Monitor

Making the health sector work for patients

Choice and competition licence conditions: guidance for providers of NHS-funded services

www.gov.uk/monitor

About Monitor

As the sector regulator for health services in England, our job is to make the health sector work better for patients. As well as making sure that independent NHS foundation trusts are well led so that they can deliver quality care on a sustainable basis, we make sure: essential services are maintained if a provider gets into serious difficulties; the NHS payment system promotes quality and efficiency; and patients do not lose out through restrictions on their rights to make choices, through poor purchasing on their behalf, or through inappropriate anti-competitive behaviour by providers or commissioners.

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Foreword

Monitor's job as regulator is to protect and promote the interests of patients by ensuring that the whole healthcare sector works for their benefit. We recognise that providers and commissioners have challenging roles on the front line of healthcare: our philosophy is to help people do the right thing rather than punishing them for doing the wrong thing.

This guidance has been written to help you, as healthcare providers, make the best decisions for patients. It is one of a set of documents explaining how we apply competition rules, first published in March 2013 for a 12-week public consultation. We are grateful for all the support and engagement we received to help us develop our guidance, and we have acted on feedback. [1]

The full set of finalised guidance comprises this document, alongside:

- how we apply provisions of the Competition Act 1998 to healthcare services
- how we approach market investigation references (under Part 4 of the Enterprise Act 2002).

As an extra aid, we have published (and will continue to publish) hypothetical scenarios on our website, which help illustrate how the choice and competition conditions of the provider licence and competition law work in practice.

We have also previously published related guidance, both to support NHS providers considering transactions[2] and to assist commissioners using the Procurement, Patient Choice and Competition Regulations.[3]

To help you use this guidance most fully and identify when it might be necessary to work with us, we briefly explain what we mean by choice and competition and set out how and why we are working in this area below.

Our role in choice and competition

Choice and competition have existed in the NHS in England for many years and are powerful tools for improving the quality of care provided to patients. They enable patients and commissioners to select a provider that offers the service that best meets their needs. The purpose of competition is to enable commissioners to select the providers which offer quality services that best meet the needs of patients.

[1] Please see the consultation response document at https://www.gov.uk/government/publications/nhs-healthcare-providers-working-with-choice-and-competition
[2] https:// www.gov.uk/government/publications/supporting-nhs-providers-considering-transactions-and-mergers
[3] https:// www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance

Choice and competition are governed by specific rules which seek to make sure that:

- they operate in the best interests of patients
- procurement decisions by commissioners achieve the best results
- all providers are treated fairly
- no-one behaves anti-competitively to the disadvantage of patients.

Our role is to make sure that this all works the way it is meant to: that the rules are applied taking into account the specific circumstances of the health sector, and above all that they are applied in the best interest of patients.

We take this responsibility seriously. We will enforce the competition rules affecting healthcare services to ensure that they operate fairly in the interests of patients, and to help both NHS providers and NHS commissioners meet the needs of patients.

To achieve this, we will explain in documents like this one how any breach of these rules might have negative effects on patients, and how we expect our intervention to maintain or improve service quality or innovation, or deliver better value for money.

Introduction

The purpose of this guidance

The NHS provider licence is Monitor's main tool for regulating providers of NHS services. It is designed to protect and promote the interests of patients while allowing providers to operate as flexibly as is appropriate. The licence sets out important conditions that licensees must meet to help us ensure that the health sector works for the benefit of patients, including provisions relating to choice and competition.[4]

This guidance explains the choice and competition conditions of the NHS provider licence and explains how we apply these licence conditions in individual cases.[5] In particular, we set out the framework we use when assessing whether behaviour is consistent with the choice and competition conditions of the licence.[6] We also provide examples of factors for licensees to consider when thinking about the requirements of the choice and competition conditions of the licence.

The choice and competition sections of the licence apply to all licensed providers of NHS-funded services in England ('licensees'). NHS foundation trusts were licensed from 1 April 2013; other non-exempt[7] providers of NHS-funded services were licensed from April 2014.[8] Both groups will find this guidance relevant.

This guidance is also relevant to NHS trusts. Although NHS trusts are not required to hold a licence, they are required by the NHS Trust Development Authority (TDA) to comply with certain licence conditions (specifically, the conditions covering general obligations, pricing, choice and competition, and integrated care). Where it comes to our attention that an NHS trust is potentially in breach of these licence conditions, we may investigate and will inform TDA of this. Following an investigation, we will provide advice to TDA, and as the body accountable for NHS trusts it will be responsible for

[4] Further information about the NHS provider licence is available at: https://www.gov.uk/government/publications/the-nhs-provider-licence

[5] This guidance reflects the views of Monitor at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. Our website will always display the latest version of the guidance.

[6] The factors listed in this guidance are provided for guidance, but are not intended as exhaustive.

[7] Details of which providers are exempt from the requirement to hold a provider licence are available at: https://www.gov.uk/independent-providers-of-nhs-funded-services-apply-for-an-nhs-provider-licence

[8] NHS foundation trusts were licensed one year before other providers. This was to allow time for Monitor and the Care Quality Commission, as required by the Health and Social Care Act (2012), to implement a joint licensing and registration system. Further detail about the licensing of independent providers is available on our website at: https://www.gov.uk/independent-providers-of-nhs-funded-services-apply-for-an-nhs-provider-licence

determining how to act in light of our findings. In doing so, TDA will have regard to our advice and recommendations and will notify us of any decision it takes in light of them.[9]

In this guide, we have tried to be clear, using straightforward language and seeking to avoid quoting the licence repeatedly where possible. This means that we do not always use the exact wording used in the licence, and the licence conditions themselves ultimately override this guidance.

As we gain more experience in dealing with potential breaches of the licence conditions, we also expect to update the guidance from time to time. Consistent with this, we may find it necessary to deviate from the guidance if, for example, a matter raises new issues. Where this is the case, we will acknowledge that we have deviated from the guidance and will set out our reasons for doing so.

Please read this guidance alongside Monitor's 'Enforcement Guidance',[10] which explains how we generally expect to go about our enforcement work in relation to potential and actual breaches of the licence. It sets out when we may decide to take action, and what action we might take; how we are likely to decide what kinds of sanctions to impose; and the high level processes we intend to follow when taking enforcement action.

As an extra aid, we have also published some worked examples that consider how the competition licence condition might apply to a number of hypothetical scenarios.[11]

Overview of the licence conditions

The choice and competition licence conditions are as follows:

- **Choice and Competition – Condition C1: The right of patients to make choices**
  This condition protects patient choice. It requires licensees to notify patients when they have a choice of provider, to tell patients where they can find information about the choices they have, to ensure that any information or advice provided is not misleading and to act in a fair way where patients have a choice of provider. This condition applies wherever patients have a choice under the 'NHS Constitution' or a choice that has been conferred locally by commissioners.

[9] Partnership Agreement between NHS Trust Development Authority and Monitor (2013-14), available at: https://www.gov.uk/government/publications/monitor-and-the-nhs-trust-development-authority-partnership-agreement

[10] Monitor (2013), 'Enforcement Guidance', available at https://www.gov.uk/government/publications/monitors-enforcement-guidance

[11] Available at: https://ww.gov.uk/government/publications/hypothetical-scenarios-choice-and-competition-conditions-of-the-nhs-provider-licence-and-competition-law

It also prohibits licensees from offering or giving inducements to refer patients or commission services.

