

Consultation response:

- Application of the Competition Act 1998
- Market investigation references
- Choice and competition licence conditions



Summary

On 27 March 2013 we launched a 12-week public consultation on draft guidance on:

- applying the Competition Act 1998 in the healthcare sector
- Monitor's approach to market investigation references
- the choice and competition conditions of the NHS provider licence

We received 26 submissions from a range of stakeholders including NHS and independent sector providers, royal colleges, professional associations, charities, other regulators and academics. We are grateful for the time, effort and thought that stakeholders devoted to our consultation.

The [final versions](#) of all three documents are available on our website.¹

Since our draft consultation, there have been some developments relevant to our co-operation and competition functions:

- on 1 April 2014, the Competition and Markets Authority (CMA) replaced the Office of Fair Trading and Competition Commission. The CMA is the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. Monitor's powers under the Competition Act 1998 and to make market investigation references are shared with the CMA (this is referred to as concurrency)
- the Enterprise and Regulatory Reform Act 2013 has resulted in changes to the way we exercise our concurrent powers
- we have been working with the CMA to develop a joint approach that will make sure patients' interests are at the heart of assessing merger proposals, and have published a [range of guidance documents](#)² about our new approach to transactions.

¹ Available at: <https://www.gov.uk/government/publications/nhs-healthcare-providers-working-with-choice-and-competition>

² Available at: www.gov.uk/government/publications/supporting-nhs-providers-considering-transactions-and-mergers

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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Introduction

Our co-operation and competition guidance documents

We have concurrent, or shared, powers with the CMA to enforce provisions of the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union in relation to the provision of healthcare services in England. Our guidance on the application of CA98 in the healthcare sector explains how we use these powers.

We have concurrent powers with the CMA to make market investigation references under the Enterprise Act 2002 (Enterprise Act) where we have reasonable grounds for suspecting that any feature, or combination of features, of a market is preventing, restricting or distorting competition. Our guidance on our approach to market investigation references explains the approach we take when using these powers.

The NHS provider licence, which Monitor is responsible for enforcing, includes conditions relating to choice and competition. Our guidance on the choice and competition conditions of the NHS provider licence explains how we assess whether a licensee's behaviour is consistent with these conditions.

Outline of this document

This document gives an overview of the feedback we got during consultation and sets out our responses. We are grateful to all of those that participated in our consultation and we have carefully considered all of the feedback that we received.

Section 1 is about the application of CA98 in the healthcare sector.

Section 2 is about our approach to market investigation references.

Section 3 is about the choice and competition conditions of the NHS provider licence.³

³ Monitor (2014) 'NHS Provider Licence'. Available at: <https://www.gov.uk/government/publications/the-nhs-provider-licence>

Section 1: Guidance on applying the Competition Act 1998 in the healthcare sector

Feedback

Several respondents requested examples of how the provisions of the Competition Act 1998 ('CA98') would apply in practice, including examples of the types of conduct that would be likely to raise concerns. One respondent said that it would be helpful if we provided separate guidance for different groups of stakeholders in the healthcare sector.

Some respondents said that we should regularly update our guidance and provide information on how we use our powers under CA98.

Some respondents requested further detail on how cases would be allocated between Monitor and the CMA and asked whether Monitor would adopt the revised decision-making processes of the CMA.

Some respondents asked for further detail about how we will take into account issues around integrated care, and financial and clinical sustainability, when applying competition law. One respondent said that we should further consider how providers and commissioners might tackle health economy sustainability issues even though they could reduce competition in an area; this respondent suggested that a wider conversation between Monitor, NHS England and others about how such considerations relate to competition law would be helpful.

Some respondents requested further detail about how we would exercise our enforcement powers, including our approach to imposing interim measures, whether threshold banding would be applied for financial penalties and what types of penalties beyond financial penalties we can impose. One respondent emphasised the need for us to strike a balance between imposing financial penalties and accepting commitments.

The following concerns were also raised by individual respondents:

- the implications of competition rules for charities
- whether providers who report a breach would be protected and whether complaints can be anonymous
- what monitoring programme Monitor will put in place to identify breaches
- the risk that Monitor will not use appropriate expertise, particularly clinical expertise, to decide cases

- whether Monitor should explore setting up approaches with the Care Quality Commission (CQC) that would facilitate consistency to make
- the term 'healthcare' should be defined and Monitor should explain how it will approach market definition
- the guidance appears to give low priority to cases that could have a significant impact on the structure of the market or on undertakings that are not necessarily significant for patients or taxpayers
- Monitor needs to recognise the risk to patients' interests if market structure undermines longer term provider sustainability and plurality
- Monitor might consider ensuring there is a mechanism for always involving the patient in decisions about them.

