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Consultation on Collective Action in the Community Pharmacy Sector

Consultation Document

10 October 2008



The Competition Authority
 An tÚdarás Iomaíochta

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1. INTRODUCTION

- 1.1 The Competition Authority is responsible for the enforcement of Irish and EC competition law in the State, working principally within the framework of the Competition Act 2002 ("Competition Act") and the EC Treaty in conjunction with Council Regulation (EC) No. 1/2003. Its mission is to ensure that competition works for the benefit of consumers throughout the Irish economy.
- 1.2 The Competition Authority wishes to conduct a public consultation into the nature and extent to which independent pharmacy undertakings may act collectively with respect to the setting of terms and conditions, including fees, for the supply of services by community pharmacies under various drugs schemes administered by the Health Service Executive ("HSE").
- 1.3 This consultation document outlines the legal provisions applicable to the community pharmacy sector, and furthermore provides some guidance in the form of the Competition Authority's views of the application of the competition rules to these issues. We invite submissions from stakeholders and interested parties on the contents of the consultation document and, in particular, in response to questions set out in the document. We hope that interested parties will take the opportunity to engage with this consultation process, which aims to develop workable mechanisms for the setting of terms and conditions for the supply of community pharmacy and other health care services.
- 1.4 Following the conclusion of the public consultation, the Competition Authority will consider whether it can issue a guidance notice addressing these issues, pursuant to section 30(1)(d) of the Competition Act, and/or issue a declaration, pursuant to section 4(3) of the Competition Act, to the effect that a specified category of agreements, decisions or concerted practices does not, in its opinion, breach the Competition Act.
- 1.5 The Competition Authority is not a decision-making body. Pursuant to the Competition Act, it is for the courts to determine whether a breach of competition law has occurred. This consultation document, and any guidance or declaration that may follow, sets out the Competition Authority's views on collective conduct by pharmacy contractors. The views expressed by the Competition Authority are not intended to be, and are not a substitute for, independent legal advice. Any person who may have concerns arising from the public consultation may wish to seek advice from his or her legal advisors.
- 1.6 On 10 January 2007, the Competition Authority published a document entitled *Guidance in respect of Collective Negotiations relating to the Setting of Medical fees*.¹ This publication followed a public consultation that began in January 2006, arising from a settlement between the Competition Authority and the representative body of hospital consultants in the State, the Irish Hospital Consultations Association

¹ Published 10 January 2007, found at <http://www.tca.ie/templates/index.aspx?pageid=1074>.

("IHCA"), in respect of an investigation about the setting of fees for consultants' services provided to private health insurers.²

- 1.7 Notwithstanding that the 2006 consultation and the current consultation address similar issues, the Competition Authority has decided for a number of reasons to undertake a public consultation relating to collective action by independent pharmacy undertakings in the setting of terms and conditions, including fees, for the supply of services under the Community Drugs Schemes.
- 1.8 Firstly, and as noted, the 2006 public consultation was conducted in the context of the collective negotiation of fees between private health insurers and the IHCA, a factual context significantly different to the community pharmacy sector. The current consultation relates to the provision of professional services that are much more homogenous in nature than the highly specialised medical services provided by hospital consultants for which, in some cases, there are merely a handful of providers of certain specialty or sub-specialty services.
- 1.9 Secondly, the Competition Authority has taken the view that the HSE is not an "undertaking" when administering the Community Drugs Schemes, and so it is not subject to competition law including the provisions regarding the abuse of a dominant position contained in section 5 of the Competition Act and Article 82 EC. This opinion about the status of the HSE as an undertaking under Irish and Community competition laws is contained in Enforcement Decision ED/01/2008 *Alleged anticompetitive conduct by the Health Service Executive relating to the administration of the Community Drugs Schemes*, which has been released concurrently with this document. The Competition Authority believes that it is necessary to explore the implications of this opinion about the status of the HSE.
- 1.10 Finally, the issues have been given renewed relevance by a recent High Court decision, *Hickey and others v HSE*,³ delivered on 11 September 2008. In *Hickey*, Finlay Geoghegan J considered a contractual clause that requires the Minister for Health and Children to consult with the representative body of pharmacists in the State, the Irish Pharmacy Union ("IPU"),⁴ before the Minister can unilaterally change the fees paid for the provision of community pharmacy services. In the past, the Minister had in fact reached agreement with the IPU on fees to be paid. Finlay Geoghegan J held that the consultation procedure mandated by the contractual provision does not "as a matter of probability" give rise to activities contrary to section 4(1) of the Competition Act, and so is not voided by that provision.⁵
- 1.11 This consultation document, and the public consultation that follows, provides the Competition Authority with the opportunity to present its understanding of the parameters and implications of the *Hickey*

² Consultation on Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees, found at http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=18, hereafter "medical fees consultation document".

³ *Hickey and others v HSE* [2007] 180 COM, hereafter "*Hickey*", judgment of 11 September 2008.

⁴ The IPU was previously called the Irish Pharmaceutical Union.

⁵ *Hickey* at paragraph 91.

judgment and, furthermore, to canvass the views of stakeholders and other interested parties as to how the consultation process envisaged by the judgment should and can operate in practice. Moreover, the disposition of the competition law issues raised in the pharmacy sector will have important implications for the supply of other health care services to the HSE.

- 1.12 The structure of the consultation document is as follows. Part II describes the relevant factual context in which these issues have arisen. Part III sets out in detail the provisions of the Competition Act and the EC Treaty of possible application on the facts of the present situation. Part IV discusses the nature and extent to which collective action by independent pharmacy undertakings may be permitted by competition law. Seven questions are identified to which the Competition Authority invites specific responses from interested parties.
- 1.13 In addition, comments are welcome on any other aspect of this consultation document. Responses should, where possible, be provided in electronic format. It is the intention of the Competition Authority to publish on its website, insofar as is possible to do so, all submissions it receives in response to this consultation document. Upon request, the Competition Authority will not publish any part of a submission where the person making the submission has so requested if such part contains business secrets or other confidential information. A person making such a request should clearly identify the relevant parts of its submission. Where possible, confidential information should be placed in a separate appendix.
- 1.14 Comments are invited at the address below **on or before 17:15 on Friday, 28 November 2008**. Submissions received after this date will not be accepted. Comments should be sent:

By email to: pharmacyconsultation@tca.ie

By ordinary post to: Consultation on Community Pharmacy
The Competition Authority
Parnell House
14 Parnell Square
Dublin 1

