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Competition Law Compliance Guidance

Annex 1 - Competition Law Affecting LLPs, Companies and Sole Traders

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

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

This 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.

Neither of FIPO's documents constitute nor should be relied on as legal advice.

Annex 1 - Competition Law Affecting LLPs, Companies and Sole Traders

Consultant Case Scenarios: Discussion Document

INTRODUCTION AND BACKGROUND

In FIPO's initial document "Competition Law Compliance Guidance - Fee Setting and Information Exchange" the general principles of Competition Law were described.

The private healthcare sector has received scrutiny by the Competition and Markets Authority ("CMA") in recent years, in particular in its 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). Consultants are referred to the CMA's decision in its investigation which can be found here:

<https://www.gov.uk/government/news/cma-confirms-fine-as-it-completes-eye-surgeons-investigation>

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. Consultants practising within a single economic entity such as an LLP (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.

An LLP consultant partner may want to offer his services both through the LLP and independently as a sole trader ("Hybrid Structure"). The LLP partner consultant providing services outside the LLP is a "Hybrid Partner".

This Annex 1 to FIPO's Competition Law Compliance Guidance provides a more detailed review of the potential competition issues arising in a Hybrid Structure. It uses a simplified "Base Case Scenario" with examples of possible variations in order

to illustrate the potential scenarios. In each hypothetical example we consider whether any competition law concerns would arise if the Hybrid Partner engages in outside services for various procedures and in various capacities.

The examples are highly simplified in order to illustrate a particular issue. Other scenarios may well exist in real practice. The fees quoted in these examples are not based on the actual benefits quoted by any Private Medical Insurer (“PMI”) and are used for illustrative purposes only.

The application of competition law is highly fact-specific and depends on the economic context. Consultants should seek legal advice if in doubt about the application of competition law to their own particular private practice arrangements.

THE BASE CASE SCENARIO

"Hernia LLP" is a partnership of four consultant surgeons who practise in Anytown. Hernia LLP has a dedicated facility for performing day case hernia surgery and providing pre and post-operative consultations. No other type of surgery is performed in the Hernia LLP premises which provides facilities for day care hernia repairs and out-patient consultations.

All four consultants working as partners in Hernia LLP have some degree of other professional work that is not conducted through Hernia LLP.

Two of the Hernia LLP partner consultants (consultants A and B) have been in practice for over 10 years. The other two Hernia LLP partner consultants (consultants C and D) started in independent practice since 2010. Consultant E is a very recently appointed consultant to the NHS and wishes to join Hernia LLP.

Hernia LLP offers the "Hernia Package" (comprising the operation, one pre-operative and one post-operative consultation but excluding the anaesthetic) at a package price of £600. An initial consultation alone costs £150. This applies for all patients whether insured or self-pay.

All consultants adhere to Hernia LLP's agreed charges. All fees are pooled and then profits are distributed equally to the four partners after administrative and other practice expenses have been paid.

HYPOTHETICAL SCENARIOS

There are 6 hypothetical scenarios considered that might affect Hernia LLP. In Scenarios 1 – 5 let us assume and, unless otherwise specified, that all four consultant partners are able to set their own fees for any work performed outside Hernia LLP.

Thus, apart from scenario 6, they are all hypothetically unconstrained by any restrictive PMI insurance policies which require them to charge according to rates set by the PMIs (i.e. none are Fee Assured/Fee Approved in scenarios 1-5). Scenario 6 considers the impact of consultant fee restrictions imposed to varying degrees by certain PMIs on Hernia LLP.

HYPOTHETICAL EXAMPLE 1: NON-CLINICAL SURGICAL SERVICES

Consultant A produces written medico-legal reports for solicitors (“medico-legal services”) in his capacity as a sole trader and working at home or in the local private hospital.

Analysis Example 1

Medico-legal reports are not part of the patient consultation process that typically involves the diagnosis of a particular condition which may lead the patient to surgery or other forms of treatment.

Competition concerns do not arise in this scenario because the LLP services provided through Hernia LLP do not compete with the medico-legal services provided by consultant A in his capacity as a sole trader.

The same reasoning would apply to the following other non-clinical services:

- fees for lectures and paid professional advice to various bodies
- cremation forms, blind registration and other “official” forms and certificates for which a fee is chargeable
- money earned from other sources, e.g. reports for participation in drug and equipment trials and/or research for design and development of equipment, software etc, royalty fees from manufacturing companies or from publishers (relating to books and other publications).

In each of these cases consultant A would be permitted to conduct the non-clinical services outside Hernia LLP.

HYPOTHETICAL EXAMPLE 2: OTHER SPECIALIST PROCEDURES

All the four partners in Hernia LLP also perform specialist complex colorectal, upper gastrointestinal and other forms of surgery in their capacity as sole traders. They work in a local private hospital and set their own (different) fees for these operations which typically will be around £700- £1,000 depending on the procedure.

Analysis Example 2

Competition concerns do not arise in this scenario because the LLP services provided through Hernia LLP are not a substitute for, and therefore do not compete with, the more complex specialist abdominal surgery provided by the partners elsewhere in their capacity as sole traders.

