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SECTION27 SUBMISSION TO THE COMPETITION COMMISSION: DRAFT GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION

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I. Introduction

1. SECTION27 is a public interest law centre that seeks to influence and use the law to protect, promote and advance human rights. One of our priority areas is the right of access to health care services as guaranteed by section 27 of the Constitution of the Republic of South Africa.[1] As an organisation that acts in the public interest, we are concerned about equitable access to health care services in the private sector, particularly, pricing and the drivers of the high cost of health care in the private health care sector.

2. SECTION27 has recently made submissions the Competition Commission itself and the Health Inquiry Panel, pertaining to the importance of a constitutionally informed approach to the Competition Act[2] in the context of the ongoing market inquiry into the private healthcare sector.[3] In addition SECTION27 has elsewhere, at the Competition Commission's 2014 Policy Conference, set out in full our motivation for this approach to competition policy and law.[4] We attach our submissions to the Health Inquiry Panel and presentation at the 2014 Policy Conference to this submission for ease of reference.

3. As result of SECTION27's mandate and this recent work, these submissions therefore focus heavily on the importance of equity and rights-focussed approaches to mergers in the context of private health care markets. Given the scope of the Commission's Draft Merger Guidelines, we use markets for healthcare as an example which we submit is of application to, at the very least, the market for other social and economic rights, such as education, food, housing, social security, electricity and water. Though the approach we adopt may well be applicable to markets for goods or services that impact on human rights more broadly or, indeed, competition law and policy in general, discussion of these markets is beyond the scope of these submissions.

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[1] Constitution of the Republic of South Africa 1996, section 27.
[2] Competition Act 89 of 1998.
[3] See SECTION27's submission to the Panel of the market inquiry into the private health care sector here: http://section27.org.za/wp-content/uploads/2014/11/SECTION27-Submission-to-the-Panel-for-the-Health-Inquiry.pdf.
[4] Timothy Fish Hodgson, "Public interest, the Constitution and the Health care Inquiry: preventing patients from becoming the victims of market failure" [Hodgson] (2014) Competition Commission of South Africa: Eighth Annual Conference on Competition Law, Economics & Policy part I and II, available at http://www.compcom.co.za/assets/Uploads/events/Eighth-Annual-Conference/Parallel-2A/Public-interestthe-Constitution-and-the-Private-Health care-Inquiry-preventing-patients-from-becoming-the-victims-ofmarket-failure.pdf.

4. SECTION27 submits that the overconcentration of markets for products and services which also fall within the ambit of the right to have access to healthcare services is a serious practical legal and public health issue. As is illustrated below and through the patient testimonials included within SECTION27's submissions to the Health Inquiry Panel,[5] mergers within markets such as the healthcare market are manifestly a human rights issue.

5. SECTION27 therefore encourages the Competition Commission to thoroughly interrogate the importance of the Constitution and the public interest provisions of the Act in the process of finalising the Draft Merger Guidelines. In addition to having a practical effect on what conditions mergers are approved, we submit that a transparent indication of the Commission's approach to the applicability of constitutional rights to the merger evaluation process will initiate a much needed debate on the importance of the Constitution and the Act's public interest provisions to the functions of the competition authorities.

II. The purposes of competition law and policy in South Africa: Why does it matter which market or sector is being scrutinised?

6. Competition law and policy have a crucial role to play in the transformation of the South African economy. This was acknowledged as early as the drafting process of the Competition Act which was purposefully aim at forming the core of a *"uniquely South African competition policy"*, grounded in a *"combination of competitiveness and development"*.[6] The Act and competition policy more broadly therefore seek to achieve "*a redistribution of income and opportunities to favour the poor; a society in which health, education and other services are available to all*."[7]

7. Although not speaking directly to social and economic rights or the redistribution of wealth, the Competition Act's text embodies these purposes explicitly throughout. The Preamble of the Act acknowledges that this dual efficiency and equity approach *"will*

[5] SECTION27's submission at footnote 3, Annexure A1-A9.
[6] Timothy Fish Hodgson, "Public interest, the Constitution and the Health care Inquiry: preventing patients from becoming the victims of market failure" at footnote 40.
[7] Id at footnote 41.

benefit all South Africans".[8] The Act's purposes section lists multiple purposes including non-efficiency focussed aims including to promote *"efficiency, adaptability and development* of the economy"[9] and to *"promote employment and advance the social and economic welfare of South Africans"*.[10]