2. THE FACTUAL CONTEXT

- 2.1 The HSE is a State body charged with the management and delivery of health and personal social services in the State.⁶ The object of the HSE is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public.⁷
- 2.2 Pursuant to section 59 of the Health Act 1970, the HSE administers a variety of schemes for the provision of prescription drugs to the public, known as the Community Drugs Schemes. The HSE has chosen to secure the delivery of drugs under the Community Drugs Schemes by concluding a series of Community Pharmacy Contractor Agreements (“contractor agreements”) with the proprietors of retail pharmacies located throughout the State.⁸ Each proprietor is designated a “pharmacy contractor” by the contractor agreement, and their pharmacy a “community pharmacy”. There are about 1600 retail pharmacies operating in the State, and practically every retail pharmacy supplies community pharmacy services under the Community Drugs Schemes.⁹
- 2.3 Under the terms of each contractor agreement, the community pharmacy dispenses drugs to eligible persons under the various Community Drugs Schemes. In consideration of the provision of community pharmacy services, the HSE makes payment to the pharmacy contractor. Payment consists of a fixed fee to cover the dispensing service provided by the community pharmacy, which varies according to the particular Community Drugs Scheme at issue, and reimbursement of the cost of the drug provided.
- 2.4 Prior to changes announced on 17 September 2007, discussed below, community pharmacies were reimbursed the ex wholesaler price of drugs, which is calculated as the fixed ex factory price (also known as the “landed price”) plus a mark-up of 17.66 percent. The ex factory price of a prescription drug is fixed by agreement between the HSE and pharmaceutical manufacturers. The 17.66 percent mark-up is presumed to be the price paid by a community pharmacy to its wholesale supplier, i.e. the wholesaler mark-up. Under some of the Community Drugs Schemes, the community pharmacy also received a 50% mark-up on the ex wholesaler price.
- 2.5 Between 2000 and 2007, the total cost to the HSE of providing drugs under the three main Community Drugs Schemes – the General Medical Services scheme (“GMS”), Drugs Payment Scheme (“DPS”)

⁶ Health Act 2004, section 7(4).

⁷ Health Act 2004, section 7(1).

⁸ The full text of the current contractor agreement, concluded in 1996, is found at: http://www.dohc.ie/publications/pdf/community_pharmacy_services.pdf?direct=1.

⁹ Report of the Independent Body on Pharmacy Contract Pricing, June 2008, hereafter “Dorgan Report”, found at http://www.dohc.ie/publications/pdf/pharmacy_contract_pricing.pdf?direct=1, at paragraph 2.2.

and Long Term Illness (“LTI”) – increased by 190 percent, from €511 million in 2000 to €1.482 billion in 2007.¹⁰

- 2.6 On 17 September 2007, the HSE informed pharmacy contractors that it would be altering, as of 1 January 2008, the mark-up payable for the reimbursement of prescription drugs provided by community pharmacies under the Community Drugs Schemes. The ex wholesaler price would be lowered to an 8% mark up on ex factory price from 1 January 2008, and a 7% mark up on ex factory price from 1 January 2009. No changes to the dispensing fee payable for community pharmacy services were proposed. The first phase of reductions was in fact implemented as of 1 March 2008.¹¹
- 2.7 It appears that the HSE did not discuss with the IPU its proposals to reduce reimbursement in advance of making the announcement. The HSE instead maintained that competition law prevents collective negotiations with the representative body of an association of undertakings.¹²
- 2.8 Historically, the terms of the contractor agreement, including the fee paid under the contract, were negotiated between the HSE and the IPU. While the terms of the contractor agreement do not require the collective negotiation of fees with pharmacy contractors, a reading of clause 12(1) of the contractor agreement appears to make provision for consultation with the IPU prior to fee-setting by the Minister for Health.¹³ It is interesting to note that Finlay Geoghegan J in *Hickey* took the view that clause 12(1) actually *requires* the Minister to consult with the Pharmaceutical Contractors’ Committee of the IPU, prior to exercising her unilateral power to set fees for the provision of community pharmacy services.
- 2.9 Recently, the HSE has come to the view that the collective negotiation of fees with a representative body of undertakings, such as the IPU or the Pharmaceutical Distributors Federation (“PDF”), which represents pharmaceutical wholesalers in the State, would result in a breach of the Competition Act by the undertakings concerned. It should be noted that Article 81 EC will almost certainly also apply in this instance, to the extent that any anticompetitive agreement, decision of an association of undertakings or concerted practice has the potential to affect trade between Member States of the European Union. The HSE has therefore modified its established procedure for the setting of fees for health care professionals, including pharmacy contractors, moving from an approach based on negotiation to a unilateral fee-setting model.

¹⁰ Dorgan Report, Table 3.1.

¹¹ Dorgan Report at paragraph 2.17.

¹² See http://www.hse.ie/eng/newsmedia/A_Fair_Price_for_Wholesale_Services_Means_Lower_Medicine_Prices.html.

¹³ Clause 12(1) of the contractor agreement provides:
The board shall in consideration of the service provided by the pharmacy contractor in accordance with these terms and conditions and on foot of claims made in the form and at the times directed by the Minister, make payments or arrange for payments to be made to the pharmacy contractor for prescriptions dispensed at his/her contracted community pharmacy in accordance with such rates as may be approved or directed by the Minister from time to time after consultation with the Pharmaceutical Contractors’ Committee.

