

# briefing

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## What do EU competition rules mean for the NHS?

The recent establishment of the NHS Co-operation and Competition Panel has drawn attention to the application of EU competition law to the NHS and whether the Panel will have any competence in this area. The application of EU competition policy is a very complex area characterised by legal uncertainty. The aim of this *Briefing* is to explain what EU competition law is and our understanding of what it means for the NHS. It also provides some comments on the remit of the Panel.

### Key points

- Activity carried out for social purposes, not involving engagement in 'normal' markets for goods and services, is generally not subject to EU competition law.
- European Court decisions confirming this include the FENIN case, which ruled that organisations managing the Spanish National Health Service were not subject to EU competition rules, as they operate according to the spirit of solidarity.
- European Court decisions are, however, case-specific and there is uncertainty as to how they apply generally.
- As the NHS develops the way it delivers healthcare to incorporate patient choice and a wider role for independent healthcare providers and enterprises, the extent to which NHS activity could be challenged under EU competition rules becomes less clear.
- It will be important to monitor developments in this area, including the advice given by the recently established NHS Co-operation and Competition Panel, and whether this may have the consequent effect of exposing more NHS activity to challenges under EU competition law in the future.

### Introduction

The NHS Co-operation and Competition Panel is responsible for advising strategic health authorities (SHAs), the Department of Health (DH) and Monitor on potential breaches of the *Principles and rules for co-operation and competition* in the NHS, which aim to strike an appropriate balance between the benefits of co-operation and competition in driving improvements in quality and efficiency.<sup>1</sup> Although the *Principles and rules for co-operation and competition* are broadly

1. The principles and rules for co-operation and competition are available at [www.ccpanel.org.uk/content/Principle-and-rules-for-Cooperation-and-Competition.pdf](http://www.ccpanel.org.uk/content/Principle-and-rules-for-Cooperation-and-Competition.pdf)

*'EU competition law regulates anti-competitive behaviours that affect trade within the EU'*

consistent with EU and UK competition and procurement law, they do not seek to apply this law to the commissioning and provision of NHS-funded services. Nevertheless, the establishment of the Panel has drawn attention to the question of how EU competition law may apply, both now and in the future, and whether the Panel will have any competence in this area.

## What is EU competition law and when does it apply?

EU competition law governs trading market structures and behaviour in order to uphold 'fair play' within the EU's internal market. It regulates anti-competitive behaviours that affect trade within the EU; notably in the form of cartels, abuse of dominant market position, mergers and acquisitions, and direct or indirect aid given by public authorities (state aid).

European legislation states that EU competition law applies to 'undertakings'. According to the European Court, an undertaking is any entity engaged in an economic activity (defined as the offering of goods and services in a given market), regardless of its legal status or the way it is financed. This definition includes state-owned bodies. However, a

distinction is drawn when an organisation is fulfilling a purely social function, its activity is based on the principle of solidarity and it is non-profit making. In this case the organisation is not considered to be an undertaking and therefore is not subject to EU competition rules.

The Office of Fair Trading (OFT) is responsible for enforcing EU competition law (enshrined in the Competition Act 1998) in the UK. The Competition Act 1998 extended EU competition law prohibitions to cases which only affect trade within the UK. The Department for Business, Enterprise and Regulatory Reform (BERR) has lead responsibility within the UK Government for the co-ordination and development of state aid policy. This includes providing advice and guidance on state aid rules, and co-ordinating and advising on complaint cases and formal investigations.

## What does it mean for the NHS?

As mentioned earlier, the different components of EU competition law (state aid, merger control and cartels) apply to undertakings. Organisations fulfilling a purely social function – based on the principle of solidarity and not for profit – are not considered to fall into this definition and, therefore, are not subject to EU competition rules. This principle has been confirmed by the European Court on several occasions.

The most relevant European Court decision is on the FENIN case,<sup>2</sup> concerning a complaint made to the European Commission by an association of enterprises that market the medical goods and equipment used in Spanish hospitals against the 26 bodies (including the Spanish Government) which run the Spanish National Health Service. The complaint was made under EU competition rules alleging abuse of dominant position by the Spanish National Health Service when purchasing goods produced by FENIN.

The European Commission rejected the complaint on the grounds that the bodies involved were not undertakings – because their purpose was a 'social' one – and that consequently they were not acting anti-competitively. This decision was ultimately upheld by the European Court, which confirmed that the organisations managing the Spanish National Health Service were not acting as undertakings, as they operate according to the principle of solidarity; in that they are funded from social security contributions and other state funding, and provide services free of charge to their members on the basis of universal coverage. The Court also confirmed that purchasing is not in itself an economic activity and that EU competition law does not apply if the activity is carried out in the spirit of solidarity.

