

Licence conditions - choice and competition: consultation on draft guidance for providers of NHS-funded services

Issued on: 27 March 2013

Deadline for responses: 25 June 2013

This draft guidance sets out Monitor's interpretation of the choice and competition conditions of the NHS provider licence and explains how we will assess whether a licensee's behaviour is consistent with these conditions.

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1 Introduction

Monitor's role in choice and competition

Choice and competition have existed in the NHS in England for many years and the Government sees them as powerful incentives for improving the quality of care provided to patients.

Local commissioners decide if and when to use competition as a tool to improve services for patients, within a regulatory framework under which Monitor has a duty to protect and promote the interests of patients.

This means operating a regulatory regime that enables patients to make choices about their health care – which hospital to attend for a planned operation, for example, or which care provider to choose when commissioners have decided to have more than one in their local area.

It also involves ensuring that commissioners and providers of health care follow rules designed to ensure patients do not lose out as a result of anti-competitive behaviour.

Monitor will inherit these choice and competition functions on 1 April 2013 as a result of the Health and Social Care Act 2012 (the Act). The will of Parliament, expressed during the passage of the Bill, was that the sector regulator should not promote competition for its own sake.

We take that responsibility seriously. This means we will police the competition rules affecting health care services to ensure that they operate fairly in the interests of patients, and to help both NHS providers and NHS commissioners meet the needs of patients.

When we are doing this we will explain how any breach of these rules might affect patients adversely. We will also explain how we would expect our intervention to maintain or improve quality or innovation, or deliver better value for money.

We are therefore publishing for discussion and consultation a series of documents that set out how we propose to discharge our new statutory duty from 1 April 2013.

This includes draft guidance on the choice and competition conditions of the licence that is being issued to all NHS foundation trusts and in due course to other NHS-funded providers.

The documents show how Monitor will apply the provisions of the Competition Act 1998 to health care services, and set out our approach to providing advice to the Office of Fair Trading on the benefits to patients of mergers involving NHS foundation trusts.

They also include draft guidance about how we propose to enforce the Procurement, Patient Choice and Competition Regulations (№2) 2013 currently before Parliament.

Monitor's approach builds on the work of the Co-operation and Competition Panel, which will in future advise Monitor; its former staff have become employees of Monitor.

The purpose of this guidance

The Act makes important changes to the way that providers of NHS-funded health care services are regulated, and gives Monitor new duties and powers.

A key change is the introduction of a licence for providers of NHS services. The licence will be issued and enforced by Monitor and will help us carry out our main duty which is to protect and promote the interests of people who use health care services.

The licence will be central to the new regulatory regime and contains various obligations that licensees must meet. The obligations on licensees will allow us to fulfil our new duties in relation to:

- setting prices for NHS-funded care in partnership with the NHS Commissioning Board;
- safeguarding choice and preventing anti-competitive behaviour which is against the interests of people who use health care services;
- enabling integrated care;
- supporting commissioners to maintain service continuity; and
- enabling Monitor to continue to oversee the way that foundation trusts are governed.

This guidance concerns sections of the licence relating to choice and competition. The guidance sets out Monitor's interpretation of the choice and competition conditions.¹ It thereby provides guidance on how we will apply the licence conditions in individual cases. We also set out the analytical framework we expect to use and the types of factors we will take into consideration when assessing whether a licensee's behaviour is consistent with the choice and competition sections of the licence.²

The guidance is relevant to all licensed providers of NHS-funded services in England, as the choice and competition sections of the licence apply to all licensees. NHS foundation trusts are licensed from 1 April 2013. These were the first providers of NHS-funded

¹ This guidance reflects the views of Monitor at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. Monitor's web site will always display the latest version of the guidance.

² The factors listed in this guidance are provided for guidance, but are not intended as exhaustive.

services to be licensed. Other non-exempt³ providers of NHS-funded services will be licensed from April 2014.⁴

We have written this guidance to be as clear as possible. We have tried to use straightforward language and have avoided quoting the licence repeatedly where possible. This means that we do not always use the exact wording used in the licence. The licence conditions themselves ultimately override this guidance.

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

This guidance is to be read alongside Monitor's *Enforcement Guidance*.⁵ Our *Enforcement Guidance* explains how we generally expect to go about our enforcement work in relation to potential and actual breaches of the licence. It sets out when Monitor may decide to take action, and what action we might take; how Monitor is likely to decide what kinds of sanctions to impose; and the high level processes Monitor intends to follow when taking enforcement action.

Overview of the licence conditions

The choice and competition licence conditions are as follows:

- *Choice and Competition - Condition C1: The right of patients to make choices*
This condition protects patients' right to choose between providers by obliging licensees to make information available, to ensure that any information or advice provided is not misleading and to act in a fair way where patients have a choice of provider. This condition applies wherever patients have a choice under the NHS Constitution or a choice that has been conferred locally by commissioners. It also prohibits licensees from receiving or offering inducements to refer patients or commission services.
- *Choice and Competition - Condition C2: Competition oversight*
This condition prevents a licensee from entering into or maintaining agreements that have the object or effect of preventing, restricting or distorting competition to the extent that it is against the interests of health care users. It also prohibits the licensee from engaging in other conduct which has (or is likely to have) the effect of preventing, restricting or distorting competition to the extent that it is against the interests of health care users.

³ Details of exemption rules have been published by the Department of Health. See: Department of Health, *Protecting and Promoting patients' interests – licensing providers of NHS services*, Summary of responses to the consultation, Notice of intent to make regulations given under section 83(4) of the Health and Social Care Act 2012, 1 March 2013, available at: <https://www.wp.dh.gov.uk/publications/files/2013/03/130227-Licensing-consultation-response.pdf>.

