

BREXIT BRIEFING

**Competition and
procurement in the
healthcare system**



Key points

- EU (European Union) law currently establishes rules by which public services, including some healthcare services in the UK, must be competitively procured.
- The decision to leave the EU presents an opportunity for the UK to extricate itself from these laws and reduce the role of competition within the commissioning of healthcare services, particularly in England.
- Ending the application of EU competition law to healthcare services, though helpful, would not be sufficient alone to fundamentally alter the role of competition within the NHS. Existing domestic legislation, such as the English Health and Social Care Act 2012, already enforces competition within healthcare services entirely separately to EU law.
- The terms of any future trade deal between the UK and the EU, or another country, could also impose the same or similar competition rules on healthcare services.
- *This issue relates primarily to England, where competition within the NHS is significantly more prominent than it is in Northern Ireland, Scotland and Wales.*
- To take advantage of this opportunity, the UK should:
 - End the application of EU competition and procurement law to the commissioning of healthcare services
 - Take this opportunity to reconsider and reform domestic competition policy, in England especially
 - Exempt the NHS from future international trade agreements.
- For the UK, this approach would:
 - Allow commissioners greater control over how they procure services
 - Reduce fragmentation and better support the integration of care.
- Relationship to the EU negotiations:
 - This issue does not directly relate to the ongoing exit negotiations between the UK and the EU.
 - The UK government already has the authority to reduce the impact of the application of EU competition law to healthcare services by restricting competition domestically, as Scotland or Wales have done.

Background

Competition and procurement is an area where the UK's decision to leave the EU has presented some opportunities to make positive reform. Brexit presents a chance for the UK to extricate itself from the EU laws which, in part, have helped to establish the rules by which publicly funded healthcare services, particularly in the English NHS, must be procured and open to competition.

The EU's role in competition and procurement in the UK

EU law, particularly the EU treaty and the Procurement Directive 2014/24/EU, currently underpins the broad terms under which public procurement and competitive tendering operate in the UK. This includes the requirement to openly and competitively tender certain contracts and rules prohibiting anti-competitive behaviour.

The Procurement Directive 2014/24/EU refined the minimum public procurement rules set out under EU law, which are designed to create a level playing field across Europe, ensuring equal access to, and competition for, eligible public contracts.

The rules have been transposed into national law as the Public Contracts Regulations 2015 by the UK, Northern Irish, Scottish, and Welsh governments, and establish how public authorities and certain public utility operators, including health and social care commissioners, purchase goods, works and services. These regulations include the requirement for commissioners to advertise contracts valued above certain specific thresholds, in the OJEU (Official Journal of the European Union).¹

EU law also establishes rules that ban co-operation between providers and commissioners of services which might limit competition.² This is especially significant in the English NHS, where the purchaser-provider split remains in force and competition is actively encouraged. Where the purchaser-provider split does not apply, as in the Welsh NHS and Scottish NHS, then neither do these rules.

However, existing domestic legislation, such as the Health and Social Care Act 2012 and the NHS (Procurement, Patient Choice and Competition) Regulations 2013 in England, currently enshrine effectively the same rules as EU law. These laws, for example, prohibit NHS England or CCGs (clinical commissioning groups) from favouring a single provider and give powers to the regulator Monitor (and now its successor NHS Improvement) to enforce competition rules on NHS trusts. EU law per se does not require governments to open-up public sector services that provide a purely social function to the independent sector, nor does it prevent services that have been opened to competition from being returned to the public sector.³

As health is a devolved matter and each nation has a different approach to competition within their respective healthcare system, this issue is of varying importance across the UK. Governments in Scotland and Wales have for example both imposed significant limits on the role of the market in their respective health services and neither country's health system has a purchaser-provider split. Northern Ireland has also restricted competition within its health service, which tends to emphasise co-operation between HSCNI (Health and Social Care Northern Ireland) providers. However, the country does have a purchaser-provider split, which has attracted high profile criticism, notably from Sir Liam Donaldson in his 2014 report *The Right Time, The Right Place*.⁴

In England there are some signs that change may be on the cards. The Conservative Party's 2017 general election manifesto included a commitment to review the operation of the internal market, on the basis that it is not working effectively.⁵ Simon Stevens, Chief Executive of NHS England, has argued that the implementation of STPs (Sustainability and Transformation Partnerships) could end the purchaser-provider split in England.⁶ There have also been recent cases of NHS organisations in England choosing to award contracts to providers without going through the procurement process. For example, in July 2017, Coventry and Rugby CCG and Warwickshire North CCG awarded a £57 million contract for community services to South Warwickshire Foundation Trust, without a competitive tender.⁷

Potential consequences of the UK's exit from the EU on competition and procurement

– Removal of EU laws on procurement, creating opportunities to reduce competition in the NHS

Brexit now presents an opportunity for the UK to extricate itself from EU law on competition and procurement.

