IRISH PHARMACY UNION

Ref: IPU/CA/1108

28 November 2008

Consultation on Community Pharmacy
The Competition Authority
Parnell House
14 Parnell Square
Dublin 1

Dear Sir/Madam

Re: Consultation on Collective Action in the Community Pharmacy Sector

Further to the Competition Authority's invitation for submissions on its *Consultation on Collective Action in the Community Pharmacy Sector*, please find enclosed a submission from the Irish Pharmacy Union.

Please do not hesitate to contact us if you require clarification on any item in this submission.

Yours faithfully

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IRISH PHARMACY UNION

THE COMPETITION AUTHORITY CONSULTATION ON COLLECTIVE ACTION IN THE COMMUNITY PHARMACY SECTOR

RESPONSE OF THE IRISH PHARMACY UNION DATED THE 28TH NOVEMBER 2008 TO THE CONSULTATION DOCUMENT OF THE COMPETITION AUTHORITY DATED 10TH OCTOBER 2008

Irish Pharmacy Union
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1. INTRODUCTION

1.1 In its consultation document on the "Consultation on Collective Action in the Community Pharmacy Sector" dated the 10th October 2008 ("the Consultation Document"), the Competition Authority ("the Authority") stated that it wished to conduct a public consultation on the "*nature and extent to which independent pharmacy undertakings may act collectively with respect to the setting of terms and conditions, including fees, for the supply of services by community pharmacies under various drugs schemes administered by the Health Service Executive ("HSE")*"[1].

1.2 The Consultation Document then states that the document *"outlined the legal provisions applicable to the community pharmacy sector, and furthermore provides some guidance in the form of the Competition Authority's views of the application of the competition rules to these issues"*[2].

1.3 The Consultation Document then invites submissions from stakeholders and interested parties on its contents. The Authority confirms that following the conclusion of the public consultation, *"the Competition Authority will consider whether it can issue a guidance note addressing these 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 concerted practices does not, in its opinion, breach the Competition Act*"[3].

1.4 The Irish Pharmacy Union ("the IPU") wishes to make a submission to the Competition Authority in the context of its consultation.

[1] Paragraph 1.2 of the Consultation Document
[2] Paragraph 1.3 of the Consultation Document
[3] Paragraph 1.4 of the Consultation Document

2. SUBMISSION AS TO PROCESS

2.1 The IPU notes the attention the Competition Authority is giving to pharmacy contractors. While the Authority is perfectly entitled to commence this consultation process, it is not clear what useful purpose the consultation process will serve.

2.2 In the Consultation Document, the Authority states that it is for the courts to determine whether a breach of competition law has occurred[4]. Specifically the Authority notes that it is not a decision-making body[5]. Further the Authority confirms on three separate occasions that concerned parties should obtain advice from their legal advisors[6]. Indeed, the Authority confirms that "*the views expressed by the Competition Authority are not intended to be, and are not a substitute for, independent legal advice*"[7]. The IPU welcomes this confirmation by the Authority that it is (a) not a decision-making body; (b) not the arbiter of the issues in play; and (c) not an advisor to any of the parties concerned. In the circumstances, it follows as to what the utility or purpose of the consultation document, the consultation process or any guidance note that follows from the consultation is to any of the parties concerned in the matter. The issuance of a declaration pursuant to Section 4(3) of the Competition Act is a matter with which we deal below.

2.3 While the IPU does not question the *bona fides* of the Authority in carrying out its statutory duties as the Authority sees fit, it queries, on a very fundamental level, a number of significant aspects of the Consultation Document and the consultation process.

2.4 Firstly, there is the assertion in the document that the Consultation Document and the public consultation "*provides the Competition Authority with the opportunity to present its understandings of the parameters and implications of the Hickey*

[4] Paragraphs 1.5 and 3.37 in the Consultation Document
[5] Paragraph 1.5 of the Consultation Document
[6] Paragraphs 1.5, 3.37 and 4.33 of the Consultation Document
[7] Paragraph 1.5 of the Consultation Document

judgment"[8]. The IPU questions as to whether it is appropriate for the Authority to do so. A High Court decision has been rendered in the *Hickey* case which has not been appealed. It is therefore final and binding on all parties thereto. Further, it is of precedent value to other pharmacy contractors. The IPU is of the view that it is not appropriate for the Authority, or indeed another similar public body, to publish its understanding of the parameters and implications of that judgment and in so doing, however unwittingly, influence the conduct or actions of independent legal entities. Is it not for the parties concerned to take the best possible legal advice regarding the parameters and implications of that judgement? Were the parties concerned to turn to the Authority for its advice on the parameters and implications of the judgement, the Authority would stress that such advice cannot be given by it and that any comments it would make would be by way of guidance to the parties but subject to their own legal advice. So the parties would be unlikely to ask the Authority for such advice – simply because, they cannot, in the legal sense, rely upon such advice. So why is the Authority giving the guidance gratuitously? Upon what basis does the Authority assume that it is appropriate for it to interpret Court decisions? Why is it giving guidance to parties in a legal dispute upon which they cannot rely? We trust that it is not endeavouring to influence events without being accountable for its guidance.

