Notice in Respect of Collective Action in the Community Pharmacy Sector

Decision No. N/09/001

Date: 23 September 2009

The Competition Authority
An tÚdarás Iomaíochta

Table of Contents

1. INTRODUCTION

1.1 The Competition Authority is the government body with responsibility, *inter alia*, for the enforcement of Irish and EC competition law in the State. It operates within the framework of the Competition Act 2002 ("Competition Act") and the Treaty establishing the European Community ("Treaty") in conjunction with Council Regulation (EC) No. 1/2003. The mission of the Competition Authority is to ensure that competition works well for consumers and the Irish economy.

1.2 The Competition Authority has, on a number of occasions, considered the application of competition law to the activities of undertakings providing goods and services within the health sector, in particular in relation to the activities of trade associations representing self-employed health care professionals.[1] In January 2007, the Competition Authority published its Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees, following a public consultation on the setting of fees for professional medical services provided to private health insurers.[2] Furthermore, in September 2007, the Competition Authority began examining allegations of collective action by pharmacy contractors in response to attempts by the Health Service Executive ("HSE") to modify reimbursement for drugs dispensed to the general public on behalf of the HSE.[3]

1.3 In October 2008, in an effort to bring the community pharmacy investigation to a constructive outcome, the Competition Authority commenced a public consultation into collective action in the sector. A consultation document, entitled *Consultation on Collective Action in the Community Pharmacy Sector*, was published alongside the consultation process.[4] The consultation document set out the views of the Competition Authority on the issues involved and invited submissions from interested parties on mechanisms by which pharmacy contractors might engage collectively with the HSE, within the parameters laid down by Irish and EC competition law. In particular, the Competition Authority sought to determine whether, in accordance with its statutory functions, it might issue a guidance notice addressing the relevant issues, pursuant to section 30(1)(d) of the Competition Act, and/or issue a declaration, pursuant to section 4(3) of the Competition Act, to the effect that a specified category of agreements, decisions or

[1] For example, in September 2005, the Competition Authority arrived at a settlement with the Irish Hospital Consultants Association (IHCA), relating to legal action taken by the Competition Authority against the IHCA that concerned negotiations between the IHCA and private health insurance companies, which set the fees consultants receive for the treatment of patients covered by private health insurance. Furthermore, in May 2007, the Competition Authority agreed settlement terms with the Irish Medical Organisation (IMO) in relation to legal proceedings initiated in the High Court by the Competition Authority; this action stemmed from allegations of price-fixing by the IMO in relation to the provision of medical reports to life assurance companies.

[2] Published 10 January 2007, available on the Competition Authority's website at http://www.tca.ie/templates/index.aspx?pageid=1074.

[3] See the press release issued by the Competition Authority on 17 October 2007, entitled "Competition Authority launches Investigation into Collective Withdrawal by Pharmacies from the Methadone Programme", available on the Competition Authority's website at http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=204.

[4] Published 10 October 2008, available on the Competition Authority's website at http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=228, hereafter "consultation document".

concerted practices complies with the conditions set out in section 4(5) of the Competition Act, and therefore is not prohibited.

1.4 The public consultation concluded on 28 November 2008, by which stage four substantive submissions had been received by the Competition Authority in response. On the basis of the submissions received, the Competition Authority finds itself unable to issue a declaration pursuant section 4(3) of the Competition Act on this issue. Instead, the Competition Authority has decided to issue this guidance notice pursuant to section 30(1)(d) of the Competition Act, reiterating its views on the question of collective negotiations by professionals involved in the health sector. The notice explains why the submissions received in response to the public consultation have not permitted the Competition Authority to substantially advance the parameters of the community pharmacy debate. In addition, the notice summarises the guidance provided in the consultation document, and moreover, updates it to reflect recent judicial and legislative developments, in particular the Financial Emergency Measures in the Public Interest Act 2009. Interested parties are referred also to the consultation document itself, and to the 2007 guidance notice on the setting of medical fees.[5]

1.5 Chapter 2 of this guidance notice lays out the relevant competition law and other legislative provisions of application to these circumstances. Chapter 3 details the public consultation on community pharmacy, including the background to the consultation, the consultation process and responses received, and subsequent developments. Finally, Chapters 4 to 7 set out again the views of the Competition Authority with regard to collective action by undertakings in the health sector, including an analysis of the *Italian Lawyers* principle and some consideration of the messenger model for the setting of contractual terms and conditions.

[5] See footnote 2 above.

2. LEGAL PROVISION OF APPLICATION TO COLLECTIVE ACTION BY PHARMACY CONTRACTORS

Section 4(1) of the Competition Act and Article 81(1) of the Treaty

2.1 It is necessary, first of all, to recap on the legal provisions applicable in this instance. Section 4(1) of the Competition Act prohibits and makes void all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State. A non-exhaustive list of forms of conduct which may be caught by the Competition Act is provided, namely agreements, decisions by associations of undertakings or concerted practices which:

> (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
>
> (b) limit or control production, markets, technical development or investment,
>
> (c) share markets or sources of supply,
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage, *and/or*
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

2.2 Moreover, if the conduct at issue has the potential to affect trade between Member States, this will trigger the application of Community competition law.[6] It is well-established in Community law that any agreement, decision or concerted practice is liable to have an appreciable affect on trade between Member States where it applies to the whole of a national territory.[7] Moreover, the retail pharmacy sector is one which benefits from a significant amount of parallel trade between Member States, creating a further potential for inter-State effect. It must be emphasised that, where trade between Member States is affected, thus triggering the application of the Treaty, it is not possible for national law to disapply or derogate from the application of the Community competition rules.

2.3 Article 81(1) of the Treaty,[8] upon which section 4(1) of the Competition Act is based, prohibits all agreements between undertakings, decisions

[6] Pursuant to Article 3 of Regulation 1/2003, where section 4 of the Competition Act is applied to agreements, decisions by association of undertakings or concerted practices which may affect trade between Member States, Article 81 of the Treaty must also be applied to that conduct. The application of section 4 cannot lead to the prohibition of conduct which may affect trade between Member States but would not be prohibited by Article 81 of the Treaty. Therefore, where EC law applies applies, section 4 must be interpreted as essentially coterminous with Article 81 of the Treaty.

