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The Inquiry Director
Market Inquiry into Private Healthcare

The Competition Commission
Block C (Mulayo), the dti Campus
77 Meintjies Street
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Dear Tamara

Comments on the Statement of Issues and Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector

Life Healthcare welcomes the opportunity provided by the Panel to comment on the draft Statement of Issues and Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector. We agree with the inclusive and objective approach taken by the Panel in drafting these documents and consider the content to be a clear reflection of the realities facing the industry.

We do, however, wish to raise the comments below for the Panel's consideration.

1. THE STATEMENT OF ISSUES

We agree with the framework proposed in the Statement of Issues. We believe that the suggested theories of harm are well placed to engage on those issues identified in the Terms of Reference and that the "harm to competition" approach articulated in the Statement of Issues (paragraph 8) is the appropriate standard of assessment in the context of a market inquiry being conducted under the authority of the Act.

1.1. The Rationale for the Inquiry

1.1.1. As expressed in our comments on the draft Terms of Reference, Life Healthcare fully supports the constitutional right of access to healthcare services and recognises the role of the State in fostering that right. The realisation of this right has a bearing on the present inquiry and a meaningful assessment of the private healthcare market must take into account the extent to which the State has been able to progressively realise this right.

1.1.2. While we accept that the public healthcare sector is not a focus in the inquiry, certain factors in the public health sector do impact upon the private healthcare sector. For this reason, we agree with the Panel that, in considering the role of the public health sector in this inquiry, it is important to understand how the public and private healthcare sectors interact and to interrogate whether there are competitive impacts imposed by the public health sector (paragraph 44).

1.1.3. In principle, we do not view the constitutional dynamic as central to the Panel's objectives as mandated by the Competition Act, 1998 ("**the Act**"). We fully support an evaluation of prices, expenditure and costs in private healthcare but we do not believe that it is appropriate to rely directly on the Constitution when there is legislation which deals

specifically with the market inquiry. The application of the Constitution – to the extent necessary – must be informed first and foremost by the application of the Act. As such, the evaluation of prices, expenditure and costs must be performed in accordance with the Panel's objectives set out under section 43B of the Act. For this reason, it is critical that there be an acceptance of the fact of a private healthcare market that operates in an already highly regulated environment.

1.2. **Techniques for Defining Markets and Analysing Competition – The omission of a profitability assessment framework**

1.2.1. We welcome the acknowledgment by the Panel that the analytical methods and tools used in the inquiry to define markets and analyse competition must be consistent with best practice.

1.2.2. In outlining techniques for defining markets and analysing competition, the Panel has rightly recognised that the definition of the relevant product and geographic markets is an important step in the assessment of the competitive constraints in competition matters. The Panel notes that both "standard" and "alternative" techniques may be used to define relevant markets and analyse competition. We suggest that the Panel articulates in advance what such techniques are likely to be. This would allow participants in the inquiry to properly consider and engage with these techniques at the outset of the inquiry. We would appreciate if this guidance was provided early as it would also allow participants sufficient time to respond meaningfully. This is critical given the impact of the techniques to be used by the Panel on the nature of the assessments to be undertaken and on the outcomes of the inquiry. Our understanding of the UK inquiry is that there were debates regarding appropriate techniques and that the UK authority issued position papers identifying the analytical techniques it sought to apply.

1.2.3. As concerns market definition, we note that, conceptually, there is no difference in the nature of the analysis to be done in assessing competitive constraints as compared to including public healthcare in the market definition for the inquiry. Market definition is, however, a very useful tool and we therefore suggest including public healthcare in the market assessment. This will impose a rigorous framework for considering whether the public healthcare sector in fact poses a competitive constraint.

