



Abridged Version
Of
TERMS OF REFERENCE FOR THE MARKET INQUIRY
INTO PRIVATE HEALTHCARE

Introduction

The notice that the Competition Commission ("Commission") will conduct a market inquiry into the private healthcare sector ("healthcare inquiry") in terms of Chapter 4A of the Competition Act, 89 of 1998 (as amended) ("Competition Act") is published in terms of section 43B(2) of the Competition Act.

It indicates the scope of the healthcare inquiry as well as the time within which it is expected to be completed.

TERMS OF REFERENCE FOR THE MARKET INQUIRY INTO PRIVATE HEALTHCARE

1. LEGAL BASIS FOR THE MARKET INQUIRY

Chapter 4A of the Act, which introduces the powers to conduct market inquiries came into effect on 01 April 2013

A market inquiry is a general investigation into the state, nature and form of competition in a market, rather than a narrow investigation of specific conduct by any particular firm.

The Commission is initiating an inquiry into the private healthcare sector because it has reason to believe that there are features of the sector that prevent, distort or restrict competition.

The Commission further believes that conducting this inquiry will assist in understanding how it may promote competition in the healthcare sector, in furtherance of the purpose of the Act.

One of the prerequisites to commence a market inquiry is that the Commission must develop and publish Terms of Reference ("ToR") for the market inquiry.

This ToR sets out the scope of the market inquiry, as well as the expected timelines for the inquiry.

2. THE PRIVATE HEALTHCARE SECTOR

This inquiry will examine the private healthcare sector, which encompasses numerous interrelated markets. In this document, "private healthcare sector" refers to that portion of

healthcare services that are funded by private patients themselves, either through medical schemes, insurance or through out-of-pocket payments.

Due to the many interrelated aspects of the various markets that comprise the private healthcare sector, The achievement of the inquiry's objectives requires the consideration of a range of markets, including healthcare financing and suppliers of healthcare goods and services.

2.1. Healthcare in South Africa

The South African healthcare sector is characterised by many challenges related to uneven distribution of coverage and access to funding, poor infrastructure and human resource constraints.

South Africans are also facing what is referred to as a "quadruple burden of disease": The first burden is the HIV/AIDS pandemic; the second is that of injury, both accidental and non-accidental; the third consists of infectious diseases such as tuberculosis, diarrhoea and pneumonia, and the fourth is the growing prevalence of lifestyle diseases' related to relative affluence.

2.1.1. The South African Private Healthcare sector

As stated above, the private healthcare sector is made up of several interrelated markets involving the financing of healthcare, healthcare goods (such as medical devices and pharmaceutical products) and healthcare services provided by hospitals, practitioners and other intermediaries/agents.

2.1.2 Financing of healthcare/Financing mechanisms

Financing mechanisms refer to the institutional framework that exists to support risk pooling (i.e.insurance) and the purchase of healthcare goods and services. This framework principally includes health insurance entities such as medical schemes and private insurance companies, supported by administration and managed care companies. Direct purchases of healthcare goods and services also constitute a form of personal healthcare financing.

The Board of Healthcare Funders ("BHF") is an industry body representing more than 85% of the medical schemes in South Africa'. Medical schemes and administrators are subject to oversight by the Council for Medical Schemes ("CMS").

Medical schemes are responsible for the bulk of private healthcare expenditure. Medical schemes are required to comply with the Medical Schemes Act, 131 of 1998, designed to achieve the following:

Open enrolment; whereby all open membership schemes must accept all applicants;

Community rating; whereby schemes are not permitted to determine contribution rates based on the health status of beneficiaries; and

Mandated minimum benefits; whereby schemes must cover certain medical conditions fully, either directly or through a Designated Service Provider ("DSP").'

Medical schemes are predominantly administered on an outsourced basis.

Managed care companies can be closely affiliated with administrators (a subsidiary of the same holding company) or even part of the same company. In only a few instances are they more closely affiliated with healthcare providers.