[7] Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] OJ L13/34 at paragraph 27; Case C-309/99 *Wouters* [2002] ECR I-1577 at paragraph 95.

[8] Article 81 of the Treaty, and its subsections, will hereafter be referred to as "Article 81" et seq.

by associations of undertakings and concerted practices which may affect trade between Member States to an appreciable extent and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. Article 81(1) lists the same examples of conduct that may raise competition concerns as found in section 4(1) of the Competition Act. It is clear, however, that the examples listed in Article 81(1) do not constitute an exhaustive list of potential violations of EC (and by analogy, Irish) competition law.[9]

2.4 More detailed consideration will now be given to various elements of the section 4(1) and Article 81(1) prohibitions. This information was originally published in paragraphs 3.8-3.13 of the consultation document, and is reproduced here for guidance purposes.

Undertaking

2.5 An "undertaking" is defined by section 3(1) of the Competition Act as "*a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service.*" For the purpose of Community competition law, the concept of an "undertaking" encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.[10] The Competition Authority takes the view that each self-employed pharmacist, or "pharmacy contractor",[11] is an undertaking for the purposes of both Irish and EC competition law.[12]

2.6 The word "association" is defined widely,[13] and thus the Competition Authority takes the view that the representative body of pharmacists in Ireland, the Irish Pharmacy Union ("IPU"),[14] is an association of undertakings for the purposes of section 4(1) of the Competition Act and Article 81(1). This is in accordance with the views of the Commission, which has stated:

> A professional body acts as an association of undertakings for the purposes of Article 81 when it is regulating the economic behaviour of the members of the profession. This is true even where professionals with employee status are admitted, since professional bodies normally and predominantly represent independent members of the profession.[15]

[9] Case C-209/07 *Beef Industry Development Scheme* (Judgment of 20 November 2008) at paragraph 23.

[10] Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979 at paragraph 21.

[11] See paragraph 3.3 below for a definition of the term "pharmacy contractor".

[12] This view is consistent with the position of the Commission that professionals, insofar as they are not employees, are engaged in an economic activity (and thus constitute undertakings) because they provide services for remuneration on markets. See *Report on Competition in Professional Services*, COM (2004) 83 final, hereafter "*Professional Services Report*", at paragraph 68.

[13] See Faull & Nikpay (eds.), *The EC Law Of Competition* (Oxford 2007), at paragraph 3.100.

[14] Formerly the Irish Pharmaceutical Union.

[15] *Professional Services Report* at paragraph 69.

Agreement

2.7 The concept of "agreement" requires that the undertakings involved express their joint intention to conduct themselves on the market in a specific way.[16] At least two undertakings must be party to the impugned agreement before any section 4(1) or Article 81(1) concerns can arise.

Concerted Practice

2.8 A "concerted practice" is a form of joint conduct by undertakings which does not result in an actual agreement between the undertakings concerned, yet the undertakings involved "*knowingly substitute practical cooperation between them for the risks of competition*".[17] There is no requirement that the undertakings involved work out an "actual plan" for a concerted practice to exist.[18]

2.9 The concepts of agreement and concerted practice are fluid and frequently shade into each other. It is understandable why concerted practices are treated like agreements when they have an anticompetitive object or effect. Competition law requires independent undertakings to take independent actions on the market. It is unnecessary, in establishing a violation of section 4(1) or Article 81(1), to classify the impugned conduct as either an agreement or a concerted practice. The Commission has, in many Article 81 cases, classified the infringements at issue as "*agreements and/or concerted practices*", a practice that has been approved by the Community courts.[19]

Sections 4(2) and 4(5) of the Competition Act and Article 81(3) of the Treaty

2.10 The prohibition of anticompetitive agreements, concerted practices and decision of associations of undertakings that is contained in section 4(1) of the Competition Act is qualified by section 4(2). This subsection provides that an agreement, decision or concerted practice shall not be prohibited if it complies with four conditions set out in section 4(5) of the Competition Act. Consequently, any agreement, decision or concerted practice that, strictly speaking, is caught by the section 4(1) prohibition may be saved if it satisfies the four criteria set out in section 4(5) of the Competition Act.

2.11 Article 81(3) contains a similar exception, providing that the prohibition contained in Article 81(1) may be disapplied where the same four conditions are satisfied. The phrase "exemption criteria" will be used to refer to the four conditions contained in both section 4(5) of the Competition Act and in Article 81(3).

2.12 The exception contained in both section 4(2) and in Article 81(3) acknowledges that a restrictive agreement, decision or concerted practice may nevertheless produce significant objective economic

[16] Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711.

[17] Case 48/69 *ICI v Commission* [1972] ECR 619 at paragraph 64.

[18] Case T-202/98 *Tate & Lyle v Commission* [2001] ECR II-2035 at paragraph 55.

[19] Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

benefits. It is presumed that where the exemption criteria are satisfied, the pro-competitive benefits resulting from the agreement, decision or concerted practice outweigh the anticompetitive effects identified by section 4(1) and/or Article 81(1).[20] The exemption criteria are cumulative, and therefore all four elements must be satisfied for section 4(1) or Article 81(1) to be disapplied. The exemption criteria are:

(i) The agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress;

(ii) Consumers receive a fair share of the resulting benefit;

(iii) The agreement, decision or concerted practice does not impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives; *and*

(iv) The agreement, decision or concerted practice does not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Financial Emergency Measures in the Public Interest Act 2009

2.13 The Financial Emergency Measures in the Public Interest Act 2009 ("2009 Act"), which became law on 27 February 2009, addresses expressly the setting of rates of payment for services provided by health professionals for or on behalf of the State. Section 9(1) of the 2009 Act provides for the unilateral reduction of fees paid to health professionals for services provided for or on behalf of the State in the following terms:

> Notwithstanding any other enactment, contract, arrangement, understanding, expectation, circular or instrument or other document, the Minister for Health and Children may, with the consent of the Minister for Finance, by regulation, reduce, whether by formula or otherwise, the amount or the rate of payment to be made to health professionals, or classes of health professionals, in respect of any services that they render to or on behalf of a health body from the date of the regulation.