1.2.4. We note also that a critical component of the inquiry's analysis has not been addressed, namely the methodologies to determine profitability. We propose that Panel present its methodology on the appropriate techniques to measure profitability and invite submissions from stakeholders on these techniques. Following this, we suggest that the Panel outline the methodology it intends to use to assess profitability. In particular, the Panel should set out the benchmarks it is likely to use in order to examine whether profits are above those that would prevail at competitive levels and it should indicate whether it will focus on the profitability of the industry as a whole or whether it will focus on individual participants. Articulating a profitability framework upfront will provide for a structured approach to the Panel's profitability assessment.

1.3. **Pharmaceutical and Consumable Costs**

1.3.1. We agree with the inclusion of the pharmaceutical and consumable industries as the impact of both industries on healthcare costs is significant. Whilst the Statement of Issues clearly seeks to understand the relationship between practitioners and

pharmaceutical and consumable suppliers, we are of the view that the key issue of these costs and their impact on the costs of private healthcare has been omitted.

1.3.2. As stated in our comments on the Terms of Reference, the impact that pharmaceuticals and consumables have on healthcare costs is significant. While the price of pharmaceuticals has been regulated, both the choice of pharmaceuticals and the utilisation thereof continue to influence cost trends, hence exploration of these issues is warranted in the inquiry. In addition, evaluating the impact of SEP as compared to market forces in the context of pharmaceutical pricing will likely provide meaningful insights to consider for the Panel's recommendations.

1.3.3. With respect to consumables (for example surgical supplies), pricing in this market is not regulated. The impact of consumables costs is significant as can be evidenced by the fact that consumables account for ~17% of every Rand billed by Life hospitals. Any process seeking to develop a comprehensive understanding of healthcare cost drivers to inform recommendations would therefore need to include this component as a key line of inquiry.

1.4. **Market power and distortions in relation to healthcare practitioners**

The Panel indicates that it will focus on certain types of medical specialisation when considering the market power and distortions in relation to healthcare facilities but has not provided any indication of what these particular specialisations might be. We suggest that the Panel provide guidance on the specialisations that it intends to focus on.

1.5. **Regulatory Framework**

1.5.1. We note that the Statement of Issues makes reference to regulation in the context of many of the topics to be covered in the inquiry. However, these aspects have not been adequately described or specifically detailed under theory 6.

1.5.2. In seeking to develop an informed understanding of the drivers of healthcare costs in South Africa, as well as other market dynamics such as innovation, it will be important to take into consideration the current regulatory environment and the extent to which regulation is playing a role in affecting these competitive dynamics. By way of example, the HPCSA's interpretation of the regulations with respect to medical professional employment, which essentially prevents hospital groups from employing medical professionals, arguably adds inefficiency, and ultimately costs, to the provision of care. Other regulations that warrant consideration in reviewing the sector through the inquiry include medical scheme legislation, healthcare legislation (the certificate of need requirements under the National Health Act, 2003), building regulations governing hospital buildings and licences (R158 ad R187), the proposed healthcare waste regulations, the proposed Health Facility Guide and even regulations that are applicable more broadly but which have a material impact, such as the Labour Relations Act and the Protection of Personal Information Act.

1.5.3. We agree that the Statement of Issues should take cognisance of the impact of regulation on competitive market dynamics and therefore recommend that theory of harm six be expanded to articulate these specific regulatory impacts.

2. THE GUIDELINES FOR PARTICIPATION IN THE MARKET INQUIRY INTO THE PRIVATE HEALTHCARE SECTOR

We view the guidelines as an essential document that creates the platform for an objective and meaningful engagement with the Panel and other stakeholders in this process.

2.1. Conduct of the Inquiry

2.1.1. Whilst we welcome the various methods proposed by the Panel for the gathering of information, we caution against the use of methods that may pose problems in terms of objectivity. For example, whilst public consultations may provide varied perspectives on private healthcare, they may not necessarily be an effective tool to make recommendations premised on sound forensic analysis. Naturally, we accept the need for pragmatism and avoidance of a judicial style inquiry. We merely state that there must be an appropriate balance struck between serving the role of transparency and basing the findings on sound forensic methods, which are capable of being tested in an objective manner. We propose that the Panel bear these nuances when undertaking its information gathering exercise.