8. The history of the drafting of the Act and these features of its purposes provision motivate strongly for interpretation of the Act's entire contents as partially development-oriented and geared towards the improvement of the social and economic conditions of the people of South Africa. This approach to the Act's provisions is fortified by the generous, purposive, rights and economic transformation-oriented approach to the Act. SECTION27 submits that the competition authorities, courts and all state organs are constitutionally required to take to take an approach to interpreting the Act's provisions, including its merger evaluation provision, which best supports these purposes.[11]

III. Interpretation of section 12A of the Competition Act

9. Section 12A of the Competition Act provides a broad definition of mergers.[12] In the process of merger determinations the Competition Commission is required to conduct analyses on the impact that a proposed merger would have both on competition in the market and the public interest.[13] It then sets out considerations that must be required in these separate analyses in separate sections, the "public interest provision" reads as follows:

> "(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—
>
> (a) a particular industrial sector or region;
> (b) employment;
> (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
> (d) the ability of national industries to compete in international markets."

[8] Preamble: "That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans."
[9] Section 2(a) Competition Act 89 of 1998.
[10] Section 2(c) Competition Act 89 of 1998.
[11] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) [Hyundai] at 21-6. See also Tim Fish Hodgson above note 4.
[12] Section 12(1) Competition Act 89 of 1998.
[13] Section12A(1)(a)-(b) Competition Act 89 of 1998.

10. SECTION27 submits that a purposive, expansive interpretation is required both with regard to the ambit of the section in its entirety and to the determination of specific meaning and breadth of the factors listed in subsections (a)-(d).

11. First, we argue that sectors in markets in which the service or product traded is a constitutionally entrenched right are *"particular industrial sector*[s]" for the purposes of s12A(3)(a) of the Act. Interpreted through the lens of the Constitution and purposes of the Act this provides the competition authorities with room to withhold approval for mergers, or subject approval to conditions, in instances in which a merger is likely to result in harms to constitutional rights. Precedent for this approach, which should be explicitly incorporated in the Merger Guidelines, can be found in the Tribunal's decision in *Nasionale Pers Limited v Educational Investment Corporation Limited*.[14]

12. Second, we argue that even if this approach is not accepted, that purposively interpreted, section 12A(3) of the Act allows for factors other than those listed in subsections (a)-(d) to be considered in determining whether there is a relevant, substantial harm to public interest in terms of the Act. The impact on constitutional rights, we submit, while not a listed factor, is a constitutionally required consideration that is consistent with the objectives of the Competition Act.

[14] Case Number: Case No. 45/LM/Apr00.

Section 12A(3)(a) – interpreting "a particular industrial sector or region" through a constitutional lens

13. Of the public interest factors listed in section 12A(3) of the Act, subsection (a) is perhaps the factor of most direct relevance to ensuring an approach to merger evaluation which is sensitive to the constitutionally mandated differentiation between ordinary markets/sectors and markets/sectors in which the product or service traded is a socio-economic right.[15] The need sensitivity to the particular sector in which a merger is taking place is evident from the text of section 12A(3)(a) alone which requires that the competition authorities in their public interest analyses *"must consider"* the effect that each every merger navigating this hurdle has on *"a particular industrial sector or region"*.[16]

14. In *Industrial Development Corporation v Anglo American Holdings*,[17] the Tribunal rightly noted that this provision *"opens up for consideration an enormous range of issues without doing any violence to the language*".[18] Finding that the *"wide ambit"* of s 12(A)(3) means that the sections of the Act which set out its "*purposes and objectives*" may be used as a "lens" through which the s 12(A) should be interpreted.[19] It then proceeded to determine that the meaning of "*sector*" extends beyond the merger's impact on the particular market in which the merger is taking place, holding that *"clearly the legislature intended ... the competition authorities were to have regard to some sphere of economic activity wider the mere relevant market".*[20]

Section 12A(3)(a) markets in which the product or service traded is a constitutional right

15. Section 12A(3)(a) of the Act has been effectively applied by the Competition Tribunal in a matter concerning a sector in which the service traded was the constitutionally entrenched right to education. In *Nasionale Pers Limited v Educational Investment Corporation Limited*, a matter pertaining to a merger of two firms operating in various

[15] See Hodgson, supra.
[16] Section 12A(3)(a) Competition Act 89 of 1998.
[17] (45/LM/Jun02) [2002] ZACT 74 (24 December 2002).
[18] Id at para 36.
[19] Id.
[20] Id at para 43.

markets relating to *"further education"*[21] but including an overlap between secondary and tertiary education services, the Competition Tribunal noted that *"the potentially pervasive economic and social consequences of monopolistic structures and conduct in the education sector demand that the Tribunal pays particularly close attention to its public interest mandate."*[22]

