

Statement of issues

Case CCD 04/13: Investigation into the commissioning of cancer surgery services in Greater Manchester and Cheshire

Executive summary

1. This statement of issues provides an update on our investigation into the commissioning of certain cancer surgery services in Greater Manchester and Cheshire. We launched this investigation on 8 August 2013, following complaints from University Hospital of South Manchester NHS Foundation Trust and Stockport NHS Foundation Trust.
2. We explained in the notice of initiation of investigation that we would publish an update on the case in October¹. The purpose of this document is to set out the potential issues we have identified to date and seek views from all interested parties. The document also sets out the next steps that we plan to take in connection with the investigation. We have not reached any conclusions on the potential issues set out in this statement.
3. Given current information, the matters we plan to continue to investigate concern the behaviour of both the commissioner and the providers in the reconfiguration process complained about. Regarding the commissioner, we will consider whether the process put in place to select future providers of the cancer surgery services, including the criteria that providers were required to satisfy, was consistent with the applicable rules. Regarding the providers, we will consider their involvement in the reconfiguration and their ability to influence this process and its outcomes to determine whether this was consistent with the rules with which they are required to comply.
4. We plan to focus our investigation on the potential issues we have identified under the various rules for the NHS which came into force on 1 April 2013. The potential issues are detailed in this document. We propose not to use our concurrent competition law powers at this point in time.

¹ The notice of initiation of investigation can be found [here](#).

5. We have been told that the commissioning process is ongoing and that the commissioner has made certain changes to its approach to commissioning the relevant cancer surgery services. We are in contact with the commissioner to understand these developments and will consider their effect as we progress our investigation. However, based on the information we have received to date, it appears to us that the complaints raise important potential issues which are appropriate for Monitor to investigate.

Introduction

6. On 8 August 2013, Monitor opened an investigation into matters raised in complaints made by University Hospital of South Manchester NHS Foundation Trust (“**University Hospital of South Manchester FT**”) and Stockport NHS Foundation Trust (“**Stockport FT**”)². The complaints relate to the steps taken by the National Health Service Commissioning Board (now known as NHS England), and before that NHS Greater Manchester, in commissioning certain cancer surgery services in Greater Manchester and Cheshire. NHS Greater Manchester’s commissioning functions transferred to NHS England on 1 April 2013.
7. The essence of the complaints is that the process adopted by NHS England to select future providers of specialist urology, gynaecology, oesophago-gastric and hepato-pancreatico-biliary cancer surgery services in the area (“**the four cancer surgery services**”) was not based on quality, patient outcomes or patient preferences³.
8. The purpose of our investigation is to establish whether the process put in place by the commissioner was consistent with the applicable rules. As we explained when we opened the investigation⁴, Monitor will also examine whether the way that providers were involved in the process was consistent with the rules with which they are required to comply.
9. The purpose of this document is to set out the potential issues we have identified to date. We first summarise the complaints. We then describe the legal scope of the investigation, including our decision to focus on the Procurement, Patient Choice and Competition Regulations and the competition condition in the NHS provider licence (and equivalent obligations), and our decision not to use our concurrent competition law powers. We then set out the potential issues identified to date.

² See the [notice of initiation of investigation](#).

³ A summary of the complaints can be found [here](#).

⁴ See the [notice of initiation of investigation](#).

10. We have not reached any conclusions on any of the potential issues set out in this document.
11. We now invite responses to the potential issues identified in this document. Details of how to submit your response can be found at the end of this document.

Summary of the complaints

12. On 22 March 2013 we received a complaint from University Hospital of South Manchester FT about the commissioning of the four cancer surgery services in Greater Manchester and Cheshire. On 28 June 2013, we received a second complaint from Stockport FT about the commissioning of these services.
13. The complainants told us that the aim of the work being undertaken by NHS England was to reconfigure the four cancer surgery services in Greater Manchester and Cheshire to improve the quality of provision and patient outcomes. We have been told that the reconfiguration aimed to address non-compliance of certain cancer surgery services with Improving Outcomes Guidance (“**IOG**”)⁵ published by the National Institute for Clinical Excellence (now the National Institute for Health and Care Excellence).
14. A number of meetings were held during the course of 2012 and 2013 to consider the best approach to the commissioning of the services. These were attended by a number of stakeholders, including providers and commissioners, in the Greater Manchester and Cheshire area and were known as cancer summits/conventions.
15. We have been told that it became clear in 2012 that NHS Greater Manchester wished to move to a model in which cancer surgery services would be provided from a smaller number of sites. We have been told that a decision to establish a “**Provider Board**” (now known as the Greater Manchester Cancer Services Provider Board) through which providers would work together towards achieving this model was made, in September 2012, at a meeting attended by the commissioner, providers, GPs, local patients, hospital and public health specialists and representatives from relevant charities and the academic sector.
16. We have been told that the intention was that the Provider Board process would be used in connection with the commissioning of all cancer surgery

