

SECTION27 Advisory to the Competition Commission Regarding the Large Merger between Manta Bidco Limited and Mediclinic International PLC Case Number 2022AUG0047

25 October 2022

1. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. Our name is drawn from section 27 of the Constitution which enshrines everyone's right of access to health care services, food, water and social security.
2. We note the impact of mergers between major players on competition and pricing in the private healthcare sector and the effect on equitable access to health care services. We see the private sector as an avenue for the fulfilment of people's right to access health care services. The Health Market Inquiry (HMI) recognised the need for reform in the private health care sector. Mergers have long lasting impact on the private healthcare market, affordability and proportionality of cost to the quality of services provided at health facilities. Thus, they directly impact private sector health reform; and must be considered in the context of health systems reform and the proposed introduction of the National Health Insurance (NHI).
3. This advisory focuses on the following points that the Competition Commission should consider in making its decision about the proposed merger between Manta Bidco Limited and Mediclinic International PLC:
 - 3.1. The Competition Commission's obligations to uphold the right to access health care services,
 - 3.2. The need for reform in the private sector,
 - 3.3. How the proposed merger would affect competition in the sector, and

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3.4. The impact of such a merger on health system reform and the NHI as recognised in the findings of the HMI.

4. We urge the Competition Commission to act in concert with its own findings, recommendations and recent efforts to decide mergers in the public interest.
5. This advisory is made in support of the advisory by academics from the University of the Witwatersrand and the University of Cape Town to the Competition Commission on the proposed merger (“academics’ advisory”), dated October 2022. Although we did not have access to the original documents outlining the terms, conditions and possible proposed mitigations of the proposed merger, we relied on the academics’ advisory as well as the evidence provided therein.

Constitutional rights and obligations

6. Section 27 of the Constitution enshrines people’s right to access health care services and government’s obligation to fulfil this right. Government provides for the realisation of this right in the private sector by subsidies to medical scheme members and through appropriate regulation of the private health sector.¹ Although private sector providers are not public providers, they do serve as an avenue for government’s fulfilment of its constitutional obligation. Thus, pricing and the drivers of the high cost of health care in the private health care sector are important indicators of equitable access to health care services in the private sector. We recognise the importance of understanding, responding to and effectively regulating the complexities of mergers in the private sector as part of the constitutional obligation to fulfil the right to access health care services.
7. One of the purposes of the Competition Act is to regulate the transfer of economic ownership in keeping with the public interest.² In *Competition Commission of South Africa*

¹ See SECTION27 Submission on the Draft Amendment to Regulation 8 of the Medical Schemes Act, in which we emphasise the importance of regulations as part of the realisation of rights <https://section27.org.za/wp-content/uploads/2015/12/SECTION27-submission-on-Regulation-8.pdf>

² Preamble of the Competition Act 89 of 1998.

v Mediclinic Southern Africa (Pty) Ltd and Another, the Constitutional Court found that in deciding the impact of mergers, consideration must be had to public interest considerations and that the Competition Commission has a constitutional obligation to discourage “mergers that would most likely or inevitably give rise to, and in a way normalise, tariff hikes for desperately needed goods or services in any economic space where they are already costly and somewhat unaffordable or inaccessible.”³

8. The Competition Tribunal emphasised that the public interest in mergers includes acting to protect the interests of vulnerable people.⁴ Additionally, that the cost implications of increased tariffs that offer no increase in quality would put “further constraints on the public healthcare system in South Africa”.⁵
9. The Competition Commission is a critical mediator in ensuring the prioritisation of the public interest in the private health care sector and protecting people’s right to access health care services.

The Health Market Inquiry

10. The Health Market Inquiry (HMI) was one way in which the Competition Commission performed its role in protecting access to health care services. The HMI found that the private healthcare market is characterised by high and rising costs of healthcare and medical scheme cover, and significant overutilization without demonstrable improvements in health outcomes.⁶ Consequently, the HMI recommended that the Competition Commission review their approach to creeping mergers. It also recommended the establishment of a Supply-side Regulator of Health (SSRH) to regulate suppliers of healthcare services, including health facilities. The HMI also recognised the

³ [2021] ZACC 35, para 8.

⁴ *Mediclinic Southern Africa (Pty) Limited (Mediclinic) and Matlosana Medical Health Services (Pty) Limited (Matlosana)*, Competition Tribunal of South Africa Case number LM124Oct16.

⁵ *Ibid.*

⁶ *Health Market Inquiry*, page 30.

importance of improving competition in the private sector, including to ensure that the NHI inherited a more competitive system with lower costs for services.

11. It is imperative that the Competition Commission recalls the findings of the HMI and decides on mergers of private sector health facilities in accordance with its own recommendations.