The OFT themselves have ruled on a domestic health-related dispute

2. Case T-319/99 and C-205/03. Detailed information is available here: [curia.europa.eu](http://curia.europa.eu)

relating to competition law. The ruling reversed an earlier decision by the UK Competition Commission Appeals Tribunal that a Northern Ireland NHS purchaser was engaging in economic activity in procuring nursing home places from private companies whilst also providing some itself. The OFT's ruling in the 'BetterCare' case found the purchaser was acting legitimately.<sup>3</sup> However, the earlier view taken by the Appeals Tribunal does serve to highlight that differences in the interpretation of EU competition rules can arise at a European and national level.

NHS organisations should be aware that the strongest precedent is set at European level, and that on the basis of the European Court decision in the FENIN case, amongst others, it can be assumed that activity, including procurement, carried out for social purposes, which does not involve engagement in 'normal' markets for goods and services, is generally not subject to EU competition law. This remains the case even if the activity causes the kinds of effects which competition rules are intended to prevent if they are caused by the actions of undertakings.

However, as the NHS develops the way it delivers healthcare to incorporate patient choice and a

*'Differences in the interpretation of EU competition rules can arise at a European and national level'*

wider role for independent healthcare providers and enterprises, the extent to which NHS activity could be challenged on the basis of EU competition rules becomes less clear. Some of the potential risks to be considered are highlighted below.

### State aid

State aid is defined as an advantage, in any form whatsoever, conferred on a selective basis to undertakings by national public authorities. State aid can take the form of loans and grants, tax breaks, goods and services made at preferential rates, or loan guarantees that render the borrower a lesser credit risk. EU law generally prohibits state aid, to ensure that government interventions do not distort competition and intra-community trade. It should be noted, however, that EU law does allow for a number of exemptions from this prohibition when government interventions are necessary for a well-functioning and equitable economy.

State aid rules are not, in principle, applicable to the NHS. This is because there have been no European Court rulings to date that recognise circumstances under which publicly-funded organisations providing healthcare on the basis of social solidarity and not for profit could be considered as undertakings.

However, if an NHS organisation was to employ an independent provider to deliver an NHS service, and the compensation levels to the company were far in excess of what it would ordinarily have cost the NHS to deliver those services, then the provider could be deemed to be in receipt of disproportionate and subsequently illegal state aid. The European Court decision on the Altmark case (C-280/00) is a helpful guide to the conditions that need to be met to ensure that the relationship between a public body and a contracted independent sector provider is not in breach of EU state aid rules.

Other potential risks of state aid becoming applicable could include possible differential access for providers to the NHS Pension Scheme, or in relation to the minimum practice income guarantee currently payable to general practices, if it could be shown that this guaranteed a disproportionate level of compensation for services provided.

### Cartels

Agreements between two or more entities that restrict competition are prohibited by EU law, subject to some limited exceptions. This provision covers a wide variety of behaviours such as the establishment of 'cartels'; which are collusions between competitors that may involve price-fixing or market sharing.

The provisions around cartels do not appear relevant to NHS activity that is based on social solidarity principles.

3. Additional information on the 'BetterCare' case is available at: [www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/bettercare.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/bettercare.pdf). The OFT's guidance on the Competition Act 1998 and public bodies is available at: [www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_mini\\_guides/oft443pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft443pdf)

However, challenges on the grounds of collusion may occur if, for example, providers came to an agreement to allocate groups of patients between themselves.

### Mergers

Mergers and takeovers of one company by another can be disallowed or restricted by the European Commission if the merger has the following consequences:

- the enlarged company could squeeze out its competitors
- the merger would leave so few stakeholders in the market that innovation would be hampered
- the merger would result in significant reduction in cost-competition or consumer choice.

EU provisions on mergers are generally considered not to apply to mergers and acquisitions in the NHS if they are taking place on a social, and not an economic, basis. However, a merger between healthcare organisations could be considered to be in breach of EU competition laws if, for example, it involved an independent healthcare provider and the merger could result in the squeezing out of competition from other providers; or if the merger were to result in a major reduction of cost competition or consumer choice.

### Public procurement

Public procurement rules are not part of EU competition law but pursue similar objectives. As commissioning and procurement are a key part of the

*Principles and rules for co-operation and competition* in the NHS, a short overview of EU requirements in this area is provided below.

Under EU public procurement law a public authority has full discretion to decide whether it provides services itself<sup>4</sup> or entrusts them to a third party. There is no obligation for public authorities to externalise service provision through the award of a public contract. However, if the public authority decides to externalise the service and provides remuneration, it has to follow key rules on public procurement. It should be noted, however, that contracts for health and social services are not subject to all the detailed rules of the EU directives on public procurement. In awarding contracts for the provision of health or social services, public authorities only have to comply with the basic principles of Community law; such as the principles of equal treatment, transparency, proportionality and mutual recognition.

The *PCT procurement guide for health services*, published by the DH in May 2008<sup>5</sup>, sets out the policy and regulatory context for procurement and supports NHS commissioners in deciding whether and how to procure health services through formal tendering and market-testing exercises. Although

4. This is called provision of services 'in-house' and applies when the relationship between the contracting body and the provider is so close that they are considered to be part of the same organisation.

