

**COSATU Submission on the Statement of Issues
and Guidelines for Participation in the
Competition Commission's Health Inquiry: 30th
of June 2014**



COSATU

Introduction

The right to quality and affordable health care is enshrined in the constitution of the Republic of South Africa. It is captured in section 27 which states everyone has the right to **“health care services, including reproductive health care”** (South Africa 1996). COSATU has always argued that exorbitant prices in the private health sector are denying citizens access to this fundamental socio-economic right. This point is captured in the resolutions of the 11th National Congress which state that:

“The Minister should immediately appoint a commission to investigate and take action against the overcharging by private hospitals and specialists, with a view to impose strict regulation to prevent anti-competitive practices, including price fixing and excessive pricing and abuses of dominance, stretching from hospitals, drug companies and other stages of the value-chain”
(COSATU 2012: 8).

This sentiment has been by echoed by other civil society organizations and groups. They have joined the federation in its attempts to persuade government to transform the structure and regulatory mechanisms in the sector. This advocacy is informed by section of 27(2) of the constitution which clearly explains that: **“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of this right”** (South Africa 1996). This is the context within which the Competition Commission’s intervention should be engaged. The decision to launch the inquiry is informed by the above-mentioned background.

COSATU welcomes the inquiry, and wishes to enrich the process by stating some observations on the **Guidelines for Public Participation** and **Statement of Issues**. Our comments are informed by both the terms of reference published in 2013, and our resolutions on health adopted at various COSATU congresses. These terms of reference outline a number of important objectives of the inquiry. The most salient goal is developing a

regulatory framework which increases access to quality and affordable health care in the private sector (Competition Commission 2013:12). This inquiry is the first step towards realizing this goal, and it should be supported by all stakeholders. Social partners should participate in the inquiry by tabling their views on all matters related to this inquisitorial exercise. This input will explain COSATU's analysis of the guidelines and then proceed to a discussion on the proposed statement of issues.

1. Guidelines for Public Participation.

According to the Competition Commission (2014: 2-3), these guidelines are supposed to provide a framework for participation in the inquiry. These directives are also meant to inform all stakeholders on how to engage the panel. COSATU welcomes the commission's transparency and inclusive decision-making process on administrative and procedural issues. We hope that this democratic ethos will be prevalent throughout the entire proceedings. This will increase the legitimacy and value of the public inquiry. However, we would like to raise a number of concerns regarding some points in the draft guidelines.

The first is related to the powers of the chairperson regarding the application of the guidelines. The document states that:

“The guidelines are binding on the Commission, the Panel and the participating stakeholders in the inquiry unless the Chairperson of the inquiry directs otherwise, in which case the Chairperson will provide reasons for any deviation from the guidelines. The Chairperson may exercise flexibility in the application of the guidelines to the extent that the chairperson considers it fair do so” (Competition Commission 2014:3).

COSATU supports the exercise of flexibility by the chairperson of the inquiry. But this flexibility should be guided by clearly defined principles or criteria. The term fair is quite vague and does not provide a well articulated

rationale for the application of this flexibility. Moreover, any form of deviation which is not guided by central principles can be misused or abused. Therefore, we propose that the draft guidelines contain some criteria or principles for deviation and flexibility. For example, the chairperson may be allowed to deviate or exercise flexibility in situations where it will increase access to participation in the inquiry.

1.2 Methods of Gathering Information

The second concern is based on the methods of gathering information. One of these methods is the review of research studies (Competition Commission 2014: 4). This statement should be qualified by a sentence which indicates that the research should be drawn from a variety of sources. This is important because the aim is to get a balanced view based on sound empirical evidence. The inquiry cannot solely rely on private sector commissioned research. It must draw its knowledge and evidence from different sources. Another concern is the nature of public consultations, which according to the commission will involve workshops and seminars. The document does not provide an explanation of the participants or location of these forums. This is problematic because the sessions can be reduced to discussions amongst consultants, lawyers and elites in urban areas.

COSATU firmly believes that any form of engagement must allow citizens equal access. Moreover, it must be transparent and accommodate all divergent views or interests. The commission should ensure that these consultations do not only take place in elite urban areas. Furthermore, they should not be reduced to technocratic discussions amongst professionals. This argument applies to the public hearings which are also identified as a source of gathering information.

1.3 Participation

The third point we wish to make is related to the methods of participation. The federation firmly believes that all participants should be allowed to

speak and write in their first languages. Therefore, COSATU welcomes the commission's recommendation that deals with the issue of language regarding written submissions. But COSATU thinks that it's unnecessary to create a submission framework which is too technical. This view is informed by the fact that the inquiry will receive submissions from citizens who do not have a sound academic or research background. Thus, the commission should not place academic or technical pre-requisites which will alienate the majority of the population.