- **Choice and Competition – Condition C2: Competition oversight**
  This condition prevents a licensee from entering into or maintaining any agreement that has the object of or which has (or is likely to have) the effect of preventing, restricting or distorting competition to the extent that it is against the interests of healthcare users. It also prohibits the licensee from engaging in other conduct which has (or is likely to have) the effect of preventing, restricting or distorting competition to the extent that it is against the interests of healthcare users.

These conditions are set out in full in the Annex. All of the standard licence conditions are available on our website.[12]

Structure of the guidance

- Section 1 provides background relating to the choice and competition licence conditions, including how we will go about taking action against possible breaches of these conditions.
- Section 2 explains how we will apply the choice licence condition.
- Section 3 explains how we will apply the competition licence condition.

[12] Monitor's standard licence is available at:
https://www.gov.uk/government/publications/the-nhs-provider-licence

1 Background and overview

1.1 The purpose of the licence conditions

Choice and competition have existed in the NHS for many years. Patients are able to choose who provides their healthcare for a broad range of different services and, where patients choose their provider, providers compete to attract patients. Providers also compete to secure funding from commissioners. In this way, choice and competition are used to improve outcomes for patients by stimulating improvements in service quality, innovation and efficiency within the sector.

The licence sets out obligations that licensees are required to follow to help ensure that choice and competition work effectively in the interests of patients.

1.2 Relationship between the competition licence condition and competition law

Some of the conduct that falls within the scope of the competition licence condition may also be subject to UK and European competition law. In particular, where a licensee is acting as an **undertaking** for the purposes of the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU),[13] conduct that is in breach of the competition licence condition may also be prohibited by this legislation.

The Health and Social Care Act 2012 (the 2012 Act) gives Monitor concurrent powers with the Competition and Markets Authority (CMA) to apply UK and European competition law in relation to the provision of healthcare services in England. On 1 April 2014, many of the functions of the Office of Fair Trading (OFT) and the functions of the Competition Commission were transferred to the CMA, and the OFT and Competition Commission were abolished. The CMA is the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers.

Where we suspect anti-competitive behaviour in the healthcare sector in England, we may decide to use our powers under the provider licence and/or apply the prohibitions set out in the Competition Act 1998 and Articles 101 and 102 of the TFEU. We have set

[13] The term undertaking is described in guidance adopted by the Competition & Markets Authority (see: OFT, 2004, 'Agreements and concerted practices', available at: www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft401.pdf; OFT, 2004, 'Assessment of market power', available at: www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft415.pdf.On the specific question of whether public bodies can be undertakings and subject to UK and European competition law, see: OFT, December 2011, 'Public bodies and competition law: A guide to the application of the Competition Act 1998', available at: www.oft.gov.uk/shared_oft/ca-and-cartels/OFT1389.pdf

out how we intend to take action under the Competition Act 1998 and Articles 101 and 102 in separate guidance.[14]

1.3 Interaction with other authorities and regulatory organisations

Monitor sits within an overall regulatory system for the healthcare sector made up of a number of organisations. These include the Care Quality Commission, NHS England,[15] TDA, CMA, the Charity Commission and the Advertising Standards Authority, among others.

We work with other organisations to avoid regulatory duplication (which can use up precious resources) wherever possible. To achieve this, we have established formal working relationships with the organisations that we work most closely with. Details of these arrangements are available on our website at: https://www.gov.uk/government/organisations/monitor/about#who-we-work-with.

1.4 Initiation of cases

Identifying possible breaches

We expect to become aware of potential breaches of the choice and competition licence conditions in a number of ways, including:

- complaints from third parties
- intelligence from another regulator or authority
- facts that emerge from our current or completed cases and reviews; or
- our own knowledge of the sector.

Accordingly, we may start investigations in reaction to complaints or on our own initiative.

Anyone can make a complaint regarding suspected breaches of the choice and competition licence conditions, including for example a provider, a commissioner, a representative body, a patient group, or an individual user of healthcare services. Guidance on how to make a complaint, including where to send a complaint and who to speak to, is available on our website at: www.gov.uk/nhs-procurement-choice-and-competition-ask-a-question-or-make-a-complaint.

[14] Monitor (2014) 'Guidance on the application of the Competition Act 1998 in the healthcare sector', available at: www.gov.uk/government/publications/nhs-healthcare-providers-working-with-choice-and-competition

[15] The National Health Service Commissioning Board, which is established by section 1H of the National Health Service Act 2006, is referred to in this guidance as NHS England.

Deciding to investigate

When we become aware of a potential breach, we will consider how to proceed in accordance with our prioritisation principles. Our prioritisation principles are set out in our 'Enforcement Guidance'.

We prioritise by weighing up the costs and benefits of a particular course of action. Factors we expect to consider include: the likely direct and indirect benefits to patients, the likelihood of success,[16] and the likely cost of resources needed to take that particular action.

We apply our prioritisation principles to decisions not only about whether to begin a case, but also whether to continue with one once under way. We will also apply these principles when deciding whether to take informal or formal enforcement action. We apply the framework to ensure we make best use of the resources available to us.

Each year, we also publish an annual plan. This provides further detail about Monitor's key actions for the year ahead and where we are likely to prioritise our advice and investigations. The plan sits alongside our overall strategy, which sets out our long-term plan for achieving our mission, and sets out our objectives in ensuring that choice and competition operate in the interests of patients. These documents are available here.

1.5 Process for conducting cases

We have set out the general procedures that we follow when conducting a case which may result in us taking formal enforcement action in our 'Enforcement Guidance'.

The 2012 Act does not specify a time period within which we must complete an investigation of a suspected licence breach. However, we will publish an indicative timetable as each case begins. This will provide the parties involved with further details on our expected process and the indicative timescales. If we expect our timescales to change significantly during an investigation from those set out as a case begins, we will advise the parties and explain why.

When we have a well-reasoned complaint, we aim to complete an initial assessment of the case within 40 working days. Straightforward issues may be resolved quickly after that; it may take longer to resolve cases that raise complex or new issues, or where we are having difficulty obtaining information to make an assessment. In some cases, considerable additional work may be required to understand whether there is any substance to a complaint.

[16] For example, whether we expect to be able to gather sufficient evidence to be satisfied that a condition has been breached.

We can decide not to continue with a case at any point during an investigation without further action if, for example, we consider that there is insufficient evidence of a breach or that a formal investigation should no longer be prioritised. We will publish reasons for a decision not to continue with a case on our website.

1.6 Consequences of a licence breach

Our enforcement powers, and the potential consequences of a licence breach, are set out in our 'Enforcement Guidance'.

Where we find that a licensee is breaching, or has breached, one or more of its licence conditions, we may impose certain requirements, including:

- requiring a licensee to take steps to ensure that the breach in question does not continue or recur
- requiring licensees to take actions to restore the situation to what it would have been, were the breach not occurring or had not occurred and
- requiring a licensee to pay a financial penalty.