Our response

We have published several [hypothetical scenarios](#)⁴ which set out how the provisions of CA98 and the choice and competition licence conditions might apply in practice. We hope that these examples will be helpful for stakeholders. They include examples of how competition rules might apply to models for delivering integrated care. We have not published separate guidance for different groups of stakeholders. If stakeholders have specific queries about how the competition rules apply to them we invite them to seek informal advice from us. Please send queries to cooperationandcompetition@monitor.gov.uk.

As noted in our guidance, we intend to update the guidance as we develop more experience in dealing with potential breaches of competition law.

We share concurrent powers with the CMA under CA98 and the Treaty on the Functioning of the European Union. We have updated the guidance to reflect the case allocation principles that will apply between Monitor and the CMA. The general principle is that cases will be investigated by the authority best placed to undertake the investigation. The factors to be considered in determining which authority deals with the matter include the sectoral knowledge of each authority, whether the case affects other sectors, and the authority's experience of dealing with the parties or issues involved in the proceedings. Under the CA98 (Concurrency) Regulations 2014, Monitor will normally be responsible for any CA98 case that is principally concerned with matters relating to the provision

⁴ Available at: <https://www.gov.uk/government/publications/hypothetical-scenarios-choice-and-competition-conditions-of-the-nhs-provider-licence-and-competition-law>

of healthcare services for the purposes of the NHS in England. However, Monitor may nevertheless agree with the CMA that the CMA shall act in a case.

We are bound by the rules of procedure set out in the CMA's CA98 Rules. These rules include a formal complaints procedure whereby complaints about the procedures of an investigation under CA98 may be made to a procedural officer. The rules also include requirements relating to decision-making in investigations under CA98. In particular, decisions to issue a supplementary notice of a proposed infringement decision, whether to make an infringement decision, and whether to impose a penalty must be made by at least two persons. These persons must be separate from the person who oversees the investigation.

Integrated care, competition and choice are not mutually exclusive. However, we recognise that there is concern across the sector that competition may lead to greater fragmentation of services. There are many different ways in which providers and other stakeholders can deliver integrated care for patients that are unlikely to reduce competition or choice. The hypothetical scenarios provide examples of how the competition rules apply to models for delivering integrated care. There are also other materials available on our website that deal with competition, choice and integrated care. These include guidance on complying with Monitor's integrated care requirements.⁵

It is also important for stakeholders to be aware of the application of the competition rules when taking action to preserve the financial or clinical sustainability of a provider. We hope that the hypothetical scenarios will assist stakeholders to understand what types of actions might raise concerns under the competition rules, and how we will examine any benefits of the conduct. We have updated our guidance to indicate that issues about the financial or clinical sustainability of a provider may be relevant to our decision on whether to pursue enforcement action and what type of enforcement action is appropriate. We will assess the relevance of health economy sustainability issues to the application of the competition rules on a case-by-case basis. Stakeholders are encouraged to seek our informal advice if they have queries about how the competition rules might apply to their circumstances.

We have added further detail to the guidance on the types of considerations we will take into account when deciding whether to impose interim measures, and on how we will calculate the suitable penalty. Our powers to enforce breaches of competition law are set out in the guidance. They are not limited to imposing financial penalties and include the power to give directions to or accept

⁵ Available at: <https://www.gov.uk/government/publications/integrated-care-how-to-comply-with-monitors-requirements/complying-with-monitors-integrated-care-requirements>

commitments from organisations. To impose a financial penalty for a breach of competition law we need to be satisfied that the infringement has been committed intentionally or negligently. In exercising our discretion on suitable enforcement action we will ensure the action we take is proportionate and reasonable in the circumstances at hand.

The guidance clarifies that not-for-profit organisations such as charities may be undertakings for the purposes of CA98 if they are carrying on some form of commercial or economic activity. These organisations are encouraged to seek informal advice from us if they have queries about the application of competition rules in their particular circumstances.