2.5 The Authority asserts that the Consultation Document and the public consultation that follows offers it the opportunity "*furthermore, to canvass the views of stakeholders and other interested parties as to how the consultation process envisaged by the judgment should and can operate in practice*"[9]. Again with the greatest of respect to the Authority, it is very questionable as to whether this is any of its concern. Even if the Authority differs from the IPU in this respect and believes that it is legitimately part of its statutory role and functions, of what benefit are the views of "*stakeholders*" and "*other interested parties*"? It is a matter for the parties concerned, principally, the Minister of Health and Children ("the Minister"), the HSE, the IPU and independent pharmacy contractors to conduct their affairs. That they will do so in accordance with the law is a given.

[8] Paragraph 1.11 of the Consultation Document
[9] Paragraph 1.11 of the Consultation Document

Of what possible benefit is some sharing of views of "*stakeholders*" and "*other interested parties*" in a consultation document that results in some guidance given by a body that is not an independent legal advisor to any of the concerned parties, is not a decision-making body and finally, is not the arbiter of the issue?

2.6 A second and further fundamental issue is the fact that the consultation process itself is sorely trammelled. This is not a consultation in the true sense of the term. This is unfortunate because if the Authority wished to be of true assistance to the parties and indeed to all of the healthcare providers to the HSE, it would have embarked upon a truly realistic public consultation process. Unfortunately, it has failed to do so. What we have is a public consultation process in an extraordinarily narrow context. The Authority has already formed its view on a number of the key legal issues. Furthermore, unfortunately, it has formed and expressed that view without inviting any public comment thereon. Were this a legal submission, we would argue that the process is in fact flawed *ab initio* and while this is neither a legal submission nor the process a legal one, the point remains that a significant opportunity has been lost by the pre-determination by the Authority, unfortunately before consideration of submissions from the relevant parties and without evidence of significant analysis, of key factual and legal issues in this matter. To these key issues we now turn.

3. SUBMISSION ON SECTION 4(1)

3.1 "*As a preliminary issue, the Competition Authority takes the view that pharmacy contractors are competing undertakings, notwithstanding that community pharmacies receive identical fixed dispensing fees and rates of remuneration for drugs dispensed under the Community Drugs Schemes*"[10].

3.2 The IPU would like to make a number of points regarding this. Firstly, it is extraordinary that the Authority treats the issue as to whether pharmacy contractors are competing undertakings as a "*preliminary issue*". It is far from a

[10] Paragraph 3.21 of the Consultation Document

preliminary issue, it is, in fact, a fundamental issue. Secondly, the Authority has actually stated that it believes that pharmacy contractors are competing undertakings notwithstanding that they all receive identical fixed dispensing fees and rates of remuneration for drugs dispensed under the Community Drugs Scheme ("CDS"). The rationale for such a fundamental determination of a key issue in this matter is worth quoting: "*the community pharmacies are competitors for services provided under the various Community Drugs Schemes, in the sense that if one community pharmacy dispenses a prescription the other community pharmacies do not get the business*"[11]. In other words, the Authority determined this complex factual, economic and legal issue on the following, over-simplistic, basis: "if you are a community pharmacy and I am a community pharmacy and you get the customer and I don't, then we are competitors".

3.3 The issue at play in this matter is whether pharmacy contractors are competitors on price. The Consultation Document speaks about non-price competition existing in the retail pharmacy sector[12]. Non-price competition is not the key issue in this matter. The key issue is price under the CDS. Since eligible persons get prescription drugs with the CDS for free (or, depending on the particular scheme involved, after a certain level of expenditure), price is not a differentiating factor as between pharmacy contractors from the point of view of the eligible person. Thus, it has not been established that pharmacy contractors are undertakings competing on price under the CDS when the price concerned is agreed between the manufacturers and the HSE and is the same price for all pharmacy contractors. This is confirmed by the following statement in the letter dated 20 December 2006 from the HSE to the IPU which precipitated this matter: *"The coming together of the Pharmacy Contractors, under the auspices of the IPU / PCC, to negotiate prices would prima facie constitute a breach of section 4(1)"*. The words *"prima facie"* merit emphasis since it does not follow from the foregoing, nor has it been established, that the acts at issue involve a breach of section 4(1). It is worth underscoring the fact that, almost two years on, this whole debate has arisen on the basis of an asserted *"prima facie"* case rather than of any judicial

[11] Paragraph 3.22 of the Consultation Document
[12] Paragraph 3.25 of the Consultation Document

finding of fact and law regarding the matter.

