Response to Monitor Consultations

Farasat Bokhari	Senior Lecturer, School of Economics / ESRC Centre for Competition Policy, University of East Anglia
Charlotte Davies	Research Associate, Norwich Medical School, University of East Anglia
Steve Davies	Professor of Economics / ESRC Centre for Competition Policy, University of East Anglia
Sven Gallasch	Research Associate, ESRC Centre for Competition Policy, University of East Anglia
Mary Guy	PhD student, Law School / ESRC Centre for Competition Policy, University of East Anglia
Rob Heywood	Reader, Law School, University of East Anglia
Morten Hviid	Professor of Law / Director, ESRC Centre for Competition Policy, University of East Anglia

1. Scope of response:

This response follows discussions between a group of researchers at the University of East Anglia including members of ESRC Centre for Competition Policy[1] across different disciplines (law, economics and health economics) and covers issues arising from the following Consultations:

(i) On guidance on the application of the Competition Act 1998 in the health care sector;
(ii) On guidance on Monitor's approach to market investigation references;
(iii) On draft Monitor guidance on merger benefits;
(iv) Licence conditions – choice and competition: consultation on draft guidance for providers of NHS-funded services.

2. General comments:

In its *Consultation on guidance on the application of the Competition Act 1998 in the health care sector*, Monitor states that it is to provide examples of anticompetitive practices and abuse of dominance (paras 39 -45). Addressing specific markets and correspondingly specific parties appears key not only to refining Monitor's guidance, but also to clarifying the division of effort with the OFT [and in the future, the CMA].

In view of the unique nature of healthcare, we consider that the guidance needs to include a definition of what is meant by "healthcare" and address the issues of market definition and parties, even if this is only at the level of distinguishing NHS and private healthcare, or specific types of treatment.

[1] An ESRC funded Investment. The views and statements expressed are those of the author and do not necessarily reflect the views of the ESRC

Defining the market is the first step in assisting both participants (typically commissioners, but also healthcare providers at different levels) and others in understanding "healthcare" as a market, their role in it and how competition works. This is important for at least two reasons.

Firstly, healthcare is a market which is new to competition. Although the OFT has experience of overseeing the Private Healthcare (PH) sector, Monitor's role is wider, as it appears to encompass PH in addition to the NHS. Furthermore, there is a need to manage the significant cultural change and shift in perception from experiencing the English NHS as a public service (with implications – however erroneous - of it being exempt from competition rules) to a fully-functioning competitive market.

Secondly, the novelty of competition in healthcare suggests that actors who are "undertakings" for the purposes of competition law may not consider themselves as such, nor be entirely clear on the implications of this. For example, if the distinction between cooperation and collusion is not well understood, this could in theory lead to practitioners taking an excessively cautious (even defensive) approach in order to avoid breaches of competition law at the cost of potential efficiencies and benefits to patients.

Related to this is the further need to pitch guidance at different levels for those involved in healthcare – from GPs and clinical specialists to managers, commissioners and ultimately policymakers.

In this regard, the experience of Dutch healthcare regulation may prove instructive, where the competition authority and healthcare regulator have produced guidance aimed at specific groups (healthcare providers and health insurers) detailing how competition law affects them with concrete examples. While attempting to cover all potential eventualities is impossible, examples which show engagement with different practitioners may assist Monitor in developing its new role.

3. Specific issues:

We also wish to highlight the following specific issues:

(i) Effect and extent of concurrent powers / demarcation of OFT and Monitor competence:

The HSCA 2012 provides that Monitor and the OFT [and in the future, the CMA] are to share concurrent powers with regard to anticompetitive agreements (breach of Chapter I Prohibition CA98 and/or Article 101 TFEU), abuse of dominance (breach of Chapter II Prohibition CA98 and/or Article 102 TFEU) and market investigations (Part 4 EA02). Further clarification regarding the extent of these powers (and exceptions to these) are found in the Explanatory Notes to the HSCA 2012[2].

[2] E.g. Regarding s.72 HSCA 2012 http://www.legislation.gov.uk/ukpga/2012/7/notes/division/5/3/2/1 and s.73 HSCA 2012 http://www.legislation.gov.uk/ukpga/2012/7/notes/division/5/3/2/2

In its *Consultation on guidance on the application of the Competition Act 1998 in the health care sector*, Monitor reaffirms its concurrent powers with the OFT and states that its remit applies to all health care services in England, and is not limited to NHS-funded services (para 10).

It would be useful for Monitor and the OFT to clarify as precisely as possible where the limits of their respective competence lie – perhaps by reference to specific cases. For example, where firms supplying the NHS enter into agreements which may resemble cartels, would this be investigated by the OFT or Monitor? With an increased emphasis on the procurement process, who will tackle information exchange between different undertakings, including providing clear guidelines about the problem areas? Were NHS Hospital Trusts to be investigated again regarding the anticompetitive sharing of confidential information regarding PPUs (http://www.oft.gov.uk/news-and-updates/press/2012/71-12), would this fall to Monitor (in view of the NHS angle), or the OFT, as previously?

(ii) Remedies:

In its *Consultation on guidance on the application of the Competition Act 1998 in the health care sector*, Monitor states that it may accept binding commitments (para 29) and is empowered to impose financial penalties (para 33).

We consider that there is a balance to be struck between the two potential remedies with regard to healthcare. An obvious concern is that patients could be harmed by the imposition of financial penalties, where a loss of available funds could equate to a loss of quality, or availability of healthcare provision. This may be particularly pertinent for the NHS given the implicit emphasis on benefitting taxpayers as well as patients. When assessing the appropriateness of the remedy, the impact on current and future patients should be accounted for explicitly so that the trade-off between giving incentives to staff not to violate competition law through large expected fines and the costs to patients where the fine is actually imposed is visible.

While it is important for Monitor to balance the management of punitive action with ensuring overall patient (and taxpayer) welfare, there is a need to consider whether commitments would be a "better" solution in view of pressure being put on public finances (although financial penalties may prove more effective in some circumstances). In addition, although it is individuals who violate competition provisions, it may prove impractical to identify culpable individuals given the complex structures of NHS FTs (and the "systemic" nature of competition law infringements). It therefore appears that punishing relevant institutions may be more appropriate where these can be incentivised to put in place systems ensuring that violations are deterred successfully.

(iii) Licence conditions – choice:

With regard to the *Licence conditions – choice and competition: consultation on draft guidance for providers of NHS-funded services* document, it was considered that further detail about choice and the implications of giving advice would be welcome. The current

guidance would potentially provide a disincentive to provide information where this is not strictly mandated.

(iv) Mergers:

In the *Consultation on draft Monitor guidance on merger benefits*, there is significant emphasis on "relevant customer benefits" in recognition of Monitor's duty under s.79(5)(a) HSCA 2012. S.79(5)(b) HSCA 2012 may give Monitor greater freedom in expressing concerns about mergers ("*such other matters…as Monitor considers appropriate*"). Clarification of what the "appropriate" matters may include could be useful, even if this is ultimately determined on a case-by-case basis.