2.1.2. There will, no doubt, be various issues and areas of dispute emanating within the conduct of the inquiry particularly around the use of documentary evidence. While we accept that many of these intra-inquiry disputes will be capable of being resolved by the Panel itself, it is not outside of contemplation that some aspects will not be properly and satisfactorily dealt with. Some of these disputes may have a material bearing on the findings of the inquiry. We would like the Panel to consider whether or not there should be any immediate appellate or review access to the Competition Tribunal on limited aspects where there is a disagreement with the rulings, interlocutory or otherwise made by the Panel. The scope of this access is to be determined by the Panel itself.

2.2. Activities and Estimated Duration

2.2.1. We agree with the phased approach proposed by the Panel, and view it as a sensible way to address all the issues in this inquiry.

2.2.2. However, we consider it necessary for the Panel to first lead evidence which explains the basis for the theories of harm identified, through a position paper prior to the information requests and then through leading its evidence during the public hearing phase of the inquiry. This will allow the Commission to properly articulate its position in relation to the theories of harm and will allow parties an adequate opportunity to interrogate the Commission's case. In the absence of this, the public hearing may be susceptible to a lack of direction and may result in parties not knowing with sufficient particularity the case that needs to be answered.

2.2.3. We also believe that the one year period proposed by the Panel is in general entirely inadequate given the wide scope of the inquiry and the detail and volume of information and analysis that this inquiry will involve. We appreciate the Panel's focus in managing the time frame of the inquiry to create stability in the market, but we are also cognisant that the process must provide for enough time to properly interrogate the issues arising from the inquiry. In light of the comprehensive nature of the public hearings contemplated by the Panel, we also strongly suggest that the 2 month period proposed for the hearings be expanded to a 4-5 month period.

2.2.4. Regarding the estimated duration, we note that the inquiry timetable ceases at the publishing of the provisional findings and recommendations. We propose that the timetable be extended to make provision for the process that will ensue after the provisional findings, i.e. an opportunity for stakeholders to comment on the provisional findings and recommendations and a further period for the Panel to consider these comments, before publishing its final report (in line with paragraph 31).

2.2.5. We also note that the timetable does not provide for interim position papers by the Panel on certain issues nor does it offer any opportunity to comment on these issues prior to the finalisation of recommendations (paragraph 30). Life Healthcare is of the view that these interim papers would be beneficial in ventilating certain issues upfront and allowing more engagement prior to the publishing of recommendations. We therefore, propose the timetable be amended to provide for this process.

2.3. **Participants in the Inquiry**

We note the use of the word firms when referring to participants. Given that many healthcare practitioners are individual stakeholders, we suggest this terminology be clarified to avoid confusion.

2.4. **Methods of Participation**

We appreciate the Panel's structured approach regarding participation in this inquiry. However, we would suggest including provisions clarifying how the Panel/Commission will engage with participants directly. It is important that the Panel uses a single point of contact when dealing with firms/ organisations in particular, for example by identifying a designated key contact person for each organisation. This will allow participants to engage with the Panel in an orderly and consistent manner and allow continuity.

2.5. **Public hearings**

We believe that the following matters concerning the public hearings require clarity:

2.5.1. *Leading of witnesses*

2.5.1.1. Paragraph 23.8 allows the parties to request the Chairperson to permit the parties to call their own witnesses. The clause also says that participants "wishing to call witnesses of their own" should provide advance notice to the Chairperson and/or the Evidence Leader in sufficient time to enable them to prepare. This implies that parties who call their own witnesses will be entitled – through their appointed representatives – to lead the evidence of the witnesses they have called, subject to any rights of cross examination which may be allowed by the Chairperson.

2.5.1.2. On the other hand, paragraph 23.9 provides that "at any hearing, the Chairperson may call upon the Evidence Leader or other person designated for the purpose to question witnesses, directly or through the Chairperson". This provision implies that the right to lead the evidence of a witness called by a part is not automatic and will be subject to the overriding discretion of the Chairperson.

