The Competition Authority
An tÚdarás Iomaíochta

Guidance in respect of Collective Negotiations relating to the Setting of Medical fees

TABLE OF CONTENTS

1. INTRODUCTION

1.1 In September 2005, the Competition Authority concluded an investigation into the way in which fees for consultants' services are negotiated between consultants and private health insurers. The Competition Authority's view from that investigation was that the actions of the consultants' representative body, namely the Irish Hospital Consultants Association ("the IHCA"), in the context of those negotiations, amounted to price fixing in breach of Section 4(1)(a) of the Competition Act, 2002 ("the Competition Act"). The Competition Authority issued a letter of initiation outlining its view to the IHCA and a settlement was subsequently reached between the Competition Authority and the IHCA on 27th September 2005 ("the Agreement and Undertaking"). The Agreement and Undertaking furnished by the IHCA to the Competition Authority, as required by this settlement, is contained at Annex A below.

1.2 The Competition Authority published a consultation document in January 2006 to determine the scope of guidance that could be provided in respect of collective negotiations relating to the setting of medical fees. The consultation arose as a consequence of the Agreement and Undertaking furnished by the IHCA to the Competition Authority as the IHCA had requested additional guidance on compliance as part of the settlement. The aim of the Consultation Document was to get a better understanding of the way in which fees for consultants' services are negotiated between consultants and private health insurers. Submissions were received from Vhi Ireland Limited ("Vhi"), BUPA Ireland Limited ("BUPA"), Vivas Health ("Vivas"), the IHCA, Irish Medical Organisation ("IMO") and Independent Hospital Association of Ireland ("IHAI").[1]

1.3 The Competition Authority is concerned that within the discussions that take place between hospital consultants (and their representative bodies such as the IHCA and IMO) and private health insurers, there may be conduct amongst consultants which breaches the Competition Act. The objective of the Competition Authority issuing guidance is to ensure that consultants are aware of the prohibitions contained in the Competition Act as they apply to them and to assist them in complying with the Competition Act.

1.4 During the Competition Authority's investigation into the setting of consultant fees it was argued by the parties to the investigation that there are efficiencies to be gained from the involvement of consultant representative bodies when fee levels are being determined between private health insurers and consultants. There is uncertainty, however, as to what negotiations, if any, consultants and their representative bodies can have with private health insurers without infringing the Competition Act. One of the reasons for issuing guidance is to address this uncertainty and facilitate compliance with the Competition Act.

1.5 The Consultation Document identified behaviour that the Competition Authority is concerned about and explored mechanisms that could be used to avoid breaching the Competition Act. Section 4 of the Consultation Document set out three alternative fee setting mechanisms that are

[1] Non-confidential versions of each of these submissions are available on the Competition Authority's website via www.tca.ie.

unlikely to breach the Competition Act and where certain efficiencies can be achieved:

- fee setting by the payor;[2]
- application of a messenger model;[3] and
- contracting with hospitals.[4]

Respondents were asked to consider the feasibility of these fee setting mechanisms and to identify other fee setting mechanisms that could be used to set fees without infringing the Competition Act.

1.6 The content of the submissions are of limited assistance to the Competition Authority in formulating detailed guidance on the permitted fee setting mechanisms set out in Section 4 of the Consultation Document. Vhi, the IHCA and IMO appear to be unwilling to consider an alternative "state of the world" to the one in which consultants (and their representative bodies) discuss medical fees with private health insurers. All three fee setting mechanisms set out in paragraph 1.5 above are heavily criticised in many of the submissions. More significantly, none of the submissions provide any suggestions as to (a) how these fee setting mechanisms might be altered to make them more feasible, or (b) whether there exists any alternative fee setting mechanisms. Given the absence of any suggestions in the submissions as to how the permitted fee setting mechanisms outlined in Section 4 of the Consultation Document could be adapted to work in the State, the Competition Authority has decided to publish a guidance note reiterating what actions are prohibited under the Competition Act. It is the IHCA, the IMO and the private health insurers that have the most expertise in this area – without their assistance, it is not possible for the Competition Authority to provide more detailed guidance concerning permitted fee setting mechanisms than that already provided in Section 4 of the Consultation Document.

1.7 As a consequence of the consultation process, the Competition Authority has decided to publish a guidance note under Section 30(1)(d) of the

[2] This mechanism consists of one large buyer or payor, in possession of considerable information relevant to the setting of fees, unilaterally making a contractual fee offer for consultant services. The payor uses market intelligence and market facts to make an offer to consultants. The latter discuss fees on a unilateral basis with the health insurer. For a more detailed description of this fee setting mechanism, see paragraphs 4.3-4.7 of the Competition Authority's *Consultation on Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees*, January 2006.

