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Ms Tamara Paremoer
The Inquiry Director
Market Inquiry into Private Healthcare
The Competition Commission

By E-mail: TamaraP@compcom.co.za

16 July 2014

Dear Ms Paremoer

Netcare's submissions in relation to the Draft Guidelines for Participation and the Draft Statement of Issues

1. Netcare has received a copy of the draft guidelines for participation in the market inquiry ("**the draft guidelines**") and the draft statement of issues ("**the draft statement of issues**"). These submissions are made on behalf of Netcare in response to the invitations to provide written submissions in relation to the draft guidelines and the draft statement of issues.

2. As the inquiry team may be aware, a subsidiary of Netcare, BMI Healthcare Limited ("**BMI**"), has recently participated in a similar market inquiry conducted by the United Kingdom Competition Commission ("**the UK market inquiry**") and, as such, Netcare believes it is in a position to provide the inquiry team with a number of helpful insights in relation to the draft guidelines.

3. Through its participation in the UK market inquiry, BMI was able to observe first-hand a number of positive features of the processes, which were followed by the UK Commission, now the Competition

and Markets Authority, as well as a number of pitfalls which emerged during that process. We hope that these insights will be of assistance to the inquiry team in crafting the final guidelines in order to ensure a process which is transparent, efficient and fair.

4. This submission is divided into three parts – first, an executive summary of the key considerations that we believe arise from the draft guidelines and draft statement of issues; second, more detailed comments on the draft guidelines; and third, detailed comments on the draft statement of issues.

5. At the outset it should be noted that the recommendations which will be made by the inquiry team have the potential to have very significant implications for participants in the relevant markets, as well as for the public and the health sector as a whole. This is particularly the case given the interaction between the private and public sectors and the importance of section 27(2) of the Constitution. Significant and far reaching interventions could be made on the basis of the recommendations of the inquiry team, with or without legislative amendment, and it is, therefore, of great importance that the process which is adopted by the inquiry team is one which is governed not only by the principles of fairness and natural justice, but which is designed to arrive at outcomes which fairly and accurately reflect the objective facts which are placed before the Inquiry.

EXECUTIVE SUMMARY

6. With respect to the draft guidelines, it is believed that the process and administrative timetable proposed on page 6 of the guidelines could be improved to make the process more efficient and more equitable by the implementation of the following:

6.1. **Staggered submissions:** The inquiry would be made more efficient through the use of staggered submissions on the basis that those parties which support particular theories of harm should initially make their submissions, which should then be followed by submissions by those who do not support particular theories of harm. This would increase the efficiency of the inquiry by (i) enabling the inquiry team to group the various submissions in respect of each of the different theories of harm that it has identified, (ii) allowing parties to make more focused submissions in relation to those theories of harm and (iii) enabling the respondents to engage directly with one another's submissions. This would also facilitate the objectives of fairness and

transparency, because it will ensure that parties have an opportunity to identify specific facts which require a response. For example, proponents of a particular theory of harm may set out certain facts or submissions which they believe support a particular theory. If the responses are filed in a staggered fashion, this would enable those parties who do not agree with a particular theory of harm to respond directly to any such facts or submissions that they believe to be incorrect;

6.2. **Periodic written updates on progress:** The proposed process does not provide for any indication of the inquiry team's developing views at specific stages during the process, and appears to provide only for provisional findings to be published for comment towards the very end of the process in October 2015. We would suggest that the inquiry team should (as provided for in the terms of reference) publish issues papers or working papers to reflect their developing thinking and the impact thereon of the submissions they receive from various parties on the particular theories of harm. The publication of periodic working papers would enable stakeholders and interested parties to understand the inquiry team's evolving views at each stage of the inquiry process, and thereby facilitate meaningful responses thereto;

6.3. **Increased opportunity for review and comment:** The current process and timetable for the review of, and submission of comments in respect of, the provisional findings appears to be unduly truncated; and

6.4. **Confidentiality and access to information:** While maintaining the confidentiality of information presented to the inquiry team is obviously important, it is also necessary for relevant parties to have sufficient access to information in order to be able to respond properly thereto. It is believed that there are certain practical procedures that could be adopted in order to strike an appropriate balance between these considerations, and thereby increase the fairness, transparency and efficiency of the process.