⁴ NHS foundation trusts are licensed one year before other providers. This is to allow time for Monitor and the Care Quality Commission, as required by the Act, to implement a joint licensing and registration system.

⁵ Monitor, *Draft Enforcement Guidance: consultation document*, December 2012, available at <http://www.monitor-nhsft.gov.uk/home/news-events-and-publications/consultations/consultations-and-engagement-monitors-role-sector-re>

These conditions are set out in full in the Annex. All of the standard licence conditions are available on Monitor's website.⁶

Structure of the guidance

The remainder of this guidance is structured as follows:

- Section 2 provides background relating to the choice and competition licence conditions, including how we expect to go about taking action against possible breaches of these conditions;
- Section 3 explains how we expect to apply the choice licence condition; and
- Section 4 explains how we expect to apply the competition licence condition.

Feedback on this draft guidance

Monitor welcomes feedback on the views expressed in this guidance.

We also welcome comments on the four discussion papers which have been published by the Cooperation and Competition Panel which relate to issues relevant to this guidance.⁷

Please submit any suggestions and your comments by **5pm, Tuesday 25 June 2013**. There are a number of ways to send us feedback.

By email

You can email your feedback to: cooperationandcompetition@monitor.gov.uk

By post

Send your comments to:

Guidance on licence conditions – choice and competition
Cooperation and Competition Directorate
Monitor
Wellington House
133-155 Waterloo Road
London
SE1 8UG

Confidentiality

⁶ Monitor's standard licence is available at: <http://www.monitor-nhsft.gov.uk/home/news-events-and-publications/our-publications/monitors-new-role/the-new-nhs-provider-licence>

⁷ The four discussion papers, published by the Cooperation and Competition Panel, are: *The Implications of Competition Rules for Agreements Involving Providers of NHS-Funded Healthcare Services*; *The Implications of Competition Rules for the Unilateral Conduct of Providers of NHS-funded Services*; *The Implications of Competition Rules for Clinical Networks*; and *The Implications of Competition Rules for the Delivery of Integrated Care*. These papers are available for download [here](#).

If you would like your name, or the name of your organisation, to be kept confidential and excluded from the published summary of responses or other published documents, please let us know by emailing cooperationandcompetition@monitor.gov.uk. If you send your response by email or post, please don't forget to tell us if you wish your name, or the name of your organisation, to be withheld from any published documents.

If you would like any part of your response - instead of or as well as your identity - to be kept confidential, please let us know and make it obvious by marking in your response which parts we should keep confidential - an automatic computer-generated confidentiality statement will not count for this purpose. As we are a public body subject, for example, to Freedom of Information legislation we cannot guarantee that we will not be obliged to release your response even if you say it is confidential.

What we will do next

After considering all the feedback received on the draft guidance, we intend to publish final guidance.

If you have any questions about this process please contact Luke Dealtry on 0207 270 5359 (until 12 April 2013) or 0207 9724610 (from 13 April 2013).

You can sign up to receive emails when we publish other engagement and consultation publications [here](#) on our website.

2 Background and overview

2.1 The purpose of the licence conditions

Choice and competition have existed in the NHS for many years. Patients now have a right to choose who provides their health care for a broad range of different services and, where patients have a right to a choice of provider, providers compete to attract patients. Providers also compete with one another to secure funding from commissioners. The intention of the government's policies on choice and competition is to improve outcomes for patients by stimulating improvements in service quality, innovation, and efficiency within the sector.

The licence sets out obligations that providers of NHS-funded health care services are expected to follow to help ensure that choice and competition work effectively in the interests of people who use health care services.

Before 1 April 2013, the rules that governed choice and competition in the commissioning and provision of NHS services in England were set out in the Principles and Rules for Cooperation and Competition (the Principles and Rules). While the substance of those rules will remain, from 1 April 2013 the rules are given a firmer statutory footing through the conditions of the provider licence and through secondary legislation imposing requirements on commissioners as to procurement, patient choice and competition.⁸

2.2 Relationship between the competition licence condition and competition law

Some of the types of conduct that fall within scope of the competition licence condition may also be subject to UK and European competition law. In particular, where a licensee is considered to be an *undertaking* for the purposes of the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU),⁹ conduct that is in breach of the competition licence condition may also be in breach of this legislation.

The Act gives Monitor concurrent powers with the Office of Fair Trading (OFT) to apply UK and European competition law to providers in relation to the provision of health care services in England. Where we suspect anti-competitive behaviour in the health care sector in England, we may decide to use our powers under the provider licence or apply

⁸ Requirements on commissioners are set out in *The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012* and *The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013*. The regulations on procurement, patient choice and competition are available at: <http://www.legislation.gov.uk/ukxi/2013/500/contents/made> Section 78 of the Act requires Monitor to publish and consult on guidance about compliance with requirements imposed by those regulations and how it intends to exercise powers conferred on it by the regulations.

⁹ The term undertaking is described in OFT guidance (see, OFT, *Agreements and concerted practices*, 2004, available at: http://www.offt.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft401.pdf; OFT, *Assessment of market power*, 2004, available at: http://www.offt.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft415.pdf) On the specific question of whether public bodies can be undertakings and subject to UK and European competition law, see: OFT, *Public bodies and competition law: A guide to the application of the Competition Act 1998*, December 2011, available at: http://www.offt.gov.uk/shared_of/ca-and-cartels/OFT1389.pdf

the prohibitions set out in the Competition Act 1998 and Articles 101 and 102 of the TFEU.

