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FIPO
federation of independent practitioner organisations

Competition Law Compliance Guidance

November 2015

Consultant Fee Setting and Information Exchange

FIPO is providing two information documents on aspects of Competition Law.

Competition Law Compliance Guidance

- **Consultant Fee Setting and Information Exchange**
- **Annex 1 - Competition Law Affecting LLPs, Companies and Sole Traders**

FIPO (Federation of Independent Practitioner Organisations) brings together the majority of the medical professional specialist associations and other organisations in Britain that have private practice committees. Amongst our activities we provide consultant appraisals, information, guidance and training in order to advance patient care and the cause of independent healthcare.

The philosophy of FIPO is enshrined in its Charter which has the endorsement of the Patients Association, the GMC, Royal Colleges and specialist professional associations (http://www.fipo.org/docs/patientcharter.htm).

The Charter defines the relationship between the consultant and the patient in terms of a duty of care and the financial contract between them. In particular, it embodies the principle that practitioners should be free to set their fees and other terms and conditions independently and in the interests of providing value and choice to patients. This is relevant to competition law compliance. However, more recent developments in the independent sector have put this balance under strain. This is most clearly seen with an intrusion by certain insurance companies into patient referral routes and clinical issues and with new payment arrangements with consultants.

Competition Law Compliance Guidance- Consultant Fee Setting and Information Exchange

Summary

This document provides consultants with information about competition law and how this may impact directly on their practice.

A recent large fine imposed by the CMA ("Competition and Markets Authority") on a membership organisation of Consultant Limited Liability Partnerships (CESP - Consultant Eye Surgeons Partnership) has highlighted the need for general competition law guidance for all consultants in private practice.

Consultants practise as "economic entities" which may be as individuals (sole traders) or within another structure such as an LLP or limited company. When consultants operate as such "economic entities" they are treated as "undertakings" and competition law applies to all such entities. This relates to consultants' activities where they are providing their services privately and not when they act as employees of the NHS.

There are two particular aspects of competition law that apply to all consultants who operate as an economic entity, namely the prohibition of anti-competitive agreements and the prohibition of abuse of a dominant position.

Consultants practising within a single economic entity (and without a separate partner or shareholder with competing activities) are not treated as being in competition with each other. They are therefore able to agree fee levels and other terms of supply imposed by that entity because they are treated as a single economic unit for competition law purposes. Competing consultants practising through separate economic entities must not fix fees or other terms of supply with consultants operating through other separate economic entities.

Anti-competitive agreements or arrangements which are illegal when entered into between separate economic entities include agreeing or fixing fees, agreeing to reduce output (such as consultants' capacity to take on work), sharing competitively sensitive financial market information, joint negotiation

with outside businesses such as hospitals or insurers over competitively sensitive matters or jointly boycotting such parties.

There is no prohibition on holding a dominant position in a market; only its abuse is illegal. A dominant position in a relevant market depends on a range of factors including the size of the consultant group and its competitors, its specific practice specialty and the availability of substitutes, its market share and its impact on competitors, suppliers and consumers.

Competition law should not interfere with normal clinical practice and joint consultant activities for the benefit of patients (such as referrals between consultants based on experience, expertise or capacity or on educational and clinical improvements).

The law is complex but sanctions by the authorities are severe and thus all consultants should be fully aware of the issues and take their own legal advice if they are in any doubt over how any aspects of their practice would be treated under competition law.

FIPO's two documents are for information purposes only and provide a summary of the key principles.

This Competition Law Compliance Guidance describes the general aspects of Competition Law relevant to doctors.

Annex 1 to the Competition Law Compliance Guidance discusses in more detail and with hypothetical scenarios the impact of Competition Law on consultants practising in LLPs, companies or as sole traders.