Monitor will adopt the CMA's approach to leniency where cartel cases are allocated to us under the concurrency arrangements. This includes the availability of immunity or a reduced penalty for undertakings and/or employees/directors where an applicant is the first to approach Monitor but there is a pre-existing investigation; the availability of a reduction of any penalty which might be imposed on applicants who are not the first to apply and the possibility that some co-operating current or former employees and directors in such circumstances will be granted individual immunity.

In relation to complaints about a possible breach of competition law we would usually expect complainants to identify themselves. However, we have amended the guidance to indicate that before disclosing a complainant's identity or other information we will discuss the matter with them and give them an opportunity to make representations.

While we do not intend to put in place a formal monitoring programme to identify breaches, the guidance describes the ways in which we would expect to become aware of potential breaches. For example, through complaints from third parties, intelligence from another regulator or authority, facts that emerge from our current or completed cases, or through other information we receive in our role as sector regulator.

We will draw upon expert clinical advice whenever clinical input is relevant to a case, and ensure that we have access to the clinical expertise necessary in the development of our decisions. Clinical advice will be a key element in understanding how co-operation, patient choice and competition can be effective in improving services for NHS patients and delivering value for taxpayers. We have also agreed a memorandum of understanding with the CQC that includes an agreement to co-operate in the exercise of our respective functions, hold joint meetings and otherwise exchange information as required.

The guidance includes a definition of the term 'healthcare' as set out in section 64(3) of the Health and Social Care Act 2012, which provides that healthcare means all forms of healthcare, whether relating to physical or mental health. In relation to market definition in competition law cases, Monitor will follow the CMA's approach as set out in the publication '[Market definition: Understanding competition law](#)', as well as drawing on any relevant cases in the health sector and the previous experience of the Co-operation and Competition Panel. Broadly, a market definition exercise should identify services, and the locations from which they are provided, that are effective substitutes for the services provided by the merged organisation. This allows the competitive effects of a merger to be analysed by identifying providers of services capable of applying competitive pressure to the merged organisation. Market definition is not an end in itself and it may not be necessary to reach a definite view on the specific boundaries of the relevant product and geographic markets.

The impact of anti-competitive behaviour on market structure is likely to be a relevant factor under the prioritisation criteria set out in Monitor's '[Enforcement guidance](#)'.⁶ For example, in weighing up the benefits and costs of taking action, we will consider, among other relevant factors, indirect benefits to healthcare service users including increased confidence in the functioning of the healthcare sector more generally.

The obligations to ensure that patients are offered choice, as set out in the provider licence and the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013, provide a mechanism for Monitor to help ensure that patients are fully involved in decisions about their care and treatment.

⁶ Available at: <https://www.gov.uk/government/publications/monitors-enforcement-guidance>

Section 2: Guidance on Monitor's approach to market investigation references

Feedback

We received several consultation responses that were supportive of the draft guidance. Some specific issues were raised by individual respondents which are set out below.

One respondent said there was a risk of a gap emerging between Monitor's prioritisation criteria and the requirements under the Enterprise Act to pay attention to the structure of the market. This respondent said that Monitor needs to recognise the risk to patients' interests if market structure undermines longer term provider sustainability and plurality.

One respondent said that Monitor should consider whether barriers to entry or other restrictions impede the introduction of innovation.

One respondent raised concerns about whether Monitor would have enough resources to carry out a sufficient range and number of market investigations.

One respondent said that we should update the guidance regularly in light of our decisions and publish clear explanations for any deviations from the guidance. This respondent said that we must be transparent about how we use our discretion to make a market investigation reference, to build a clear body of publicly available evidence that allows NHS providers to better understand our rationale and approach.

One respondent said that the guidance should take account of changes to the process introduced by the Enterprise and Regulatory Reform Act 2013 and describe what happens once a market investigation reference is made.

Our response

We have the power to make a market investigation reference if we have reasonable grounds for suspecting that any feature, or combination of features, of a market concerning the provision of healthcare services in England prevents, restricts or distorts competition. A feature of a market may include its structure or any aspect of that structure. Our guidance explains the factors we will take into account in deciding whether to make a market investigation reference. Among other things, we will take account of the structure of the market and the nature and seriousness of the competition issues in the market.

As part of making a market investigation reference or doing a market study, we are likely to look at barriers to entry and other restrictions that might impede innovation in a market.

