

From: Ann Pope  
*Senior Director, Antitrust*

3 December 2015

Dear Sir/ Madam,

### **CMA open letter to private medical practitioners**

In August 2015 CESP Limited, a membership association of consultant eye doctors (ophthalmologists), was fined £500,000 for breaking competition law. This fine was later reduced to £382,500 because CESP Limited co-operated with the CMA and settled the case, which allowed for a swift resolution of the investigation. You can read more about the investigation [here](#).

The CMA has sent warning letters<sup>1</sup> to limited liability partnerships (LLPs) who are CESP Limited's members, since similar infringements (see below) are also capable of being committed by other groups on behalf of their consultant members and also by individual members when acting as sole traders. In addition to this, we are issuing this open letter to raise awareness of why the actions of CESP Limited were illegal, and what other medical practitioners working in private practice need to know to make sure they do not engage in similar activity.

Please note: this letter does not relate to work carried out under employment with the NHS in relation to NHS funded services.

### **What you need to know**

Competition law exists to protect businesses and consumers - in this case, patients - from anti-competitive behaviour. Competitive pressure helps keep fees from inflating or becoming unjustifiably expensive. Attempts to remove this pressure can be illegal under competition law. The CMA found that CESP Limited broke competition law since it:

---

<sup>1</sup> Warning Letters are referred to in Paragraph 4.5 of the [CMA's Guidance \(CMA8\)](#) which states "If the CMA decides not to prioritise a complaint at this stage, in appropriate cases it may send a warning letter to the company or companies whose conduct is the subject of the complaint. This would inform them that the CMA has been made aware of a possible breach of competition law by them and that, although the CMA is currently not minded to pursue an investigation, it may do so in future if the CMA receives further evidence of a suspected infringement or the CMA's prioritisation assessment changes".

- Recommended to its members that they refuse to accept lower fees offered by an insurer, and to charge patients higher self-pay fees. CESP's members are each other's competitors - it is a breach of competition law for competitors to get together to discuss commercial offers and for a membership organisation to recommend a commercial course of action in response to such commercial offers.
- Negotiated and entered into price agreements with insurers which set a fixed price for a number of procedures (such as cataract surgery) across its members who signed up to them. As competitors, CESP's members should have set their prices independently. Negotiating and agreeing these collectively set prices restricted competition between members, did not pass on lower local costs (such as cheaper hospital fees or savings for not using an anaesthetist) and made it harder for insurers and patients to obtain lower prices.
- Facilitated the sharing of consultants' future pricing and business intentions such as whether to sign up to a private hospital group's package price. Again, it is in breach of competition law for competitors to align their responses or exchange commercial intentions. This reduces incentives to compete on fees and offer lower prices.

This coordinated the LLPs' commercial conduct and that of their consultant members, many of whom were actively involved in formulating the recommendations and exchanging commercially sensitive information. In this case, the CMA decided to focus the investigation and impose a fine on CESP Limited only but similar breaches of the law can also be committed by groups such as LLPs, as well as by individual consultants when acting as sole traders.

I would like to highlight the following lessons from this case:

- **Medical practitioners who provide similar private medical services in the same geographic market are each other's competitors.** It is not anti-competitive if you work within a group or business (e.g. an LLP) unless you offer similar services to the same set of customers outside of that group (e.g. as a sole trader). There are rules around [what competitors can and cannot do](#).
- **Continuing to work as a sole trader outside your group may mean you fall foul of competition law.** You may be competing with your group and its members. Medical practitioners working in this way could be breaking competition law by using the group's pricing information (which should remain confidential to the group) when setting their own prices as sole traders.

Limited exceptions may apply in circumstances where the group price relates only to a distinct 'segment' of the market (for example, a particular category of patients or a specific procedure) and the practitioner does not provide

services to that same segment outside of the group. In this scenario, practitioners should still take care not to exchange commercially sensitive information amongst themselves. They can share information that is strictly necessary to deal with that segment but even then, they should assess to what extent that information could be used with other segments of the market when acting as sole traders. If the information shared could be used to inform commercial conduct with other segments, it may still restrict competition.

If you work both within and outside a group then consider setting up internal rules which restrict who can receive the group's pricing information in respect of offering similar services to the same set of customers. For example, you could change the type of membership to limit the exchange of competitively sensitive information and the coordination of commercial responses by competitors.

