

**DELIVERED BY FACSIMILE**

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Dear Sirs

THE MARKET INQUIRY INTO THE PRIVATE HEALTHCARE SECTOR: COMMENTARY ON THE DRAFT GUIDELINES FOR PARTICIPATION IN THE MARKET INQUIRY INTO THE PRIVATE HEALTHCARE SECTOR AND THE DRAFT STATEMENT OF ISSUES

- 1 We refer to the above matter and the Draft Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector ("the Guidelines") and the Draft Statement of Issues in respect of the Market Inquiry into the Private Healthcare Sector ("the Statement of Issues").
- 2 As you are aware, we act for the South African Dental Association ("our client").
- 3 We have been instructed by our client to submit comments on the Guidelines and Statement of Issues, respectively, which comments are set out below for ease of reference.
- 4 **The Guidelines**
 - 4.1 Paragraph 12 of the Guidelines set out various methods that will be used for gathering information. These methods are set out in sub-paragraphs (a) to (h). Presumably, the various methods identified in paragraph 12 will be used at different points and times during the inquiry. Therefore, a person who is interrogated by the Inquiry Panel ("the Panel") may be required to adhere to more than one method of supplying information to the Panel and at different times during the inquiry process. Therefore, Part VI of the Guidelines, dealing with methods of participation, must be more flexible.
 - 4.2 The methods of participation are unduly rigorous in so far as they contemplate persons in the healthcare sector being able to anticipate that they will make a written submission to the Panel or an oral submission to the Panel due to other parties making submissions or

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even at the instance of the Panel. The imposition of deadlines by which submissions must be made and notices provided of an intention to participate are thus unduly rigorous and may ultimately operate to exclude persons from the operation of the inquiry improperly and unreasonably.

- 4.3 In so far as the inquiry is not completed by November 2015, measures will have to be made clear as to the process that will then be followed by the Competition Commission ("the Commission"). The timetable on page 6 of the Guidelines allows for no delays albeit that delays may inevitably occur in a task of this size both due to the complexity of the issues that are to be examined and the number of people that are participating in the inquiry.
- 4.4 No reason is provided as to why a person wishing to participate in the inquiry is to make both a written submission and an oral presentation. Participating in the inquiry should be either by making a written submission or an oral presentation. There is no need for a participant to be required to make both a written submission and an oral presentation or qualify to make an oral representation by making a written submission. In this regard, the provisions of paragraph 21.6 contradict the provisions of paragraph 19 in so far as certain people will not be afforded an opportunity to make an oral presentation notwithstanding having submitted a written submission.
- 4.5 The phrase "a form substantially similar", used in paragraph 20.1, must be clarified.
- 4.6 Clarity is required in respect of the phrase "obscure jargon", used in paragraph 20.6, and "technical terms", used in the same paragraph. Participants should not be required to anticipate what the Commission or the Panel believes to be obscure or technical, respectively.
- 4.7 Paragraph 20.8 uses the phrase "specifically adversely affects another or other parties". Kindly confirm the meaning of the phrase "specifically adversely" in order for participants to understand when rights arise for them to require the Commission or the Panel to allow such participants to respond to such a submission. In so far as a participant is disqualified from making an oral presentation, based on the statements made in paragraph 21.6, because time is restricted, kindly clarify the rights of that participant in respect of participating in the inquiry.
- 4.8 In so far as the Guidelines currently require participants wishing to make oral representations at the public hearings to complete a form, kindly confirm why the Panel will not be in a position to identify precisely the participants that will be making oral presentations and allocate appropriate time accordingly.
- 4.9 In so far as "[e]ach party making an oral presentation will only be permitted to do so once", clarity is required as to how such a restriction is to be read with the provisions of paragraph 20.8 where a party already having made an oral presentation is specifically adversely affected by a submission by another party in an oral presentation.
- 4.10 Furthermore, it is unclear from the Guidelines whether or not a participant's oral presentation will be restricted to the contents of the written submission by that participant. The Panel is kindly requested to clarify this issue.
- 4.11 Kindly clarify if a party will be restricted to only one person being allowed to make oral submissions – as the wording of paragraph 22.5 is unclear. Obviously it may not be possible for only one person to make oral submissions for a party due to the diverse nature of the expertise required in order to address the various issues being examined in this inquiry.

