PRIVATE HEALTH CARE MARKET INQUIRY

Remarks by the Chairperson of the Market Inquiry

Retired Chief Justice Sandile Ngcobo

To

The Private Healthcare Market Stakeholders

Balalaika Hotel Sandton, Johannesburg

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I. Introduction

The purpose of this meeting is two-fold: firstly, it is to talk to you about what you can expect from the Market Inquiry; and secondly, it is to indicate to you what we expect of you. Perhaps to give you a roadmap for my remarks, here is what I propose to do. I will address these two broad purposes of this meeting in three parts.

In Part 1, I will make some general remarks on the market inquiry. These remarks cover a brief explanation of a market inquiry; what triggers it; its possible outcomes; our basic approach to the inquiry; the use of information obtained during the inquiry; and the management of sensitive or confidential information.

In Part 2, I focus on the rules of engagement, which will include administrative guidelines; statement of issues; theories of harm; administrative timetable; and the timelines for the publication of key documents as well as the main stages of the inquiry.

In Part 3, I will talk about what the panel expects of the participants in the market inquiry.

Perhaps before addressing the purpose of this meeting, I should first say a word about the delay in holding this meeting

II. Explanation for the delay

The panel was announced on 30 January 2014. On that occasion I indicated that the panel would, in due course, announce its programme of action. That has taken longer than we had anticipated. However, two factors conspired to bring about delay.

First, prior to the appointment of the panel, the Commission had done all the preparatory work including the appointment of a service provider who would provide technical assistance to the panel. However, as most of you are probably aware, there is at present litigation between one of the stakeholders and a service provider that had been retained by the Competition Commission for the market inquiry (the Commission is a second respondent in the litigation). The Commission had to make a decision whether to wait for the outcome of the litigation or to start searching for alternative support.

Given the time it might take to finalize litigation including possible appeals, a decision was taken to begin a search for an alternative service provider at least for the interim period. This process presented its own challenges mainly because of the limited pool of expertise in this area as well as guard against the possibility of conflict of interests. The process is continuing and it is expected that a full complement of the technical team will be in place by the time the information-gathering phase commences.

Apart from this, this market inquiry is the first of its kind in the country. The panel, as most of you have been doing, had to familiarize itself with the legal as well as the competition environment within which the inquiry must be conducted. In addition, some of the panel had to familiarize themselves with the private healthcare sector. And this being a new terrain in South Africa, some of the panel members had to study the practice in international and comparable foreign jurisdictions on the conduct of market inquiries and reflect on the guidance these might offer on how to conduct this inquiry.

The cumulative effect of all of this has led to a delay in holding this meeting.

III. *General comments on the process of the market inquiry*

Perhaps to provide context for this meeting and the issues that we will be addressed, it is necessary to recall that in 2009 our competition laws were amended to permit the Competition Commission to conduct market inquiries.[1] In doing so, this country joined a growing number of countries that have incorporated market inquiries as one of the arsenal of tools available to enhance competition.

(a) What is a market inquiry?

The Competition Act, 1998 (as amended)[2] defines a market inquiry as "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."[3] Market inquiries are essentially "research projects

[1] Competition Amendment Act No. 1 of 2009.
[2] Act No 89 of 1998.
[3] Section 43A.

conducted to gain in-depth understanding of how sectors, markets, or market practices are working."[4] The purpose of the exercise is to determine whether the process of competition is working well or can be improved effectively in a market as a whole. Market inquiries provide a framework for identifying, analyzing and, where appropriate, remedying sector-wide or market-wide competition problems.

What we need to emphasize is the point that other jurisdictions have emphasized; a market inquiry is fundamentally investigative and inquisitorial in nature; it is not accusatorial. No one is accused of anticompetitive conduct; the focus is on how the market as a whole functions. Consistently with the principles of fairness, where there is information that might adversely affect a particular firm or group of stakeholders, the panel will provide those firms with an opportunity to present information to counter such adverse information.

(b) What triggers a market inquiry?

[4] *Market Studies Good Practice Handbook* , International Competition Network (ICN Handbook) at p 6.

The market inquiry provisions empower the Commission to conduct a market inquiry in two situations, namely, (a) if it has reason to believe that any feature or combination of features of a market for goods or services prevents, distorts or restricts competition; or (b) in order to achieve the purposes of the Competition Act.

A market inquiry is generally triggered by concerns about the functioning of a market or markets. These concerns may arise from the behavior of firms; market structure; lack of information; consumer conduct; or public sector intervention by way of policies or regulation.

(c) What are the possible outcomes of a market inquiry?

At the conclusion of the inquiry, we are required to answer the question whether there are features that prevent, distort or restrict competition in the private healthcare markets. There is a whole range of outcomes that the panel may reach including a finding that the market is functioning well or that it is not functioning well.