Supply side concentration and the Supply-side Regulator of Health

12. Evidence of the significance of the proposed merger has been explained in detail in the academics' advisory. We wish to highlight the possible impact of this merger on the implementation of the recommendations of the HMI, particularly the ability of the SSRH (once it is established) to effectively regulate an even more concentrated supply side.
13. The HMI identifies high market concentration of hospital facilities as a contributing cause of poor competition, high pricing and poor quality of services; and initially recommended a moratorium on new licenses for hospital beds nationally and a set of criteria to guide the Competition Commission in assessing concentration levels locally.⁷ As part of the proposed moratorium, the HMI also recommended that the market share of the top three hospital groups be limited to 20%. These hospital groups include Mediclinic, a subject of the merger under consideration. This recommendation was softened following complaints of arbitrariness of "20%" and poor evidence of market concentration. Notwithstanding the complaints, the intention underlying the limit on market share of the top three hospitals was to ensure that these hospital groups are not in control of a significant portion of the market, and as a result straining competition.
14. The HMI report noted that in order to prevent further supply side concentration, the Competition Commission would need to control creeping mergers to address the concentration of hospitals and should consider the long term impact of mergers.

⁷ Health Market Inquiry, page 219.

15. In addition, the SSRH was recommended as a solution to improve regulation of the private sector including private health facilities and the quality of the facilities and services provided in the sector. The HMI recommended that the Minister of Health use his powers to create the SSRH and anticipated that such a process would take around five years to establish. The SSRH would fulfil healthcare planning and facility licensing functions to incorporate measures to increase competition thereby decreasing prices and increasing the quality of services.⁸ The HMI provided for an intermediary process to fulfil the recommended functions of the SSRH. It is unclear what progress has been made toward the SSRH or its intermediary body.
16. The academics' advisory provides evidence of how this merger would contribute to higher concentration in the supply side of the private sector nationally and locally; and defeat the objects of the HMI. Currently, Mediclinic owns over 50% of the beds in Free State, Mpumalanga and Western Cape; and 100% in the Northern Cape and Limpopo. Evidently, the proposed merger would increase Mediclinic's market share of hospital beds and consequently, perpetuate the current concentration issues in the private health care sector.
17. In addition to contributing to supply side concentration, the proposed merger gives REMGRO (which has significant stakes in both the supply and demand sides of the private healthcare sector through its stake in Discovery, a medical scheme, and Mediclinic, a private health care hospital group) even greater control in the market. The HMI recognised that the structure of the private health care system incentivises doctor referrals to hospitals. REMGRO's increased control of the supply side of the private health care will increase its vested interest in increased demand for hospitals.
18. The impact of the proposed merger may create long term risk that REMGRO's market share and affiliations with both demand and supply would put it beyond regulatory supervision, even once the SSRH is established. The SSRH is envisioned to control competition in assessing control of hospital bed share both locally and nationally. It is

⁸ Health Market Inquiry, page 215 – 219.

encompassed within a proposed network of regulation to resolve the issues in the private health care sector. The SSRH is intended to balance the system and support existing regulation of the demand side of the sector. The proposed merger may create an entity that is able to evade this regulation, thus defeating the purposes of the HMI's recommendations. It would seem prudent to address this risk now, in considering the impact of a creeping merger, rather than attempt to regulate it at a later date.

Threat to quality of services offered

19. One of the key purposes for competition is to ensure that customers, in this instance, patients in the private healthcare sector, receive value (in the form of price and quality) for their money.

20. The HMI found that *“facilities [in the private healthcare sector] operate without any scrutiny of the quality of their services and the clinical outcomes that they deliver because there are no standardised publicly shared measures of quality and healthcare outcomes.”*⁹ In this regard, the HMI recommended the establishment of an Outcomes Monitoring and Reporting Organisation *“in which key actors such as providers (doctors and hospitals) and patients co-operate to generate relevant and standardised outcome information...to provide patients...with relevant choice information on health outcomes.”*¹⁰ The progress with respect to the establishment of such a body is unclear.

21. We proffer that, in the absence of the establishment of measures of quality and/or a body responsible for monitoring quality and given the evidence at its disposal from the HMI, there is a greater duty that falls on the Competition Commission to ensure that competition in the market is maintained to a level that ensures value.

22. A less competitive private health sector is a risk to value and to quality. In a system such as South Africa's private sector, that is designed to compete on benefits offered and where the consumer is unable to make their purchasing decision based on value for money, it is incumbent upon the authority responsible for regulating competition in the

⁹ Health Market Inquiry, page 31

¹⁰ Health Market Inquiry, page 38

market to ensure that quality is maintained, to the extent possible, through the preservation of competition.

23. Implicitly, there exists a link between the quality of services offered and the health outcomes of individuals who access those services. It follows therefore that when quality is compromised, the right to healthcare is negatively impacted.
24. In our view, regard to value and quality dedicate that the Competition Commission must place significant consideration on the impact to competition posed by merger submissions such as the one under consideration.

