



Public & Regulatory Law Update

November 2008

Health Service Executive: not an undertaking under competition law

Background. Section 4 of the Competition Act 2002 (2002 Act) prohibits all agreements between undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Section 5 of the 2002 Act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State. An undertaking is any individual, body corporate or unincorporated body of persons engaged for gain in the provision, supply or distribution of goods or the provision of a service. The definition of undertaking is therefore very wide and includes most businesses, semi-state companies and individuals engaged in a business activity.

The Competition Authority (Authority) conducted an investigation into allegations of anti-competitive conduct in the community pharmacy sector under sections 4 and 5 of the 2002 Act and collective actions taken by community pharmacists following a recent dispute on remuneration with the Health Service Executive (HSE). The HSE through various community drugs schemes reimburses the costs of prescription drugs dispensed by pharmacists. In September 2007 it announced that it was reducing the amount it paid pharmacists for these drugs. Pharmacists have argued that the HSE has breached its contract with them by unilaterally reducing the re-imburement price paid under the schemes. As part of the investigation, the Authority examined allegations that the HSE was engaged in anti-competitive conduct and had abused its dominant position.

Decision. On 10 October 2008 the Authority published an enforcement decision that stated that the HSE is not an undertaking under Irish or EU competition law. It came to this conclusion after considering the statutory definition of an undertaking and its interpretation by the Irish and European courts. The Authority's view is that the HSE is not subject to competition law rules when it negotiates the price of certain drugs with pharmacy representative bodies or when it buys pharmacy services under the community drugs schemes and the Authority will take no further action in respect of complaints received that the HSE has breached competition law. It should be noted and this is stated in the Authority's decision notice, that under Irish law, the courts and not the Authority, are the decision-making body with regard to the enforcement of competition law in the state and, accordingly, the Authority's decision cannot be considered a legally enforceable decision as to whether a breach of either Irish or European law has occurred.

Public Appointments Transparency Bill 2008

The Public Appointments Transparency Bill 2008 is a Fine Gael private members Bill that was introduced in the Dail at the end of September. The Bill aims to make state agencies and public bodies more accountable by reforming the way in which ministerial nominees are appointed to the boards of these bodies and agencies and by giving real power to Oireachtas committees.

It requires:

1. All ministerial appointments to specified statutory agencies and other public bodies to be presented to the relevant Oireachtas Committee.
2. Chairpersons and chief executives of specific public bodies and statutory agencies to be subject to a hearing of a relevant Oireachtas committee before their nomination is ratified by the Dail. Members of the Oireachtas could then question appointments that they do not believe to be in the public interest.
3. Specified statutory agencies and public bodies to furnish to the relevant Oireachtas committee a copy of their annual report, annual accounts, work plan and strategic plan every year and whenever asked to do so.
4. Chief executives and board chairpersons to appear before the relevant Oireachtas committee when asked to do so to account for the performance of their functions.

A public body covered by the Bill means any body which is in receipt of in excess of €1,000,000 of public funds in any year and the appointment to the management of which is in the control of a Government minister. A statutory agency covered by the Bill means a body created by legislation which is in receipt of in excess of €1,000,000 of public funds in any year. This means that the majority of existing public bodies and statutory agencies would fall within the ambit of this legislation. As it is a private members Bill there is no timetable for implementation and it would require Government party support to enable enactment.



Financial Services Ombudsman: new complaints procedures

Background. The Financial Services Ombudsman (Ombudsman) adjudicates complaints regarding the conduct of regulated financial services providers (providers). The Ombudsman has updated its procedures for dealing with complaints as a result of the recent decision in *Davy v Financial Service Ombudsman and Enfield Credit Union* where the High Court ruled that the Ombudsman failed to follow fair procedures in the way in which he upheld the complaint against Davy's (see *October 2008 ezine* for more details).

Lodging a complaint

1. A complainant should complete and return the Ombudsman's complaint form within 14 days of receipt accompanied by relevant documents. A complainant's written authorisation is required if it wishes to be represented by a third party.
2. The form is assessed to determine whether the complaint falls within the remit of the Ombudsman. If so, the complainant will be advised to write to a nominated member of senior management in the provider concerned stating the complaint and asking for a final response letter. On receiving written notification of the complaint and request for a final response, the provider has 25 working days in which to try to resolve the complaint. If at the end of the 25 working days a resolution has not been attained, a final response letter must be issued to the complainant (outlining the provider's response). If the complainant is not satisfied, it must submit this letter to the Ombudsman within 15 working days of the provider issuing it.
3. The Ombudsman then assesses the complaint and the option of mediation will be offered. If mediation is not availed of or is unsuccessful then an investigation will begin.

Investigation and oral hearings

The provider will be required to answer questions and make submissions to enable the Ombudsman to investigate the complaint within 20 working days. These responses will be copied to the complainant who will be given ten working days to submit any observations. Any observations from the complainant will be sent to the provider who will be given five working days to submit any further observations.

The complaint will then be examined. The time taken to investigate depends on the complexity of the case as well as outside factors but the Ombudsman's stated aim is to complete the investigation within 20 working days. The Ombudsman has power to require the provider to provide information including the power to require employees to give information under oath. The Ombudsman will also consider whether an oral hearing is necessary. If an oral hearing is held then the oral evidence given under oath at that hearing will be reviewed together with the documentary evidence and a finding will be issued to both parties. If there is no oral hearing a finding will issue to both parties after all the evidence has been reviewed in full.

Finding

The Ombudsman can direct the provider to do one or more of the following:

- Rectify or change the conduct complained of or its consequences.
- Provide reasons or explanation for that conduct.
- Change that practice.
- Pay compensation up to a maximum of €250,000 or a €26,000 annuity.
- Take any other lawful action.

The finding is legally binding on both parties subject to appeal by either party to the High Court within 21 calendar days.

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