2.14 Section 9(4) of the 2009 Act provides that prior to making a regulation to reduce the payment rate to health professionals, the Minister for Health and Children ("Minister") or the relevant health body concerned *"shall engage in such consultations as that Minister considers appropriate*." Section 9(10) of the 2009 Act then explicitly deals with the application of the Competition Act to any consultation process, in the following terms:

> The Minister for Health and Children may define the manner in which consultations under subsection (4) are to be conducted and conduct them in such manner, and with such

[20] Commission Notice *Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08), hereafter "*Article 81(3) Guidelines*", at paragraphs 11, 33.

representatives of health professionals or otherwise, as he or she considers appropriate, and nothing in the Competition Act 2002 shall prevent participation by that Minister or any such representative in such consultations, or the communication and discussion of the outcome of such consultations by the representatives with the health professionals they represent.

2.15 The likely scope of section 9(10) is discussed in greater detail below.[21] Furthermore, section 9(8) of the 2009 Act gives any health care professional, whose fees have been altered pursuant to section 9(1), the right to give 30 days' notice to the HSE that he or she no longer wishes to provide services for or on behalf of the State; after that 30 day period, the health care professional has no further obligations to provide those services.

2.16 Section 9(13) of the 2009 Act contains a review provision, whereby the Minister may from time to time, and shall before 30 June 2010 and every year after 2010, carry out a review of any rates set by regulation pursuant to section 9(1), to consider whether they remain appropriate in light of the existing circumstances.

2.17 Section 9(17) of the 2009 Act contains a definition of "health professional", which includes (note this is not an exhaustive list):

(a) a registered medical practitioner,

(b) a registered dentist,

(c) a registered pharmacist,

(d) an optometrist,

(e) an ophthalmologist,

(f) a podiatrist, and

(g) a chiropodist.

2.18 In addition to the express provision relating to health professionals contained in section 9 of the 2009 Act, section 10 of the 2009 Act grants any Minister of the Government, with the consent of the Minister for Finance, the power to reduce by regulation other payments to be made to "*persons, or classes of persons, in respect of any service that they render*" for or on behalf, or under the aegis of, that Minister.[22] In his or her exercise of this general power of reduction, the relevant Minister has the powers enjoyed by, and the obligations imposed on, the Minister under section 9 of the 2009 Act. The Competition Authority's public consultation on community pharmacy was prompted by an attempt by the HSE to reduce the reimbursement paid to pharmacy contractors for drugs dispensed under the HSE's prescription drugs schemes, and potential collective action by pharmacy contractors in response. The competition law issues under examination were, furthermore, considered likely to have important implications for the supply of health care services to the HSE more

[21] See paragraphs 4.10-4.11, and Chapter 5.

[22] 2009 Act, section 10(1).

generally, as these issues are likely to reoccur in other areas of the health sector.

3. THE COMMUNITY PHARMACY CONSULTATION

3.1 This chapter details the structure of the Community Drugs Schemes up until 2007, events leading to the public consultation on community pharmacy and the consultation process itself, and subsequent developments in the community pharmacy sector.

Background to the Public Consultation on Community Pharmacy

3.2 The HSE is a public body charged with the management and delivery of health and personal social services in the State.[23] The object of the HSE is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public.[24]

3.3 The HSE administers a variety of schemes for the provision of prescription drugs to the public,[25] known as the Community Drugs Schemes, through a series of Community Pharmacy Contractor Agreements ("contractor agreements") which it has concluded with the proprietors of retail pharmacies located throughout the State.[26] Each proprietor is designated a "pharmacy contractor" by the contractor agreement, and their pharmacy, a "community pharmacy". There are about 1,600 retail pharmacies operating in the State, practically all of which supply community pharmacy services under the Community Drugs Schemes.[27]

3.4 Under the terms of each contractor agreement in place in 2007, a community pharmacy dispensed drugs to eligible persons under the Community Drugs Schemes. The HSE made payment in consideration, consisting of a fixed fee to cover the dispensing service provided by the community pharmacy, which varied according to the Community Drugs Scheme at issue, and reimbursement of the ex wholesaler price of the drug provided.[28] Under some of the Community Drugs Schemes, the community pharmacy also received a 50% mark-up on the ex wholesaler price.

3.5 On 17 September 2007, the HSE informed pharmacy contractors that it would be altering, as of 1 January 2008, the mark-up payable for the reimbursement of prescription drugs provided by community pharmacies under the Community Drugs Schemes.[29] Historically, the

[23] Health Act 2004, section 7(4).

[24] Health Act 2004, section 7(1).

[25] Health Act 1970, section 59.

[26] The terms of the contractor agreements in place in 2007 were concluded in 1996. There full text of that agreement is available at: http://www.dohc.ie/publications/pdf/community_pharmacy_services.pdf?direct=1.

[27] Report of the Independent Body on Pharmacy Contract Pricing, June 2008, hereafter "Dorgan Report", available online at: http://www.dohc.ie/publications/pdf/pharmacy_contract_pricing.pdf?direct=1, at paragraph 2.2.

[28] Previously, the ex wholesaler price was calculated as the fixed ex factory price (also known as the "landed price"), plus a mark-up of 17.66 %, presumed to be the wholesaler mark-up paid by the community pharmacy.

[29] The ex wholesaler price was to be lowered to an 8 % mark up on ex factory price from 1 January 2008, and a 7 % mark up on ex factory price from 1 January 2009. No changes to the dispensing fee payable for community pharmacy services were proposed.

terms of the contractor agreement, including the fee paid, were negotiated between the HSE and the IPU. In this instance, however, it appears that the HSE did not discuss with the IPU its proposal to reduce reimbursement in advance of the announcement of 17 September 2007. The HSE instead maintained that competition law prevented consultation with the representative body of an association of undertakings.[30]

3.6 Pharmacy contractors responded, individually and collectively, to the HSE's proposal to change their remuneration. A number of pharmacy contractors commenced court actions against the HSE, alleging a breach of the contractor agreement. In the *Hickey* case,[31] Finlay Geoghegan J in the High Court interpreted the 1996 contract to mean that the Minister had the right, unilaterally, to set prices under the contract, but that the exercise of that right was subject to the obligation to consult (but not negotiate) with the IPU, as required by clause 12(1) of the agreement. Thus, the Court concluded that the unilateral change in the mark-up by the HSE constituted a breach of the 1996 contractor agreement, on the basis that the new rates were not set by the Minister after consultation with the IPU. The Court further held that clause 12(1) was not contrary to section 4(1) of the Competition Act, because it was simply a contractual obligation to consult in advance of a unilateral determination of the rates of payment by the Minister.

