

EDITORIALS

Regulating the NHS market in England

The government must make its intentions clear as it rewrites the regulations on competition

Chris Ham *chief executive*

King's Fund, London W1G 0AN, UK

The government's draft regulations on procurement, patient choice, and competition, published in February, have opened up old wounds in the debate about NHS reform. The regulations set out in detail how commissioners should procure NHS services under section 75 of the Health and Social Care Act 2012. The stated aim of the regulations, which will be enforced by Monitor as the economic regulator, is to ensure that the NHS Commissioning Board and clinical commissioning groups act to protect patients' rights and to prevent anti-competitive behaviour.¹

The government claims that the regulations follow from commitments given during the passage of the 2012 act and are consistent with the "Principles and rules for cooperation and competition" put in place by the previous administration. Its critics contend that they go much further and represent a major extension of market principles in the NHS. In this they are supported by legal advice, which argues that commissioners of NHS services will be expected to make greater use of tendering, with competition becoming "the norm for placing NHS contracts."²

The government's critics comprise general practitioner leaders who are worried that clinical commissioning groups will have to use tendering to procure all services; Liberal Democrat MPs and peers who fear this will make it more difficult to promote integrated care; and opposition politicians who interpret the regulations as confirmation that ministers are hell bent on opening the NHS up to the private sector. In the face of these concerns, the government has announced that it will amend the regulations to ensure that they are not open to misinterpretation. Statements made by ministers indicate that this means commissioners will not have to tender all services, Monitor will not force commissioners to tender competitively, and competition will not take precedence over cooperation and integration.³

The decision to make these changes less than a month before the provisions of the 2012 act come into effect is embarrassing for the government. It reflects both the influence of the Liberal Democrats within the coalition and the need to retain the support of GP leaders, who will play a key role in the work of clinical commissioning groups. If these leaders had walked away at this

stage, the edifice on which the reforms are based might well have crumbled to the ground even before it had come into being.

Underlying the debate about the precise wording of the regulations is the more important question of the government's intentions regarding the role of markets in the NHS. On this question there is room for legitimate doubt in the light of the debate on the 2012 act and the amendments made after the work of the NHS Future Forum. Particularly important was the change to Monitor's role from an original duty to promote competition to a revised duty to protect and promote the interests of people who use healthcare services, and in so doing to prevent anti-competitive behaviour.

These amendments may have watered down Andrew Lansley's ambitious plans to apply market principles to the NHS, but the architecture of economic regulation set out in part 3 of the 2012 act remains in place. A key element in this architecture is the role that the Office of Fair Trading (OFT) and the Competition Commission will play in the future NHS. In the debate about the regulations, the involvement of the OFT in assessing the proposed merger of two NHS foundation trusts in the south of England has gone largely unnoticed. The OFT is also investigating the proposed merger of an NHS foundation trust and an NHS trust in Torbay, which is designed to bring about closer integration of services in an area well known for its innovative approach to the care of older people.

The question this begs is whether this kind of market regulation is needed in the NHS in addition to the new role of Monitor? There are many differences between healthcare and the industries that OFT and the Competition Commission regulate, and there is a danger that regulators with experience in other sectors will adopt an approach that is not sensitive to these differences. Over exuberant regulation of mergers could delay the implementation of service changes that may benefit patients—for example, by preventing the full integration of care as is being proposed in Torbay.

It is worrying that fundamental questions of this kind are unresolved so close to the date of implementation of the reforms. Evidence that competition in healthcare is beneficial is both equivocal and contested.^{4,5} Even where benefits can be delivered, these have to be set against the considerable transaction costs involved in contract negotiations between commissioners and

providers and the work of the regulators. The well known limits to markets in healthcare mean that planning, collaboration, and clinical networks⁶ should also play a major role in bringing about improvements in care.

Where markets are used, regulators need to be sensitive to the different forms of competition in healthcare. Competition in the market has a role in situations where patients have the time and inclination to decide where to obtain treatment—for example, when receiving planned care. Competition for the market should be the preferred approach when commissioners want different providers to work together under long term contracts to deliver integrated urgent care and care for groups such as older people and those with complex needs.⁷ A nuanced approach that combines the right kind of competition alongside planning, collaboration, and clinical networks, where appropriate, is most likely to deliver the desired results.

If GP leaders and Liberal Democrats are to withdraw their opposition, the government needs to provide reassurance on its intentions with regard to regulating the NHS market. To avoid doubt, ministers must be explicit about the place of markets in the NHS, including the role of the OFT and Competition Commission, when they publish the revised regulations. Without absolute clarity on these questions, there is a risk of uncertainty and misinterpretation by the commissioners and regulators tasked with making the regulations and the 2012 act work in practice.

There is also every possibility that old wounds will not heal and will cause even deeper rifts within the coalition, which will create political difficulties for the government as well as unwelcome confusion for the NHS.

Competing interests: I have read and understood the BMJ Group policy on declaration of interests and declare the following interests: none.

Provenance and peer review: Commissioned; not externally peer reviewed.

- 1 Department of Health. Explanatory memorandum to the National Health Service (procurement, patient choice and competition) regulations 2013. No 257. 2013 www.legislation.gov.uk/uk/si/2013/257/note/made.
- 2 Lock D. 38 degrees. Legal briefing on SI 257. 2013. <https://dnwssx4l7gl7s.cloudfront.net/38degrees/default/page/-/documents/38degrees%20legal%20brief%20SI257.pdf>.
- 3 Lamb N. Response to urgent question by the minister of state, Norman Lamb. House of Commons. 5 March 2013. Hansard. www.publications.parliament.uk/pa/cm/201213/cmhansrd/cm130305/debtext/130305-0001.htm#13030539000017.
- 4 Cooper Z, Gibbons S, Jones S, McGuire A. Does hospital competition save lives? Evidence from the English NHS patient choice reforms. *Econ J* 2011;121:228-60.
- 5 Pollock A, Macfarlane A, Kirkwood G, Majeed FA, Greener I, Morelli C, et al. No evidence that patient choice in the NHS saves lives. *Lancet* 2011;378:2057-60.
- 6 Boyle R. Clinical networks are effective, work in patients' interests, and shouldn't be disbanded. *BMJ* 2013;346:f565.
- 7 Dixon A, Ham C. Liberating the NHS. The right prescription in a cold climate? The King's Fund response to the 2010 Health White Paper. King's Fund, 2010. www.kingsfund.org.uk/sites/files/kt/field/field_publication_file/liberating-nhs-right-prescription-cold-climate-oct10.pdf.

Cite this as: *BMJ* 2013;346:f1608

© BMJ Publishing Group Ltd 2013