

BMA guidance on competition law for LMCs

Legal advice was recently sought on the effect of UK competition law on the ability of professional bodies such as the BMA, the GPC or LMCs to recommend or advise on fees that can be levied by their members or constituents.

UK competition law is essentially determined by the Competition Act 1998, section 2 of which prohibits agreements (in whatever form) between undertakings (i.e. businesses) or decisions (including recommendations) of associations of undertakings which in either case have the object or effect of preventing, restricting or distorting competition.

The BMA instructed Queens Counsel to consider four key questions around the Competition Act and these are summarised below and this guidance is drafted with the benefit of the advice received. LMCs are recommended to consider this guidance carefully before issuing any guidance of their own to members regarding professional fees.

Do GPs operate in a market for the purposes of the Competition Act?

It could be argued that although patients are free to change their GP, this happens rarely and in some parts of the country it may be impractical to do so. In this context is there a market for the purposes of competition law, and if there is no such market then how can competition law apply for the purposes of preventing the BMA from providing recommended fees for its members to charge?

Existing case law suggests the Competition Act will apply even if in practice there is little practical scope for competition to take place as a result of regulation. As such the BMA will not provide recommended fees for its members to charge, even if the practical scope for competition is very limited or practically non-existent.

What if LMCs became involved in the negotiation of fees for services which were not free at the point of use?

Although LMCs are statutory committees charged under the NHS Acts with representing GPs and GP practices in their areas; even for activities where statute pertains, existing caselaw makes it clear that LMCs cannot set a fee when the end funder is the user of the service, for example cremation fees. We are aware that without some guidance, the risk is some GPs may charge too little, and that other GPs may charge too much, neither of which is desirable from the BMA's perspective.

LMCs are recognised by statute and are given statutory functions as well as the right to obtain funding through a statutory levy (to which may be added further voluntary levies). LMCs are elected by and are therefore accountable to their GP membership. LMCs may constitute an association of undertakings for the purposes of the 1998 Act. On this basis any recommendation by them for a fee to be charged for services not free at the point of use risks being prohibited. To do so could be interpreted as unlawful price fixing.

Could the BMA offer guidance to GPs as to the type of costs to be factored in without recommending a fee?

Many GP Practices fail to properly account for all of their costs when it comes to the setting of fees. The Professional Fees Committee is developing a business support paper to provide full guidance to GPs on the type of costs they should factor in, as well as how to calculate their overheads, but without stating the final calculation which would incorporate the personal hourly charge. GPs must determine the final calculation independently and without reference or discussion with colleagues in neighbouring practices.

The BMA, having taken legal advice, believes that such support would be acceptable, provided that GPs are free to decide whether or not to use such a cost calculation model (which they would be) and that it is not designed to operate so as to fix a minimum fee (which would not be the case).

What is the position regarding fees for services commissioned by a local authority, but paid for by the NHS as the benefit of the services to the end user is free of charge (e.g. collaborative arrangements)?

We understand that competition law does not apply to an agreement for the provision of services, where the service provider is providing that service free at the point of delivery, as is the case with collaborative arrangements. **In other words, it is our understanding that where a fee is not ultimately paid by the consumer, the constraints of the Competition Act do not apply.**

It therefore follows that the BMA (and LMCs) could recommend suitable fees for GPs to charge. A considerable body of work is in hand alongside the business support model to understand how best to determine and raise awareness of such fees to both GPs and local authorities. We will update this guidance once we have a clearer timeframe for when this work will be completed.

If you have any further questions please contact info.lmcqueries@bma.org.uk