6.5. The following table provides an overview of the revised "*list of events*" proposed in this letter:

Event
Statement of Issues and Guidelines for participation issued for public comment
Receive comments on the Statement of Issues and Guidelines for Participation
Consider comments on the State of Issues and Guidelines for Participation
Publish Final Statement of Issues and Guidelines for Participation
Call for submissions on subject matter of the inquiry by parties supporting theories of harm.*
Parties opposing theories of harm respond to submissions.*
Receive submissions on subject matter of the inquiry
~~Last day to register for oral submission~~*
Analysis of information
Publish working papers*
Register for oral hearings
Public hearings
Analysis and publish working papers ~~targeted public hearings and information requests~~*
Targeted public hearings and information requests
Publish provisional findings and recommendations
Opportunity to comment on provisional findings and recommendations*
Publish revised findings*

* The asterisks above reflect new insertions into the table.

7. In relation to the **draft statement of issues**, it is believed that the theories of harm set out therein are not sufficiently clearly articulated to enable parties to understand them fully and to respond meaningfully thereto. In order to address this concern, it is submitted that the theories of harm should be formulated with greater clarity and particularity, including identification of the material facts upon which they are based.

Principles highlighted in relation to the terms of reference and the draft guidelines

8. Netcare believes that certain key principles should inform the manner in which the statement of issues should be formulated and the inquiry conducted. These include the following:

8.1. The inquiry should be conducted fairly and openly in accordance with the Constitution and administrative law principles. The recognition of the need for the inquiry to be conducted in an open and fair manner also conforms with the approach of the UK Commission[1], which recognises that "*market inquiries can result in significant interventions in markets and that its investigations must not only be thorough and disciplined but fair. The requirement for fairness includes giving the parties opportunities to understand the CC's analysis affecting them, the CC accordingly aims to be open and transparent in its work*". An ancillary benefit of an open, fair and transparent process is that it is likely to be more efficient.

8.2. The principles of natural justice, and in particular the principle of *audi alteram partem*, should infuse the entire inquiry process in order to ensure that it is fair and efficient.

8.2.1. One of the requirements for the exercise of the right to *audi* is access to relevant information in order to enable a party to respond properly thereto.[2] As recognised by the UK Commission and the UK Competition Appeal Tribunal, access to information (including that pertaining to any methodologies used and analyses performed) is particularly important in competition law matters as these investigations involve engaging

[1] See: "*Guidelines for market investigations: Their role, procedures, assessment and remedies April 2013 CC3 (Revised)* ("**the UK Guidelines**").

[2] *Heatherdale Farms v Deputy Minister of Agriculture 1980 (3) SA 476 (T)* at 486F–G.

with complex facts and also require detailed economic analysis. In the context of complex sectors such as the private healthcare sector, such analyses can only be conducted with access to all relevant facts. It is only with access to the information that is submitted to the inquiry team that parties who are the subjects of the inquiry are able to make meaningful submissions in relation thereto.

8.2.2. By way of example, the UK Commission initially refused to provide BMI and other hospital groups' legal representatives and economists with adequate access to the "*data room*" which had been created by the UK Commission during the course of the market inquiry. This prompted BMI, HCA and Spire (a number of private hospital participants) to make an application to the Competition Appeal Tribunal which found in their favour and ordered the UK Commission to provide adequate access. While recognising the importance of protecting confidentiality, the Competition Appeal Tribunal also remarked that "*Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when detail is revealed*". It was also noted that this will often require the disclosure of a high level of specificity with respect to the UK Commission's reasoning.