In accordance with our 2013/14 annual plan we have resources to undertake a broad range of work into whether and how choice and competition operate effectively in different healthcare markets, and what this means for patients. This work will include publishing working papers on different aspects of healthcare markets and drawing on intelligence from our case work and informal advice service; gathering evidence to understand whether the GP sector is working well for patients; and reviewing if and why walk-in centres are closing and whether this is in the interests of patients.

We intend to update the guidance as we gain more experience in examining markets. We will publish information about market studies, market investigation references and undertakings on our website.

Since the consultation, we have included further detail in the guidance about changes introduced by the Enterprise and Regulatory Reform Act 2013 to the way in which market investigation references are made. We have also described the CMA's process for market investigations.

Section 3: Guidance on the choice and competition licence conditions

1.1 Purpose of the choice and competition licence conditions

Feedback

A number of respondents said that they were opposed to the overall policy direction enshrined in the Health and Social Care Act 2012. They said that competition risks fragmenting services, creates unnecessary transaction costs and increases uncertainty for commissioners and providers. Some also told us that our guidance was too focused on protecting competition and did not sufficiently address the duty to promote quality and integration of services.

Others welcomed the support of choice and competition through the licence conditions. Several respondents suggested that choice is an important part of healthcare delivery in the modern world, and that the regulatory system should actively support patient choice. Some advocated that competition could be used to help achieve important objectives such as improved quality, greater productivity, innovation and reduced costs.

One respondent drew a distinction between choice and competition. They acknowledged that although the two are related, choice stands in its own right as a concept and objective and should be linked firmly to the idea of a patient-centred NHS.

One respondent told us that there was need for a strong education campaign about the choice and competition rules.

Several respondents welcomed regular updates to our guidance. Some also suggested that we publish a summary of lessons learned with examples.

Our response

As the sector regulator for health services in England, Monitor's job is to make the health sector work better for patients. We have a range of functions to achieve this objective. This includes ensuring that procurement, choice and competition operate in the best interests of patients. This means helping commissioners and providers make sure that patients do not lose out through poor commissioning, restrictions on their rights to make choices or inappropriate anti-competitive behaviour by commissioners or providers.

In line with this, we have revisited the guidance to make clear that the choice and competition licence conditions are in place to protect the interests of patients and not competition for its own sake.

Since our draft guidance was published last year, we have made considerable efforts to engage more widely with the sector to explain and discuss the implications of the choice and competition rules. This has included a series of events to support commissioners in their procurement activities consistent with the Procurement, Patient Choice and Competition Regulations. These events have touched on other aspects of Monitor's competition powers, including the choice and competition licence conditions.

In response to feedback, we have also expanded our discussion on the relationship between choice, competition and integrated care in the guidance. As noted earlier, there are also other materials available on our website that consider how competition, choice and integrated care work together. This includes our [frequently asked questions](#) on integrated care.

We have also published several hypothetical scenarios explaining how the competition licence condition would apply in particular circumstances. We will add to these examples over time as appropriate.

We are also committed to supporting providers and others in considering how the rules apply to specific scenarios by providing informal advice: please send queries to cooperationandcompetition@monitor.gov.uk. Over time, we plan to publish a series of frequently asked questions covering common topics on which people have sought informal advice.

We will continue to keep the guidance under review and will update it, as appropriate, as our experience of enforcing the choice and competition licence conditions develops.

1.2 Initiation of cases, process for conducting cases and consequences of a breach

Feedback

We received very few comments about process-related issues.

One respondent said that it would be helpful to understand what monitoring programmes Monitor intended to put in place to identify breaches of the licence conditions.

A few commented on the proposed timescales for conducting cases. Some respondents told us that the lack of clarity on timescales for cases to be heard and resolved could pose risks that might affect service continuity, service quality and provider financial viability. One respondent suggested Monitor should commit to a 40-working-day investigation period and that if more time is needed Monitor should make an estimate of the extra time required and notify the parties accordingly.

Some respondents raised issues relating to the consequences of breaches. One respondent said that further guidance on the scale of financial penalties would be helpful to allow providers to assess their possible financial position if challenges affecting them arise.

Another suggested that measures should be put in place to protect providers reporting a breach (for example, complainants might be granted anonymity).

In terms of the offer in our guidance to provide informal advice, one respondent expressed hesitancy around how such an arrangement would work in practice. The respondent told us that it could present blurred boundaries and potential risks for either side.

