



RCN Policy and International Department
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Help Inform Our Response to Monitor: Guidance on Procurement, Patient Choice and Competition in England

**(Guidance on 'Section 75' regulations of the Health and
Social Care Act 2012)**

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Summary

Competition in the NHS needs to be carefully handled to ensure it is used to benefit patients and not distract from the quality of care. Monitor is consulting on guidance to both commissioners and providers to help them know what to do, to avoid breaching the rules and regulations (the regulations were referred to as Section 75 regulations during the passage of legislation). These issues were raised and debated by members at RCN Congress. This included a call for the House of Lords to reject the regulations and for Council to continue and increase its lobbying on these important matters. RCN Congress discussed these issues, through an emergency resolution on Section 75, highlighting how important these issues are to our members.

The RCN wants to know what you think about the guidance from Monitor.

Underlying all the guidance from Monitor are some key themes:

- Adherence to existing legislation (e.g. compliance with patient rights to choose as set out in the NHS Constitution) – Monitor cannot change the underlying legislation.
- Commissioner led approach to competition; commissioners decide when or when not to use competition, but they must be transparent about their reasons and process.
- Monitor will take a cost/benefit approach when considering whether the rules and regulations have been broken and if so, which action they will take. This is not just about the money, but also a qualitative assessment, and looks at whether patients are affected or not (for good, or bad).

We will be looking at the detail of the guidance but we have some key questions on which we would like to hear from you:

- Do you have concerns about the guidance and any related impact on patients?
- Do you have concerns about the guidance and any related impact on any specific areas of nursing policy and/or practice?
- Do you think the guidance provides sufficient reassurance that decisions about the use of competition will be made in the best interests of patients?
- Do you think that there are sufficient safeguards to ensure that patients are the focus of all our efforts, including regulatory action on competition?

Please let leela.barham@rcn.org.uk know your views by the **21st June 2013**.

Introduction

Monitor is the sector regulator for health.¹ Monitor has a key role in the regulation of competition and is consulting on guidance for both providers and commissioners on how they can operate so that they will not breach competition rules. The RCN is preparing our response and we want to hear your views.

What's New?

Competition and the involvement of many different providers delivering care is not new in the English NHS, but the RCN believes that the pace of change is accelerating.

The Health and Social Care Act 2012 changed two key elements:

- It places previous guidance and rules² for commissioners on to a statutory footing (The National Health Service (Procurement, patient choice and competition) regulations 2013 (No. 2). These relate to sections 75, 76, 77 and 304 (9) and (10) of the Act, and are widely known as the “section 75 regulations”). Monitor can take action against commissioners and providers if the regulations are breached.
- It introduced a provider license for providers delivering NHS services, which includes provisions on competition and patient choice, and relaxed the private income cap. The license is issued by Monitor.

We raised concerns throughout the passage of the Bill and as these regulations were laid that competition needed to be handled very carefully as there are many risks:

- That care could be fragmented and that competition might hinder integration and collaboration.
- That care could be compromised in the pursuit of profit, especially if there is price competition.
- That NHS patients may lose out to private patients jumping the queue.

We wanted to ensure that these regulations have the patients' interest at heart. We did not want competition to be forced on commissioners, and competition pursued for the sake of competition. RCN Congress discussed these issues through an emergency resolution on Section 75, highlighting how important these issues are to our members.³

Monitor has issued guidance for both commissioners and providers to help them understand what they need to do to stay within the rules and regulations and what happens if they don't. This briefing gives you the main highlights.⁴

In all the consultation documents, Monitor is taking a similar approach to using its new powers. They are taking a principles-based approach rather than being prescriptive, and propose weighing up the costs and benefits of anti-competitive behaviour and its impact on service users.

¹ You can find out more about Monitor here: RCN Policy and International Briefing: Monitor and the Provider License England, May 2013

http://www.rcn.org.uk/__data/assets/pdf_file/0003/519645/16.13_Monitor_and_the_NHS_provider_license.pdf

² The principles and rules for co-operation and competition², introduced in 2007, and The procurement guide for commissioners of NHS funded services²,

³ You can watch the debate on our website, item 30E on 24th April 2013

http://www.rcn.org.uk/newsevents/congress/2013/archive_webcast

⁴ But you can also see the full details here on Monitor's website, a full set of links is provided at the end of this briefing.