8.2.3. Upon being granted access to the pertinent information, it quickly became apparent to BMI's external representatives that the UK Commission had made a number of significant errors in its economic analysis and also that certain highly relevant submissions (made by BMI and others) had been overlooked. These errors had significant implications for the provisional findings and provisional remedies that had been proposed by the UK Commission, and resulted in their being amended.

8.3. The UK Commission recognised that it is necessary to disclose information to parties during the course of the market inquiry process "*so that interested persons (main parties or other interested persons) are able to comment on matters affecting them and so that they can draw to the [Commission's] attention any inaccuracies, incomplete or misleading information*". Netcare believes that this is a salutary approach and one that properly complies with the principles of procedural fairness, particularly given the complexity of the private healthcare sector in South

Africa. This principle informs a number of the more detailed suggestions that we make below in relation to the draft guidelines.

MORE DETAILED SUBMISSIONS ON THE DRAFT GUIDELINES

9. In the context of the key guiding principles set out above, Netcare believes that there are a number of potential shortcomings in the current proposed administrative timetable, which are likely ultimately to hamper the inquiry team's work. We outline below a number of practical proposals that are designed to address these shortcomings and to assist the inquiry team in conducting a process that is efficient and thorough, as well as fair and transparent.

A) Staggered Submissions

10. A mechanism allowing for staggered submissions would be more conducive to an efficient process. This will enable the various parties to engage with the submissions that have been made by other parties and thereby ensure that the inquiry team is able to assess the competing versions in a more meaningful fashion. We set out below certain practical proposals in this regard:

10.1. Once the final statement of issues has been published, parties who wish to make submissions in support of particular theories of harm should be invited to do so.

10.2. These submissions should then be made publicly available (subject to any confidentiality safeguards) so as to permit parties who disagree with such submissions to respond directly thereto.

10.3. While this staggered process may initially take slightly longer, it will mean that the inquiry team will be presented with submissions that engage with each other (and are, therefore, more focused and "*to the point*"). By contrast, under the current proposed guidelines, no specific opportunity is provided for parties to respond to statements or arguments made by parties with adverse views and for the inquiry team to revise its views to take account of these submissions. The current proposed approach also relies on those parties who are submitting information to the inquiry team to indicate whether other parties are specifically adversely affected by the content of their submissions to enable the Panel to give notice to the affected parties. There is a significant risk

that parties submitting information will not correctly identify information which may be adverse to another party, which may violate that other party's right to procedural fairness. This risk will be avoided by the proposed staggered approach.

11. It is submitted, in summary, that the adoption of a more structured process of the kind we propose, will assist in crystallising issues which require additional analysis and will also enable the inquiry team to obtain a clearer view of the opposing views of various parties in respect of the various potential theories of harm.

12. In the context of a market inquiry, this proposed approach will better allow for meaningful submissions to be made by all the participants, thus giving best effect to the principle of procedural fairness. It is also believed that this proposed approach will be more consonant with the requirements of natural justice, and the *audi* principle in particular.

B) Publication of Working Papers or Issues Papers

13. Paragraph 30 of the draft guidelines states that "*The Commission will thus take all reasonable steps to ensure that all interested parties understand the Commission's thinking on the subject matter of the inquiry as it develops. To give effect to the Commission's commitment to transparency, the Commission will also release "issues statements" or interim reports throughout the market inquiry for public consideration and comment*". (our emphasis)

14. It is believed that this is a fundamentally important and necessary process, and that publication of these statements should be expressly provided for in the proposed timetable set out on page 6 of the draft guidelines.

15. Netcare further proposes in this regard that, once the inquiry team has received the initial written submissions from various parties, working/issues papers should then be prepared in relation to the various theories of harm which are being considered. These working/issues papers should reflect the evolving thinking of the inquiry team in relation to the various issues, as well as the methodologies that have been adopted in relation to the issues in question. The working/issues papers should set out any legal analysis, economic analysis and financial modelling that has been performed in relation to the data, and information that has been collated by the inquiry.

