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Dear Deborah

Health and Social Care Bill: application of competition law to NHS foundation trusts

I am writing in the context of the Office of Fair Trading's recent publication: "*Public bodies and competition law: A guide to the application of the Competition Act 1998*" (OFT1389)[1] ("the OFT Guidance") to seek the OFT's view on particular issues relating to NHS foundation trusts.

Questions have arisen in Parliament on how proposed reforms to foundation trusts, contained in the Health and Social Care Bill, might affect the application of the Chapter 1 and Chapter 2 prohibitions in the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union ("competition law") to those bodies. A view from the OFT on the Department of Health's opinion on the issues raised would therefore be very welcome.

NHS foundation trusts

NHS foundation trusts were established by the Health and Social Care (Community Health and Standards) Act 2003, as new organisations within the national health service ("NHS") which have mainly replaced NHS trusts (which were established to own and manage hospitals etc. previously managed by health authorities, or to develop new facilities). Foundation trusts are public benefit corporations authorised to provide goods and services for the purposes of the health service in England. They are answerable not to the Secretary of State but to the Independent Regulator of NHS foundation trusts (known as "Monitor", albeit this term is not used in the legislation) which is responsible for granting and setting the terms of authorisations for foundation trusts, and monitoring their compliance with the terms of their authorisation (see now sections 30-57 of the National Health Service Act 2006 ("the NHS Act")).

The Health and Social Care Bill

Part 3 (Monitor) of the Bill includes provision for regulation of health care services in England and establishes a sector regulator for such services, to be known as "Monitor". Amongst other functions, Monitor will be responsible for running a system of licensing for providers of health care services for the purposes of the NHS in England. Subject to any exemptions granted in regulations, all persons providing such services will be required to hold a licence from Monitor. Amongst other things, the new regulatory regime will:

(a) give Monitor concurrent powers with the OFT to enforce Part 1 of the Competition Act 1998 ("the Competition Act") (clause 68 of the Bill);

[1] December 2011.

(b) provide for seven-yearly reviews by the Competition Commission of the development of competition in the provision of health care services for the purposes of the NHS (clause 76 of the Bill); and

(c) give powers to Monitor to make references to the Competition Commission to determine questions on a number of issues (following objections from service providers), including proposed modifications to licence conditions and the proposed methodology determining prices to be included in the national tariff for the provision of health care services for the purposes of the NHS (see, for example, clauses 99 and 118 to 120 of the Bill).

Part 4 (NHS foundation trusts and NHS trusts) of the Bill makes various changes to the provisions of the NHS Act governing foundation trusts. It removes various restrictions on foundation trusts that reflect changes to the role of Monitor introduced by Part 3 of the Bill. All foundation trusts will however remain within public ownership as public benefit corporations. In particular, the Bill will:

(a) remove Monitor's power to authorise new foundation trusts once all remaining NHS trusts have become foundation trusts;

(b) replace foundation trusts' authorisations with licences from Monitor, where such licences would also be held by other types of providers of NHS services (licences could however contain conditions which are set specifically for foundation trusts, where these relate to the governance of foundation trusts, to take account of their different status, and to enable Monitor to maintain the statutory register of foundation trusts – clauses 93 and 95(2)(f) of the Bill);

(c) repeal Monitor's powers of intervention in relation to failing foundation trusts (currently in section 52 of the NHS Act) and replace these with similar, time limited powers under clauses 109 to 112 of the Bill (these powers will expire on 1 April 2016[2], unless the Secretary of State extends that date by order in relation to all, or specified foundation trusts);

(d) remove the cap on income which foundation trusts can generate from treating private patients (clause 162(1) of the Bill). This cap, found in section 44 of the NHS Act, has the effect that a foundation trust cannot earn in any financial year a higher proportion of its total income from private charges than it derived from private charges in the financial year 2002-03.

The question raised in the House of Lords is whether the changes referred to in paragraph 4(a) to (c) and paragraph 5(b), (c) and (d) above will, in themselves, change the application of competition law to foundation trusts. Concerns have also been raised about the possible levying of sanctions on foundation trusts should they be found to have breached competition law.