We can revoke a provider's licence if the licensee has failed to comply with a licence condition. We do not expect to consider revoking a licence often – to do so would prevent a provider from continuing to provide NHS healthcare services (where it is obliged to hold a licence).[17]

1.7 Informal advice

We are often asked to provide informal advice to parties who have queries or concerns about how the licence conditions are likely to be applied in certain circumstances.[18]

If you want informal advice (or simply wish to discuss whether to request informal advice), please refer to the contact details on our website: https://www.gov.uk/nhs-procurement-choice-and-competition-ask-a-question-or-make-a-complaint

[17] We explain when we might consider revoking a licence on page 34 of our 'Enforcement Guidance'.
[18] We will also provide informal advice on matters relating to the application of the Competition Act 1998, and relevant to our concurrency powers.

2 Licence Condition C1: The right of patients to make choices

Being able to choose a provider can directly benefit patients. Effective patient choice incentivises providers to deliver higher quality and more efficient services than would otherwise be the case. For choice to be effective, patients need to be well informed about the options that are available to them. Patients need to know **when** they have choices, **what** choices are available, and **how** the different options compare.

Licence Condition C1 (the choice licence condition) supports patient choice. In particular:

- Clause 1 of the licence condition requires the licensee to notify patients that they have a choice and tell patients where they can find information about the choices they have wherever a patient has a choice of provider under the NHS Constitution or a choice that has been conferred locally by a commissioner.
- Clause 2 of the licence condition requires the licensee to ensure that any information or advice made available is not misleading where patients have a choice of provider.
- Clause 3 of the licence condition requires the licensee to ensure that any information or advice made available does not unfairly favour one provider over another and as far as reasonably practical assists patients in making well-informed choices between providers of treatments or other healthcare services.
- Clause 4 of the condition prohibits the licensee from offering or giving inducements to refer patients or commission services.[19]

The following sections explain how we expect providers to meet these obligations.

2.1 The licensee's obligation to notify patients that they have a choice, and to tell patients where they can find information about the choices they have

Which patient choices are captured by the choice licence condition?

The obligations under the licence condition apply when a patient has a choice of provider under the NHS Constitution or a choice of provider conferred locally by commissioners.

The NHS Constitution[20] explains patients' rights to make choices about their NHS care. It explains that patients have the right to choose the organisation that provides their

[19] Licence Condition C1 (the right of patients to make choices) is set out in full in the Annex.

NHS care when they are referred for a first outpatient appointment with a service led by a consultant.[21,22]

The NHS Constitution also explains that patients have a right to access services within maximum waiting times, or where this is not possible, commissioners must take all reasonable steps to offer patients a choice of alternative provider.[23] With respect to maximum waiting times, patients have the right to:

- start consultant-led treatment within a maximum of 18 weeks from referral for non-urgent conditions[24] and
- be seen by a cancer specialist within a maximum of 2 weeks from GP referral for urgent referrals where cancer is suspected

(in each case '**the maximum waiting time**').

There are other circumstances where patients' rights to choice are being extended as a matter of policy. For example, patients' right to choice has been extended to include elective referrals for mental health services from 1 April 2014.[25] If patients' rights to

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[20] 'The NHS Constitution', 26 March 2013. (More detail about patients' rights in the NHS Constitution is available in 'The Handbook to the NHS Constitution'.)

[21] Commissioners have obligations to make arrangements to ensure that patients are offered a choice of provider for a first outpatient appointment for a consultant-led service under Regulation 39 of The National Health Services Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012. This duty is subject to certain exceptions.

[22] 'The Handbook to the NHS Constitution', page 65. There are some exceptions. We note that even though choice in maternity services is not covered by the NHS Constitution, patients can expect a range of choices over those services. We note there is a clear policy position in favour of choice in maternity services (eg the 2014 to 2015: NHS Choice Framework, the NHS Mandate 2014 to 2015).

[23] See Regulations 47−53 of The National Health Services Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012. Exceptions are noted in Regulation 49. Commissioners have a corresponding obligation under Regulation 12 of the Procurement, Patient Choice and Competition Regulations 2013.

[24] This assumes that the clock has not been paused or stopped over the 18-week period. If the wait clock has been paused or stopped, this requirement would not apply. Such circumstances are set out in further detail at Regulation 46 of The National Health Services Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012. Exemptions are also described in 'The Handbook to the Constitution', pages 27−28.

[25] The 2013 amendment to The National Health Services Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012. The changes mean that, from 1 April 2014, a patient who requires an elective referral for mental health services has a right to choose any clinically appropriate health service provider for their first outpatient appointment with a consultant or a consultant-led team, or with a healthcare professional or a team led by such a professional, as long as the provider has a contract with a commissioner for the service required. There are some exceptions.

choice are extended further in future, then these rights will also be protected under the choice licence condition.

Choice of provider may also be **conferred locally by commissioners**. This is a matter for commissioners. The Procurement, Patient Choice and Competition Regulations require commissioners to consider whether the quality and efficiency of services can be improved by allowing patients a choice of provider (or through services being provided in a more integrated way or enabling providers to compete to provide services).

The types of services where commissioners have introduced patient choice include: adult hearing services, musculo-skeletal services (MSK) for back and neck pain, continence services, selected diagnostic tests (including non-obstetric ultrasound (NOUS) and magnetic resonance imaging (MRI)), wheelchair services, podiatry, venous leg ulcer and wound healing, primary care psychological therapies, attention deficit hyperactivity disorder (ADHD) and dermatology.[26] The range of services where choice is conferred locally is expected to evolve over time. Different choices may be available in different areas.[27]

We expect commissioners will want to publicise and promote the choices that they have conferred. We also expect licensees to engage with commissioners so that they are aware of the services where choice has been conferred locally.

The types of choices that the choice licence condition might apply to include:

- **where a patient is referred by an acute provider to a service where choice has been conferred locally.** For example, a frail, elderly patient is taken to an acute hospital for treatment of a fractured neck of femur following a fall at home. On discharge, the multidisciplinary team refers the patient for community rehabilitation and also makes a referral to a podiatrist in the community for evaluation and treatment of an ongoing foot problem, which may have contributed to the fall. If the patient lives in an area where patient choice has been adopted by commissioners for podiatry (eg through local AQP, see footnote 26), the team member making the referral should make clear to the patient that they have a choice of provider.

[26] The Any Qualified Provider (AQP) scheme was used by commissioners to introduce patient choice. Further details about local AQP is available at: www.nhs.uk/choiceintheNHS/Yourchoices/choice-in-the-community/Pages/your-choice-of-community-services.aspx

[27] Some services may be commissioned nationally (for example, specialised services), and the choice licence condition also applies to situations where choice has been conferred by commissioners on a national basis.

- **where a patient is referred by a referral management centre for their first outpatient appointment with a service led by a consultant or to a service where choice has been conferred locally.** For example, a patient is seen by a physiotherapist at a referral management service for MSK services. The physiotherapist suspects the patient needs surgery and refers them to a consultant-led orthopaedic clinic for assessment. In doing so, the physiotherapist should make clear to the patient that they can choose which provider they want to go to.

- **where a patient is referred by a provider in the community for a first outpatient appointment with a service led by a consultant.** For example, a diabetic patient is seen by a nurse specialist in a diabetic foot clinic located in the community. The nurse specialist suspects the patient may need surgery, and refers them to a consultant-led diabetic team for assessment. The nurse specialist should make clear to the patient that they can choose which provider they want to go to.