HYPOTHETICAL EXAMPLE 3: PACKAGED SERVICES

Consultant B proposes to offer hernia consultations and surgery in his capacity as a sole trader on two separate pricing plans in another local private hospital in Anytown. To do this he is offering: (1) a packaged deal (comprising the operation, one pre-operative and one post-operative consultation but excluding the anaesthetic); and (2) an unbundled deal (i.e. where the consultation and surgery services components are priced on a standalone basis).

Analysis Example 3

As the consultation and operation offered by consultant B in his capacity as a sole trader are clinically identical to those services provided through Hernia LLP, they compete with each other and prices should be set independently.

Consultant B is not permitted to agree fees with the other Hernia LLP partner consultants for the Hernia LLP Package whilst he also provides competing hernia consultation and surgery services outside Hernia LLP.

Competition concerns arise in relation to the provision of a packaged offering outside Hernia LLP because this competes head on with the Hernia Package. Competition concerns will also arise in relation to the unbundled offering outside Hernia LLP. This is because consultant B has access to commercially sensitive information on the Hernia Package (including prices, price components, costs or profitability) and the sharing of such information between competitors is viewed strictly by the competition authorities. In the CESP case the CMA considered that the sharing of future pricing information limits the ability of competitors to make their pricing decisions independently, and they are assumed to take such information into account when setting their pricing. As a result, the sharing of pricing information amongst the Hernia LLP partners while one of them maintains a competing outside business is likely to be unlawful without there being a need to show any effects on the market.

The fact that prices for the Hernia LLP Package are publicly available does not, by itself, remove competition concerns. In general, exchanges of genuine public information among competitors are unlikely to constitute an infringement of competition law. However, for information to be genuinely public, obtaining it should not be more costly or difficult for patients and parties unaffiliated to the closed group (here the Hernia LLP partners) who have access to the information through non-public channels such as through the accounts of Hernia LLP. For example, early release of the information to Hernia LLP partners before it is made public could still render it commercially sensitive in the period before it is more widely available. If the information is as easily accessible to the public and in the same form and at the same time as it is to the Hernia LLP partners, it is unlikely to be treated as commercially sensitive.

If, on the other hand, a Hernia LLP patient is required for medical reasons to spend a night in the same local hospital and is operated on at that hospital by consultant B and charged as a Hernia LLP patient at the partnership's agreed rates (which are paid in to Hernia LLP), then there would be no competition concerns. In this situation, the patient is a patient of Hernia LLP and the reason he is not being treated at the Hernia LLP unit is medical – the hospital in this case is not competing with Hernia LLP for the underlying clinical service package (it is providing the facilities for delivery of part of the service).

HYPOTHETICAL EXAMPLE 4: COMPETITION AT THE GEOGRAPHIC LEVEL

This question revolves around how far geographically Hernia LLP's pricing may be subject to competitive constraints from similar units or hospitals. Hernia LLP tends to attract patients who live within a 50 km radius of Anytown. All Hernia LLP consultant partners live within 20 km of Anytown.

However, consultant C is willing to travel to other hospitals or units outside of Anytown to provide hernia consultations and surgery in his capacity as a sole trader, including:

- The XX Hospital - 100 km from Anytown
- The YY Hospital - 50 km from Anytown
- The ZZ Hospital - 20 km from Anytown

Analysis Example 4

Competition takes place at

- a) the product/service level (i.e. competition between procedures) and
- b) at the geographic level (i.e. competition between units and consultants in different locations).

If the services offered through these other hospitals are essentially the same as those offered through the Hernia Unit(Hernia LLP), the starting point is that Hernia LLP and these other hospitals should compete with each other. Therefore, consultant C is not permitted to fix fees with his other Hernia LLP partners at the Hernia LLP rate while at the same time pricing equivalent services separately as a sole trader (see example 3 above).

The geographic sphere of competition is less easy to define. There is insufficient information available in this example to conclude what is the relevant geographic market and whether, for example, Hospital XX (100 km away) is outside the geographic area for competition with Hernia LLP. This will depend on both demand and supply-side factors.

From the demand-side, it is relevant to consider whether, and to what extent, patients using Hernia LLP would consider services at the other hospitals to be substitutable.

From the supply-side, it is relevant to consider whether and to what extent consultants consider the different units to be substitutes. In each case relevant factors include the

distance to be travelled from the individual's home (whether the patient or the consultant) and any other factors specific to the particular unit such as the quality of facilities, reputation and accessibility.

When seeking to determine the relevant geographic market in which Hernia LLP competes, previous competition law cases are informative but inconclusive. Each case must be looked at on its facts. While it may be reasonable to conclude that competition takes place at the regional level (say, where the widest geographic market includes Hospital YY and Hospital ZZ) there may be wider national elements of competition which would bring Hospital XX into the relevant market.

A routine procedure such as a hernia repair is likely to be available at a greater number of hospitals in different localities, whereas certain highly specialised conditions (such as paediatric cardiac surgery) would tend to draw patients from a much wider geographical area.