- 2.10 At this juncture, it is worthwhile noting the Competition Authority's view that the HSE is not an undertaking for these purposes and thus not subject to competition law. Nevertheless, the fact that one party to a commercial transaction does not act as an undertaking does not determine the status of other parties to the transaction. Regardless of the status of the HSE in this instance, the undertakings (e.g. pharmacy contractors, pharmaceutical wholesalers) and associations of undertakings (e.g. IPU, PDF) involved remain subject to the application of the competition rules.
- 2.11 Pharmacy contractors responded, individually and collectively, to the HSE's proposal to change the remuneration scheme for drugs. A number of pharmacy contractors commenced actions in the courts against the HSE, alleging a breach of their contractor agreements.
- 2.12 In *Hickey*, Finlay Geoghegan J concluded that the unilateral change in the mark-up by the HSE constituted a breach of the 1996 contractor agreement, because the new rates were not set by the Minister for Health after consultation with the IPU, as required by the contractor agreement. Although the judgment relates principally to an action for breach of contract, as noted above the Court further held that clause 12(1), which requires consultation with the IPU prior to setting of the rates of remuneration, is not contrary to section 4(1) of the Competition Act. This conclusion will be explored further in this document.
- 2.13 The HSE also received a large number of letters from pharmacy contractors throughout the State, all threatening to withdraw from the provision of community pharmacy services under the GMS from 1 December 2007. The deadline for the threatened withdrawal by pharmacy contractors was extended to March 2008 as the dispute continued. Between 15 and 22 October 2007, numerous pharmacy contractors in the Dublin and Wicklow areas withdrew from the Methadone Treatment Scheme, a HSE-administered programme for the provision of methadone to HSE patients by community pharmacies. The Methadone Treatment Scheme does not form part of the Community Drugs Schemes and thus it was possible for pharmacy contractors to withdraw without breaching their principal contractor agreement with the HSE.
- 2.14 The Competition Authority commenced an investigation into alleged collective action by pharmacy contractors in response to the HSE's attempts to modify the reimbursement to be received for services provided under the Community Drugs Schemes.¹⁴ This investigation is ongoing and will not be discussed in this consultation document.
- 2.15 On 18 February 2008, the Minister for Health and Children appointed an Independent Body on Pharmacy Contract Pricing to recommend an interim dispensing fee for community pharmacy services provided under the Community Drugs Schemes. Pending the recommendation of the Independent Body, the HSE offered pharmacy contractors an increased dispensing fee of €5 per item for drugs dispensed under the

¹⁴ See the press release issued by the Competition Authority on 17 October 2008, entitled "Competition Authority launches Investigation into Collective Withdrawal by Pharmacies from the Methadone Programme", found at http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=204.

GMS, DPS and LTI.¹⁵ The Independent Body issued its report, known as the Dorgan Report, which is dated 19 June 2008 and was released in July 2008. The Dorgan Report proposes a tiered dispensing fee based on the number of items dispensed by the community pharmacy under the Community Drugs Schemes per annum.

- 2.16 In these circumstances, it is understandable that pharmacy contractors may wish to respond, individually or collectively, to the remuneration changes unilaterally announced by the HSE. However, collective conduct by pharmacy contractors relating to the terms and conditions, including prices, for the supply of community pharmacy services under the Community Drugs Schemes raises concerns under Irish and Community competition law. This is the subject-matter of the present consultation.

¹⁵ It appears that no pharmacy contractors chose to avail of the increased dispensing fee. See the Dorgan Report at paragraphs 2.19-2.21.

3. THE LEGAL CONTEXT

Section 4(1) of the Competition Act and Article 81(1) EC

- 3.1 The starting point for this consultation document is the prohibition of anti-competitive collective conduct contained in section 4 of the Competition Act.
- 3.2 Section 4(1) of the Competition Act prohibits and makes void 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. A non-exhaustive list of forms of conduct which may be caught by the Competition Act is provided, namely agreements, decisions by associations of undertakings or concerted practices 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 parties 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.
- 3.3 Moreover, if the conduct in issue has the potential to affect trade between Member States, this will trigger the application of Community competition law.
- 3.4 Pursuant to Article 3 of Regulation 1/2003, where section 4 is applied to agreements, decisions by association of undertakings or concerted practices which may affect trade between Member States, Article 81 EC must also be applied to that conduct. The application of section 4 cannot lead to the prohibition of conduct which may affect trade between Member States but would not be prohibited by Article 81 EC. Therefore, where Article 81 EC applies, section 4 must be interpreted as essentially coterminous with Article 81 EC. Any differences between section 4 and Article 81 EC will be highlighted in the text.
- 3.5 Article 81 EC prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States to an appreciable extent and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. A professional regulation is liable to have an appreciable effect on trade between

Member States where it applies to the whole of a national territory.¹⁶ Article 81(1) EC lists the same examples of conduct which may raise competition concerns as found in section 4(1) of the Competition Act.

- 3.6 It should be emphasised that where trade between Member States is affected, it is not possible for national law to disapply or derogate from the application of the Community competition rules.
- 3.7 It is illustrative to consider in greater detail some elements of the section 4(1)/Article 81(1) EC prohibition.

Undertaking

- 3.8 An “undertaking” is defined by section 3(1) of the Competition Act 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.” For the purpose of Community competition law, the concept of an “undertaking” encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.¹⁷
- 3.9 Applying these definitions, the Competition Authority is of the opinion that pharmacy contractors are undertakings under both Irish and Community competition law. This view is consistent with the position of the Commission that professionals, insofar as they are not employees, are engaged in an economic activity (and thus constitute undertakings) because they provide services for remuneration on markets.¹⁸
- 3.10 Furthermore, as the word “association” is defined widely,¹⁹ the Competition Authority is of the view that the IPU is an association of undertakings for the purposes of section 4(1) of the Competition Act and Article 81(1) EC. Again, this is in accordance with the views of the Commission, which has stated that:

A professional body acts as an association of undertakings for the purposes of Article 81 when it is regulating the economic behaviour of the members of the profession. This is true even where professionals with employee status are admitted, since professional bodies normally and predominantly represent independent members of the profession.²⁰

For the purposes of the present consultation it is unnecessary to consider whether the IPU itself constitutes an undertaking for competition law purposes.

¹⁶ Case C-309/99 *Wouters* [2002] ECR I-1577 at paragraph 95.

¹⁷ Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979 at paragraph 21.

¹⁸ *Report on Competition in Professional Services*, COM (2004) 83 final, hereafter “*Professional Services Report*”, at paragraph 68.

¹⁹ See Faull & Nikpay (eds.), *The EC Law Of Competition* (Oxford 2007), at paragraph 3.100.

²⁰ *Professional Services Report* at paragraph 69.