We have set out how we intend to take action under the Competition Act 1998 and Articles 101 and 102 in separate guidance.¹⁰

Cases directly relating to suspected anti-competitive behaviour in relation to health care services in England will generally be dealt with by Monitor, although there may be circumstances in which the OFT could also deal with the case. Where it appears that we may have concurrent jurisdiction, the OFT and Monitor will always consult with each other before acting on a case. Cases will generally be investigated by the authority best placed to undertake the investigation. The factors to be considered in determining which authority deals with the matter might include the sectoral knowledge of Monitor, whether the case impacts other sectors, and recent experience of dealing with the parties, products and services concerned.

2.3 Interaction with other authorities and regulatory organisations

Monitor, with our new functions, sits within an overall regulatory system for the health care sector made up of a number of organisations. This includes the Care Quality Commission, NHS Commissioning Board, the NHS Trust Development Authority, the NHS Litigation Authority, the Charity Commission, and the Advertising Standards Authority, amongst others.

Mindful that we do not impose regulatory burdens that are unnecessary, Monitor is committed to working with other organisations to ensure that we avoid regulatory duplication wherever possible. Accordingly, we are establishing formal working relationships with a number of organisations with whom we work most closely. Details of these arrangements will be available on Monitor's website [here](#).

2.4 Initiation of cases

Identifying possible breaches

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

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

Accordingly, we may start investigations both in reaction to complaints and on our own initiative if we have reasonable grounds for suspecting a breach.

We will accept complaints from anyone regarding suspected breaches of the choice and competition licence conditions, including a provider, a commissioner, a representative body, a patient group, or an individual user of health care services.¹¹

¹⁰ Monitor, *Guidance on the application of the Competition Act 1998 in the health care sector*, draft for consultation, April 2013, available at: <http://www.monitor-nhsft.gov.uk/node/2512>

¹¹ We will set out how we expect to involve complainants formally in our investigation process in forthcoming guidance.

Deciding to investigate

When Monitor becomes aware of a breach, we will consider how to proceed in accordance with our prioritisation principles. The prioritisation principles that we use when deciding whether or not to open cases are set out in separate guidance (see Monitor's *Enforcement Guidance*).

Our prioritisation principles mean that we make decisions by weighing up the costs and benefits of a particular course of action. Factors we expect to consider include: the likely direct and indirect benefits to health care users, the likelihood of success, and the likely cost of resources needed to take that particular action.

We intend to apply our prioritisation principles to decisions not only about whether to begin a case, but also whether to continue with them once under way. We will also apply the framework to decisions relating to which course of enforcement action to take. We apply the framework to ensure we make best use of the resources available to us.

2.5 Process for conducting cases

We set out the general procedures that we intend to follow when conducting a case that may result in us taking formal enforcement action in separate guidance (see Monitor's *Enforcement Guidance*).

There is no specific time period within which we must complete an investigation of a suspected licence breach. However, we will publish a timetable on the commencement of each case. This will provide the parties involved in any particular case with further details on our expected process and indicative timescales.

We aim to complete an initial assessment of cases within 40 working days. Cases may take longer if they are complex or novel, or where we have difficulty obtaining information that is necessary to make an assessment.

At any point during an investigation, Monitor may close a case without further action if, for example, we consider that there is insufficient evidence of a breach or that a formal investigation should no longer be prioritised.

2.6 Consequences of a licence breach

Our enforcement powers, and the potential consequences of a licence breach, are set out in separate guidance (see Monitor's *Enforcement Guidance*).

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

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

We may also revoke a provider's licence if we are satisfied that the provider has failed to comply with a licence condition.

2.7 Informal advice

We will provide informal advice to parties who have queries or concerns about how the licence conditions are likely to be applied in certain circumstances.¹²

Informal advice will generally be given orally by the Director of the Cooperation and Competition Directorate of Monitor or other senior members of staff in that directorate.

To provide informal advice, we will need information about why the party thinks there may be a concern. Although submissions are not expected to be extensive, the quality and accuracy of our informal advice will, to a large extent, reflect the quality of information provided. Monitor recommends that parties provide clear, full and accurate information in the context of requests for informal advice.

Monitor will not have tested the information provided by the parties externally. Informal advice should be kept confidential and should not be used by the recipient as advice on which third parties can rely. Correspondence between Monitor and the party requesting informal advice must also be kept confidential and not forwarded outside the party's organisation. We will not disclose informal advice to any other party, but may permit parties to share the advice with other parties including the Department of Health with our express, prior, consent. If a party receives informal advice and then discloses it to third parties without Monitor's express consent, we will consider whether it is appropriate to provide informal advice to the party which made the disclosure in future.

There is no administrative timetable for the provision of informal advice, but we will endeavour to accommodate parties' timeframes as much as possible.

Informal advice by us is not binding on Monitor and is not a substitute for Monitor's assessment of a matter once it has formally initiated a case. To ensure resources are used effectively, we also reserve the right not to provide informal advice.

If you are seeking informal advice (or simply wish to discuss whether to request informal advice), in the first instance, please refer to the contact details on our website.

¹² We will also provide informal advice on matters relating to the application of the Competition Act 1998, and relevant to our concurrency powers. See: Monitor, *Guidance on the application of the Competition Act 1998 in the health care sector*, draft for consultation, April 2013, available at: <http://www.monitor-nhsft.gov.uk/node/2512>

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

Patient choice lies at the heart of the NHS. Everyone who is cared for by the NHS in England has formal rights to make choices about the services that they receive.¹³ In and of itself, being able to choose a provider can give direct benefits to patients. Effective patient choice can also be a key source of competitive pressure on providers and can provide incentives for higher quality of services and more efficient provision of care than would otherwise be the case. For choice to be effective, however, patients need to be well informed about the choices that are available to them. They need to know when they have choices, what choices are available, and how the different options compare.