1.4 Public Hearings

In addition to the above, we would like to raise the following concerns regarding some statements in the section on public hearings. First, COSATU rejects the idea that a “**written submission is a pre-requisite for making an oral presentation at the public hearings**” (Competition Commission 2014:11). This statement does not take into account the fact that a large portion of South Africans cannot read or write. These citizens would not be allowed to make oral presentations if the commission adopts the above-mentioned pre-requisite. COSATU urges the panel to remove it. Moreover, the federation is very concerned about the over-usage of technical procedures which ignore the nature and socio-economic context of the citizenry.

COSATU is also concerned about some of the statements in the section on the conduct of public hearings. The document argues that: “**the chairperson may, upon request, direct that a matter be heard: in private or in camera on aspects pertaining confidential information**” (Competition Commission 2014:12). It further states that the chairperson can exclude citizens or certain groups from the hearings “**if the proper conduct of the hearing requires it**” (Competition Commission 2014: 12). COSATU rejects the above-mentioned proposals on the following basis:

First, the inquiry is being led by a public institution which should allow citizens to gain access to all the information presented by participants. This is integral for increasing transparency and enhancing the legitimacy of the

process. Second, the rationale for excluding citizens from hearings is not sound. It is essential to ensure that the public hearings are conducted in an orderly fashion. But we oppose any proposal that justifies exclusion of individuals or groups on the basis of vague justifications. The term “proper conduct” should be qualified by clearly defined guidelines for limiting the public’s access. The chairperson cannot be allowed to subjectively determine what is proper. Moreover, there should be some form of recourse for citizens who believe that their exclusion is unjustified.

The other problematic area in the section on public hearings is the examination of evidence or information. According to the document, the chairperson “**may call upon an Evidence Leader or other person designated for the purpose to assist the Panel with the examination of the information on the issues of the public hearings**” (Competition Commission 2014:13). Furthermore, it proposes that the “**chairperson may call upon the Evidence Leader or other person designated for the purpose to question witnesses, and afford a similar opportunity to members of the panel**”.

COSATU understands the role of the Evidence Leader in both instances. However, the usage of the term “other person” in both instances raises a number of concerns. Firstly, it does not provide the reader with a clear description of these individuals who will be examining the information and questioning witnesses. Secondly, the criteria used for choosing the “other person” to assist the panel with these two important tasks should be spelled out. The tasks of examining information and questioning witnesses are very important for carrying out the objectives of the inquiry. It is essential to ensure that these two activities are carried out by impartial individuals. This is crucial for protecting the legitimacy of the panel’s work. Thus, COSATU proposes that the description and criteria for the other persons who will carry out these tasks is spelled out.

2. Draft Statement of Issues

The following sections will discuss COSATU's perspective on the draft statement of issues. As stated earlier, the federation's views are informed by the following three important factors. First, the background or context which motivated the Competition Commission to launch the inquiry. It is succinctly captured in the green paper on NHI which argues that:

“The private sector also has its own problems albeit these are of a different nature and mainly relate to the costs of services. This relates to the pricing and utilization of services. The high costs are linked to high service tariffs, provider-induced utilization of services and the continued over-servicing of patients on a fee-for service basis. Evidently, the private sector will not be sustainable over the medium to long term.”(DOH 2011:7).

This challenge of high prices is further emphasised in the terms of reference published in 2013. In this document, the Competition Commission (2013: 6) argues that:

Prices in the private healthcare sector are at levels which only a minority of South Africans can afford, evidenced by the small share of the population with access to private health care. Various concerns have been raised about the functioning of private healthcare markets in South Africa as a result of the fact that healthcare expenditure and prices across key segments are rising above inflation.

The evidence cited above elucidates COSATU's point of departure in this inquiry. There is ample evidence which proves that private health care prices in South Africa are too high (NEHAWU 2011: 4-5). For example, ***between 1994 and 2007 inflation averaged 6% annually, private health costs increased by 15% yet service provision has been deteriorating in the private health industry, costs of medical insurance have risen more than inflation and scheme exclusions increase each year.*** (NEHAWU 2011: 5). In our view, the main objective of the inquiry is to determine what

causes these exorbitant charges, and more importantly, provide a set of clearly defined recommendations for improving price regulation in the sector. In other words, there is no need to interrogate whether the costs of private health care in SA are just. The primary concern is to create mechanisms which can lower the prices, and make health care more accessible.

The second factor is COSATU's belief that health is a public good and should not be commercialised. This point is emphasized in COSATU's (2012:10) Congress Resolutions which state that: "***the federation should oppose corruption and over-charging by the private sector and exorbitant increase in medical aid fees***". This opposition is integral for ensuring that the profit motive does not drive the provision of health care services. South Africa will never improve its system of health care provision if it commodifies this public good. This point is echoed in the World Health Organization (2008:14) Report which identifies commercialisation as one of the key factors which impede the attainment of a nation's health policy goals. It argues that "***commercialisation has consequences for both quality and access to care. The reasons are straightforward: the provider has knowledge; the patient has little or none. The provider has an interest in selling what is most profitable, but not necessarily what is best for the patient***" (WHO 2008:14).

