

COLLECTIVE ACTION IN THE COMMUNITY PHARMACY SECTOR

On 23rd September 2009 the Competition Authority published a Notice containing guidance on the question of collective action in the Community Pharmacy Sector. A copy of the Notice (Decision No. N/09/001) is available on the Competition Authority's web site at:

<https://www.tca.ie/templates/index.aspx?pageid=1272&locale=0>

The Notice follows on the Authority's public consultation (launched in October 2008) concerning mechanisms by which pharmacy contractors might engage collectively with the HSE within the parameters laid down by Irish and EC competition law.

Under Section 4(3) of the Competition Act 2002 the Competition Authority may issue a declaration to the effect that a specified category of agreements, decisions or concerted practices complies with the criteria (set out in Section 4(5) of the Competition Act) which would allow the Authority to exempt it under competition law. The Authority concludes that none of the four responses it received to its consultation document (from the HSE, the Irish Pharmacy Union, the Pharmaceutical Distributors Federation and the Association of Optometrists Ireland) assists it in issuing a declaration under section 4(3) of the Competition Act 2002 approving an agreement on fees reached with pharmacy contractors by means of collective negotiation through the IPU. The Notice seeks to explain the reasons why those responses to the consultation "have not permitted the Competition Authority to substantially advance the parameters of the community pharmacy debate" and goes on to repeat the views expressed in its consultation document regarding the application of Irish and EC competition law to collective action by pharmacy contractors. It also updates those views in light of the relevant provisions of the Financial Emergency Measures in the Public Interest Act 2009 under which the Minister for Health and Children altered the remuneration of community pharmacists.

The overriding conclusion of the Competition Authority is that it cannot identify any forms of collective negotiation on fees between independent service providers which would satisfy the criteria in Irish and EC legislation for exemption, and that collective negotiations cannot therefore escape the prohibition of anticompetitive agreements, decisions and practices contained in the legislation. In particular, the Authority concludes that "it is highly doubtful whether any specific objective efficiencies could arise from collective negotiations between the IPU and the State." Whilst conceding that the administration of the Community Drugs Schemes might be facilitated by such collective negotiations, the Authority goes on to say that collective negotiations are not the only mechanism by which fees paid under the Community Drugs Schemes can be set. It identifies the "messenger model" which in its view is "economically practicable to use and is less restrictive of competition." The Authority further concludes that "by sheltering pharmacy contractors from rivalry with other contractors on the issue of price, collective negotiation on fees ... gives rise to a possibility of eliminating competition ..."

Under the messenger model, a third party – the messenger – would gather information from each pharmacy contractor as to the level of fees which that contractor would require to provide the service. No pharmacy contractor would be aware of any other contractor's figures. The information would be passed on to the State which would use it to establish a fee scale for the remuneration of pharmacists at a level that will ensure the participation of a sufficient number of contractors to operate the various Community Drugs Schemes. The Authority notes, however, that the success of the model depends on each pharmacy contractor maintaining absolute independence when providing information to the messenger and suggests that sufficient safeguards be incorporated into the model to avoid the risk that it would facilitate price fixing by pharmacy contractors.

For a more detailed analysis of the Authority's Notice contact:

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