Our response

We expect to identify possible breaches of the choice and competition licence condition primarily through complaints. However, we may also become aware of possible breaches through intelligence from other regulators and authorities, facts that emerge from our casework, and from our general knowledge of the sector. Monitor does not have a general audit function and will not systematically scrutinise decisions taken by providers and/or commissioners.

We recognise that an investigation process can give rise to increased workloads and uncertainty for providers and third parties, and also that it is important to ensure that any increase is proportionate and minimised where possible. With that in mind we have clarified our expected process and likely timescales for those involved. For example, we have clarified that we will publish a timetable at the start of each investigation. We have also clarified that if we expect our timescales to change significantly at any point during an investigation we will advise the parties and explain why.

The actions we might take in the event of a licence breach are set out in Chapter 3 of our 'Enforcement Guidance'. It explains that we can impose certain discretionary requirements, including financial penalties. It also explains that the penalty must not exceed 10% of the provider's turnover in England, and that the

range of penalty is likely to depend on the presence of certain aggravating or mitigating factors.⁷ We note that imposing a financial penalty is only one of a number of actions available to Monitor. Our 'Enforcement Guidance' explains the factors we expect to consider when deciding what action to take.

We recognise that some complainants may not want their identity to be disclosed. In practice, we will consider requests for anonymity, but we will balance this against the need for the complaint to be heard. If a complainant would prefer us not to reveal their identity, they should make this clear when they first contact us. We will then discuss to what extent it is possible to investigate their concerns without doing so. Please also see our [Whistleblowing Policy](#).

With respect to the comments received regarding informal advice, we note that arrangements enabling stakeholders to obtain informal advice on choice and competition matters have been in place for several years. These were first established by the Co-operation and Competition Panel to help resolve queries relating to the [Principles and rules for cooperation and competition](#),⁸ and have been continued by Monitor. We consider it a useful mechanism by which stakeholders can learn more about how the rules are likely to apply in particular circumstances, and we have received feedback from users that the approach is valuable. As already noted, over time we also plan to publish a series of frequently asked questions covering common topics on which people have sought informal advice.

1.3 Choice licence condition: obligation to notify and tell patients where they can find information about the choices they have (Condition C1 – 1)

Feedback

Several respondents suggested that the provision of choice and information to support choice should be at the forefront of how care is delivered in the NHS.

Several respondents said that patients are still not clear when choice applies. They suggested that Monitor's enforcement of the choice licence condition will be important going forward.

⁷ For example, penalties are likely to be higher if Monitor has previously imposed requirements or accepted undertakings from the provider concerned regarding similar or related matters, if the provider demonstrates a positive intent to contravene in that the provider knew or must have known that its conduct would lead to a breach, or if a provider refuses to cooperate with Monitor's investigation. Similarly, if the provider takes timely and effective action to remedy the effects of a breach, self-reports a breach, and/or has cooperated fully with Monitor's investigation and requirements then the provider can expect a much lower (or no) financial penalty.

⁸ Further details regarding the Principles and rules for co-operation and competition are available on Monitor's website at: <https://www.gov.uk/government/collections/procurement-choice-and-competition-in-the-nhs-documents-and-guidance>

Several respondents told us that the draft guidance on the choice licence condition was reasonable.

One respondent said that the draft guidance relating to this clause was consistent with the General Medical Council (GMC)'s guidance for doctors on standards of professional conduct. The respondent told us that the guidance is consistent with the requirement that doctors must work in partnership with patients, sharing with them the information they will need to make decisions about their care ('Good Medical Practice 2013', paragraph 49).⁹ This includes giving information to patients in a way they can understand and ensuring, wherever possible, that arrangements are made to meet patients' language and communication needs ('Good Medical Practice 2013', paragraph 32).

Which patient choices are captured by the choice licence condition?

A number of respondents raised issues relating to the choices covered by the licence condition, and/or sought clarification on the point at which licensees have to notify patients that they have a choice of provider. The points raised were:

- greater clarity is needed on the process for offering choice when waiting lists are likely to exceed 18 weeks
- whether choice applies to maternity services
- whether the guidance could address more explicitly the role of mental health, learning disabilities and community service providers in enabling choice in acute settings for patients in inpatient care, secure units, or prison settings.
- where choice is conferred locally, commissioners should be required to inform local providers because it is unreasonable to expect individual providers to keep up to date with all services where choice has been conferred locally.

