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Irish doctors have fees gag lifted

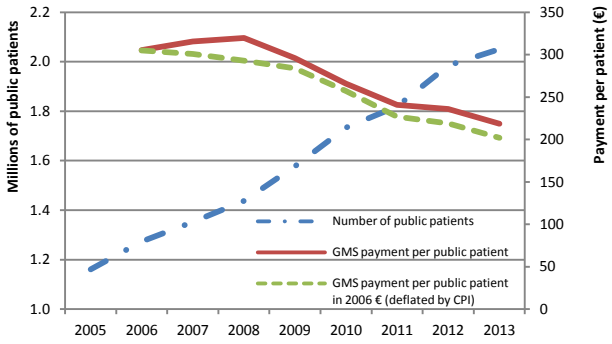
The IMO and Competition Authority settle case alleging collective boycott to raise GP fees

In June the Competition Authority settled its case with the Irish Medical Organisation (IMO). Since 2006 the Competition Authority has prohibited the IMO and the Minister of Health from discussing fees paid to GPs to provide free general medical services to public patients. This emasculated the IMO as a registered trade union in representing its members, and left the Minister as the sole purchaser of GP services for public patients with the power to unilaterally set fees. This application of the Irish *Competition Act 2002* was seen as inimical to good labour relations and to the smooth running of the public health scheme. As a reaction to the Irish Government's third successive reduction in fees, the IMO "suggested" to its members that they refuse to supply services which it claimed had hitherto been provided *pro bono*. The Competition Authority pursued the IMO into the High Court alleging breaches of the *Competition Act 2002* (s 6) and its equivalent Art.101(1)TFEU. It alleged that the IMO's action had the object or effect of directly or indirectly fixing "prices" i.e. GP's remuneration for the *pro bono* services (somewhat a contradiction in terms); and/or attempting to maintain fees in general at their previous level. One week into the trial the parties settled on terms which withdrew the Competition Authority's prohibition on fee discussions between the IMO and Minister.

The facts

The General Medical Service (GMS) scheme pays GPs a capitation and other fees to provide free general medical services to eligible patients. The scheme is administered by the Health Services Executive (HSE), while fees are set by the Minister and funded by the Irish taxpayer.

In July 2013 the Minister announced a further reduction in GP remuneration following earlier reductions in 2008 and 2009. Over the same period, the number of public patients increased significantly (see figure). Unable to discuss these developments with the Minister, the IMO "suggested" that its members withdraw from the provision of a range of medical services provided or to be provided which it regarded as not covered by the GMS Scheme.



Where's the competition?

The core of the Competition Authority's case was that the IMO's actions had the object or effect of reducing competition in the supply of free general medical services to public patients. Yet the GMS scheme lacked a competitive market rationale or any competitive features. It replaced market provision and competition with a monopolistic administrated scheme which subsidised free medical services. There was no price competition in provision of these free medical services to public patients, and GPs' remuneration was set by the Minister. The allocation of GMS contracts among GPs was not competitive either.

The Competition Authority claimed that the IMO's action restricted non-price competition, and thereby would have an indirect effect on GP remuneration. Yet, it failed to produce any evidence of competition between GPs for public patients, or of patients switching because they were dissatisfied with their GP. Its own Market Study in 2010 established this.

The difficulties of applying competition law was, in our view, exacerbated by the growth of the GMS scheme and the Irish government's stated intention to abolish private GP practice. If the Government had failed to support competition in the operation of the GMS scheme, and was also intent on abolishing private market provision which it accepted was

competitive, then the claim that the actions of the IMO had or would adversely affected competition was bound to be exceptionally weak.

Another argument put forward was that the Minister could and did not act as a profit-maximising monopsonist since it sought to expand free health services within the GMS's limited budget. It therefore had to attract sufficient GPs willing to enter the scheme, and this restrained the Minister from depressing GP remuneration below market rates, otherwise GPs would leave for Australia, Canada and elsewhere. The consideration missing from this scenario was that GPs, especially older ones, were locked into their practices and hence such effortless labour mobility was illusory and unlikely to provide the graduated constraints on the HSE's buyer power that was claimed.

Causation analysis

There was another way of viewing the case. While the Competition Authority did not set out an explicit counterfactual, it implied that in a competitive market GPs would not have resisted and withdrawn the services they offered to patients when paid less. However, the market response to a monopsonist's unilateral decision to reduce "price" would have been precisely that – a reduction in quantity supplied. Thus the IMO's reaction, albeit collective, was precisely what would have been expected since it was the Irish Government that had first unilaterally reduced GP remuneration.

In other words, the withdrawal of the quantity of services supplied was "caused" by the decline in the HSE's willingness to pay; not by the withdrawal of supply by producers, even if was preceded by threats to withdraw the services. Put more tersely, the counterfactual was the factual.

The policy issues

Given the history of the case the settlement agreement was a victory for the IMO. The Competition Authority's legal advice and threat to the Minister and the IMO that they were prohibited from even discussing remuneration was rescinded under the settlement agreement; which was the central bone of contention between the IMO and the Competition Authority.

The case also raises the issue of the interpretation of the "object" provision of Art 101(1)TFEU. Specifically, whether it can be applied without the need to show that competition exists. The Competition Authority appeared content to argue that a mere agreement or understanding which indirectly could be seen to affect GP remuneration was sufficient. But as argued above, there was no evidence of competition in the provision of medical services to public patients, and therefore even if the action was characterised as an agreement indirectly affecting "price", it would not have had the object of restricting competition; as there was none. It is instructive that this month the EUCJ has put a stop to this over-liberal interpretation in *Groupement des cartes bancaires*. Further, the Competition Authority appeared to take the position that it had a duty to protect the Minister and the public purse. This position conflated two considerations – the government's austerity programme and competition law - with the Authority oddly arguing that the Minister could do no wrong from a competition law perspective, despite the Minister (government) replacing the private competitive market provision of primary care in Ireland, and being the sole purchaser of GP services for public patients..

The case also raised policy questions about the role of professional organisations whose members supply services to government schemes. In some jurisdictions these organisation are treated as trade associations banned from negotiating fees and prices. In others they are regarded as actual or *de facto* trade unions with a legitimate role in the non-market process of determining fees and terms. In the UK, for example, the OFT has never acted to prevent the British Medical Association (BMA) from negotiating GP remuneration with the National Health Service (NHS), despite the same law applying as in Ireland.

Case Associates filed an expert report on behalf of the IMO under instructions from their solicitors O'Connor, Dublin.

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Dr Cento Veljanovski +44 (0) 20 7376 4418 or cento@casecon.com