⁵ IOGs provide guidance for commissioners, providers and lead clinicians on the design of cancer services for individual specialties. The guidance was developed by the Chief Medical Officer’s Cancer Guidance Group. The guidance is published by NICE and more detail is available [here](#).

services in the area, but the first specialities to which it was to be applied were the four cancer surgery services. The role and responsibilities of the Provider Board is one of the subject matters of Monitor's investigation.

17. In a letter dated 14 January 2013, and before being formally established⁶, the Provider Board issued a call for proposals from providers for each of the four cancer surgery services. The letter set out the number and type of sites from which services were to be provided, which were stated to be based on the requirements of commissioners:

- gynaecology cancer surgery services – a single service for specialist surgery across two university teaching hospital sites;
- urology cancer surgery services – a single specialist surgical service across two university teaching hospital sites plus a surgical service at The Christie NHS Foundation Trust;
- oesophago-gastric cancer surgery services – a single specialist surgical service across two university teaching hospital sites; and
- hepato-pancreatico-biliary cancer surgery services – a single specialist surgical service operating from a single university teaching hospital site.

18. The call for proposals defined the term “university teaching hospital” to include University Hospital of South Manchester FT, Central Manchester University Hospitals NHS Foundation Trust (“**Central Manchester University Hospitals FT**”), Salford Royal NHS Foundation Trust (“**Salford Royal FT**”) and The Christie NHS Foundation Trust (“**The Christie FT**”) only. The letter also stated that each case proposal would need to be on behalf of and with agreement between more than one trust in order that the single service required by commissioners could be assured.

19. The deadline for submitting proposals was 31 January 2013.

20. The final commissioning specification – sent to providers by the commissioner on 25 January 2013⁷ – set out the following requirements with regards to the four cancer surgery services:

- gynaecology cancer surgery services – a single Greater Manchester and Cheshire specialist surgery service operating across two university teaching hospital sites;

⁶ We have been told that the memorandum of understanding and the terms of reference for the Provider Board were signed by all but one provider – University Hospital of South Manchester FT. We understand that this took place between March and April 2013. We have been told that before that two meetings of the Provider Board in shadow form were held.

⁷ Although the final specification was dated 21 January 2013, we have been told that it was only sent to providers on 25 January 2013.

- urology cancer surgery services – a single specialist surgical service operating across two university teaching hospital sites plus the surgical service at The Christie FT;
- oesophago-gastric cancer surgery services – a single Greater Manchester and Cheshire specialist surgical service operating across two university teaching hospital sites;
- hepato-pancreatico-biliary cancer surgery services – a single Greater Manchester and Cheshire specialist surgical service operating from a single university teaching hospital site; and
- one gynaecology and one urology specialist cancer site to be co-located to create a joint Greater Manchester and Cheshire “Pelvic Cancer” centre.

21. The final commissioning specification defined the term “university teaching hospital” to include University Hospital of South Manchester FT, Central Manchester University Hospitals FT, Salford Royal FT and The Christie FT only.

22. We understand that the Provider Board received two proposals in response to its call for proposals. These were:

- a. A joint proposal from Central Manchester University Hospitals FT, Salford Royal FT and The Christie FT to provide:
 - gynaecology – a single surgery service operating across Central Manchester University Hospitals FT and The Christie FT;
 - hepato-pancreatico-biliary – single surgical service operating from Central Manchester University Hospitals FT;
 - oesophago-gastric – a single surgical service operating across Central Manchester University Hospitals FT and Salford Royal FT; and
 - urology – single surgical service operating across Central Manchester University Hospitals FT, Salford Royal FT and The Christie FT.
- b. A proposal from Stockport FT to provide a surgical service for urology (with support from The Christie FT)⁸.