When is the licensee expected to notify patients that they have a choice and tell them where they can find information about the choices available?

The choice licence condition requires a licensee to:

- notify patients whenever they have a choice of provider under the NHS Constitution or a choice of provider conferred locally by commissioners

- tell patients where information about that choice can be found.

These actions should be undertaken **before** the patient is referred. This means that at every point where the patient has a choice of provider, the obligation to notify and make information available to the patient applies to the licensee making the referral. For example, a patient should be told that they have a choice of provider for their first outpatient appointment for a consultant-led service and told where they can find information about that choice before they are referred to a provider for that appointment.

Where a patient has been referred for consultant-led treatment or to a cancer specialist, a licensee to whom the patient is referred should also notify him or her of the choices available in the event of the maximum waiting time not being met. In particular, we expect that if the licensee becomes aware at any stage that the patient will wait longer than the maximum waiting time (or as soon as the patient has been waiting 18 weeks for non-urgent conditions or 2 weeks for urgent referrals where cancer is suspected), the licensee should notify the patient about this as soon as possible. When doing so, the licensee should provide contact details for the patient's commissioner and remind

them that the commissioner is required to take all reasonable steps to ensure that the patient is offered a choice of appointment with an alternative provider(s).

In addition, to ensure that in practice patients are well placed to be referred to an alternative provider where the maximum waiting time is not going to be met, providers might consider making arrangements along the following lines:

1) where a patient requires a referral, **the licensee making the referral** notifies the patient of their rights to start treatment (or be seen by a cancer specialist) within the maximum waiting time.[28] In addition:

    a) if the licensee making the referral has information at the time of referral that one or more of the options available to the patient is likely to involve a wait longer than the maximum waiting time, the licensee should tell the patient this

    b) the licensee making the referral advises the patient to contact the provider that they have been referred to[29] and/or the patient's commissioner, if the patient waits longer than the maximum waiting time and

    c) the licensee provides the patient with contact details for the patient's commissioner and explains that where the patient notifies their commissioner that they will wait longer than the maximum waiting time, the commissioner is required to take all reasonable steps to ensure that the patient is offered a choice of alternative provider(s) to start treatment (or be seen by a cancer specialist) at an earlier date.

2) where **a licensee accepts a referral**, the licensee notifies the patient of their rights to start treatment (or be seen by a cancer specialist) within the maximum waiting time.[30] In particular, the licensee explains these rights to the patient in the letter informing the patient of the timing of their first appointment. The letter contains contact details for the patient's commissioner and explains that the commissioner is required to take all reasonable steps to ensure that, where the

[28] Including an explanation of any circumstances that the clock can be paused or stopped (see footnote 22).

[29] We note a commissioner's duty to offer an alternative provider arises where the patient notifies the provider that they were referred to (and not the commissioner) that they have not commenced, or will not commence, treatment within the required period. In practice, we expect that commissioners and providers would make arrangements to ensure commissioners are promptly notified where patients have contacted providers about failure to begin treatment within the required timeframe.

[30] Including an explanation of any circumstances that the clock can be paused or stopped (see footnote 22).

patient will wait longer than the maximum waiting time, the patient is offered a choice of appointment with an alternative provider(s).

What information is the licensee expected to make available to patients who have a choice of provider?

Regarding the requirement to tell patients where they can find information about the choices they have, the main responsibility for promoting, publicising and enabling choice lies with commissioners, and we will apply the choice licence condition in this context. In particular, we are mindful that:

- the Act places a duty on clinical commissioning groups to promote the NHS Constitution and requires them to act with a view to enabling patients to make choices with respect to aspects of healthcare services provided to them

- the NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 place a duty on commissioners to make arrangements to ensure that patients are offered a choice of provider in respect of a first outpatient appointment, and that the availability of choice is publicised and promoted and

- the NHS Constitution gives patients a right to information when they have a legal right to choice. It also commits the NHS to offering patients easily accessible, reliable and relevant information to support them to make choices. This includes NHS Choices (www.nhs.uk) and Choose and Book[31], but other sources are also available. The Care Quality Commission, for example, publishes information about the performance and service quality of NHS services against minimum quality standards and a number of third parties provide web-based information on providers.[32]

Accordingly, we expect information about patients' choices to be publicly available. The information sources that the licensee tells the patient about can be sources developed and maintained by parties other than the licensee. We do not expect licensees to prepare or maintain their own materials to assist patients to make well-informed choices. We do not expect licensees to provide patients with other providers' advertising or promotional materials to assist patient choice. At the same time, the condition does not prevent licensees from preparing, maintaining or providing their own materials or

[31] Choose and Book is a national electronic referral service which gives patients a choice of place, date and time for their first outpatient appointment in a hospital or clinic. Further information about Choose and Book is available here: www.chooseandbook.nhs.uk/ Over the next few years, we understand that a new NHS e-Referral Service may succeed the current Choose and Book service. See: http://systems.hscic.gov.uk/ers

[32] Sources of information to help patients choose are set out in 2014 to 2015 NHS Choice framework.

providing other providers' advertising or promotional materials to patients to assist them in making a choice.

Where the licensee provides information and/or advice to patients on making a choice, it should be, as far as practicable, designed to assist that patient in making a well-informed choice between providers of treatments or other healthcare services. The information and advice must not mislead or unfairly favour one provider over another and must be presented in a way that as far as reasonably practical assists patients in making well-informed choices between providers of treatments or other healthcare services. (Section 2.2 describes information that is 'misleading' and 'unfairly favours one provider over another', including examples of such behaviour; see also the discussion relating to advertising and promotional activity in Section 2.3.)

When telling patients about particular information sources, licensees should consider the format and accessibility needs of different sectors of the population. Licensees should be mindful of meeting the needs of all their patients, and it is important that information sources are suitable and appropriate to the individual. Information sources that rely on medical jargon, for example, should generally be avoided. Licensees should consider the needs of patients of all ages, including children and young people, and patients with mental health illnesses, learning disabilities, those with hearing or sight impairments, non-English speaking people and other vulnerable groups. Where suitable formats are not readily available, the licensee should tell the patient where they can obtain additional support. This might include advocacy or translation services for patients with specific language or other communication needs, and/or other services specifically designed to meet the needs of vulnerable or disadvantaged groups who face barriers when accessing healthcare services. Licensees might also help enable carers to make choices on behalf of the patient where the patient does not have the capacity and the carer has the right to make a choice on the patient's behalf. Such principles will be well known to licensees.

Notifying patients that they have a choice and telling patients where they can find information about the choices they have: examples of factors that licensees should consider

- Whether the licensee has taken active steps to ensure that all relevant staff are familiar with the contents of the NHS Constitution (including any updates) affecting patient choice, and are familiar with the licensee's obligations under the choice licence condition. This could include mandatory compliance training for all relevant staff (for example, as part of an induction programme).
- Whether the licensee has sought to engage with commissioners from time to time to confirm where patient choice of provider has been conferred by commissioners.
- Whether the licensee, before referring a patient who has a choice of provider under the NHS Constitution or conferred by commissioners, has sought to notify that patient of their choice of provider.
- Whether the licensee makes information resources concerning patient choice of provider widely known to patients.
- Whether the licensee uses and/or supports patients to use Choose and Book (or equivalent) to book their first outpatient appointment when they have a choice of provider under the NHS Constitution or conferred by commissioners.
- Whether the licensee has engaged patients in discussions and decisions about their healthcare when they have a choice of provider under the NHS Constitution or conferred by commissioners.
- Whether the licensee has taken reasonable steps to ensure that the format and accessibility of any information about patient choice of provider made available by the licensee is appropriate to the individual needs of the patient. This could include referring the patient to local support services for vulnerable or disadvantaged patients, if and as appropriate.
- Where information or resources about patient choice of provider is found to be inaccurate, incomplete or otherwise lacking, whether the licensee has taken active steps to give feedback to the organisation responsible for preparing the information (for example, Department of Health, NHS England or local commissioners).