Guidance for commissioners: 'Substantive guidance on the Procurement, Patient Choice and Competition Regulations'

The new regulations on procurement, patient choice and competition require NHS England and CCGs to work towards the following objective when procuring NHS services:

- Securing the needs of health care service users.
- Improving the quality of services.
- Improving the efficiency with which services are provided.

Monitor states that there is no “one-size-fits-all” approach that commissioners should take to achieve these objectives, and have therefore developed a principles-based approach to provide flexibility.

When Monitor considers if commissioners have acted with a view to achieving this objective, they will consider

- whether they have properly identified the needs of the population
- whether they have properly evaluated the quality and efficiency of existing services
- whether they have explored all the options available
- whether they have consulted those affected by services
- whether they have tried to ensure equal access to services for everyone
- whether they have taken into account the sustainability of services.

Commissioners can contract other organisations to provide support to them, including NHS commissioning support units (CSUs). Commissioners must ensure that these organisations are working within the procurement, patient choice and competition regulations, as they retain overall responsibility.

General requirements of commissioners

The guidance lists a number of general requirements for commissioners when procuring services. Commissioners must:

- **act in a transparent way** - for example, publishing information on their strategy, contract opportunities, and the way they will judge providers. They must publish details of contracts they have awarded, and record the decisions they make and the reasons behind the decisions
- **act in a proportionate way** - taking into account the nature, size, complexity and clinical risk of services when deciding how to proceed. Commissioners should weigh up the value of the service against the cost of procuring it. Any financial criteria by which potential providers will be judged should also be proportional to the value of the contract
- **act in a non-discriminatory way** - the criteria being used to judge providers must be openly available to all providers, must not discriminate against any providers without justification, and must be applied equally. Commissioners can take into account relevant

differences between providers when making decisions (e.g. CQC inspection reports or whether or not they participate in education, training and research), but have to be clear that they will be considering these factors from the outset

- **procure services from providers offering the best value for money** - this does not necessarily mean the provider quoting the lowest price, but best overall quality and price. When deciding how to procure a service, commissioners should consider whether better value for money for patients could be achieved through bundling services together, even if that could exclude some providers who could not provide all the services in the bundle
- **refrain from anti-competitive behaviour** - the regulations prohibit anti-competitive behaviour (i.e. restricting choice unnecessarily), unless it is in the interests of service users
- **consider appropriate ways of improving the quality and efficiency of services** - these can include providing services in a more integrated way, enabling providers to compete to provide services, and allowing patients a choice of provider.

The new regulations require commissioners to **consider** whether they could use the introduction of **integrated care, patient choice** or **competition** (or a combination of these) to improve quality and efficiency. They will need to do this each time they make decisions regarding the procurement of services from now on, but can decide **not** to use these methods if it is in the best interests of patients. All contracts entered into before the introduction of the regulations will still stand.

Integrated care

The guidance states that there is no single model for commissioners to ensure care is integrated.

Deciding whether or not to tender

The guidance states that the regulations do not automatically require commissioners to publish a notice inviting offers from prospective providers, or run a full tender, whenever they are awarding a contract – it is up to commissioners.

Monitor advises that there are benefits to publishing a notice or tendering, including helping to identify potential providers that offer good value for money, and encouraging providers to improve the quality and efficiency of services.

The guidance states that there will be situations where commissioners could procure services without publishing a notice or running a tender process. They list four situations as examples of where this applies:

- Where **only one provider is capable of providing the service**. This could be because it is the only one to have infrastructure or capacity to provide the service, because the service has to be co-located with other services to ensure patient safety, or because there is an immediate interim need to provide the service (for example because of a major incident or because another provider has had its services suspended).

