

Working arrangements between the OFT and the CCP

Introduction

1. These working arrangements establish a framework for cooperation and constructive communication between the Office of Fair Trading (OFT) and the Cooperation and Competition Panel (CCP) (together, the Parties). They explain how the Parties will deal with cases involving the provision of healthcare services in England.
2. This document is not legally binding on either of the Parties.

The role and responsibility of the OFT in relation to these working arrangements

3. The OFT is a non-ministerial government department and the United Kingdom's independent consumer and competition authority. It has powers to investigate and take enforcement action against infringements of the prohibitions in the Competition Act 1998 (Competition Act) and infringements of Articles 81 and 82 of the EC Treaty¹. Specifically the OFT:
 - Investigates agreements between undertakings that may have as their object or effect the prevention, restriction, or distortion of competition and that may affect trade within the UK and/or between EU Member States;² and
 - Investigates potential abuse by one or more undertakings of a dominant position that may affect trade within the UK and/or between EU Member States.³
4. The OFT also investigates criminal cartels under the Enterprise Act 2002 (the Enterprise Act).
5. Pursuant to the Enterprise Act, the OFT also has a statutory duty to refer to the Competition Commission (CC) those mergers between enterprises which may lead to a substantial lessening of competition (SLC) in a market(s) in the United Kingdom.

¹ EC Regulation 1/2003 (the Modernisation Regulation), which came into force on 1 May 2004, requires national competition authorities (NCAs) of the Member States and the courts of the Member States to apply and (in the case of the NCAs) enforce Articles 81 and 82 as well as national competition law. Where NCAs apply national competition law to an agreement or conduct which may affect trade between Member States they must also apply Articles 81 and 82.

² Anti-competitive agreements between undertakings that may affect trade in the UK may infringe the Chapter I prohibition of the Competition Act. Anti-competitive agreements that may affect trade between EU Member States may infringe Article 81 of the EC Treaty.

³ Abuse of a dominant position that may affect trade in the UK may infringe the Chapter II prohibition of the Competition Act. Abuse of a dominant position that may affect trade between EU Member States may infringe Article 82 of the EC Treaty.

6. Under the Enterprise Act, the OFT also conducts market studies, applying its general functions in Part 1 of the Enterprise Act. The OFT may also receive super-complaints from consumer bodies designated to make them under Part 1 of the Enterprise Act. Under Part 4 of the Enterprise Act, the OFT has a power to make a reference to the CC for further investigation where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK prevents, restricts, or distorts competition. Nothing in these working arrangements affects the OFT's exercise or application of these powers, duties and functions under the Enterprise Act.
7. Moreover, the OFT and other bodies (including the CCP – see para. 11 below) have a range of powers and responsibilities relating to misleading advertising.
8. The OFT's work may involve examining the conduct of any healthcare service providers as well as mergers involving any healthcare service providers to the extent that they are engaging in economic/commercial activity and are acting as undertakings or enterprises, as the case may be (see para. 16 below).

The role and responsibility of the CCP in relation to these working arrangements

9. The CCP is an independent, non-statutory advisory body. It has been established by the Secretary of State to provide advice to the Department of Health, Strategic Health Authorities (SHAs) and, in relation to NHS Foundation Trusts (Foundation Trusts), Monitor on issues arising from the application of the Principles and Rules of Cooperation and Competition (PRCC) which apply to all NHS-funded services in England. The Secretary of State, acting through the Commissioning and System Management Directorate (System Management and New Enterprise Division) of the Department of Health (DH), and Monitor are the joint sponsors of the CCP (the Sponsors).
10. The PRCC were published by DH as part of the NHS Operating Framework for 2008/09.
11. The CCP has a wide remit which is not limited to issues relating to patient choice or competition. It will receive the following cases:
 - i. First, a procurement or advertising case has been considered by an SHA and that SHA has referred the matter to the CCP for consideration or a party which has attempted resolution directly with the PCT using the dispute resolution procedure of the relevant SHA has appealed the SHA's decision to the CCP (appeal);
 - ii. Second, the case involves a merger or conduct falling to be considered under the PRCC (reserved matter); and
 - iii. Third, a request is made to the CCP by one of the Sponsors to review a general issue arising under the relevant principles in the PRCC which is broader than a single specific case -(non-case specific matter).
12. The CCP will advise one or more of DH, Monitor or SHAs on the application of the PRCC and make recommendations as to how any breaches should be remedied.