If we should find that there are features that have an adverse effect on competition, the Act empowers us to make

recommendations, which may include new or amended policy, regulation or deregulation[5], and an investigation of an alleged prohibited practice by a particular firm or firms under Part C of Chapter 5. Indeed based on the information contained in our report, the Competition Commission may take any of the actions set out in section 43C (3) of the Act, including, initiating a complaint against any firm for further investigation under the Act.

The fact that the Competition Commission decides whether it is necessary to conduct a market inquiry and thereafter conducts the inquiry as well as the fact the Act contemplates information obtained during the market inquiry could be used to initiate a complaint under the Act might give rise to a perception that the Commission has prejudged the issues to be investigated and that the inquiry will necessarily result in an enforcement action under Part C of Chapter 5.

The range of possible outcomes that may result from a market inquiry immediately distinguishes a market inquiry from an

[5] Section 43C(1).

enforcement investigation and should dispel any perception that the inquiry will necessarily result in an enforcement action under Part C of Chapter 5.

(d) Our approach to the terms of reference

The remit of the panel derives from the terms of reference on which most, if not all, of you have commented. The terms of reference as published in the Government Gazette on 29 November 2013 therefore defines the scope of our work.

I am aware, however, that some stakeholders are particularly interested in the extent to which the panel will evaluate the pharmaceuticals market, the medical devices market, and the market (or markets) for other consumables. These markets have been incorporated into the Terms of Reference to a limited extent. At this stage we do not contemplate a full-scale evaluation of competition or competitive dynamics in these markets. However, as the inquiry progresses and as more information is received, it may be necessary to reconsider our initial view (in accordance with section 43B (5)).

Our approach to the inquiry is to proceed wholly independently of what may have prompted the Competition Commission to initiate the inquiry and to cast a fresh pair of eyes on the issues raised in the terms of reference. It is therefore possible that after considering all the evidence the panel may conclude that there are no features that prevent, distort or restrict competition in the private healthcare markets. This is the approach that is followed in other jurisdictions, in particular, in the UK, and we think this is a sound approach to follow.[6]

And I am sure most of you are anxious to know whether information obtained in the course of the inquiry will be used to initiate complaints.

(e) How information might be used

It is apparent from the provisions of section 43C (3) of the Act that the Act contemplates that information obtained during a market inquiry may be used to initiate a complaint under Part C of Chapter 5. It may be necessary in this regard to distinguish between the use of

[6] UK Competition Commission Guidelines for Market Investigations: Their Role, procedures, assessment and remedies, April 2013. (CC 3 Revised) at paragraph 22.

information obtained from a firm against that particular firm and use of information obtained from another source against a firm that is not the source of the information. The decision whether any information obtained during a market inquiry will be used in a subsequent enforcement investigation lies with the Commission.

It is also apparent from these provisions that the Competition Commission has a discretion on how to use the information obtained during the market inquiry. We are mindful of the fact that if incriminating information could be used against a firm; this might discourage some of the stakeholders from participating in the inquiry and volunteering information. This may well undermine the objective of this market inquiry.

The panel is not at this stage in a position to provide any indication as to whether or not the Commission will decide that any information obtained during the market inquiry will be used to initiate enforcement action; that is a matter for the Commission to decide. We understand, however, the Commission's Corporate Leniency Policy will be applicable to all participants in the market inquiry.

Before leaving the topic relating to information, let me also address another related issue on which, I am sure you are anxious to obtain clarity, namely, how sensitive or confidential information will be handled.

(f) Sensitive or Confidential information

The panel is mindful of the fact that unless the participants in the market inquiry have the assurance that their sensitive or confidential information will be protected from general disclosure, this might have a negative effect on the degree of their participation in the inquiry. The provisions of the Act relating to confidential information are applicable to a market inquiry.[7] Firms submitting information to the market inquiry are entitled to claim confidentiality in respect of information submitted.

However, written statements explaining why the information is confidential must support all claims of confidentiality.[8] The inquiry is not bound to accept the mere say so of a firm that the information is

[7] Section 43B (3) (a).
[8] Section 44(1)(b).

confidential. It has a responsibility in the public interest to satisfy itself that the claim of confidentiality is valid. If it is not so satisfied, it may refer the claim to the Competition Tribunal for it to determine validity of the claim.[9] Other participants too may challenge the claim of confidentiality and ask the Tribunal to determine its validity.[10] All valid claims of confidentiality will of course be protected from disclosure under the provisions of the Act.

The panel will be grateful if a participant who supplies information could indicate whether any of the information supplied is of a confidential nature and to explain why.

Against this background, let me turn to the rules of engagement.

