TREATMENT ACTION CAMPAIGN

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The Treatment Action Campaign's Oral Submission to the Competition Commission's Inquiry into the Private Healthcare Sector

The TAC is a membership-based organisation that advocates for the rights and interests of people living with and affected by HIV and TB. We have over 230 branches and 8 000 members across seven provinces of South Africa.

We have a long-standing interest in medicine pricing and ensuring access to affordable medicines. The high price of medicines is a problem that affects both the private and the public healthcare sector detrimentally. As such the cost of medicines must be a crucial part of the Competition Commission's inquiry into private healthcare.

TAC has successfully used competition law and other mechanisms in the past in order to ensure access to key medicines. We will highlight these now.

In 2001 we fought on the side of the government in the so-called "PMA case" in which our government was taken to court by 39 pharmaceutical companies. This as a result of the passing of the 1997 Medicines and Related Substances Control Act which allowed for the substitution of brand name medicines with generic medicines once a patent expired, the importation of generic medicines and a transparent pricing mechanism. Despite being signed into law, the Pharmaceutical Manufacturers' Association attempted to stop the Act. The companies eventually dropped the case following the prospect of dying AIDS patients testifying in court.

In 2002, in one of our most important victories, we won a Constitutional Court case compelling the government to provide antiretroviral treatment to prevent transmission of HIV from mothers to their babies during birth. One of the arguments against this used by the government was that providing this treatment would not be affordable.

Again in 2002 we also lodged a complaint with the Competition Commission regarding the excessive pricing of three antiretroviral medicines - AZT, lamivudine and nevirapine – in a case known as the Hazel Tau case. At the time the price of antiretroviral treatment was over R2 000 per person per month. Unaffordable to most. In 2003 the Commission found evidence supporting Tau's allegations and the matter was referred to the Competition Tribunal. As a result the companies settled and provided licenses for competitors to make cheaper generics to South Africa and other countries in Sub Saharan Africa. The price of first line antiretrovirals came down and today a first line regimen is just over R100 per person per month. Many local and international experts made submissions to the Competition Commission in that case. We urge you to revisit those submissions.

We also approached the Competition Commission regarding the excessive pricing of antiretroviral efavirenz as well as MSD's refusal to license efavirenz for the manufacture of fixed dose combinations that would simplify treatment, helping people to adhere better. This case was dropped in 2008, when four generic companies were licensed to produce it – this lead to an 80% drop in the cost of efavirenz. Unlike the Hazel Tau case this case was not referred to the Competition Tribunal. We believe that these licenses were granted due to the pressure created by the Competition Commission case.

In 2009 the Competition Commission invited input from TAC when it considered a merger between GlaxoSmithKline and Aspen Pharmacare. Our complaint identified that competition for the antiretroviral medicine abacavir would be impacted by the merger. Abacavir is

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commonly used in the treatment of infants and children with HIV. Based on the input of TAC the Competition Commission ruled that, as a condition of the merger, GSK was required to grant licenses for the generic production of abacavir. The price of abacavir halved in government's 2011 ARV tender from the 2008 tender price.

In all these cases generic competition has resulted in massive reductions in the prices of antiretrovirals in South Africa. Due largely to the success of these Competition Commission cases the South African government has been available to afford the massive AIDS programme we now have in the country. Today more than three million people have been initiated onto ARVs in the public sector. Furthermore, between 200,000 and 300,000 people are accessing ARVs in the private sector.

It is thus clear that competition law and the Competition Commission has played an important part in determining medicine prices in South Africa – and ensuring the accessibility of medicines.

While we have won important victories in relation to certain antiretrovirals, many other medicines remain priced out of reach for many in both the private and the public sector.

- We are concerned about the high price of important new ARVs like raltegravir. Raltegravir is presently only used as third line HIV treatment in the public sector in South Africa. Had it been more affordable it would likely have been used as part of first line treatment.
- We are concerned by the high prices of new medicines to treat drug-resistant TB like bedaquiline. This is of particular concern given the increasing rates of drug-resistant TB in South Africa and the fact that only about half of people with the disease are cured.
- We are concerned by the high prices of various cancer medicines – of which our colleagues working on cancer can tell you more.

We are aware that we cannot keep getting involved in extended Competition Commission cases. We simply do not have the capacity to keep taking new medicine cases to the Commission. If we want to stop fighting these individual battles there must be a greater reform of the system to ensure that medicines are affordable and available to the people who need them.

We have thus taken a strategic decision to campaign to fix the problem upstream by advocating for changes to South Africa's patent laws. South Africa can, in terms of international law, make changes to its patent laws to better balance our people's right to access healthcare with the private interests of pharmaceutical companies. We believe that Section 27 of the Constitution of South Africa places an obligation on the state to make such legislative changes. We strongly urge the government to utilise all public health safeguards as outlined in the 2001 Doha Declaration to ensure better access to medicines in both the public and private healthcare sectors.

We are also aware that medicines prices are to some extent regulated in South Africa – particularly through the regulation of annual price increases. We have also over a number of years provided submissions on multiple sets of draft regulations for the bench-marking of medicine prices in South Africa against medicine prices in other countries. As yet no international bench-marking regulations have come into effect. While we appreciate the fact that some degree of price regulation is in place, we would like such regulation to be more transparent and to allow for greater price interventions in cases where the public interest demands it.

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We recognise that patent law reform and the regulation of medicine prices may not be a central concern of these hearings.

We do however urge the commission to engage with the issue of medicines prices in all its complexity. We specifically urge you to take into account:

(a) the Competition Commission's history in relation to medicines prices,
(b) South Africa's outdated patent laws, and
(c) other price control mechanisms in South African law.

We understand that companies should be allowed to make reasonable profits. But we think it is unethical to allow companies to make excessive profits while people cannot access life-saving medicines. In addition, the Constitution of South Africa places an obligation on the state to take legislative and other measures to progressively realise the right to access healthcare. This obligation extends to the pricing of medicines since our lives and our health depend on it.

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