4. SUBMISSION ON SECTION 4(2)

4.1 *"With respect to the exemption provided by section 4(2) of the Competition Act and Article 81(3) EC, the Competition Authority takes the view that collective negotiations on fees between independent services providers and the State as purchaser of these services cannot satisfy the section 4(5) criteria. Consequently, collective negotiations do not escape the prohibition of anticompetitive agreements, decisions and practices on this basis."*[13]

4.2 Again the Authority has pre-determined a key factual, economic and legal issue. The point regarding a missed opportunity is repeated. The Authority is of the view that the exemption provided by Section 4(2) does not apply because two elements of the Section 4(5) criteria, in particular, are not satisfied in the case of collective negotiations between the HSE and the IPU. Unsurprisingly, the IPU having carried out a far more rigorous factual, economic and legal analysis, does not agree. While it might be of some academic interest to the Authority and to interested parties were the IPU to set out the detailed analysis that it has received, it believes there is no point in doing so. Firstly, the Authority has already made up its mind. Secondly, the Competition Authority is not the decision-making body. Thirdly, a public consultation conducted by such a body is not the correct forum.

4.3 Suffice to say that the IPU is surprised that the Authority has reached the conclusions on the intricacies of Section 4(5) and the underlying factual context without more detailed analysis. While the failure of the Authority to garner views on Section 4(2)/Section 4(5) issue is disappointing, its rationale for its conclusion espoused in two short paragraphs[14] are disquieting. The Authority has not in any significant way analysed any of the four criteria of Section 4(5). In contrast, it seems to have come to its conclusion by seeking how the test is not satisfied

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[13] Paragraph 3.3 of the Consultation Document

rather than whether each individual criterion is or is not satisfied and thus whether or not the criteria are cumulatively satisfied.

4.4 Such failure by the Authority is grave given that it has decided that it will not grant a declaration pursuant to Article 4(3) on collective negotiations between the HSE and IPU in relation to price terms in the contractor agreement and that it has decided to do so without seeking any submissions in relation thereto. While the IPU is of the belief that such a declaration is in fact unnecessary given its views on Section 4(1), the issuance of such a declaration by the Authority would be welcome in resolving an issue which has been created by the HSE's legal advice (which in the opinion of the IPU and its legal advisors is incorrect) and which is seriously detrimental to the provision of healthcare services in Ireland. Accordingly, the failure by the Authority to even consider through a public consultation the factual, economic and legal issues in play within the application of Articles 4(1), 4(2) and 4(5) and its consequential pre-determination of the issue of a declaration regarding price terms in collective negotiations between the HSE and IPU is disheartening to all who seek to resolve this issue in the interests of all the stakeholders in the Irish healthcare system. It is, in our view, a notable process failure by the Authority.

4.5 For the record, the IPU and the Authority are *ad idem* that negotiations between the HSE and the IPU on price terms in the community pharmacy contractor agreement would satisfy the criteria established by Sections 4(5)(i) and 4(5)(ii). The IPU takes issue with the Authority regarding its analysis of Section 4(5)(iii) and Section 4(5)(iv). Again it is disappointing that the Authority has not sought to explore this fundamental issue in any detail whatsoever. It is particularly disappointing that the Authority is of the view that the "*indispensability*" limb of the Section 4(5) criteria cannot be met simply because "*collective negotiations between the HSE and the IPU are not the only mechanism by which the fees paid under the community drugs schemes can be set*"[15]. With respect, this is a simplistic, and, we assert, incorrect basis upon which to deal, and dispose of, the

[14] Paragraphs 3.31 and 3.32 of the Consultation Document
[15] Paragraph 3.31 of the Consultation Document

Section 4(5)(iii) criterion.

4.6 Firstly, the fees paid under the community drugs schemes are set by the Minister for Health and Children. Whether or not there is negotiation, consultation or indeed any contact whatsoever between the HSE and the IPU with regard to the fees to be paid under the CDS, the Minister and she alone, has the final say on price and fees to be paid. It is therefore quite conceivable that were there negotiations between the HSE and the IPU which resulted in agreement on the rates[16] to be paid, and a recommendation pursuant to such agreement were made to the Minister, that the Minister would not approve the rates as per the recommendation but would, in the exercise of her statutory discretion, direct rates other than those agreed between the HSE and the IPU.

