

Private healthcare stakeholders to make submissions

 By [Neil Kirby](#)

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The Competition Commission has commenced with its market inquiry into the private healthcare sector in South Africa. The next step in the administrative timetable is for parties, referred to as stakeholders, to make written submissions to the panel before 31 October 2014.



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The coincidence of the deadline for written submissions with Halloween may be serendipitous as it appears to be the Commission's intention to discover if there are, indeed, any skeletons in the closets of private healthcare providers in South Africa.

The Commission is proceeding in terms of a statement of issues published on 1 August 2014. The statement is designed to explain why the Commission is interested in examining the private healthcare sector from a competition law perspective. Broadly, commentators and the man or woman in the street fall into two general categories: those who think healthcare is too expensive in South Africa and those who believe that the quality of private healthcare is commensurate with its cost. Depending on your view, you either fall into one of these categories but sometimes that R1,800 consultation fee for a specialist makes one think about the costs of healthcare in South Africa.

Theories of harm

The Commission's inquiry is to take place on a level more esoteric than necessarily what the average consumer pays for healthcare daily. The Commission has proposed various 'theories of harm' pertinent to the private healthcare sector in South Africa. These theories of harm are to be used to examine whether or not the private healthcare sector operates in an anti-competitive manner. The inquiry will also focus only on the private healthcare sector and not what occurs in the public healthcare sector. This is due to the provisions of the legislation governing the inquiry as well as the terms of reference applicable to the inquiry.

This is an interesting aspect of the inquiry in a South African context bearing in mind the significant impact that the public healthcare sector has on decisions by consumers as to where and how they wish to obtain healthcare services and perceptions concerning the quality of healthcare in the public sector. Such perceptions drive many consumers to purchase private healthcare in the belief or fear that services available in the public sector are inadequate or beneath acceptable levels and standards.

Unfortunately, such motivations are underscored by frequent media reports concerning a lack of equipment, expertise and infrastructure within the public healthcare sector in South Africa. That having been said, the panel governing the enquiry is not adverse to receiving submissions concerning the role of the public sector and how it affects competition and access to healthcare in the private health sector.

Other curious aspect

The other aspect of the inquiry which is curious is that it commences with an understanding that all South Africans are entitled to access healthcare pursuant to rights contained in the Bill of Rights. This has ramifications for members of the private healthcare sector in so far as constitutional rights are usually exercised as against the government and not private persons and it is the government's obligation to ensure that rights are fulfilled within the means available to the government to do so.

But what is this inquiry intended to achieve? Well, if one accepts that there is a concern about how much healthcare costs in the private sector in South Africa, then one may be driven to the conclusion that the inquiry is to reveal how costs are determined in the hopes of influencing that determination and bringing the costs down. Seems to be rational and logical - not so?

However, the role of the Commission cannot be to determine how much healthcare should be or impose a formulation for the determination of applicable tariffs for healthcare services. In any event, how does one assess healthcare? Is one supposed to determine whether a healthcare system is efficient by the number of people it treats and who enjoy positive outcomes or is it its accessibility based on how much the services it offers cost?

The inquiry may reveal much about the private healthcare sector but before we grab our pitchforks and light our torches and head up the hill to confront a monster, perhaps we should be reflecting on what healthcare is as a commodity and, like any other commodity, whether or not you are prepared to buy a high-end or low end-version of it and wish to retain that choice.

ABOUT NEIL KIRBY

Neil Kirby is director: health care and life sciences law of Werksmans. He is the chair of the Medicine and Law Committee of the International Bar Association. Kirby has been named as a leading lawyer in Dispute Resolution by Chambers Global: The World's Leading Lawyers for Business (2008 - 2013), and has published numerous articles in his various fields of speciality.

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