3.7 The HSE also received a large number of letters from pharmacy contractors throughout the State, each threatening to withdraw from the provision of community pharmacy services under the various HSE schemes. In October 2007, numerous pharmacy contractors in the Dublin area withdrew from the Methadone Treatment Scheme, a HSE-administered programme for the provision of methadone to HSE patients by community pharmacies. As the issue dragged on, the deadline for the threatened withdrawal by other pharmacy contractors was extended to March 2008. At the same time, the Competition Authority commenced an investigation into alleged collective action by pharmacy contractors in response to the HSE's proposal to modify reimbursement under the schemes.[32]

The Consultation Process

3.8 The community pharmacy investigation highlighted the fundamental tension existing between the prohibition on anticompetitive collusion between undertakings, contained in Article 81 of the Treaty and section 4 of the Competition Act, and what many self-employed health care professionals perceive as their right to engage in collective negotiations with the State. In an effort to resolve some of these tensions, the Competition Authority on 10 October 2008 launched a public consultation into the extent to which (if at all) independent pharmacy undertakings may act collectively with respect to the setting of terms

[30] See http://www.hse.ie/eng/newsmedia/A_Fair_Price_for_Wholesale_Services_Means_Lower_Medicine_Prices.html.

[31] *Hickey and others v HSE* [2007] 180 COM, hereafter "*Hickey*", judgment of 11 September 2008.

[32] See the press release issued by the Competition Authority on 17 October 2007, entitled "Competition Authority launches Investigation into Collective Withdrawal by Pharmacies from the Methadone Programme", available on the Competition Authority's website at http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=204.

and conditions, including fees, for the supply of services by community pharmacies under various drugs schemes administered by the HSE.

3.9 The purpose of conducting the consultation was to assist the Competition Authority in providing guidance on lawful and workable mechanisms for the setting of terms and conditions for the supply of community pharmacy and other health care services. Specifically, the Competition Authority wished to explore the possibility of issuing a guidance notice pursuant to section 30(1)(d) of the Competition Act and/or a declaration pursuant to section 4(3) of the Competition Act addressing these issues, in line with its statutory functions.

3.10 To accompany the public consultation, the Competition Authority published a consultation document setting out the legal provisions applicable to the community pharmacy sector and containing the Competition Authority's views of the application of the competition rules to the issues. Seven questions relating to the community pharmacy sector were identified, to which responses from interested parties were requested. In addition, the Competition Authority invited general comments about the relevant issues, in an effort to take into account all viewpoints and to derive the greatest value from the consultation process.

3.11 The public consultation was announced in a press release issued on 10 October 2008, and both the press release and the consultation document were published on the Competition Authority's website at www.tca.ie, where they can still be found. The Competition Authority wrote individually to a number of stakeholders and other interested parties, informing them of the public consultation underway and inviting them to submit a response.

3.12 Also on 10 October 2008, the Competition Authority published a related enforcement decision, ED/01/008 *Alleged anticompetitive conduct by the Health Service Executive relating to the administration of the Community Drugs Schemes*.[33] Publication of the HSE enforcement decision followed the receipt by the Competition Authority of a number of complaints alleging that the HSE had breached competition law in the manner in which it administered the Community Drugs Schemes in the State, and the subsequent investigation of these allegations by the Competition Authority. The document sets out and explains the Competition Authority's view that the HSE does not act as an undertaking for the purposes of either Irish or EC competition law when administering the Community Drugs Schemes. Consequently, in the opinion of the Competition Authority, the HSE is not subject to the prohibitions contained in Articles 81 and 82 of the Treaty and/or sections 4 and 5 of the Competition Act.

3.13 The public consultation concluded on 28 November 2008. Four substantive submissions were received by the Competition Authority in response to the consultation: three from trade associations representing undertakings that operate in the health sector, namely the Pharmaceutical Distributors Federation (PDF), the Association of Optometrists of Ireland (AOI) and the IPU, and the fourth response

[33] Hereafter "HSE enforcement decision"; available on the Competition Authority's website at http://www.tca.ie/EnforcingCompetionLaw/OfficialDecisions/EnforcementDecisions/Decisions.aspx?selected_item=12.

was from the HSE itself. Each of these four responses is available on the Competition Authority's website at www.tca.ie.

3.14 Two further responses were received, from the Pharmaceutical Society of Ireland and Bord na Radharcmhastóirí, each of which declined to make a submission regarding the consultation.

3.15 Unfortunately, none of the submissions received in response to the consultation have provided the Competition Authority with comments that have helped it to make any significant advance on the position set out in the consultation document. The trade association submissions, that is, the submissions of the PDF, AOI and IPU, each emphasise what the organisations perceive as the importance and indispensability of collective negotiation by undertakings in the health sector. Collective negotiation is, of course, a mechanism that creates a significant risk that the sellers may impose on the buyer inflated prices for the goods and/or services to be provided. The limitations imposed by competition law do not receive meaningful consideration in any of these three submissions. Nor is consideration given to the underlying theory behind the prohibition on collusion between competing undertakings, which in this instance has as its objective securing the best deal for the taxpayer. None of the three submissions consider the alternative mechanisms for collective engagement suggested by the Competition Authority in any constructive manner.

3.16 The HSE's submission, by contrast, is broadly supportive of the position adopted by the Competition Authority, envisaging a role for the messenger model in future contractual negotiations. The HSE stresses the need to ensure the independence of the messenger (taking the view that the IPU would not be an acceptable "messenger" in this instance), the *bona fides* participation of pharmacy contractors and the absence of anticompetitive conduct (for example, threatened withdrawals of services) by participants. However, the HSE takes the view that the use of this mechanism is not in accordance with the terms of the existing contact with pharmacy contractors and would require a variation of Clause 12 of the existing contractor agreement. Thus, the HSE's principal concern is the need to change the 1996 contractor agreement in order to eliminate the necessity, under contract law, to consult the IPU on the fee to be paid under the contract. Insofar as the existing contract does not, in and of itself, breach competition law, however, this is not an issue of direct concern to the Competition Authority.[34] Moreover, the powers granted to the Minister in the 2009 Act are likely to have altered the arguments advanced by the HSE relating to this contractual issue.

