UNDERSTANDING COMPETITION IN THE NHS: THE GOVERNOR ROLE

Choice and competition have applied to the NHS for some time. The 1990s saw the introduction of an internal market, with a split between the commissioning and provision of healthcare services. More recently, since the publication of the NHS *Five year forward view* the tendency has been towards collaboration across local areas to deliver more integrated care which has raised questions about the role competition will play in the future NHS. For the foreseeable future, though, competition law remains unchanged and governors will therefore find it helpful to have an understanding of when and how it applies to NHS foundation trusts and trusts.

A glossary of terms is included at the end of this document.

COMPETITION IN THE NHS

What do we mean by competition in the NHS?

In recent years, the NHS has increased its focus on giving people more choices about their care. Competition is a means of providing this choice, as well as one of the tools that can incentivise providers to improve. This does not have to mean competition between the NHS and independent providers – it can also mean competition between two or more trusts.

As the sector regulator, NHS Improvement has a specific responsibility to ensure patient choice and prevent anti-competitive behaviour when it goes against patient interests. Monitor's powers to enforce competition rules through the provider licence and by applying the Competition Act (1998) and procurement, patient choice and competition regulations (2013) are now exercised by NHS Improvement. It can undertake investigations where there is a concern about possible anti-competitive conduct by either a provider or a commissioner, and can take enforcement action where necessary. NHS Improvement published guidance explaining how the procurement, choice and competition rules apply to providers.

Competition law aims to promote choice and drive efficiency through the operation of a market within the NHS. To this end, competition regulations have been designed to:

- deter anti-competitive agreements and behaviour;
- benefit consumers (patients) through ensuring that providers of goods and services are subject to the same rules and held to the same standards;
- prevent anti-competitive effects such as lack of consumer choice or reductions in innovation or quality.

What does competition mean for your trust?

Competition law can apply to a number of aspects of a foundation trust or NHS trust's operation but is especially relevant to:

- configuration and reconfiguration of services – how clinical services are set up, including their location and size, and particularly when a trust proposes to change how a service is configured;
- consultation duties – whether and when the proposals constitute a change which requires public consultation[1]
- collaborations with other NHS foundation trusts or trusts;
- commissioning practices –how a trust and its commissioners work together, including to improve services. This may include a decision by a commissioner to tender a contract or otherwise.

There are six main aspects of competition law which affect NHS organisations:

- Anti-competitive agreements and practices (Competition Act 1998)
- Abuse of a dominant position (Competition Act 1998)
- EU public procurement regime (Public Contracts Regulations 2006 and 2015)
- NHS procurement (Procurement, Patient Choice and Competition Regulations (No.2), 2013)
- Merger control (Enterprise Act 2002)
- Market investigations (Enterprise Act 2002)

Statutory transactions

A statutory transaction is defined in sections 56 to 57A of the National Health Service Act 2006 (as amended by the Health and Social Care Act 2012). The term 'transaction' may include a merger, acquisition of one trust by another or other transaction which involves a change of control over all or part of an organisation's activities'. There are several types of activity which could be classed as a significant transaction, such as entering into a joint venture or franchising arrangements.

NHS Improvement reviews all statutory transactions, and may also review other types of 'significant transaction'. It also provides advice to NHS foundation trusts and trusts in the early stages of considering a transaction.
The Competition and Markets Authority (CMA) has a role in regulating competition in the NHS through its merger control regime. NHS Improvement provides advice to the CMA on the patient benefits arising from NHS mergers.

Foundation trusts pursuing a significant transaction should establish whether it meets the threshold for a review by the CMA. NHS Improvement has published guidance on the transaction review process, including a joint guidance document with the CMA that outlines the merger review process.

