The King's Fund

Ideas that change health care

BRIEFING

Procurement and competition rules

Can the NHS be exempted?

Author

Ben Collins

March 2015

Introduction

How European Union (EU) procurement and competition rules do or do not apply to the NHS is an issue fraught with confusion and disagreement. The issue has attracted particular attention over the past 10 years, driven initially by the creation of foundation trusts. It has been amplified in debate over the Health and Social Care Act 2012 and has most recently come into play around the *NHS five year forward view* and potential (or perceived) tension between new models of care and rules on procurement and competition.

If Labour wins the general election, it has committed to repealing the procurement and competition provisions in the Health and Social Care Act 2012, including the Procurement, Patient Choice and Competition Regulations made under Section 75 of the Act. It has also promised to remove the roles of Monitor and the Competition and Markets Authority in enforcing procurement and competition rules in the NHS (Labour Party 2015). Perhaps most ambitiously, in his speech at The King's Fund on 27 January, Andy Burnham, Shadow Secretary of State for Health, committed to 'claiming a full exemption for the NHS from EU procurement and competition law' (Burnham 2015).

The opposition is not alone in wishing to tear up the current rule book – even if there are different opinions within and across the political parties (Watt *et al* 2015). There is a growing sense within the NHS that the current procurement and competition rules present a major barrier to the new models set out in the *NHS five year forward view*. Whether this is fair or not is a complex matter, and not one we attempt to tackle in this paper. But at the very least, there is widespread confusion regarding what the rules mean and how to comply with them. Currently, commissioners are unsure whether they need to run formal tendering processes to select new service models, while providers are unsure whether they can collaborate with competitors to deliver the networks and integrated models being proposed. Those bidding to become vanguard sites for the new models are clamouring for support to ensure compliance.

However, there are differing views on whether an incoming government of any political persuasion could really extract the NHS from EU procurement

and competition rules, which are fundamental principles to protect the EU's internal market, with some enshrined in the 1957 Treaty of Rome (officially the Treaty establishing the European Economic Community). Andy Burnham cites correspondence from the European Commission as evidence that it could be done (Burnham 2015). A letter from Simon Stevens in 2014 suggests there is less room for manoeuvre: 'We are, as appropriate, required to observe European procurement regulations, originally introduced in 2006, and related UK law' (Illman 2014). Others point to the differences between the English NHS and the Scottish and Welsh systems. If the English NHS is boxed in by EU regulation, why do the Scottish and Welsh health authorities not have to respect similar procurement rules?

So who is right, and who is wrong? What follows is our attempt to clarify whether an incoming government could sweep away the current procurement and competition rules for the NHS, if it wished, and what broader changes to the system architecture might be needed for it to do so. It is no more than our interpretation of the current situation, and should not be relied upon as formal advice or guidance on how to comply with the regime.

The first point to make is that EU member states have the right to decide to use tax revenues to deliver health care, and indeed other services, within a public sector system. Nothing in EU law requires member states currently delivering public services through the public sector to open them up to competition from the independent sector. Member states are free to outsource some services while keeping others in the public sector. They are also free to change their policies and to bring services previously outsourced to independent providers back into the public sector.

However, when member states do decide to secure the provision of public services from a market, rather than delivering them through the state, those activities become subject to the strictures of EU procurement and competition law. These are two quite distinct sets of rules, each serving different policy objectives and applying in different circumstances. The procurement rules exist primarily to protect the EU's internal market, ensuring that when governments or public bodies purchase goods or services from the market, they give companies from other member states an equal chance alongside domestic firms. The competition rules are there primarily to ensure that competition between firms, where it is supposed to exist, delivers the intended benefits for consumers, by preventing anti-competitive conduct that would restrict or distort competition.

EU and UK procurement law

Let's start with the EU procurement rules, which are established in the EU Treaty and the Procurement Directive 2014/24/EU and enacted in the United Kingdom through the Public Contracts Regulations 2015. As explained in recital 1 of the Directive, public authorities must respect a number of general EU Treaty principles whenever they award procurement contracts, including obligations to treat economic operators equally and non-discriminatorily and to act in a transparent way. However, for contracts above particular thresholds, more detailed requirements apply, including the obligation to advertise the invitation to tender in the *Official Journal of the European Union* (*OJEU*) and to follow one of a number of specified procurement processes, each with its own procedural steps and timescales.