16. A positive aspect of the UK market inquiry was the use of "*working papers*" or "*issues papers*", which were produced by the UK Commission during the course of the market inquiry. The UK Guidelines note that "*An additional means of conveying the Inquiry Group's developing approach and analysis is to disclose some of the working papers, or parts of working papers…often through publication*". These working papers focused on specific areas which were being examined by the UK market inquiry and set out the evolving thinking of the inquiry panel in relation to the various issues. This meant that participants in the process were able to engage meaningfully with the panel during the course of the inquiry in a manner which was focused and efficient.

17. The publication of working papers also increases the transparency and fairness of the process. It permits parties to make submissions (whether oral or written) to the inquiry team that respond directly to the potential areas of concern identified in their working papers, and thus to assist the inquiry team in its developing thinking on those matters. It also permits parties to deal with issues of methodology as the process unfolds. As the inquiry team will appreciate, changes in approach are more complicated and inefficient to implement later in a process than earlier on. Regular engagements during the investigative process will help eliminate errors in methodology and allow alternative, methodologies to be more readily considered.

18. The articulation of the inquiry team's approach on an ongoing basis is particularly helpful in the context of market inquiries which, as the UK Competition Appeal Tribunal has noted, are "*redolent with factual and technical issues*". An understanding of the inquiry team's view at various stages will allow for engagement in relation to the facts, methodology and reasoning of the inquiry team at the time. This interactive process will ultimately produce better decisions as the assumptions which underpin the decision can be tested factually, legally and economically before final views are adopted.

19. Moreover, the adoption of this approach is also likely to be more efficient and disciplined as it will mean that, by the time that the provisional findings and recommendations are produced, the number of issues will have been refined and parties will already have had an opportunity to make targeted and appropriate submissions. Put differently, it allows for a winnowing or clarification process during the course of the inquiry.

20. Following the publication of the working / issues papers, provision should be made for further engagements between the inquiry team and various parties in respect of the various working papers. These engagements could occur in an informal fashion and it may be the case that engagements can be arranged between experts representing the interested parties and the inquiry team and/or other members of the market inquiry. This may enable more meaningful engagements between the parties in relation to more *technical* issues relating to methodologies, etc. This may also provide an appropriate opportunity for engagement between the economic advisers of the participating parties and the inquiry team.

21. This approach accords with the UK Guidelines which provide that "*on occasions, specific pieces of technical analysis merit discussion between a party and the CC on the methodology used and, possibly, the results found. The CC arranges meetings with one or more parties for this purpose. These are generally attended by CC staff (together, on occasion, with members of the Inquiry Group), the party and its technical advisers*".

C) Oral Hearings

22. We propose that, in addition to the regular publication of working papers at each stage of the inquiry process, an annotated issues paper should be produced prior by the inquiry team to any oral hearings. This is again drawn from BMI's experience in the United Kingdom where the UK Guidelines note that "*Ahead of the main party hearings (see paragraph 77), it will disclose (normally by publishing) an annotated issues statement. This gives an overview of the Inquiry Group's current thinking with reference to the theories of harm and its analysis to date. (In this way, the theories of harm the CC may then be considering (paragraph 168) will be communicated to the parties.*" (our emphasis) These annotated issues papers will reflect the winnowing of issues by the inquiry team, and thereby assist both the inquiry team and interested parties to identify what issues should most usefully be traversed in further oral representations to the inquiry team.

23. Once again, this proposal also accords with the principles of fairness and efficiency. Firstly, it will ensure that the oral submissions are focused and clarify relevant issues. Secondly, it will mean that parties will have notice of issues which are adverse to their views and, thus, be afforded an opportunity to make relevant and targeted submissions.