16. Though not making direct reference to the Constitution, the importance of the education sector, given South Africa's *"terrible legacy in the education arena"*,[23] was evidently considered on the surface of both the Tribunal's competition analysis,[24] its public interest assessment and ultimately the innovative conditions it provided for approval of the merger, which *"were designed to ameliorate the potentially negative consequences of the transaction for the public interest"*.[25] Indeed the Tribunal concluded that in directly assessing the impact of the merger on the public interest in terms of s 12A(3)(a) it was *"bound to accord the education sector a stature reserved for few others"*.[26]

17. SECTION27 endorses the sensitivity with which the Competition Tribunal proceeded in interpreting s12(3)(a) of the Act. However, we submit that because the purposes and objectives of the Act ought to inform the interpretation of s12A(3)(a) and since many of these purposes are *"unique to the South African competition regime"* and *"seek to incorporate in the Competition Act the constitutional principles as contained in the Constitution"*,[27] the Tribunal ought to directly consider the importance of constitutional rights in such merger evaluations. The Constitution, and more particularly the Bill of

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[21] Constitution s 29(1) of the Constitution reads:
"Everyone has the right-
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible."
The relevant markets in this matter included both secondary and tertiary education. It is not clear from the Tribunal's decision, however, whether "further education" is the component of the right which is relevant throughout. It is possible that the basic education right is implicated in some of the business undertaken by the merging firms. This does not make any difference to the analysis that follows.

[22] *Nasionale Pers* at para 25.

[23] Id at para 23.

[24] Competition Law of South Africa at 10-132

[25] I *Nasionale Pers* at para 55.

[26] Id at para 47.

[27] *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another* (26/CAC/Dec02) [2003] ZACAC 2; [2003] 1 CPLR 10 (CAC) (28 March 2003) at page 19: "The purpose of the Act as set out in section 2(f) is unique to the South African Competition regime. Such an objective is contained in neither the United States of America Anti-trust laws nor the European Union Competition Laws. This objective seeks to incorporate in Competition Act the constitutional principles as contained in the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution")."

Rights, as *"the supreme law"*[28] of and "*a cornerstone of democracy*"[29] in South Africa respectively, are the ultimate legislative articulation of the public interest on the broadest level.

18. The Draft Merger Guidelines indicate that the Commission will, in its determination of whether the merger results in a substantial impact on the public interest in a specific sector, *"consider whether the merger impedes on any public policy goals"*.[30] Though this inclusion is applauded, SECTION27 submits that these guidelines need to go further, specifying that in circumstances in which the sector in question involves the trade of products or services which are constitutionally entrenched rights, that the Commission will consider the impact of the merger on access to these rights in evaluating whether a merger will result in a substantial impact on the public interest.

Innovative rights-based remedies to "address the likely negative effect on the industrial sector"

19. A particular strength of the *Nasionale Pers* decision is the Tribunal's innovative remedy which aimed at ensuring that the merging parties take steps to mitigate the public interest harms that may result from a successful merger.[31] The Tribunal required the newly formed firm "to identify and participate in joint programmes with the Department of Education aimed at building capacity in public education" in the two years subsequent to the approval of the merger.[32] In this regard, in matters in which constitutional rights are implicated, the competition authorities should consider the Constitutional Court's finding that:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to

[28] Constitution, section 1.
[29] Constitution, section 7(1).
[30] Draft Merger Guidelines at p 13.
[31] *National Pers at para 55*.
[32] Id.

fashion new remedies to secure the protection and enforcement of these all important rights."[33]

20. This is because "Courts should not be overawed by practical problems. They should 'attempt to synchronise the real world with the ideal construct of a constitutional world' and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach."[34] In the circumstances of constitutional breaches which would, without intervention on public interest grounds, not only escape the scrutiny of the competition authorities but gain the authorities' endorsement in the form of the approval of a merger, the competition authorities are duty bound to attempt craft remedies such as the one in *Nasionale Pers*. A similar and compelling argument in favour of the use of structural remedies to advance the purposes of the Act – and in particular "socio-economic justice" – has been made by Sekgobela.[35]

21. SECTION27 therefore submits that in addition to the "appropriate remedies" to be determined on a case-by-case by basis noted in the Draft Merger Guidelines,[36] the Commission should include provision for the consideration of remedies that ameliorate harm and improve access to rights in circumstances in which a merger approval may negatively impact on access to constitutional rights. We return to this submission below when discussing creeping mergers in the national private hospital market.