<u>Neither document constitutes nor should be relied on as legal advice.</u>

Competition Law Compliance Guidance

Consultant Fee Setting and Information Exchange

Section 1: Competition Law Compliance

i. Recently, the independent medical sector has come under competition law scrutiny. FIPO is taking this opportunity to reiterate its commitment to competition law compliance and to provide guidance to consultants on how to approach the setting of their fees and other terms and conditions so that they do not breach competition law.

ii. This guidance follows a Competition and Markets Authority ("CMA") investigation into anti-competitive information exchange and pricing agreements where a membership organisation (CESP) of many Limited Liability Partnerships ("LLPs") of private consultant eye surgeons admitted breaching UK competition law and agreed to pay a fine of £382,500 (reduced from £500,000). Details of the CMA's investigation can be found here: https://www.gov.uk/government/news/cma-confirms-fine-as-it-completes-eye-surgeons-investigation

iii. The application of competition law can raise complex legal and economic questions. If any consultant is in doubt about how competition law applies to their activities they should seek their own legal advice.

Section 2: Overview of the Framework of UK and EU Competition Law

i. Competition law is aimed at preventing conduct which limits consumer welfare by increasing prices or restricting the extent to which goods or services are provided, or the exercise of market power which can lead to such adverse effects. This is achieved through rules which ban anti-competitive agreements and abuse of a dominant position (and by imposing controls on mergers). The area of most direct relevance to consultants is the control of

anti-competitive agreements between independent businesses (referred to as "undertakings" for competition law purposes).

ii. The basic structure of UK competition law under the Competition Act 1998 mirrors the approach under EU law in the Treaty on the Functioning of the EU. One key difference is that EU competition law applies where an agreement or practice has an effect on trade between EU member states, whereas UK competition law applies where there is an effect on trade in the UK. The UK competition authorities and courts are required to follow the EU case law when considering corresponding questions under UK competition law.

iii. There is one particular area where UK competition law is stricter than EU law, namely in the criminalisation of cartel activity. Under UK law, in addition to the civil law prohibitions on anti-competitive agreements and abuse of a dominant position which apply to undertakings, it is a criminal offence for an individual to engage in the following arrangements between competitors: price fixing; limiting the production or provision of goods or services; market or customer sharing or bid rigging. These activities are sometimes called "hard-core" cartel activities because they are viewed as especially serious violations.

iv. This Competition Law Compliance Guidance covers both the prohibition on anti-competitive agreements and the prohibition on abuse of a dominance position under UK/EU competition law.

Section 3: How Consultant Practice Arrangements are treated under Competition Law

i. General principle: Competition law applies to arrangements between separate economic entities

Consultants may practise as individuals or within a structure such as an LLP or a limited company. Each of these arrangements is an "economic entity" or "undertaking" and, as such, the competition laws will apply equally to agreements or arrangements between them and another undertaking.

ii. Arrangements between Consultants Practising within the Same Economic Entity

A single practitioner (a sole trader), single company or legal partnership is a single economic entity. All practitioners practising within a single economic entity – whether they are employees, directors or partners – are treated as part of the same economic entity. They are therefore not treated as being in competition with each other for the purposes of competition law and are able to agree the fees charged or terms of supply imposed by that entity without breaching competition law because they are treated as a single economic unit or "undertaking".

iii. Arrangements between Consultants Practising through Separate Economic Entities

Practitioners practising through separate economic entities or within a legal partnership or company with at least one separate partner or shareholder with competing activities are considered competitors for the purposes of competition law. Consultants may share the same premises or "chambers" to carry out their practice and may share central overheads or secretarial and administrative support. However, where they remain separate economic entities for carrying out their practice (i.e. sole traders) they will be treated as competitors for the purposes of competition law. Where such competitors engage in any of the prohibited matters discussed below in Section 4 this is illegal.

iv. 'Hybrid' arrangements

It is possible to conceive of more complex business structures such as, for example, where an LLP comprising a number of consultants might also have a partner who maintains a separate practice that is independent of the LLP. Where that partner's separate practice competes with the practice that is conducted through the LLP the prohibition on anti-competitive agreements applies. It may be possible to structure the arrangements so as to allow for

different tiers of membership of the organisation where the exchange of competitively sensitive information and the coordination of business activity can be limited to those consultants who do not maintain a separate competing practice. However, given the competition law risks involved, consultants participating in such hybrid organisational structures will want to take their own legal advice to ensure that their activities are conducted in compliance with competition law. Annex 1 to this Competition Law Compliance Guidance discusses in more detail and with hypothetical scenarios the impact of Competition Law on consultants practising in LLPs, companies or as sole traders.