⁸ We have been told that Stockport FT submitted a proposal after challenging the requirement for university hospital status in the call for proposals. We understand that at the time Stockport FT was invited to bid, The Christie FT, Central Manchester University Hospitals FT and Salford Royal FT had already submitted a joint proposal to provide the four cancer surgery services. Stockport FT told us it had received confirmation from The Christie FT that they would support the bid.

23. We have been told that having evaluated the two proposals, the assurance panel to the Provider Board⁹ concluded that the joint proposal from Central Manchester University Hospitals FT, Salford Royal FT and The Christie FT was compliant with the final commissioning specification. We have been told that Stockport FT's proposal was not considered compliant with the final commissioning specification by the assurance panel. We have been told that the assurance panel concluded that this proposal did not demonstrate an overall Greater Manchester and Cheshire service, a number of the required clinical adjacencies and co-locations, or the academic rigour and infrastructure of university hospital and tertiary status, as mandated by the final commissioning specification.
24. University Hospital of South Manchester FT and Stockport FT raised a number of concerns with us regarding the role of the Provider Board and the criteria that proposals were required to satisfy, as set out in the letter dated 14 January 2013. The complainants suggested that these may give rise to breaches of the Principles and Rules for Co-operation and Competition and/or the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. These concerns are described in more detail below.

Concerns about the Provider Board

25. University Hospital of South Manchester FT and Stockport FT both expressed general concerns about the Provider Board's role, including in relation to an overall lack of clarity as to the process to be followed and the basis for decision-making.
26. In particular, the complainants said that the Provider Board purported to commence its activities in mid-January 2013, before it had been formally established. The memorandum of understanding and the Provider Board's terms of reference, which set out the Provider Board's purpose and the relationship between its members, were only circulated and discussed between February and March 2013 and were not approved by the majority of members until March 2013. We understand that these documents have still not been approved by University Hospital of South Manchester FT, which told us that it had little or no opportunity to consider, input into or vote on the specific role and terms of reference for the Provider Board before the Provider Board began making decisions that affected it.
27. University Hospital of South Manchester FT also expressed concerns that the arrangements for the Provider Board contained no provision for recognising and managing conflicts of interest on the part of providers who put themselves

⁹ We have been told that the assurance panel was set up to evaluate proposals received by the Provider Board and make recommendations on those to the Provider Board.

forward as providers of services in the future and also assess proposals from other providers and make recommendations to commissioners about those proposals.

Concerns about the criteria in the call for proposals

28. Both University Hospital of South Manchester FT and Stockport FT raised concerns that the criteria set out in the call for proposals were not based on quality of services (including patient outcomes and experience).
29. In particular, both complainants suggested that the requirement for proposals to be made on behalf of and with agreement between more than one trust excluded the opportunity to properly consider quality. According to the complainants, this is because the selection of future providers was dependent on whether a provider had reached agreement with other providers and not on the relative quality of current provision. University Hospital of South Manchester FT suggested that service quality, impact on patients, patient outcomes and choice should be considered first, with providers that meet the necessary standards then being invited to form collaborations with others.
30. University Hospital of South Manchester FT also suggested that it did not receive sufficient notice of this criterion from the Provider Board to enable it to reach an agreement with another provider. It told us that it was first made aware of the requirement on 14 January 2013 when it received the letter calling for proposals, which required submissions to be made by 31 January 2013. University Hospital of South Manchester FT told us that although the intention to focus work at specialist sites was set out in the draft commissioning specification, circulated to providers for discussion at a meeting on 9 and 10 January 2013, this document was only a draft and did not indicate that the formation of consortia of providers would be a criterion.
31. University Hospital of South Manchester FT also told us that it understood that some other providers of the four cancer surgery services had been aware of this criterion at an earlier stage and had already commenced discussions about collaborating with each other before the January 2013 cancer meeting.
32. Stockport FT additionally raised concerns about the criterion related to university teaching hospital status. Stockport FT suggested that the criteria should look at the substantive matters thought to be reflected in university teaching hospital trust status rather than the status itself. It also told us that it raised these concerns with NHS Greater Manchester at the time and that it was agreed, on 25 February 2013, that it could submit a proposal to provide urology cancer surgery services even though it is not a university teaching hospital, without being automatically excluded from consideration. Stockport

FT expressed its concern to us that despite this assurance, the absence of university teaching hospital status was cited as one reason why its proposal had not been recommended by the Provider Board.