24. Currently the proposed administrative timetable suggests that parties who wish to make oral submissions must register to make these submissions on 1 October 2014, which is the also the final date on which written submissions can be made. It is submitted that it would be more sensible for oral representations to be made only after an annotated issues paper, of the kind described in paragraph 22 above, has been published, as this will ensure that parties are apprised of the actual issues which are being considered. Again, this will avoid the presentation of irrelevant oral submissions, which could unduly absorb the resources of the market inquiry and result in inefficiency. It will also ensure fairness as it will mean that parties are able, through oral evidence and submissions, to respond to views which are adverse to their submissions and interests.

25. The major difficulty with the current proposed timeline is that parties will be required to elect whether or not to request an opportunity to make oral submissions before they know whether there is any need to do so, or what issues it will be necessary to address. For example, parties may not initially see any need to request an oral hearing at the time of the current proposed deadline, but may subsequently become aware when the position papers or working papers have been published, that there are positions which have been adopted by other third parties in their written submissions, which are adverse to their interests.

D) Provisional Findings and Recommendations

26. While the current draft of the administrative timetable appears to contemplate that parties will be provided with an opportunity to comment on the provisional findings and recommendations, the current timetable (reflected at page 6 of the draft guidelines) does not expressly provide for the receipt of comments on the provisional findings. Clearly, sufficient time should be provided for parties to make submissions on the provisional findings and for the inquiry team to reflect on the submissions which are made.[3] As the Competition Appeal Tribunal stated in the BMI matter, "*drafting a response to the Provisional Findings which incorporates an effective response to the matters arising from the Confidential Information is necessarily an iterative process…*".

[3] *Earthlife Africa (Cape Town) v Director- General, Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) at para 64.

27. We note in this regard that the UK Commission provides a period of "*no less than 21 days*" for responses to a provisional findings report. The UK Commission also then usually provides an opportunity for "*response hearings*" with "*main parties and potentially with key third parties. At a response hearing the parties will be given the opportunity to comment orally on the provisional findings and the CC may seek clarification of particular points made in written submissions or at the hearing*". This was also the approach which was followed in the UK market inquiry.

28. Having recently been through this process in the United Kingdom, Netcare believes that this approach has significant advantages as there were significant changes in the recommendations of the UK Commission as a result of further engagements, which took place after the publication of the provisional findings.

29. The reasonable opportunity to make representations is a key feature of procedural fairness, and it is thus vital that adequate time be provided for submissions to be made.[4]

Access to confidential submissions and protection of confidential information

30. In broad terms, we support the view that claims of confidentiality need to be carefully scrutinised having regard to the confidentiality provisions of the Competition Act. This will obviously increase the transparency of the process and enable more information to be disclosed to all parties.

31. It is clearly necessary, in accordance with the requirements of *audi alteram partem*, that parties, or at least their external legal and economic representatives, should have access to, and a reasonable opportunity to respond to, adverse information which is submitted to the enquiry panel under a claim of confidentiality. It is important that this information should be disclosed to any party which is the subject of the inquiry and against whom any findings could potentially be made.

32. This is consistent with the position that is adopted in the Competition Tribunal (as the Commission is aware, in the *Unilever* matter, the Competition Appeal Court has recognised that legal representatives (subject to the provision of appropriate confidentiality undertakings) should have access to

[4] Colman J in *Heatherdale Farms v Deputy Minister of Agriculture 1980 (3) SA 476 (T)* at 486F–G; *Du Preez v The TRC* 1997 (3) SA 204 (A) at 234.

confidential information in order for them to represent the parties in merger proceedings). Similarly, the UK Competition Appeal Tribunal has noted that the use of "*confidentiality rings*" is common in competition procedures in the United Kingdom ("*in competition law, confidentiality rings are common and data rooms, whilst rarer, are certainly not unknown*"). The Competition Appeal Tribunal further cautioned that decisions of the Supreme Court "*highlight the fact that closed material procedures – and we use that term widely to embrace both confidentiality rigs and data rooms – have to be justified by the circumstances and should be used as narrowly as possible in those circumstances*", because they are a limitation on the rights to natural justice as "*confidentiality rings tend to be limited to external advisers (generally, lawyers and, in some cases, economists and accountants) and to exclude the affected party (including the affected party's in-house lawyers)*".