[3] In its simplest form, the messenger model involves doctors engaging a third party called the messenger. This messenger obtains from each participating doctor – individually - information regarding the level of fees the doctor will accept from the private health insurer. The messenger will convey to the private health insurer the information obtained individually from the doctors about the prices that the doctors are willing to accept. The private health insurer will issue its contract pre-setting the fees for medical procedures that consultants agree on an individual basis with individual health insurers ("Schedule of Benefits") and communicate this to the messenger. The messenger will pass the Schedule to the doctors or sometimes be permitted to contract on behalf of individual doctors. Doctors individually decide whether to participate or not in the Schedule of Benefits. For a more detailed description of this fee setting mechanism, see paragraphs 4.8-4.15 of the Competition Authority's *Consultation on Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees*, January 2006.

[4] This mechanism consists of private health insurers purchasing bundled services from hospitals. When payors purchase services on this basis it is entirely at the hospital's discretion how the amount received is used to fund the service, including the payment of consultants' fees. For a more detailed description of this fee setting mechanism, see paragraphs 4.16 and 4.17 of the Competition Authority's *Consultation on Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees*, January 2006.

Competition Act. This guidance note should not be considered a substitute for legal advice which parties should obtain from their own legal advisors. Rather, the note sets out the Competition Authority's views on collective negotiations relating to the setting of medical fees. The Competition Authority recognises that it is ultimately a matter for the courts to decide on issues such as the status of persons or bodies under the Competition Act and/or whether a breach of the Competition Act has occurred.

1.8 This guidance note is structured as follows. Section 2 provides a brief overview of the relevant provisions of the Competition Act. Section 3 details fee setting behaviour that is prohibited under the Competition Act. Section 4 outlines certain practices that are unlikely to infringe the Competition Act. Section 5 discusses issues that arise in the context of collective negotiations over non-price matters and their implications for the competitive process. Section 6 provides a brief conclusion. The Competition Authority is not in a position to provide more detailed guidance in relation to the permitted fee setting mechanisms set out in Section 4 of the Consultation Document on the basis of the information provided in the submissions.

2. GENERAL PRINCIPLES OF THE COMPETITION ACT, 2002

Introduction

2.1. The purpose of this section is to outline the general principles of the Competition Act.

Prevention, Restriction or Distortion of Competition: Section 4 of the Competition Act

2.2. Section 4 of the Competition Act applies when undertakings are engaged in arrangements which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State. The purpose of the Competition Act is to prohibit anti-competitive collective action by two or more undertakings. Collective negotiations would be included under the rubric of collective action. In general, undertakings should make their own unilateral decisions on price and other terms and conditions of trade, rather than doing so in collaboration with their competitors. The Competition Act is a law of general application that applies to all sectors of the economy.

2.3. Section 4(1) of the Competition Act reads as follows:

> Subject to the provisions of this section, 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 are prohibited and void, including in particular, without prejudice to the generality of this subsection, those 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 partners thereby placing them at a competitive disadvantage,
>
> (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.

The list of examples in (a) to (e) is not exhaustive. It should be noted that breaches of Section 4 of the Competition Act can attract criminal prosecution and criminal sanctions as well as civil enforcement and remedies.

2.4. The following sets out guidance on the general principles/concepts contained in Section 4(1) of the Competition Act, specifically as they relate to fee-setting or the setting of other terms and conditions of trade by the medical profession.

2.5. The general principles that must be established for Section 4(1) to apply are as follows:

- There is an agreement, decision or concerted practice;
- The parties to that agreement, decision or concerted practice are undertakings or an association of undertakings; and
- The object or effect of the agreement, decision or concerted practice is to prevent, restrict or distort competition.

Undertakings

2.6. The Competition Act applies to undertakings. Section 3(1) of the Competition Act defines an "undertaking" 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". While this is not a term defined in the Treaty, undertakings have been referred to by the European Court of Justice ("the ECJ") as "any entity engaged in an economic activity, regardless of the entity's legal status and the way in which it is financed".[5] Hence any guidance that follows will only address situations where doctors are undertakings within the meaning of the Competition Act.

2.7. Employees are not in themselves viewed as undertakings and are therefore not subject to the Competition Act. However, doctors who are engaged in private practice as consultants[6] or as GPs are persons engaged for gain in the production, supply or distribution of a service and are undertakings within the meaning of the Competition Act.[7] The fact that doctors may, in addition to their private practice, also perform services for an employer as an employee under a contract of employment will not preclude them from being subject to the Competition Act in respect of those services in which they act as undertakings.[8]

[5] Case C-41/90 *Höfner* and *Elser* [1991] ECR I-1979, para 21.

[6] There are approximately 1,800 public consultant posts of which 1,500 are filled. 90% of public consultants are also engaged in private practice by way of either category 1 or category 2 contracts. Category 1 public contracts permit consultants who hold a public contract to engage in private practice in the public hospital in which they are contracted. Category 2 public contracts permit the consultant to engage in private practice off-site in a private hospital. There are approximately 170 - 200 purely private consultants who work exclusively in private hospitals.