Decision to focus on Procurement, Patient Choice and Competition Regulations, and the competition condition in the NHS provider licence (and equivalent obligations for NHS trusts)

33. Monitor uses prioritisation principles to ensure that we make appropriate judgements about which projects and programmes of work we undertake, including whether or not to continue investigations. This enables us to make the best use of our resources to maximise the benefits of our work for patients.
34. We have thought carefully about the matters raised by both complainants in light of our published prioritisation criteria¹⁰. We have also had regard to the Co-operation and Competition Panel's case acceptance criteria¹¹. In particular, we have considered the complaints in light of the information received to date and the changes that have happened to the NHS on or around 1 April 2013, including the transfer of responsibility for commissioning specialised health care services to NHS England, the introduction of the NHS provider licence¹² and the coming into force of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 ("**Procurement, Patient Choice and Competition Regulations**")¹³.

Notice of initiation of investigation

35. In our notice of initiation of investigation we said that we would examine whether the actions of NHS England are compliant with the Procurement, Patient Choice and Competition Regulations, which came into force on 1 April 2013 for conduct relating to the period after 1 April 2013 and, with the Principles and Rules for Co-operation and Competition for conduct relating to the period before 1 April 2013.
36. As for the actions of the providers, we said that we would consider whether the involvement of NHS foundation trusts has been consistent with the competition condition (Condition C2) in the NHS provider licence, which came into force on 1 April 2013. In so far as the investigation concerns actions

¹⁰ Prioritisation criteria are outlined in: Monitor's [Enforcement guidance](#) and our draft [Enforcement guidance on the Procurement, Patient Choice and Competition Regulations](#).

¹¹ Co-operation and Competition Panel's case acceptance criteria can be found in the Co-operation and Competition Panel's [CCP Prioritisation Criteria](#).

¹² NHS Provider Licence Standard Conditions are available [here](#).

¹³ The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 are available [here](#).

relating to the period before 1 April 2013, we said we would examine whether those actions are consistent with the Principles and Rules for Co-operation and Competition.

37. NHS trusts are currently exempt from the requirement to hold a licence. The rationale for this exemption is that the NHS Trust Development Authority (“**NHS TDA**”) operates a bespoke oversight regime for NHS trusts on behalf of the Secretary of State. As part of this oversight function, the NHS TDA requires NHS trusts to comply with a number of obligations that are equivalent to certain conditions in the NHS provider licence, including the competition condition, as if they were licensed. This is also supported by a partnership agreement between the NHS TDA and Monitor¹⁴. This provides that Monitor will be responsible for investigating potential breaches of these equivalent obligations. It also provides that if, following an investigation, Monitor determines that an NHS trust is or has been in breach of one of these equivalent obligations, Monitor will provide advice to the NHS TDA on the nature of the breach and any recommended action that the NHS TDA should take. We explained in our notice of initiation of investigation that we would therefore examine the actions of NHS trusts by reference to the substantive obligations in the competition condition.

38. In so far as the investigation concerns actions by NHS trusts relating to the period before 1 April 2013, we said that we would examine whether those actions are consistent with the Principles and Rules for Co-operation and Competition.

Focus of investigation going forward

39. Having considered our prioritisation criteria in the round, we have decided to continue investigating matters raised by both complainants under the current rules.

40. In so far as the investigation concerns NHS England and NHS Greater Manchester before it, we will focus on whether or not NHS England (to whom NHS Greater Manchester’s functions have transferred) complied with the Procurement and Patient Choice and Competition Regulations. We note that actions taken before 1 April 2013 may be relevant to our assessment of whether NHS England complied with the Procurement, Patient Choice and Competition Regulations. In addition, if in the course of our investigation we identify any broader lessons, which may be learnt from the conduct of the commissioners before 1 April 2013, we may comment on those.

¹⁴ Partnership Agreement between NHS Trust Development Authority and Monitor (2013-14) can be found [here](#).

41. In so far as the investigation concerns the involvement of NHS foundation trusts, we have decided to continue our investigation focusing on whether their involvement was consistent with the competition condition (Condition C2) in the NHS provider licence. For NHS trusts, we have decided to continue our investigation focusing on whether their involvement was consistent with the equivalent obligations to the competition condition with which they are required to comply. We note, however, that the involvement of providers before 1 April 2013 may be relevant to our assessment of whether they complied with the competition condition (Condition C2) in the NHS provider licence or the equivalent obligation with which NHS trusts are required to comply, as applicable. In addition, if in the course of our investigation, we identify any broader lessons, which may be learnt from the conduct of the providers before 1 April 2013, we may comment on those.

