

DILLON EUSTACE

S O L I C I T O R S

Our Ref

Your Ref

Mr. William Prasifka
The Chairperson
The Competition Authority
Parnell House
14 Parnell Square
Dublin 1

12 April 2006

Re: Competition in the Health Insurance Sector

Dear Sir

We refer to the request to the Competition Authority (“the Authority”) and the Health Insurance Authority (“HIA”) by An Tánaiste and Minister for Health and Children, Mary Harney TD to examine the health insurance market in Ireland from a competition policy perspective, having regard to the terms of reference currently announced on the Authority’s website.

We propose to keep our submission succinct and focused in the hope that it will contribute positively to the examination by the Authority and the HIA of the Irish health insurance sector and in their preparation of their joint report for the Minister.

We confirm that while we act as solicitors for VIVAS Health on a day-to-day basis, the views expressed herein are independent and have not been commissioned or paid for by VIVAS Health.

As opening remarks, we would make the following general comments:

- We are unable to find any legal basis under the Competition Act, 2002 which would empower An Tánaiste, as Minister for Health and Children to request the Authority to undertake an examination of competition in the health insurance market:

Grand Canal House, 1 Upper Grand Canal Street, Dublin 4, Ireland.

Telephone +353-1-66 700 22 Fax +353-1-66 700 42 E-mail info@dilloneustace.ie www.dilloneustace.ie

Michael C. Barker, Andrew Bates, Paul M. Breen, Mary A. Canning, Kieran Cowhey, Orla Dennison, Brian Dillon, David Dillon, John Doyle, Paul Eustace, Paul A. Gill, David Hammond, Carmel Hynes, Karen Jennings, Paula Kelleher, Brian Kelliher, Abigail Kennedy, Lorna Kennedy, Niamh Loughran, Catherine McKnight, Donnacha O’Connor, Mark Thorne, Lorcan Tiernan. Consultants: Patrick J. Kevans, David Lawless, Fiona Mulcahy.

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- The statutory or legal basis, which would entitle the HIA to carry out a joint consultation with the Authority on competition in the Irish health insurance sector is similarly unclear; and
- The Authority and the HIA may wish to consider the appropriateness of a public examination of competition in the Irish health insurance sector at a time when several issues impinging on the state of competition in the sector may be considered *sub judice* as a result of current court proceedings involving one of the market participants.

More specifically, arising from the terms of reference of the joint consultation, if the focus of the joint Authority/HIA report to An Tánaiste is to examine competition in the health insurance market, it is imperative that the Authority and the HIA take into objective consideration the following facts:-

- the Authority itself is an emanation of the State;
- the largest player in the market VHI is a commercial state company owned and controlled by the Minister for Health and Children;
- the HIA, as the current regulator of the health insurance market, operates under the auspices of the Minister for Health and Children; and

We would consider it important that any report made to An Tánaiste dealing with the structure and regulation of, and behaviour in, the health insurance market would focus on the need to ensure effective competition in that market and not on the protection of the State's financial interest in VHI.

VHI market share and dominance

It is our understanding that the Irish health insurance market is a concentrated market characterised by high barriers to entry on the supply side.

There are currently three health insurance providers in the Irish health insurance market. Market strength in that market is concentrated in VHI. Our understanding is that the Herfindahl-Hirschman Index for the Irish health insurance market is approximately 6,700. It doesn't need to be emphasized that a value in excess of 1,800 indicates a highly concentrated market.

VHI has a market share of approximately 80%. As you are aware, pursuant to the *Akzo* and *Microsoft* caselaw very large market shares of over 50% are considered in themselves and but for exceptional circumstances evidence of the existence of a dominant position. Market shares of between 70% and 80% have been held to warrant such a presumption of dominance. A dominant position has been defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

Currently, VHI enjoys a dominant position in the Irish health insurance market which would enable it to behave to an appreciable extent independently of both BUPA and VIVAS Health, its customers and ultimately of the consumers.

