



newsletter

Competition & Health - November 2009

Co-operation and Competition Panel for NHS-funded Services: Raison d'etre and Remit

Action so far: the CCP set up to act as internal regulator and address competition concerns within the healthcare sector.

Introduction

Value for money is a concern for most people. It is of particular concern to those responsible for funding the public sector - we taxpayers. The public sector includes, in this respect, healthcare businesses. The debate about value and choice in healthcare rages on. Much money has gone into the Government's drive to improve the National Health Service. Questions are often asked about what this money has bought, and continues to buy, in terms of value, choice and innovation.

As the **Secretary of State** has recently made clear, the NHS will always be the preferred supplier of services where all else is equal. But where there is a need to involve other suppliers, the efficiencies brought by competition should not be lost. In the drive to address concerns in this area, the regulators have not been standing idly by.

The Office of Fair Trading has made it clear that it has a specific interest in making sure that competition rules are complied with by healthcare providers. Publicly-funded bodies are not exempt from the requirement to comply in this respect. It is a feature of some public bodies - and the healthcare sector is no exception in this regard - that they can often achieve very powerful positions in their markets because of the limited competition that exists.

The Secretary of State for Health has clearly decided that, so far as NHS-funded services are concerned, something more than the general regulatory bodies - principally the Office of Fair Trading and the Competition Commission - is required.

For this reason, there has been set up the '**Co-operation & Competition Panel for NHS-funded Services**' ['CCP']. This is effectively an internal regulator. It is not a statutory body. It is made up of eminent and experienced professionals with backgrounds in both the health sector and relevant regulation. [For more detail on current membership, see the article on consultants' non-contracted hours.]

So what does the CCP do?

It covers four areas:

- It reviews whether the **conduct** of healthcare providers and commissioners is in accordance with, or breaches, the 'Principles and Rules for Co-operation and Competition' ['PRCC'], set out by the Department of Health.
- It assesses **mergers** of NHS-funded healthcare providers to ensure that they are in the best interests of patients and taxpayers, using tests of choice and competition to ensure high standards of care and value for money.
- It investigates general issues arising from the PRCC in response to a request from a sponsor of CCP - either the Department of Health or 'Monitor', the independent regulator of NHS Foundation Trusts.
- It assesses appeals on procurement and advertising issues from the decisions of Strategic Health Authorities.

What progress so far?

Well the CCP began work on **30th January 2009**. It has already produced decisions on a number of cases referred to it. For details of these cases, see the separate articles herein.



Please email Toby Tyler at toby.tyler@morgan-cole.com with your feedback, comments and suggestions on this publication.

Transfer of Barking and Dagenham's community health services to North East London NHS Foundation Trust

On 30th June 2009, the Panel announced its recommendation that the proposed transfer be allowed to proceed.

On 30th June 2009, the [Co-operation and Competition Panel](#) ["CCP"] announced its recommendation that the proposed transfer of Barking and Dagenham community health services to [North East London Foundation Trust](#) be allowed to proceed. The recommendation was made to 'Monitor', the independent regulator of NHS Foundation Trusts. The recommendation followed a review of the proposed merger under the [Principles and Rules of Co-operation and Competition](#) ["PRCC"].

The reasons for this clearance were as follows:

1. The merger would not impose significant costs on patients or taxpayers by reducing the scope for patient choice or competition;
2. It will benefit patients and taxpayers by allowing NHS Barking & Dagenham to focus on its commissioning responsibilities;
3. Review within North East London showed that there is a substantial number of possible providers of community services in Barking and Dagenham. As a result, the loss of North East London Foundation Trust as a potential provider of these services in competition with Barking and Dagenham community services is not significant.

One question mark remained over the deal: There was a risk that the commissioning contract with North East London Foundation Trust for community services - that formed part of the deal - would delay the introduction of appropriate forms of patient choice and competition in community services. To address this concern, the CCP made it clear that they expect NHS Barking and Dagenham to work in close cooperation with [London Strategic Health Authority](#) ["SHA"] to minimise this risk. They should do this by working also with London SHA on its implementation. What is not clear is how decisions such as this will be policed. It is noticeable that the CCP has not asked for undertakings to underpin their approach here. Indeed, it is debatable whether the CCP has the authority to seek such undertakings. The CCP's full report on this merger is available on the CCP website at www.ccp-panel.org.uk

CCP ruling on restrictions on consultants' non-contracted hours

The Panel's decision is an important milestone in the development of 'system management' within the NHS.

