

Consultation on guidance on the application of the Competition Act 1998 in the health care sector

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Monitor has concurrent, or shared, powers with the Office of Fair Trading to enforce provisions of the Competition Act 1998 and the Treaty on the Functioning of the European Union in relation to the provision of health care services in England. We refer to these laws as competition law in this document. This guidance explains how we will use these powers.

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Monitor's role

Monitor's main duty is to protect and promote the interests of patients. We do this by promoting the provision of health care services which is effective, efficient and economic, and which maintains or improves the quality of services.

We assess NHS trusts for foundation trust status and ensure that foundation trusts are well led, in terms of both their quality and finances. We license foundation trusts (other eligible providers of NHS services will be licensed from April 2014) and we:

- set prices for NHS-funded care in partnership with the NHS Commissioning Board;
- enable integrated care;
- safeguard choice and prevent anti-competitive behaviour which is against the interests of patients; and
- support commissioners to protect essential health services for patients if a provider gets into financial difficulties.

Further information on our role can be found on our website: www.monitor.gov.uk

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 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.

Introduction

1. The Health and Social Care Act 2012 (the Act) gives Monitor concurrent, or shared, powers with the Office of Fair Trading (OFT) to enforce provisions of the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union (TFEU) in relation to the provision of health care services in England. We refer to these laws as competition law in this document. This guidance explains how we will use these powers.¹²
2. By investigating anti-competitive behaviour, we will seek to ensure that patients have access to high quality health care services. Preventing anti-competitive behaviour also ensures that providers can compete in a fair environment. This helps to ensure that providers are rewarded based on the quality of services they provide which may incentivise them to make long term investments and to improve services further for patients.
3. In applying our concurrent powers, we will draw upon the approach of the OFT as set out in guidelines (see <http://www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/> for a list of the OFT's guidelines as to how the OFT and sector regulators enforce CA98 and deal with particular matters).
4. As we gain more experience in dealing with potential breaches of competition law we will update our guidance. From time to time we may find it necessary to deviate from this guidance, e.g. if a case raises particularly novel issues. When we do this, we will acknowledge that we have deviated from our guidance and will set out our reasons for doing so.
5. The remainder of this guidance is structured as follows:
 - Monitor's concurrent powers;
 - Monitor's investigation procedures in competition cases;
 - Monitor's enforcement powers in competition cases;
 - Monitor's approach to publishing decisions;
 - Appeals of Monitor's decisions;
 - Assessing anti-competitive practices in the health sector; and
 - Assessing abuse of dominance in the health sector.

Feedback on this draft guidance

Monitor welcomes feedback on the views expressed in this guidance. Please submit any suggestions and your comments by **5pm, Tuesday 25 June 2013**. There are a number of ways to send us feedback.

¹ This guidance is not a substitute for the TFEU nor for regulations made under it. Neither is it a substitute for European Commission notices and guidelines. Furthermore, this guideline is not a substitute for CA98 and the regulations and orders made under that Act. It should be read in conjunction with these legal instruments, Community case law and United Kingdom case law. Anyone in doubt about how they may be affected by the TFEU or the CA98 should seek legal advice.

² 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 website will always display the latest version of the guidance.

By email

You can email your response to cooperationandcompetition@monitor.gov.uk

By post

Send your response to: Guidance on the application of the Competition Act 1998 in the health care sector, Monitor, Cooperation and Competition Directorate, Wellington House, 133-155 Waterloo Road, London, SE1 8UG.

Confidentiality

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) / 0207 972 4610 (from 13 April 2013) or luke.dealtry@monitor.gov.uk.

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

Our concurrent powers

6. **Anti-competitive practices:** competition law prohibits agreements³ between undertakings, decisions by associations of undertakings and concerted practices that have the object or effect of preventing, restricting or distorting competition. The term undertaking is described in OFT guidance '[Agreements and Concerted Practices](#)' (OFT 401); and '[Assessment of market power](#)' (OFT 415).

On the specific question of whether public bodies can be undertakings and subject to UK and European competition law, see '[Public bodies and competition law: A guide to the application of the Competition Act 1998](#)' (OFT 1389).