The earlier Procurement Directive of 2004 made a distinction between the procurement of what were known in the United Kingdom as 'Part A' services (subject to the full advertising and procedural requirements) and 'Part B' services, which included health services and were subject to less onerous rules. However, case law made clear that contracting authorities still needed to advertise tenders and respect the general EU principles when procuring Part B services if the contract could be of interest to bidders from other member states. The new Directive of 2014 removes this distinction between Part A and Part B services entirely. This means that from April 2016 (there is a delay in introducing the rules for public health care) contracting authorities will need to advertise all invitations to tender for health services contracts above specified thresholds in the *OJEU.* There will still be some scope for member states to apply lighter touch rules for some health services, such as restricting competition for these contracts to mutuals or social enterprises.

In addition to the Directive and the Public Contracts Regulations 2015, commissioners of NHS services must also comply with the NHS (Procurement, Patient Choice and Competition) Regulations 2013, made under Section 75 of the Health and Social Care Act 2012. The regulations set out a number of objectives for commissioners when procuring services, including securing the needs of patients and improving the quality and efficiency of services. They also set out a number of principles that commissioners must respect when they procure services, mirroring general EU and UK procurement law, including transparency, proportionality

and non-discrimination. One key difference between the NHS regulations and the general rules is that NHS regulations can be enforced by Monitor rather than the courts.

According to Monitor's guidance on the sectoral regulations, 'it is for the commissioner to decide which services to procure and how best to secure them in the interests of patients' (Monitor 2013). We could debate how much flexibility the regulations really give commissioners to decide whether to competitively tender a service. One interpretation, possibly Monitor's, is that commissioners can decide whether to tender based on their assessment of the quality of existing services and the needs of their populations. But commissioners need to follow an appropriate process in making these decisions and, where they do decide to tender, to respect the advertising, non-discrimination and other requirements in the regulations. An alternative interpretation is that the regulations leave limited scope for commissioners to procure services without competitive tendering, except where there is only one capable provider.

Whatever the correct interpretation, however, it is clear that the sectoral regulations sit alongside rather than replace the EU Directive and the Public Contracts Regulations. Irrespective of the intricacies of the NHS regulations, commissioners must still respect the EU rules and their UK implementing rules. In the past, as discussed above, these rules required commissioners to run open tenders for health services wherever the contract could be of interest to firms in other member states. From April 2016, the rules will require commissioners to run tenders whenever the contract value exceeds a given threshold, as was previously the case for Part A services.

So where does this leave an incoming government if it wished to liberate commissioners from tendering obligations? First, it is clear that the government would be entitled to repeal Part III of the Health and Social Care Act 2012 and, along with it, the Procurement, Patient Choice and Competition Regulations 2013. However, it seems equally clear that simply repealing the NHS regulations would not be enough, since commissioners would still need to comply with the EU procurement rules, at least whenever they enter contracts with foundation trusts or other independent bodies. It is extremely unlikely that the government would be able to negotiate an exemption for the NHS from those EU rules. No other member states have secured special treatment in this area. It is almost impossible to overestimate the political, legal and practical obstacles it would need to overcome.

Nevertheless, it should still be possible for an incoming government to extract commissioners from tendering obligations. As we said at the outset, member states have the right to deliver public services within the public sector without opening them up to independent providers. Rather than seeking an exemption from EU rules, a new government might escape them by bringing health services, specifically foundation trusts, more firmly back within the public sector.
EU procurement law applies to public sector contracting authorities when they establish contracts with external suppliers to deliver goods or services. However, the rules do not apply when public authorities secure those goods or services in-house. Case law has made clear that, for this exemption to apply, the contracting authority needs to exercise control over the organisation delivering the goods or services, similar to the control it exercises over its internal departments, and that the provider must derive effectively all of its revenue from the delivery of services to the controlling public body (**Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia 1999**).

In short, a new government would at a minimum need to establish the Secretary of State for Health's (or perhaps another government body's) direct control over foundation trusts and provide that 'contracts' between NHS commissioners and NHS bodies providing services to patients took the form of NHS contracts, rather than contracts that were enforceable in law.