A number of respondents told us that the scope of our guidance could be widened beyond choice of provider to cover other categories of choice. For example, one respondent asked Monitor to put in place a mechanism to allow patients a choice of location and/or treatment, as patients were not always aware or fully informed of their options. Another respondent suggested that

⁹ Further details concerning 'Good Medical Practice 2013' are available at: www.gmc-uk.org/guidance/good_medical_practice.asp

choice of diagnostic provider should be promoted even when tests are urgent,¹⁰ as choice could be a factor in ensuring effective and early diagnosis.¹¹

What are licensees expected to tell and provide to patients?

Several respondents told us that providers should not be expected to provide advertising or promotional materials to support the choice of other (rival) providers, noting that this would not be expected in other commercial environments.

Some told us that commissioners were better placed than providers to give information to support patient choice and that the obligation to provide information should rest with them. One respondent suggested that Monitor should work with other parts of the healthcare system to ensure patients have access to independent information to support their choices.

One respondent said that our guidance could provide a disincentive for licensees to provide information to patients where the provision of information is not strictly mandated. They said further detail about the implications of giving advice to patients was needed.

Another respondent proposed that licensees should be obliged to offer an impartial choice service.

Our response

Which patient choices are captured by the choice licence condition?

We have revised the guidance to clarify the process for offering choice where waiting lists are likely to exceed 18 weeks (see Section 2.1).

We have also revised the guidance to clarify the role of choice in maternity services. We note that, although there is no explicit right to choice of maternity service provider in the NHS Constitution,¹² in practice patients are often able to

¹⁰ Under the NHS Constitution, patients have a choice of provider for diagnostic tests provided the test forms part of the patient's first outpatient appointment and the test is not required urgently.

¹¹ The respondent cited the example of a diagnostic service whereby patients are required to be seen within 5 days of referral, which is achieved by contacting the patient shortly following referral and offering them a choice of alternate locations close to their home for their appointment.

¹² The NHS Constitution covers referrals for a first consultant-led outpatient appointment and the right does not correspond well to maternity services (which are characterised by the option of self-referral, care that is not necessarily consultant-led and the opportunity to switch providers a number of times during the pathway of care).

choose and there is a clear policy position in favour of choice in maternity services.¹³

In terms of enabling choice for vulnerable patients or those with capacity issues, our guidance explains that providers should be mindful of meeting the needs of all their patients. We set out some practical steps that providers might take to enable choice for these patients (see Section 2.1).

Where commissioners have chosen to introduce choice locally, we expect they will want to promote and publicise information to help patients make well-informed choices. We also expect providers to engage with commissioners to confirm where choice has been introduced and where information about those choices can be found.

With respect to scope, at present our guidance focuses on choice of provider and not on other categories of choice such as choice of location or treatment. This is because the choice licence condition is designed to protect the choices that patients have under the NHS Constitution or when choice has been conferred locally by a commissioner. Both focus on patients having a choice of provider. The Procurement, Patient Choice and Competition Regulations do not prevent commissioners from extending patient choice. Commissioners may give patients more choice and control over aspects of their care if they consider it could improve patient experience and better meet the needs of patients. If patients' choices are extended under the NHS Constitution or by commissioners locally, these choices would also be covered by the choice licence condition.

What are licensees expected to tell and provide to patients?

The NHS Constitution explains that patients should be given information to support their choices, and legislative arrangements place responsibility for promoting, publicising and enabling patient choice on commissioners. This includes a requirement on commissioners to make arrangements for publishing and promoting awareness of information about healthcare providers, consultant-led teams and teams led by healthcare professionals providing mental health services to enable patients to make choices in a meaningful way. Commissioners

¹³ Department of Health's '2014/15 NHS Choice Framework', for example, makes clear that women can expect a range of choices over maternity services, although what choices are available will depend on what is available locally. Available at: <https://www.gov.uk/government/publications/nhs-choice-framework>.

are also required to make arrangements for publicising details and promoting awareness of where that information may be found.¹⁴

Accordingly, we expect sources of information to be publicly available to support patient choice. We expect licensees to be able to tell patients how to find this information or how to contact the commissioner responsible for publishing and promoting the information. We do not require each provider to prepare, hold and/or maintain this information itself. We have also clarified in the guidance that licensees are not expected to provide patients with other providers' advertising or promotional materials to assist patient choice.

