3) as amended by Competition Amendment Act 1, of 2009, s 6.

[13] For a full analysis and discussion of how constitutional rights interact with the public interest provisions of the Act, including its purposes section, see SECTION27's submissions on the Commission's Draft Statement of Issues dated 30 June 2014, submitted simultaneously with this submission. Competition Amendment Act, s 43B(1)(ii); Competition Act, s 2.

participatory methods are not discussed in any detail. These should be spelled out in some detail. The Commission should outline how it intends to reach out to users and how those users should expect to participate in an information-gathering process. The methods of participation should include all interactions, including consultation, workshops and the public awareness programmes that will be undertaken by the Commission during the course of the inquiry.

Para 19 (methods of participation)

19. We anticipate that members of the public, organised groups and others will participate through the consultations, workshops and other public awareness exercises conducted by the Commission. We recommend adding a sub-paragraph (c) to include these and other forms of participation.

Para 20.1 (Written Submissions)

20. Sub-paragraph (f) places an onus on the person making submissions to identify the potentially adverse effects of their submission and identify which individuals and/or corporate entities may be so adversely affected. It is concerning that the draft guidelines do not define what "specifically adversely affects" means.

21. In our view, the provision is problematic because (1) it places an unfair burden on those making written submissions, (2) there is no guidance as to what an adverse effect is, and (3) there is no indication of the consequences of failing to identify those adversely affected. The provision appears to take an approach of adversarial proceedings rather than a truth-seeking inquisitorial process in which the public interest is paramount.

22. The burden is likely to be unfairly high for individuals, organised groups and members of the public making submissions. Some of the larger stakeholders may have the capacity to do the exercise but others may not. This may have the effect of discouraging participation

and may prevent the disclosure of information relevant to the inquiry for fear of non-compliance with this requirement.

23. Does "specifically adversely affects" refer to an adverse effect on a right or an interest? Does an adverse effect on the reputation of a party also trigger the requirement for notification? Does an individual or firm have to be named in the submission or is it sufficient that they fall into a category of individuals or industry participants referred to in the submission? In administrative law, the term is fraught with difficulty and in our view unnecessarily creates interpretive difficulties.

24. It creates an expectation that participants will be informed of any statement that is made that adversely affects them, and presumably that they will have an opportunity to respond. It is not clear from the text what the consequences of a failure to inform the Commission of such an adverse effect will be. The danger of this omission is that it opens up room for further processes and/or litigation that will only serve to delay the Commission.

25. In our view, this requirement is not necessary to ensure procedural fairness. Instead, the Commission should ensure that all written submissions are made public, for example, by routine publication on its website. Submissions that contain confidential information (as determined by the Commission and/or competition authorities) should be redacted appropriately, but made public.

26. This requirement is, in any event, unnecessary and impractical, because (except for confidential information) submissions will be public documents. This will enable parties to themselves determine whether they may be adversely affected by any information, and inform the Panel accordingly. Those individuals and participants that wish to respond because they identify themselves as sufficiently adversely affected should be given an opportunity to do so.

27. We suggest that this can be remedied by removing paragraph 20.1(f) and 20.8. Alternatively if the panel maintains this requirement, we submit that it should provide detailed guidance on the meaning of the phrase "specifically adversely affects", what the consequences of failure to identify these effects and how disputes about the meaning of this requirement are to be mediated.

Para 20.4 (executive summary)

28. We agree with the requirements for an executive summary for submissions longer than 10 pages as this will assist both the Commission and members of the public and other stakeholders to critically engage with the submissions made to the Commission. We suggest that the Commission also sets a maximum page limit to ensure that the submissions are concise, with the provisos that additional information can be provided in annexures or that permission can be sought from the Panel for longer submissions.

Para 20.9 (indexing and pagination)

29. Those making submissions with the assistance of lawyers may understand what this requirement means. However, without guidance in the Draft Guidelines, the requirement that all submissions should be "properly indexed and paginated" will be meaningless to members of the public and participants who do not have legal assistance. In any event, this paragraph does not refer to any particular rules regarding indexing and pagination that participants should have regard to. The Rules for the Conduct of Proceedings in the Competition Commission do not refer to indexing or pagination. The Commission should provide clarity on this requirement in the final Guidelines.

30. The requirement that all submissions that are more than 10 pages should be 'securely bound' seems unreasonable. In the Rules of the Constitutional Court, appeal records that are longer than 100 pages are required to be securely bound. We recommend that similar requirements are put in place in the final Guidelines.

Para 21 (public hearings)

31. The draft guidelines suggest that the public hearings will be conducted "expeditiously and in accordance with the rules of natural justice". In our view, the term natural justice should be replaced with the term procedural fairness, which is a much more understandable term to a wider audience. The term procedural fairness encompasses rules that must underlie administrative decision-making.