- Where the **commissioners have comprehensively reviewed the way in which a service could be improved in the local area, and has identified the most capable provider through this process**. However, this should not be carried out in order to avoid running a more formal process.
- Where the **cost of a competitive tender for a particular service outweighs the benefit** (for example if the contract is of a low value and clinical risk, or very short-term).
- If the service is an **acute elective care services provided under the Any Qualified Provider model**, for example consultant-led outpatient appointments. Patients can choose between any provider with an NHS contract and CQC registration, so commissioners do not need to tender these services separately.

When is a new contract necessary?

The guidance states that the decision whether or not to publish a contract notice or tender needs only to be taken when there is a “new” contract, and discusses when this is the case. Existing contracts can carry on as normal, and have transferred automatically from SHAs and PCTs to CCGs and NHS England. If a contract has a renewal mechanism built in, commissioners can use this to renew the contract without having to formally consider other options. However, if a commissioner is looking at providing a service in a new way, introduce a new service, or a contract ends without a mechanism for renewal, then a new contract will be needed.

Anti-competitive behaviour

The regulations prohibit anti-competitive behaviour by commissioners unless it is in the best interests of service users. Monitor will assess whether commissioners have worked within the rules and regulations by carrying out a cost/benefit analysis which includes qualitative impacts and isn't just about finance, following the same framework used previously by the Co-operation and Competition Panel. This includes considering whether any benefits could only be achieved by restricting competition. Benefits could include improving quality or efficiency by providing services in a more integrated way, or allowing co-operation between providers. Monitor states that this analysis will also be qualitative rather than a “purely mathematical exercise”, weighing up whether or not the behaviour is in the interests of patients overall.

Conflicts of interest

The regulations state that commissioners must not award contracts where conflicts of interest could affect the way the contract is awarded. Commissioners must keep a detailed record of all conflicts that arise and how they are managed – whether they affect a decision to award a contract, or any other decisions that the commissioner makes. Even if a conflict does not have an effect, it can damage the reputation of commissioners, so potential conflicts of interest must be recorded in the same way as actual conflicts.

In the guidance, Monitor suggests that the best way to manage conflicts is to exclude the individual with the conflict from discussions about the award of a contract, and states that it would be hard to

justify someone with a conflict of interest voting on relevant decisions. If this becomes impossible because many individuals have conflicts, commissioners will have to come up with alternative ways to manage conflicts. This could include having third parties on the governing body, or allowing third parties to independently review the decisions the governing body makes.

When judging whether or not a conflict of interest has had an effect, Monitor will consider how the process was recorded and managed, as well as the nature of the conflict.

Monitor's enforcement powers: 'Enforcement guidance on the Procurement, Patient Choice and Competition Regulations'

Monitor has published separate guidance on their approach to enforcing the regulations. This lays out when Monitor may take action against commissioners, what action they may take, and how their enforcement system will work. Monitor has the power to:

- investigate potential breaches
- require that a commissioner provides information for an investigation
- declare that an arrangement of NHS health care services is ineffective, which will make the arrangement void
- require commissioners to remedy breaches or prevent further breaches if they find them (however, Monitor cannot direct a commissioner to hold a competitive tender for a contract)
- accept an undertaking from a commissioner (a voluntary action that would sort out the problem), rather than continuing an investigation to save resources. Monitor must publish all undertakings it accepts, and cannot keep them confidential (though they can withhold details that might significantly hurt the interests of a person it relates to).

When deciding whether or not to take action and which potential breaches to prioritise, Monitor proposes that it will take into account what benefit the investigation could have on service users, the likely costs of taking action, and the likelihood of success. During an investigation, they will carry out another cost/benefit analysis to determine whether the behaviour in question is in the interests of service users or not.

When deciding what action to take if a breach (or potential breach) is found, Monitor proposes that it will take into account the seriousness of the breach, which action would best remedy the breach and whether taking action would deter other commissioners from making the same mistake. Monitor may take informal action if they believe it is in the interest of service users, for example giving guidance to commissioners so that they can address the issue themselves.

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

Within the licence for providers of NHS services there are conditions relating to choice and competition. Monitor has released draft guidance for providers about these conditions and how it will deal with any breaches.