Agreement

3.11 The concept of “agreement” requires that the undertakings involved express their joint intention to conduct themselves on the market in a specific way.²¹ At least two undertakings must be party to the impugned agreement before any section 4(1) or Article 81(1) EC concerns can arise. It is worth noting, in this context, that the Competition Authority takes the view that the HSE is not an undertaking when it negotiates with pharmacy contractors or the IPU for the purposes of administering the Community Drugs Schemes.²²

Concerted Practice

3.12 A “concerted practice” is a form of joint conduct by undertakings which does not result in an actual agreement between the undertakings concerned, yet the undertakings involved “*knowingly substitute practical cooperation between them for the risks of competition*”.²³ There is no requirement that the undertakings involved work out an “actual plan” for a concerted practice to exist.²⁴

3.13 The concepts of agreement and concerted practice are fluid and frequently shade into each other. It is understandable why concerted practices are treated like agreements when they have an anticompetitive object or effect. Competition law requires independent undertakings to take independent actions on the market. It is unnecessary, in establishing a violation of section 4(1) or Article 81(1) EC, to classify the impugned conduct as either an agreement or a concerted practice. The Commission has, in many Article 81 EC cases, classified the infringements at issue as “*agreements and/or concerted practices*”, a practice that has been approved by the Community courts.²⁵

Sections 4(2) and 4(5) of the Competition Act and Article 81(3) EC

3.14 The prohibition of anticompetitive agreements, concerted practices and decision of associations of undertakings contained in section 4(1) of the Competition Act is qualified by section 4(2). This section provides that an agreement, decision or concerted practice shall not be prohibited if it complies with four conditions set out in section 4(5) of the Competition Act, or if it falls within a category of agreements, decisions, or concerted practices about which a declaration has been made, pursuant to section 4(3) of the Competition Act. Consequently, any agreement, decision or concerted practice that, strictly speaking,

²¹ Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711.

²² See Competition Authority Enforcement Decision ED/01/2008 *Alleged anticompetitive conduct by the Health Service Executive relating to the administration of the Community Drugs Schemes*.

²³ Case 48/69 *ICI v Commission* [1972] ECR 619 at paragraph 64.

²⁴ Case T-202/98 *Tate & Lyle v Commission* [2001] ECR II-2035 at paragraph 55.

²⁵ Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

is caught by the section 4(1) prohibition may be saved if it satisfies the four criteria set out in section 4(5) ("section 4(5) criteria").

- 3.15 Article 81(3) EC contains a similar exception, providing that the prohibition contained in Article 81(1) EC may be disapplied where the same four conditions are satisfied. Hereafter, the phrase "section 4(5) criteria" is used to refer to the four conditions contained in both section 4(5) and in Article 81(3) EC.
- 3.16 The exception contained in both section 4(2) and in Article 81(3) EC acknowledges that a restrictive agreement, decision or concerted practice may nevertheless produce significant objective economic benefits. It is presumed that where the section 4(5) criteria are satisfied, the pro-competitive benefits resulting from the agreement, decision or concerted practice outweigh the anticompetitive effects identified by section 4(1) and/or Article 81(1) EC.²⁶ The section 4(5) criteria are:
- (i) The agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress;
 - (ii) Consumers receive a fair share of the resulting benefit;
 - (iii) The agreement, decision or concerted practice does not impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives; and
 - (iv) The agreement, decision or concerted practice does not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.
- 3.17 The section 4(5) criteria are cumulative, and therefore all four elements must be satisfied for section 4(1) or Article 81(1) EC to be disapplied.

Section 4(3) of the Competition Act: Declaration

- 3.18 This public consultation is being conducted in order to explore the possibility of issuing a declaration and/or a guidance notice dealing with the particular issues raised by the community pharmacy dispute.
- 3.19 Section 4(3) of the Competition Act empowers the Competition Authority to "declare in writing that in its opinion a specified category of agreements, decisions or concerted practices complies with the [section 4(5) criteria]". One possible outcome of this public consultation is that a category of agreements, decisions or concerted practices shall be identified, in respect of which the Competition Authority would consider making a declaration pursuant to section 4(3).

²⁶ Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, hereafter "Article 81(3) Guidelines", at paragraphs 11, 33.

Application of section 4 of the Competition Act and Article 81 EC

- 3.20 In order to establish a departure point for our public consultation on the community pharmacy sector, in addition to providing guidance to stakeholders, this document now sets out the views of the Competition Authority in relation to the application of the relevant legal principles to the instant facts.
- 3.21 As a preliminary issue, the Competition Authority takes the view that pharmacy contractors are competing undertakings, notwithstanding that community pharmacies receive identical fixed dispensing fees and rates of remuneration for drugs dispensed under the Community Drugs Schemes.
- 3.22 Individual community pharmacies operate in local markets, competing with other community pharmacies located within the same geographic market. The community pharmacies are competitors for services provided under the various Community Drugs Schemes, in the sense that if one community pharmacy dispenses a prescription the other community pharmacies do not get the business.
- 3.23 The Competition Authority is of the opinion that any agreement between pharmacy contractors on the issue of price (e.g. dispensing fee or rate of remuneration for drugs dispensed), where the pharmacy contractors concerned intend that the agreed price(s) will be imposed on the purchaser (i.e. the HSE), is contrary to section 4(1) of the Competition Act and Article 81 EC. Any agreement to threaten a collective withdrawal of services would also amount to a breach of section 4(1) and Article 81(1). An agreement between two or more competing undertakings, setting the price to be charged by each undertaking for a particular service, is considered to have the object of restricting competition, and therefore constitutes a breach of section 4(1) and Article 81(1) without any need to demonstrate actual effects on the market concerned.²⁷ Similarly, any agreement to share markets or to restrict output would also be object restrictions contrary to section 4(1) and Article 81(1).
- 3.24 Price competition is not, however, the only form of competition. In *Conorzio Industrie Fiammiferi (CIF)*, the European Court of Justice observed that "*price competition does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be given*".²⁸
- 3.25 Non-price competition exists in the retail pharmacy sector. Pharmacies compete on such factors as location, opening hours, quality of service provided, availability of drugs covered by the Community Drugs Schemes, range and price of non-prescription drugs and other products carried and ancillary services offered. Any agreement between pharmacy contractors which has the object or effect of reducing the

²⁷ "Article 81(3) Guidelines", at paragraph 21.

²⁸ Case C-198/01 [2003] ECR I-8055 at paragraph 68.

level of competition between community pharmacies in relation to these non-price factors may be contrary to section 4(1) of the Competition Act and Article 81(1) EC.