The third factor which influences COSATU's position on the statement of issues is the organization's resolutions on private health care. These call for transformation of the sector, decreasing the costs of private health care, enhanced regulation and challenging commercialisation (COSATU 2012 7-10).

The above-mentioned factors will underpin COSATU's participation and views on the following thematic areas discussed in the statement of issues.

2.1 Competition Policy and Health Care

The document on the draft statement of issues is based on the assumption that there is insufficient competition in the private health care sector. This point is also captured in the terms of reference of the inquiry, which state that “***the commission is initiating an inquiry into the private health care sector because it has reason to believe that there are features of the sector that prevent, distort or restrict competition***” (Competition Commission 2013:2).

COSATU welcomes the examination into the state of competition in the private health care sector. However, it should be noted that the federation opposes the conceptualization of competition within the confines of economic liberalism. This school of thought argues that increased competition in any market is essential for efficiency. The logical conclusion of this paradigm is that market-led efficiency should be prioritized over socio-economic objectives. Moreover, it advocates for market-driven solutions to address externalities. In other words, the development of competitive markets is essentially based on the sole purpose of increasing efficiency.

COSATU rejects the above-mentioned interpretation of competition. The core point of departure in the inquiry should be: how does that lack of competition increase prices and deprive citizens of their socio-economic right to access quality healthcare? This point needs to be emphasized because the assumptions or questions of any investigation will determine the outcomes. Therefore, COSATU proposes that the notion of competition—which is at the centre of the terms of reference—be conceptualized within a methodological framework that takes into account the fundamental right of access to quality and affordable health care. This is essential for making “***recommendations on appropriate policy and regulatory mechanisms that would support the goal of achieving accessible, affordable, innovative and quality private health care***” (Competition Commission 2013: 13).

In simpler terms, the inquiry should not be reduced to an academic exercise—based on economic liberalism—that over-emphasizes technical arguments on competition policy. It should not only focus on efficiency; but primarily assess how competition in the various health submarkets affects access to quality and affordable healthcare. The panel has proposed a framework for analysis which is based on the “**Theories of Harm**”. The following sections will discuss COSATU’s position on these theories.

2.2 Theories of Harm

The central theme of the theories is the nature of competition in the private health sector. They are based on an assumption that if there are more independent players in the “private health care markets”, there will be beneficial outcomes for the consumers of healthcare in the private sector. This logic is one of the key pillars of economic liberalism. It has influenced various governments’ policies in developing countries including South Africa.

The mid-nineties government’s policy interventions sought to open our economy to the cold winds of global competition, with the hope that the economy would perform better. On the contrary, this increased integration into the capitalist global political economy has produced a number of negative socio-economic effects. Our shores were flooded by cheap, sometimes illegal, imports that accelerated deindustrialisation with devastating effects on jobs. These consequences affected all markets including the health sector.

COSATU acknowledges that the structure of the private healthcare sector may result in conduct that militates against the attainment of the goal of affordable and quality healthcare for most South Africans. However, we do not believe that the solution lies in the regulation of the sector. We contend that piece-meal reforms and policies meant to regulate the private health sector are not sufficient. These solutions don’t deal with fundamental problem of transforming the structure of the nation’s health system.

In our view, at the heart of the challenges facing our health sector is a two-tier contradictory and wasteful health care system. On the one hand, is a public health care system which treats health as a social need, but it faces inadequate funding and resources. The public health sector has less than 40% total health care resources but serves 85% of the population, which is mostly black and poor (COSATU 2008).

On the other hand, is the private health sector which treats private healthcare as a commodity and accounts for more than 60% of the total health care resources, including most of health care professionals but serves a minority of the population, which is mainly white and wealthy (COSATU 2008). This sector, if the proposed theory of harm 4 is anything to go by, is likely to expand even more.

Our problem is that the market-driven private health care system is based on avoiding the sick. Thus, we propose that the inquiry uses a theory of harm that addresses the challenges identified by COSATU in its position paper on National Health Insurance (2008) which states that:

- Medical schemes and private providers compete not so much by increasing quality and lowering of costs but by avoiding unprofitable patients and shifting costs back to patients or to underfunded public health system;
- The private health sector generates huge administration costs that, along with profits, divert resources from clinical care to the demands of business; and
- Consulting and marketing firms consume increasing fraction of health care money.

The above-mentioned arguments are related to another thematic area: the public and private divide which will be discussed below.