Licence Condition C1 (the choice licence condition) supports patients' rights to make choices. In particular:

- Clause 1 of the licence condition requires the licensee to notify and make information available to patients wherever a patient has a choice of provider under the NHS Constitution or a choice that has been conferred locally by a commissioner;
- Clause 2 of the licence condition requires the licensee to ensure that any information or advice made available is not misleading where patients have a right to a choice of provider;
- Clause 3 of the licence condition requires the licensee to ensure that any information or advice made available does not unfairly favour one provider over another and assists patients in making well-informed choices between providers of treatments or other health care services; and
- Clause 4 of the condition prohibits the licensee from offering or giving inducements to refer patients or commission services.¹⁴

The following sections explain how Monitor expects to interpret these obligations.

3.1 Obligation to notify and make information available to patients who have a choice of provider

This section sets out how Monitor will interpret the licensee's obligation to notify and make information available to patients who have a choice of provider.

Which patient choices are captured by the choice licence condition?

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

The **NHS Constitution**¹⁵ gives patients the right to make choices about their NHS care.¹⁶ It gives patients the right to choose the organisation that provides their NHS care when

¹³ Information about patients' right to choice can be found on 'NHS Choices'. See, in particular: <http://www.nhs.uk/choiceintheNHS/Rightsandpledges/Pages/Rightsandpledgeshome.aspx>

¹⁴ Licence Condition C1: the right of patients to make choices is set out in full in the Annex.

they are referred for their first outpatient appointment for elective care.¹⁷ This right has also recently been extended to elective referrals for mental health services. Patients also have a right to choose which consultant will be in charge of their treatment (or which professional, if they need to see a mental health professional as an outpatient).¹⁸

The NHS Constitution also gives patients the right to access services within maximum waiting times, or, where this is not possible, the NHS must take all reasonable steps to offer patients a range of alternative providers. The waiting times are as follows:

- a maximum of 18 weeks from referral to see a consultant, if treatment is not urgent;¹⁹ and
- a maximum of two weeks from referral for urgent referrals to a cancer specialist where cancer is suspected.²⁰

Accordingly, we would also expect patients to be offered a choice of alternative provider by a licensee if waiting times exceed these thresholds.

If patients' rights to choice are extended under the NHS Constitution in future, then these rights would also be protected under the choice licence condition.

Choice of provider may also be **conferred locally by commissioners**. This extension of choice is being phased in over time under the Any Qualified Provider (AQP) scheme.²¹ The range of services where choice is conferred locally is expected to evolve over time. Different choices may be available in different areas.

We expect licensees to engage with those responsible for commissioning locally so that they are aware of the services where choice has been conferred locally.

An initial point of reference for licensees is the AQP Resource Centre developed and maintained by the Department of Health. This includes an interactive map and service listing which aims to clarify where patient choice of provider has been, or soon will be conferred locally by commissioners.²²

¹⁵ *The NHS Constitution and Handbook to the NHS Constitution*, March 2012, available at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_132961. At the time of writing, the NHS Constitution was subject to consultation and was due to be re-issued.

¹⁶ *The NHS Constitution*, page 7.

¹⁷ *The Handbook to the NHS Constitution*, page 51. There are some exceptions. Persons excluded: persons detained under the Mental Health Act 1983, military personnel, and prisoners. Services excluded: where speedy diagnosis and treatment is particularly important (e.g.: emergency attendances/admissions, attendances at a Rapid Access Chest Pain Clinic under the two-week maximum waiting time, and attendance at cancer services under the two-week maximum waiting time), maternity services, and mental health services.

¹⁸ These rights are underpinned by *The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012*. See: <http://www.legislation.gov.uk/ukxi/2012/2996/regulation/39/made>

¹⁹ Non-medical consultant-led mental health services and maternity services are excluded from this right.

²⁰ This excludes non-medical consultant-led mental health services and maternity services.

²¹ Information on AQP, and the initial roll-out of patient choice of any qualified provider can be found here: <http://healthandcare.dh.gov.uk/any-qualified-provider-2/>

²² The AQP map is available here: <https://www.supply2health.nhs.uk/AQPResourceCentre/AQPMap/>

The types of choices that we expect the licence condition to apply to include where a patient is:

- referred by an acute provider to a service where choice has been conferred locally;
- referred by a referral management centre for their first outpatient appointment or to a service where choice has been conferred locally;
- referred by a provider in the community for their first outpatient appointment; and
- re-referred by an acute provider because of an incorrect referral for a first outpatient appointment.

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

The choice licence condition requires a licensee:

- to notify patients whenever they have a right to a choice of provider under the NHS Constitution or a choice of provider conferred locally by commissioners; and
- to tell patients where information about that choice can be found.

Both of these actions should be undertaken *before* the patient is referred. This means that, at every point that the patient has a choice of provider, the obligation to notify and make information available to the patient rests with the provider making the referral and not the provider to whom the patient is referred.

The information source(s) that the licensee tells the patient about should be, as far as practicable, designed to assist that patient in making a well-informed choice between providers of treatments or other health care services.

The information sources that the licensee tells the patient about can be sources developed and maintained by parties other than the licensee (e.g., sources developed by the Department of Health – see further below).