The continued application of these laws to the UK is dependent on the form of whatever deal, if any, the UK agrees with the EU on Brexit, and on what form its relationship with the EU, EEA (European Economic Area) and Single Market takes post-Brexit. If the UK leaves the EU but remains a member of the EEA then treaty obligations would require that EU law, including the Procurement Directive 2014/24/EU, would still apply. This is the case for Norway, a non-EU member of the EEA,⁸ but not for Switzerland, which is a member of the single market but not of either the EU or EEA.⁹

At this stage, the UK government is clear that its position is to leave the EU, EEA and Single Market.¹⁰ This would mean that the UK could no longer be subject to EU law and that EU laws that have previously been transposed into UK law could be altered or removed, through powers granted to ministers by the European Union (Withdrawal) Bill. The bill, also known as 'The Repeal Bill', will be used to transpose directly applicable EU law into UK law, after which ministers will have the power to adapt or remove any of those laws, including the Procurement Directive 2014/24/EU.¹¹

– Risk that future trade deals actually increase competition and the role of the private sector

It is also possible that, were the UK to remove the relevant EU laws, it may still be subject to the same or similar rules on procurement and competition under any future international trade deal it negotiates, whether with the EU or with other countries.

The potential TTIP (Transatlantic Trade and Investment Partnership) deal between the EU and the USA, as well as the CETA (Comprehensive Economic and Trade Agreement) deal between the EU and Canada, are recent examples of international trade deals that were perceived to risk further opening up publicly funded healthcare to market forces. Although assurances were given in the case of TTIP that the NHS would be exempt from the deal, there is no guarantee that NHS services will not be part of trade deals between the UK and other nations in the future.¹²

It is not possible to speculate on the content of any future international trade agreements the UK might make, but it is likely that the current UK government will aim to make deals with countries such as the USA as quickly as possible. While the UK is not supposed to officially negotiate, and therefore sign, any trade deals prior to Brexit, it is understood that these deals are being actively discussed.¹³ Therefore, the importance of a clear position on the future of competition in the NHS is paramount.

Creating a healthcare system that promotes collaboration over competition post Brexit

The NHS should be the preferred provider of NHS services and the BMA has long-standing concerns about the increasing role of the independent sector in the provision of publicly-funded healthcare. BMA investigations have discovered that UK Department of Health spending on independent service providers in England has increased annually for several years, growing by 33 per cent between 2012/13 and 2015/16.¹⁴ This has happened at a time in which NHS providers in England are under increasing pressure to maximise resources and make cuts to spending. The role of competition and privatisation within the English NHS which must be addressed, and the ongoing Brexit negotiations present an important opportunity to do so.

The imposition of competition onto commissioners creates fragmentation, distracts from the primary goal of providing the best quality care, and presents a barrier to integration and cooperation. Commissioners should be given full autonomy to choose the most appropriate procurement process for the services that they wish to put in place, including the ability to appoint a specific provider or group of providers without competition, something which EU law and current UK law does not allow in England.¹⁵

It is therefore crucial that:

- The UK government ends the application of EU competition and procurement law to the commissioning of NHS services in England
- Access to NHS markets should not be used as a bargaining chip in relation to any future trade deals with the EU
- The NHS should be exempted from any future international trade deals, such as those with the USA
- Post-Brexit, all regulations and rules requiring competitive tendering for NHS, or HSCNI, services should be removed, allowing clinicians and commissioners to focus on care and not competition

Summary

Competition within health systems leads to fragmentation and undermines the NHS's own founding principle of publicly delivered healthcare. While the extent to which Brexit could facilitate an immediate change in competition within the UK's health systems, and most notably in the NHS in England, is debateable, the fact that it presents an opportunity for reform is not. UK government must therefore end the application of EU competition and procurement law as soon as possible, reform domestic regulations requiring competitive tendering and not open the NHS up to competition as part of future trade deals.

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