- 3.26 Collaborative, joint or co-ordinated conduct by independent undertakings which does not result in an agreement may constitute a concerted practice, contrary to section 4(1) and Article 81(1). The prohibition of concerted practices extends to any contact between undertakings *"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"*.²⁹ The principal issue is whether, by acting jointly with other undertakings, pharmacy contractors are seeking to reduce the degree of risk from acting independently in competition with other undertakings. A specific incident that came to light during the community pharmacy investigation³⁰ illustrates this point.
- 3.27 During the course of this investigation, the Competition Authority uncovered evidence of what it believed to be a concerted practice among pharmacy contractors in a townland in Ireland. The pharmacy contractors met to discuss the HSE's proposals to reduce remuneration for community pharmacy services, and following the meeting, one of the contractors involved sent to all pharmacists in the town and surrounding area a draft of a letter he had sent to the HSE announcing his intention to withdraw from the Community Drugs Scheme. Three other pharmacy contractors then sent identical letters to the HSE, threatening withdrawal in response to the HSE's proposal.
- 3.28 The Competition Authority took the view that this behaviour amounted to an anticompetitive concerted practice contrary to section 4(1) of the Competition Act. The object of the concerted practice was to disclose to each of the pharmacy contractors involved the intended course of action of their competitors in the townland, in order to force the HSE into collective negotiations with the IPU and to indirectly fix the price that pharmacy contractors in the State receive for the provision of community pharmacy services. Undertakings were secured by the Competition Authority from the four pharmacy contractors that had sent identical letters to the HSE, who undertook not to enter into an anticompetitive agreement or engage in an anticompetitive concerted practice contrary to the Competition Act in the future.³¹
- 3.29 The position of the Competition Authority on collective conduct by independent pharmacy undertakings reflects views expressed by other national competition authorities and the Commission on the application of Community competition law. The Netherlands Competition Authority (NMa), for example, has stated that the setting down in a collective

²⁹ Case 40/73 etc *Coöperatieve Vereniging 'Suiker Unie' and others v Commission* [1975] ECR 1663 at paragraph 174.

³⁰ See paragraph 2.15 above.

³¹ Each undertaking acknowledged the view of the Competition Authority in relation to their actions, but there was no admission of liability by the undertakings involved. See W. Prasifka, *Competition Law and the Community Pharmacy Sector*, conference paper delivered on 2 October 2008, Part 3, found at http://www.tca.ie/PromotingCompetition/Speeches/Presentations.aspx?selected_item=135, for further details of this investigation.

agreement of tariffs to be paid to self-employed persons amounts to a horizontal agreement relating to the fixing of prices.³² The Commission, in its *Professional Services Report*, takes the view that “[f]ixed prices...are the regulatory instruments that are likely to have the most detrimental effects on competition, eradicating or seriously reducing the benefits that competitive markets deliver for consumers.”³³

- 3.30 With respect to the exemption provided by section 4(2) of the Competition Act and Article 81(3) EC, the Competition Authority takes the view that collective negotiations on fees between independent services providers and the State as purchaser of these services cannot satisfy the section 4(5) criteria. Consequently, collective negotiations do not escape the prohibition of anticompetitive agreements, decisions and practices on this basis. Two elements of the section 4(5) criteria, in particular, are not satisfied in the case of collective negotiations between the HSE and IPU.
- 3.31 Firstly, collective negotiations between the HSE and IPU are not the only mechanism by which the fees paid under the Community Drugs Schemes can be set. This point is considered in greater detail below. Therefore, the “indispensability” limb of the section 4(5) criteria cannot be met.
- 3.32 Furthermore, the Competition Authority is of the opinion that collective negotiations create a substantial risk that pharmacy contractors may impose a supra-competitive price on the HSE for services supplied under the Community Drugs Schemes. In essence, collective negotiations produce a supply price targeted at satisfying and ensuring the participation of every pharmacy contractor, including the pharmacy contractor with the least interest in participating in the Community Drugs Schemes (who consequently requires the largest incentive to sign up). The resulting price is above the price that would be accepted by the majority of pharmacy contractors in a more competitive environment. Collective negotiations on fees consequently allow pharmacy contractors the possibility of eliminating competition in respect of a substantial part of the services they provide. Accordingly, the final limb of the section 4(5) criteria is not satisfied in this instance.
- 3.33 The Competition Authority’s view in this instance has been shared by the Netherlands Competition Authority, which has stated that the section 4(5) criteria are not satisfied in the case of a price-fixing agreement between self-employed professionals and the purchasers of the services they provide:

Horizontal price agreement, such as agreement setting out fixed or minimum tariffs for the self-employed, cannot in principle be deemed to be for the good of the users. Prescribed fixed tariffs may after all prevent self-employed persons from working in a cost-effective manner and lowering prices. This may result in an artificially high level of tariffs being adopted, at the expense

³² *Tariff provisions for self-employed persons as laid down in collective labour agreements in the light of the Dutch Competition Act*, Netherlands Competition Authority Vision Document, December 2007 (Informal Translation), hereafter “*NMA Vision Document*”, at paragraph 49.

³³ *Professional Services Report* at paragraph 31.

of the users. It must be emphasised here that “users” is intended to refer to all direct and indirect users of the services of the self-employed persons involved, including other undertakings and – eventually – consumers.³⁴

- 3.34 Nevertheless, it is not inconceivable that collective negotiations between the HSE and IPU in relation to non-price terms in the contractor agreement may, to the extent that such conduct results in a breach of section 4(1) of the Competition Act and Article 81(3), qualify for exemption pursuant to section 4(2) and Article 81(3) by virtue of fulfilling the section 4(5) criteria. This is one issue to be explored in this public consultation. At this juncture, the Competition Authority must state its opinion that any agreement, decision or concerted practice that is restrictive of competition by object cannot benefit from a declaration pursuant to section 4(3) of the Competition Act. “Object” restrictions include the hardcore restrictions of price fixing, restricting output and the sharing of markets by pharmacy contractors.
- 3.35 The Competition Authority’s views on these issues do not challenge the principle set out in the *Italian Lawyers* cases³⁵ and applied in *Hickey*, which permits a professional association to recommend a draft fee tariff where no collective action is taken by the members of the professional association to secure adoption of the draft tariff. There is a clear distinction between the situation where, for example, a trade association suggests an appropriate level of fees and where the association imposes this level of fees on purchasers of the services provided by its members. The *Italian Lawyers* cases are discussed in greater detail below.

Section 30(1)(d) of the Competition Act: Guidance Notice

- 3.36 The Competition Authority is exploring the possibility of issuing a guidance notice addressing these issues. Pursuant to section 30(1)(d) of the Competition Act, it is a statutory function of the Competition Authority to “*publish notices containing practical guidance as to how the provisions of [the Competition] Act may be complied with*”.
- 3.37 The Competition Authority stresses that any guidance notice it may produce on this topic, pursuant to section 30(1)(d) of the Competition Act, merely presents its views of the relevant issues. The Competition Authority recalls that it is for the courts to determine whether a breach of the Competition Act has occurred, and recommends that parties obtain independent legal advice on any competition law issues that may arise.