Under these circumstances, it seems likely that commissioners in the English NHS would be free, like the Scottish and Welsh authorities, to choose whether to roll over contracts with public sector providers without competition, whether to run internal 'public-sector only' tendering processes or whether to run open tenders involving public sector and independent providers. (EU procurement law would be likely to come back into play only if NHS commissioners chose the last of those options.) Doing so would of course represent a significant departure from Conservative, Labour and coalition policy over the past two decades, which has – at least on paper – attempted to distance ministers and state commissioners from providers and to establish a more autonomous provider market.

EU and UK competition law

Let's turn now to the EU and national rules governing competition, which are set out in the Treaty on the Functioning of the European Union (TFEU), the Competition Act 1998 and Monitor's licensing regime. As discussed above, the aim of the rules is to prevent organisations engaging in economic activity from undermining competition, where it is supposed to exist, against consumers' interests. Article 101 of the TFEU prohibits competitors from reaching certain agreements that restrict competition against consumers' interests. For example, in almost all circumstances it prohibits competing firms from grouping together to impose higher prices on consumers. Article 102 prohibits dominant undertakings (those with a high market share) from abusing their position, for example by setting excessive prices or preventing other organisations from competing on their merits.

The Competition Act 1998 establishes an almost identical set of prohibitions to those in the TFEU, with Chapter I of the Act prohibiting anti-competitive agreements and Chapter II prohibiting abuse of a dominant position. In the United Kingdom, the Competition and Markets Authority is responsible for enforcing the competition prohibitions in both the Treaty and the Competition Act across sectors (including health). Monitor has a duty to enforce them in the health sector. (The European Commission also enforces the TFEU prohibitions, but naturally tends to focus on the biggest cases and those that affect a number of member states. Affected parties can also challenge potential breaches of the rules in the courts.)

Finally, under the Health and Social Care Act 2012, Monitor also has the power to prevent anti-competitive conduct through its licensing regime for NHS providers. The current provider licence includes rules prohibiting licensees from entering into agreements or engaging in other conduct that restricts competition, to the extent that it is against the interests of people who use health services. It is not immediately obvious why Monitor needs to maintain licence conditions that appear to duplicate general competition law. One explanation might be that it is easier for Monitor to enforce these licence conditions than to pursue misconduct under the Competition Act 1998, where it needs to meet a high standard of proof and runs the risk of appeals on the merits (rather than just judicial review) to the Competition Appeal Tribunal.

For organisations in the NHS, the most problematic rules are probably those prohibiting anti-competitive agreements. As we know, in order to deliver better care, providers often need to group together in ways that restrict competition, for example, entering alliances to develop more integrated services, or dividing up responsibilities as part of a network. It would be a misrepresentation to suggest that the legislation prevents this type of collaboration. Under both the EU and national rules, many agreements are allowed because they do not in reality significantly affect competition. In addition, competitors can indeed reach agreements that restrict competition where this is necessary to deliver certain wider benefits for consumers. But opponents would argue that NHS organisations have to navigate a legal minefield to determine whether a particular agreement is permissible under the rules.

So how could an incoming government liberate the NHS from these competition rules? Like the EU procurement rules, it would be extremely difficult for an incoming government to negotiate a formal exemption for the NHS from the competition prohibitions in EU law. Such a change would require changes to some of the most fundamental provisions of the EU treaties, which would be extremely unlikely to be negotiable. The European Commission has no formal powers to exempt a particular sector in a particular member state from rules established in the EU Treaty, even if it might take a less rigorous enforcement approach in some sectors in practice.

Simply amending the Competition Act 1998 will not solve the problem. Back in 2003, the EU member states agreed that their national competition authorities would apply EU competition law in parallel with national competition law wherever there is an effect on trade between member states. So member states will encounter some significant legal and practical difficulties if they wish to make changes to national competition laws that cause them to diverge substantially from the EU rules. The EU rules would in any case still apply.

By contrast, it is certainly within the gift of an incoming government to repeal Monitor's powers, which it exercises concurrently with the Competition and Markets Authority, to enforce the prohibitions of anti-competitive conduct in the EU Treaty and the Competition Act 1998 in the health sector. An incoming government could also sweep away Monitor's powers to impose and enforce rules on anti-competitive conduct through the provider licence. But irrespective of these

changes, very similar prohibitions of anti-competitive conduct, set at the EU level, would remain, applicable to health care along with other sectors.