When considering the geographic market, even though most factors may point to a regional market in this case, it could be that some constraint is exerted at a national level, for example where pricing in a wider market exerts some pricing pressures 'at the margins'.

HYPOTHETICAL EXAMPLE 5: NHS ARRANGEMENTS

Consultant D carries out NHS waiting list work as an NHS consultant where NHS agreed fees are paid to him directly as an individual in his capacity as a sole trader operating outside Hernia LLP.

Consultant E is a very recently appointed consultant with tougher fee restrictions placed on him by certain PMIs. He works primarily as an NHS employee and wishes to join Hernia LLP as a partner to allow him to carry out some limited private work on Hernia LLP's terms. His arrangements with PMIs now mean that his average package rates are lower than all the other Hernia LLP partners.

Analysis Example 5

Consultant D, a Hernia LLP partner, may carry out NHS waiting list work in his capacity as

a sole trader without this raising competition issues. The fact that consultant D has access to pricing information for services conducted through Hernia LLP cannot affect price competition in relation to NHS waiting list work. The consultant will typically be offered a fixed or sessional rate for the work by the NHS which he is free to accept or reject. The patients who are treated through the NHS waiting list channel are not actual or potential contenders for treatment through Hernia LLP which operates only in the private healthcare market.

When consultant E works for the NHS as an employee he is not an "undertaking" for competition law purposes. Competition law does not prevent consultant E engaging in other economic activity through an undertaking such as, for example, performing private work for a fee as a sole trader or through Hernia LLP (but not via both routes where he is providing competing services – see example 3 above).

However, Hernia LLP may not wish to engage this newly appointed consultant who can only charge at lower fee rates than all the other partners and thus it may not be commercially viable for him to be admitted to the partnership and take advantage of shared costs and the facility.

HYPOTHETICAL EXAMPLE 6: PRIVATE MEDICAL INSURER (PMI) ARRANGEMENTS

The previous examples assumed that all four partners in Hernia LLP were able to charge their own level of fees for insured patients, i.e. they all charged the agreed Hernia LLP package price of £600. In the following scenario the four Hernia LLP partners have different arrangements with various PMIs which can affect how much they can charge for their individual services.

Consultant A has agreed with certain PMIs to only charge according to the benefits laid down by the PMI (Fee Assured/Fee Approved) and for these insurers he must submit to their benefit rates via Hernia LLP. He thus only earns, on average, £500 per Hernia LLP package for his patients.

Consultant B has not agreed to charge within PMI rates (non-Fee Assured or Fee Approved) and submits accounts via Hernia LLP for the standard package price of £600.

Consultants C and D can only charge the fixed reduced fee rates imposed by certain PMIs on consultants appointed since 2010 which also include restrictions on consultation fees. They earn on average £425 per Hernia LLP package as the restrictions placed on them by certain PMIs are harsher than those on more senior consultants who are Fee Assured/Fee Approved.

Consultant C has an opportunity to provide hernia consultations and surgery services in his capacity as a sole trader at the local private hospital which is not part of Hernia LLP but is also based in Anytown. However, as noted above, he is fee restricted with various PMIs and can therefore only charge £425 for the services provided under the Hernia LLP package.

Analysis Example 6

The starting point is that while consultant C retains his status as a sole trader he operates as an economic entity or “undertaking” that is separate from Hernia LLP. He would therefore be expected to set his fees as a sole trader independently of Hernia LLP. While this situation might in practice lead to him charge the same level of fees as Hernia LLP competition law requires that he sets those fees independently of his competitors. Such fees should be arrived at as a result of his own assessment of what is an appropriate price and which is not subject to distortion as a result of any privileged access to commercially sensitive information of competitors. In this regard, the example is no different to consultant B in example 3 above and would give rise to competition concerns.

However, the position is more complex because unlike consultant B, consultant C can only charge £425 for these particular clinical services – whether or not he operates through Hernia LLP or outside - whereas consultant B can vary his charges. Due to his newly appointed and fee restricted status, higher charges would mean automatic loss of PMI recognition for consultant C. Such a loss of major PMI recognition would make consultant C’s practice (and position as a partner in Hernia LLP) unsustainable. He cannot charge below the PMI imposed rates because it is not economically sustainable for him to do that, even before he meets his share of expenses of the LLP.

A further complication emerges from this example. The notion of a “standard Hernia LLP package price” for a specific service is most likely to be constrained by the arrangements that individual consultant partners have with various PMIs. As seen in this example, whereas consultant B is not constrained by any arrangements with PMIs all the other consultants are constrained (and at different rates).

Therefore, the starting point of freedom to set agreed partnership fees through an LLP independently of external constraints does not exist in the current independent sector. The reimbursement rate set by the PMIs is effectively the price that is and can be charged for the relevant services by each consultant both through and outside the LLP. Further, the rate may differ depending on the consultant and his/her PMI arrangements. This in turn will create tensions as the contribution to the shared practice expenses will vary and it may well thus preclude the partnership from admitting new young consultants to their group and thus benefiting from shared clinical cover, secretarial and other administrative arrangements.