2.3. Public and Private Health Care

COSATU moves from the premise that this is an inquiry into the private health care sector, which is mainly funded by private funds. Both the draft statement of issues and terms of reference use the term “market inquiry”. This means that the inquiry should mainly focus on activities in the private sector. However, we strongly believe that the inquiry must compare the costs and general characteristics of both sectors. This will allow the panel to get a more comprehensive understanding of the underlying problems in the country’s health sector. But our proposal must not be interpreted as a move to suggest that we launch a sub-inquiry into the public sector. Rather, COSATU suggests that the private and public sector must not be viewed in isolation. This is an important point, as it relates to one of the key impediments to quality health care provision identified in the Joint COSATU /NEHWAU (2003) submission on the public health bill which argues that:

***“In addition poor working conditions in the public sector, with long hours, shortages of staffing and resources and relatively low pay. At the same time we have a runaway private health industry, which is responsible for huge inequalities in healthcare provision and use of state resources. The rapid rise in Medical Aid costs is far higher than medical inflation for most of the past decade.*”**

This statement indicates that this inquisitorial exercise must take into account the fragmented two-tiered nature of the health sector in South Africa. The unequal, contradictory and intersecting relationship between the sectors continues to undermine affordable health care provision.

2.4. International Experience

The analysis of any domestic market cannot be separated from the structure of the international political economy. Moreover, it is essential to draw knowledge from other states attempts to transform their health care systems. Some states such as the UK have also initiated inquiries into their

health systems. COSATU proposes that the panel uses some of the valuable findings in international experience and literature. However, the panel should not be biased towards Eurocentric experiences and research. Other regions in the world such as South America have made substantial progress on key health indicators. The Human Development Index (HDI) Report (2013) indicates that Latin America is rated second in the world's regional comparison. The panel should examine the health systems in countries such as Brazil and Chile. This analysis should focus on state-led interventions-including regulation and other policy measures- which have assisted these countries to improve their health indicators, especially access to quality affordable healthcare.

2.5 Patterns of Ownership in the Private Sector

COSATU believes that the inquiry should examine the patterns of ownership in the private health sector. We acknowledge the steps taken to initiate a general market inquiry; but we believe that the investigation should be extended to the composition of private entities in the sector. This is informed by past experiences, which indicate that the nature of ownership influences patterns of investment, production and administration. These are all key factors which influence the costs associated with the private health care system in South Africa. For example, the inquiry should investigate how the character of ownership influences pricing in the sector. The role of Multinational entities should also be analysed, especially their influence on the attainment of national health objectives such as creating affordable healthcare.

For example, the Joint NEHAWU/SAMWU (2013) submission on the terms of reference highlights the need for addressing this question by pointing out that: ***“The Netcare group had a market capitalisation of US\$40 million upon listing on the Johannesburg Stock Exchange (JSE) in 1996 and this had grown to \$3.5 billion by end of 2006, for a compounded annual growth rate of 30% (Shevel, 2007). Netcare had 71 hospitals in***

South Africa (ibid). Its growth has been fuelled by acquisition of other groups, various independent hospitals and other investments. Netcare the third largest hospital group in the world and largest in South Africa had annual revenues in excess of R14 billion employed more than 24,000 personnel”.

Conclusion

These proposals must not be interpreted as COSATU’s ultimate solution to the health crisis in SA. The federation will still advocate for the creation of a single public health system in the country. COSATU wishes to reiterate its support for the introduction of the National Health Insurance policy paper in 2011. The speedy and efficient roll-out of NHI will ensure that we achieve better health outcomes for all South Africans. We view the inquiry as one of the crucial processes in affirming our belief that privatization and commercialization of essential services produces negative socio-economic effects.

References

Competition Commission 2014. ***DRAFT GUIDELINES FOR PARTICIPATION IN THE MARKET INQUIRY INTO THE PRIVATE HEALTHCARE SECTOR.*** 30 MAY 2014.

Competition Commission 2014. ***Draft Statement of Issues Market Inquiry into the Private Healthcare Sector.*** 30 May 2014.

COSATU 2008. Position Paper on National Health Insurance.

COSATU 2012: ***Socio-economic Section Resolutions adopted at the 11th National Congress***

COSATU/ NEHWAU 2003. ***Joint submission by Cosatu and Nehawu to the Public Hearing on the National Health Bill Portfolio and Select committees on Health***

Department of Health 2011. ***NATIONAL HEALTH INSURANCE IN SOUTH AFRICA POLICY PAPER .***

Human Development Report 2013. ***The Rise of the South: Human Progress in a Diverse World.***

NEHWAU 2011. ***National Health Insurance in South Africa Policy Paper Submitted to the Department of Health 15 December 2011.***

NEHAWU/SAMWU.2013. ***Competition Commission Submission on terms of Reference***

World Health Organization (WHO). ***World Health Report 2008.***

