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For Your Eyes Only: Anticompetitive Collusion at a UK Hospital

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Last week the UK Competition and Markets Authority (CMA) published its decision to fine Spire and 7 consultants ophthalmologists operating in its Macclesfield hospital for fixing "*the level of the initial consultation fees charged by the Ophthalmologists at the Hospital*" (para 3.34).

This is a classic 'price-fixing' decision against ophthalmologists who agreed to charge the same fee (£200) for an initial consultation. However, and more importantly, this decision comes as a stark reminder to Hospitals not to regulate the pricing policy of their external consultants – even if it is for selfless reasons! Indeed, although the CMA recognised that "*Spire does not itself provide initial consultations in competition with the ophthalmologists*", Spire received the largest (by far!) fine of £1.2 million, whilst the individual fine for each consultant did not exceed £3,000.

This is because, according to the CMA, "*Spired played a central role in reaching and putting into effects the Parties' common objective of fixing the Ophthalmologists' initial consultation fee at the Hospital*" (para 5.32). In particular, the CMA emphasised that Spire (i) brought up the topic of initial consultation fees during a dinner with the ophthalmologists, (ii) emailed the ophthalmologists to propose the alignment of the initial consultation fees and (iii) suggested the price be fixed at £200. On these facts the CMA simply applied the now-established *Treuhand* jurisprudence, pursuant to which a company can be liable for anticompetitive practices "*regardless of whether* [it] *is active in the market affected by the agreement*" (paras 5.23-5.24 and 5.32).

Having found Spire liable for the anticompetitive practice (alongside the ophthalmologists), the CMA significantly increased the fine on Spire to ensure a deterrent effect "*having regard to Spire's size and financial situation*" (para 6.45) to attain £1.2 million (whilst it should not otherwise have exceeded £225,824). The CMA applied this increase for deterrence notwithstanding:

- the strong control exercised by the CMA over private hospitals as part of the Private Healthcare Market Investigation Order 2014; and
- the compliance efforts undertaken by Spire and acknowledged by the CMA in the decision

(paras 6.33-6.35).

In addition to this steep increase, the CMA does not seem to have sufficiently taken into account a number of aspects when fixing the so-called “gravity factor” on which the level of the fine ultimately imposed depends (which is likely due to the Parties’ decision to enter into a settlement agreement with the CMA). This factor was set at 25% in this case (the maximum being 30%), but could arguably have been lower on account of the following:

- Spire arguably took no financial advantage of the infringement and the CMA further recognises that “[i]*t is likely that the Infringement had a limited impact on customers/patients since the cost of an initial consultation only constitutes a relatively small proportion of the price*” (para 6.24(c));

- The practices in question were initially suggested by Spire to the benefit of consumers who were confused by the variation in price between consultants and for which, it seems, a uniform pricing across ophthalmologists providing a similar, if not identical service, during the initial consultation seemed preferable. It is however correct that for 4 ophthalmologists this resulted in a fee increase of up to £20, entirely supported by patients;

- The CMA recognised that there is a very high degree of pricing transparency in the industry – in particular, as noted in paragraph 3.64, the “*Hospital carried out a compliance exercise in respect of their obligations under the Private Healthcare Market Investigation Order 2014 to publish consultant fees and inform patients about consultation costs.*”

Finally, and as a side note, this whole investigation was triggered by one of the consultant ophthalmologist acting on its own by reporting the above practices to the CMA.

Hospitals are therefore well advised to listen and consult with their consultants in compliance with competition rules – in particular as it is now established that they can be viewed as facilitators of anticompetitive practices between the consultants using their facilities. This decision is also a strong reminder that competition rules apply to all, companies and individuals alike.

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