3.17 In addition, although the HSE identifies a number of non-price issues about which pharmacy contractors may wish to engage in collective negotiations, it takes the view that any collective engagement on these issues should be by means of consultation, as opposed to negotiation. In particular, the HSE states that it does not believe the Competition Authority should make a declaration pursuant to section 4(3) of the Competition Act, stressing that non-price issues may still have an impact on competition.

[34] The significant changes introduced by the 2009 Act likely now mean that the existing contractor agreement no longer prevents the use of the messenger model for fee-setting by the Minister for Health and Children.

Subsequent Developments

3.18 On 4 March 2009, pursuant to section 9(4) of the 2009 Act, the Minister commenced a consultation on fees payable to health care professionals in respect of services provided to the HSE or any other health body. Closing date for written submissions was 18 March 2009, following which the Department of Health and Children conducted a number of oral hearings with various stakeholders.

3.19 On 18 June 2009, the Minister announced changes to the structure of remuneration for pharmacy contractors under the Community Drugs Schemes, comprising the following:

(i) A higher dispensing fee structure, with a sliding scale which would lower the fee for higher volumes dispensed;

(ii) Reduction in the mark-up payable on medicines dispensed under the DPS from 50 percent to 20 percent; *and*

(iii) Reduction in the wholesale reimbursement price payable for the delivery of drugs to pharmacy, to ex factory price plus 10 percent mark-up from 17.66 percent mark-up.[35]

3.20 These changes became law on 1 July 2009, under the Health Professionals (Reduction of Payments to Community Pharmacy Contractors) Regulations 2009 (S.I. No. 246 of 2009).

3.21 In response, a substantial number of pharmacy contractors chose to exercise their rights pursuant to section 9(8) of the 2009 Act, and gave 30 days' notice of discontinuation of service to the HSE, effective from 1 August 2009. While the HSE urged pharmacy contractors to remain within the schemes, it also set up a number of "contingency" pharmacies, operated by HSE staff, in order to provide dispensing services in regions of the State in which large numbers of pharmacy contractors had given notice of withdrawal. It would appear that at least a third of pharmacy contractors did, in fact, cease participating in the various schemes under section 9(8) of the 2009 Act on 1 August 2009.[36] However, on 11 August 2009, the IPU issued a statement in which it "*urged pharmacists to resume normal services*",[37] and it would appear that the substantial majority of pharmacy contractors consequently did so.

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[35] See the Department of Health and Children's press release issued on 18 June 2009, entitled "Minister Harney announces reductions in payments to community pharmacists to reduce rapid rise in State expenditure on drugs and medicines", available online at http://www.dohc.ie/press/releases/2009/20090618.html.

[36] There was considerable dispute between the HSE and the IPU as to the number of pharmacy contractors who had given valid notice of withdrawal effective from 1 August 2009. The IPU claimed that about 1,100 pharmacy contractors had withdrawn; conversely, the HSE claimed that less than pharmacy contractors 600 had given valid notice of withdrawal and had furthermore followed through with actual withdrawal.

[37] Press release entitled "In light of growing risks to patient safety, IPU urges members to resume normal services", available online at the IPU's website at http://www.ipu.ie/index.php?option=com_content&task=view&id=378&Itemid=60.

Outcome of the Consultation

3.22 Having considered the submissions received in response to the public consultation, and taking account of subsequent legislative and other developments in this area, the Competition Authority finds itself unable to issue a declaration pursuant to section 4(3) of the Competition Act in respect of collective negotiation agreements. *Prima facie*, such agreements constitute an anticompetitive restriction of competition contrary to section 4(1), and moreover, nothing in the submissions received has given the Competition Authority any reason to believe that collective negotiations in the community pharmacy sector are likely, generally, to fulfil each of the four cumulative conditions set out in section 4(5) of the Competition Act.

3.23 Instead, the Competition Authority has chosen to issue this guidance notice, summarising the legal position outlined in the earlier consultation document, which represents the current thinking of the Competition Authority. Furthermore, consideration has been given to and account taken of the provisions of the 2009 Act and its potential application in this area.

4. APPLICATION OF SECTION 4 OF THE COMPETITION ACT AND ARTICLE 81

4.1 The following summarises the guidance provided by the Competition Authority in the consultation document with regard to the application of Irish and EC competition law to collective action by pharmacy contractors. This constitutes the considered opinion of the Competition Authority in light of the applicable provisions of the Competition Act and the Treaty and Irish and EC case law. In addition, account has been taken of the relevant provisions of the 2009 Act and its likely application in this instance.

4.2 It must be emphasised that, under Irish law, the Competition Authority is not the decision-making body for competition law purposes. This guidance is provided instead to inform interested parties and their legal advisors about the limits placed by competition law on collective action by undertakings, and thus to assist professional associations and their members in complying with the requirements of competition law. The Competition Authority strongly encourages any trade association and/or undertaking(s) that wish to engage in collective conduct likely to fall within the purview of competition law to seek advice from their legal advisors.

4.3 The Competition Authority takes the view, firstly, that pharmacy contractors are competing undertakings for the purposes of applying Article 81 and section 4 of the Competition Act. Individual community pharmacies operate in local markets, competing with others located within the same geographic market for services provided under the various Community Drugs Schemes. If one community pharmacy dispenses a prescription, for example, the other community pharmacies do not get the business.

4.4 Pharmacy contractors are therefore prohibited from entering into any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition. The representative body of pharmacy contractors, the IPU, which constitutes an association of undertakings, is similarly prohibited from taking a decision which has such an object or effect.[38] The discussion that follows lays out the general principles in terms of an agreement or concerted practice between undertakings; however, the same principles apply to a decision of an association of undertakings.

4.5 An agreement between two or more competing undertakings, setting the price to be charged by each undertaking for a particular service, is considered to have the object of restricting competition, and therefore constitutes a breach of section 4(1) of the Competition Act and Article 81(1) without any need to demonstrate actual effects on the market concerned.[39] Any agreement between pharmacy contractors on the issue of price, such as the dispensing fee or rate of remuneration for drugs dispensed, where the pharmacy contractors concerned intend that the agreed price(s) will be imposed on the purchaser (in this

[38] A professional body may constitute an undertaking in its own right if its activities fall within the definition set out in Irish and/or EC competition law. In this instance, however, it is not necessary to consider whether the IPU acts as an undertaking, insofar as its actions are in any event caught as a decision of an association of undertakings.