[7] Doctors, notwithstanding their professional status, have in the past been held by the European Court of Justice to be undertakings. For example, see Judgment of the European Court of Justice of 12th September 2000 which states: "The self-employed medical specialists who are members of the LSV [National Association of Specialists of the Royal Netherlands Society for the Promotion of Medicine] therefore carry on an economic activity and are thus undertakings within the meaning of Articles 85 [now Article 81], 96 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion". *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined cases C-180/98 to C-184/98.

[8] See paragraphs 2.10-2.17 of Competition Authority Enforcement Decision E/04/002, *Agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors*, for further guidance concerning undertakings as defined under the Competition Act.

2.8. Agents can potentially be subject to the Competition Act where, for example, the agent is appointed by doctors to negotiate prices or other commercial terms and conditions on their behalf. In such circumstances, the agent may be used to facilitate a group of undertakings coming together to agree prices or other commercial terms and may itself be subject to competition law scrutiny.[9] Sections 3 and 4 of the Consultation Document contain further discussion on the use of agents.[10]

Agreements between Undertakings

2.9. Section 4(1) of the Competition Act applies to co-ordinated or collective action/conduct and not unilateral behaviour. There must be some element of co-operation between separate undertakings and/or decisions by associations of undertakings. It is therefore a requirement that there is an agreement, arrangement or some evidence of coordination between undertakings, i.e., between two or more entities as defined in Section 3 of the Competition Act. Section 4(1) of the Competition Act does not apply to agreements between entities which form a single economic unit or to unilateral behaviour by a single undertaking.[11]

2.10. In the United Kingdom, the Office of Fair Trading ("the OFT") has taken the view, in the case of the activity of a group of anaesthetists, that such a group,

> … will be treated as a single undertaking if it operates and presents itself as a single entity on the market, for example, where the members generate profits for the common benefit of the group, operate under a common name, share administrative functions such as joint billing, have a bank account (or accounts) in the name of the group and/or a single set of accounts is produced in respect of the group's commercial activities.[12]

An agreement between members of a medical practice that is a *bona fide* partnership and which concerns the acts of that partnership will not amount to an agreement between undertakings.

2.11. The United States antitrust authorities have also considered the circumstances where a physician network joint venture[13] can collaborate

[9] A number of recent US cases concern physician groups/organisations purporting to be acting as agents in the negotiation of fees between physicians and payors. In several instances, the antitrust agencies found that the organisations did not operate as legitimate agents and orchestrated boycotts and agreements among physicians to fix prices and other terms they would accept from payors. For details see section 4 of the Competition Authority's *Consultation on Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees*, January 2006.

[10] Although application of the Competition Act is limited to "undertakings", persons (including those persons who may not be undertakings) who aid and abet a criminal violation of the Competition Act may be guilty of an offence under Irish law.

[11] Of course, Section 5 of the Competition Act prohibits certain unilateral conduct by undertakings that are in a dominant position in a relevant market for goods or services and where they abuse that dominant position. In these circumstances a medical partnership, while comprising one economic entity or undertaking, may still be subject to Section 5 of the Competition Act.

[12] For details see, OFT, 2003, *Anaesthetists' groups*. London: OFT. This document is accessible at: www.oft.gov.uk/business/competition+act/decisions/anaesthetists+groups.htm

[13] In the US such networks market the services of doctors to health plans and other purchasers of health care services. The networks include individual practice associations, preferred provider organisations and other arrangements. Typically such networks contract with the plans to provide physician services to plan subscribers at predetermined prices, and the physician participants in the network agree to controls aimed at containing costs and assuring the appropriate and efficient

efficiently promising significant pro-competitive benefits for consumers of health-care services and without violating competition laws similar to Section 4(1) of the Competition Act. The US authorities stress that the participants in a physician network joint venture "must share substantial financial risk involving all the services that are jointly priced through the network". The importance of this risk sharing is set out as follows:

> The safety zones [from antitrust prosecution] are limited to networks involving substantial financial risk sharing not because such risk sharing is a desired end in itself, but because it normally is a clear and reliable indicator that a physician network involves sufficient integration by its physician participants to achieve significant efficiencies. Risk sharing provides incentives for physicians to cooperate in controlling costs and improving quality by managing the provision of services by network physicians.[14]

Thus, both the US and UK competition authorities acknowledge that doctors must form a single, integrated undertaking sharing substantial economic and financial risks. It is further the case that any agreements on fees and related issues between members of that integrated entity must be ancillary to the partnership and reasonably necessary to realise the efficiencies of integration. The two approaches are quite consistent with one another since risk sharing and integration are implicit in the OFT statement.