When telling patients about particular information sources, licensees should consider the format and accessibility needs of different sectors of the population. It is important that information sources are suitable and appropriate to the individual. Information sources that rely on medical jargon, for example, should generally be avoided. Licensees should also consider the needs of those with learning disabilities, those with hearing or sight impairments and non-English speaking people. Where suitable formats are not readily available, the licensee should tell the patient where they can obtain additional support. This might include translation services for patients with specific language or communication difficulties. Alternatively, many community organisations exist to meet the needs of people who are vulnerable or disadvantaged or, because of cultural issues, face barriers when accessing health care services.

These requirements will be applied in the context of legislative arrangements that place responsibility for promoting, publicising and enabling patient choice on commissioners. In particular, we will be mindful that:

- the Act places a duty on clinical commissioning groups to promote the NHS Constitution and requires them to act with a view to enabling patients to make choices with respect to aspects of health care services provided to them;
- the NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 place a duty on commissioners to make arrangements to ensure that patients are offered a choice of provider in respect of a first outpatient appointment, and that the availability of choice is publicised and promoted; and
- the NHS Constitution gives patients a right to information when they have a legal right to choice. It also commits the NHS to offering patients easily accessible, reliable and relevant information to support them to make choices. The Department of Health is driving much of the development of this information (e.g., NHS Choices (www.nhs.uk) and Choose and Book²³), but other sources are also available. The Care Quality Commission, for example, publishes information about the performance and service quality of NHS services and a number of third parties provide web-based information on providers.

Accordingly, the choice licence condition does not require licensees to prepare independent materials or sources to assist patients to make well-informed choices. Neither however does the choice licence condition prevent licensees from doing so. (See also discussion relating to advertising and promotional activity in Section 3.3.)

The choice licence condition does not require licensees to provide advice to the patient on making a choice, although neither does it prevent a licensee from doing so. Where the licensee provides advice to patients on making a choice, the advice must not mislead or unfairly favour one provider over another and must be presented in a way that assists patients in making well-informed choices between providers of treatments or other health care services.

In considering whether a licensee has complied with the requirement to notify and direct information to patients who have a choice of provider under the NHS Constitution or a choice of provider conferred locally by a commissioner, Monitor may consider, for example:

- *Whether the licensee has taken active steps to ensure that all relevant staff are familiar with the contents of the NHS Constitution (including any updates) affecting patient choice, and are familiar with the licensee's obligations under the choice licence condition. This could include mandatory compliance training for all relevant staff.*
- *Whether the licensee has sought to engage with commissioners from time to time to confirm where patient choice of provider has been conferred locally.*

²³ Choose and Book is a national electronic referral service which gives patients a choice of place, date and time for their first outpatient appointment in a hospital or clinic. Further information about choose and book is available here: <http://www.chooseandbook.nhs.uk/>

- *Whether the licensee, before referring a patient who has a choice of provider under the NHS Constitution or conferred locally by commissioners, has sought to notify that patient of their right to choice of provider.*
- *Whether the licensee makes information resources concerning patient choice of provider widely known to patients.*
- *Whether the licensee utilises and/or supports patients to utilise Choose and Book to book their first outpatient appointment when they have a choice of provider under the NHS Constitution.*
- *Whether the licensee has engaged patients in discussions and decisions about their health care when they have a choice of provider under the NHS Constitution or conferred locally by commissioners.*
- *Whether the licensee has taken reasonable steps to ensure that the format and accessibility of any information about patient choice of provider made available by the licensee is appropriate to the individual needs of the patient. This could include referring the patient to local support services for vulnerable or disadvantaged patients, if and as appropriate.*
- *Where information or resources about patient choice of provider is found to be inaccurate, incomplete or otherwise lacking, whether the licensee has taken active steps to give feedback to the organisation responsible for preparing the information (e.g., the Department of Health, the NHS Commissioning Board, or local commissioners).*

3.2 Obligation to ensure that information and advice is not misleading and does not unfairly favour one provider over another

This section sets out how Monitor will interpret the licensee's obligation to ensure that information and advice about patient choice of provider made available by the licensee is not misleading and does not unfairly favour one provider over another.

When will information and advice be considered to be “misleading”?

Monitor's interpretation of the term misleading will be informed by analogous regimes seeking to protect consumers from misleading practices and/or information in other sectors. This includes the *Consumer Protection from Unfair Trading Regulations 2008* and *Control of Misleading Advertisements Regulations 1988*.

In particular, we will consider information and advice about patient choice of provider made available by the licensee to be misleading if it is false or, in any way, including its presentation, it deceives or is likely to deceive the patient to whom it is addressed and if, by reason of its deceptive nature, causes or is likely to cause the patient to make a choice he or she would not have taken otherwise.

Information and advice made available by the licensee should not mislead either directly or by omission. Information should not be hidden from the patient or presented in an unclear, unintelligible, ambiguous or untimely manner. All material exclusions, limitations,

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

Neither should information or advice made available by the licensee mislead by implication, distortion, exaggeration or undue emphasis.

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

In considering whether a licensee has complied with the requirement that information and advice should not be misleading, Monitor may consider, for example:

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

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

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

In considering whether a licensee has complied with the requirement that information and advice should not unfairly favour one provider over another, Monitor may consider, for example:

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

3.3 Obligation not to offer or give inducements to refer patients or commission services

This section sets out how Monitor will interpret the obligation on licensees not to offer or give inducements to refer patients or commission services.

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

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

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

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

The choice licence condition does not prohibit offers that are not intended as inducements or rewards and where these are likely to be in the interests of people who use health care services. This includes common training events or events to provide a forum for the discussion of improvements in services to patients.