[39] *Article 81(3) Guidelines* at paragraph 21.

instance, the HSE), is contrary to section 4(1) of the Competition Act and Article 81(1). Similarly, an agreement to threaten a collective withdrawal of services, to share markets or to restrict output would be a prohibited object restriction.

4.6 Non-price competition is an important factor in the community pharmacy sector. Pharmacies compete on such factors as location, opening hours, quality of service provided, availability of drugs covered by the Community Drugs Schemes, range and price of non-prescription drugs and other products carried and ancillary services offered. Any agreement between pharmacy contractors which has the object or effect of reducing the level of competition between community pharmacies in relation to these non-price factors is likely to breach section 4(1) of the Competition Act and Article 81(1).

4.7 Coordinated conduct between independent undertakings, even where there is no actual agreement, may constitute an anticompetitive concerted practice, which is also prohibited by section 4(1) of the Competition Act and Article 81(1). The concept of concerted practices extends to any contact between undertakings "*the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*".[40] The principal issue is whether, by acting jointly with other undertakings, pharmacy contractors seek to reduce the degree of uncertainty in the market, and thus to reduce the degree of risk that would normally be attendant upon acting independently of competitors.[41]

4.8 An important issue that was at the forefront of the community pharmacy debate is the extent to which a process of consultation with services providers regarding contractual terms and conditions can lead to a breach of competition law by the undertakings involved. Clause 12(1) of the 1996 contractor agreement allowed for unilateral fee-setting by the Minister, but required prior consultation with the IPU before this power can be exercised. Applying the *Italian Lawyers* principle (see below), Finlay Geoghegan J in her judgment in *Hickey* took the view that the requirement to consult contained in clause 12(1) did not, *a priori*, require anticompetitive coordination between undertakings and thus is not voided by section 4(1) of the Competition Act. This is because, in theory at least, consultations can take place without involving a breach of competition law.

4.9 Similarly, section 9(4) of the 2009 Act gives the Minister and/or a health body an express power to engage in "*such consultations as that Minister considers appropriate*" prior to reducing payments to be made to health professionals. Consultations with health care professionals were conducted by the Minister pursuant to this provision in March 2009. Section 9(10) of the 2009 Act confirms that nothing in the Competition Act prevents participation by the Minister and/or representatives of the health professionals in these consultations, or further, the communication and discussion of the outcome of the consultation by the representatives with the health professionals they

[40] Case 40/73 etc *Cooperatieve Vereniging 'Suiker Unie' and others v Commission* [1975] ECR 1663 at paragraph 174.

[41] Case C-8/08 *T-Mobile Netherlands BV and others* (judgment of 4 June 2009).

represent.[42] As illustrated by the *Hickey* case, section 9(1) of the 2009 Act therefore confirms the existing position that consultation, in and of itself, does not breach the Competition Act.

4.10 Implicit within the *Hickey* judgment, however, is the real risk that a consultation process may lead to anticompetitive coordination by the professional association and/or among individual undertakings involved, contrary to Irish and EC competition law. Indeed, the judgment cannot be interpreted to establish that any form of consultation is permitted by law. Section 4(1) of the Competition Act and Article 81 apply with equal force to the activities of undertakings and associations of undertakings occurring in the context of, or response to, a consultation process. Section 9(10) of the 2009 Act, which declares that certain activities do not fall within the purview of the Competition Act, applies only to certain narrowly drawn categories of coordinated activity by representative organisations. In this regard, the 2009 Act is not a new departure. Instead, it merely reiterates the existing position in law, that is, that there is nothing wrong with an association of undertakings being consulted as to what might be an appropriate price, so long as the final decision is not made by agreement with that association. Crucially, section 9(10) of the 2009 Act does not exempt collective action by health professionals in response to changes in remuneration for services provided to or on behalf of the State, beyond the communication and discussion of proposed changes.

4.11 Therefore, while section 9(8) of the 2009 Act gives a right to terminate their contract with the State health body to each individual health professional whose remuneration has been reduced pursuant to section 9(1), any agreement between competing undertakings or decision by an association of undertakings to collectively withdraw services in the event that the buyer does not adopt proposals made to it in the course of a consultation process would likely be contrary to section 4(1) of the Competition Act and Article 81(1). Such actions clearly go beyond the communication and discussion of proposed changes permitted by section 9(10) of the 2009 Act. Similarly, any threat to withdraw services to reinforce a submission, made pursuant to an agreement among independent undertakings or a decision by an association of undertakings, would likely be contrary to Irish, and where relevant, EC competition law. This is the case regardless of whether the buyer, for example the HSE, is an undertaking for the purposes of applying competition law.[43]

4.12 Where there is no evidence of an agreement among undertakings or a decision by an association of undertakings, widespread withdrawal by

[42] It should be noted that the activities of the Minister and/or a State health body would fall within the purview of competition law only where the Minister or State body acts as an "undertaking" for the purposes of Irish, or where appropriate EC, competition law. Whether an entity constitutes an undertaking in a particular instance is dependant on the particular facts at issue. In its HSE enforcement decision, the Competition Authority previously took the view that, for the purposes of both Irish and EC competition law, the HSE is not an undertaking when it engages in various activities relating to the administration of various drugs schemes, and so its actions would not fall within the purview of competition law in those contexts. While it is possible for an entity to be an undertaking when engaged in certain activities and to not be an undertaking when engaged in other activities, it is likely that, in most instances where the Minister or a State health body is consulting in relation to the rate of payment to be made to health professionals in respect of services provided to or on behalf of a State health body, the Minister or State health body falls outside the purview or Irish and/or EC competition law.

[43] See footnote 42 above.

individual undertakings following the decision of the buyer to fix a fee different from the fee recommended by the undertakings, in circumstances that are likely to give rise to a reasonable suspicion that the action is collective, might trigger an investigation by the Competition Authority. In particular, an investigation would be more likely where there is widespread withdrawal at the national level, or where withdrawal was concentrated within a specific local market. The question to be addressed would be whether a series of individual withdrawals were the result of a concerted practice, contrary to section 4(1) of the Competition Act and Article 81(1), as opposed to independent decisions by health professional to terminate their contracts with the State health body, pursuant to section 9(8) of the 2009 Act.