32. We understand the need to effectively manage the budget for the market inquiry. However, we strongly recommend that the Commission should plan to hold public hearings in locations outside of Pretoria. It is in fact 'appropriate in order to ensure access to the hearings' (paragraph 21.4) and should be planned from the outset to ensure that the inquiry is brought reasonably close to those who are affected by the subject matter of the inquiry and in the spirit of an open, transparent and participatory process.

33. We recommend that transcripts are published on the Commission's website for free as soon as they become available, with a proviso that any confidential information will be appropriately redacted.

Para 21.13 (media access and filming of proceedings)

34. Regarding access to the inquiry proceedings by the media, the approach in the draft guidelines appears to be contrary to the principles of openness and transparency, which in our view should be the default position. The requirement that any media representative wishing to film the proceedings must request permission in advance is unnecessary to protect the process and does not acknowledge the public interest in all of the proceedings. This is particularly problematic given that access to the public hearings in particular is likely to be limited by the location of the hearings. It is useful to consider the approach of the courts in matters that are of intense public interest.

35. Media access is important to promote the principle of open justice. For example, in *Dotcom Trading 121 (Pty) Ltd v King N.O* 2000 (4) SA 973 (C) the High Court noted the importance of the right to freedom of expression of the media is not limited to print media but extends to radio and video.

36. Full access to the inquiry for the broadcast media would reflect the public interest aspect of the inquiry and enable the public and public interest stakeholders to effectively monitor the inquiry process.

37. Paragraph 21.13 of the draft guidelines requires television journalists to seek permission from the Chairperson of the Panel 72 hours in advance is, in our view, unduly onerous. This rule unreasonably limits the right of freedom of expression as protected by section 16 of the Constitution, which explicitly protects the 'freedom of the press and other media' as well as 'the freedom to receive or impart information or ideas'. In *SABC v NDPP,*[14] the Constitutional Court stated that the public have a right to know and understand how the justice system functions and to see for itself that the administration of justice is open, transparent and accountable.

38. Some of the Commission's work will be determined by the course of the inquiry itself. Subpoenas, testimonies and further evidence will be determined at a pace that is unlikely to allow for instantaneous coverage under the 72-hour rule and practical challenges may result in the applications not being fully attended to in time for crucial periods of the Commission's work to be televised. The Chairperson may be flooded with applications for permission to cover the inquiry as public interest in its activities grows. The Commission's task is broad, challenging and unique and should not be bogged down by unnecessary procedures, particularly if such procedures are not necessary to protect the integrity of the process.

39. We recommend that in the final guidelines, all media is granted immediate and full access to the proceedings of the inquiry, while noting that the Chairperson will exercise his

[14] *South African Broadcasting Cooperation v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) see paras 28-32.

discretion in limiting the broadcast of what may be claimed as confidential information, where necessary and in the context of the inquiry.

Para 23.4

40. The requirement that confidential information presented during the hearing may not be published is unnecessary in light of other protections of confidential information and should be deleted.

Para 28.2 (confidentiality claims)

41. While paragraph 28.2 assures the holders of information of confidentiality, it does not state what information is not entitled to claims of confidentiality. For example, information already in the public domain or blanket requests for confidentiality over whole documents, rather than information contained within the documents that may be confidential, should not be entertained. Many stakeholders have already shown an inclination to adopt this tactic, for example, during the public participation on the draft Terms of Reference for the Market Inquiry. This was not challenged. To send a clear message that unwarranted and spurious confidentiality claims will be contested, the final guidelines should provide examples of the categories of claims that will be rejected and/or challenged.

42. The Amendment Act provides the Commission with great latitude with regard to how an inquiry ought to be conducted. It indicates that the "Commission may conduct a market inquiry in *any* manner" and also states that the confidentiality provisions of the Act will apply to such an inquiry "with the changes required by the context."[15] Therefore, while the Commission is not free to disregard the Act's confidentiality provisions, and the way they have been interpreted by the competition authorities,[16] it is also not bound to follow

[15] Competition Act, s 43B as amended by Competition Amendment Act, s 6.

[16] See *Pioneer Foods (Pty) Ltd Competition Commission in re: Competition Commission v Tiger Brands Ltd t/a Albany and Another*; *Competition Commission v Pioneer Foods (Pty) Ltd t/a Sasko and another* [2009] 1 CPLR 239 CT; *Arcelomittal and Capegate v Competition Commission* (103/CAC/Sep 10); *Computicket (Pty) Ltd v Competition Commission of South Africa* (118/CAC/APR12) [2012] ZACAC 7 (29 October 2012); *Astral*

them if the context of a market inquiry requires otherwise. In *Nutri-Flo*, the Competition Tribunal noted that different functions under the Competition Act may require procedural flexibility. It stated that "[t]he regime for protecting confidential information in terms of the Act applies to all the functions the Tribunal performs in terms of the Act … Nevertheless these functions are all distinct, both procedurally in terms of the Act and rules, and in terms of the interests that may be advanced."[17] The Tribunal therefore concluded that "[t]his suggests that the legislature appreciated that functional heterogeneity requires procedural variation."[18] We submit that the confidentiality provisions of the Act should be interpreted in the context of the nature of a market inquiry which is a non-adversarial, truth-seeking process.