Decision not to use concurrent competition law powers

42. We have also considered whether, in investigating matters raised in this statement of issues, it would be appropriate for us to use our concurrent competition law powers¹⁵. At this stage, we are not proposing to use our competition law powers. There are a number of factors that have informed our decision in this regard. We note that this case involves different organisations – namely commissioners, NHS foundation trusts and NHS trusts – whose actions may not all be subject to competition law. Second, the other rules that these different organisations are subject to, as set out in the previous section, allow us to take enforcement action to address the types of behaviour that might fall within the scope of competition law and it is therefore not necessary to use our competition law powers separately (in particular, Regulation 10 of the Procurement, Patient Choice and Competition Regulations and competition condition (Condition C2) in the NHS provider licence prohibit similar behaviour to the relevant sections of the Competition Act 1998). We have, therefore, decided to continue our investigation focusing for the time being on the Procurement, Patient Choice and Competition Regulations and the competition condition in the NHS provider licence (and equivalent obligations). We will keep this decision under review.

Legal scope

43. The purpose of Monitor's investigation is to assess whether or not (1) NHS England complied with the Procurement, Patient Choice and Competition Regulations and (2) NHS foundation trusts complied with the competition

¹⁵ Monitor has concurrent powers with the Office of Fair Trading to apply UK and European competition law to activities which concern the provision of health care services in England, including the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

condition (Condition C2) in the NHS provider licence and NHS trusts complied with their equivalent obligations to the competition condition.

44. Monitor's general approach to enforcing the NHS provider licence set out in our enforcement guidance¹⁶. Our general approach to enforcing the Procurement, Patient Choice and Competition Regulations is set out in draft guidance published for consultation¹⁷. Monitor has also published draft guidance for consultation on the application of the competition condition of the licence¹⁸ and on how to comply with the Procurement, Patient Choice and Competition Regulations¹⁹.

Presentation of the issues

45. Monitor will assess whether NHS England and the providers complied with the applicable rules. We consider the potential issues relating to NHS England's conduct first, and then move on to consider the potential issues relating to the involvement of providers.

NHS England

46. We have identified a number of potential issues that we currently plan to investigate further. These are discussed below.

Securing the needs of patients – Regulation 2

47. Regulation 2 of the Procurement, Patient Choice and Competition Regulations establishes an overarching objective that commissioners must pursue whenever they are procuring NHS health care services. This is to secure the needs of health care service users and improve the efficiency and quality of services.

48. In assessing whether NHS England acted consistently with this objective, we will consider the reasons for NHS England's decision to reconfigure the four cancer surgery services in Greater Manchester and Cheshire. We will also consider whether the process to select the future providers of those services was consistent with this objective.

¹⁶ Monitor (2013) [Enforcement Guidance](#).

¹⁷ Monitor (2013) [Enforcement guidance on the Procurement, Patient Choice and Competition Regulations](#).

¹⁸ Monitor (2013) [Licence conditions – choice and competition: consultation on draft guidance for providers of NHS-funded services](#).

¹⁹ Monitor (2013) [Substantive guidance on the Procurement, Patient Choice and Competition Regulations](#).

The decision to reconfigure services

49. We have been told that the current configuration of the four cancer surgery services in Greater Manchester and Cheshire does not meet IOG standards. NHS England told us that this is due to too many surgical centres managing too few patients.
50. NHS England told us it wanted to reduce the number of sites from which these four cancer surgery services would be provided to achieve the configuration described in the final commissioning specification dated 21 January 2013 (see paragraph 20) in order to develop services that complied with and exceeded IOG standards across Greater Manchester and Cheshire.
51. We note that commissioners' overarching objective in Regulation 2 is to procure health care services that meet the needs of health care service users and to improve quality and efficiency. We will therefore consider how the reconfiguration met this objective. In particular, we will look into the decision to reduce the number of sites and move to a model where there was a single service for each category of cancer surgery service provided across one or more sites, and will consider whether this was consistent with this objective. In carrying out our assessment, we will have regard to the relevant IOG standards and guidance from professional bodies (where available), and their implications for the service reconfiguration. In so far as this may inform our analysis we will consider whether there is any insight we can gather which is relevant to this case from previous reconfigurations of specialist cancer surgery services, including in London.