7. **Abuse of dominance:** competition law also prohibits conduct⁴ by one or more undertakings which amounts to the abuse of a dominant position in a market.
8. Anti-competitive practices and abuse of dominant position will be discussed in further detail later in this guidance.
9. Using our competition law powers, we can:
- impose interim measures to prevent serious and irreparable damage or protect the public interest;
 - carry out investigations, both on our own initiative and in response to complaints, including requiring the production of documents and the provision of information, and searching premises;
 - impose financial penalties, taking account of the statutory guidance on penalties issued by the OFT;
 - give and enforce directions to bring an infringement to an end;
 - accept commitments that are binding on an undertaking;
 - offer information and confidential informal advice on how the prohibitions in CA98, Article 101 and/or Article 102 apply in relation to the provision of health care services in England; and
 - publish written guidance in the form of an opinion where a case raises novel or unresolved questions about the application of Article 101, Article 102, the Chapter I prohibition and/or the Chapter II prohibition in the United Kingdom, and where we consider there is an interest in issuing clarification for the benefit of a wider audience.
10. Our concurrent powers to apply competition law are not limited to NHS-funded services but apply to all health care services in England.

³ See the Chapter I prohibition contained in section 2(1) of CA98 which applies where trade within the UK may be affected; and Article 101 of the TFEU which applies where trade between Member States may be affected.

⁴ See the Chapter II prohibition contained in section 18(1) of CA98 which applies if the dominant position is held within the UK and the conduct in question may affect trade within the UK; and Article 102 of the TFEU which applies to conduct within the internal market or a substantial part of it in so far as it may affect trade between Member States.

Our investigation procedures in competition cases

Allocation of cases

11. While cases directly relating to suspected anti-competitive conduct in relation to the provision of health care services in England will generally be dealt with by us, competition law is also enforced by the OFT. 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 on other sectors, and recent experience of dealing with the parties, products and services concerned.

Prioritisation principles

12. When we become aware of a possible 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 our [Draft Enforcement Guidance](#)).
13. Our prioritisation principles explain how we weigh up the costs and benefits of a particular course of action in deciding whether to act. 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.
14. We intend to apply our prioritisation principles to decisions not only about whether to begin a case, but also whether to continue with a case once it is underway. 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 the best use of the resources available to us.
15. As part of this process, Monitor will also consider whether the case meets the thresholds set in CA 98 for Monitor to have the power to investigate. This requires considering whether there are reasonable grounds for suspecting that Article 101, Article 102, the Chapter I prohibition and/or the Chapter II prohibition of the CA98 have/has been infringed, and the potential economic effect of the agreement or conduct in the particular case.

Relationship between competition law and the choice and competition licence conditions

16. Some types of behaviour may fall within the scope of the provider licence conditions on choice and competition as well as competition law. We will decide at an early stage which powers we think are most appropriate and will advise interested parties accordingly. Our general approach is that we will use the most effective, efficient and expeditious solution where a problem is found to exist. We have set out how we intend to take action under the provider licence in separate guidance [here](#).

Making a complaint

17. We may commence an investigation into a possible breach of competition law on our own initiative or in response to a complaint. We expect to become aware of potential breaches in a number of ways: e.g. through 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.
18. A complaint to us concerning a possible breach of competition law should be supported by as much factual information as possible to allow us to make an accurate and prompt assessment as to whether there are reasonable grounds for suspecting a breach. All complaints must also contain (as a minimum) the information set out below. General allegations that a complainant considers conduct to be inconsistent with competition law will not typically be sufficient for Monitor to commence an investigation. We have published further guidance on making complaints to us about issues relating to patient choice and competition which can be found [here](#).
19. A complaint should at least include the following details:
- name, address, telephone number and email address of the complainant;
 - name and job title of the person(s) authorised to represent the organisation or person raising the complaint;
 - contact details for the party that is the subject of the complaint (the respondent);
 - a statement of why, in the opinion of the complainant, the conduct in question is inconsistent with one or more of the instruments governing choice and competition in the health care sector and any supporting evidence, where available;
 - an explanation of how the complainant's business has been affected by the alleged activity and/or how people who use health care services have been adversely affected by the alleged activity;
 - a description of the services involved;
 - an outline of the relationship between the complainant and the respondent; and
 - a chronology outlining relevant events.
20. Complaints should be submitted to cooperationandcompetition@monitor.gov.uk or posted to:

