Rt. Hon. Jeremy Hunt MP
Secretary of State for Health
Department of Health
Richmond House
79 Whitehall
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11 October 2013

Dear Secretary of State

ENSURING THE CLINICAL AND FINANCIAL SUSTAINABILITY OF NHS PROVIDERS

I am writing to set out the FTN's concerns at the considerable challenges that NHS public providers are currently facing with regard to the application of competition law within the NHS, and more importantly, to offer some proposed solutions to help overcome these challenges.

As you will be aware, NHS foundation trusts and NHS trusts are not opposed to the principle of increased competition within the NHS. Indeed, unlike many organisations, the Foundation Trust Network (FTN) supported the use of competition, as one driver of quality, during the passage of the Health and Social Care Act (2012). We understand the potential that a competitive environment with a plurality of providers offers to drive improvement, if the measures to achieve this are carefully and sensibly applied in the patient interest.

However, in the current environment, there is also a clear consensus that the NHS needs to change its delivery models to remain sustainable and improve quality. The NHS therefore needs to be careful about how we balance the potentially competing agendas of promoting competition and choice and ensuring that NHS providers are financially and clinically sustainable. The process of evaluating the impact of significant transactions (be they reconfigurations, mergers or other collaborations) in lessening competition for example, should not, in our view, prevent approval for reasonable proposals to ensure future financial and clinical sustainability. These processes should also not require providers to incur unreasonable cost to the public purse or be excessively lengthy in the time taken to complete them.

We hope that the following provides a helpful summary of the main issues facing trusts with regard to competition, including some potential solutions for streamlining the process within the existing legislative framework, recognising that the scope to amend the Enterprise Act (2002), for example, may be limited.

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Key issues affecting NHS providers:

Successful application of competition law within the NHS

While competition law has arguably been applicable to FTs for some time under the Enterprise Act (2002), the new sector regulation regime introduced by the Health and Social Care Act (2012) has only been fully operational for six months. All parties are learning how to operate in the new regime and we observe something of a "cultural gap" between NHS providers and the competition authorities – for example in understanding each other's processes, languages, frameworks of reference and ways of operating.

We fully accept the need for public providers to ensure they understand the requirements of competition law. We welcome the advice and support which Monitor has indicated it is willing to provide to trusts at an early stage, and the FTN is also offering a range of seminars on competition to support trusts.

However, a mismatch is clearly emerging between what providers and commissioners see as the best interest of patients, and what the competition authorities, including the Co-operation and Competition Panel (CCP) within Monitor, the Office of Fair Trading (OFT), and the Competition Commission (CC), will authorise.

Test cases thus far have indicated a need to refine the competition authorities' understanding of:

- the pricing of NHS care (given this is largely fixed and the government has clearly advocated competition should be based on quality not price);
- particular workforce constraints (including the limited availability of particular specialist staff groups);
- the requirements generated by commissioners;
- the processes NHS providers need to adhere to (for example the dynamics of the public consultation processes NHS service reconfiguration requires); and
- in some instances, the levels to which competition naturally applies (for instance, competition may more naturally drive quality in elective care, whereas a public provider in a rural area is less likely to face external competition to provide accident and emergency or maternity services).

While none of this suggests that competition cannot be successfully applied to drive up quality within the NHS, we would strongly argue the need for a more refined set of industry specific guidance for the health sector. This should enable all those involved in applying, and complying with, competition law to understand the unique features of the NHS where there really is no parallel in other industries. In our view, industry specific guidance must centre around a fuller definition of 'patient interest,' which, where proven, should override concerns about significant lessening of competition. We see Monitor as being central in developing a more nuanced set of guidance for application within the NHS, and in providing robust advice to the OFT and, in future, the Competition and Markets Authority (CMA).

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Conflicting policy for reconfiguration and merger control:
Ensuring clinical and financial sustainability is the central challenge that our members will face over the coming four or five years – and we believe this should be prioritised over concerns about lessening competition. To ensure the safety and sustainability of services, trusts need to move to different patterns of delivery and, in some cases, adopt new organisational forms. This means reconfiguring services or undertaking a formal merger or acquisition. We should expect to see more of this in coming years.

However these transactions are increasingly coming under the purview of both the reconfiguration and competition regimes. In essence these two parts of the public policy agenda have conflicting and competing aims – one to focus on public consultation and engagement and the other to ensure a competitive market. Operating within this framework NHS trusts and FTs are increasingly finding themselves in a position where they are unable to achieve what they need to with the required speed.

An additional complication is the variability with which local commissioners approach and interpret the section 75 regulations on procurement and choice. This risks further complication with the introduction of the new European Directive on procurement due next year.

Overall, there is a lack of clarity about how these three regimes operate together and an unclear path through the process(es) which, in nearly every case, require what our members regard as disproportionately large spend on professional advice and management time.

Two very recent examples include:

- the considerable delay experienced by the Royal Bournemouth and Christchurch and Poole Hospitals NHS FTs in seeking to merge, a process which has taken 23 months so far at the cost of millions of pounds of taxpayers money to the trusts involved; and
- the experience of the University Hospitals Bristol NHS FT and North Bristol NHS Trust which centralised and reconfigured a number of acute services at each of its respective sites to improve the quality of services, and were retrospectively found by Monitor to have lessened competition. While the regulator did not ask the trusts to reverse the existing reconfiguration, the judgement has caused considerable confusion and concern in the sector.

In quoting these examples, we accept that there are other examples where the current process has worked relatively smoothly, for instance, the recent approval by Monitor of the proposed merger of the Royal Free London NHS Foundation Trust and Barnet and Chase Farm Hospitals NHS Trust.