IV. The rules of engagement

One of the first questions that I am sure is on the mind of any keen participant in a market inquiry, is what are the rules of engagement; what are the administrative guidelines that will be

[9] Section 44(2)
[10] Section 45 (1)

followed in conducting the inquiry. In developing the administrative guidelines that will govern the conduct of the market inquiry, the panel will be guided by international and comparative foreign experience.

This being the first market inquiry to be conducted under the newly enacted market inquiry provisions of the Act, the panel needs to carefully apply its mind to international experience, in particular, good practice on the conduct of market inquiries in order to study how other countries with similar legislative provisions, again notably the UK, have approached enquiries of this nature. In addition, we will consider, the Guidelines that have been developed by the International Network of Competition Authorities on the conduct of market inquiries. The process of developing the rules of engagement for the market inquiry is therefore work in progress.

We consider that international experience will provide a useful guide in developing our rules of engagement. But in seeking guidance from international experience and comparable foreign jurisdictions, we are mindful of the fact that ultimately, we are dealing

with South African legislation, that must be understood and construed in the light of our own experience and be informed by South African laws, in particular, the values that underlie our constitutional democracy.

The guidelines will be binding on participants in the market inquiry. They are intended to facilitate the gathering of information and the conduct of the market inquiry. The administrative guidelines will strive to ensure that the procedures followed are fair and give affected parties the opportunity to participate appropriately in the inquiry. In developing these guidelines we will aim at fulfilling and balancing different demands by recognizing that:

1. The inquiry must be concluded within the time stipulated in the terms of reference;
2. The time and resources of the competition commission and the parties must be used efficiently;
3. Since a market inquiry can result in significant investment interventions in markets, the investigation must not only be thorough and disciplined but also be fair;

4. Fairness requires openness and transparency including giving the parties the opportunity to understand the process affecting them.

Broadly speaking, and without limiting matters that will be dealt with in the administrative guidelines, the guidelines will deal with the following matters:

(i) The conditions upon which parties can claim confidentiality over information submitted to the panel;
(ii) The treatment of confidential information by the inquiry;
(iii) The conduct of proceedings in public hearings;
(iv) The submission of information to the inquiry;
(v) The administrative phases of the inquiry;
(vi) The rights and responsibilities of participants;
(vii) The consequences of not complying with the administrative rules,
(viii) The powers of the market inquiry; and
(ix) The expected outcomes of this inquiry.

We anticipate that the draft administrative guidelines will be published for comment by the end of May 2014. The public will have until the end of June 2014 to submit written comments on the draft administrative guidelines. A notice indicating the publication of the draft administrative guidelines for comment as well as the final rules will be published on our website.

While we will consider carefully all comments, it is necessary to emphasize that the ultimate responsibility to make the administrative guidelines rests with the Commission, which is empowered by section 43B(3) to determine how the inquiry should be conducted. We envisage that the final administrative guidelines will be published on 1 August 2014.

a) Statement of issues

In order to assist those who will be submitting information to focus on the issues that we envisage will be relevant to the inquiry, we will publish a statement of issues. The issues set out in the statement are intended to be topics for investigation and do not represent any views or findings of the panel. For this reason, we will

publish the statement of issues and invite stakeholders, if they consider that there are additional issues, which we should consider, to identify them and explain why these are relevant to the inquiry.

We wish to emphasize that the statement of issues will be revised if necessary.

b) ***Theories of harm***

As pointed out earlier, we are required to decide whether any feature or combination of features in the relevant market have an adverse effect on competition. In order to make this determination, we will develop a set of ideas about how harmful competitive effects might arise in the relevant market. These ideas are generally referred as theories of harm. The theories of harm are no more than hypotheses of how harm to competition might arise.

Seen in this context, the theories of harm are a tool that will enable us to identify any features or combination of features that may result in an adverse effect on competition. They will provide focus and structure to how we will assess the way competition is or is not

working in the markets. These theories of harm generally draw on a number of potential sources of harm to competition.

As we understand it, harm to competition can flow from at least the following sources:

i) Market power including market concentration;

ii) Barriers to entry and expansion;

iii) Imperfect information;

iv) Regulatory framework; and

v) Vertical relationships.

Of course this list is not exhaustive there may be others.