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there is no general requirement for NHS services to be subject to a formal procurement process, the guide does cite the use of independent and third sector providers, the establishment of foundation trusts and the relevant statute and European law, thus implying that the procurement regime has become more relevant of late. Individual primary care trusts, in conjunction with the relevant SHA where applicable, are therefore left to decide how to proceed with the consequent risk of potential challenges.

### The NHS Co-operation and Competition Panel

The NHS Co-operation and Competition Panel has been established with a mandate to: "help ensure that the *Principles and rules for co-operation and competition* for the provision of NHS-funded services support the delivery of high-quality care for patients and value for money for taxpayers".

The Panel will advise SHAs, the DH and Monitor on potential breaches of the *Principles and rules* and make

5. Available at [www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_084778](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084778)

## Principles and rules for co-operation and competition in the NHS

The NHS Operating Framework requires compliance with the *Principles and rules for co-operation and competition*. These *Principles and rules* list actions and behaviours to be followed by commissioners and providers operating in the system in terms of:

- procurement and contracting
- co-operation
- fostering patient choice
- managing promotional activities
- managing payment and financial regimes
- corporate transactions (such as mergers and acquisitions, or corporate joint ventures)
- ‘vertical integration’ between primary and secondary care.

It is important to note that the *Principles and rules* do not include any specific reference to EU competition and public procurement rules. The Government has made it clear that the *Principles and rules* aim to strike

an appropriate balance between the benefits of co-operation and competition in driving improvements in quality and efficiency; and that therefore use of competition in the NHS is not about establishing normal commercial markets under price competition, but is focused on using competition to build quality, and in most instances using NHS tariff or pricing arrangements.

In view of this, the overarching aims of the *Principles and rules* can be summarised using the following documented principles:

- “Commissioners should commission services from the providers who are best placed to deliver the needs of their patients and populations”.
- “Commissioning and procurement should be transparent and non-discriminatory”.
- “Commissioners and providers should foster patient choice and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare”.

recommendations on appropriate remedies in instances of non-compliance. It will be responsible for considering complaints and reviewing cases associated with:

- the procurement of clinical services
- the competitive conduct of commissioners and providers of healthcare services
- mergers, joint ventures or acquisitions involving healthcare providers
- advertising and promotion of NHS-funded services.

The Panel will also advise on the wider development of co-operation,

patient choice and competition within the NHS.

The Panel’s draft interim guidelines indicate that the EC Treaty<sup>6</sup> and the Competition Act can be useful sources of reference, but that the Panel is not bound by the approach under these regimes. The interim guidelines also make clear that responsibility for enforcing EU competition law lies with the OFT and the European Commission and that the Panel does not have jurisdiction to

6. The EC Treaty is the treaty establishing the European Community.

enforce the Competition Act or the EC Treaty.

It is therefore unlikely that the Panel will be brought in to mediate in disputes concerning potential infringements by NHS organisations of EU competition or public procurement rules. It may, however, be asked to provide advice to the DH in this area.

The European Court decision on the FENIN case is very helpful in clarifying that entities carrying out activity, including procurement, for social purposes, which does not involve engagement in ‘normal’

*'The Panel is not expected to mediate in disputes concerning potential infringements by NHS organisations of EU competition rules, though it may be asked to provide advice in this area'*

markets for goods and services, will generally not be subject to EU competition law. However, as the NHS develops the way it delivers healthcare, incorporating more market-based reforms and including a wider range of independent and third sector providers and enterprises, the extent to which NHS activity could be open to challenge

under EU competition rules becomes less clear.

With this in mind, the establishment of a body which could provide advice to the DH, on request, on the extent to which NHS activity is vulnerable to legal challenge on the basis of competition and trade rules could offer advantages. Indeed, as the OFT adjudicates on violation of the Competition Act and EU competition rules – in addition to its advisory role in this area – if the NHS presented difficult competition issues to the OFT for advice it could potentially expose itself to litigation.

It will, however, be important to monitor closely the interpretation the Panel will give when reviewing potential breaches of the *Principles and rules* and the advice it will provide on the role of competition in the healthcare sector more generally. More importantly still, the question remains as to whether this may encourage the introduction of greater 'competition' in the NHS in the future, thereby exposing more NHS activity to challenges under EU competition rules.

For more information on the issues covered in this *Briefing*, or to submit comments, please contact: [michael.wood@nhsconfed.org](mailto:michael.wood@nhsconfed.org)

## The NHS European Office

The NHS European Office has been established to represent NHS organisations in England to EU decision-makers. The office is funded by the Strategic Health Authorities and is part of the NHS Confederation.

EU policy and legislation have an increasing impact on the NHS as a provider and commissioner of healthcare, as a business and as a major employer in the EU.

Our work includes:

- monitoring EU developments which have an impact on the NHS
- informing NHS organisations of EU affairs
- promoting the priorities and interests of the NHS to European institutions
- advising NHS organisations of EU funding opportunities.

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