Managed care intermediaries represent that part of the healthcare funding framework responsible for the development of innovative contracts with healthcare service suppliers. Although there has been growth in the business provided to these intermediaries, the sector-wide impact on private healthcare costs is not clear.

2.1.3 Suppliers of healthcare goods and services

Suppliers of healthcare goods and services include (1) healthcare professionals; (2) health facilities such as hospitals and clinics; (3) retail medicine distributors, such as pharmacies and dispensaries; (4) product manufacturers for medical consumables, medical devices, and medicines; and (5) logistics service suppliers for the distribution of medical products to health facilities and retail outlets.

According to the Department of Health, there were 27 784 medical practitioners (including specialists) working in the public and private sector in South Africa in 2010.

The three largest private hospital groups by number of beds are Netcare Limited, Life Healthcare Limited and Mediclinic Southern Africa Proprietary Limited, accounting for approximately 87.8% of private hospital beds.

The South African medical devices, pharmaceuticals and consumables industries consist of smaller local and larger multinational companies that can be classified into importers,

retailers, wholesalers, manufacturers and exporters. While South Africa relies largely on imports to meet the country's demand for medicines, devices and consumables, there are some South African providers that service the local market.

2.1.4 Agents

Agents include all market participants that provide advice to consumers on the purchasing of insurance and healthcare goods and services.

3. RATIONALE FOR A MARKET INQUIRY

Access to health care services is enshrined in the Constitution of the Republic of South Africa as a fundamental human right. Section 27(2) imposes an obligation on the state to take reasonable measures to achieve the progressive realisation of this right. Private healthcare provision takes place within the context of this constitutional commitment to the provision of universal healthcare services to all people in South Africa. 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 healthcare.

Various concerns have indeed 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 headline inflation. These increases in prices and expenditure frame the Commission's inquiry into the sector.

The market inquiry into private healthcare will evaluate the various explanations for cost, price and expenditure increases in the private healthcare sector and will identify competitive dynamics at play. Through this analysis, the inquiry aims to identify all factors that prevent, distort or restrict competition, including any evidence of market failure, regulatory failure or competition concerns. This will provide a factual basis upon which the Commission can make evidence-based recommendations that serve to promote competition in the interest of a more affordable, accessible, innovative and good quality private healthcare.

3.1. Structural features of the healthcare sector

The healthcare sector typically involves a wide range of funding mechanisms, prioritisation and rationing mechanisms, role-players, stakeholder interests, and

government regulations. The delivery of healthcare is facilitated by agency relationships, especially those between patient and doctor and patient and medical funder.

The functioning of these relationships and the nature of the incentives in the medical value chain, will determine the eventual price, quality and outcomes that patients experience.

3.2 Regulation in the healthcare sector

Given the complexity of the healthcare sector, the role of agents, and the asymmetries of information that exist, different views exist with regards to the level of intervention and regulation that is desirable in healthcare.

In South Africa, factors such as the country's disease profile, income levels, healthcare infrastructure and demographic profile add additional layers of complexity and will influence policy decisions. However, many of the recognised international health market imperfections are evident in the South African private health sector and inform the need for this inquiry.

3.3 Expenditure increases in the private healthcare sector

Expenditure increases have been raised as a concern in the private healthcare sector in South Africa. Various views have been expressed as to the reasons for these trends". This inquiry will investigate the extent of increases in cost, prices, and expenditure and how these increases relate to competition.

These indicative trends suggest that private healthcare expenditure is increasing. Numerous factors may explain these increases, including utilisation, type of disease, benefit design, and the interaction between the regulatory environment and the sector. The veracity of this data and the underlying drivers of increased expenditure must be evaluated during the inquiry.

3.4 Consolidation in key markets

In addition to the changes in prices and expenditures within the private healthcare sector, there has also been consolidation in a number of key markets., in hospitals, medical schemes and administrators.