³⁴ *NMa Vision Document* at paragraph 82.

³⁵ Case C-35/99 *Arduino* [2002] ECR I-1529 (hereafter “*Arduino*”); Joined Cases C-94/04 *Cipolla* and C-202/04 *Meloni* [2006] ECR I-11421 (hereafter “*Cipolla*”).

4. JOINT CONDUCT WITH RESPECT TO CONSULTATIONS ON CONTRACT TERMS AND CONDITIONS

- 4.1 This consultation document now introduces and provides some discussion of the issues on which the Competition Authority wishes to consult with stakeholders in the community pharmacy sector. Having set out our views of the legal principles involved, the Competition Authority invites submissions from all interested parties on these issues.
- 4.2 In particular, the document considers the nature and extent to which independent pharmacy undertakings may jointly act with respect to the setting of fees – both dispensing fees and the rate of remuneration for drugs dispensed – under the Community Drugs Schemes. This consideration has important significance having regard to the decision in *Hickey*.
- 4.3 As noted above, in *Hickey* Finlay Geoghegan J concluded that clause 12(1) of the applicable contractor agreement had to be interpreted to mean that the Minister for Health has the power to change the fees payable for the supply of community pharmacy services, but only after consultation with the Pharmaceutical Contractors' Committee of the IPU. The Court pointed out that the Minister has the unilateral power to change the fees payable, although on occasions the Minister had adopted a fee schedule that was negotiated with the IPU. The Court further held that the obligation to consult with the IPU, contained in clause 12(1), is not contrary to section 4(1) of the Competition Act. In other words, an obligation to consult, in and of itself, does not breach the Competition Act.
- 4.4 Notwithstanding the fact that the *Hickey* decision essentially concerns a contract obligation on the Minister to consult, the competition law issues raised in relation to the actions of the independent pharmacy undertakings and their representative body in the context of such consultations are of broader implication. Thus, the discussion that follows is a general analysis of the issues, using *Hickey* as an illustration where appropriate.
- 4.5 At the outset, it is important to distinguish between negotiations and consultations from the perspective of competition law. In the context of negotiations on fees between a buyer and numerous individual sellers, independent undertakings may wish to band together to negotiate collectively. They therefore offer to supply services for a specified fee or set of fees. Where an agreement is reached, the independent undertakings whose interests are represented in the negotiations supply services in accordance with the agreed fee schedule. As discussed above, any agreement among independent undertakings about the price at which to supply services, in the opinion of the Competition Authority, would be contrary to section 4(1) of the Competition Act and Article 81(1) EC, and such agreement could not be saved by section 4(2) or Article 81(3). Further, any agreement among the undertakings to threaten a collective withdrawal of services, in order to reinforce the common position on price, would also be contrary to section 4(1) and Article 81(1), and not be saved by section 4(2) or Article 81(3).

- 4.6 The word “consultation” can mean a discussion among independent undertakings, in connection with a negotiation between an undertaking and the buyer of its services. Absent any agreement, it would depend on the specific facts of the situation as to whether the consultation would constitute a concerted practice contrary to section 4(1) of the Competition Act and Article 81(1) EC.
- 4.7 “Consultation” can also mean an exchange of views between the buyer of services and the independent undertakings providing those services, prior to the fixing of the fees payable for the services. In *Hickey*, for example, consultation of this nature was held to be required of the Minister pursuant to clause 12(1) of the contractor agreement. The High Court held that the contractual obligation to consult prior to fixing the relevant fees is not, in and of itself, a breach of section 4(1) of the Competition Act. This finding is a domestic law application of the decision of the European Court of Justice in *Arduino*, discussed in detail below.³⁶
- 4.8 It is not the case, however, that either *Hickey* or *Arduino* establish that where the government fixes the tariff or fees payable, *all* joint action by undertakings connected with a consultation process conducted prior to the government decision is immunised from the application of competition law. This section of the consultation document explores the limits imposed by competition law on joint conduct by independent undertakings, in connection with the making of a submission to a consultation process conducted by the buyer of the services provided by these undertakings.
- 4.9 In the view of the Competition Authority, any agreement between independent undertakings (as well as a decision by an association of undertakings) to collectively withdraw services if the buyer does not adopt the proposals contained in a submission made to it would be contrary to section 4(1) of the Competition Act and Article 81(1) EC. Similarly, any threat to withdraw services to reinforce a submission, which is made pursuant to an agreement among independent undertakings or a decision by an association of undertakings, would be contrary to section 4(1) and Article 81(1). This is the case regardless of whether the buyer (e.g. the HSE) is an undertaking for the purposes of applying competition law.
- 4.10 Where there is no evidence of an agreement among undertakings or a decision by an association of undertakings, withdrawal by individual undertakings following the decision of the buyer to fix a fee different from the fee recommended by the undertakings would still be likely to trigger an investigation by the Competition Authority. The question then would be whether the individual withdrawals were made as part of a concerted practice, contrary to section 4(1) of the Competition Act and Article 81(1) EC.
- 4.11 Submissions made jointly by independent undertakings or by their representative body can be divided into two main types. Submissions can be made with respect to the mechanism or framework adopted by the buyer in fixing the fees. Such submissions would include the identification of factors that could or should be considered by the buyer. For example, the buyer can be asked to consider the

³⁶ *Arduino* at paragraph 44. The reasoning on this point was confirmed in *Cipolla*.

profitability of retail pharmacies, including the key components of the cost of running a pharmacy such as costs of goods, labour and energy.³⁷ Submissions can also be made with respect to the fees to be set by the buyer. Each type of submission raises different concerns under competition law.

Joint Submission on Mechanism or Framework

4.12 It is unlikely that any submissions on the framework or factors to be considered, which are made jointly by independent undertakings pursuant to an agreement or a decision of an association of undertakings, would breach section 4(1) of the Competition Act or Article 81(1) EC. Neither the object nor the effect of such an agreement would be anticompetitive in nature, provided the mechanism to be adopted does not itself breach section 4(1) or Article 81(1). In addition, collective lobbying efforts to persuade the government to accept the submission on the framework are not likely to pose concerns under section 4(1) or Article 81(1), provided the mechanism proposed is itself compatible with competition law. However, as noted above, any threat of withdrawal of services would raise concerns under both section 4(1) and Article 81(1).