33. In order to avoid unnecessary applications to the Competition Tribunal for access to confidential information, it is suggested that parties who are invited to make submissions to the market inquiry should be informed that information which is submitted subject to a claim of confidentiality may be disclosed to the legal advisers and external economists of any party which is a subject of the inquiry and against whom an adverse finding could be made; subject to the provision of appropriate confidentiality undertakings (unless it is specifically stated that the information in question may not be disclosed in this manner).

DETAILED SUBMISSIONS IN RELATION TO THE STATEMENT OF ISSUES

34. Given the fact that the panel has elected to publish a draft statement of issues, there are a number of observations and comments, as well as certain questions which arise from the draft as more fully set out below.

35. In paragraph 16 of the draft statement of issues, it is stated that "*This will provide a factual basis upon which the panel can make evidence based recommendations that serve to promote competition in the interest of a more affordable, accessible, innovative and good quality private healthcare*." (our emphasis) There seems to be an a priori assumption inherent in this sentence that the current system of private healthcare in South Africa does not offer "good quality" and that current levels of competition are not sufficient to ensure an affordable, accessible or innovative system of private

healthcare. While it is appreciated that the commission of inquiry must have a point of departure, this particular formulation in paragraph 16 does not appear to be supported by any facts.

36. As far as the theories of harm that have been proposed by the inquiry team are concerned, paragraph 52 of the draft statement of issues states that these theories of harm will serve as the "*starting point in the analysis*" and are a "*tool for the panel to remain focussed*" in pursuing the inquiry. Paragraph 9 goes on to state that the theories of harm are a "*hypothesis about how harm to competition might arise in a market to the detriment of consumers and to the detriment of efficient and innovative outcomes in that market*".

37. While it is appreciated that these theories of harm are said in paragraph 54 to be stated in "*broad terms*", it is submitted that the current formulation of the various theories of harm is too vague, and does not identify the necessary underlying factual basis for such theories to allow for meaningful submissions to be made in response thereto. We set out below our preliminary views on the theories of harm, which seem to relate most pertinently to our client Netcare.

Theory of harm 2

38. Theory of harm 2, which relates to market power and distortions in relation to healthcare facilities (as set out in paragraphs 59 to 60 of the draft statement of issues) appears to be based on the premise that healthcare facilities have market power in certain geographic markets or in respect of certain types of specialisation. In paragraph 60, some very broad indications are given that, insofar as market power is concerned, this may arise as a result of "dominance" or "co-ordination". However, no further detail or facts are provided as to what the inquiry team has in mind in relation to either dominance or co-ordination.

39. This theory of harm does not articulate the factual basis for concluding, even on a preliminary basis, that a particular firm or firms are dominant, nor does it provide any factual basis for suggesting that co-ordination has taken place. In other words, the inquiry team does not specify what issues or facts relating to dominance it wishes to explore, nor does it provide any indication as to what aspects of so-called "*co-ordination*" it is referring to or relying on. It is extremely difficult for parties to make any meaningful or detailed submissions in this regard, in the absence of specific facts or additional detail

in relation to what exactly the inquiry team has in mind in respect of these widely-framed references to "*dominance*" and "*co-ordination*".