4. PURPOSE AND OBJECTIVES OF THE MARKET INQUIRY

The purpose of the market inquiry is:

- To conduct an analysis of the interrelationship between various markets in the private healthcare sector, including examining the contractual relationships and interactions between and within the health service providers, the contribution of these dynamics to total private expenditure on healthcare, the nature of competition within and between these markets, and ways in which competition can be promoted;
- To assess the impact of Commission's interventions in private healthcare through enforcement action and merger regulation; including any impact this has had on prices, bargaining mechanisms, consolidation and competition in the healthcare sector;
- To inquire into the nature of price determination in the private healthcare sector in South Africa; and
- To establish a factual basis for recommendations that support the achievement of accessible, affordable, high quality, and innovative private healthcare in South Africa.

The main objectives of the market inquiry are to:

Evaluate the nature of price determination in private healthcare with reference to:

- the extent of competition between different categories of providers and funders;
 - the extent of countervailing bargaining power between different providers and funders;
- and

- the level and structure of prices of key services, including an assessment of profitability and costs;

Evaluate and determine what factors have led to observed increases in private healthcare prices and expenditure in South Africa;

Evaluate how consumers access and assess information about private healthcare providers, and how they exercise choice;

Conduct a regulatory impact assessment that reviews the current regulatory framework and identify gaps that might exist. Examples include the interpretation of Prescribed Minimum Benefits ("PMBs"), the introduction of a risk equalization fund etc.;

Make recommendations on appropriate policy and regulatory mechanisms that would support the goal of achieving accessible, affordable, innovative and quality private healthcare; and

Make recommendations with regard to the role of competition policy and competition law in achieving pro-competitive outcomes in healthcare, given the possibly distinctive nature of the market.

5. SUBJECT MATTER OF THE INQUIRY

The market inquiry will probe the private healthcare sector holistically to determine the factors that restrict, prevent or distort competition and underlie increases in private healthcare prices and expenditure in South Africa.

The Commission has delineated the current scope of the inquiry as best it can on the basis of the information available to it at this stage. The scope set out below provides an indication of the questions that will be asked, based on the Commission's preliminary theories of harm. These statements in no way imply that any conclusions have been reached; they will all be evaluated and tested during the inquiry.

Note: Kindly refer to the table detailing the scope of inquiry (5.1 Healthcare Financing) which appears on pg 87 – 90 of the Notice and is not reproduced here in the interests of brevity.

6. THE PROPOSED MARKET INQUIRY PROCESS

The Commission will evaluate the subject matter of the inquiry through an inquisitorial process of public hearings and a review of secondary material, obtained via information requests, consultations and summons, as required. All interested and affected parties are also invited to submit information relevant to the inquiry in accordance with the guidelines for participation to be determined by the Commission. Guidelines for participation in the inquiry will be made available on the Commission's website.

A panel comprising three to five experts will preside over the hearings, review submissions, examine evidence and oversee the drafting of the inquiry report and recommendations. The panel of experts will report to the Competition Commissioner.

A team of researchers and analysts will support the panel. This team will assume primary responsibility for producing position papers, reviewing submissions and briefing the panel prior to the public hearings.

The participants in the market inquiry process will include firms, industry associations, government departments, public entities, patient groups, civil-society based organisations, patients, and any other stakeholders that may be able to provide information relevant to the market inquiry. Members of the public will be invited to participate in the inquiry during the information gathering phase of the inquiry, as well as during the public hearings and are encouraged to participate fully in the inquiry process.

6.1. Commencement and completion of the Market Inquiry

The market inquiry will commence on 06 January 2014. The final market inquiry report, which may include recommendations, will be completed by 30 November 2015. This conclusion date may be extended in terms of the Act, if required and by publication in the Government Gazette. Further details regarding the administrative phases of the market inquiry, along with guidelines for participation in the market inquiry will be made available on the Commission's website.

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