The process adopted to select future providers

52. We have been told that NHS England's intention was that the reconfiguration process for the four cancer surgery services in Greater Manchester and Cheshire be led by providers.
53. NHS England told us that it had engaged with providers and other stakeholders in the redesign of the four cancer surgery services, including in the development of the commissioning specification.
54. NHS England told us that the Provider Board was set up to enable a joined up provider approach and a single point of contact for the development of cancer services across Greater Manchester and Cheshire. The final commissioning specification said that the Provider Board would be responsible for identifying the sites at which surgery would be undertaken and that where these sites met the specification, the proposals would be considered and endorsed for implementation by the commissioner. The specification said that if the

Provider Board was unable to reach agreement, a formal procurement process would be initiated.

55. We will consider whether the process to select future providers was consistent with the objective in Regulation 2. Our analysis in this regard is closely related to our assessment of whether or not NHS England's conduct was consistent with other rules (in particular, Regulations 3(3) and 3(4)). We therefore set out our proposed analysis under Regulation 2 in the context of our consideration of compliance with Regulations 3(3) and 3(4), set out below.

Procuring services from the most capable providers offering best value for money – Regulation 3(3)

56. Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations requires commissioners to procure NHS health care services from one or more providers that:

- are most capable of securing the needs of NHS health care service users and improving the quality of services and the efficiency with which they are provided; and
- provide best value for money.

57. We will consider whether or not NHS England's actions enabled it to comply with these requirements. In particular, we will look at whether some of the criteria set out in the call for proposals (dated 14 January 2013), and the process to select future providers, were consistent with this obligation.

Commissioning criteria

58. In relation to the criteria that provider proposals had to satisfy, we will consider, in particular, whether the following requirements were objectively justified:

- the requirement for potential providers to have university teaching hospital status; and
- the requirement for providers to submit a joint proposal to provide a single service across their sites.

59. We also propose to consider whether designating The Christie FT as one of the sites for urology cancer surgery services in the call for proposals and final commissioning specification was objectively justified.

60. First, we will consider the reasons for requiring providers to have university teaching hospital status. We will consider whether this requirement may have excluded providers that would have been able to provide high-quality, efficient

cancer surgery services that meet the needs of health care service users and deliver value for money.

61. We will also consider the reasons for requiring providers to submit a joint proposal for a single service across their sites. We will consider whether this requirement may have excluded providers that would have been able to deliver high-quality, efficient cancer surgery services that meet the needs of health care service users and deliver value for money. We will consider whether certain providers were unable to submit a joint proposal because they could not identify other providers willing to collaborate with them (because those providers had agreed to collaborate with different providers instead).
62. Finally, we will consider the reasons for automatically designating The Christie FT as one of the centres for the provision of cancer surgery services for urology. We will assess whether designating The Christie FT might have excluded other providers that would have been able to deliver high-quality, efficient urology cancer surgery services that meet the needs of health care service users and deliver value for money.

Selection process

63. In relation to the process to select providers, we will consider whether the process adopted (and the providers' involvement in this process) was consistent with Regulation 3(3).
64. In particular we plan to consider the role of providers and the involvement of the Provider Board in the commissioning process. We will consider whether the Provider Board was in a position to influence or determine the choice of providers based on the collective interests of all or some of its members or to take decisions that excluded one or more providers. We will consider whether this could have affected the ability of the providers best placed to provide high quality and efficient services that meet patients' needs and deliver value for money to be chosen as the future providers.

Appropriate ways for making quality and efficiency improvements – Regulation 3(4)

65. Under Regulation 3(4) of the of the Procurement, Patient Choice and Competition Regulations, commissioners, in acting with a view to improving quality and efficiency when procuring NHS health care services, must consider appropriate ways of making such improvements including through services being provided in a more integrated way, enabling providers to compete to provide services and allowing patients a choice of provider.
66. We will consider whether or not NHS England acted consistently with this requirement. In particular, we will consider whether NHS England had due

regard to ways in which competition and choice might be used to improve the four cancer surgery services.

Enabling providers to compete to provide services

67. First, we will consider whether NHS England had regard to whether the four cancer surgery services might be improved by enabling providers to compete to be selected as one of the future providers (through the process to select them).