Background

The [Co-operation and Competition Panel](#) (the Panel) began work on 30 January 2009. Its remit is to ensure that NHS-funded healthcare services deliver (a) high quality care for patients, and (b) value for money for taxpayers.

The Panel investigates breaches of the NHS's ["Principles and Rules of Co-operation and Competition"](#) (the PRCC). It makes recommendations to Strategic Health Authorities, the Department of Health and Monitor on how breaches should be resolved. The PRCC were published in December 2007 as an annex to the Operating Framework for the NHS in England 2008/9. They consist of 10 guiding principles, each of which contains a rationale, required actions and behaviours, and a list of rules.

The Panel also assesses proposed mergers within the NHS, and advises on the wider development of co-operation, patient choice and competition. The Panel consists of its Chairman, Lord Carter of Coles, its Director, Andrew Taylor, and a further 6 part-time panellists drawn from legal, economics, business and healthcare backgrounds. 3 of the 6 part-time panellists are senior specialist competition lawyers. It has a full-time staff which includes competition law and economics specialists who have worked in the competition regulatory authorities in the UK and Australia.

Facts

In April 2009, the Department of Health and Monitor asked the Panel to study restrictions placed on consultants relating to the non-contracted hours that they can work for other providers of NHS-funded healthcare services.

On 24 September 2009 the Panel published its findings. It has found that:

["Restrictions on consultants' ability to work for other providers of NHS funded services in their non-contracted hours have the effect of reducing patients' and commissioners' choice of service provider, and competition between these service providers."](#)



This in turn reduces incentives for service providers to improve the quality of their care, innovate and provide better value for money, and thus has an adverse effect on patients and taxpayers."

The Panel considered that there are only two situations where patients and the taxpayer could benefit from such restrictions:

- first, where they are "imposed on an individual consultant as part of a package of measures to address legitimate patient safety concerns arising from the specific performance of that consultant";
- second, where they prevent a consultant from:
 - holding strategic management positions (at the level of Clinical Director and above) in more than one organisation;
 - 1. holding a strategic management position in one organisation while assisting another organisation to tender for NHS-funded services; and
 - 2. assisting more than one organisation to respond to the same tender for NHS-funded services.
 - 3. The Panel considers that "any other explicit or implicit restriction imposed by an NHS Trust on a consultant's ability to work for other providers of NHS-funded services during their non-contracted hours is likely to be in breach of the Principles and Rules for Co-operation and Competition".

Comment

The Panel's decision is an important milestone in the development of 'system management' within the NHS. The Panel has delivered a regulatory decision based on the principle that choice and competition within the NHS are drivers of care quality and taxpayer value for money, and should be protected. Importantly, it said in its Executive Summary that it would: "expect increased patient choice and competition to encourage greater choice and convenience for patients, greater pressure on service providers to increase quality, greater innovation in service provision and more bidders for PCT contracts leading to improved services and better value for money".

The same general principle (that competition and choice generates consumer welfare) is one of the hallmarks of a market economy. Outside the NHS it is enshrined in systems of competition law policed by competition regulators in market economies worldwide. It also seems reasonably clear that in regulating co-operation and competition within the NHS, the Panel will use established competition law theories and techniques developed through UK and EU regulatory practice and court judgments over many years.

As for the decision itself, it sends a clear message that restrictions on consultants' non-contracted hours are not acceptable within the NHS. It does though leave Trusts free to impose those restrictions in the two limited circumstances described above, where the Panel considered that there could be some patient and taxpayer benefit. Trusts will now be well advised to examine the terms of their HR policies and contracts with consultants, and consider whether changes should be made to comply with the Panel's ruling.

Consideration should be given as to how health and safety concerns (if any) will be addressed when they emerge. Similarly, Trusts should also review the application of the 48 hour limit on the working week of consultants. Where a consultant has more than one employer each employer has a responsibility to ensure that the total working time does not exceed 48 hours; consultants who work more than 48 hours should be asked to opt out. Trusts may find that guidance from employment law specialists will be useful in these areas.

Morgan Cole has an expert employment team, that would be happy to help with any of these issues. To contact one of the team, please email employment@morgan-cole.com

Transfer of Church View Medical Practice to City Hospitals Sunderland NHS Foundation Trust

The Department of Health has commissioned 16 Integrated Care Organisation (ICO) pilot projects.