2.12. It should also be noted that the partnership need not be confined to doctors who are competitors with each other but may also include complementary specialities that are usually supplied as a bundle of services.

2.13. Agreements within genuine partnerships do not fall under Section 4(1) of the Competition Act as they are not agreements between independent undertakings as required. The Competition Authority is not aware of any instances where partnerships amongst consultants have been formed with the intention of fixing prices and it appears that there may be efficiencies associated with such partnerships.

Decision(s) by an Association of Undertakings

2.14. Any body formed to represent the interests of its members in commercial matters may be an association of undertakings within the meaning of the Competition Act. Decisions made by an association of undertakings fall within the prohibition of Section 4(1) regardless of the exact form that the

---

provision of high quality physician services. According to US antitrust authorities, "[B]y developing and implementing mechanisms that encourage physicians to collaborate in practicing efficiently as part of the network, many physician network joint ventures promise significant pro-competitive benefits for consumers of health care services". Department of Justice and Federal Trade Commission, 1996, *Statements of Antitrust Enforcement Policy in Health Care*, Washington DC: Department of Justice and Federal Trade Commission, Statement 8, p. 61. This document may be accessed at: www.ftc.gov/reports/hlth3s.pdf.

[14] See Department of Justice and Federal Trade Commission, 1996, supra note 13, p. 67 & 68. It should be noted that where there are instances where the network might become too inclusive in terms of the physicians in a given location (e.g., all the physicians in a particular geographic market are members) antitrust concerns could arise since the network might be able to exercise market power. Physician network joint ventures should not be seen as giving physician participants a blanket pass with regards to what they can do – such ventures may be subject to competition enforcement if their behaviour raises competition concerns.

association takes, i.e., it is not necessary for the association to have a formal constitution or for it to be incorporated.[15]

2.15. Professional associations whose objective is to represent doctors, such as the IHCA and the IMO, are clearly associations of undertakings within the meaning of the Competition Act. *Ad hoc* speciality groups formed to discuss or negotiate fees on behalf of a particular speciality can also be associations of undertakings, notwithstanding that rules or a formal constitution may not exist. In addition, associations such as, for example, the Royal College of Physicians of Ireland, may constitute an association of undertakings. Insofar as these associations solely discuss and promote optimum standards of medical care and ethics, they will not breach the provisions of the Competition Act. Where, however, these associations discuss or become involved in the commercial activities of their members, such as the level of services offered or their fees or fee-setting mechanisms, then their conduct may be characterised as a decision by an association of undertakings or a concerted practice within the meaning of Section 4(1) of the Competition Act.

2.16. It is settled case law that a recommendation made by an association of undertakings can constitute a decision within the meaning of Section 4(1) of the Competition Act. Furthermore, it is not necessary that the recommendation is binding upon the members of that association or that it has been fully complied with for Section 4(1) of the Competition Act to apply.[16]

2.17. It is unlikely to be contrary to the Competition Act for a trade union to represent employees in collective bargaining with their employers. However, where the trade union has both employed persons and self-employed independent contractors as members, its trade union mantle cannot exempt its conduct when it acts as a trade association for self-employed independent contractors.[17]

Anti-Competitive Agreements, Decisions or Concerted Practices

2.18. Having broadly delineated the circumstances where medical professionals may or may not be considered undertakings or associations of undertakings within the meaning of the Competition Act, the next step is

---

[15] See, for example, OFT, 2004, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guideline, London: OFT. para 1.4. This may be accessed at: www.oft.gov.uk/NR/rdonlyres/E13DECC7-48CF-49E0-95AD-AF968E10762B/0/oft408.pdf See also Case 123/83 BNIC v Clair [1985] ECR 391.

[16] Case 45/85 *Verland der Versicherer –v- Commission* [1987] ECR 405. In *Verland der Versicherer* the ECJ said: "In view of those factors it must be stated that the recommendation regardless of what its precise legal status may be, constituted the faithful reflection of the applicant's resolve to co-ordinate the conduct of its members on the German insurance market in accordance with the terms of the recommendation. It must therefore be concluded that it amounts to a decision of an association of undertakings within the meaning of Article 85(1) [now Article 81(1)] of the EC Treaty".

Similarly, in *NVIAZ International Belgium NV v. Commission* [Case 96/82 [1983] ECR 3369, [1984] 3 CMLR 276], an association of water-supply undertakings recommended that its members not connect dishwashing machines to the mains systems, which did not have a conformity label supplied by the Belgian association of producers of such equipment. The ECJ confirmed the Commission's view that this recommendation, although not binding, could restrict competition.

[17] Bellamy C. & G Child, 2001, *European Law of Competition,* 5th Edition Roth ed. London: Sweet & Maxwell. § 2-006. For further discussion on this point see Competition Authority, 2004, *Agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors,* Enforcement Decision No. E/04/002, Dublin: The Competition Authority. This may be accessed at: www.tca.ie/enforcement_decisions.html.

to outline the circumstances where agreements, decisions and/or concerted practices – in short collective behaviour - concluded between medical professionals may have the object or effect of preventing, restricting or distorting competition.