4.7 Secondly, the superficial analysis is also disappointing because, in the respectful submission of the IPU, it focuses on the methodology by which the agreement, decision or concerted practice referred to in Section 4(5)(iii) is reached rather than on the terms thereof. It follows that given that the terms would be set by negotiation solely between the HSE and the IPU, the Authority cannot pre-determine whether any such negotiations would or would not satisfy Section 4(5)(iii).

4.8 There are obviously sound logistical reasons as to why it is more sensible for such negotiations to take place on behalf of the pharmacy contractors collectively rather than have hundreds or thousands of individual negotiations occurring between individual pharmacy contractors and the Minister and HSE. Indeed, even from the HSE's perspective, it would seem almost impossible that they would seek to negotiate different terms with individual pharmacy contractors. The various schemes which make up the CDS are moderately complex and require a very considerable amount of administration and management by the HSE. If these schemes had to be operated where the financial or other terms were different as between individual pharmacy contractors and the HSE, we imagine

[16] C.f. clause 12(1) of the Community Pharmacy Contractor Agreement

that this would be something of an administrative nightmare for the HSE. It is, we submit, telling that the HSE has not sought to negotiate individual terms with individual pharmacy contractors.

4.9 That being so, the question then arises as to whether there is anything objectionable from a competition law perspective in pharmacy contractors, each of whom lacks any market power or negotiating leverage vis-à-vis the HSE, coming together through the IPU for the purpose of collectively negotiating the terms of what will be an industry-wide standard contract.

4.10 As the Authority knows, there is support for the argument that collective bargaining agreements which are used to counteract market power on the other side of the market, in particular in the health care sector, may not fall foul of s.4 or Article 81. The argument most frequently arises in the context of whether alleged dominance on the part of the seller is counteracted by the presence of one or more powerful purchasers whose countervailing power may negate the existence of dominance in a particular market. There may well be nothing objectionable in a number of small undertakings, none of whom has any significant market power or negotiating leverage vis-à-vis a large dominant purchaser, coming together to negotiate collectively with a view to equalising the bargaining process.

4.11 As the Authority also knows, the distinctive type of competition law issues that have arisen between the IPU and the HSE are by no means peculiar to this jurisdiction. It is also clear that the "countervailing power" argument, in the context of the health care sector, has found such favour in the United States as to prompt the adoption of specific rules for this sector.

4.12 The fact that collective bargaining can give rise to efficiency gains has been explicitly recognised by the Irish Supreme Court, though not in a competition law context.

4.13 In *Collooney Pharmacy Ltd. v. North Western Health Board*[17], McCracken J. noted that health boards were required to enter into *"something in the nature of agency agreements"* with pharmacy contractors to discharge their statutory obligations to ensure the supply of drugs. He further noted that *"standard contracts negotiated with representative bodies are now a frequent feature of both commercial and administrative law, and were desirable in the interests of uniformity"*.

4.14 Similarly, Kearns J. considered that the negotiations gave rise to:-

> *"significant and tangible benefits achieved at the end of a long drawn-out process of negotiation between the pharmaceutical contractor's committee and the Department of Health"*.

5. SUBMISSION ON ARTICLE 81 EC

5.1 The IPU questions the application of Article 81 EC to the issues in play by the Authority and is disappointed that the Authority has not in any way established the applicability of Article 81 EC to the issues. The IPU notes the Authority's assertion that *"a professional regulation is liable to have an appreciable affect on trade between Member States where it applies to the whole of a national territory"*[18]. The Authority particularly *"emphasised that where trade between Member States is affected, it is not possible for national law to disapply or derogate from the application of the Community competition rules"*[19]. While this is all very well, the Authority has failed to establish how any negotiation between the HSE and the IPU would constitute (i) a professional regulation; or (ii) would have an appreciable affect, or any affect, on trade between Member States; or (iii) would apply to the whole of the national territory. The simple answer is that the Authority simply cannot do so because no such negotiation has taken place and therefore the terms established or agreed between the parties do not exist.

