

Whistle blast on private healthcare's 'zero sum game'



The newly strengthened Competition Commission says it will probably begin its long-awaited, robust probe into South

Africa's increasingly unaffordable private healthcare market towards the end of this year, with final recommendations and findings due out in late 2015.

This comes after President Jacob Zuma announced in early March that the commission would be empowered to conduct formal market inquiries, with powers of subpoena and wide terms of reference. Taking effect from 1 April, these powers raise the bar on the commission's previous probes. For example, in 2008, the Competition Commission completed a market enquiry into the banking sector, relying on its general powers (i.e. without the new investigative powers), and depending entirely on companies' voluntary participation. While this had some impact on bank charges, it did not impact hugely on the way banks do business. In terms of the legislative amendment, the Commission can now issue summons to compel any person to appear before it or elicit any evidence which it believes may have a bearing on its proceedings. Failure to appear or to answer fully or truthfully during an inquiry can now constitute an offence, with heavy penalties.

By July a final draft of the full terms of reference should be ready for gazetting, enabling the commission to begin hacking into the private healthcare labyrinth by, at the latest, 2014.

Trudie Makhaya, manager for stakeholder relations at the commission, told *Izindaba* that engagement with stakeholders (which began in November last year) would continue over the next three months, and that adjustments for the amended and enhanced new powers are 'top of mind'. By July a final draft of the full terms of reference should be ready for gazetting, enabling the commission to begin hacking into the private healthcare labyrinth by, at the latest, 2014.

It's all geared towards understanding the market and its distortions in a holistic fashion

– to understand where it's failing – and then making recommendations to policy makers and regulators,' she said. 'We'll present our findings to the Minister [of Health], who'll present them to cabinet.'

Asked whether fines and other penalties against individual or collective sector players might result, Makhaya said this could be a byproduct of the wider investigation, which was aimed at 'bigger competition policy problems'. 'If we suspect price-fixing we can open a new probe and run with it [via the Competition Tribunal], imposing penalties – but that's not our primary purpose,' she emphasised. A market inquiry is a formal probe into the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular corporate entity or firm.

Consensus pricing elusive

There have been repeated and urgent calls – from the Board of Healthcare Funders (BHF), doctor groupings and patient organisations – for a mutually agreed-upon forum that can set fair prices for medical services. At present it's a 'free-for-all', with some specialists charging up to 500% of medical aid prices and patients coughing up the payment shortfall, in addition to their ever-rising monthly medical aid subscriptions. It's a 'zero-sum game' with each stakeholder operating at the expense of the other, and the patient all but forgotten in the mix.

As medical inflation soars, medical aids blame collusion between specialists and private hospitals (via perverse incentives such as inappropriate use of lucrative hi-tech equipment, general over-servicing and free or very low-rental office space), as well as collusion between patients and doctors to abuse hospital plans. Specialists point to almost intolerable workloads induced by serious shortages in their numbers, rampant brokerage and administration and managed-care costs in medical aids, plus soaring litigation insurance costs. Last year Discovery Health Medical Scheme members called for an independent review of the R3.2 billion administration and managed care fee paid to the scheme's administrator, Discovery Health, during the 2011 financial year.

Medical schemes argue that they are unable to act in the best interests of their members

due to their lack of bargaining power relative to the powerful hospital groups. This followed a Competition Commission ruling in 2005 (aimed at preventing collective price setting without any regulatory oversight), which stopped price negotiations between the BHF, Hospitals Association of South Africa (HASA) and the South African Medical Association (SAMA).

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After this, differences between what healthcare providers charge and what medical schemes pay widened. Schemes cited an inability to keep paying higher amounts to providers, while providers claimed escalating costs were forcing them to charge more. The Competition Commission now holds that a regulatory vacuum arose after the Health Department's tariff guidelines (aka the Reference Price List (RPL)) were struck down by the Gauteng High Court in 2010, citing insufficient consultation and research. The commission argues that this needs to be addressed.

Hospital groups 'dominant'

The hospital market is dominated by Netcare, Life Healthcare and Medi-Clinic, who collectively hold about 80% of the market. Independent hospitals, mostly represented through the National Hospital Network (NHN), make up the remainder, but market concentration is increasing as the three large hospital groups gradually acquire independent hospitals. Hospitals are not subject to price regulation (aside from the regulations which apply to the pricing of pharmaceutical products). In several previous healthcare hearings before the Competition Tribunal, the hospital

groups have denied the link between the gradual, systematic increase in private hospital concentration and the rising costs of healthcare.^[1]

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The Health Professions Council of South Africa (HPCSA) is now 'gun shy' about publishing its guideline tariffs for doctors and dentists, after these two groups threatened legal action in August last year. They argued that the HPCSA's rates were too low, took no account of practitioners' costs, and omitted numerous new procedures and practices.

Since the RPL was struck down, calls to reverse the Competition Commission's

rulings, which put a stop to negotiations over healthcare tariffs, have become louder and were repeated at several parliamentary hearings. At the hearings, medical practitioners and medical schemes advocated a forum that can set fair prices for medical services.

The health department expects that policies flowing from the commission's market inquiry will be less susceptible to legal challenges from healthcare providers. However, it emphasises that it will continue to do all it can to ensure an interim pricing authority as soon as possible – without awaiting the Commission's findings in 2015.

High road or low road?

A recent on-line commentary by a leading South African law firm, Werksmans Attorneys, strongly advises healthcare companies to 'proactively' consider their business interactions and agreements (especially those concerning price-setting mechanisms, information exchanges and interactions with competitors), well before

the Commission reveals the full scope of its inquiry – in their own best interests. With the accelerating implementation of National Health Insurance, any further escalation in private healthcare costs will put additional and hugely unwelcome strain on the already overburdened public healthcare sector – winning its private counterpart few political allies and virtually guaranteeing ever-more restrictive legislation.

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1. Halse P, Moeketsi N, Mtombeni S, Robb G, Vilakazi T, Weni Y, Competition Commission of South Africa. The role of competition policy in healthcare markets – 2011/2012 Competition Commission Annual Report. <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-7/The-role-of-competition-policy-in-healthcare-markets.pdf> (accessed 8 April 2013).

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