13. The CCP can also advise DH and Monitor on wider competition policy issues in relation to healthcare in England.

No concurrent powers to enforce competition law

14. Responsibility for enforcing competition law in the UK under the Competition Act, the Enterprise Act, and Articles 81 and 82 lies with the OFT. The CCP does not have jurisdiction to enforce the Competition Act, the Enterprise Act or Articles 81 and 82, and does not have any concurrent powers in this respect.

Healthcare services providers in the UK

15. Many independent sector healthcare providers provide both NHS-funded healthcare services⁴ and non-NHS funded healthcare services. Similarly, in addition to providing NHS-funded services, many NHS bodies also generate private patient income through commercial or economic activity.

16. The Competition Act and Articles 81 and 82 of the EC Treaty apply to entities which are acting as “undertakings”. The merger control provisions of the Enterprise Act apply to “enterprises”. What constitutes an “undertaking” under EC and UK competition law is defined by case law, and may change over time. The concept of undertaking presently encompasses every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed. Currently, entities are unlikely to be considered to be engaged in economic activity if:

- i. they provide services on a universal or compulsory, rather than optional basis,
- ii. the benefits are the same for all beneficiaries (rather than depending on the amount of contribution by beneficiaries and/or the financial results of the investments made by the managing organisation) (known as “solidarity”), and
- iii. a redistribution mechanism applies between relevant entities in order to remedy financial disparities (rather than each entity operating according to the principle of capitalisation).

17. It is possible that the provision of certain NHS-funded healthcare services may fall within the Competition Act and Articles 81 and 82 of the EC Treaty.

18. If there are any legal or economic developments in the relevant law applicable to the provision of NHS-funded healthcare services, or the way these are provided materially changes, the Parties would need to reconsider their current interpretation.

Conduct

19. For routine elective NHS-funded services, patients now have the right to choose⁵ any willing and registered provider of these services regardless of the physical proximity or

⁴ Indeed some provide NHS-funded services exclusively, e.g. some Independent Sector Treatment Centres.

⁵ Choice is exercised at the point at which a patient requires a referral for his/her first, consultant-led outpatient appointment.

type of provider.⁶ The NHS is also moving towards a more competitive model in the procurement of health services as well as through patient choice.

20. The PRCC contain a number of obligations in relation to the commissioning or provision of NHS-funded services in England which relate to choice or competition, for example:

- i. Principle 1 states that commissioners should commission services from the providers who are best placed to deliver the needs of their patients and population;
- ii. Principle 4 states that 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;
- iii. Principle 4, Rule 2 states that providers, referrers to and commissioners must not restrict choice via collusive behaviour or any other action;
- iv. Principle 6 states that providers must not discriminate and must promote equality;
- v. Principle 7, Rule 3 states that commissioners must not contract with providers whose pricing strategy constitutes predatory pricing; and
- vi. Principle 8 states that financial intervention in the system must be transparent and fair.

21. If the CCP receives a complaint which relates to conduct involving NHS-funded services, it will investigate the conduct under the PRCC⁷. The CCP may investigate the provision of NHS-funded healthcare services by independent sector providers if a complaint concerns the application of the PRCC to their conduct.⁸

22. Where conduct involves the provision of commercial healthcare services by the independent sector or by NHS bodies (i.e. where they generate private patient income) it may breach the prohibitions in the Competition Act and/or Articles 81 and 82 of the EC Treaty. The OFT has power to examine such conduct.