2.2 The licensee's obligation to ensure that information and advice is not misleading and does not unfairly favour one provider over another

When considering whether materials are misleading, we will have regard to analogous regimes seeking to protect consumers from misleading practices and/or information in other sectors. This includes the 'Consumer Protection from Unfair Trading Regulations 2008'.[33]

When will information and advice be considered to be 'misleading'?

Information and advice could be misleading in a number of ways. For example, if a patient was told that they had to be referred to their local hospital because it was 'already in the system' or because they need to support the local hospital, this would be misleading because it is inaccurate about the availability of choice. Information and advice would be misleading if a licensee refused to refer a patient to their choice of provider on the basis that the provider was 'unknown' to the licensee. Similarly, information and advice would be misleading if a licensee referred patients to a particular provider because of a financial interest in that provider, without telling patients that they have a choice of provider or without declaring that conflict of interest to patients.

We consider information and advice about patient choice of provider made available by the licensee to be misleading if:

- it is false
- in any way, including in its presentation, it deceives or is likely to deceive the patient to whom it is addressed
- by reason of its deceptive nature, causes or is likely to cause the patient to make a choice they would not have taken otherwise.

Information and advice made available by the licensee should not:

- mislead either directly or by omission
- mislead by implication, distortion, exaggeration or undue emphasis
- hide information from the patient or present it in an unclear, unintelligible, ambiguous or untimely manner.

[33] The Consumer Protection from Unfair Trading Regulations 2008 introduce a general prohibition on traders in all sectors engaging in unfair commercial (mainly marketing and selling) practices against consumers.

All material exclusions, limitations, and qualifications to the information and advice should also be made clear to the patient. Material information is any information that is likely to be needed by patients to make a well-informed decision.

The requirement that information and advice should not be misleading applies to all communications, whether written or verbal.

Ensuring that information and advice is not misleading – examples of factors that licensees should consider

- Whether the information and advice made available by the licensee is accurate, honest, and truthful.
- Whether the licensee has taken reasonable steps to ensure that the information made available is the most recent version.
- Whether the licensee has taken reasonable steps to ensure that any testimonials or endorsements made available are based on genuine experience, given freely without either financial payment or other inducement.
- Whether the licensee has taken reasonable steps to ensure that the information made available is complete, and covers the options available to the patient, so that the patient is able to make a well-informed choice.
- Whether the licensee has openly engaged with the patient about the information and advice made available, including its source and currency, as well as any material exclusions, limitations, or qualifications.
- Whether the licensee has taken reasonable steps to ensure that the information made available does not distort, exaggerate or place undue emphasis on a particular provider, treatment or service.
- Whether the licensee has declared all conflicts of interest to the patient when the licensee makes the information and advice available, including any financial or commercial interests in an organisation to which the patient might be referred.
- Whether the information and advice made available by the licensee reflects a general sense of responsibility to the interests of the patient.

When will information and advice be considered to 'unfairly favour one provider over another'?

We consider information and advice made available by the licensee to unfairly favour one provider over another if that information or advice contains false, inaccurate, incomplete or unfair claims regarding the services of a provider relative to another.

For example, information and advice would unfairly favour one provider over another if a licensee knowingly gives patients false or outdated information on providers' expected waiting times or clinical outcomes in an effort to influence the patient's choice of provider.

Ensuring that information and advice does not unfairly favour one provider over another – examples of factors that licensees should consider

- Whether the licensee has made accurate, honest and truthful claims regarding providers' treatments and services.
- Whether comparative information and advice made available by the licensee offers an objective comparison of one or more material, relevant, verifiable and representative features of the treatments and services available to the patient.
- Whether comparative information and advice made available by the licensee compares treatments and/or services that meet the same needs or are intended for the same purpose.
- Whether comparative information and advice made available by the licensee is evidence based and supported by objective data or other evidence.
- Whether the licensee has taken reasonable steps to ensure that the information and advice made available does not distort, exaggerate or give undue emphasis to any aspect of a provider's treatment or service.
- Whether the licensee has taken reasonable steps to ensure that the patient is aware of all the treatment and service options available to them.
- Whether the licensee has declared all conflicts of interest to the patient when making information and advice available, including any financial or commercial interests in an organisation to which the patient might be referred.
- Whether the information and advice made available by the licensee reflects a general sense of responsibility to the interests of the patient.

2.3 The licensee's obligation not to offer or give inducements to refer patients or commission services

What is meant by 'inducements' to refer patients or commission services?

The choice licence condition prohibits the offering or providing of gifts, benefits in kind, or pecuniary benefits to clinicians, other health professionals, commissioners or their administrative or other staff as inducements to refer patients or commission services.

The purpose of the choice licence condition is to prohibit any offers, promises or giving of financial or other advantages that are intended to induce, or intended as rewards for, clinicians, other health professionals, commissioners or their administrative or other staff to refer patients or commission services to the advantage of the licensee as compared with other providers.

'Inducements' can include gifts, hospitality, and items for the personal benefit of the health professional, commissioner or administrative or other staff. Items offered or provided on long-term or permanent loan are regarded as gifts and are also prohibited under the licence condition.

The choice licence condition does not prohibit offers that are **not** intended as inducements or rewards and which are likely to be in the interests of patients. This includes, for example, common training events or events to provide a forum for the discussion of improvements in services to patients. The availability of charitable resources or fundraised income to be spent on patient care is not generally relevant to the prohibition on inducements to commission services.

The offering of reasonable hospitality is permitted where this is offered at purely professional or scientific events (and where it is subordinate to the main scientific objective of the event and is offered only to clinicians, health professionals, commissioners or their relevant administrative staff). These events must be held in appropriate venues conducive to the main purpose of the event. The level of subsistence offered must be in proportion to the occasion.

When considering what promotional aids may be given to and accepted by healthcare professionals, we will have regard to the requirements set out in the Association of British Pharmaceutical Industry (ABPI)'s code of practice for the promotion of pharmaceutical products to healthcare professionals.[34] For example, that code of practice explains that healthcare professionals may be provided with inexpensive[35]

[34] In particular, see Clause 18 of the ABPI 'Code of Practice for the Pharmaceutical Industry', which is available at: www.pmcpa.org.uk/thecode/Pages/default.aspx

[35] The ABPI defines an 'inexpensive' item as: 'one that has cost the donor company no more than £6, excluding VAT. The perceived value to the health professional and the patient must be similar'.

items which are to be passed onto patients and which are part of a formal patient support programme and directly benefit patient care (eg a peak flow meter as part of a scheme for patients to regularly record readings or a pedometer as part of a scheme to encourage exercise).