EU Legal Considerations

The EC Treaty requires that State barriers to the free movement of services shall be abolished. Article 10 of the EC Treaty, in particular, obliges the Irish State to co-operate dutifully with the institutions of the Community to promote competition in the internal market.

The provision of health insurance services is an economic activity falling within (i) the free movement of services and (ii) the competition provisions of the EC Treaty.

While the EC Treaty guarantees the freedom to provide cross-border health insurance services, it also recognizes the right of Member States to protect mandatory requirements including the rights of the consumer.

Prior to the implementation of the Third Non-Life Directive, VHI enjoyed exclusive and special privileges under statute. As a matter of EU law, VHI's enabling statute operated as a complete barrier to the free movement of services protecting it from all competition in the Irish market place.

The State (in line with its requirements under EU pre-emptive legislation) removed the exclusive statutory privilege from VHI and liberalized/opened the Irish health insurance sector, thus enabling two new entrants to enter the market. Bearing in mind the presence of restricted undertakings, the direct consequence of market liberalization and the State's elimination of the exclusive State barrier to entry has been the reduction of VHI's market share to approximately 80%. Nonetheless, competitors and potential new entrants still continue to face significant economic and regulatory barriers to entry onto and competition into the market. Key barriers faced by new entrants and potential new entrants include:

- (i) dominant market presence enjoyed by VHI reflected in an 80% market share (approx);
- (ii) regulatory authorization and supervision by two regulators (HIA and the Financial Regulator) while VHI is supervised solely by a sister state body controlled by the same Minister;
- (iii) regulatory tolerance which may be enabling VHI to operate in markets unrelated to the health insurance market (e.g. VHI travel insurance product, multi agency intermediary licence, dental insurance product, on-line retail shop). Such tolerance is characterised by the capacity of VHI to operate on different and more beneficial commercial terms to those imposed on its competitors;
- (iv) a risk equalization scheme whereby the State requires new market entrants to provide financial contributions to a dominant incumbent without having appropriate regard to the concentrated nature of the Irish health insurance market and the fact

- that VHI infrastructure, reputation, distribution systems and customer base were developed upon a platform put in place using state resources; and
- (v) more onerous solvency requirements imposed upon new entrants than those required for the incumbent.

Suggestions to contribute to effective competition in the marketplace

The statutory framework for the management of competition in the marketplace should engender legal certainty and fairness.

It would appear fair to all competitors in the market to suggest that the primary regulator of the health insurance market, the HIA, should be established on an independent footing from the largest player in the market, VHI. Objectively, the independence of the HIA as a regulator can be queried so long as it remains under the auspices of the same Government Department as VHI. We would refer you to the regulation of the telecommunications sector in the 1990 where EU law required the regulator to be independent of the Government Department that owned and controlled Telecom Eireann prior to its privatization. An obvious solution may be for the HIA to form part of the Financial Regulator thus enabling single authorisation and supervision under the Third Non-Life Directive for all market participants.

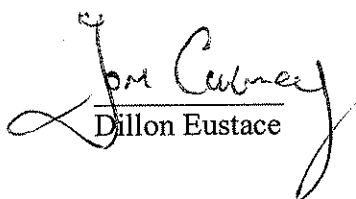
The solvency and other regulatory requirements for VHI should be the same as for every other player on the Irish health insurance market.

Competitors like BUPA and VIVAS Health should not be required by the State to meet, and incur additional costs in respect of compliance with, regulatory requirements in excess of those imposed on VHI.

It would appear objectively unfair and disproportionate that the State through the enforcement of the Risk Equalisation Scheme 2005 would require smaller competitors and new entrants effectively to make risk equalizations payments to the VHI where the incumbent enjoys an 80% dominant position in the market place and has grown its market share at a time when it enjoyed privilege and monopoly status under statute together with State subvention and promotion. It is recommended that the State might consider more proportionate ways to address social and economic concerns it might have as regards the age profile of VHI's client base.

We trust these comments assist.

Yours sincerely


Dillon Eustace