Cooperation and Competition Directorate
Monitor
Wellington House
133-135 Waterloo Road
London
SE1 8UG

Informal advice

21. Anyone can approach us informally to seek informal advice about the application of our concurrent powers or to engage in discussions with us as a precursor to making a complaint about a possible breach of competition law. Resources permitting, we will endeavour to give an initial view as to whether we would be likely to investigate the matter further if a formal complaint were to be made. If you wish to seek informal advice please refer to the contact details on Monitor's website.
22. We have a range of information gathering powers under competition law including the power to require any person to produce specified document(s) and/or information which relates to any matter relevant to the investigation, and the power to enter premises in connection with an investigation in certain circumstances. A person is guilty of an offence if he/she fails to comply with a requirement imposed on him/her under our information gathering powers.
23. Before making a decision that there has been a breach of competition law, we will give written notice to the person(s) likely to be affected by the proposed decision and give that person(s) an opportunity to make representations. We may, in some circumstances, also allow oral representations to be made.

Our enforcement powers in competition cases⁵

24. We have a number of enforcement powers in cases involving a breach of competition law.

Directions

25. Where we have decided that there has been a breach of competition law, we may give such directions as we consider appropriate to bring the infringement to an end. Directions may include requiring organisations to modify or terminate an agreement, or to modify or cease the conduct in question. We may give directions to such persons as we consider appropriate, and are not limited to giving directions to the infringing parties. Directions may also require positive action, such as reporting to us, or structural changes. The directions must be in writing.
26. If a person fails, without reasonable excuse, to comply with a direction given by us, we may apply to court for an order requiring compliance with the direction.

Interim measures

27. If we have begun an investigation into a potential breach of competition law, but we have not completed our investigation into the matter, we may give interim measures directions pending our final decision. Interim measures directions are temporary directions which

⁵ For further guidance on the application of these principles see '*Enforcement*' (OFT 407).

require certain steps to be taken while an investigation is carried out. Interim measures directions will not affect the final decision.

28. We have power to give interim measures directions if we consider that it is necessary to do so as a matter of urgency for the purpose of:
- preventing serious, irreparable damage to a particular person or category of person; or
 - protecting the public interest.

Commitments

29. We may accept binding commitments from organisations suspected of infringing competition law. We are required to have regard to the OFT's guidance when considering whether to accept commitments offered (See Annexe to OFT '*Enforcement*' (OFT 407)). Commitments may be structural or behavioural in nature, or a combination of both.

30. In accordance with the OFT's guidance, we are likely to consider it appropriate to accept binding commitments only in cases where:

- the competition concerns are readily identifiable;
- the competition concerns are fully addressed by the commitments offered; and
- the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.

31. Once binding commitments have been accepted, we will terminate our investigation into the aspects of the alleged infringement addressed by the commitments. We are not prevented from taking action in relation to competition concerns which are not addressed by the commitments we have accepted.

32. Binding commitments are enforceable by us in the same way as directions.

Penalties

33. We have the power to impose a financial penalty in relation to a breach of competition law. We must have regard to the OFT's guidance (['OFT's guidance as to the appropriate amount of a penalty'](#) (OFT 423)) when determining the appropriate level of a penalty. The OFT or concurrent regulators presently may impose a financial penalty on an undertaking of up to 10 per cent of the undertaking's worldwide turnover.

Leniency

34. The OFT's '*Guidance as to the appropriate amount of a penalty*' (OFT 423) also sets out the OFT's policy and practice on leniency in cartel cases (including, subject to certain conditions, granting total immunity from financial penalties to a participant in cartel activity who is the first to come forward). Where cartel cases are allocated to us under the concurrency arrangements, we will adopt the OFT's approach to leniency.

Publishing decisions

35. The non-confidential version of an infringement decision and a summary of the decision will be published on our website.