The effect of the proposed changes on the application of competition law to foundation trusts

The Department accepts that we can only have complete certainty as to the extent to which competition law applies in individual cases involving the provision of NHS health care services following decisions by competition authorities, after investigations by them, or through judgments of the courts.

[2] In relation to foundation trusts authorised after 1 April 2014, Monitor will retain these intervention powers for a period of two years from the day the trust was authorised, unless the Secretary of State extends that period by order.

The Department however agrees with the OFT that a body can act as an undertaking in respect of some of its functions and not in respect of others. We note that paragraphs 2.3 to 2.5 of the OFT Guidance state:

> "2.3 … The focus of the assessment of whether a body is an undertaking is … on the nature of the **particular activity** undertaken, not the nature of the body that undertakes it. As such:
>
> - The term 'undertaking' can apply equally to public sector bodies and no-for-profit bodies, as well as to private sector bodies. Public authorities, State-controlled enterprises, charities, etc. all fall within the definition of an undertaking, if they are carrying on an economic activity.
> - The legal form of the body in question is also irrelevant to the question of whether it acts as an undertaking. A body need not, for example, be an incorporated company in order to be an undertaking.
> - The fact that a body is intended to be not-profit making will not of itself, be sufficient to deprive it of its status as an undertaking.
>
> 2.4 It is also important to note that this 'functional' approach means that a public body may act as an undertaking – and therefore be subject to competition law – in respect of some of its activities, but not in respect of others.
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> - For example, a body vested with powers to grant applications to organise motorcycling events was found not to be acting as an undertaking when making such authorisation decisions, but was considered to act as an undertaking when carrying out economic advertising and sponsorship activities relating to such events.
>
> 2.5 As a result, each activity carried out by a public body must be considered separately to assess whether or not it is 'economic'.

The Department's view is that the changes made to legislation governing foundation trusts will not, in themselves, change the way in which competition law would be applied to foundation trusts. Thus the question of whether or not a foundation trust is acting as an "undertaking" for the purposes of competition law will not be determined by an assessment of the foundation trust as a whole, but would be based on an assessment of a particular activity of the foundation trust. In other words, a 'functional' approach will be taken.

In relation to the proposed changes to the regulatory regimes for providers of health care services for the purposes of the NHS and for foundation trusts specifically, our view is that it would mean the following:

(a) matters relating to the structure of the regulatory regime (including as referred to at paragraph 4(a) to (c) and paragraph 5(b) and (c) above) would be irrelevant to, or not determinative of, the question of whether or not a foundation trust was carrying out an economic activity;

(b) for the purposes of the Competition Act 1998, it is whether an economic activity is being undertaken which is germane to the question of whether or not a body is acting as an undertaking, not the volume or value of that activity. Therefore, the fact that a foundation trust may increase the amount of income it receives from providing health care services to private paying patients would not change the assessment of whether or not, in providing health care services for the purposes of the NHS, a foundation trust was carrying out an economic activity. That assessment would look at the particular activity concerned, rather than the activities of the foundation trust as a whole.

The consequences for foundation trusts in breaching competition law

Paragraphs 4.8 and 4.9 of the OFT Guidance clearly set out the consequences of failure by a public body, such as a foundation trust, to comply with competition law in carrying out an economic activity; as well as the possible penalties which may be imposed by the OFT for such a breach.

However, paragraph 4.11 of the OFT Guidance also says:

> "... in response to a competition concern in a public services market, the OFT will consider the range of options available to it, and will balance the beneficial deterrent effect of a formal decision and possible fine against the impact that payment of a fine might have on the public body and ultimately, the taxpayer."

The Department's reading of what paragraph 4.11 says is that, in the case of a foundation trust breaching competition law when acting as an undertaking, in assessing whether or not to impose a fine, or the level of any fine, a factor that the OFT would take into account would be the impact on the foundation trust, as a public body, and ultimately, the taxpayer. Our view is that it must follow that, in doing so, the OFT would take into consideration any relevant submissions made by the foundation trust about the impact of a fine on the provision of health care services for the purposes of the NHS and ultimately, patients.

If possible, I would be grateful for a response by the end of the week.

Thank you for your assistance with this matter.

Yours sincerely

Bob Ricketts CBE
Director of Provider Policy