



**SUMMARY OF SECTION27'S SUBMISSIONS ON THE COMPETITION COMMISSION'S DRAFT
GUIDELINES FOR PARTICIPATION AND DRAFT STATEMENT OF ISSUES IN THE MARKET
INQUIRY INTO THE PRIVATE HEALTH CARE SECTOR**

30 JUNE 2014

INTRODUCTION

1. SECTION27 and its partners welcome the publication of the Draft Guidelines for Participation and Draft Statement of Issues for public comment.
2. 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 terms of the Competition Act in light of the spirit, purport and objects of the Bill of Rights, particularly the right of access to health care services. It is crucial that the Panel confront the constitutional obligations placed directly on participants in the market inquiry by the Constitution.
3. The Draft Guidelines are intended to provide guidance and clarity on the process that will be followed by the inquiry and the underlying principles that will guide it. SECTION27's comments on the Draft Guidelines are aimed at ensuring a transparent, fair and open process that allows for wide and meaningful participation of the public in the inquiry.
4. The Draft Statement of Issues sets out a framework for approaching the investigation and sheds light on issues the Panel envisages are most relevant from the Terms of Reference. It also includes theories of harm as a practical tool in competition analysis and as an approach to guide the market inquiry in to the private health care sector.
5. This summary will deal with SECTION27's submissions on the Draft Guidelines for Participation and Draft Statement of Issues respectively.

SUBMISSION ON THE DRAFT GUIDELINES FOR PARTICIPATION

THE CONSTITUTIONAL AND PUBLIC INTEREST CONTEXT OF THE MARKET INQUIRY

6. Given the important constitutional context of the market inquiry as mentioned above, we urge the Panel to take cognisance of the following key principles enshrined in section 1 of the Constitution: openness, transparency, responsiveness and section 2 of the Competition Act: the promotion of the public interest and most particularly the right of access to health care services. These principles should be expressly laid out in the Guidelines and Statement of Issues.

SPECIFIC RECOMMENDATIONS

7. Disclosure of information: Public participation is important for the integrity of the inquiry and its findings. We encourage the Commission to facilitate the wide distribution of information that is of interest to the public.
8. Written submissions: We suggest that the onus on a person making submissions to identify the potentially adverse effects on parties of their submission is removed, or, if retained, is spelt out in more detail.
9. Public hearings: We recommend that the term 'rules of natural justice' in relation to the conduct of public hearings should be replaced with the term 'procedural fairness'. We strongly recommend that the Commission should plan to hold public hearings in locations outside of Pretoria and transcripts are published on the Commission's website for free as soon as they become available with confidential information redacted.
10. Media access and filming of proceedings: We recommend that all media is granted access to the proceedings of the inquiry without any need for 72 hours prior consent, while noting that the Chairperson will exercise his discretion in limiting broadcast of what may be confidential information.
11. Confidentiality claims: Unwarranted and spurious confidentiality claims should be contested. We recommend that the final guidelines should provide examples of the categories of claims that will be rejected and/or challenged. The confidentiality provisions of the Competition Act should be interpreted in the context of the nature of a market inquiry which is a non-adversarial, truth-seeking process. 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 health care services.
12. Confidential and non-confidential report: We are firmly opposed to the production of two final reports, one confidential and the other non-confidential. There should be one final report that is accessible to everyone and can be used by decision-makers, stakeholders, users of the system and any other interested parties.

SUBMISSION ON THE DRAFT STATEMENT OF ISSUES

SPECIFIC RECOMMENDATIONS

13. *A rights and patient-focussed inquiry:* We submit that, although the extent of obligations that the Constitution places on 'natural and juristic persons' may vary, the nature and content of the right to health care lends strong support to scrupulous application to participants in the market for private health care. We therefore encourage the Inquiry Panel in the strongest terms to grapple with both the state's and market participants' constitutional obligations throughout its investigations. We further submit the rights to health care, equality, dignity and life are interconnected and interdependent and should be grappled with constantly by the Panel in its analysis. These interconnected rights should be the core rationale for the inquiry. It should be explicitly clarified that these rights are relevant in understanding the state's obligation as well as the obligations of participants in the private health sector in interpreting the public interest and equity-based aims of the Act as well as ensuring the understanding that competition in the health care market should be geared towards better health outcomes.
14. *The importance of an expansive understanding of competition law:* We encourage the Panel to avoid a narrow purely efficiency-focussed perspective of competition analysis and competition law. We encourage the Panel to embrace its crucial public interest role in contributing towards the realisation of the right to have access to health care services and interrogating whether its recommendation may contribute towards the creation of equitable markets for private health care which advance the social and economic welfare of all South Africans. While we encourage the Panel to adopt an expansive understanding of competition law, the Panel should also remain cognisant of the limitations of competition law and the need for complementary reform through other mechanisms.
15. *The breadth and generality of the Draft Statement of Issues:* Given the complexity of the private health care system, we are concerned that the Draft Statement of Issues has been too broadly phrased and find that it lacks the necessary clarity, focus and detail on how the Panel plans to undertake its investigation into the private health care market and what the Panel plans to focus on. Therefore, the Draft Statement of Issues would benefit strategically from a systematic analysis of how the market under inquiry has been

determined, identifying the characteristics of the way that privately-funded health care services in South Africa operate and that appear to be particularly relevant when assessing competition in the sector.

16. Assessing competition I – The over breadth of the theories of harm: We are concerned that the theories of harm may not sufficiently address the issue of the public interest and the nature of private health care provision within the constitutional framework informing the right of access to health care.

17. Assessing competition II – The under-inclusive interpretation of the relevance of public interest provisions: It appears that the Panel has unnecessarily limited the potential relevance of public interest analysis in the context of theories of harm. We agree that the scope of the inquiry will have an impact on employment, small and medium-sized businesses and the spread of ownership within the economy. We submit that the public interest purposes of the Competition Act are sufficiently broad to incorporate, amongst other factors, social welfare issues, most crucially the importance of ensuring quality health outcomes for users of the private health care market.

18. Regulatory framework: We express particular support for the inclusion of the regulatory framework in the theories of harm. We wish to emphasise the importance of a thorough investigation of the current regulatory framework and how it affects competitive outcomes. We urge the Panel to critically review not only existing legislative measures and regulations but the functioning of existing regulatory bodies such as the Council for Medical Schemes (CMS), the Health Professional Council (HPSCA) and the Medicines Control Council (MCC). In particular, an assessment of their existing capacity to fulfill their mandates, including: access to human and financial resources; ability to enforce compliance with their decisions; accessibility to users of the health care system; and political independence. We stress, for example, that regulatory bodies should be easily accessible to users of the health care system and that their processes should be easily understandable, expediently completed and where possible not require access to legal representation.

19. The role of the public health care sector: We agree that the public sector is an important factor for the Panel to consider and an understanding of how the public and private

health care sectors interact will be invaluable. Where possible, the interests of the public and private sector in providing health care services and improving health outcomes should be aligned and changes in the private sector should not undermine access to health care services in the public sector. The publication of the White Paper on NHI is said to be imminent and the Panel may have an opportunity to engage with the policy paper in the context of the inquiry.

CONCLUSION AND ENDORSEMENTS

20. Given the importance of the market inquiry, we are open to further engagement with the Commission and the Panel in order to provide more comment and support the process in any way we can to best serve the public interest.
21. The following have endorsed SECTION27's submission: Treatment Action Campaign (TAC), Budget Expenditure and Monitoring Forum (BEMF) and the National Consumer Forum (trading as Consumer Fair).

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