4.13 It is useful to note that under US antitrust (competition) law, the *Noerr-Pennington* doctrine grants “petitioning immunity” to collective action by businesses, where such action is intended to influence legislative or administrative processes. So, for example, business lobbying falls outside US antitrust law.³⁸ However, US courts are divided as to whether the doctrine applies where the government enters into a commercial contract, such as a contract to purchase services from private businesses.³⁹ In any event, the *Noerr-Pennington* doctrine does not legitimise hardcore restrictions, such as price fixing, nor does it cover threats of collective withdrawal of services in order to exert pressure on a government body that purchases these services.⁴⁰

Joint Submissions on Price

4.14 Independent undertakings may wish to make a joint submission on prices, and in doing so, may wish to consult with other individual undertakings in order to best reflect the views of all market

³⁷ In *Hickey*, the Court at paragraph 87 identified a variety of factors in respect of which the Minister has a contractual obligation to consult, such as developments in the pharmacy market since 1971, differences between pharmacies and the different commercial arrangements between wholesalers and pharmacies.

³⁸ The doctrine takes its name from two antitrust cases decided by the US Supreme Court, *Eastern Railroad Presidents Conference v. Noerr Motor Freight* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington* 381 U.S. 657 (1965).

³⁹ See ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007) at p.1296-7 for examples of cases both supporting and rejecting this proposition.

⁴⁰ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 at 503.

participants. The challenge is to devise a mechanism by which to do so, within the limits imposed by competition law.

- 4.15 The consultation may take different forms. Consultation may take place at an open meeting attended by the undertakings. Consultation may also take the form of a survey, which could be conducted by a third party, including the buyer. Each form of consultation carries different risks under competition law.
- 4.16 At an open meeting, individual undertakings could state the price at which they are prepared to supply services. This information would be gathered and submitted to the buyer. If, when the price is ultimately set by the buyer, a not insignificant number of undertakings withdraw services to express their dissatisfaction, there may be a breach of section 4(1) of the Competition Act and Article 81(1) EC. It would have to be established that the individual decisions to withdraw, which took place in the context of an open exchange of information about the supply price of individual undertakings, constituted an anticompetitive concerted practice.
- 4.17 Information about individual undertakings may be gathered through a survey. This poses fewer risks, in terms of competition law, than an information exchange at an open meeting. However, the respondents to the survey must not discuss with each other their responses, the information collected must not be shared among the undertakings and the survey should be conducted by a third party, who could be the buyer. Provided these conditions are fulfilled, the process is unlikely to raise competition law concerns.
- 4.18 In effect, a survey of undertakings, whether done by the buyer or the undertakings themselves, amounts to a messenger-model for fee setting. This mechanism was considered in detail in the medical fees consultation document, and interested parties should refer to this publication for a more comprehensive description.
- 4.19 The essence of the messenger model is as follows. A third party – the “messenger” – obtains from each pharmacy contractor, individually, the level of fees that the pharmacy contractor requires from the HSE to participate in the Community Drugs Schemes. The messenger provides this information to the HSE, which uses it to devise a fee scale for the reimbursement of pharmacy contractors for services provided. All communications between the messenger and individual pharmacy contractors remain confidential *vis-à-vis* other pharmacy contractors, so that no pharmacy contractor knows what any other requires. Each pharmacy contractor is then offered a revised contractor agreement by the HSE, which the contractor, again individually, chooses to accept or reject.
- 4.20 The messenger model is attractive from the perspective of pharmacy contractors, as it ensures that the HSE is fully informed of the views of individual contractors prior to setting reimbursement rates under the Community Drugs Schemes. From the HSE’s perspective, the messenger model provides it with the information it needs in order to calculate the minimum fee it must offer to pharmacy contractors to secure the required degree of participation in the Community Drugs Scheme. Moreover, if the information-gathering exercise is correctly structured, it may allow for the development of a tiered fee, enabling the HSE to pay a premium to certain pharmacy contractors (for

example, contractors operating community pharmacies in deprived urban or isolated rural areas) in order to ensure their participation in the Community Drugs Schemes.

- 4.21 Some aspects of the messenger model may be more problematic. It is central to the success of the mechanism – and critical to its compliance with competition law – that each pharmacy contractor acts absolutely independently when providing information to the messenger, and again when deciding whether to accept the revised contractor agreement offered by the HSE. There remains a risk that the mechanism could facilitate an agreement or concerted practice among pharmacy contractors on price or other issues on which they compete. Any model selected must incorporate sufficient safeguards to avoid this risk.
- 4.22 Furthermore, the messenger model allows the HSE to set its fees at a level that secures what the HSE believes to be optimum participation by pharmacy contractors in the Community Drugs Schemes. Contrary to the current position, the result may be less than complete participation by pharmacy contractors, a move which may be opposed by pharmacy contractors. This is, however, a political question that is not within the mandate of the Competition Authority to address.
- 4.23 The Competition Authority poses the following question in relation the messenger model:

Q 1: Is there a place for the messenger model in structuring the relationship between pharmacy contractors and the HSE? Can the messenger model be adapted to secure a contract for the provision of community pharmacy services that is acceptable to both pharmacy contractors and the HSE (and ultimately, taxpayers)?

Q 2: What safeguards can and would have to be put in place in order to ensure that the messenger model does not facilitate anticompetitive conduct by pharmacy contractors?

- 4.24 The broadest permissible parameters of collective action by pharmacy contractors on the issue on price are arguably set out in the two European Court of Justice decisions dealing with fees charged by Italian lawyers, *Arduino* and *Cipolla*. In these cases, the ECJ held, in essence, that where a professional body representing undertakings prepared a draft tariff of fees, which became compulsory only when approved by the State, competition law was not infringed because the tariff was not the result of a discretionary decision of the professional organisation in question. The State played the decisive role, so that there was no delegation to private economic operators of the power to fix the tariff, in breach of what is now Article 81 EC. The principle set out in *Arduino* has recently been applied by Finlay Geoghegan J in *Hickey*.

4.25 At the time of the *Arduino* judgment, the then Competition Commissioner Mario Monti stated that:

The *Arduino* judgment clarifies that Member States have the right to regulate a profession. [...] Member States can associate professional bodies in this task as long as they retain the decision-making powers and establish sufficient control mechanisms. They must not abdicate their powers to professional bodies without clear instruction and control.⁴¹

4.26 The limits of the principle set out in *Arduino* and *Ciopolla* are clear. Where a professional body is involved with the State in setting fees or a price for services, it will escape the application of the competition rules only if it is clear that the body itself does not make the actual decision on fees or prices. The professional body cannot agree fees or prices with the State, as an agreement of this nature means that no one party is the decision-maker.