2.19. Akin to the wide judicial interpretation given to the term "decision" as demonstrated above, the terms "agreement" and "concerted practice" have similarly been construed broadly in case law. Agreements within the meaning of the Competition Act can include legally binding agreements as well as informal ones and they may be written or not. The latter could include, for example, so-called "gentlemen's agreements".[18]

2.20. In the case of concerted practices, the European Court of Justice has held that the competition provisions

> strictly preclude any direct or indirect contact between operators, 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.[19]

2.21. If consultants act together to determine a fee schedule that is the basis for collective negotiation with private health insurers then that would be considered an agreement or concerted practice between undertakings.

[18] Agreements or concerted practices between undertakings or decisions by associations of undertakings in the medical profession to fix prices or other trading conditions are dealt with further in the sections discussing prohibited fee-setting mechanisms and permitted practices below.

[19] *Suker Unie v Commission* [1975] ECR 1663, [1976] 1 CMLR 295.

3. PROHIBITED FEE SETTING MECHANISMS

Introduction

3.1 Price fixing is considered per se a restriction of competition with little or no redeeming features. There have been few, if any, exceptions at either the European or the national level for such arrangements.[20]

3.2 The settlement that the Competition Authority reached with the IHCA, reproduced in Annex A below, sets out in clause 3 the various types of conduct that the IHCA agrees to cease and desist from and in which it undertakes not to engage in the future. These forms of conduct, which the Competition Authority believes are in breach of the Competition Act, relate either directly or indirectly to price fixing. It is, of course, a matter for the courts to decide on issues such as whether a breach of the Competition Act has occurred. In this section of the guidance note, the prohibited forms of price fixing are considered in greater detail and the explanatory notes highlight some vital points for parties involved in fee negotiations to bear in mind.

Price Fixing by Doctors

3.3 The Competition Act forbids all agreements that have as their object or effect the prevention, restriction or distortion of competition and then specifically proscribes "agreements… which directly or indirectly fix purchase or selling prices or any other trading conditions…".[21]

3.4 In the context of this guidance note, examples of agreements in breach of Section 4(1)(a) of the Competition Act would include agreements between doctors that:

- Fix or constrain the fees that doctors or medical practices will charge for their services; or
- Provide that in the absence of a payor (for instance, private health insurers or hospitals) paying a certain price for their services or agreeing to other terms and conditions of trade, members withhold services. This is known as a collective boycott.

[20] The US Supreme Court ruled in 1982 that the conduct of a physician joint venture, which was not financially integrated but established a maximum fee schedule for its participants, was per se illegal under the antitrust laws. See *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

[21] Section 4(1)(a) of the Competition Act. While the emphasis in this section may be agreements on price, it is important to note that Section 4(1) of the Competition Act is also concerned with agreements concerning non-price related terms and conditions of trade and is not solely confined to agreements on fees.

Explanatory Note 1: Price-Fixing by Doctors

Agreements between doctors or medical practitioners which collectively set fees or other commercial terms are in breach of the Competition Act;

Doctors must individually decide the fees they charge for their services;

Agreements which fix prices or other commercial terms can attract criminal prosecution and criminal sanctions as well as civil enforcement.

Price Fixing by Medical Professional Associations or other Representative Bodies

3.5 The Competition Act also forbids all decisions by an association of undertakings that have as their object or effect the prevention, restriction or distortion of competition. Again, decisions "which directly or indirectly fix purchase or selling prices or any other trading conditions" are prohibited.

3.6 Examples of decisions in breach of Section 4(1)(a) of the Competition Act would include recommendations by a medical representative and professional body to its members that:

- They charge a certain price for certain services; or
- In the absence of a payor, such as a private health insurer, paying a certain price for their services or agreeing to other terms and conditions of trade, members withhold services.

Explanatory Note 2: Price-Fixing by Medical Representative and Professional Bodies

A decision/recommendation by a medical representative or professional body, the object or effect of which is to co-ordinate or facilitate the co-ordination of fees or other commercial terms amongst its member doctors, is in breach of the Competition Act;

A decision/recommendation by a medical representative or professional body which claims to be only a recommendation but which in fact fixes or facilitates the fixing of prices or other commercial terms by its member doctors is in breach of the Competition Act;

A decision/recommendation by a medical representative or professional body, the object or effect of which is to arrange a collective boycott by doctors, is in breach of the Competition Act;

Agreements which fix prices or other commercial terms can attract criminal prosecution and criminal sanctions as well as civil enforcement.

