

Commissioning and compliance: GP consortia and the competition rules

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In summer 2010 the government announced in the health white paper (Equity and Excellence – Liberating the NHS) that commissioning would be devolved to GP consortia, and that Monitor would become an economic regulator for the healthcare sector. The Health and Social Care Bill 2011 has given us the draft detail for both reforms.

This Q&A considers the application of the competition rules to GP commissioning, in the light of the Health and Social Care Bill.

Q. What is meant by the competition rules?

A. The competition rules are laws set out in UK legislation (Competition Act 1998 and Enterprise Act 2002) and in the EU Treaty that outlaw anti-competitive behaviour – specifically, **anti-competitive agreements and the abuse of a dominant market position.**

Q. Who has to comply with the competition rules?

A. Every entity that offers goods or services on a market and that has the potential to make profits.

Q. Will the competition rules apply to GP commissioning?

A. That remains a difficult question, even after the bill. The competition rules apply to “undertakings”. Case law explains that undertakings are entities that engage in economic activity – that is, the offering of goods or services on an economic market, with the potential to make a profit. Case law also makes clear that where health bodies fulfil a social function, based on the principles of universal cover and national solidarity (being funded by social security contributions and other state funding), to provide a service free of charge, they do not engage in “economic activity” and so are not undertakings for the purposes of the competition rules. That means that the competition rules do not apply to health bodies, where these criteria are met. It may be that GP commissioning consortia will meet these criteria, with the result that they are not caught by the competition rules. However, caution is needed and each consortium will need to assess its own position carefully. Guidance from Monitor, once established as the economic regulator for the sector, would be useful. The procurement rules are likely to apply to GP commissioning consortia regardless of the position on the competition rules, and consortia will do well to familiarise themselves with this regime and the DH’s 2010 Procurement Guide.

Q. What if the competition rules apply to GP commissioning, and we break them?

A. A range of significant sanctions applies for breaking the competition rules: businesses can be fined up to 10% of their annual turnover, third parties that have suffered loss can sue for compensation, company directors can be disqualified for up to 15 years, and for the most serious breaches (cartels between competing businesses) there is a criminal sanction that can lead to imprisonment for up to 5 years.

Q. Who will enforce the rules?

A. Monitor (the independent regulator of NHS foundation trusts) will be expanded to take on the role of the economic regulator for the healthcare sector. It will have powers to investigate and take action against breaches of the competition rules.

Q. What will we need to do to ensure compliance?

A. Follow a simple compliance plan:

1. Track developments as they occur – ie the parliamentary process that will lead to the Health Act 2011.
2. Keep up to speed with DH consultations and guidance papers as they are issued.
3. On establishment of your GP consortium, ensure that there is a high level of awareness of the relevant rules – arrange training before the rules take effect and annually thereafter.
4. Keep good records of competition issues that arise, and solutions to them. Develop this as a resource for decision-making in future cases that are similar.

Q. What about public procurement law?

A. Procurement law exists to ensure that contracts for public bodies are awarded fairly. For Part A procurements (which include IT, property management, waste disposal, etc), there are detailed requirements for the advertising and award of contracts; a less onerous regime applies to services that fall within the Part B list (which includes health services), although public bodies must still observe general rules of equality of treatment, non-discrimination and transparency. GP commissioning consortia will have powers and responsibilities to spend public money, and as such will generally be subject to procurement law.

Consortia will also need to observe DH guidance: the Procurement Guide for Commissioners of NHS-funded Services will be updated for 2011/12 and can be expected to give more detailed guidance on how procurement policy will apply to GP consortia.

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