Appeals

36. Our decisions under CA98 and the TFEU may be appealed to the Competition Appeal Tribunal. Appeals can be brought by addressees of our decisions and by third parties with a sufficient interest. Appealable decisions include decisions as to whether there has been a competition law infringement; interim measures decisions; and decisions on the imposition of, or the amount of, a penalty⁶.
37. The Competition Appeal Tribunal was created by Section 12 and Schedule 2 to the Enterprise Act 2002 which came into force on 1 April 2003. It is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues.
38. The Competition Appeal Tribunal has wide powers to determine most appeals under competition law on their merits and may:
- confirm or set aside all or part of the decision;
 - remit the matter to us;
 - impose, revoke or vary the amount of any penalty;
 - give such directions, or take such other steps as we could have given or taken; or
 - make any other decision which we could have made.

Assessing anti-competitive practices in the health sector

39. In assessing whether agreements infringe competition law, we will follow the approach set out by the OFT in the guidance '*Agreements and Concerted Practices*' (OFT 401). Monitor will also publish examples of anti-competitive practices in relation to the provision of health care services that may breach the Chapter I prohibition and/or Article 101.
40. The health care sector features a wide range of representative and professional bodies. These organisations play an important role in the sector in terms of representing the interests of members on a range of matters, and can play a role in helping providers improve their effectiveness in the marketplace, for instance by disseminating clinical knowledge and sharing best practices.
41. Decisions by such organisations are also subject to competition law, and the organisations themselves can infringe competition law and be subject to enforcement action. Similarly, agreements entered into by an association or professional group might be construed as an agreement on the part of its members, which means the members could be held accountable for infringements.

⁶ See <http://www.catribunal.org.uk/242/About-the-Tribunal.html#Appeal-under-CA98>

42. Decisions by such organisations are most likely to raise concerns where they lead to the coordination of members' behaviour instead of the members competing with each other. In particular, representative and professional bodies should be mindful that they do not facilitate or provide a forum for anti-competitive behaviour by their members.
43. It is good to keep in mind that where a commissioner initiates or participates in an agreement this does not necessarily protect participating providers or trade associations from the possibility of breaching competition law. Nor can providers justify infringing competition rules simply by claiming that they were encouraged to adopt particular arrangements by a commissioner.

Assessing abuse of dominance in the health sector

44. In assessing whether the conduct of an individual organisation infringes competition law, we will follow the approach set out by the OFT in the guidance '*Abuse of a dominant position*' (OFT 402). Monitor will also publish examples of conduct in relation to the provision of health care services that may breach the Chapter II prohibition and/or Article 102.
45. Conduct by providers may frequently be motivated by good intention. Behaviour that might look like attempts to prevent rival organisations from competing effectively, for example, could be motivated by a desire to promote the interests of patients or protect the local health economy. However, providers should be mindful that such motivation does not necessarily imply that conduct will always be in the interests of patients and/or taxpayers.

Glossary

Abuse of dominance	<p>Conduct may constitute an abuse of dominance if, for example, it consists in:</p> <ul style="list-style-type: none"> • Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions • Limiting production, markets or technical development to the prejudice of consumers • Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage • Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
Anti-competitive practices	<p>The prohibition in Chapter I of CA98 and Article 101 of the TFEU applies to agreements, decisions or practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. This includes agreements, decisions or practices which:</p>

- Directly or indirectly fix purchase or selling prices or any other trading conditions
- Limit or control production, markets, technical development or investment
- Share markets or sources of supply
- Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature according to commercial usage, have no connection with the subject of such contracts.

CA98	Competition Act 1998.
Competition law	For the purposes of this guidance, competition law means Chapter I and Chapter II of the Competition Act 1998 and Articles 101 and 102 of the TFEU.
Concurrent powers	Powers to enforce competition law that may be exercised by both the OFT and sector regulators.
OFT	Office of Fair Trading.
Sector regulator	A regulator responsible for regulating matters (including competition) in a particular sector. Other sector regulators are: the Office of Communications (Ofcom), the Water Services Regulation Authority (Ofwat), Office of the Gas and Electricity Markets (Ofgem), the Northern Ireland Utility Regulator, the Office of Rail Regulation (ORR), and the Civil Aviation Authority (CAA).
TFEU	Treaty on the Functioning of the European Union.
Undertaking	The term undertaking is described in guidance published by the OFT (see paragraph 6 above).

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