



**SECTION27 submission on the draft Competition Amendment Bill, 2017**

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## **Introduction**

1. On 1 December 2017, the Minister of Economic Development published a draft Competition Amendment Bill, 2017 for public comment together with a background note and explanatory memorandum.<sup>1</sup>
2. SECTION27 is a public interest law centre that uses the law to advance fundamental human rights in South Africa.
3. SECTION27 welcomes the publication of the draft bill and the public consultation process that has accompanied the publication. The Bill's emphasis on transformation of the economy in the interests of promoting equality.
4. SECTION27 has a particular interest in the third priority identified by the Department of Economic Development ("Department") in the explanatory memorandum - "the provisions relating to market inquiries must be strengthened so that their remedial actions effectively address market features and conduct that prevents, restricts or distorts competition in the relevant markets". SECTION27 has engaged robustly with the Health Market Inquiry (HMI) since its inception, and has recognised the shortcomings of the current regime, particularly the lack of specific timeframes for the conclusion of different aspects of the inquiry, including the public participation process.
5. We provide comments on specific proposed amendment below.

## **Clause 18**

6. Clause 18 amends the definition of a market inquiry. The expanded definition will bring greater clarity to stakeholders and to the public as to the nature of a market inquiry. We agree that the more flexible definition will enable the

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<sup>1</sup> Government Gazette 41295, Government Notice No 1345, 1 December 2017

tailoring of a market inquiry to the features of a specific market. It will also enable the commission to consider the perspective of consumers, particular if the nature of the market involved the application of fundamental human rights as is the case in the private health market.

### **Clause 19**

7. Clause 19 introduces time limits, which is a welcome addition and will resonate with those stakeholders that have been engaging with the HMI for the last four years and with approximately a year still ahead. However, it should be recognised that some markets are so vast and so complex, as is the case with the private health sector. The complexities have caused the process to go on longer than initially anticipated. The HMI has also stated publicly that the stakeholders, particularly the private hospitals, have been responsible for some of the delays in the conclusion of the HMI. It should be noted that the HMI was interrupted by court proceedings launched by Netcare Hospital Group<sup>2</sup> in the very early stages of its work. Netcare objected to the Commission's appointment of consultants, that were to provided significant support services to the HMI and halted the inquiry for a period of a few months. It may be that the Department will have to consider how to deal with how litigation proceedings would affect the timeframes set out in the Bill.

### **Clause 24**

8. Clause 24 introduces provisions related to participation and representations to a market inquiry.

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<sup>2</sup> Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd and Another [2014] 4 All SA 241.

9. The proposed amendments seek to distinguish between persons who are entitled to participate in the market inquiry and those who are entitled to make representations. It appears that interested parties that are not firms in the market or a trade union must meet a high standard for participation. Any other person must meet all three requirements in 43G(1)(f),

“(i) who has a material interest in the market inquiry’

(ii) whose interest is, in the opinion of the presiding member of the inquiry, not adequately represented by another participant; and

(iii) who would, in the opinion of the chairperson of the inquiry, substantially assist with the work of the inquiry”

10. There are two difficulties with the structure of the proposed 43G:

10.1. Participation is not defined; and

10.2. The parties other than firms in the market and trade unions are likely to be civil society, consumer groups and groupings in society that have an interest in the subject of the inquiry.

11. We note the similarity between the proposed section 43G and the current section 53 of the Competition Act, which deals with the right to participate in hearings in the Competition Tribunal. Section 53 provides as follows:

### **Right to participate in hearings**

The following persons may participate in a hearing in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

...

(iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented;

12. In our view, the Department should explain what it means to participate in the market inquiry, however, in our view, the approach is in any event inappropriate for a market inquiry. A market inquiry "means 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." A market inquiry is materially different from proceedings that would come before the Competition Tribunal, which focuses on specific conduct or activities of a named firm, with named parties and a defined dispute. In those circumstances, it is possible for the presiding member of the Competition Tribunal to determine whether a party has a material interest, which is not adequately represented already.

13. The proposed amendment requires the presiding member of the market inquiry to determine, at the outset, whether the interests of a person other than a firm or trade union is already represented prior to representations being made by the firms and trade unions. The presiding member is also called upon to determine the usefulness of such parties to the inquiry at the outset. This places an undue burden on parties other than firms and trade unions to their standing in a public inquiry whose purpose is to investigate the general nature of competition and not specific conduct by firms.

14. Furthermore, we note that the effect of the proposed section 43G is to exclude civil society and consumer groups, amongst others, as a matter of principle, which is not in keeping with the open democracy in which market inquiries take place.
15. The above standing provisions may be appropriate in Tribunal hearings as set out in the Competition Act, for example, requiring such a person to show a material interest and to show that the interest is not adequately represented by another participant. However, the nature of the market inquiry is market inquiry”.
16. In the Netcare case noted above, the South Gauteng High Court found that the Health Market Inquiry was a constitutional measure in terms of section 27 of the Constitution of the Republic, 1996 because of the implications for the right of access to health care service. It is not unusual that commercial activity involves the realisation of human rights and the Department should consider that future market inquiries may have an impact on human rights and therefore approach participation its proceedings in a manner that is in keeping with our open and democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. As an organ of state, the Commission itself is bound by the Constitution and is required to respect, protect, promote and fulfil the rights in the Bill of Rights.
17. The panel should be able to regulate its own processes to manage time spent on various aspects of the inquiry, and may do so by, for example, limiting the amount of time given to parties to make oral submissions in the context of an open hearing. In addition, there are provisions in the Competition Act and in the proposed amendments that protect confidential information and that would bind any person interested in accessing any information submitted to the Commission in the course of an inquiry.

18. Lastly, the provision is likely to have a chilling effect on the participation of interested parties in a public process and who may assist the Commission in conducting market inquiries. We would like to emphasise that this approach is not in keeping with the principles of accountability, openness and transparency required of organs of state in terms of section 195 of the Constitution.

19. SECTION27 recommends that the proposed section 43G is substantially redrafted to exclude the high standing requirement for interested parties and to clarify the meaning of participation in a market inquiry.

### **Conclusion**

20. We thank the Department of Economic Development for the opportunity to comment on the draft Bill. SECTION27 is available for further consultations on the Bill. For more information, please contact Umunyana Rugege at [rugege@section27.org.za](mailto:rugege@section27.org.za).