The offering of reasonable hospitality is permitted where this is offered at purely professional or scientific events where it is subordinate to the main scientific objective of the event and is offered only to clinicians, health professionals, commissioners or their relevant administrative staff. These events must be held in appropriate venues conducive to the main purpose of the event. The level of subsistence offered must be appropriate and not out of proportion to the occasion. The costs involved must not exceed the level that the recipients would normally choose when paying for themselves.

Promotional aids, whether related to a particular service or of general utility, are also permitted provided that the promotional aids are inexpensive and relevant to the practice of the recipient's profession or employment. Promotional aids are more likely to be acceptable if they benefit patient care. Items of general utility that are acceptable promotional aids for health professionals, commissioners, or their administrative or relevant staff include stationery items, such as computer accessories for business use, pens, paper pads, diaries and calendars, and clinical items such as nail brushes, surgical gloves, tongue depressors, tissues and peak flow meters.

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

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

Any advertising or promotional activity should be compliant with the Advertising Standards Authority's codes.²⁴ These codes are administered by the Advertising Standards Authority, and apply to broadcast advertising, non-broadcast advertising, sales promotions and direct marketing. The codes are intended to ensure that advertising and promotional activity does not mislead, harm or offend. They also require advertisements to be socially responsible and compatible with fair competition.

Licensees' advertising and promotional content will also be subject to the choice licence condition to the extent that it contains information and advice about patient choice of

²⁴ The Advertising Standards Authority administers two codes: *The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing* (the CAP Code) and *The UK Code of Broadcast Advertising* (the BCAP Code) (together, the Codes). These Codes are available at: <http://www.cap.org.uk/The-Codes/CAP-Code.aspx>

provider. As such, when engaging in advertising or promotional activity, licensees must ensure that any information or advice about patient choice of provider contained in advertising or promotional material is not misleading, does not unfairly favour one provider over another, and is presented in a manner that helps patients to make well-informed choices. (How Monitor expects to interpret “misleading” and “unfairly favour one provider over another” is explained in Section 3.2.)

4 Licence Condition C2: Competition Oversight

Under the Act, we must exercise our functions with a view to preventing anti-competitive behaviour in the provision of health care services which is against the interests of people who use health care services.

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

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

The following sections explain how Monitor expects to apply these requirements.

4.1 What types of behaviour are covered by the competition oversight licence condition?

This section describes the types of anti-competitive behaviour to which the competition oversight licence condition may apply.

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

It is not necessary for an agreement to be legally binding for the competition licence condition to apply. Informal agreements and understandings, whether written or verbal, are also subject to the competition licence condition. Neither does there have to be a physical meeting of the parties for an agreement to be reached: an exchange of letters or telephone calls can be sufficient.

If a licensee has played only a limited role in the setting up of an agreement, has not been fully committed to its implementation, or has participated in the agreement only under pressure from other parties, the licensee can still be party to the agreement.²⁵

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

²⁵ Where an agreement is entered into unwillingly, this may influence Monitor's course of enforcement action.

4.2 When will behaviour be anti-competitive and against the interests of people who use health care services?

This section sets out how Monitor will assess whether behaviour is anti-competitive and against the interests of patients.

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

- anti-competitive behaviour might limit the options from which patients and commissioners can choose;
- anti-competitive behaviour could prevent the emergence of new or improved services which fill gaps between existing services; and
- anti-competitive behaviour may prevent the introduction of new providers with experience in providing more flexible personalised care.

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

We recognise that behaviour that looks like an attempt to restrict patient choices or limit competition, may well be motivated by good intentions – for example, motivated by a desire to protect the local health economy or otherwise promote the interests of patients. However, such motivation does not necessarily imply that behaviour will always be in the interests of health care users. The actual effect of behaviour on health care services users therefore requires assessment.

In assessing whether anti-competitive behaviour is against the interests of people who use health care services, Monitor will carry out a cost/benefit analysis.

Monitor will first consider whether, by preventing, restricting or distorting competition, behaviour may give rise to material adverse effects (costs) for health care users.

If we find that behaviour gives rise to material costs, we will consider whether it will also give rise to benefits that could not be achieved without the restriction on competition.²⁶

Monitor will then weigh the benefits and costs against each other. If the behaviour gives rise to sufficient benefits to outweigh the costs, and those benefits could be attained without the restriction on competition, it will not be against the interests of people who use health care services. Conversely, if the costs resulting from the behaviour outweigh the benefits, or if the restrictions on competition are not necessary to achieve the benefits, the conduct will be against the interests of people who use health care services.

This analysis is described in more detail below.

²⁶ Where Monitor finds that there are no material costs to people who use health care services arising from an agreement or conduct, it will not necessarily analyse health care service user benefits ascribed to the conduct.

Assessing costs

Competition between providers, whether to attract patients or win commissioner contracts, can incentivise them to improve the services that they deliver – including both the quality of services and the efficiency with which they are provided.

In assessing the costs of anti-competitive behaviour, Monitor will consider whether the behaviour reduces the intensity of competition between providers such that it is likely to have a material adverse effect on users of health care services.

By restricting competition, licensees' conduct may remove or materially reduce the incentives on providers to improve the services they provide.

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

- the nature of the agreement or conduct in question;
- the nature of the restriction on competition;
- the legal and economic context relating to the particular service or services likely to be affected by the agreement or conduct;
- the proportion of a particular service or services likely to be affected by the agreement or conduct; and
- the duration of the conduct or its likely effects.