Does the choice licence condition prevent advertising or promotional activity by the licensee?

The choice licence condition does not prevent a licensee from advertising or promoting its services. The promotion of healthcare services can be an effective and important method of informing patients of the different providers, treatments and services available and can assist them when making choices.

Any advertising or promotional activity should comply with the Advertising Standards Authority (ASA)'s codes.[36] These codes are administered by the ASA, and apply to broadcast advertising, non-broadcast advertising, sales promotions and direct marketing. The codes contain general rules stating that advertising must be socially responsible and must not mislead or offend.

Licensees' advertising and promotional content will also be subject to the choice licence condition to the extent that it contains information and/or advice about patient choice of provider. This might include materials such as posters, brochures or leaflets that contain information about when a patient has a choice, information about the providers or service options available to the patient, or that advise the patient where such information can be found. As such, when engaging in advertising or promotional activity, licensees must ensure that any information or advice about patient choice of provider contained in advertising or promotional material is not misleading, does not unfairly favour one provider over another, and is presented in a manner that helps patients to make well-informed choices. (See Section 2.2 for an explanation of 'misleading' and 'unfairly favour one provider over another'.)

[36] The Advertising Standards Authority administers two codes: 'The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing' (the CAP Code) and 'The UK Code of Broadcast Advertising' (the BCAP Code) (together, the Codes). These Codes are available at: www.cap.org.uk/The-Codes/CAP-Code.aspx

3 Licence Condition C2: Competition Oversight

The 2012 Act requires us to carry out our duties with a view to preventing anti-competitive behaviour in the provision of healthcare services which is against the interests of patients.

Anti-competitive behaviour is behaviour which prevents, restricts or distorts competition, or is likely to have that effect.

Licence Condition C2: Competition Oversight (the competition licence condition) allows us to protect and promote the interests of patients by taking action against anti-competitive behaviour which is against the interests of patients. In particular:

- Clause 1 (a) prevents a licensee from entering into or maintaining agreements that have the object or effect of preventing, restricting or distorting competition to the extent that it is against the interests of healthcare users.
- Clause 1 (b) prevents a licensee from engaging in any other conduct which has the effect of preventing, restricting or distorting competition to the extent that it is against the interests of healthcare users.

The following sections explain how we will apply these requirements.

3.1 What types of anti-competitive behaviour are covered by the competition oversight licence condition?

The competition licence condition applies to all types of behaviour that licensees might engage in when providing NHS-funded healthcare services, including agreements (eg with another provider(s) or a commissioner(s) as well as other conduct by individual licensees).

It is not necessary for an agreement to be legally binding for the competition licence condition to apply: informal agreements and understandings, whether written or verbal, are also subject to this condition. There does not have to be a physical meeting of the parties for an agreement to be reached: an exchange of letters or telephone calls can be sufficient. Neither does an agreement have to be explicit. It may also be achieved through an implicit understanding between the parties, without any formal arrangement.

If a licensee has played only a limited role in the setting up of an agreement, has not been fully committed to its implementation, or has participated in the agreement only under pressure from other parties, the licensee can still be party to it.[37]

[37] Where an agreement is entered into unwillingly, this may influence our course of enforcement action.

Agreements entered into by an umbrella organisation, such as a representative body or professional group, can also be an agreement on the part of the members of the organisation.

Behaviour that is likely to be anti-competitive includes two providers of the same or similar services agreeing not to bid against one another in a competitive tender or agreeing to share the contents of their respective bids to a competitive tender. Another example would be several providers of the same or similar services agreeing or telling each other the geographical areas (eg postcodes) from which they will and will not accept patients; or alternatively, a number of providers coming together and agreeing not to refer to a particular provider (eg a new provider).

3.2 When is behaviour anti-competitive and against the interests of patients?

We will explain during our investigations and in our decisions how we expect anti-competitive behaviour to compromise patients' interests. Examples include:

- limiting the options from which patients or commissioners can choose
- preventing the emergence of new or improved services
- preventing the introduction of new providers with experience in providing more flexible personalised care.

We recognise that behaviour may be motivated by good intentions – for example, by a desire to protect the local health economy or otherwise promote the interests of patients. However, good motives do not necessarily ensure that anti-competitive behaviour will always be in the interests of patients. This is why the actual effect of behaviour on patients needs to be assessed.

In assessing whether anti-competitive behaviour is against patients' interests, we consider whether the benefits of the anti-competitive behaviour outweigh any reduction in competition.

Monitor will first look at whether, by preventing, restricting or distorting competition, behaviour may give rise to material adverse effects for patients.

If we find that behaviour does give rise to material adverse effects, we will consider whether it will also give rise to material benefits for patients that could not be achieved without the restriction on competition.[38]

[38] Where we find that there are no material adverse effects for healthcare users arising from an agreement or conduct, we will not necessarily analyse patient benefits ascribed to the conduct.

We will then weigh the benefits and adverse effects of the behaviour against each other: if the benefits outweigh the adverse effects, and could not be attained without the restriction on competition, then the behaviour is not against the interests of patients. Conversely, if the adverse effects resulting from the behaviour outweigh the benefits, or if the restrictions on competition are not necessary to achieve the benefits, the conduct will be against the interests of patients.

This analysis is described in more detail below.

Assessing whether there is an adverse effect on patients

When assessing whether anti-competitive behaviour has adverse effects for patients, we consider whether the behaviour reduces these incentives for providers.

We will consider all relevant factors in deciding whether the behaviour is likely to have an adverse effect. In carrying out our assessment, we may consider, among other relevant factors:

- the nature of the agreement or conduct in question
- the nature of the restriction on competition (for example, whether the agreement or conduct limits the extent to which particular providers compete or eliminates competition between them altogether)
- the legal and economic context relating to the particular service or services likely to be affected by the agreement or conduct (eg whether the conduct in question is undertaken by the major provider of a service in an area, whether parties to the agreement provide services which are close alternatives)
- the proportion of a particular service or services likely to be affected by the agreement or conduct
- the duration of the agreement or conduct or its likely effects. The longer the duration of the agreement or conduct and/or its likely effects, the greater the likely impact.

Providers will be competitors if they are viewed by patients or commissioners as viable alternatives for one another and ordinarily compete with one another to attract patients or commissioner funding (or are likely to do so in future). Agreements and other arrangements which involve a licensee agreeing with a competitor or competitors not to compete are likely to disadvantage patients. Such agreements or arrangements, if proven, are known as ‘collusion’. Collusion will generally be prohibited because it rarely generates benefits that are sufficient to offset the adverse effects on patients.

Agreements or other arrangements and conduct that enable a licensee(s) to prevent or restrict others from being able to offer or provide services are likely to lead to adverse effects on patients.

Assessing benefits

Where we identify adverse effects arising from the behaviour, we will consider whether it also gives rise to patient benefits.