Although not a requirement on licensees, the licence condition does not prevent licensees from preparing their own information sources and/or providing advice to patients to help them make choices. If information and advice about patient choice is provided, the licensee should ensure that the information and/or advice is not misleading and does not unfairly favour one provider over another. Our approach to these issues is described in Section 2.2 of the choice and competition licence conditions guidance. We will keep this aspect under review, and may revise the guidance in future if we find that the requirements are dampening licensees' incentives to provide useful information or advice to patients.

In relation to the comment that licensees should be obliged to offer an impartial choice service, we did consider and consult on an option to include such a provision in the licence when we were first drafting the conditions of the NHS provider licence.¹⁵ However, we decided not to include the requirement. We were persuaded by stakeholders' arguments at the time that more work was needed to understand all of the costs and benefits ahead of such a condition being introduced.¹⁶ We signalled that we would do further work on whether such a requirement was needed at some point in the future, and we continue to keep this under review.

¹⁴ Commissioners are required to comply with requirements under the Procurement, Patient Choice and Procurement Regulations and the Responsibilities and Standing Rules Regulations. Monitor can take action to prevent and/or remedy breaches of these requirements by commissioners. Guidance on how we enforce these requirements is available at: <https://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance>

¹⁵ Under the option, where a patient had a choice of provider, and where the provider responsible for giving advice was itself a provider of some services that the patient could choose, the licensee would need to make arrangements to ensure that the patient was offered impartial advice about the available choices.

¹⁶ For further details see: Monitor, 'The new NHS provider licence'. Available at: <https://www.gov.uk/government/publications/the-nhs-provider-licence>

1.4 Choice licence condition: obligation to ensure that information is not misleading and does not unfairly favour one provider over another (Condition C1 – 2 and 3)

Feedback

We received few comments on our guidance on this clause. One respondent noted that the guidance is consistent with the GMC requirement that doctors are expected to be honest and trustworthy in all communications with patients, and to make reasonable checks to make sure that the information they give is accurate ('Good Medical Practice 2013', paragraph 68). The respondent noted that it is also consistent with established professional standards and the expectation that doctors report conflicts of interest wherever possible and to be open with patients (and anyone else who might be affected) if a conflict of interest could be seen to affect the way they prescribe, advise, treat, refer or commission services for patients ('Good Medical Practice 2013', paragraphs 78 and 79).¹⁷

One respondent said that the licence condition should apply only to materials produced specifically to be used to inform a patient at the point of referral and should not apply to providers' promotional or advertising materials more generally. The respondent suggested that compliance with the Advertising Standards Authority requirements should suffice.

Our response

The Advertising Standards Authority's requirements apply to all advertising and promotional activity by a licensee. Our guidance states that licensees' advertising and promotional content will also be subject to the choice licence condition but only to the extent that it contains information and/or advice about patient choice of provider. We have also revised the guidance to make clear that we would expect this to 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 information advising the patient where such information can be found. It may be difficult to distinguish between materials that have been produced specifically to inform a patient at the point of referral about their choices, and those about choice of provider produced more generally for promotional or advertising purposes. We have therefore adopted the above approach. In any event, in our view the requirement does not

¹⁷ We note that our guidance is also consistent with other aspects of GMC requirements including paragraphs 70 and 71 of 'Good Medical Practice 2013'.

pose any substantial additional burden on licensees: there are clear parallels between the Advertising Standards Authority's requirements and those of the choice licence condition.

1.5 Choice licence condition: obligation not to offer inducements to refer patients or commission services (Condition C1 – 4)

Feedback

One respondent noted that the requirement that licensees must not offer or give inducements to refer patients or commission services mirrors the GMC requirement that doctors must not ask for, accept or offer any inducement, gift or hospitality that may affect or be seen to affect the way they refer patients or commission services ('Good Medical Practice 2013', paragraph 80).

However, one respondent questioned our suggestion that hospitality offered at professional or scientific events should not exceed the level that recipients would normally choose to pay for themselves. The respondent suggested that it could lead to perverse outcomes such as different levels of hospitality being acceptable for consultants than would be acceptable for trainee doctors, and that the GMC had recently moved away from such a requirement in its guidance.

A respondent also questioned our guidance on the acceptability of certain promotional aids. The respondent suggested that the draft guidance was at odds with the Association of British Pharmaceutical Industry's (ABPI) current code of practice for the promotion of medicine to health professionals, thereby creating a double standard across the two sectors.

Another respondent sought clarification on whether part-funding patient care through charitable resources might be considered an inducement to commission services.