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4.12 Paragraph 23.4 should be amended to read as follows:

"Confidential information presented during the hearing will not be published."

4.13 Please clarify what experience and qualifications the "*Evidence Leader or other person designated for the purpose to assist the Panel...*", referred to in paragraph 23.7, will have, as, in terms of paragraph 23.9 of the Guidelines, it is contemplated that such person/s may be involved in questioning witnesses at a hearing.

4.14 The precise extent of the "advance notice", referred to in paragraph 23.8, should be clarified.

4.15 The "sufficient and reasonable notice", referred to in paragraph 23.9, must be clarified in order to ensure that the process is clear.

4.16 It appears from paragraph 24.1 of the Guidelines that provision is made for the Panel to elect to conduct pre-hearing consultations with certain participants. In terms of paragraph 24.1(e), provision is made for the Panel to give directions in respect of technical or formal amendments to correct errors in any documents filed by participants. However, the manner in which amendments should be sought is of interest and importance to all participants in the Inquiry. Therefore, the Guidelines should provide clearly for the manner in which participants may amend any document which they have filed with the Panel without the pre-requisite of participants waiting for the Panel first to convene and conduct a pre-hearing consultation.

4.17 In so far as the recommendations, which are referred to in paragraph 32 are concerned, kindly confirm whether or not draft recommendations will be made available for comment prior to final recommendations being published by the Panel.

5 Statement of Issues

5.1 The invitation in paragraph 8 is noted. However, at this time, our client reserves the right to deal with the application and interpretation of the concepts referred to in paragraph 8 (and used throughout the Statement of Issues) at any applicable and appropriate time during the course of the inquiry.

5.2 The phrase "better competitive outcomes", used in paragraph 8, must be clarified in so far as –

5.2.1 it presupposes that "competitive outcomes" are acceptable but simply need to be improved. If this is so, then the Statement of Issues should identify the competitive outcomes already in existence in order for parties to understand the starting point of the inquiry and assess, properly, the betterment of the outcomes, which must inextricably be linked to both the "features" and "harm to competition", referred to in paragraph 8 and the balance of the Statement of Issues;

5.2.2 the person/s who are to benefit from the "better competitive outcomes" must be identified.

5.3 In so far as the phrase "efficient and innovative outcomes", used in paragraph 9, is concerned, clarity is required on the meaning of that phrase within the context of how healthcare is made available. Clarity is further required on whether or not the Panel is measuring the efficient and innovative outcomes with reference to improved healthcare, improved access to healthcare or reduced costs of healthcare. This consideration is

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important especially in so far as the recognition in paragraph 13 is concerned and bearing in mind that the constitutional commitment to which reference is made, is a commitment adopted by Government to provide access to healthcare services and not the private sector to do so.