Benefits may consist of improvements in quality (including clinical and non-clinical improvements) or improvements in efficiency that lead to better value for money for patients:

- **clinical benefits** may arise in a number of different ways, for example, by improving patient outcomes (for instance, by increasing the number of patients treated by a provider where higher patient volumes result in improved outcomes for patients), by increasing the range of services available to patients, or by delivering care in a more integrated way
- **non-clinical benefits** may include a range of service improvements such as better access, improved surroundings, and better amenities, or otherwise improving the overall patient experience through improved co-ordination and continuity in the delivery of service and
- **better value for money** might be delivered by certain behaviour, for a number of different reasons. This includes improved economies of scale or scope, more efficient clinical or managerial processes and reduction of duplicative patient assessments.

We expect the licensee(s) whose agreement or conduct is in question to identify and describe the benefits to patients arising from it, and to provide any relevant evidence in support (eg business plans, board decisions, clinical research). Where the licensee says there are benefits to anti-competitive behaviour, we will expect them to provide robust evidence as to the predicted improvements in outcomes to their specific patient population or the subset of that population that is expected to benefit.

In deciding what value should be attributed to the benefits, we will consider all relevant factors including, for example:

- the scale of benefits submitted
- the period of time over which the benefits are likely to be realised and

- the robustness of the analysis and evidence that supports the claimed benefits (in considering clinical benefits, Monitor will have particular regard to supporting research and evidence regarding clinical improvements).

We may also test whether or not the benefits put forward by licensees are perceived as benefits by patients.

To the extent that benefits involve improvements in efficiency, the licensee must also demonstrate that these efficiencies will benefit patients. In other words, the licensee must demonstrate how the efficiencies will be passed on, for example through lower prices to commissioners or increased financial surpluses that will be reinvested into services for patients.

Any restrictions on competition must also be necessary to achieve the benefits in order for the anti-competitive behaviour to be permissible. We will therefore consider the extent to which the benefits could be realised without the restrictions on competition.

A restriction on competition may be regarded as necessary where the benefits can be achieved more quickly or more cost effectively than would otherwise be the case. We will consider the extent to which achieving the benefits more quickly or cost effectively outweighs the adverse effects resulting from the reduction in competition as part of its analysis (see next section 'Assessing whether the restriction on competition is in patients' interests').

Our assessment of whether a restriction is necessary will be made in the context in which the particular agreement or conduct occurs. If a licensee submits, for example, that a restriction on competition is necessary to achieve certain public health and/or safety objectives, we would expect to consider that assertion in the context of the role of other entities, such as the Care Quality Commission, whose main responsibility is to establish and enforce quality standards in the sector. For example, we would not ordinarily expect a licensee or group of licensees to take action on their own initiative against another provider, which prevents or restricts that other provider from being able to supply services, simply because they consider the provider's services unsafe or inferior to their own.

In some cases, a restriction may only be necessary for a certain period of time. For example, a restriction might only be justified for the period of time reasonably needed to achieve the benefits.

Assessing whether the restriction on competition is in patients' interests

We will then consider whether the benefits of the anti-competitive behaviour for patients outweigh any reduction in competition. In short:

- If the benefits outweigh the adverse effects of anti-competitive behaviour, and those benefits could not be achieved without the restriction on competition, the anti-competitive behaviour will be in the interests of patients.

- If the reduction in competition is not outweighed by the benefits, or if the restrictions on competition are not necessary to achieve the benefits, the anti-competitive behaviour will not be in the interests of patients.

This is not a purely mathematical or quantitative exercise. Adverse effects and benefits may not always be quantifiable or quantifiable in comparable units. The weighing of adverse effects and benefits may therefore include a qualitative assessment and will require the exercise of judgement. For example, where benefits are purely non-financial (eg involve improvements to the quality of care which saves lives), we do not expect licensees to generate financial proxy values.[39]

When balancing the interests of different groups of patients, we expect to take into consideration a range of factors, which might include the number of patients affected, the nature of services affected, the severity with which services are affected, and the time period over which services are affected.

To complement this guidance, we have published a number of worked examples which consider how the competition licence condition might apply to a number of hypothetical scenarios.

Role of commissioners

Licensees can breach the competition licence condition even if a commissioner initiates or encourages a licensee to behave in a certain way or participates in an arrangement that gives rise to a breach. Licensees cannot justify anti-competitive behaviour on the basis that they were asked or encouraged by a commissioner to behave in a certain way.[40]

For example, a commissioner might decide to reconfigure services and ask a number of existing providers to participate in a panel responsible for evaluating all the bids for a competitive tender. The participating providers' behaviour could be considered anti-competitive, for example, if those participating providers are likely to be bidding in the tender themselves and/or there are no clear or objective criteria against which to assess the tender bids.

We are happy to provide informal advice to any party who has a query about whether a particular course of action is likely to breach the competition licence condition. Relevant contact details are provided on our website at: https://www.gov.uk/ monitor

[39] Where benefits have a financial element, we do expect licensees to quantify that element.

[40] These factors may influence our course of enforcement action (see footnote 37).

Examples of agreements or other conduct that may be anti-competitive and not in patients' interests

In considering whether a licensee has engaged in anti-competitive behaviour which is against the interests of patients, Monitor will consider, for example:

- Whether a licensee has agreed with another provider of the same type of services to allocate certain services, patients, groups of patients or patient flows between themselves. This includes agreeing to serve only patients located in particular geographical areas or patients with particular medical needs.
- Whether a licensee has agreed with another provider the price at which services will be provided (in situations where the national tariff does not already establish the price).
- Whether a licensee has agreed with another provider to collude on their responses to commissioners' invitation to tender. This includes agreeing not to bid for certain contracts (eg contracts relating to particular commissioners, services, patient groups, or geographic areas). It can also include discussing and/or agreeing the content of individual responses to the invitation to tender, including price or service quality aspects.
- Whether a licensee has agreed with other providers not to cooperate with a particular commissioner or provider. This might be through an umbrella organisation such as a representative body or professional group, and can include collectively agreeing not to supply services to a particular commissioner or another provider.
- Whether a licensee has agreed with another provider of similar services to share commercially sensitive information such as each other's future intentions regarding forthcoming tenders and/or non-tariff pricing. This includes sharing information through an umbrella organisation such as a representative body or professional group.
- Whether a licensee participates in meetings which provide a forum for members to discuss aspects of upcoming tenders or non-tariff pricing, or reaching agreements on referral patterns or areas of specialisation in relation to other healthcare services.
- Whether a licensee, who has control over an input that is essential to the provision of a healthcare service, refuses to supply that input to another provider without objective justification.
- Whether a licensee delays, or in some other way limits the quality of products or services that it is obliged to supply to another provider without objective justification. This might include delaying the transfer of patient information or providing poor quality information on patient referral.
- Whether a licensee requires a commissioner or another provider to purchase a particular service exclusively or to a large extent from that provider without objective justification.

- Whether a licensee requires a supplier of an input to sell exclusively or to a large extent to that provider without objective justification.
- Whether a licensee makes a commissioner's purchase of a particular service conditional on the purchase of another without objective justification.
- Whether a licensee makes a contract with a commissioner or another provider conditional on factors that have nothing to do with the subject of that contract. This can include imposing conditions in contracts with commissioners which restrict commissioners' ability to contract with other providers or sponsor new treatments, services or providers.

3.3 The implications of the competition licence condition for the delivery of integrated care

The 2012 Act explicitly sets out the importance of integrated care and gives us a duty to enable integrated care where this improves quality or efficiency, or reduces inequality. Our NHS provider licence includes a condition about integrated care that enables us to take action where there are problems with the delivery of integrated care.