Agreements and other arrangements which involve a licensee agreeing with a competitor or competitors not to compete are likely to lead to material adverse effects on users of health care services.²⁷ Providers will be competitors if they ordinarily compete with one another to attract patients or commissioner funding (or are likely to do so in future). Such agreements or arrangements are known as collusion. Collusion will generally be prohibited because it rarely generates benefits that are sufficient to offset the material adverse effects on service users.

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

Assessing benefits

Where Monitor identifies material costs arising from the behaviour, we will consider whether the behaviour also gives rise to material benefits to people who use health care services.

Benefits may consist of improvements in quality (including clinical and non-clinical improvements) or improvements in efficiency that lead to better value for money for people who use health care services:

²⁷ An agreement need not be explicit – i.e., achieved through communication and agreement between the parties involved. It may also be achieved through an implicit understanding between the parties, without any formal arrangements.

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

Monitor expects the licensee(s) whose agreement or conduct is in question to identify and describe the benefits to health care service users that arise from their agreements or conduct and to provide any relevant evidence in support (e.g. business plans, board decisions).

Where benefits are asserted by the licensee, Monitor expects them to provide robust evidence as to the predicted improvements in outcomes to their specific patient population or the subset of that population that will accrue the asserted benefit.

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

- the materiality of the benefits submitted;
- the period of time over which the benefits are likely to be realised; and
- the robustness of the analysis and evidence that supports the claimed benefits (in considering clinical benefits, Monitor will have particular regard to supporting research and evidence regarding clinical improvements).

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

To the extent that submitted benefits involve improvements in efficiency, the licensee must also demonstrate that these efficiencies will lead to better value for money for health care users. In other words, the licensee must demonstrate that a reasonable share of those efficiencies will be passed on to health care users. This might be through lower prices to commissioners or increased financial surpluses that will be reinvested into services for health care users.

Any restrictions on competition must also be necessary to achieve the benefits, if those benefits are to be taken into account. Monitor will therefore consider the extent to which the benefits claimed could be realised without the restrictions on competition.

A restriction on competition may be regarded as necessary to the attainment of the benefits claimed where the benefits can be achieved more quickly or more cost effectively as a result of the restriction on competition. In these circumstances, Monitor

will consider the extent to which achieving the benefits more quickly or cost-effectively outweighs the cost resulting from the reduction in competition as part of its cost/benefit analysis (see next section).

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

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

Weighing the costs and benefits

Where both benefits and costs are identified, Monitor will consider whether the material benefits of the conduct outweigh the costs.

This is not a purely mathematical exercise. This is because costs and benefits may not always be quantifiable or quantifiable in comparable units. The weighing of costs and benefits may therefore include a qualitative assessment.

Monitor will publish worked examples of how we would expect to apply the competition licence condition to various agreements and provider conduct in due course.

Role of commissioners

Providers should be mindful that they are not protected from the possibility of a licence breach if a commissioner initiates or encourages them to behave in a certain way or participates in an arrangement that could rise to a breach. Nor can providers justify breaches on the basis that they were asked or encouraged by a commissioner to behave in a certain way.

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

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

- *Whether a licensee has agreed with another provider to allocate certain services, patients, groups of patients or patient flows between themselves. This includes allocating patients in particular geographical areas or patients requiring particular health care services between themselves.*

- *Whether a licensee has agreed with another provider the price at which services will be provided (in situations where the national tariff does not already establish the price).*
- *Whether a licensee has agreed with another provider to collude on their responses to commissioners' invitation to tender. This includes agreeing not to bid for certain contracts (e.g., contracts relating to particular commissioners, services, patient groups, or geographic areas). It can also include discussing and/or agreeing the content of individual responses to the invitation to tender, including price or service quality aspects.*
- *Whether a licensee has agreed with other providers not to cooperate with a particular commissioner or provider. This might be through an umbrella organisation such as a representative body or professional group, and can include collectively agreeing not to supply services to a particular commissioner or another provider.*
- *Whether a licensee has agreed with another provider to share commercially sensitive information such as each other's future intentions regarding forthcoming tenders and/or non-tariff pricing. This includes sharing information through an umbrella organisation such as a representative body or professional group.*
- *Whether a licensee participates in meetings which provide a forum for members to discuss aspects of upcoming tenders or non-tariff pricing, or reaching agreements on referral patterns or areas of specialisation in relation to other health care services.*
- *Whether a licensee, who has control over an input that is essential to the provision of a health care service, refuses to supply that input to another provider without objective justification.*
- *Whether a licensee delays, or in some other way clearly limits the quality of products or services that it is obligated to supply to another provider without objective justification. This might include delaying the transfer of patient information or providing poor quality information on patient referral.*
- *Whether a licensee requires a commissioner or another provider to purchase a particular service exclusively or to a large extent from that provider without objective justification.*
- *Whether a licensee requires a supplier of an input to sell exclusively or to a large extent from that provider without objective justification.*
- *Whether a licensee makes a commissioner's purchase of a particular service conditional on the purchase of another without objective justification.*
- *Whether a licensee makes a contract with a commissioner or another provider conditional on factors that have nothing to do with the subject of that contract. This*

can include imposing conditions in contracts with commissioners which restrict commissioners' ability to contract with other providers or sponsor new treatments, services or providers.

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

The Act sets out an explicit focus on the importance of integrated care and gives Monitor a duty to enable integrated care where this improves quality or efficiency, or reduces inequality. Our provider licence includes a condition about integrated care that will enable us to take actions where there are problems with the delivery of integrated care.