COMPETITION AND NEW CARE MODELS

Over the last five years, the degree to which national bodies have focused on competition in implementing NHS policy has changed considerably. Andrew Lansley's reforms were predicated on the role of markets in driving quality and efficiency. The Health and Social Care Act 2012 created the framework for competition to operate in the NHS, including a clear role for the CMA. However, the policy context has moved on. The secretary of state for health,

[1] NHS bodies should consult the public if the proposals would have an impact on: (a) the manner in which the services are

Jeremy Hunt, recently spoke about the role of transparency in driving 'natural competitiveness' and we have seen a push towards collaborative care models since the publication of the NHS *Five year forward view* (FYFV), which 'vanguard' sites across the country are currently developing. More recently, local areas have been asked to produce five year sustainability and transformation plans setting out how they will work together to meet financial and quality challenges. These shifts mark a renewed focus on integration and collaboration as a means of moving towards more financially and clinically sustainable care. Competition between providers, driven by competitive tendering, is no longer seen as the future of the NHS. National bodies have made a commitment to be flexible in the way they apply regulatory requirements and other mechanisms locally to help enable this more integrated, collaborative approach. But on the other hand, there has been no signal that competition legislation in relation to the NHS will change.

Do new care models raise competition concerns?

So far the national bodies have maintained that the CMA's review process should not pose a problem for areas developing new care models as long as the organisations coming together do not provide the same services. However, moving to a new care model could result in a significant transaction, requiring involvement of the CMA, even if it does not involve a merger, acquisition or dissolution of a trust. The acute care collaboration model[2], which involves providers either collaborating to deliver specific acute services or between whole institutions, and more informal models of collaboration such as alliance partnerships could also raise concerns with the CMA.

PROCUREMENT, PATIENT CHOICE AND COMPETITION REGULATIONS

The procurement, patient choice and competition regulations (also called Section 75 regulations) form the framework for procuring NHS healthcare services. NHS Improvement has published guidance on the regulations for clinical commissioning groups and NHS England to ensure they procure high-quality, efficient services that meet the needs of patients.

The regulations set out the objective that commissioners must pursue when procuring NHS services: "to secure the needs of patients who use the services and to improve the quality and efficiency of the services, including through the services being provided in an integrated way (including with other health care services, health-related services or social care services)".

They also set out a number of general requirements that commissioners must comply with when procuring NHS services. Commissioners are required to act in the interests of patients, but are not under an obligation to use competitive tendering:

- to act transparently and proportionately, and to treat providers equally and in a non-discriminatory way;
- to procure services from one or more providers that are most capable of delivering commissioners' overall objective and that provide best value for money;
- to consider ways of improving services (including through services being provided in a more integrated way, enabling providers to compete and allowing patients to choose their provider); and

[2] A description of the acute care collaboration model and other *Five year forward view* care models is available at: https://nhsproviders.org/media/1807/nhs-vanguard-factsheets.pdf

- to maintain a record of how each contract awarded complies with commissioners' duties to exercise their functions effectively, efficiently and economically, and with a view to improving services and delivering more integrated care.

As public bodies, all NHS organisations have to operate in respect of EU public procurement law when they purchase goods, services or works. The regulations came into effect for commissioners from 18 April 2016. All NHS contracts valued above €750,000 (£589,148) must be advertised and the commissioner must follow a transparent process, which they are free to define, but which must treat all applicants equally and without discrimination. Exemptions remain which mean commissioners are not required to tender services in all circumstances, such as when there is one 'capable provider'.

Following the referendum on the UK's membership of the European Union, it is uncertain whether these regulations will continue to apply in the UK in the future. In any case, NHS commissioners will need to continue to comply with them for at least two years until the UK formally leaves the European Union.

For more information on the EU directive, please refer to the NHS European Office briefing.

WHAT DOES COMPETITION MEAN FOR GOVERNORS?

The role of the council of governors generally and specifically in relation to choice and competition is to represent the public and hold the non-executive directors (NEDs) to account for the performance of the board. As such, if a foundation trust is planning any undertaking with competition implications, governors should be informed early in the planning process and will want to ensure that the proposal in the best interests of members and that any risk to the continued functioning of the organisation is proportionate and appropriately managed.