NHI and systemic health reform

25. South Africa has long been intending to implement health system reform, including through implementation of the NHI. The primary goal of the NHI is to protect patients against the cost of health care services and to thereby ensure access to quality and affordable healthcare for all. We contend that these objectives are aligned with those of the Competition Commission in regulating competition in the private healthcare sector. It is no surprise then that the HMI report recognises that one of the key functions of the recommendations provided therein is to improve the health market to ensure an environment in which a future integrated health system can flourish. Regulatory reform is necessary for the anticipated NHI environment which would “rely on a suitably empowered regulatory body to deal with supplier regulatory issues”.¹¹ A competitive and well-regulated private sector is paramount to the success of health system reform.

26. For our report entitled “Health Reform: Perspectives and Proposals”, we interviewed 33 stakeholders in the health sector on the need for health reform.¹² Participants included

¹¹ Nkoni, L., and others (2019) “The health market inquiry and its potential contribution to improving health systems functioning in South Africa”, South African Health Review, https://www.hst.org.za/publications/South%20African%20Health%20Reviews/07%20SAHR_2019_The%20Health%20Market%20Inquiry.pdf, accessed 25 October 2022.

¹² <https://section27.org.za/2021/12/health-systems-reform-perspectives-and-proposals/>.

academics, government representatives, civil society, trade unions and private sector. All of the participants agreed that people have a right to access health care services and that there is a need for health reform, in both the public and private sector. Health reform is a broad exercise, inclusive of NHI, and encompasses resolving high pricing and disproportionate quality of services.

27. One of the issues raised by a participant in the research was how the structure of health markets in South Africa contributed to escalating costs in private healthcare provision and medicines. The example cited was Discovery and Mediclinic both being substantially owned by REMGRO. The participant highlighted how the oligopolistic nature of hospital facilities both nationally and locally “makes the facilities market susceptible to collusion”. Participants also highlighted the HMI as a basis for private health sector reform and expressed their disappointment in government’s failure to implement the recommendations of the report.
28. Implementation of the HMI recommendations is crucial for health reform at a systemic level and will ensure that the NHI inherits a more efficient, cost-effective system with healthy competition.¹³ The Competition Commission must therefore ensure that it includes considerations of the HMI such as the concentration of market share of facility beds; and the oligopolist nature of the proposed merger as highlighted by the evidence presented by the academics’ advisory.
29. The HMI recognises that considerations of mergers must include the future impact on the NHI. Although the NHI provides a new system of funding access to health care services, key stakeholders in the health system emphasise a need for systemic reform of the private health sector and for the Competition Commission to seek to implement the recommendations of the HMI as far as possible. The proposed merger would work against systemic health reform and risks worsening pricing issues, control of hospital concentration and decreasing service quality. Allowing this would be ceding an oligopolist system to the NHI and adding to challenges against its success.

¹³ Ibid page 11.

30. Beyond the threat to competition posed by the merger under consideration and its effect on the price and quality of services offered to patients in the private healthcare sector, an important consideration is also the effect on government as a strategic purchaser of goods and services in the private sector healthcare market. The HMI contends that *“the process for strategic purchasing need not wait for the NHI and Government could, and should, already contract with the private sector where it needs capacity.”*¹⁴ We are aware of several outsourcing contracts between government and the private sector, which were concluded to assist the government in its response to the COVID-19 pandemic by allowing for capacity within the public sector to deal with the pandemic through the referral of patients with certain chronic conditions to the private sector. Decreased competition in the private sector places in jeopardy the continuation of contracts like these, thereby constricting access to healthcare for individuals whom the public sector has limited capacity to assist.

Conclusion

31. In this advisory we highlight the Competition Commission’s duty to uphold constitutional rights and to act in the public interest. We also highlight the need for reform in the private health sector, the anticipated health system reform, including the NHI, and the role of the Competition Commission in considering long term, systemic impacts of mergers on private health sector and how it will affect the NHI.

32. In the absence of the establishment of regulatory bodies with powers to regulate price, quality and competition in the private healthcare sector, the obligation rests on the Competition Commission to, in accordance with its mandate to uphold the values and rights in the Constitution, including the right to access to healthcare, to ensure that competition is protected. In this regard, it is our view that mergers such as the merger under consideration pose a threat to competition in the private healthcare market and to access to healthcare for many.

¹⁴ Health Market Inquiry, page 102

33. We urge the Competition Commission to act in accordance with its own findings and recommendations as far possible and to consider the impact of the proposed merger on the efficacy of recommendations for health reform through regulatory bodies like the SSRH.

34. We trust these submissions will be helpful and should you require any further information, please do not hesitate to contact:

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