Potential solutions to these challenges
At the FTN's recent fringe meeting at the Conservative Party Conference, Health Minister Dr Daniel Poulter indicated, helpfully, that Ministers are in listening mode on this issue. We also

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welcome David Bennett's recent indications that Monitor is willing to adopt a more substantial advisory role with regard to significant transactions. This is particularly important given Monitor's role as sector regulator for health. We are therefore writing to set out our early, top line, view of the changes that we believe that you and the relevant competition authorities should consider. We would clearly want to work with you and the relevant authorities to flesh these out in more detail.

We believe that, in a number of areas, small changes could bring substantial benefits within the existing legislative framework as follows:

i) Resolving the **operational misalignment** between the three different regimes:

- Commissioner led procurement and competition under section 75 of the Health and Social Care Act – opening up the NHS market to more than one service provider to drive improvement;
- Reconfiguration – changing the shape and nature of NHS services delivered to ensure they are clinically and financially sustainable; and
- Merger control – ensuring that mergers between organisations are not anti-competitive and do not lessen the choice for patients and the public.

Often, for NHS providers, proving compliance with one of these regimes means a danger of 'failing the test' with the others. There needs to be greater clarity about the policy intention of each of these regimes and a clear commitment that there will be interoperability between them to avoid double or triple jeopardy.

Our members would also welcome clarity of message from the national bodies including NHS England and Monitor, on competition policy – there has been a delay, for example, in the publication of the choice and competition framework which both organisations are committed to publishing.

ii) Putting **greater emphasis on Monitor's role and advice** in merger control
There is a fundamental need to expand guidance and definition around the 'patient interest.' In our view, competition cases must balance judgements between sustainability (both clinical and financial) which we would see as acting in the patient (and public) interest, and the impact on competition and choice. We also note a need for Monitor and the competition authorities to understand the different groups of patients which fall within this 'catch all' term and may be impacted differently by proposed changes.

We are concerned that the current approach to NHS merger control has a series of drawbacks in that it offers providers a very uncertain and disproportionately costly and lengthy process, given the potential involvement of three different bodies – Monitor, OFT and the Competition Commission.

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Judgements reached by these bodies all appear to be stacked in favour of ensuring there is no significant loss of competition as opposed to ensuring sustainability. Although the relationships between all the different players is complicated, we believe that in the operation of the merger control regime in the NHS, Monitor must play a bigger role, and the OFT and the CC (and in future, the CMA once it acquires its powers in April 2014) must place greater emphasis on Monitor's advice. Monitor has an explicit duty to protect the patient interest, which we believe it needs to interpret in a way that corrects the current imbalance between lessening of competition and ensuring sustainability.

This could be brought about by considering the long term impact on patients (and the wider tax payer interest in sustaining services) and by greater consideration of the counter-factual case should a proposed NHS merger fail to take place. To date, the counter-factual has tended to focus on whether one of the parties would fail without the merger, whereas we feel it is more appropriate to compare the relative benefits to patients in the medium to long term, with and without the merger.

It is important to note that we are not arguing that mergers or changes of organisational form should not be subject to appropriate rigorous scrutiny. We recognise the value and importance of such a process. Rather we are arguing that the means of scrutiny should:

- be clear;
- involve as few competition authorities as possible;
- be of proportionate length and cost; and
- prioritise the patient interest, including by considering and ensuring the long term clinical and financial sustainability of NHS providers.

iii) **Clarifying Monitor's role with regard to reconfiguration**
Given Monitor's wide ranging responsibilities across competition and the shape and sustainability of the sector, we would expect Monitor to play a similar role in providing balanced advice with regard to the competition impacts of proposed reconfiguration.

We recognise that trusts will also need to seek legal advice at an early stage as competition law could be triggered by a range of ventures including collaborations, joint ventures and the development of new service models. Given the need to develop sustainable models of care, and to improve integration and drive up access and quality of care, we can expect to see greater reconfiguration in future.

iv) Supporting and developing **Monitor's role with regard to Section 75 Regulations**
Monitor is already building a helpful case history of investigating complaints around the interpretation of Procurement and Choice regulations by commissioners. We welcome this approach, and note that while there has been some variability in the interpretation of the regulations to date, a helpful body of case precedent will emerge over time. Our members and their commissioners are keen to see as much detail as possible here, as quickly as possible.

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v) Clarifying the **narrative around competition and integration**
Monitor is tasked to 'enable integrated care' alongside its other regulatory duties. The regulator has helpfully set out to date ways in which integration (particularly vertically) can be seen to complement competition. However, the feedback from our members is that this remains a confused area which would benefit from further clarification, particularly where a more integrated approach requires considerable co-operation and information sharing between different parties.

vi) **Continuing to support trusts own understanding of competition policy**
We accept the need to support trusts to develop their understanding of the implications of competition policy and to integrate competition considerations into their decision making at an earlier stage. We welcome Monitor's offer of informal guidance to trusts, and we are likewise considering how to build on our existing support for our members. We would welcome discussion across ourselves, the Department and the competition authorities on how we can improve the advice and support available here. We are keen to avoid our members each having to employ expensive advisers to develop a general understanding of these issues, recognising that complex individual transaction will require bespoke advice.

We believe that these achievable but important changes will help to streamline and speed up the merger process; will avoid NHS providers facing double or triple jeopardy; and will ensure that the process genuinely works in the long term interests of the patients, service users and the public.

I hope this is a helpful analysis and would be happy to discuss, or expand, on any of these points further. Given the substance of this letter and the proposals put forward I have copied it to colleagues at Monitor, OFT and the Competition Commission.

Given the recent public discussions in the Health Service Journal on this issue, we will also be providing them with a copy of this letter.

Yours sincerely,

Chris Hopson
Chief Executive

cc CEOs Monitor, OFT, Competition Commission
cc Stephen Dorrell MP

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