A case could be made that the likelihood of regulatory action for breaches of these EU Treaty or Competition Act prohibitions is relatively slim. The prohibitions in the EU Treaty apply only in cases where there may be an impact on trade between member states (although the EU courts have interpreted this test widely) and where other tests are met. Some commentators would say that the UK regulators have been notoriously reluctant to launch enforcement action for breaches of the prohibitions in their sectors, perhaps because it is easier for them to use their licensing powers, not least given the high standard of proof they need to meet and the risk of successful appeals to the Competition Appeal Tribunal. But none of this entirely removes the difficulties faced by NHS organisations in ensuring compliance or the theoretical possibility of legal challenge.

Nevertheless, like the procurement rules, an incoming government might still, for all practical purposes, extract public sector NHS providers from EU and national competition law – not by seeking exemptions or removing all the existing rules, as Labour has suggested, but through changes to policy and system architecture that reduce the likelihood of these laws applying in the first place.

Both the prohibitions of anti-competitive conduct in the EU Treaty and those in the Competition Act 1998 apply only to 'undertakings' – a term that can refer to any public or private organisation – but only when it is carrying out the economic activity of offering goods or services in a market (Opinion of Advocate General Jacobs). So when commissioners harness open competition between public and independent providers in the delivery of health services, it seems almost certain that those providers will qualify as undertakings and must respect the prohibitions in the Treaty and the Competition Act. But if commissioners eschew competition entirely, for example by securing services from public sector providers without tendering, then it seems equally evident that those providers would not constitute undertakings and so would not be caught by the competition rules.

A more tricky question is whether NHS organisations would constitute undertakings when competing for tenders or patients and revenues within an internal public sector market, rather than an open market involving public and independent providers. Our interpretation is that NHS organisations would

probably not qualify as undertakings or be caught by competition law under these circumstances, providing that all the relevant organisations were fully part of the public sector and under direct government control. However, experts in competition law have different views on the subject.

So there we have it. An incoming government could not, in our view, secure formal exemptions for the NHS from EU procurement or competition rules. Nor could it easily extract the NHS from the national procurement and competition rules that apply across sectors, because these flow from or are deeply intertwined with the EU rules. However, an incoming government could make broader changes to policy and the system architecture of the NHS that would ensure that commissioners and public sector providers were rarely subject to these rules in practice. Those changes would give commissioners much greater flexibility to decide whether and how to tender services and ensure that public sector NHS providers escape EU and UK competition law wherever commissioners decide not to use competition or (arguably) to restrict competition to an internal public sector market. To achieve this would require a major shift against the direction of government policy over at least the past 15 years, bringing foundation trusts firmly back under the direct control of government.

References

Burnham A (2015). Speech on Labour's 10-year plan for health and care and accompanying Q&A session at The King's Fund, London, 27 January 2015.

Illman J (2014). 'Stevens to Burnham: 2006 law "prevents NHS tendering ban"', *Health Service Journal*, 11 September 2014.

Labour Party (2015). *Labour's ten year plan for health and care* [online]. Your Britain website. Available at: www.yourbritain.org.uk/agenda-2015/policy-review/labours-ten-year-plan-for-health-and-care (accessed on 10 March 2015).

Monitor (2013). *Substantive guidance on the procurement, patient choice and competition regulations*. London: Monitor. Available at: www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance (accessed 10 March 2015).

Opinion of Advocate General Jacobs, Hofner, Case C-41/90, [1991] ECR I-1979, 1-1997, 13, [1993] 4 CMLR 306, 317.

Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (Case C-107/98 [1999] ECR I-8121. Available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-107/98 (accessed on 12 March 2015)

Watt N, Mason R, Wintour P (2015). 'Labour's NHS election crusade a pale imitation of 1992 campaign – Milburn'. *The Guardian*, 27 January 2015.

Legislation

Competition Act 1998
www.legislation.gov.uk/ukpga/1998/41/contents

Health and Social Care Act 2012
www.legislation.gov.uk/ukpga/2012/7/contents/enacted

NHS (Procurement, Patient Choice and Competition) Regulations 2013
www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_20130500_en.pdf

Public Contracts Regulations 2015
http://www.legislation.gov.uk/uksi/2015/102/pdfs/uksi_20150102_en.pdf

Treaty on the European Union and Treaty on the Functioning of the EU
http://europa.eu/eu-law/decision-making/treaties/index_en.htm

The Procurement Directive 2004/18/EC
http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32004L0018

The Procurement Directive 2014/24/EU
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0024