Price fixing where an Agent is engaged

3.7 A breach of Section 4(1)(a) of the Competition Act can occur even if doctors engage an agent or a representative body to negotiate with a payor, such as a private health insurer, on their behalf. This may be the case where, for example, the agent or representative body facilitates an agreement on price or other co-ordinated behaviour between doctors aimed at preventing, restricting or distorting competition. There are circumstances, however, when the use of an agent/messenger can be consistent with the Competition Act.[22]

Explanatory Note 3: Price-Fixing Through An Agent or Representative Body

Agreements between doctors and private health insurers on fees or other commercial terms which are collectively negotiated on behalf of doctors through an agent or representative body may be in breach of the Competition Act;

Such negotiations may leave the doctors and/or the representative body open to an action for a breach of Section 4(1) of the Competition Act.

Section 4(5) of the Competition Act

3.8 If conduct or behaviour breaches Section 4(1) of the Competition Act, Section 4(5) provides a defence or safe haven where the parties can establish that their conduct is ultimately efficiency enhancing and complies with each of the four criteria set out in that provision. The onus of proving that the agreement or conduct in question satisfies the criteria of Section 4(5) lies on the party/parties. To qualify for the safe haven provided by Section 4(5) the agreement, decision or concerted practice must be one that:

1) Contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress;
2) Allows consumers a fair share of the resulting benefit;
3) Does not impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives; and
4) Does not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

3.9 There have been few, if any, instances where a price fixing agreement has successfully been able to avail of the safe haven provided by Section 4(5). Respondents were asked to identify instances when the prohibited fee setting mechanisms identified above satisfy the provisions of Section 4(5) of the Competition Act. None of the submissions offer any arguments or evidence as to why the prohibited fee setting mechanisms satisfy any of the conditions set out in Section 4(5) of the Competition Act.

[22] These are discussed in Section 4 of the Competition Authority's *Consultation on Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees*, January 2006.

4. PERMITTED PRACTICES: GENERAL

Introduction

4.1 Most of the co-ordinated behaviour discussed in section 3 above is deemed likely to breach the Competition Act. Even if the behaviour can avail of the safe haven provided for in Section 4(5) of the Competition Act, this implies that the behaviour has first breached Section 4(1) of the Competition Act. However, there may be certain co-ordinated behaviour that in general does not fall foul of Section 4(1) and hence is deemed to fall outside of the Competition Act altogether. Like all such statements, there is, however, a caveat that these forms of co-ordinated behaviour not be used as a ruse to fix prices or in some other way to prevent, restrict or distort competition within the meaning of the Competition Act.

Partnerships

4.2 As addressed in section 2 above, doctors who are engaged in a genuine partnership will likely be considered a single economic entity. Hence, agreements between doctors in the same partnership on fees or other market related conditions are unlikely to be in breach of Section 4(1) of the Competition Act, provided such agreements are ancillary and reasonably necessary to achieve the efficiencies of integration.[23]

4.3 As noted in section 2 above, the consensus in the submissions is that existing partnerships amongst consultants do not appear to be formed with the intention of fixing prices and that there may be efficiencies associated with such partnerships.

Rotas[24]

4.4 A rota arranged by consultants is a list or plan showing turns of duty in the provision of consultant services to patients. Rotas may be necessary to balance sustainable working hours for doctors and facilitate continuous access to health care for patients. Rotas with the key purpose of facilitating these aims are consistent with the Competition Act.

4.5 If the doctors involved in a rota are not a single economic entity each doctor must independently determine the fees to be charged to his patients. The fact that all of the doctors are working under one rota arrangement does not change this legal requirement. Collective fee setting arrangements between separate entities are not necessary in order to operate a roster.

4.6 The Competition Act may be breached if, for example, doctors collectively decide to end a rota to provide services to a hospital. If the purpose of ending the rota in this instance is to prevent, restrict or limit the supply of medical services in the absence of a payor agreeing to certain fees or conditions, it may raise issues under the Competition Act.

[23] Such undertakings might, however, be subject to Section 5 of the Competition Act, which is concerned with abusive unilateral behaviour by firms with market power.

[24] This discussion of rotas borrows heavily from ACCC, 2004, *Setting your fees straight,* Canberra: ACCC. This document may be accessed on the ACCC's website www.accc.gov.au/content/index.phtml/itemId/532694#h2_26.

4.7 Most of the submissions agree with the Competition Authority's characterisation of rotas and there is no suggestion that they are used to prevent, restrict or limit the supply of medical services in the absence of a payor agreeing to certain fees or conditions.

5. ISSUES THAT ARISE GENERALLY IN NEGOTIATIONS BETWEEN CONSULTANTS AND PRIVATE HEALTH INSURERS

Introduction

5.1 Section 6 of the Consultation Document examined some additional topics which have traditionally featured in the context of collective negotiations between the private health insurers and the representative bodies for consultants: participation rates and balance billing; the codes and descriptions for certain procedures; and the ground rules for consultants' services.