68. We will consider, for example, whether the criteria that provider proposals were required to satisfy limited the number of providers who were eligible to submit proposals to provide the cancer surgery services. We will also consider whether this was likely to affect the quality of proposals that would be received in response to the call for proposals.

Allowing patients a choice of provider

69. Second, we will examine whether NHS England had regard to whether the four cancer surgery services might be improved by choosing to have at least two providers of each of cancer surgery service in the Greater Manchester and Cheshire area. This might have incentivised the selected providers to maintain or improve the quality of their respective services in order to attract referrals.

70. We will also consider the extent to which the potential benefits of choice and competition were outweighed by other considerations, such as the advantages of ensuring a minimum volume of procedures at each centre.

Equality/non-discrimination – Regulation 3(2)

71. Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations requires commissioners to treat all providers equally and prohibits commissioners from favouring one provider (or category of provider) over another. Different treatment between providers requires objective justification.

72. There are four aspects to the commissioning process complained about that we plan to consider against this requirement: the requirement for providers to have university teaching hospital status; automatically designating The Christie FT as one of the sites for urology cancer surgery; the requirement to submit joint proposals; and the advance notice of the requirements in the call for proposals that we have been told was given to certain providers.

University teaching hospital status

73. We will consider whether the requirement for potential providers to be university teaching hospitals was objectively justified. In carrying out our analysis we will explore whether this was in and of itself a robust way of assessing the quality of cancer surgery services provided by a provider (and therefore not discriminatory). We will also consider whether the identification of only University Hospital of South Manchester FT, Central Manchester University Hospitals FT, Salford Royal FT and The Christie FT as university teaching hospitals was reasonable.

Designating The Christie FT as one of the sites for urology cancer surgery

74. We will consider whether the decision to designate The Christie FT as one of the sites for urology cancer surgery services in the call for proposals and the final commissioning specification was consistent with the requirement to treat all providers equally. We will consider whether there was an objective justification for any such designation.

The requirement to submit joint proposals

75. We will consider whether the requirement for providers to submit joint proposals with other providers to provide a single service across their sites was consistent with NHS England's obligation to treat providers equally. We will consider whether there was an objective justification for this requirement.

The advance notice of the commissioning requirements

76. We will consider whether NHS England treated all providers equally in light of the complaint from University Hospital of South Manchester FT that some providers had advance notice of the requirement for providers to submit joint proposals.

77. We will therefore examine whether some providers were given advance warning of the requirements that providers would need to satisfy.

78. If we establish that some providers were given advance notice, we will consider whether this might have given them an advantage in submitting proposals over those providers who had not had this advance notice.

Acting in a transparent and proportionate manner – Regulation 3(2)

79. Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations also requires commissioners to act in a transparent and proportionate way. This requirement is closely linked to the requirement to treat providers equally. We will consider whether NHS England sufficiently explained the process to select future providers of the four cancer surgery

services in Greater Manchester and Cheshire in assessing whether it acted transparently.

80. We plan to consider, for example, whether NHS England provided enough clarity to potential providers about:

- the requirements that providers would need to satisfy;
- the role of providers in service redesign, including the role of the Provider Board (including the effect of its decisions);
- the consequences of refusing to become a member of the Provider Board (for example, whether membership was a pre-condition to providing services); and
- the consequences of the Provider Board failing to reach agreement (for example, whether a failure to reach unanimous agreement would lead to an “arm’s length” procurement process being used to select a provider).

Anti-competitive behaviour – Regulation 10

81. Under Regulation 10 of the Procurement, Patient Choice and Competition Regulations, commissioners must not engage in anti-competitive behaviour unless it is in the interests of NHS health care services users.

82. We will consider whether the way in which NHS England involved providers in the commissioning process reduced competition that would otherwise have taken place between providers to be selected to provide services.

83. The incentives of providers are not identical to those of commissioners. As well as to provide high-quality services to their patients, individual providers may also, understandably, be motivated by the interests of their own organisations and/or staff. These interests may not always be the same as securing the highest quality, most efficient services that best meet the needs of patients in an area (in particular where this may mean the loss of a service at one of the provider’s sites). Commissioners, on the other hand, are required to act with a view to securing services that meet the needs of health care service users and improving quality and efficiency.