As the theories of harm are crucial to the assessment of how competition is working, we would be interested in your comments on the theories of harm.

c) ***Administrative timetable***

We are also mindful that most stakeholders are anxious to know the timelines for gathering information including the invitation

for written submissions, holding of public hearings, site visits, seminars, workshops and conducting surveys. This will be a function of an administrative timetable. The administrative timetable will deal the timelines for the main stages of the inquiry, including:

- Publication of the initial statement of issues;
- Timelines for initial information requests;
- Publication of an amended statement of issues;
- Public hearings;
- Publication of provisional findings;
- Submission of comments on provisional findings;
- Consultation on recommendations, if necessary;
- Publications of proposed recommendations and comments thereon;
- Final deadline for all parties' responses before the final report; and
- Publication of the final report.

d) Timelines for publication of key documents

If all goes well we are planning on meeting the following deadlines:

1. **Statement of issues**
   - i) Publication of draft for comment **31 May 2014**
   - ii) Period for comments **1 – 30 June 2014**
   - iii) Consideration of comments **1 – 31 July 2014**
   - iv) Publication of final statement of issues **1 August 2014**

2. **Administrative Guidelines**
   - i) Publication of draft for comment **31 May 2014**
   - ii) Period for comments **1 - 30 June 2014**
   - iii) Consideration of comments **1 – 31 July2014**
   - iv) Publication of final administrative Guidelines **1 August 2014**

3. **Administrative Timetable:** Publication **1 August 2014**

4. **Call for submission of information:** **1 August 2014**

e) When will the investigative work of the inquiry start?

As these deadlines indicate, the inquiry will start in earnest on **1 August 2014** when all the key documents would have been finalized. While we have not yet finalized the administrative timetable, we are aiming at implementing the key stages of the inquiry during the following periods:

- Requests for Information will be issued no later than 1 August 2014.
- The inquiry will accept both voluntary submissions and submissions in response to specific information requests from 01 August 2014.
- The analysis of responses to the first round of information requests will take place from the end of August 2014. This may result in an amended statement of issues being issued. Any amended statement of issues will be made available for comment by stakeholders and interested parties.

- We are planning on holding the first round of public hearings between 1 March 2015 and 30 April 2015. The seat of the public hearings will be in Pretoria, but the panel may decide to conduct public hearings at other venues across the country, should it be required.
- From May 2015, the inquiry will analyze and review the information before it and may conduct targeted public hearings and may issue targeted information requests to address any issues arising from information received.
- We are aiming at publishing provisional findings and recommendations, if any, for comment during October 2015.

However, we would like to stress that this is a tentative schedule that we hope to meet. The final schedule will be reflected in the Administrative timetable, which will be published on 1 August 2014. While every effort will be made to adhere to this schedule, even the final Administrative timetable is subject to change, as the circumstances require. Any changes to the schedule will be published on our website.

This is what you could expect from us. And before concluding this presentation may I say a word about the other purpose of this meeting, namely, what we expect from participants.

f) What is expected of participants in the private healthcare sector?

At the beginning of this presentation, I pointed out that the purpose of a market inquiry is to determine whether the process of competition is working well or can be improved effectively in the market as a whole. Seen from this point of view, it is a process that can be beneficial to participants in a market, consumers, businesses and government.

1. Consumers for example may gain a better understanding of the market that may potentially improve their bargaining power;

2. Businesses are provided with the opportunity to engage in voluntary compliance and to understand how the relevant market works and be in a position to influence the introduction of new, efficient government policy or regulation; and

3. It can assist government and other regulatory bodies to adopt regulation and/or policies that stimulate, rather than restrict, competition, and thus promote increased productivity.[11]

A market inquiry can bring about these benefits because it affords the market players the opportunity to: inform the panel on how the market operates; make suggestions on how to improve the functioning of the market; identify outputs that could improve market functioning, potentially including deregulation; and identify which of their practices do or do not comply with the law and which ones raise doubts as to their compliance – this could prompt voluntary compliance.

But these benefits can only be achieved if the panel has accurate information on how the market operates. Stakeholders know how the market operates because they are involved in it. It is therefore in the interest of all stakeholders to come forward with accurate information so that the panel can in turn make an accurate

[11] *ICN Handbook* at paragraph 4.10

assessment of how the market operates; or to put in terms familiar to most of you, to enable the panel to make the correct diagnosis.

Without accurate information, there is a real danger that the panel's finding may be flawed and this will be to the detriment of the not only the market inquiry but also to the detriment of the market as a whole.

What the panel therefore expects of the stakeholders is utmost cooperation. While the Inquiry has been given powers to summons persons to provide information, we would hope that it will not be necessary to use those powers. However, if needs be, the Inquiry will not hesitate to use those powers to obtain the required information (in accordance with section 49A of the Act).

V. Conclusion

For the next two years or so we will all be working together. We hope that over the months to come we will develop a mutual sense of trust that is vital for the proper conduct of the inquiry. And the importance of this inquiry, not only to you, but also to the nation

as a whole cannot be gainsaid. The right of access to healthcare is a fundamental human right that is vital to the right to life. Most of you who are engaged in this sector are rendering a vital service.

It is therefore in the interest not just of competition that the private healthcare sector functions effectively and efficiently but in the public interest that the private healthcare markets function in a manner that promotes rather than undermines the purposes of the Act.

THANK YOU FOR YOUR ATTENTION.