The sections below are examples of the types of undertaking that may prompt councils of governors to ask questions of the NEDs in relation to competition considerations. In any of these cases, governors can expect to be provided with information about the nature and reasons for the changes, the evidence that has informed the decision, and how the board plans to manage the risks. Governors may also seek information about:

- the impact of the change upon staff, the membership and the council of governors. For example, if staff choose to go and work elsewhere as a result of a change, how might this affect the sustainability of services?
- Related to the above, is there is a duty to carry out public consultation and/or would such consultation be beneficial?
- Which of the competition regulations outlined in this briefing may be applicable and if relevant, assurance that the board has sought advice on managing any potential concerns.

Mergers, acquisitions and significant transactions

A significant transaction as described in the section above may be undertaken for quality and safety reasons or for reasons of organisational or local health economy sustainability (e.g. long term financial viability, ability to recruit). Councils of governors will wish to understand the likely impact on the trust's services: will the change lead to people receiving higher quality, safer and/or timelier care? As a minimum, the council will want to be assured that standards of care provided by the trust will be maintained. Other questions governors may wish to consider include:

- If the decision has been made for financial reasons, how is the board assured that the transaction will lead to an improved financial position for the organisation?

- How are the NEDs assured that the board and management have capacity and capability to undertake such a transaction?
- Has the board considered alternatives? Have they carried out an options appraisal and are the NEDs assured it is robust?
- What is NHS Improvement's view of the plans?

Tendering for services

If the trust is seeking to acquire a new service (for example an acute trust taking on a community services contract), the NEDs should be assured that it has the right expertise to be able to deliver it effectively. Governors may also wish to understand the impact on the trust's existing services, for example, will this new contract improve the organisation's overall financial position?

If the trust has lost a contract for a service it previously provided, the NEDs should be able to explain the reasons and if the quality of the service was a factor, explain what action the board is taking to establish whether there are similar problems in other services and if so, to address them.

Collaborations

Collaborations between organisations may take a number of different forms and with the introduction of sustainability and transformation plans and the spread of new care models we can expect to see more of them. Some collaborations – for example a joint venture – may also qualify as a significant transaction. It is up to the trust to decide what counts as a significant transaction but not all trusts specify this in their constitutions.
In any form of collaboration, NEDs should understand where ultimate accountability lies for the delivery of services within scope of the collaboration. NEDs should also be assured that this will not adversely affect patient care or patient choice, and should know what other options the board has explored and why this option was chosen.

As with any significant change, the council of governors will ask questions to understand how the board plans to engage patients and the public and how NEDs are assured that the board has the capacity to implement the planned changes.

GLOSSARY OF TERMS

Acquisition

An acquisition refers to a foundation trust acquiring an NHS trust or another NHS foundation trust, e.g. the Royal Free London NHS Foundation Trust's acquisition of Barnet and Chase Farm NHS trust. Following an acquisition the acquiring organisation, its board and its council of governors remain in place and the board of the acquired body and its council of governors are both disbanded.

Commissioning

Commissioning is the process of planning and purchasing health and care services to ensure they meet the needs of the population.

Franchising

In a franchising arrangement a third party is permitted to use the trust's intellectual property, such as branding or logos.

Joint venture

A joint venture is a business agreement in which two or more parties create a new legal entity or enterprise with shared revenues and assets.

Merger

A merger refers to a merger of an NHS foundation trust with another NHS foundation trust or with an NHS trust to form a new single organisation, e.g. the proposed merger of Ashford and St Peters NHS Foundation trust with Royal Surrey NHS Foundation trust. At the point of a merger the two merging organisations cease to exist and a new board and council of governors are established.

Vanguard

As part of a national NHS England programme, vanguard sites are being funded and supported to test, evaluate and accelerate change by taking a lead on the development of new care models which will act as the blueprints for the NHS moving forward.