Section 4: The Prohibition of Anti-competitive Agreements – General Principles

i. The competition law prohibition of restrictive or anti-competitive agreements applies to agreements and arrangements between independent "undertakings". Practitioners who practise through separate legal entities will be treated as separate undertakings and are therefore subject to competition law as explained above in Section 3.

ii. To be banned under competition law, an agreement does not need to be written down or be legally binding. The same is true of an informal gathering of practitioners operating through separate legal entities who together reach an understanding over any of the prohibited matters (see further paragraph 4(iv) below). An oral information exchange or understanding can breach competition law even if it is merely a "gentleman's agreement".

iii. Agreements or conduct taking place outside the UK/EU can breach UK/EU competition law if their object or effect is to prevent, restrict or distort competition in the UK/EU. Any agreement or understanding over the prohibited matters will breach competition law regardless of whether it is actually put into effect.

iv. Competing practitioners practising through separate legal entities should not discuss or be involved in any of the following activities ("prohibited matters"):

a. **agreeing between themselves the level of fees that they will accept from an insurer or that they will charge self-pay patients including fee ranges, discounts or other components of fees**
b. **market or customer sharing whether in terms of the allocation between them of patients or patient groups, medical procedures, or geographic location (for example, a particular catchment area around a hospital or town centre)**
c. **the exchange of competitively sensitive information, for example the sharing of detailed and individualised information on fees, costs, margins or future pricing and business intentions**
d. **agreeing to reduce investment levels or otherwise limit the development of new service offerings**
e. **agreeing to limit other elements of service on which individual consultants compete (for example, service availability outside of normal practising hours)**
f. **joint negotiations with insurers or joint selling of consultant services in each case where competitors coordinate over competitively sensitive matters such as fees**
g. **any other agreement with the aim or effect of restricting competition such as, for example, a collective boycott of particular insurers or hospitals or joint action to seek to exclude another party from the market.**

v. Outside the area of prohibited matters set out above other forms of collaboration between competitor consultants such as joint purchasing of supplies are treated less strictly under competition law in the absence of market power but should only be entered into following legal review.

vi. Competition law recognises that some forms of collaboration between competitors can be pro-competitive by allowing for the efficient sharing of finite resources (for example, consulting rooms) or by bringing together complementary skills and allowing for consumer/patient benefits to be realised more efficiently (such as through research and development or innovation). The assessment of these types of practices is fact-specific and legal advice should be taken before engaging in any cooperation with a competitor in a

competitively sensitive matter and where the parties would otherwise be in a position to act independently. (See Section 8 below for guidance on aspects of consultants' practice that fall outside competition law because they do not relate to competitively sensitive matters at all).

vii. If an agreement appreciably restricts competition it may benefit from an exemption under competition law based on a self-assessment and balancing of the restrictive and pro-competitive effects. This is the case if the agreement

   a. contributes to improving the production or distribution of products/services or to promoting technical or economic progress
   b. allows consumers a fair share of the resulting benefit

   AND DOES NOT

   c. impose indispensable (i.e. unnecessary) restrictions
   d. eliminate competition in respect of a substantial part of the products/ services.

viii. The application of the above exemption criteria to an agreement or arrangement can be complex and should be undertaken with specialist legal advice.

ix. A further discussion of consultant practice in LLPs, companies or as a sole trader is explored in a separate document from FIPO (Annex 1 to this Competition Law Compliance Guidance).