Section 12A(3) – read holistically and purposively in light of the Act's purposes and the Constitution

22. Before proceeding with an analysis of the text of section 12A(3) read as a whole, it is important to note that, generally, but particularly in the context of mergers pertaining to markets in which the products and services are entrenched socio-economic rights, section 12A of the Competition Act must be generously and purposively interpreted in line with the contextually relevant constitutional rights and the Constitution's transformative

[33] *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997) at para 19.
[34] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery* (Pty) Ltd (187/03, 213/03) [2004] ZASCA 47; [2004] 3 All SA 169 (SCA) (27 May 2004)
[35] T Sekgobela 'Can socio-economic justice be adequately addressed through the competition law system: A look at efficacy of structural remedies in abuse of dominance matters in light of the structure of South Africa's economy' (4 October 2011), Fifth Annual Competition Law, Economics & Policy Conference.
[36] Draft Merger Guidelines at p 13-4.

mandate. This is particularly important when the interpretation exercise in question is the determination of a phrase intended explicitly to transcend ordinary competition analysis and consider broader public interest factors that the Act and the Constitution seek to achieve. The constitutional rights most relevant to this analysis will vary depending on the merger evaluation in question, but, for example, SECTION27 submits that in the context of mergers in markets within the private healthcare sector the right to have access to healthcare services ought to be central to the evaluation of public interest grounds.

23. There are both similarities and differences between the sections guiding the evaluation of whether public interest will be substantially affected by a merger and whether a prospective merger is likely to substantially lessen competition which are instructive in the interpretation of section 12A(3) of the Act.

24. First, it noteworthy that both tests require the impact to be "*substantial*" in order for it to be determinative of the Competition authorities' decision to allow or disallow a particular merger on competition grounds. SECTION27 respectfully submits that competition authorities would do well to acknowledge that the threshold for relevance of public interest grounds is therefore no different from the threshold for relevance of impact on competition. The public interest factors are, according to the Competition Tribunal, "*an amalgam of social and distributional concerns ... and industrial policy considerations"*.[37] This is consistent with the Act's treatment of development and rights-oriented purposes (equity-based goals, social or distributional goals) on par[38] with traditional competition purposes (efficiency-based goals) as has been affirmed by the Constitutional Court:[39]

> "The Commission performs an important public function: one essential to the success of our democracy and to creating a competitive commercial sector. The Act deliberately sets out both equity and efficiency-based goals. This shows that competition law and the competitive market it seeks to attain is not for the benefit of businesses alone but also for consumers, workers, and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. It exists for the benefit of all South Africans. The Commission is the primary vehicle through which much of this is to be achieved. It is the lifeblood of the Act."

[37] *Telkom SA Limited v Business Connexion Group Ltd* Case No: 51/LM/Jun06 at para 301.
[38] Hodgson (supra).
[39] Competition Commission v Yara South Africa (Pty) Ltd and Others (CCT 81/11) [2012] ZACC 14; 2012 (9) BCLR 923 (CC) (26 June 2012) at para 49: http://www.saflii.org/za/cases/ZACC/2012/14.html. Emphasis added, footnotes omitted.

25. Second, understandably, given the open and broad meanings of the both *"public interest"* and *"lessening of competition"* the Act makes no attempt to either exhaustively define or provide a closed list of factors which *may* be considered by Competition authorities in making these crucial determinations in the course of a merger analysis. In the case of the determination of whether a merger will *"substantially prevent or lessen competition"* a list of potential considerations is provided and the word *"must"* is not used and the word "including" preceding the list clearly indicates that factors not listed may be considered.

26. This section is unfortunately not a picture of clarity and a contextual, holistic, purposive interpretation is required to resolve its ambiguity. Sections 12A(1)(a)(ii) and 12A(1)(b) state that any public interest assessment must be conducted *"by assessing the factors set out in subsection (3)"*. These provisions are typically interpreted to have the effect that competition authorities must make the required assessment, taking into consideration *only* the factors set out and listed (a)-(d) in s12(A)(3). However, as we shall argue below, difficulty is caused by the fact that this interpretation appears to somewhat contradict the plain wording of s12(A)(3), the constitutionally required approach to purposive interpretation of s 12(A)(3) and an interpretation of s12A(3) consistent with the extensive equity-focussed purposes of the Act as set out in s 2.[40]

27. Section 12A(3) of the Act, unlike, its sister provision on the substantial lessening of competition does not list factors that *may* be considered but rather factors which the Competition authorities *"must consider*" when making a public interest determination in terms of the Act.[41] It does not, again unlike its sister provision, make clear that this list is either exhaustive or non-exhaustive. A "closed list" approach could easily have been achieved by the legislator by an indication that the Competition authorities "must *only* consider" or by rewording the section to read something to effect of "for the purposes of this Act public interest is limited to considering the following factors".