43. The Amendment Act must be read in light of the purposes of the market inquiry. It should also be interpreted in light of the constitutional obligation to interpret legislation consistently with the promotion of the spirit, purport and objects of the Bill of Rights. This encompasses the founding values of the Constitution, including "accountability, responsiveness and openness".

44. Asymmetry of information is highlighted in the Draft Statement of Issues as a key issue for investigation. In this context, it is important that as much information as possible is publicly available. The only way to increase market transparency is for the Commission to engage in a transparent process free from all but the most necessary restrictions when it comes to confidentiality claims. It must be borne in mind that section 43 B (1)(ii) of the Competition Act explicitly allows the Commission to initiate a market inquiry to "achieve the purposes of the Act".

45. The practice of claiming confidentiality for any and all relevant documents in competition proceedings is widespread. Competition Law of South Africa, for example, advises parties to make confidentiality claims even when merely conferring or meeting with the Commission, prior to any formal proceedings such as complaint initiation, referral or the

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Operations Ltd and Others v Competition Commission, In re: Competition Commission v Astral Operations Ltd and Others (74/CR/Jun08) [2011] ZACT 83 (20 October 2011).

[17] *Nutri-Flo CC v Sasol Ltd* [2004] ZACT 23, paras 62-63.

[18] *Ibid*, para 64.

filing of merger documents.[19] The Commission is right to take these claims seriously as the Competition Act provides for the extension of its confidentiality provisions to the conduct of market inquiries. It should, however, bear in mind that the Act provides it with latitude to depart from the "ordinary" manner with which it addresses confidentiality.

46. We appreciate the challenges in managing transparent, participatory processes under threat of litigation from parties seeking to resist disclosure. Market players may be anxious to ensure that their interests are adequately represented and duly considered, particularly since legislation on market inquiries was recently enacted with limited prior institutional experience. We note also that market participants are accustomed to circumventing laws and regulations.

47. We support the Panel's cooperative non-adversarial approach with its emphasis on voluntary disclosure and it adopting existing procedures, rules and safeguards to protect bona fide confidential information. This will incentivise voluntary and full disclosure.

48. Even where confidential information forms part of legal proceedings, the process can still be conducted in public, in an open and transparent manner, while maintaining the confidentiality of information. The recent *Netcare v KPMG*[20] case to which the Commission was party is an example of legal proceedings successfully conducted in public even where parties refer to confidential papers in oral submissions. There is no reason why this approach should not be considered in relation to public hearings in the inquiry process in so far as it is practicable to do so.

49. The success of a deliberative process, both in terms of the quality of its recommendations and the extent to which achieves consensus, depends on the quality of information that is uncovered, exchanged, considered and interpreted.

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[19] *Competition Law of South Africa* (Lexis Nexis, December 2013) p 11-76.
[20] *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) and The Competition Commission of South Africa*, Case No: 2013/47505.

50. Therefore, we encourage the Commission to interpret the confidentiality provisions pertaining to the market inquiry through the lens of the values of "accountability, responsiveness and openness", the importance of its role in executing the aims of the Act and the central constitutional purpose of the inquiry to ensure the realisation of the right of access to healthcare services.

Para 29 (confidential and non-confidential report)

51. We are firmly opposed to the production of two reports, one confidential and the other non-confidential. It is really not clear what purpose a confidential report would serve. This again points to the Commission's sensitivity regarding confidential information of parties.

52. It is also contradicted by the previous sub-paragraph (sub-para 28.6) that '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.'

53. It should be noted that in the United Kingdom Competition Commission's Private Healthcare Market Investigation a single final report was published, with the confidential information redacted. The publication of a confidential and non-confidential report may have an impact on the outcome of the market inquiry. Section 43C of the Competition Act states:

43C. (1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the Gazette, and must submit the report to the Minister with or without recommendations, which may include, but not limited to—
(a) recommendations for new or amended policy, legislation or regulations; and
(b) recommendations to other regulatory authorities in respect of competition matters.

54. Our concern is that the Panel's recommendations to various institutions, including regulators, will have to be considered without the complete information necessary to carry out the recommendations, which may include legislative intervention.

CONCLUSION

55. We wish to thank the Competition Commission for the opportunity to make this submission. Given the importance of the issue we are open to further engagement with the Competition Commission and the Panel to providing further comment in order to support the process in any way we can to best serve the public interest.

56. The following have endorsed this submission:

56.1 Treatment Action Campaign (TAC)
56.2 Budget Expenditure and Monitoring Forum (BEMF)
56.3 National Consumer Forum (trading as Consumer Fair)

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