Integrated care is synonymous with person-centred coordinated care. From a health care service user's perspective, integrated care is *"planned with people who work together to understand me and my carer(s), put me in control, co-ordinate and deliver services to achieve my best outcomes."*²⁸

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

A perceived risk of breaching the rules relating to competition is sometimes cited as one of the barriers to implementing processes aimed at achieving integrated care.²⁹ However there are a number of reasons why the delivery of integrated care need not be at odds with competition rules.

As set out earlier in the guidance, competition in the NHS typically takes two forms. The first is competition based on patient choice, where patients can choose between multiple providers of the same or similar services and providers compete with one another to attract patients. The second is competition through competitive tendering for the right to provide a particular service to patients. A commissioner may choose a single or limited number of providers, and patient choice may be limited or non-existent, but providers will compete with one another to win the commissioner's contract. Competition between providers, whether to attract patients or to win contracts for tendered services, incentivises providers to improve the services that they deliver.

Competition takes place between existing and potential providers of the *same* or *similar* services. Integrated care typically involves the seamless delivery of *different* services.

²⁸ This wording from the perspective of a service user is in draft form and subject to consultation (at the time of writing). It was developed by National Voices, on behalf of the NHS Commissioning Board in partnership with the Local Government Association and with support by the Department of Health and Monitor. See: <http://www.commissioningboard.nhs.uk/2012/12/11/narrative-integrated-care/>

²⁹ For example, this barrier was identified in the Future Forum report to the Government. See: <http://healthandcare.dh.gov.uk/forum-report/>

With careful design therefore, many models for the delivery of integrated care can be implemented in a way that does not reduce competition between providers.

Arrangements involving non-competitors³⁰ working together to deliver integrated care, for example, are unlikely to raise competition concerns.³¹ Similarly, if integrated care is brought about through improvements in the handover of patients, including coordination and sharing of patient records and case history, this alone is unlikely to restrict competition or raise competition concerns. Where it is clear that an initiative does not give rise to competition concerns, or appear to operate against the interests of patients because it is anti-competitive, it is unlikely that Monitor will become involved to review the initiative.

Moreover, choice and competition can help facilitate the delivery of integrated care. Choice and competition incentivises providers to improve the services that they deliver, including taking steps to deliver care that is integrated. By delivering care that is integrated, the provider can make its services more attractive to patients and commissioners. A provider, for example, might respond to competition from another provider for GP referrals by improving the patient pathway to and from the GP practice (for instance, through improved discharge summaries and electronic submission of reports to the GP practice to speed up waiting times). Similarly, a commissioner can use a competitive tender to identify the most innovative and high quality service provider (or group of providers) to deliver an integrated care pathway (e.g., a care pathway involving the coordination of the range of services required for a specific long-term condition).

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

Monitor will publish worked examples of how we would expect to apply the competition licence condition to integrated care arrangements are provided in due course.

We intend to publish further details on how choice, competition and integrated care can work together to improve services for patients in our forthcoming FAQs on integrated care.

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

Monitor is also happy to provide informal advice to any party who has a competition query relating to integrated care. Relevant contact details are provided on our website.

³⁰ Providers will be non-competitors if they do not (and will not likely in future) compete with one another to attract patients or commissioner funding.

³¹ A key exception is where a model places a provider in the position of both referring patients and of competing for referrals of these same patients.

Annex – the choice and competition and the provision of integrated care licence conditions

Condition C1- The right of patients to make choices

1. Subsequent to a person becoming a patient of the licensee and for as long as he or she remains such a patient, the licensee shall ensure that at every point where that person has a choice of provider under the NHS Constitution or a choice of provider conferred locally by Commissioners, he or she is notified of that choice and told where information about that choice can be found.
2. Information and advice about patient choice of provider made available by the licensee shall not be misleading.
3. Without prejudice to paragraph 2, information and advice about patient choice of provider made available by the licensee shall not unfairly favour one provider over another and shall be presented in a manner that, as far as reasonably practicable, assists patients in making well informed choices between providers of treatments or other health care services.
4. In the conduct of any activities, and in the provision of any material, for the purpose of promoting itself as a provider of health care services for the purposes of the NHS the licensee shall not offer or give gifts, benefits in kind, or pecuniary or other advantages to clinicians, other health professionals, Commissioners or their administrative or other staff as inducements to refer patients or commission services.

Condition C2 – Competition oversight

1. The licensee shall not:
 - a) enter into or maintain any agreement or other arrangement which has the object or which has (or would be likely to have) the effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS, or
 - b) engage in any other conduct which has (or would be likely to have) the effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS,

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

Condition IC1 – Provision of integrated care

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

2. The Licensee shall not do anything that reasonably would be regarded as against the interests of people who use health care services by being detrimental to enabling its provision of health care services for the purposes of the NHS to be integrated with the provision of health-related services or social care services by others with a view to achieving one or more of the objectives referred to in paragraph 4.
3. The Licensee shall not do anything that reasonably would be regarded as against the interests of people who use health care services by being detrimental to enabling it to co-operate with other providers of health care services for the purposes of the NHS with a view to achieving one or more of the objectives referred to in paragraph 4.
4. The objectives referred to in paragraphs 1, 2 and 3 are:
 - (a) improving the quality of health care services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision,
 - (b) reducing inequalities between persons with respect to their ability to access those services, and
 - (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.
5. The Licensee shall have regard to such guidance as may have been issued by Monitor from time to time concerning actions or behaviours that might reasonably be regarded as against the interests of people who use health care services for the purposes of paragraphs 1, 2 or 3 of this Condition.

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