28. Indeed this approach of defining an otherwise ambiguous term is common in the drafting of legislation and is in fact used by the legislature earlier in the very same provision in defining what a merger is in s12(1)(a) of the Act.[42] It could also have been accomplished by using the construction of the exemption provision which states clearly that exemption of a

[40] Competition Act 89 of 1998.
[41] Ibid.
[42] Ibid.

practice or agreement can be made only if it "contributes to *any of the following objectives"* and then proceeds to list them.[43]

29. SECTION27 submits that this restrictive, closed list approach to the interpretation of section 12(A)(3) runs contrary to the spirit, purport and objects of the Bill of Rights and the closely-related, equity-focused purposes of the Act. Any reasonable interpretation of this provision which is consistent with Constitution and allows for internal-consistency within the Act must be preferred to this interpretation.

IV. Can the public interest merger provisions be interpreted consistently with the Constitution and the Act?

30. Though the list in section 12(A)(3) is peremptory, it is not, on the section's wording alone, exhaustive. It is arguable that the purpose of the list provided in the section is to ensure that the factors of impact on particular industry or region,[44] employment,[45] small businesses and firms controlled by previously disadvantaged persons[46] and ability of national firms to compete internationally[47] *are always* considered in the public interest analysis rather restricting the section's potential public interest impact are the *only* factors considered. In other words, the section should be read as if the text said the "Competition Commission or the Competition Tribunal must <u>*always at the very least*</u> consider the effect that the merger will have on [the listed factors]". This as opposed to the current convention, mirrored in the Commission's Draft Merger Guidelines, which reads the

[43] S 10(3) of the Competition Act 89 of 1998 which reads:

> "The Competition Commission may grant an exemption in terms of subsection (2)(17), if—
> (a) any restriction imposed on the firms concerned by the agreement. or practice, or category of either agreements, or practices, concerned, is required to attain an objective mentioned in paragraph (b): and
> (b) the agreement, or practice, or category of either agreements, or practices, concerned, contributes to any of the following objectives:
> (i) maintenance or promotion of exports:
> (ii) promotion of the ability of small businesses, orfirnrs controlled or owned by historically disadvantaged persons, to become competitive;
> (iii) change in productive capacity necessary to stop decline in an industry; or
> (iv) the economic stability of any industry designated by the Minister. after consulting the minister responsible for that industry."

[44] Section 12A(3)(a) Competition Act 89 of 1998.
[45] Ibid at section 12A(3)(b).
[46] Ibid at section 12A(3)(c).
[47] Ibid at section 12A(3)(d).

section as if it the text said the "Competition Commission or the Competition Tribunal must *only* consider the effect that the merger will have on [the listed factors]".

31. The Act does not rank or distinguish between the importance of its equity and efficiency purposes.[48] Nor does it limit its equity based purposes to what might be called "directly" or "traditionally" economic effects as does s12A(3) of the Act. Deliberately[49] departing from what may be considered a mainstream approach to competition law, it aims to allow the Competition authorities to assist in the transformation of the structure of the economy and contribute to the redistribution of basic resources. This much can be inferred from its purposes section which indicates that one of the Act's goals is to "promote employment *and advance the social* and economic *welfare of South Africans"*.[50] It would be curious then, for a specific section of the Act – more especially the *only* section which contains an explicit public interest condition – to limit rather than expand on the scope of the Act's broad equity focus.

32. SECTION27 submits that a more reasonable, constitutionally compatible, interpretation is that the specific listing of public interest factors is purposed at emphasising or highlighting the importance of certain public interest considerations that the legislature determined were of such great importance that the Competition authorities ought to be given no option but to consider in each and every public interest consideration in a merger analysis.