- 5.4 With reference to paragraphs 14 to 16 --
- 5.4.1 the emphasis appears to be on the costs of private healthcare services but no attention is given to the question of whether or not fewer people are accessing the private healthcare market as a result of the supposed increase in costs. Presumably, the number of participants in the private healthcare market is a central feature to any assumption that costs are operating to prohibit access to healthcare;
- 5.4.2 clarity is required in respect of the precise scope and ambit of the "minority" referred to in paragraph 14 and whether or not the ratio between those participating in the private healthcare market versus those participating in the public healthcare market is dissimilar in other similar healthcare markets to that prevailing in South Africa.
- 5.5 Kindly clarify the source of the explanations referred to in paragraph 17.
- 5.6 The contents of paragraph 18 contradict the contents of paragraph 8. In so far as an inquiry is to be held into the private healthcare sector on the basis of paragraphs 1 to 16 of the Statement of Issues, then the qualification contained in paragraph 18 is inconsistent with the beliefs held by the Commission and the need for the inquiry. The factors that have been identified in the Statement of Issues are indeed complex and their scope is broad and that is the nature of the sector and the services that are provided. There is no basis to qualify the inquiry as set out in paragraph 18. To do so may jeopardise the quality of the outcome of the inquiry in so far as a particular factor is not taken into account on the basis that it was simply impractical or not feasible to do so. Accordingly, paragraph 18 should be deleted.
- 5.7 The use of the word "concerns" should be clarified in paragraph 40, more particularly, as it relates to the terms identified in paragraph 8. Paragraph 40 is not clear as to the person holding the concerns or what the concerns are that require attention to be focused on the subject matter contained in paragraph 40.
- 5.8 The Commission should clarify how it will evaluate and measure whether the profits charged by practitioners for services "*are consistent with a ... sustainable sector*", as referred to in paragraph 42.
- 5.9 There appears to be confusion in paragraph 43: the term "consumables", within the healthcare sector, refers to items that are not medicines or pharmaceutical products but medical devices. The term "consumables" is thus used to identify medical devices. Therefore, paragraph 43 confuses its focus in respect of whether or not it will be examining the costs of pharmaceuticals, i.e. medicines and complementary medicines with reference to the single exit pricing legislation currently in effect, or medical devices as a separate category of items in use in the healthcare sector.
- 5.10 The restraint imposed in paragraphs 44 to 46 concerning the public healthcare sector is unrealistic. The primary functioning of the private healthcare sector in South Africa is informed directly by the outcomes, from a healthcare point of view, that occur in the public healthcare sector. The examination of the effect of so called "areas of excellence in the public healthcare sector" as a single factor in examining outcomes in the private healthcare sector is artificial and discriminatory in so far as one focuses only on areas of

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excellence as supposed to areas in need of attention such as the lack of appropriate positive healthcare outcomes in the public sector, generally, of the public healthcare sector in South Africa. These issues obviously inform directly choices made by consumers concerning their participation in the private healthcare sector. We remain of the view that the steadfast refusal by the Commission to engage in matters concerning the state of the public healthcare sector in South Africa, in the context of this inquiry, is problematic to the point of the inquiry producing any meaningful results.

- 5.11 The invitation contained in paragraph 51 is noted but without understanding what the "alternative techniques" will be and what the "different degrees of theoretical soundness" of those "techniques" are, it is not possible for our client to comment on the appropriateness or reasonableness of the techniques concerned. In this regard, our client reserves the right to the comment on the techniques at an appropriate time during the course of the inquiry.
- 5.12 In light of what is set out above, we submit that a seventh "theory of harm" should be included in the inquiry concerning the direct or indirect effects on the private healthcare sector of the public healthcare sector with reference to health outcomes in the public healthcare sector, training in the public healthcare sector, human resources policies applicable to and in the public healthcare sector and the services provided in the public healthcare sector on the basis that the theory hypothesises that health outcomes in the public healthcare sector are of such a nature that consumers are compelled to purchase private healthcare products, which may place a greater amount of power on providers in the private healthcare sector.
- 5.13 Kindly clarify how the "public interest issues", referred to in paragraph 55 of the Statement of Issues, are relevant to or relate to the concepts referred to in paragraph 8 of the Statement of Issues or to assessing competition in private healthcare.
- 5.14 Kindly clarify the meaning of the word "coordination", which is used in paragraph 57 of the Statement of Issues. It is unclear whether or not the use of that word is intended to refer to collusion between dominant firms, a "concerted practice", as defined in the Competition Act, 1998, or some other conduct.
- 6 Should you require us to clarify any of the aspects referred to above, kindly contact us immediately.
- 7 We look forward to receiving your reply.
- 8 Our client's rights remain reserved.

You faithfully

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