5. THE *ITALIAN LAWYERS* PRINCIPLE

5.1 As discussed at some length in the consultation document, the broadest parameters of collective action by pharmacy contractors are found in the various *Italian Lawyers* decisions of the European Court of Justice.[44] In these cases, it was held, in essence, that where a professional body representing undertakings prepares a draft tariff of fees, which becomes compulsory only when approved by the State, competition law is not infringed because the tariff was not the result of a discretionary decision of the professional organisation in question. Provided that the State has the decisive role, there will be no delegation to private economic operators of the power to fix the tariff, in breach of what is now Article 81.

5.2 The *Italian Lawyers* principle was subsequently invoked by the European Commissioner for Competition, Neelie Kroes, in June 2008, to explain the Commission's approach to collective negotiations by trade associations, in response to a European Parliamentary question put to her regarding the IPU issue.[45] This principle was also applied by Finlay Geoghegan J in the High Court in *Hickey*, and is now confirmed by section 9(10) of the 2009 Act.

5.3 The limits of this principle are clear. It is not the case that where the government fixes the tariff or fees payable, *all* joint action by undertakings connected with a consultation process conducted prior to the government decision is immunised from the application of competition law. Where a professional body is involved with the State in price-setting, the organisation escapes the application of the competition rules only if it is clear that it does not make the actual decision on fees or prices. The professional body cannot agree fees or prices with the State, as an agreement of this nature means that no one party is the decision-maker. Moreover, the professional body in question cannot impose any form of pressure on the State, whether consisting of threats of coordinated withdrawals of services or otherwise. Any pressure exercised upon the State indicates that it is not a real decision-maker and thus leaves the behaviour of the professional body in question open to challenge under national and Community competition law. As Commissioner Kroes stated clearly in her response of June 2008, "*cases where the state either 'rubberstamps' agreements or decisions by the collective body or where the State may only accept or reject a proposal by a collective body without the power to alter or change the proposal may be challenged under Community competition rules.*"

5.4 The right of consultation contained in section 9(10) of the 2009 Act extends only to the communication and discussion of proposed remuneration changes by representatives with the health professionals they represent; it does not, for example, extend to agreements or concerted practices between competing undertakings to collectively withdraw services in response to a proposed reduction in remuneration.

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[44] Case C-35/99 *Arduino* [2002] ECR I-1529; Joined Cases C-94/04 *Cipolla* and C-202/04 *Meloni* [2006] ECR I-11421.

[45] Hereafter "response of June 2008", the full text of which is available at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-2381&language=EN.

5.5 The 1996 contractor agreement required consultation with the IPU, prior to unilateral fee-setting by the Minister. Similarly, section 9(4) of the 2009 Act gives the Minister, or at his or her direction, a State health body, a power to engage in such consultations as the Minister considers appropriate, prior to reductions in the remuneration of health professionals, pursuant to section 9(1) of the 2009 Act. From an enforcement perspective, the precise mechanism by which remuneration is set is an issue outside the concern of the Competition Authority, provided that the mechanism does not mandate or involve a breach of EC competition law or the Competition Act, where applicable.

5.6 However, the Competition Authority would note the significant risk that prior collective action by undertakings may function as a signalling device, facilitating an anticompetitive concerted practice in breach of section 4(1) of the Competition Act and Article 81(1). The *Italian Lawyers* principle does not protect professional associations or undertakings from the application of the competition rules where their actions constitute a concerted practice contrary to section 4 of the Competition Act and/or Article 81. In addition, section 9(10) of the 2009 Act does not protect forms of collective action by undertakings which go beyond the mere communication and discussion of reductions in remuneration. To protect the interests of both the State and health professionals, the Competition Authority recommends that comprehensive safeguards, designed to protect the integrity of the competitive process and to prevent any breach of the competition rules, should be put in place whenever the State chooses to utilise the consultation model of contract-setting.

6. SECTION 4(2) AND ARTICLE 81(3) EXEMPTION

6.1 The Competition Authority has examined the potential application of the exemption provided by section 4(2) of the Competition Act and Article 81(3) to these matters in considerable detail. Having conducted this analysis, the Competition Authority has not identified any forms of collective negotiation on fees between independent service providers which, in its considered opinion, will satisfy all four cumulative conditions for exemption. Consequently, the Competition Authority takes the view that collective negotiations cannot escape the prohibition of anticompetitive agreements, decisions and practices on this basis.

6.2 In the case of collective negotiations between the HSE and IPU, the Competition Authority takes the view that two aspects of the exemption criteria in particular, namely the third and fourth conditions, are not satisfied on the facts. The difficulties identified with these conditions are of a relatively general nature, and therefore these difficulties are likely to reoccur in other areas of the health service, should the exemption be invoked. The submissions received in response to the public consultation did not alter the Competition Authority's thinking in relation to the possible application of the section 4(2)/Article 81(3) exemption to behaviour of this nature.

Third condition: indispensability of the restrictions

6.3 Collective negotiations between the HSE and IPU do not satisfy the third condition for exemption, namely the indispensability of the restrictions. The decisive factor in this instance is whether greater efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction.[46] There is a two-fold test to determine this: firstly, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies, and secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.[47]

6.4 Collective negotiations fall at the first hurdle under this two-fold test. The first part of the test requires that the efficiencies be specific to the agreement in question, in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies, a test not satisfied on the facts. Firstly, it is highly doubtful whether any specific objective efficiencies could arise from collective negotiations between the IPU and the State. However, even if one assumes that collective negotiation facilitates the administration of the Community Drugs Schemes by setting the terms and conditions of the contractor agreements and that this might be construed as an objective efficiency, this efficiency is not specific to the agreement in question and so fails the first limb of the test in any event. Collective negotiations are not the only mechanism by which fees paid under the Community Drugs Schemes can be set: there is at least one alternative mechanism available, the messenger model,[48] which is economically

[46] *Article 81(3) Guidelines* at paragraph 74.

[47] *Article 81(3) Guidelines* at paragraph 73.

[48] See paragraphs 7.1 to 7.4 below for greater details on the functioning of the messenger model.

practicable to use, and is less restrictive of competition. Therefore, the "indispensability" limb of the exemption criteria is not met, without any need to consider whether the individual restrictions of competition that flow from the agreement are reasonably necessary.