33. Three further practical and historical circumstances help explain, why it is the legislature may have insisted on the consideration of the specific listed factors in s 12(A)(3):
    - First, labour unions presence and strength throughout the drafting process and central role in the securing of public interest purposes and provisions in the Act is well documented. It is likely that the specific inclusion of employment and industrial policy in the list was at the demand of the strong union movement who would neither budge on their insistence of this inclusion to protect their constituencies nor trust courts and Competition authorities to resist the

[48] Timothy Fish Hodgson, "Public interest, the Constitution and the Health care Inquiry: preventing patients from becoming the victims of market failure".
[49] Competition Commission v Yara South Africa (Pty) Ltd and Others (CCT 81/11) [2012] ZACC 14; 2012 (9) BCLR 923 (CC) (26 June 2012) at para 49: "The Act *deliberately* sets out both equity and efficiency-based goals". (Emphasis added).
[50] Competition Act, s 2.

temptation of an approach to public interest which argued that free and efficient markets were always and only what was in the public interest.[51]

- Second, the factors listed in s 12(A)(3) are all general, economic and social factors which are capable of application to all sectors and markets. It is therefore possible, and sensible, to give the Competition authorities clear guidance on their uniform relevance to the public interest analysis. This does not mean that in particular markets in which an equity focus is necessary for other economic and social reasons, as is the case in market in which the product or service is the entrenched constitutional right to access to healthcare services, that such a public interest consideration should not be canvassed, but only that this type of consideration varies from market to market and sector to sector rendering specific listing less effectual.
- Third, merger analysis, by its very nature gives competition authorities the crucial ability to prevent future harms to the rights of people electing to participate in particular markets. Arguably uniquely amongst the Competition's powers[52] it gives the Competition Commission the ability prevent distortions of the structure of the South African economy which depart from the broad public interest objects of the Act, the rights entrenched in the Constitution and the Constitution's broader project of economic transformation. Particularly in markets in which the products or services in question are constitutionally entrenched rights, it is difficult to conceive of either better placed institutions than the competition authorities to protect people from the violations of their rights likely to be caused uniquely by the overconcentration of power in healthcare, food or education markets or a reason why the Competition Commission, in the fulfilment of its duty to *"respect, protect, promote and fulfil the rights in the Bill of Right"* could lawfully fail to do so.[53]

34. It must be emphasised that any interpretation of the Act which ignores or contradicts the scope of the application of the Constitution as the supreme law, or prevents the

[51] See generally, David Lewis, 'Thieves at the Dinner Table: Enforcing the Competition Act' (2012) (noting that given the character of South Africa's new political regime it is clear that no major piece of socio-economic legislation would have passed muster without clear public interest provisos) at 40-41, 118.
[52] With the possible exception of the broad power granted by the Competition Amendment Act, s 43(B)(1) to initiate market inquiries. Note however that the Commission's enforcement powers with regard to market inquiries are more circumscribed and effectively only allow for the Commission to issue recommendations or utilise the ordinary complaints and referral system at its disposal.
[53] Section 7(2) Constitution of the Republic of South Africa 1996.

competition authorities from complying with their constitutional and statutory duties, cannot be constitutional. SECTION27 submits that the "restrictive interpretation" of section 12A(3) which regards the factors listed therein as a closed list achieves precisely these effects.

V. Mergers in the market for private hospitals: creeping mergers and socio-economic rights

35. We now make brief submissions with regard to the well documented phenomena of so-called creeping mergers in the national private hospital sector and the potential relevance of an expansive, rights-informed interpretation of s 12A(3) of the Act to the treatment of these mergers. Creeping mergers can be defined as follows:

> "The term 'creeping acquisition' encompasses a range of situations. While it can refer to a series of acquisitions over time that individually do not raise competitive concerns, but when taken together, the acquisitions have a significant competitive impact, the term creeping acquisition also refers to a firm with existing substantial market power enhancing its market power through one (or more) acquisitions which individually do not substantially lessen competition."[54]

36. The Competition Tribunal has in several cases noted concerns about the effects of creeping mergers.[55] The potential dangers of creeping mergers are particularly pronounced in markets with high barriers to entry, such as private hospital markets.[56] The upshot is that the Terms of Reference for the Health Inquiry note that three hospital groups share 87.8% of the beds in the national private hospital market.[57] According to the Department of Health, not only does this place private hospitals at a "negotiation imbalance" with medical schemes and administrators but also "placed the hospital groups in an oligopoly position which has largely eliminated any possibility of price

[54] "Creeping mergers – should we be concerned? A case study of hospital mergers in South Africa" Genna Robb, page 1. Twelve such mergers in the hospital market are noted by Robb at 15-7.
[55] Id at page 2.
[56] "Creeping mergers – should we be concerned? A case study of hospital mergers in South Africa" Genna Robb, page 1.
[57] Terms of Reference for Market Inquiry into the Private Health care Sector Government Gazette Notice 1166 of 2013 [Terms of Reference].

competition".[58] An OECD report on Pricing and Competition in Specialist and Hospital Services in 2013 cited hospital mergers as responsible for the impact of market concentration on price increases of at least 10%.[59]