Section 5: The Prohibition of Abuse of a Dominant Position

i. Businesses that have the market power to act independently and set prices and restrict innovation regardless of customers, suppliers or competitors have a special responsibility not to restrict competition.

ii. "Dominance" is essentially the power to determine price without competitive constraints and it is determined according to a range of factors including but not limited to market share. Typically, under UK and EU competition law dominance concerns tend to arise where a party has a relevant market share of 40% or more. However, it is important to define the relevant (product and

geographic) market correctly and legal and economic advice may be needed to do this properly.

iii. In the healthcare sector, consultant groups could be found dominant on the basis of a very narrow market definition which could be limited to a practice speciality or a specific region or catchment area around a hospital or population centre. Consultants should therefore ensure that they are aware of the products and services that they provide and in relation to which they might be at risk of being found dominant if there are limited substitutes.

iv. Even if individual consultants may not be dominant, a group of consultants may be considered collectively dominant in a particular product or service market if a small number of them (say, four or fewer) account for a large share of the market (say, 80% or more). Such "collective dominance" tends to be rare but in such "oligopolistic" markets parallel behaviour such as alignment on fees or terms of supply that restricts competition or exploits patients might be found to be abusive even if there is no evidence of an agreement or actual collusion.

v. In contrast with the prohibition on anti-competitive agreements, there is no need to demonstrate an actual agreement for a practice to be caught by the prohibition on abuse of a dominant position.

vi. There is no prohibition on the holding of a dominant position; only its abuse is unlawful. Also, certain practices that are acceptable for non-dominant parties are unlawful if entered into by a dominant party.

vii. There is no exhaustive list of the practices that may constitute an abuse of a dominant position.

viii. **Examples of possible abuses of a dominant position include**:

a. imposing unfair or excessive fees
b. imposing different fees or terms on parties who are in the same or a similar situation (or imposing the same fees or terms on parties who are not in the same or a similar situation)
c. offering below-cost fees with a view to excluding a competitor from the market (i.e. predation)
d. limiting innovation or technical development

e. exclusive dealing (e.g. where the customer is required to purchase the majority (i.e. 80% or more) of their needs from the dominant undertaking)
f. refusing to supply products or services to a buyer where those products or services are essential in order to compete
g. making the provision of products or services that a buyer needs dependent on the purchase of a product or service that they do not want (i.e. tying or bundling consultant products or services).

ix. In some cases conduct which would otherwise be considered abusive may be justified because it is objectively necessary or brings about efficiencies which outweigh the likely consumer harm.

Section 6: Why this Matters and Possible Sanctions

i. The consequences of infringement of either UK or EU competition law include:
   a. fines of up to 10% of worldwide turnover
   b. possible criminal sanctions and imprisonment in respect of hard-core cartel arrangements (up to 5 years in the UK)
   c. third party litigation for injunctions and damages - such claims are becoming increasingly frequent
   d. void agreements – restrictions that breach competition law are unenforceable
   e. disqualification of directors (up to 15 years in the UK)
   f. disruption, distraction and management costs
   g. damage to reputation
   h. loss of patient confidence and goodwill

Section 7: Consultant Clinical Practice

i. Elements of clinical practice that do not relate to competitively sensitive matters are not affected by competition law.

ii. Many forms of collaboration between consultants have an objective justification/legitimate aims and thus general patient care with therapeutic justification does not raise competition law issues. Specialist group practice within hospitals is to be encouraged.

iii. Thus, agreements over emergency cross-cover for patients, MDTs, patient referrals between colleagues based on clinical need and availability, clinical audits, publication of clinical outcomes by individual or at unit level and all joint educational activities are unaffected by the competition law prohibitions.

Section 8: What should Consultants Do?

i. Familiarise yourself with the above guidelines and your obligations under competition law

ii. Continue to attend MDTs and to discuss clinical, educational and scientific developments, public policy, regulatory or ethics matters of general interest, general professional trends, aggregated surveys or general benchmarking reports, but be careful that such discussions do not stray into the area of prohibited matters.

iii. If you are at a meeting where any of the prohibited matters are mentioned you should terminate the discussion, leave immediately and record your disagreement.

iv. Consider your own practice arrangements. Annexe 1 to this document outlines certain hypothetical practice scenarios but there are many variations on these.

v. **If you are in any doubt about how competition law applies to your particular activities seek your own legal advice.**