84. We will consider how the providers were involved in the commissioning of the four cancer surgery services, with a view to understanding whether this would have had an adverse effect on competition and therefore on the quality of services provided to patients. In carrying out our assessment, we will look into the nature of the involvement of the providers in the reconfiguration process, including through the Provider Board (including the extent to which they were able to influence or determine the future selection of providers). We will then consider whether this involvement was in the interest of patients.

Providers

85. In this section we set out the potential issues that we have identified with regards to the involvement of providers in the reconfiguration of services in Greater Manchester and Cheshire. As explained above, we will focus our analysis on the providers' compliance with the provisions of the competition condition (Condition C2) in the NHS provider licence (for NHS foundation trusts) or equivalent obligations (for NHS trusts).
86. We will focus our analysis on the matters related to the providers' participation in the Provider Board process. In particular, we intend to examine the extent to which providers, through the Provider Board, were able to decide or influence the future configuration of the four cancer surgery services and whether this was in patients' interests.
87. NHS England has told us that the Provider Board was put in place to enable a joined-up provider approach and a single point of contact for the development of cancer services across Greater Manchester and Cheshire. It also told us that it was not involved in the formation of the Provider Board governance arrangements. However, we have been told that the commissioner required the Provider Board to have appropriate governance arrangements in place and required unanimity amongst providers of cancer surgery services in order to accept its recommendations. We have also been told that the commissioner's representative attended meetings of the Provider Board and provided comments where necessary.
88. The final commissioning specification dated 21 January 2013 said that the Provider Board would be responsible for identifying the sites at which surgery would be undertaken and that it was expected that where these sites met the specification, the proposals would be considered and endorsed for implementation by the commissioner. The specification said that if the Provider Board was unable to reach agreement a formal procurement process would be initiated.
89. Based on our understanding of this process there are a number of matters we will investigate further.
90. We will consider whether the Provider Board process provided a forum through which some of the providers were able to allocate services between themselves and/or otherwise reduce the degree to which they competed with each other to be selected to provide services.
91. In carrying out our analysis, we will examine the process adopted by the Provider Board (including that before being formally established) when

drafting the call for proposals and the involvement of providers in this process. In particular we will examine whether the requirements within the call for proposals might have facilitated outcomes sought by some or all of the providers.

Other matters which we do not currently plan to investigate further

92. During our investigation we have become aware of a number of other discussions between providers that took place in advance of the call for proposals by the Provider Board on 14 January 2013 about the future provision of the four cancer surgery services. The precise extent to which NHS England was involved in these is not yet clear, although it appears to have played some role in all. These include:

- discussions between University Hospital of South Manchester FT, The Christie FT, Salford Royal FT and Central Manchester University Hospitals FT about the future provision of gynaecology cancer surgery services;
- discussions between Pennine Acute Hospitals NHS Trust and Central Manchester University Hospitals FT that Pennine Acute Hospitals NHS Trust will cease to provide hepato-pancreatico-biliary cancer surgery services; and
- discussions between Central Manchester University Hospitals FT, Salford Royal FT and The Christie FT to work together to provide the four cancer surgery services.

93. We have not reached any view as to whether any of these discussions were consistent with the competition condition in the NHS provider licence (or the equivalent obligations with which NHS trusts are required to comply).

94. As explained in paragraph 83 above, the incentives of providers are not exactly the same as those of commissioners. Consequently, where the future configuration of services is determined or influenced by providers rather than commissioners, this may not always achieve the best outcome for patients.

95. However, we have considered our prioritisation framework and, at this stage, we do not propose to investigate these other discussions under the NHS provider licence (and equivalent obligations) further. This is because it appears to us that our investigation of the other issues, as set out in this document, will enable us to find out whether the process adopted for the reconfiguration of the four cancer surgery services was consistent with the applicable rules and in the best interests of the health care users. For this reason it is not necessary to examine these matters separately.

Responses to the statement of issues

96. We now invite responses to this statement of issues, including the issues identified and the scope of our investigation, from all parties, including NHS England, the Provider Board and providers of cancer services in Greater Manchester and Cheshire. We also welcome responses from any other third parties, including other NHS health care service users, providers and clinicians.
97. Please provide your response by close of business on **14 November 2013**.
98. Please email your responses to coopandcompcases@monitor.gov.uk.
99. We intend to publish non-confidential versions of **all** submissions received. If your submission contains confidential information, please submit a non-confidential version of your response at the same time, indicating clearly what information has been removed and why.

30 October 2013