37. Later this year, the Health Inquiry Panel will investigate the state of competition in the private hospital market comprehensively, including an assessment of "the influence of market concentration on costs and quality of hospital-based care".[60] Stakeholders in the Health Inquiry have noted concerns that there is limited price and quality-based competition in this market and that the private hospital system has shown limited innovation. The Department of Health has observed that "sufficient market power to impose their increases on medical schemes, and specialists who balance bill patients, sometimes by as much as 300% of the NHRPL."[61]

38. Therefore, though it has not yet been definitively determined by the competition authorities, the high concentration within the private hospital market is possible contributing factor to inflated prices and reduced quality of healthcare services accessed by the 8.7 million people accessing their constitutional right through this private sector.[62] Whilst potentially compromising the public interest of users of the private healthcare system in accessing affordable healthcare,[63] research suggests that these interests may be conflict with the private interests of private hospital groups. There appears to be a correlation between concentration levels in the private hospital markets and the

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[58] National Department of Health, Discussion Document the Determination of Health Prices in the Private Sector at p 12 accessed at http://www.medicalschemes.com/files/Health%20Price%20Determination/DiscussionDocOnPriceDetermination.pdf.

[59] National Department of Health submission to the Panel of the market inquiry into the private health care sector, section 5.2, page 30, para 67.

[60] Terms of Reference for Market Inquiry into the Private Health care Sector Government Gazette Notice 1166 of 2013.

[61] National Department of Health, Discussion Document the Determination of Health Prices in the Private Sector at p 12 accessed at http://www.medicalschemes.com/files/Health%20Price%20Determination/DiscussionDocOnPriceDetermination.pdf. See also the 2008 report of the Council for Medical Schemes cited in Robb (supra):

> "The hospital market technically became concentrated in the key national markets (major metropolitan areas) from 1999 (due to merger activity), and overall from 2002. The period when the market became concentrated coincides with a trend break in hospital costs. This report concludes that the two are causally related. Concentration increases market power, which sustains high prices, costs and inefficient behaviour."

[62] Robb (supra) at p 2-3.

[63] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14 at para 32.

profitability of the major hospital groups: increases in market concentration in the South African private hospital markets have corresponded with a period of higher profitability.[64]

39. Furthermore, it must be emphasised that the highly concentrated state of the private hospital market is a recent development which has, in part, taken place during the operation of the merger provisions of the Competition Act.[65] It appears that because these mergers are each individually sufficiently small to pass through the merger evaluation provisions "competition test", they have simply been allowed to proceed, many free of any conditions whatsoever.[66] SECTION27 submits that for the public interest test and the appropriate remedies determined to alleviate harms to public interest to be of value, they must be able to address these and similar well-known problems exposed by self-interested business practices within markets in which the product or services traded are constitutionally entrenched rights.

40. Finally, it is should be noted that the overconcentration within private hospital markets has, plausibly, not only impacted on the quality and price of healthcare services accessed by 8.7 million South Africans but may speculatively also contribute to further breakdowns within the private healthcare system:

    - The concentration of medical schemes and medical scheme administrators markets have increased in last decade, apparently more exponentially than in the private hospital market, according to hospital groups' submission to the Health Inquiry Panel.[67] The increased concentration of medical schemes and medical schemes administrators may well give rise to similar rights-based concerns that "creeping" mergers in the private hospital markets in the future. Indeed hospital groups have alleged that some of these mergers have been under scrutinised;[68]
    - Increased concentration of medical schemes and medical schemes administrators may reduce the bargaining power of users of the private healthcare system in

[64] "Creeping mergers – should we be concerned? A case study of hospital mergers in South Africa" Genna Robb, page 8.
[65] Id at page 6: "from 1996 to 2006, concentration in the South African private hospital market increased substantially. In 1996, the three main hospital groups (Life, Netcare and Mediclinic) accounted for 51% of acute beds. By 2006 this proportion had increased to 84%."
[66] Id at p 15-7.
[67] Life Healthcare Group's submission to the Panel of the market inquiry into the private health care sector, pages 32-40; Netcare's submission to the Panel of the market inquiry into the private health care sector, page 39.
[68] Mediclinic's submission to the Panel of the market inquiry into the private health care sector, page 90.

their interactions with medical schemes and limit their range of choices, and potentially increase administrative costs and premiums paid by medical scheme members, thereby impacting on their ability to access the right to have access to healthcare services; and