2.5.1.3. It is proposed that there should be an automatic right by any party calling its own witnesses to lead the evidence of its own witnesses. This right should be capable of being revoked by the Chairperson, if there are sufficient grounds for doing so.

2.5.2. *Cross examination*

2.5.2.1. The right of cross examination is also not clearly set out in the draft guidelines. Paragraph 23.9 provides that leave to question a party "where the need to do so could reasonably be appreciated prior to the hearing" must be sought on sufficient and reasonable notice to the Chairperson, stating the reasons for the request. It is not clear if this statement is intended to regulate the limited instance where a party could not decide in advance whether to cross examine a witness, or if it is intended to set the general rule that parties are required to ask for permission from the Chairperson in respect of each witness they intend cross examining.

2.5.2.2. If it is intended that there must be specific requests in respect of each witness to be cross examined, witness statements should then be made available timeously, to enable each party to make an informed assessment of the need to cross examine. In addition there should be a specific notice period – i.e. 5 days before a witness testifies allowed for the giving of notice. Furthermore, the Commission should spell out the considerations which will be taken into account by the Panel in deciding whether or not a party will be allowed to cross examine a witness.

2.5.2.3. The alternative approach, which we prefer, is that each party should be allowed the automatic right to cross examine any witness, if they give advance notice and a statement indicating the areas to be covered in cross examination. The Chairperson will have the overriding discretion to refuse the cross examination where the areas to be covered in the proposed cross examination are not germane to the terms of reference of the inquiry or there is another justifiable reason for the refusal. Under this proposal there should be a time limit to the cross examination, which can be agreed upon at the preliminary meetings proposed under clause 24 or as decided by the Chairperson.

2.5.3. *Competitively sensitive information*

It must be noted that some of the evidence which will be presented at the Panel will be competitively sensitive. It is therefore proposed that the Commission should devise a system for the calibration of information which is competitively sensitive. This could include, for instance, the physical separation of dates when the various firms which are competitors will be giving evidence and ensuring that other firms are excluded from the affected hearings. This would also assist the Panel when receiving requests for information from third parties such as the media.

2.5.4. *General and specific hearings*

We suggest that a more controlled hearing process in addition to the public hearings would be appropriate in order to impose structure and order on the information gathering exercise to be undertaken by the Panel and to allow the Panel to direct the issues raised in the hearings. We suggest holding the general public hearings open to all parties interested in attending and holding more specific hearings to which a limited number of

participants are invited, based on their particular interests and on the contribution that they intend to make at the specific hearing.

2.5.5. *Direct consultations*

2.5.5.1. In addition to public hearings, the Statement of Issues contemplates direct consultations. We support this use of these consultations as it will allow the Panel to engage directly with participants in a closed forum and will allow participants to engage in a frank and robust manner with the Panel. We assume, as was the process in the UK inquiry, that these sessions will be closed sessions between the Panel and the relevant organisation.

2.5.5.2. The Statement of Issues does not provide any guidance on the form that these consultations will take or the process that will followed during these meetings. It would be useful if the manner in which these consultations will be conducted is described clearly.

2.5.6. *Access to confidential information by participants*

The draft guidelines contemplate participants' having access to confidential information received by the Panel (paragraph 28.3) but does not expressly provide for such a process. It is submitted that the guidelines should either make provision for access to such information by external legal counsel and economists or should articulate a clearly defined process through which parties can request access to such information, for example, via a data room once the provisional findings have been released.

2.5.7. *International guidance on market inquiries*

During the stakeholder engagement meeting on 16 April 2014, the Chairperson of the Panel indicated that the Panel would draw on the experience of other competition authorities and made specific reference to the UK competition authorities. In this regard we would suggest that the Panel refer to the detailed guidance on market inquiries published by the UK Competition and Markets Authority's (Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach: January 2014), which incorporates previous market inquiry guidance documents published by the Office for Fair Trading and the Competition Commission (both now subsumed into the CMA).

Yours faithfully

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