- **Membership associations must be careful not to break competition law.** Members are usually each other's competitors, so membership associations should take particular care to avoid making recommendations or taking decisions which interfere with their members' commercial conduct, including how they set fees or prices. Whilst membership associations can offer many legitimate benefits such as the sharing of premises, equipment and clinical expertise, when they issue formal or informal pricing recommendations or enable the sharing of commercially sensitive information, they risk breaking competition law. The association, **as well as its members**, can be fined for such conduct. The CMA has advice on [dos and don'ts for trade associations](#).
- **The consequences for breaking competition law can be severe.** Fines can be as much as 10% of a business' turnover and if private medical practitioners are also directors of their business, then they can also be banned from running a company for up to 15 years. In the most serious criminal cases, individuals can go to prison for up to 5 years.
- **Collaboration is not banned outright.** Collaboration with your competitors is still possible but if it involves a restriction of competition, for example because commercially sensitive information is exchanged, then it must meet the test to be exempted. The law provides that such collaboration is legal provided that it contributes to improving production or distribution or promoting technical or economic progress, while allowing consumers (in this case patients) a fair share of the resulting benefit, and provided that the collaboration does not:
  - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the product(s) in question.

### **Circumstances which do not pose a risk to competition law**

It is important to note that there are many circumstances where private medical practitioners can cooperate and exchange information with their competitors to achieve positive outcomes for patients. These could include the joint purchasing of services or exchanging information for the purpose of improving services to patients, such as offering new and additional services and extending opening hours

It follows that private medical practitioners do not risk breaching competition law where they:

- provide private medical services only as a sole trader and decide on their conduct individually.
- provide private medical services exclusively within the same group of practitioners where decisions on members' conduct are taken centrally by the group and individual members do not retain autonomy on how to provide their services, similar to a law firm or accountants' firm; this would mean you are no longer viewed as each other's competitors but as a single economic unit (known in competition law as a 'single undertaking').
- collaborate on elements of clinical practice that do not relate to the provision of services in competition with other providers (eg. joint educational activities, sharing knowledge or clinical best practice) or do not provide private medical services in the same area/region as other consultants in their LLP (or similar group) based on where their patients are and could be drawn from. Other consultants are only providing competing services if they are in the same area which will vary depending on patients' willingness to travel for treatment and the type of specialism sought and who can provide it.
- collaborate with their competitors to provide innovative and improved services so that any reduction of competition is outweighed by the benefits to patients and is the least restrictive way to achieve these so that the collaboration meets the [exemption criteria](#).
- collaborate on ventures that meet the test for exemption (see above).

### **What you need to do**

The CESP Limited case shows that it's important for private medical practitioners and groups such as LLPs to review their structures and practices to avoid the risk of entering into illegal agreements or sharing confidential information with competitors.

You should:

- Carefully consider how you interact with your competitors. Do you co-operate with them and discuss matters such as pricing?
- Take advantage of CMA advice - there is a range of guidance on the CMA's website to help sole traders and businesses comply with the law. These include a [60-second summary and short guides for private medical practitioners](#).
- If you plan to, or if you currently collaborate with your competitors, then consider how working together benefits patients and whether this outweighs any restrictions on how you compete as you may benefit from an exemption from competition law applying. Consider whether and how the [exemption criteria](#) in the Competition Act apply.
- If signing up to a membership association, always check that its conduct does not restrict how members can set their prices or run their individual businesses.
- If you are already a member of an association like an LLP, share this open letter with your fellow members.
- If your activity falls within areas that are not clearly lawful then consult the [CMA's short guide on 'cans, can'ts and maybes'](#). Carry out a self-assessment to make sure your conduct does not risk breaking competition law and make any changes necessary to ensure you are compliant.
- Prevention is better than cure: create a culture of compliance and introduce a compliance programme – everyone in your business must understand what they need to do to [stay on the right side of competition law](#).
- If you are unclear whether you may be breaking competition law, seek independent legal advice.

**If you have information about anti-competitive business behaviour, you should report this to the CMA.**

- **If you think you have broken competition law:** the CMA runs a leniency programme. Businesses and individuals can come to us in confidence and find out if they can benefit from our leniency programme. Businesses and individuals that come forward to report their own involvement in anti-competitive agreements under the leniency programme may have their financial penalty reduced or avoid a penalty altogether. You can obtain information about leniency [here](#).

- If you have information about anti-competitive business behaviour (which you are not involved in) – contact a member of the case team ([james.macbeth@cma.gsi.gov.uk](mailto:james.macbeth@cma.gsi.gov.uk) or [sue.aspinall@cma.gsi.gov.uk](mailto:sue.aspinall@cma.gsi.gov.uk)) or the CMA cartels hotline on 020 3738 6888 (or [cartelshotline@cma.gsi.gov.uk](mailto:cartelshotline@cma.gsi.gov.uk)). You can also find information about reporting other types of anti-competitive behaviour [here](#).

The CMA does not wish to limit the legitimate activities of associations and their members where these provide clinical benefits to patients such as new and innovative services. It is important, therefore, that practitioners know both what they can and can't do in order to compete in compliance with the law. The message from this recent case is clear: private medical practitioners and membership associations need to keep an eye on how to comply with competition law - the CMA is alert to legal wrongdoings and will take action. The repercussions of such action can be severe and far reaching, so it is in your best interests to give careful consideration to this letter.

Yours faithfully,

*Ann Pope*

*Senior Director, Antitrust.*