- Inadequate or non-payment of treatment, care and diagnosis for Prescribed Minimum Benefits in terms of the Medical Schemes Act and its regulations appear to be, in part, collateral damage which is borne by members of medical schemes in this bargaining war between medical schemes and national private hospitals. This bargaining war is, in turn, impacted on by the relative market power of hospital groups and medical schemes. The Council for Medical Schemes has reported "glaring non-compliance" with PMB regulations which it describes as under "vociferous" and "unrelenting" "constant attacks" by medical schemes.[69] The harm of this non-compliance with PMB's, which are a major safeguard of the healthcare rights of members of medical schemes, undoubtedly violates these rights. SECTION27's patient testimonials, included in our submission to the Health Inquiry Panel indicate the significant human impact of these violations.[70]

41. These speculative impacts of mergers within major healthcare markets are those which emerge in the submissions of parties to the Health Inquiry Panel. Although the Health Inquiry must still investigate this bargaining process thoroughly, SECTION27 would like to bring these potential constitutional consequences of increased concentration in key markets in which the products and services traded are constitutionally entrenched rights to the Competition Commission's attention during the process of finalising the Draft Merger Guidelines. This is because the evidence available at this point suggests that the Commission's present approach to the merger evaluation provisions may be allowing, and indeed inadvertently approving of, violations of the healthcare rights of users of the private healthcare system.

42. SECTION27 submits that the inclusion within the Merger Guidelines of an approach to both sections 12A(3)(a) in particular and 12A(3) more broadly, which can accommodate for the protection of constitutional rights will contribute significantly to the competition

[69] SECTION27 Submission to the Health Inquiry Panel at para 110. See pages 44-52 for a fuller discussion of the PMBs.
[70] Id at Annexure A1-A9.

authorities' ability to mitigate potential harms to the right to have access to healthcare services through mergers within various markets in the healthcare sector.

43. Finally, innovative, constitutionally informed remedies, similar to those granted by the Tribunal in *National Pers* in the private healthcare market would go a long way to mitigating potential negative effects of creeping mergers. SECTION27 submits, that it may, for example, be entirely appropriate in some circumstances for competition authorities to require merger parties to identify and participate in joint programmes with the Department of Health aimed at building capacity in public health sector, as a condition for the approval of mergers which may have negative impacts on users of the private healthcare systems' rights to have access to health care services.[71]

VI. Summary of key recommendations

44. In line with the above submissions SECTION27 makes the following recommendations with regard to the Draft Merger Guidelines:
    - That the Merger Guidelines explicitly acknowledge the significance and importance of the role of both the Constitution and the dual equity and efficiency purposes of the Competition Act to merger evaluations, including the role of merger in economic transformation and the advancement of social and economic welfare of all in South Africa;
    - That the Merger Guidelines adopt an "expansive interpretation" of both specific factors listed in s 12(A)(3)(a-d) of the Act and s 12A(3) of the Act read as a whole. This will enable the competition authorities to consider public interest factors beyond those listed in s12A(3)(a)-(d), and allow for special consideration of constitutional rights as particular industrial sectors in terms of s12A(3)(a) of the Act. To the extent that this is deemed undesirable, given the ambiguous wording of the Act, SECTION27 submits the Commission should recommend an amendment to the Act which gives better effect to both the Constitution and the purposes of the Act and allow the Commission to consider harms to constitutional rights that may result from mergers; and
    - Irrespective of whether the above suggestions are accepted, that the Merger Guidelines acknowledge the particular constitutional importance of mergers in

[71] *National Pers* at para 55 – remedy reworded in order to tailor the suggestion to the healthcare context.

markets in which the products or services being traded are constitutionally entrenched rights such as the rights to sufficient food and water, access to healthcare services, housing and education. SECTION27 submits that the Merger Guidelines should explicitly recognise that in mergers in these markets that it is more than abstract efficiency or equity at stake but the constitutionally entrenched rights of people living in South Africa. If an expansive interpretation of s 12A(3) is not accepted, SECTION27 submits that the Commission should detail how it will accommodate the constitutional requirement that the competition authorities respect and protect the rights of people living in South Africa through the application of its merger evaluations procedures.

VII. Conclusion

45. SECTION27 applauds the efforts made by the Competition Commission over the last 15 years to attempt to use competition law for the "advance the social and economic welfare of South Africans" and congratulates the Commission recent efforts to protect South African's rights such as the prioritisation of food and agro-processing sector and the initiation of the market inquiry into the private healthcare sector.

46. SECTION27 would like to thank the Competition Commission for the opportunity to make submissions on the Draft Merger Guidelines. We would like to express our willingness to participate in any further consultations or discussions on this matter or the issue of the role of the Constitution and public interest in competition law more broadly.

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