40. Insofar as distortions of competition and potential "*market power relations*" are concerned, the draft statement of issues document indicates that these concepts could include:

40.1. Negotiations with medical schemes and administrators;

40.2. Market power of healthcare facilities over patients;

40.3. Market power arising from healthcare facilities offering specialised treatments;

40.4. The relationships between healthcare practitioners and healthcare facilities; and

40.5. The relationships between healthcare facilities and the suppliers of consumables.

41. While paragraph 60 provides some high level indications of the nature of the issues that the inquiry team wishes to explore, it does not provide sufficient detail of the factual foundations upon which these issues are based. Without such a basis, it is impossible for parties to engage meaningfully in relation to these topics. Put differently, there is no clarity regarding the issues that need to be addressed in written or oral submissions. Nor is there sufficient identification of the facts that underpin these concerns to enable the parties to respond meaningfully thereto.

42. For example, questions relating to the relationships between healthcare facilities and suppliers of consumables and, similarly, to the relationships between practitioners and healthcare facilities, are so broadly framed as not to permit of any clear understanding of what issues the inquiry team has in mind. There are so many conceivable aspects of the relationships between facilities and suppliers, and between facilities and practitioners, that could hypothetically be of interest to the inquiry team, that it is very difficult for parties, absent greater specificity, to appreciate which specific issues it should focus on and what specific facts and information the inquiry team would like to receive in this regard. Equally, issues relating to negotiations with medical schemes, and interactions between healthcare facilities and patients, are formulated too vaguely and imprecisely to permit parties to respond meaningfully thereto. It is, therefore, submitted that the inquiry team should refine these issues in

order to provide greater specificity and clarity as to which specific issues should be addressed. The inquiry team should also indicate which facts and information it has relied on for purposes of framing these issues, as this will enable parties to have a greater level of understanding of how it should respond to these concerns.

43. In summary, it is submitted that theory of harm 2, as currently formulated, is too generally and vaguely formulated to enable parties to respond meaningfully and comprehensively to this theory.

Theory of harm 4

44. Theory of harm 4, as set out in paragraphs 62 and 63 of the draft statement of issues relates to "*barriers to entry and expansion at the various levels of the healthcare value chain*". According to paragraph 62 of the draft statement of issues, there are both "*structural barriers*" and "*behavioural barriers*" to entry and expansion in the healthcare value chain that could potentially harm competition. However, the theory does not clearly articulate what the alleged structural and behavioural barriers are, and what particular facts inform these potential concerns. Although paragraph 63 references factors such as investment and sunk costs, licensing and contractual arrangements between healthcare facilities and practitioners, it does not clearly explain whether these should be regarded as structural or behavioural barriers, nor does it provide sufficient particularity or identify the facts upon which this theory of harm is based.

45. In the circumstances, this theory of harm is also too widely and vaguely framed to permit parties to provide a meaningful response thereto. It is submitted that a clearer articulation of this theory of harm should be provided, including a clearer elucidation of what is meant by "*structural*" and "*behavioural*" barriers, as well as what specific evidence and facts are relied on for this specific theory of harm. For example, when reference is made to contractual or informal arrangements between healthcare facilities and practitioners, no information or guidance is provided as to what specifically the inquiry team has in mind in this regard. Similarly, when it comes to licensing and other regulatory requirements as referenced in paragraph 63, no clarity is provided as to what specific aspects of the licensing and regulatory framework are in issue.

Theory of harm 5

46. Theory of harm 5 as reflected in paragraphs 66 to 68 of the draft statement of issues, relates to imperfect information and evidently considers the extent to which "*imperfect information distorts outcomes in the healthcare markets and harms competition*". Some additional information as to what constitutes imperfect information is provided in paragraph 67 and includes:

46.1. the patient's ability to choose the best provider for their condition;

46.2. the member's choice of medical schemes;

46.3. healthcare funders' ability to compare cost and quality when contracting providers; and

46.4. the patient's lack of information available to healthcare facilities and funders on the use value of treatment and technologies which may lead to inappropriate use.

47. Paragraph 68 suggests that another form of imperfect information arises from the third party payer mechanism which may distort the incentives of the consumer or provider, giving rise to adverse selection and moral hazard.