Our response

We have removed the reference to the level that recipients would normally choose to pay for themselves.

We have revised the discussion in our guidance on the acceptability of promotional aids to align with the requirements of the ABPI's code of practice for the promotion of medicines to healthcare professionals.¹⁸

¹⁸ ABPI, The Code of Practice for the Pharmaceutical Industry Second 2012 Edition, available at: www.abpi.org.uk/our-work/library/guidelines/Pages/code-2012.aspx

We have also revised the guidance to make clear that we do not consider the use of charitable resources or funds raised to part-fund patient care to be relevant to the prohibition on inducements to commission services.

1.6 Competition licence condition (Condition C2)

Feedback

Several respondents said that we had set out a helpful explanation of our approach to assessing whether behaviour is anti-competitive. They welcomed the section on the implications of the licence conditions for the delivery of integrated care.

Some sought further detail about our proposed methodology. Specific points where further clarification was sought were:

- concerns that providers could breach the competition licence condition even though a commissioner might initiate or encourage them to participate in the arrangement that results in the breach. It was suggested that providers should be protected from licence breaches if a commissioner instructs them to act in a certain way
- practical steps that might help providers to avoid breaches in the first instance
- how competition and integrated care could work in practice, including worked examples. One respondent said that our suggestion that providers involved in the delivery of integrated care will often be from different services and therefore not in competition was overly simplistic
- the implications of the licence condition for collaboration between charities
- assessing patient benefits, for example how value should be ascribed to non-financial benefits as well as clearer articulation of the kinds of information and evidence that providers could supply in support of their claims
- the balancing of interests of one group of patients with another in assessing whether there is an adverse effect on patients

A few respondents suggested areas of focus for Monitor in the future. For example, one respondent suggested that further consideration should be given to situations where providers control the care pathway (eg through referral

management systems). Another told us that we should consider issues around the purchasing power of commissioners.

One respondent said that any decisions concluding that anti-competitive behaviour is in the interests of patients should be well evidenced and rigorous.

A number of respondents also raised issues relating to pricing and the potential to affect choice and competition. This included the implications of block contracts, opportunities for cherry picking where tariffs are based on average costs, and the implications of tariffs that do not correspond to costs.

Our response

Our guidance makes clear that, even if conduct is initiated or encouraged by another party such as a commissioner, licensees are not protected from the possibility of breaching the licence. We may take such factors into consideration when deciding what course of enforcement action to take (eg we might take a more lenient approach if a provider is coerced or acts in a certain way unwillingly). We are also very happy to provide informal advice in advance to any party who has a query about whether a particular course of action is likely to breach the competition licence condition.

As noted earlier, we have expanded our discussion in the guidance on the relationship between competition and integrated care. We refer to other materials on our website that considers the interaction between competition and integrated care. These include [frequently asked questions on integrated care](#). Our [hypothetical scenarios](#) on this topic include an example involving the delivery of integrated care.

On the question of the applicability of the competition licence condition to charities, the condition applies to all licensees including charities. This helps to promote a fair playing field between providers, and is consistent with other areas of law, such as competition law. There may be circumstances in which a charity wishes to collaborate with another charity or other providers. Even if competition is likely to be affected, collaboration between providers is permissible when it is in the interests of patients. This might be because collaboration improves the quality of service outcomes, reduces health inequalities, or is essential for the delivery of complex pathways (such as cancer care). How we assess whether conduct is in the interests of patients is explained in our guidance (see Section 3.2).

With respect to benefits, we explain in the guidance that we expect licensees to identify and describe any patient benefits arising from an agreement or conduct

and to provide any relevant evidence in support. Where benefits are purely non-financial (for example, patients' lives are saved as a result of improvements to the quality of care), we do not expect licensees to generate financial proxy values. For further details on the types of information that licensees might submit to substantiate their benefit claims, we refer readers to our [merger benefits guidance](#).

In terms of our approach to balancing the interests of different groups of patients in assessing whether there is an adverse effect on patients, we have revised the guidance to clarify that we expect to consider a range of factors. This could include the number of patients affected, the nature of services affected, the severity with which services are affected, and the period over which services are affected.

We thank respondents for their suggested areas of focus for Monitor's co-operation and competition function going forwards. With respect to the pricing issues raised, we are working with NHS England to ensure that the national tariff prices and rules support the reimbursement of care that is efficiently provided. We expect this to include consideration of any issues where pricing may affect choice and competition.



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