5.2 The market for private health insurance in the State has one large buyer – Vhi. It has 76% of the private health insurance market. BUPA, who entered the Irish market in 1997, has approximately 22% of the market. Vivas entered the market in 2004/05 and has 2% of the market.[25] BUPA announced in December 2006 that it intends to exit the market for private health insurance in the State once it has honoured existing contracts with customers. Thus, market share figures should be considered in light of this significant pending change.

5.3 The Schedule of Benefits between consultants and Vhi sets out the ground rules for treatment of Vhi patients by consultants and lists the price that Vhi will pay consultants for each treatment. Treatments are classified under codes, updated on occasion to reflect advances in medical practice. The Schedule of Benefits produced by Vhi has traditionally been followed by BUPA and Vivas.

5.4 It has been practice in Ireland for negotiations between Vhi and consultants, resulting in the Schedule of Benefits, to be conducted through the representative bodies for consultants, namely the IHCA (representing approximately 85% of all hospital consultants) and to a lesser extent the IMO (representing approximately 15% of consultants although there are a small percentage of consultants that are not represented by any association).[26] Negotiations also occur between Vhi and speciality groups who represent the interest of one particular consultant speciality, for example, radiology or neurosurgery.

5.5 Following the Agreement and Undertaking reached between the Competition Authority and the IHCA, representative bodies or groups now have to re-consider the nature of their involvement in negotiations between their doctor members and payors, such as private health insurers. The aim of this guidance is to highlight issues that arise in the context of such collective negotiations and attempt to clarify their compatibility with competition law.

Participation Rates and Balance Billing

5.6 Consultants who contract with a private health insurer receive the agreed amount in the Schedule of Benefits for that particular procedure. These consultants are known as participating consultants. Participating

[25] These figures are for the end of June 2006 and are taken from a study by the Health Insurance Authority as reported in an article in The Irish Times, *Risk Equalisation would have cost BUPA over* €37m, 28th November, 2006.

[26] A small number of consultants are members of both the IMO and the IHCA.

consultants are not permitted to "balance bill", i.e., charge the patient more than that agreed with the private health insurer. Consultants who decide not to contract with the private health insurer, called non-participating consultants, receive a lesser amount from the private health insurer for procedures, but may balance bill patients for an additional amount. Vhi and the other private health insurers aim to ensure that 100% of consultants in the State are participating consultants and claim that this objective reflects patient preferences.

5.7 The Competition Authority recognises that it is in consumers' interests that they do not receive additional bills from consultants for medical treatment when they have private health insurance. In essence, the private health insurer acts as an agent for its members and by using its bargaining power is able to secure a lower overall price than if the member were liable for some amount to be determined by the consultant in addition to the agreed fee.

5.8 The Competition Authority accepts that full cover schemes[27] are a legitimate objective and they do not breach the Competition Act. The Competition Authority understands why private health insurers strive to ensure that 100% of consultants in the State are participating consultants, particularly given the relatively low level of consultant numbers. There is a consensus amongst the submissions that consultant numbers in the State need to be increased. Given that 48 out of the 86 consultant specialities represented by consultants registered with Vhi comprise 10 or fewer consultants, selective providers' networks (i.e., where an insurer purchases services from a list of preferred service providers rather than striving to enlist the services of 100% of consultants) do not seem a feasible option in the current environment. However, the Competition Authority believes that selective providers' networks appear to be a workable model if consultant numbers are increased in the State.

The Codes and Descriptions for Certain Procedures

5.9 The Competition Authority accepts that consultants could work collectively to agree with private health insurers appropriate codes and descriptions for medical procedures so long as this complies with the provisions of the Competition Act. It would appear that this form of interaction can help ensure a symmetric flow of information between private health insurers and consultants concerning the services provided by consultants.

5.10 This in itself should not necessarily provide any information concerning fees or other commercial terms or conditions. It would appear that this type of interaction could be pro-competitive in that it: (a) leads to the adoption of internationally accepted codes and procedures in the provision of consultant services; (b) facilitates the introduction of new procedures and technologies; and (c) leads to increased transparency and standardisation of codes and procedures thereby ensuring that claims are processed uniformly and more efficiently.

5.11 However, to realise the benefit from setting codes and describing procedures there is no need for consultants to collectively discuss or agree on the actual fees to be paid by the insurers or the terms and conditions under which they offer such procedures.

[27] Under a full cover arrangement the member of a private health insurance scheme does not pay any additional bills beyond what appears in the Schedule of Benefits. In other words, there is no balance billing.