Background

The Department of Health has commissioned 16 Integrated Care Organisation (ICO) pilot projects, following the June 2008 report 'High Quality Care for All - the Next Stage Review'. The merger between City Hospitals Sunderland NHS Foundation Trust (City Hospitals) and Church View Medical Practice (Church View) is one of those 16 pilot projects. As reported by the Co-operation and Competition Panel (CCP), under the merger Church View's staff and Personal Medical Services (PMS) contract will be transferred to City Hospitals. City Hospitals will become the employer of Church View's staff and will take over Church View's patient list as the holder of its PMS contract. Church View will be established as a service line within City Hospitals.



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Also as reported by the CCP, integrated care seeks to improve the quality of care by better coordinating the delivery of care across multiple healthcare services, providers and care settings. The primary focus of the City Hospitals / Church View ICO is to improve the delivery and co-ordination of care, and reduce the number of unplanned admissions from Church View to secondary care - particularly in respect of services to the elderly.

Facts

The CCP reviewed the merger under the Principles and Rules for Co-operation and Competition. On 7 August 2009 it recommended to Monitor that it should be allowed to proceed, on the basis that it would not "impose any significant costs on patients or taxpayers by reducing the scope for patient choice or competition or undermining the primacy of the GP gatekeeper function".

CCP Director [Andrew Taylor](#) commented:

"The proposed merger will not impose any significant costs on patients or taxpayers by reducing the scope for patient choice or competition, and will allow the benefits that might be realised from an ICO to be explored. There is a risk with any ICO that employs GPs that those GPs will have an incentive to refer patients to their employing hospital. However, in this case, we believe that the measures being taken by City Hospitals to protect patient choice combined with the professional obligations on GPs to refer patients appropriately is sufficient to address this risk. We were also reassured by the large number of other GP practices near Church View if patients wish to attend a GP surgery not linked to City Hospitals.

Further, the small size of the Church View practice and the fact that more than 80% of Church View patients referred for secondary treatment already go to City Hospitals means that the potential for patient choice and competition to be distorted by this merger is limited. A further possible concern with this merger was that it might allow City Hospitals Sunderland to obtain an unfair advantage over other GPs in Sunderland through favouring patients from its own GP surgery. However, the small size of the Church View medical practice means that the financial benefits to City Hospitals from discriminating in favour of patients from its GP surgery would be limited. Furthermore, discrimination like this would itself be in breach of the Principles and Rules of Cooperation and Competition."

Merger of the provider services arms of NHS Richmond and NHS Hounslow

On 12 October 2009, the Panel recommended that the merger should be allowed to proceed.

Background

On 12 October 2009 the Co-operation and Competition Panel (CCP) recommended to the London Strategic Health Authority that the merger of the provider services arms of NHS Hounslow and NHS Richmond should be allowed to proceed. As a result, the provider arm of NHS Hounslow will transfer to NHS Richmond. NHS Hounslow will enter into a community services agreement with NHS Richmond for the provision of community services by the merged entity.

Facts

A management alliance between the provider arms of NHS Hounslow and NHS Richmond took effect in April 2009. The transfer of NHS Hounslow's provider arm to NHS Richmond extends the collaboration between the two entities, by placing both provider arms under the control of NHS Richmond. In this case, the CCP considered whether the merger would affect patient choice or competition by reducing the number of bidders for community services contracts. The CCP has decided that the merger "is unlikely to impose any material costs on patients or taxpayers by reducing the scope for patient choice or competition", since there is a "substantial number of potential providers of community services in Richmond and Hounslow and the South West London area". Accordingly, the "loss of one competitor would not have a material effect on the extent of patient choice or competition".

Comment

Importantly, CCP Director [Andrew Taylor](#) commented: "In our view the earlier management alliance involving Richmond Provider Services and Hounslow Provider Services constituted a reviewable merger under the Principles and Rules and should have been referred to the CCP before it came into effect. The risks to organisations of putting a merger into effect without CCP approval are serious. If a subsequent CCP review was to conclude that such a merger is inconsistent with the Principles and Rules it may recommend the merger parties be separated. This would no doubt have significant consequences for the organisation concerned, its employees and patients. For the avoidance of doubt, the CCP expects parties to seek prior approval for management alliances or other arrangements that place previously separate organisations under common control. Where there is any uncertainty as to whether a proposed arrangement constitutes a reviewable merger under the Principles and Rules, parties should seek informal advice from the CCP."