The licence conditions stipulate that:

- providers must make accurate and accessible **information and support available to patients on their right to make choices**. They must notify patients when they have a choice of provider, and their advice cannot unfairly favour one provider, or type of provider, over another or mislead patients. Monitor will draw on approaches outside of health to inform their views on what is 'misleading' and will check to see if the information is accurate, honest and truthful and uses the most up to date information, and that the provider has declared any conflict of interest. **Monitor suggests that providers take active steps to ensure staff know about the NHS Constitution and the rights for patients to exercise choice, perhaps even mandatory compliance training.**
- providers **must not offer or give inducements** (for example, money, gifts or benefits in kind) to health professionals or commissioners for referring patients or procuring services. This does not prohibit common training events or events to discuss improvements in services for patients.
- providers **must not prevent, restrict or distort competition in a way that damages patient interests**. This could be by limiting the options from which patients and commissioners can choose, preventing the emergence of new or improved services, or preventing new providers entering the market. Providers cannot agree with another provider how to 'share' patients out between them, for example. Monitor recognises that this may be motivated by good intentions but will check whether or not it is in the patients' interest. This will be assessed via a cost/benefit analysis and will include clinical benefits. Monitor also says that providers are not protected even if the commissioner initiates or encourages behaviour that is anti-competitive.

Monitor will consider a complaint from anyone but will apply a prioritisation process to decide whether to investigate, and look at the specific issue to determine what action to take, if any.

The guidance states that the restrictions on anti-competitive behaviour should not impact on the ability of commissioners and providers to develop integrated care. Although co-operation between providers of the same service may be anti-competitive, co-operation between providers of different services (for example, improving the handover of patients) will be unlikely to raise competition concerns. The guidance also suggests that choice and competition can encourage integration by incentivising providers to improve services.

Other consultations related to competition

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

Monitor now has shared powers with the Office of Fair Trading (OFT) to enforce the Competition Act 1998 and the Treaty on the Functioning of the European Union in relation to health care services in England, and have released guidance on how they will use these powers, which builds on the existing work of the OFT.

The guidance says that Monitor will consult with the OFT where there may be areas that they both could take action on. Monitor will also take an early view on which legislation applies; the Health and Social Act 2012 and associated legislation or the Competition Act.

Monitor can undertake an investigation on its own, or as a result of a complaint. If providers are concerned about whether they may be breaching the rules and legislation they can ask Monitor for informal advice. Over time Monitor will also be publishing examples of behaviour that breaches the rules and legislation so that providers will know what they should not do.

‘Consultation on guidance on Monitor’s approach to market investigation references’

Monitor also shares powers with the OFT to report markets to the Competition Commission (CC), if it believes a feature of the market is preventing, restricting or distorting competition. This process is called a “market investigation reference”. When deciding whether or not to contact the CC, Monitor’s draft guidance states that they should take into account the seriousness of the competition issues, whether they could address the issues in another way, and whether the CC is able to impose appropriate remedies to sort out the problem. They must also consult with the people who would be affected before making their decision.

‘Consultation on draft guidance on merger benefits’

Monitor is now required to advise the OFT about the benefits that mergers involving NHS foundation trusts (either between NHS foundation trusts, or NHS foundation trusts and other organisations) would have on people who use NHS-funded health care services. This is based on advice from the Cooperation and Competition Panel members and Monitors Clinical Reference Group.

In this context, benefits could be increased value for money, higher care quality, increased choice, or greater innovation in services, and may arise through methods such as the reconfiguration of services, or rollout of best practice across the merged trust. Evidence for this must be supplied by the organisations merging and can include clinical studies. Monitor will only report benefits to the OFT if it can conclude that they are likely to be realised, and that they can only be achieved through the merger. The OFT will then take this information into account when deciding whether they should refer a merger to the CC because it may result in a substantial lessening of competition.

Guidance is helpful, but action will matter

Because of the principles-based approach that Monitor has taken, the real impact of the guidance and new system will not be known until we have seen them working in practice. The flexibility of the guidance means that Monitor could interpret it in different ways at different times. The RCN will therefore look closely at what action Monitor takes.