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[17] [2005] 4 I.R. 12
[18] Paragraph 3.5 of the Consultation Document in reference to the Wouters' case (footnote 16 thereto)
[19] Paragraph 3.6 of the Consultation Document

5.2 In paragraph 2.9 of the Consultation Document the Authority states that Article 81 is likely to apply on the occurrence of collective negotiation of fees with a representative body. However, in relation to Article 81, the European Commissioner for Competition, Neelie Kroes,[20] gave her opinion in June 2008, stating that under EU Competition Law, the Irish State can negotiate pharmacy contractors' fees with their representative body, the IPU. The Commissioner said "*...the fixation of fees for pharmacy services would only be problematic from the point of view of EC competition law if it was not the Irish State which had the final word in fixing the price.*" No further clarity is required on this point.

6. SUBMISSION ON A GUIDANCE NOTICE

6.1 *"The Competition Authority stresses that any guidance notice it may produce on this topic, pursuant to section 30(1)(d) of the Competition Act, merely presents its views of the relevant issues. The Competition Authority recalls that it is for the courts to determine whether a breach of the Competition Act has occurred, and recommends that parties obtain independent legal advice on any competition law issues that may arise"*[21]

6.2 The IPU could not have put it better. It is not clear what the Authority is trying to achieve for competition or consumers in carrying out this consultation. It is not the decision-making body. It is not the final arbiter. Its views are purely for guidance but do not constitute legal advice and thus do not have the status or relevance of legal advice.

6.3 The Authority has a clear role to play when, in its view, there has been an apparent breach of competition law. Further, in fairness to the Authority, it seeks to give guidance to parties so as to avoid such a breach occurring. While the IPU does not wish to prejudge any guidance given by the Authority, it believes, for all of the reasons already enunciated, particularly the process failures of the Authority, that any such guidance emanating from this consultation process will

[20] 2381/08 EN Answer given by Ms Kroes on behalf of the Commission (10.06.2008)
[21] Paragraph 3.37 of the Consultation Document

be of limited value to the parties concerned.

6.4 The dispute between the HSE and the IPU has been long-running and has caused deep upset to numerous people not least the eligible persons under the CDS. This dispute is wholly unnecessary. In the opinion of the IPU, the HSE has received legal advice, with which the IPU does not agree, and to which the HSE has trenchantly clung. Unfortunately the opportunity which existed to the Authority to share its view on the issues had been lost, not simply as noted above, through the trammelled scope of its consultation but because it has failed to address a key point in the matter. The Authority is of the opinion "*that any agreement between pharmacy contractors on the issue of price.....where the pharmacy contractors concerned intend that the agreed price(s) will be imposed*[22] *on the purchaser (i.e. the HSE), is contrary to Section 4(1) of the Competition Act and Article 81 EC*"[23]. Not only does the IPU not wish to impose a price on the HSE, it has never intended nor sought to do so. Even were it minded to do so, the IPU simply cannot do so. The IPU wishes to agree price terms in the contractor agreement with the HSE. The HSE is more than capable on deciding whether or not it agrees to any such price terms. It certainly is not the kind of public body upon which a price term can be "*imposed*" by the IPU or any other entity. Furthermore, as explained above, any such agreed price is subject to determination by the Minister for Health and Children.

6.5 This misunderstanding on the part of the Authority of the context in which the issues are at play in this matter is repeated when the Authority, correctly in the submission of the IPU, endorses the principles set out in the Italian lawyers' case as applied in the *Hickey* case[24]. In relation thereto, the Authority distinguishes between the suggestion of an appropriate level of fees by a trade association and a situation where the association "*imposes*" this level of fees on purchasers of the services provided by its members. The underlying assumption that the IPU wishes and seeks to impose prices on the State is flawed, is incorrect, misplaced

[22] Emphasis added
[23] Paragraph 3.23 of the Consultation Document
[24] Paragraphs 3.35 of the Consultation Document

and, it has to be said, unfair to the IPU.

7. CONCLUSION

7.1 The Authority has commenced a consultation on foot of the Consultation Document. It has invited views and may issue a guidance note. However it warns that it is not the ultimate arbiter of the issue nor will it make any decision in the matter. It also warns that its guidance note, if issued, is not to be relied upon by the parties concerned and that they should get their own independent legal advice.

7.2 Thus its actions in the matter are of very little assistance to any of the "*stakeholders*". This is particularly so because it has, despite not being the decision-making body in the matter, already formed a view on most of the key issues. Going forward, the role of the Minister, in the exercise of her statutory duties, and any discussions, negotiations and agreements between the HSE and the IPU are solely a matter for agreement between the parties themselves.

7.3 The Competition Authority should now accept that the European Commission and the High Court have both addressed this issue in clear and unambiguous terms. The HSE has also set out a process through which future negotiations with the IPU will be conducted. These developments have vindicated the position adopted by the IPU since the issue of negotiations was first raised by the HSE.