23. If conduct relates to both NHS-funded and non-NHS funded healthcare services, the CCP and OFT will decide at the earliest opportunity which authority is best placed to investigate on a case by case basis. Practically, where the conduct is carried on by public sector healthcare providers, the CCP will usually investigate in the first instance, but if the conduct relates primarily to non-NHS funded and/or commercial healthcare services it may not satisfy the CCP's acceptance criteria because the CCP would not be the most appropriate body to consider or resolve the issue. For the avoidance of doubt,

⁶ This right has now been enshrined within the NHS Constitution (Department of Health, January 2009).

⁷ Assuming that its case acceptance criteria are satisfied.

⁸ As set out in paragraph 17 however, it is possible that the provision of certain NHS-funded healthcare services may fall within the Competition Act and Articles 81 and 82 of the EC Treaty. In such cases the OFT has power to examine the relevant conduct.

the OFT is not precluded from commencing its own investigation irrespective of whether the CCP is also examining those activities.

24. In all cases, the CCP will inform the OFT of a suspected serious breach of the Chapter I prohibition under the Competition Act 1998 or Article 81 of the EC Treaty. If the OFT decides to open an investigation the CCP is unlikely to conduct an inquiry, and is likely to cease any inquiry it has already started, insofar as it concerns conduct that relates to the provision of any non-NHS funded and/or commercial healthcare services provided. However, given the different remedies available to the Parties, and in particular the wide powers of DH and Monitor to direct NHS organisations and FTs respectively following advice from the CCP, there may be instances where the CCP will investigate the relevant conduct under the PRCC and the OFT will investigate the relevant conduct under the Chapter I prohibition and/or Article 81.

Mergers

25. Under the Enterprise Act 2002, the OFT has a statutory duty to make a reference to the Competition Commission where there is a realistic prospect of a relevant merger situation giving rise to an SLC. A relevant merger situation is, broadly, one where two or more “enterprises” have ceased to be distinct, or will cease to be distinct, and where one of the jurisdictional tests under the Act is met (either turnover or share of supply). The OFT’s duty is to refer, not to investigate. Therefore, where it is clear that there is no prospect of its duty to refer being met, and a merger is not notified to it, the OFT may choose not to investigate even in cases where it would have jurisdiction to do so. The OFT will take such decisions on a case by case basis.

26. By contrast, the CCP will examine all mergers, acquisitions, joint ventures or vertical integration (“mergers”) involving entities offering NHS-funded healthcare services, including NHS Trusts, Foundation Trusts and primary care service providers, which satisfy certain thresholds⁹ and which are notified to it. The CCP will advise DH, Monitor and the parties on competition issues arising from such mergers. In particular, the CCP will assess the consistency of transactions with Principles 9 and 10 of the PRCC and will recommend remedies if appropriate:

- i. Principle 9 provides “*Mergers, acquisitions, de-mergers and joint ventures are acceptable and permissible when demonstrated to be in patient and taxpayers’ best interests and there remains sufficient choice and competition to ensure high quality standards of care and value for money*”;
- ii. Principle 10 provides “*Vertical integration is permissible when demonstrated to be in patient and taxpayers’ best interests and protects the primacy of the GP gatekeeper function; and there remains sufficient choice and competition to ensure high quality standards of care and value for money*”.

Cooperation and information sharing

⁹ The combined turnover of the merging parties exceeds (i) £70 million in the case of acute and mental health trusts; (ii) £35 million in the case of community service providers; or (iii) £15 million in the case of primary care providers.

27. The Parties will:

- a. meet and communicate regularly to discuss matters of mutual interest; and
- b. consult one another at an early stage on any issues that might have significant implications for the other organisation.

28. The Parties will agree, publish and periodically review operational procedures on information sharing. Any information-sharing between the two organisations is subject to relevant restrictions on disclosure of information.

29. Currently the OFT is unable to supply specified material that has come to it in the course of its functions that relates to the business of an undertaking or the affairs of an individual, unless the consent gateway under Part 9 of the Enterprise Act is available.

Review and implementation

30. These working arrangements come into effect when signed by both Parties. They will be reviewed as the need arises or by written request of either Party, though we anticipate that they will be reviewed no later than two years after coming into force. Any changes will be subject to the agreement of both Parties.