Tell us what you think

We will be looking at the detail of the guidance, but we have some key questions on which we would like to hear from you:

- Do you have concerns about the guidance and any related impact on patients?
- Do you have concerns about the guidance and any related impact on any specific areas of nursing policy and/or practice?
- Do you think the guidance provides sufficient reassurance that decisions about the use of competition will be made in the best interests of patients?
- Do you think that there are sufficient safeguards to ensure that patients are the focus of all our efforts, including regulatory action on competition?

Please let leela.barham@rcn.org.uk know your views by the **21st June 2013**.

Further reading

You can find out the full details for the consultations here:

- Substantive guidance on the procurement, choice and competition regulations
<http://www.monitor-nhsft.gov.uk/node/3352>
- Enforcement guidance on the procurement, patient choice and competition regulations
<http://www.monitor-nhsft.gov.uk/home/news-events-publications/consultations/consultations-and-engagement-monitors-role-sector-regula-6>
- Consultation on draft Monitor guidance on merger benefits
<http://www.monitor-nhsft.gov.uk/home/news-events-publications/consultations/consultations-and-engagement-monitors-role-sector-regula-3>
- Consultation on guidance on Monitor's approach to market investigation references
<http://www.monitor-nhsft.gov.uk/home/news-events-publications/consultations/consultations-and-engagement-monitors-role-sector-regula-1>
- Consultation on guidance on the application of the Competition Act 1998 in the health care sector
<http://www.monitor-nhsft.gov.uk/home/news-events-publications/consultations/consultations-and-engagement-monitors-role-sector-regula-2>
- Licence conditions – choice and competition: consultation on draft guidance for providers of NHS funded services
<http://www.monitor-nhsft.gov.uk/home/news-events-publications/consultations/consultations-and-engagement-monitors-role-sector-regula-0>

You can find out more about what the RCN has said about competition and related issues here:

- On Section 75
http://www.rcn.org.uk/newsevents/government/uk/section_75_regulations
- RCN Policy and International Department Policy briefing 16/13 May 2013 Monitor and the NHS Provider License England
http://www.rcn.org.uk/_data/assets/pdf_file/0003/519645/16.13_Monitor_and_the_NHS_provider_license.pdf
- RCN Policy and International Department Policy briefing 18/12 July 2012 New Monitor in England
http://www.rcn.org.uk/_data/assets/pdf_file/0011/465653/18.12_New_Monitor_in_England.pdf
- RCN Response to Monitors Consultation on the Draft Enforcement Guidance February 2013
http://www.rcn.org.uk/_data/assets/pdf_file/0007/503377/4.13_Response_Form_For_The_Draft_Enforcement_Guide_Consultation_RCN_Response_Final.pdf
- RCN Response to Monitors Consultation on the Draft Risk Assessment Framework April 2013
http://www.rcn.org.uk/_data/assets/pdf_file/0006/513663/3.13_Draft_Risk_Assessment_Framework_Response_Form_RCN_Final.pdf
- RCN Response to Monitors Consultation on the new NHS provider license October 2012
http://www.rcn.org.uk/_data/assets/pdf_file/0006/483171/72.12_RCN_response_to_Monitor_on_the_new_NHS_provider_licence.pdf
- RCN Response to Department of Health's Consultation on securing best value for NHS patients October 2012
http://www.rcn.org.uk/_data/assets/pdf_file/0007/483208/71.12_RCN_response_to_Securing-best-value-for-NHS-patients-consultation-RCN_Response-Form_Final.pdf
- RCN Response to Monitors Tranche Two Engagement on the licence March 2012
http://www.rcn.org.uk/_data/assets/pdf_file/0005/436748/13.12_RCN_Response_Monitor_tranche_2_engagement_final.pdf
- RCN Response to Monitors Engagement on Developing the new NHS Provider Licence: A Framework Document
http://www.rcn.org.uk/_data/assets/pdf_file/0018/421515/83.11_Developing_the_new_NHS_Provider_Licence_A_Framework_Document.pdf