4.27 Moreover, the professional body in question cannot impose any form of pressure on the State, whether that pressure is exercised by threats of withdrawal of services or otherwise. Any pressure exercised upon the State would indicate that the State was not a real decision-maker and would leave the behaviour of the professional body in question open to challenge under both national and Community competition law.

4.28 This position is wholly compatible with the finding in *Hickey*. Finlay Geoghegan J held that the consultation procedure mandated by the contractor agreement did not “*as a matter of probability*” give rise to activities contrary to section 4(1) of the Competition Act, and so was not voided by it.⁴² The judgment did not, however, exclude the possibility that, *in connection with* the consultation procedure, activities contrary to section 4(1) may take place. The Competition Authority is of the opinion that, for competition law purposes, what the *Hickey* judgment does *not* say about consultation and collective action is as relevant, if not more so, than the conclusions it in fact reaches. These issues will benefit from further exploration during the course of the public consultation.

4.29 The Competition Authority also highlights the significant risk that prior collective action will function as a signalling device, which may facilitate a concerted practice in breach of section 4(1) of the Competition Act and Article 81(1) EC. The Competition Authority believes that concrete safeguards to prevent any breach of the competition rules must be in place before a version of the *Arduino/Ciopolla* principle can be applied to the instant facts.

Q 3: How can the principle set out in *Arduino/Ciopolla* – and applied in *Hickey* – be adapted and applied to fit the pharmacy contractor/HSE context?

⁴¹ *Competition in Professional Services: New Light and New Challenges*, speaking at the Bundesanwaltskammer, Berlin on 21 March 2003.

⁴² *Hickey* at paragraph 91.

Q 4: In particular, what risk-limiting mechanisms can be put in place to ensure that:

(i) pharmacy contractors do not engage in prohibited collective conduct in arriving at a draft fee scale; *and*

(ii) having proposed a draft fee scale to the HSE, pharmacy contractors do not engage in any collective action contrary to section 4(1) of the Competition Act and Article 81(1) EC?

Agreements satisfying the section 4(5) criteria

- 4.30 As noted above, collective negotiation by undertakings on the issue of price is almost invariably caught by section 4(1) of the Competition Act and Article 81(1) EC, and furthermore, is highly unlikely to satisfy the section 4(5) criteria. Therefore, the Competition Authority does not believe that it will be possible to issue a declaration pursuant to section 4(3) approving any agreement, decision or concerted practice which involves a hardcore restriction of competition, such as the collective setting of fees by pharmacy contractors or output or market restrictions.
- 4.31 Nevertheless, there may be other terms contained in the contractor agreement about which pharmacy contractors wish to negotiate collectively with the HSE. In relation to terms on which pharmacy contractors do not compete, the Competition Authority takes the view that collective negotiations on these issues are unlikely to be prohibited by section 4(1) of the Competition Act or Article 81(1) EC.
- 4.32 If pharmacy contractors compete on a particular non-price, output or market issue, collective negotiation by pharmacy contractors with the HSE on this issue may result in an anticompetitive agreement, decision or concerted practice, in breach of section 4(1) of the Competition Act and Article 81(1) EC. However, if the section 4(5) criteria are satisfied, then pursuant to section 4(2) of the Competition Act and/or Article 81(3) EC, collective negotiation on these issues will not be prohibited.
- 4.33 In this regard, the Competition Authority notes that when the Competition Act 2002 was passed, the notification system established pursuant to the Competition Act 1991 was discontinued.⁴³ Under the notification system, agreements with the potential for anticompetitive impact had to be notified to the Competition Authority for approval prior to implementation. Nowadays, an undertaking must make its own assessment of whether an agreement to which it is party satisfies the section 4(5) criteria. On this issue, the Competition Authority recommends that any undertaking party to an agreement or concerted practice that may raise a question in relation to section 4(1) or Article 81(1) EC take independent legal advice as to the likely application of the section 4(5) criteria to the circumstances.

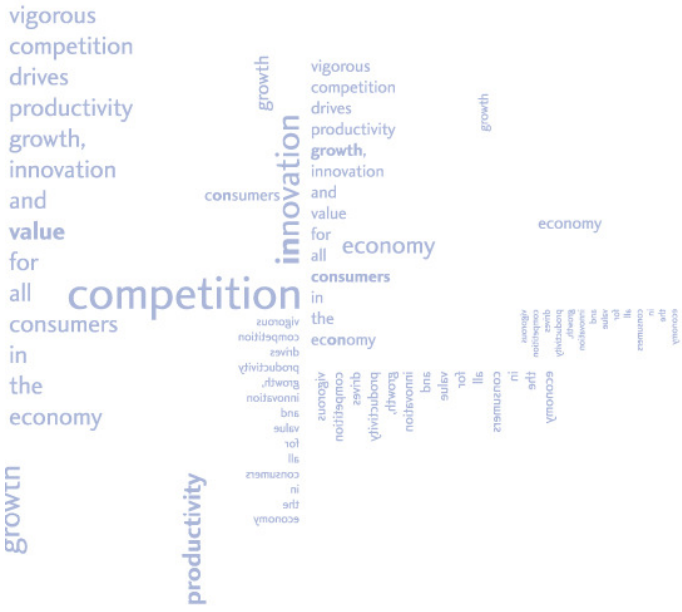
⁴³ Competition Act 2002, section 48(d).

- 4.34 As noted above, the Competition Authority is examining the possibility of making a section 4(3) declaration in relation to any category of agreements, decisions or concerted practices that satisfies the section 4(5) criteria and may be helpful to the setting of terms and conditions contained in the contractor agreement. To this end, the Competition Authority asks the following questions:

Q 5: Are there non price, output and market terms and conditions of the contractor agreement about which pharmacy contractors wish to engage in collective negotiation?

Q 6: If so, what is the rationale for setting these terms by collective negotiation?

Q 7: Given the Competition Authority's view that it is not possible to make a declaration pursuant to section 4(3) of the Competition Act exempting collective negotiations between pharmacy contractors and the HSE in relating to the setting of fees, sharing of markets or output restrictions, are there any other categories of agreements, decisions or concerted practices in relation to which the Competition Authority might consider making a declaration? Please provide an explanation as to how the suggested agreement, decision or concerted practice satisfies each of the section 4(5) criteria.



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