The Ground Rules for Consultant Services

5.12 The Competition Authority accepts that consultants may be able to work collectively to agree with private health insurers (whether through a representative body, speciality group, or otherwise) appropriate ground rules for treatments so long as this complies with the provisions of the Competition Act. As in any other business transaction involving the provision of services, it may be necessary to negotiate a service level agreement. Agreed standard terms and conditions for the delivery of services may, for example, create certainty for insurers as well as consultants and thus likely reduce transaction costs. However, in order to come to an agreement with private health insurers about appropriate ground rules, there is no need for consultants to collectively discuss or agree on the actual fees to be paid by the insurers.

6. CONCLUSION

6.1 The objective of issuing guidance is to facilitate compliance with the Competition Act by consultants. Section 3 of this guidance note sets out the forms of conduct which the Competition Authority believes breach the Competition Act. As a consequence of the content of the submissions received in response to the Consultation Document, the Competition Authority has been unable to formulate any more detailed guidance on the permitted fee setting mechanisms than that already set out in Section 4 of the Consultation Document.

6.2 It should be noted that the Competition Authority has the function of investigating alleged breaches of the Competition Act and of Articles 81 and 82 of the Treaty of Rome. The Competition Authority will examine any complaint alleging anti-competitive behaviour by consultants.

ANNEX A

FULL TEXT OF AGREEMENT AND UNDERTAKING BETWEEN

The Competition Authority ("the Authority")

and –

The Irish Hospital Consultants Association ("the IHCA")

1. In February 2003 the Authority commenced an investigation into the negotiations entered into between the representative bodies for consultants and health insurers which resulted in the Schedule of Benefits being circulated to all consultants registered in the State setting the fees consultants receive from health insurers for the treatment of patients covered by private health insurance. As a result of this investigation, it is the Authority's view that a breach of Section 4(1) of the Competition Act, 2002 ("the Act") has occurred. In the Authority's view the conduct and activities of the IHCA, when engaging in collective negotiations on behalf of its members with health insurers pertaining to price and/or other terms and conditions for the provision of consultant services set out in the Schedule of Benefits, constitutes a decision/recommendation by an association of undertakings, the object and/or effect of which is to either directly or indirectly fix the fees paid to consultants by health insurers.

2a. The IHCA deny that they are in breach of the Act and enter this Undertaking without admission of liability.

2b. In consideration of the undertakings furnished by the IHCA set out in this Agreement, the Authority agrees it will cease this investigation of the IHCA, and for so long as the IHCA complies with the undertakings contained in this Agreement, The Authority will refrain from instituting proceedings against the IHCA under the Act arising from the facts set out in Paragraph 1 herein.

3. The IHCA undertakes that the IHCA, together with its employees and agents (to include all speciality groups formed under the auspices of the IHCA), will immediately cease and desist from and will not in the future engage in any of the following:-

- entering into, adhering to, participating in, maintaining, organising, implementing, enforcing or otherwise facilitating any agreement or concerted practice between consultants, or issuing any decision/recommendation to consultants, regarding the negotiation or agreement of the fee levels and increases sought from health insurers by particular specialities or consultants in general,

- entering into, adhering to, participating in, maintaining, organising, implementing, enforcing or otherwise facilitating any agreement or concerted practice between consultants, or issuing any decision/recommendation to consultants, regarding the responses of particular specialities or consultants as a whole to particular proposals on fees from the health insurers,

- expressing an opinion on contract terms directly or indirectly relating to specific fees offered for a particular procedure or general fee increases by health insurers to the members of the IHCA,

- suggesting to health insurers that a particular fee increase is required to obtain full participation of its members,

- directly or indirectly discouraging its members from individually negotiating with health insurers,

- suggesting to health insurers that its members, or some or all members of a particular speciality, will refuse to supply consultant services to the health insurers if the insurer does not accede to the fee levels and/or increases sought by the IHCA.

- encouraging, suggesting, advising or otherwise inducing or attempting to induce any third party from engaging in any action that would be prohibited if carried out by the IHCA by the terms of this undertaking.

4. The IHCA will provide information, from time to time, as may reasonably be required by the Authority regarding compliance with its undertakings herein contained.

5. The undertakings herein contained shall be binding on the successors and assigns of the IHCA and its employees, servants and agents and further all consultant speciality groups formed within the IHCA.

6. This Agreement and Undertaking shall be and is intended by the parties to be a binding and enforceable agreement which may be enforced by action in any Court of competent jurisdiction in the State.

7. This Agreement and Undertaking is strictly without prejudice to the due exercise by the Authority of its functions, powers and duties under law and in particular under the Competition Act, 2002 and is also without prejudice to the due exercise by the IHCA of any of its rights under law and in particular under the Competition Act, 2002.

Dated 27th of September 2005.

AGREED TO AND ACCEPTED BY

Signed: Finbarr Fitzpatrick
On behalf of and with the authority of
the Irish Hospital Consultants Association

Signed: Dr. Paul K Gorecki
Member for and on behalf of the Competition Authority