48. Netcare's comments in relation to theory of harm 5 are very similar to those in respect of theories of harm 2 and 4. As was the case with theories of harm 2 and 4, theory of harm 5 is formulated in such vague and general terms that it is very difficult to determine with any degree of precision what specific issues and aspects should be focused on, and which particular facts inform the inquiry team's preliminary thinking in this regard. For example, paragraph 67 which references concepts such as "*the member's choice of medical schemes*" and "*the patient's ability to choose the best provider to deal with their condition*", does not provide any meaningful insight into what issues the inquiry team wishes to have regard to in respect of these issues. Similarly, it is difficult to discern from statements such as, "*patients lack of information available to healthcare facilities and funders on the use value of treatment and technologies…"* what specific response is called for by parties. The only guidance that is provided in this regard is that this lack of information may lead to what has been described as "*inappropriate use*". However, no explanation is provided as to what is meant or understood by inappropriate use and what particular information is the subject of this particular concern.

49. Equally, as far as paragraph 68 is concerned, the references to "*adverse selection*" and "*moral hazard*" are contained in a footnote, but it is not clear how these issues relate to "*imperfect information*", nor are any facts set out which relate thereto. Accordingly, it is again difficult to determine what the specific theory of harm is in this regard and we submit that this should be clarified with a greater level of precision.

Theory of harm 6

50. Theory of harm 6, as reflected in paragraphs 69 to 70 of the draft statement of issues, relates to the regulatory framework and the inquiry team indicates that it wishes to understand the "*current regulatory framework and how it affects competitive outcomes*". In paragraph 70 of the draft statement of issues, the inquiry team has indicated that it also wishes to understand "*the role that competition law and policy plays in this sector*" and also intends conducting a review of "*previous interventions by competition authorities into the healthcare sector in order to understand their effects on the market*".

51. However, the term "*the current regulatory framework*" is extremely wide and all-embracing and it is difficult to identify which specific aspects of the regulatory framework the inquiry team wishes to focus on. Further clarity should, therefore, be provided in this regard.

52. Insofar as the role of competition law and policy in the private healthcare sector is concerned, it is not understood what the inquiry team has in mind when it refers to previous interventions by the competition authorities. For example, does this include prohibited practice or merger investigations or both? Furthermore, what specific aspects of these interventions does the inquiry team believe are relevant to the current inquiry, and what particular aspects of these interventions should Netcare be considering for purposes of any submissions to the inquiry team (whether in writing or orally)?

53. In short, insofar as theory of harm 6 is concerned, it is submitted that the inquiry team should elucidate with greater particularity which aspects of the regulatory framework, and what features of the role of competition law and policy, should be focused upon.

Conclusion on the draft statement of issues document

54. In conclusion on the topic of the theories of harm which have been set out in the draft statement of issues, we submit that, as currently articulated, the theories of harm are too general and vague to permit of a focused and well documented response. As set out in more detail in other parts of this letter, one of the key principles in ensuring the fairness of the process, is that parties that are the subject of the inquiry, should clearly understand the precise theories of harm in relation to which the inquiry team intends structuring its inquiry. In particular, it is proposed that the inquiry team should set out the relevant facts or information upon which the theories of harm have been predicated, in order to enable parties to understand the factual basis for the various theories of harm which have been set out in the draft statement of issues. As they are currently formulated, parties are unsighted as to the factual basis upon which the theories of harm have been drafted. Even at the level of theory or hypothesis, it is difficult to determine the exact nature of the various theories that have been set out in the draft statement of issues.

55. Netcare hopes that the above submissions are useful to the inquiry team in structuring its inquiry and in refining the various theories of harm that have been proposed. In the event that the inquiry team wishes to engage further on any of these issues, we would be pleased to provide any further assistance that may be necessary.

Kind regards

Anthony Norton / Anton Roets
Nortons Inc