Fourth condition: no elimination of competition

6.5 Furthermore, the Competition Authority is of the opinion that the fourth condition for exemption, namely, that the restriction does not afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products or services in question, will not be not satisfied on the facts. This limb of the exemption prioritises rivalry and the competitive process, as an essential driver of economic efficiency, over potentially pro-competitive efficiency gains which could result from restrictive coordination. As the Commission notes:

> When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.[49]

6.6 In particular, the fourth condition is not fulfilled if an agreement, decision or practices eliminates competition in one of its most important expressions, such as price competition.[50]

6.7 Here, collective negotiation creates a substantial risk that pharmacy contractors may impose a supra-competitive price on the HSE for services supplied under the Community Drugs Schemes. In essence, collective negotiation produces a supply price targeted at satisfying and ensuring the participation of every pharmacy contractor, including the pharmacy contractor with the least interest in participating in the Community Drugs Schemes, who consequently requires the largest incentive to sign up. The resulting price is above the price that would be accepted by the majority of pharmacy contractors in a more competitive environment. The potential anticompetitive impact of collective negotiation is heightened by the relatively homogeneous, substitutable nature of the services at issue.[51]

6.8 By sheltering pharmacy contractors from rivalry with other contractors on the issue of price, collective negotiation on fees consequently gives rise to a possibility of eliminating competition in respect of a substantial part of these services. Accordingly, the final limb of the exemption criteria will not be satisfied.

[49] *Article 81(3) Guidelines* at paragraph 105.

[50] *Article 81(3) Guidelines* at paragraph 110 and Case 26/76 *Metro* [1977] ECR 1875 at paragraph 43.

[51] *Article 81(3) Guidelines* at paragraph 113.

7. THE MESSENGER MODEL

7.1 Finally, the Competition Authority highlights again the messenger model, which, provided appropriate safeguards are in place, permits a degree of collective input by service providers into fee-setting by the State within the limits imposed by competition law. In this context, the Competition Authority is of the opinion that the messenger model is the fee-setting mechanism with the greatest potential for satisfying the needs of *all* parties, within the boundaries of the Competition Act and the competition provisions of the Treaty. Accordingly, the Competition Authority actively recommends the messenger model as the most appropriate fee-setting mechanism in these circumstances.

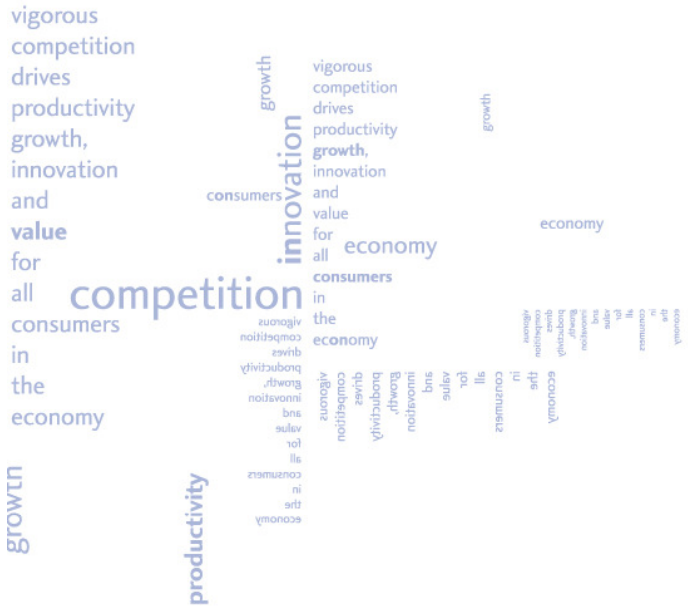
7.2 The messenger model would operate as follows. A third party – the "messenger" – obtains from each service provider (here, each pharmacy contractor), individually, the level of fees that the service provider would require from the State to provide the relevant service. The messenger provides this information to the State, which uses it to devise a fee scale for the reimbursement of service providers that will secure the desired level of participation in the State's scheme. All communications between the messenger and individual service providers must remain confidential *vis-à-vis* other service providers, so that no undertaking knows what any other undertaking requires to participate. Each service provider would then be offered a revised contract by the State, which the provider, again individually, must choose to accept or reject.

7.3 The messenger model is attractive from the perspective of service providers, as it ensures that the State is fully informed of the views of individual participants, as well as other relevant data such as the business' costs structure, prior to setting reimbursement rates for the relevant scheme. From the State's perspective, the messenger model would provide it with the information required to calculate the minimum fee it must offer in order to secure the required degree of participation by service providers. Moreover, if the information-gathering exercise was correctly structured, it would allow for the development of a tiered fee, enabling the State to pay a premium to certain service providers (for example, those operating in deprived urban or isolated rural areas) in order to secure their participation.

7.4 As noted in the consultation document, some aspects of the messenger model may be more problematic. Crucially, the successful application of the mechanism is premised upon each service provider maintaining absolute independence when providing information to the messenger, and again when deciding whether to accept the contract offered by the State. Otherwise, the mechanism might facilitate an agreement or concerted practice among service providers on price or other issues on which they compete. There is a need to incorporate sufficient safeguards into any model selected in order to avoid this risk.

7.5 In its submission to the community pharmacy consultation, the HSE indicated its willingness to consider the messenger model of fee-setting, subject to appropriate amendment of clause 12(1) of the existing contractor agreement. Section 9 of the 2009 Act gives the Minister the power to reduce unilaterally, with the consent of the Minister for Finance, the remuneration of health professionals for services provided to or on behalf of the State. Prior to doing, the

Minister is obliged engage in such consultations as he or she considers appropriate. This broadly drafted provision would appear to provide scope for the development of a messenger model for fee-setting for services provided by health professionals. However, the Competition Authority reiterates that in order both to protect the interests of the State as buyer and to protect health professionals from falling afoul of section 4 of the Competition Act and/or Article 81, any fee-setting mechanism chosen must incorporate sufficient safeguards to minimise the possibility that it may facilitate a breach of Irish and/or EC competition law.



The Competition Authority, Parnell House, 14, Parnell Square, Dublin 1, Ireland
Tel: +353 (0)1 8045400 LoCall 1890 220224 e-mail: info@tca.ie

www.tca.ie