Integrated care is synonymous with person-centred co-ordinated care. From a patient's perspective, integrated care is 'planned with people who work together to understand me and my carer(s), put me in control, co-ordinate and deliver services to achieve my best outcomes.'[41]

Where care is delivered in an integrated way it can result in a better patient experience and can help to secure better patient outcomes. There are significant opportunities to promote the interests of patients through the delivery of integrated care. Integrated care is especially important for groups such as older people, who may need continuous care or have long-term conditions and need to be in contact with a range of health and social care professionals. It is also particularly important for those using specialist services – for example, cardiac and cancer care, and for those with long-term conditions like diabetes or asthma.

[41] This person-centred narrative on integration was developed by National Voices. It was adopted as an agreed definition of integrated care in May 2013 by the national partners in the National Collaboration for Integrated Care and Support, which includes Monitor. For further details, see: www.england.nhs.uk/2013/05/14/c-care/

A perceived risk of breaching the rules relating to competition is sometimes cited as one of the barriers to implementing processes aimed at achieving integrated care.[42] However, there are a number of reasons why the delivery of integrated care need not be at odds with competition rules.

Competition generally takes place between existing and/or potential providers of the **same** or **similar** services. Delivering care in a more integrated way generally requires different services to be provided to an individual patient in a seamless way. A person with diabetes, for example, may require a wide range of different services including hospital-based care, GP services, mental health support, social care and community care (for example, physiotherapy, dietician services, optometry, and podiatry).

Models of care can be designed to enable competition between providers to provide services, to allow patients a choice of provider, and to deliver care to individual patients in an integrated way. The effect of a care model on choice, competition and integrated care should be considered to establish what will achieve the best overall outcome for patients. Commissioners are required to consider how services can be improved by using these elements.

Many measures designed to improve the links between different services that make up a patient's care to make it more seamless (for example, between a provider of mental health services and a patient's GP) can co-exist alongside competition between providers to deliver the individual services and patient choice. Measures might include, for example:

- multi-disciplinary meetings between the different professionals involved in a patient's care
- the development of a care plan for the patient that covers all aspects of their care
- improving physical transfers between sites (eg the patient's discharge from hospital into the community)
- more effective sharing of the patient's clinical records.

In addition, choice and competition can help facilitate or encourage the delivery of integrated care. Choice and competition incentivise providers to improve the services that they deliver, including taking steps to deliver care that is integrated. By delivering care that is integrated, the provider can make its services more attractive to patients and commissioners. A provider of hospital-based care could attract GP referrals by improving the patient pathway to and from the GP practice (for instance, through

[42] For example, this barrier was identified in the Future Forum report to the government. See: http://healthandcare.dh.gov.uk/forum-report/

improved discharge summaries and electronic submission of reports to the GP practice to speed up waiting times).

Similarly, a commissioner may wish to select a single provider to deliver an integrated pathway for all or a number of services that a patient requires (for example, a care pathway involving the co-ordination of a range of services required for a specific long-term condition). A commissioner could use a competitive tender to identify the most innovative and high quality service provider (or group of providers) to deliver that pathway.

Accordingly, by using our powers to ensure that choice and competition is working well for patients, Monitor can help facilitate the delivery of integrated care.

Where it is clear that an initiative to deliver integrated care does not give rise to competition concerns, and does not appear to operate against the interests of patients because it is anti-competitive, it is unlikely that we will review the initiative.

To complement this guidance, we have published a number of worked examples which consider how the competition licence condition might apply to a number of hypothetical case scenarios, including those involving integrated care arrangements.

There are also other materials on our website that consider the interaction between competition and integrated care. These include our guidance on the Procurement, Patient Choice and Competition Regulations[43] for commissioners and the frequently asked questions[44] on integrated care. We also intend to publish a number of further materials on the subject in the context of our work on the integrated care pioneers.[45]

We also expect to issue guidance on our integrated care licence condition. This will explain how we will apply that licence condition, including details on how we think licensees should act to make sure they do not hinder the development of integrated care.

We are also happy to provide informal advice to any party who has a competition query relating to integrated care. Relevant contact details are provided on our website at www.gov.uk/monitor

[43] Available at: https://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance
[44] Available at: https://www.gov.uk/government/publications/integrated-care-how-to-comply-with-monitors-requirements/complying-with-monitors-integrated-care-requirements
[45] Available at: https://www.gov.uk/enabling-integrated-care-in-the-nhs#integrated-care-pioneers

Annex: The choice and competition and the provision of integrated care licence conditions

Condition C1 – The right of patients to make choices

1. Subsequent to a person becoming a patient of the licensee and for as long as he or she remains such a patient, the licensee shall ensure that at every point where that person has a choice of provider under the NHS Constitution or a choice of provider conferred locally by Commissioners, he or she is notified of that choice and told where information about that choice can be found.

2. Information and advice about patient choice of provider made available by the licensee shall not be misleading.

3. Without prejudice to paragraph 2, information and advice about patient choice of provider made available by the licensee shall not unfairly favour one provider over another and shall be presented in a manner that, as far as reasonably practicable, assists patients in making well informed choices between providers of treatments or other health care services.

4. In the conduct of any activities, and in the provision of any material, for the purpose of promoting itself as a provider of health care services for the purposes of the NHS the licensee shall not offer or give gifts, benefits in kind, or pecuniary or other advantages to clinicians, other health professionals, Commissioners or their administrative or other staff as inducements to refer patients or commission services.

Condition C2 – Competition oversight

1. The licensee shall not:

    a) enter into or maintain any agreement or other arrangement which has the object or which has (or would be likely to have) the effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS or

    b) engage in any other conduct which has (or would be likely to have) the effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS

to the extent that it is against the interests of people who use health care services.

Condition IC1 – Provision of integrated care

1. The Licensee shall not do anything that reasonably would be regarded as against the interests of people who use health care services by being detrimental to enabling its provision of health care services for the purposes of the NHS to be integrated with the provision of such services by others with a view to achieving one or more of the objectives referred to in paragraph 4.

2. The Licensee shall not do anything that reasonably would be regarded as against the interests of people who use health care services by being detrimental to enabling its provision of health care services for the purposes of the NHS to be integrated with the provision of health-related services or social care services by others with a view to achieving one or more of the objectives referred to in paragraph 4.

3. The Licensee shall not do anything that reasonably would be regarded as against the interests of people who use health care services by being detrimental to enabling it to co-operate with other providers of health care services for the purposes of the NHS with a view to achieving one or more of the objectives referred to in paragraph 4.

4. The objectives referred to in paragraphs 1, 2 and 3 are:

   (a) improving the quality of health care services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision

   (b) reducing inequalities between persons with respect to their ability to access those services and

   (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.

5. The Licensee shall have regard to such guidance as may have been issued by Monitor from time to time concerning actions or behaviours that might reasonably be regarded as against the interests of people who use health care services for the purposes of paragraphs 1, 2 or 3 of this Condition.

Monitor

Making the health sector work for patients

Contact us

Monitor, Wellington House,
133-155 Waterloo Road,
London, SE1 8UG

Telephone: 020 3747 0000
Email: enquiries@monitor.gov.uk
Website: www.gov.uk/monitor

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