

NHS Confederation summary response to the consultation by the Cooperation and Competition Panel for NHS funded services

1. Introduction

- 1.1. This summary response is submitted to the Cooperation and Competition Panel consultation on guidance and methodology for competition regulation. This is intended to be considered alongside the member responses from the Foundation Trust Network, PCT Network, Mental Health Network and NHS Partners Network. Networks have made specific points about the guidance and methodology as proposed reflecting the views of front line NHS organisations. They should be considered as independent responses representing the diversity of today's NHS and the issues raised should be addressed in their own right.
- 1.2. This summary does not list all the points raised by Networks. The Networks collectively, through the NHS Confederation, would like to highlight two specific issues for consideration by the Panel as it begins to fulfil its role as competition advisor. These are issues where we believe there is more work to be done and where the Confederation and Networks would be willing to collaborate with the Panel.

2. Defining co-operation

- 2.1. The NHS Confederation welcomes the introduction of an independent adviser on the emerging NHS market. This should bring greater clarity to commissioners, providers and patients about the consistent application of competition and help to build the capacity of the service to manage a more plural and patient-centred system. The NHS has a relatively short history of working in such a competitive system and welcomes the provision of such an advisory body.
- 2.2. However there is a shared concern that whilst the guidance published by the Panel specifies in great detail the definition of competition and the types of behaviours that could constitute anti-competitive practice, there is much less about what is expected in terms of co-operation. Where co-operation is defined, it is as an enabler of competition, i.e. sharing information where necessary to enable patients to move between providers.
- 2.3. As Networks have raised in their responses, there is a wider role for co-operation in the NHS that is required in order to improve quality and efficiency, including service integration, clinical networking, innovation collaboratives and benchmarking.
- 2.4. There is a need for decisions in the market to be based on an understanding of the distribution of risks across the system. Without a definition of co-operation and guidance on behaviours that would breach co-operative principles, there is concern that the Panel will have an unbalanced approach to market regulation

that promotes competition and only allows for co-operation as an off-setting benefit.

- 2.5. We understand that there is less of a history of co-operation regulation in the rest of the economy on which this definition and guidance can be based. The Confederation and its members would be happy to work with the Panel and the Department of Health to develop a set of co-operative principles and regulatory processes to achieve a balanced approach to ensuring that the emerging, more open system benefits patients and taxpayers.

3. Public interest test methodology

- 3.1. Networks were also keen to be involved in the development of the methodology of the public interest test. In the short term, unless and until a definition is developed, co-operation will be protected by the implementation of the public interest test for Panel decisions. This places an increased weight on this part of the process.

- 3.2. Whilst the principle of taking a patient and taxpayer interest approach to regulation is welcomed, it is not clear from the consultation documents how this will be applied in practice. In particular there will be a need to quantify risks and benefits from behaviours that may be in breach of the rules in order to draw a conclusion about the balance of public interest. This will be potentially challenging where there is, for example, a lack of certainty about the number of lives saved by a service change or the financial savings from a higher degree of competition.

- 3.3. Again we understand that this is a new area for all involved and that there will be a degree to which methodology will develop on a case by case basis. As the representatives of front line organisations affected by Panel advice, the Confederation and Networks would be keen to have continuing involvement in this work, drawing on the expertise of members.

4. Joint working between the Panel and the Confederation

- 4.1. We appreciate the effort that the staff and Chair of the Panel have made to engage with the Confederation, Networks and members over recent months. We have confidence that this close working relationship will lead to an effective and balanced regulation that benefits the public whilst challenging current practices where necessary. We look forward to continuing to work together to develop this area of work over coming months.