Submission and response from BEIS

Submission from Dr. Caroline Kamau-Mitchell, Birkbeck, University of London, on the Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2022 (SI 2022/124)

I ask the House of Lords' Secondary Legislation Scrutiny Committee (SLSC) to please oppose statutory instrument SI 2022/124 (laid before you on 14 February 2022) for the following reasons.

1. The proposed statutory instrument will disincentivise quality control by healthcare providers

Within the National Health Service (NHS), the Competition Act (1998) – including the Chapter I prohibition – helps to ensure that service providers compete for patients, funds and access to opportunities on the basis of a reasonably fair and transparent process [1]. By striving towards becoming competitive, the NHS and independent providers improves the quality of the services given to patients. This is particularly important with respect to the provision of healthcare services for covid-19 patients (including patients with long covid) because SARS-CoV-2 has created a new area of clinical practice whose efficacy relies on scientific evidence that is new, changing and, in some cases, unclear or contradictory. It requires a competitive process driven by the latest scientific evidence – whereas removing existing competition laws, as applied to the NHS and other healthcare providers in these sphere of clinical practice, will likely disincentivise providers from adapting, changing and complying with the latest scientific evidence. Maintaining quality control, by retaining this aspect of the Competition Act, will stimulate a culture of high-quality service provision by competing providers and ensure that coronavirus services remain of high quality. I urge the SLSC to oppose SI 2022/124 because it is a statutory instrument whose impact will be to foster an environment in which the NHS and independent service providers do not have enough incentives to improve their covid-19/long covid services, and an environment which will harm the growth of high-quality, evidence-based services in coronavirus care.

2. The proposed statutory instrument will reduce patient choice

The Competition Act (1998), when applied to the NHS and independent healthcare service providers, helps to give patients a choice by creating a culture in which more service providers are welcome – through a process of competition. That, in turn, promotes patient choice about which service to use based on e.g., the service's location, its reputation in online reviews, and the type of treatment or care it provides. Location is an important consideration for patients with e.g., long covid because many suffer from debilitating fatigue which makes day-to-day activities difficult [2] therefore it is not realistic to expect such patients to have to walk or travel long distances. The SLSC should oppose SI 2022/124 because it is a statutory instrument which will have the indirect impact of reducing the number of service providers and, therefore, the choice that patients have. That, in turn, may mean that some patients will find the services inaccessible (e.g., because of distance). Likewise, the reputation that a service provider has – in terms of the type of treatment/care it provides – is an important part of giving patients a choice, and is vital to dealing with the complex, sometimes unique, needs of patients with covid-19 and long covid. For instance,

there is wide variation in the types of symptoms experienced by patients with long covid e.g., some patients have lung or other major organ damage, and some patients have chronic fatigue syndrome/myalgic encephalitis (CFS/ME). Therefore, patients need choice in the type of aftercare available based on the type of symptoms they have. Retaining competition will safeguard the rights of patients because it will foster an environment in which a diverse range of evidence-based services exist to cater for a wide range of covid-19/long covid patients.

3. The proposed statutory instrument will reduce compliance with clinical standards

Providers of covid-19 aftercare (e.g., long covid clinics) vary in what kinds of treatment or aftercare they provide to patients because current NICE guidelines are vague in that they provide very few recommendations to clinicians about treatment interventions [3]. That leaves service provision open to interpretation and bias e.g., bias towards or against a certain form of treatment intervention based on the expertise or theoretical perspective of the clinicians staffing a service for patients with covid-19 or long covid. There is a lack of inherent adaptability in what a given NHS service, or an independent provider, can do for patients with covid-19/long covid because they require specialist expertise and, therefore, adequate numbers of staff with that expertise. For example, a long covid clinic that specialises in helping patients cope with lung damage because it is staffed by a respiratory expert offers very different treatment/aftercare to long covid patients, compared to a long covid clinic specialising in mental health care. Without competition, service providers can focus on what they have been doing rather than on what patients need, and what the latest scientific evidence shows. Without competition law in place, each covid-19/long covid service provider will provide the type of care or treatment which it believes to be best based on its interpretation of current evidence or guidance [3], and based on the staffing expertise available. However, that might be the wrong interpretation of the evidence or guidance. Without the relevant clause of the Competition Act in place there will be few incentives or monitoring processes in place to reduce these problems. Without the Competition Act (1998), there will be no incentive for providers to revise their treatment/care approach as more scientific evidence emerges – they can simply carry on as they were, but that might be clinically harmful. Without the Competition Act (1998), there is no incentive for providers to justify a bias towards or against a certain form of treatment through a monitoring process and using current scientific evidence. Therefore, the SLSC should oppose SI 2022/124 because it is not in the public interest to reduce the incentives that the NHS and independent providers have to provide evidence-driven, high-quality care for covid-19 patients.

4. It will reduce value for money

Finally, the Competition Act (1998), including the Chapter 1 prohibition, is important in helping to ensure value for money such as by reducing collusion in setting prices. The government recently announced that *"£6.6 billion in new funding will support the ongoing NHS response to the pandemic, continuing funding for the hospital discharge programme, infection control measures, long COVID services, and NHS staff support services*." [4] By opposing SI 2022/124, the SLSC can protect the public interest by safeguarding a principle central to obtaining value for money in NHS service provision [1] – which is, maintaining competition.

Covid-19 is a major public health emergency which has had an impact on a large proportion of the UK population therefore the demand for covid-19 healthcare services will be high, and there is an urgent need to help the money stretch farther.

In summary, there are serious and compelling reasons why SI 2022/124 should be opposed, and I encourage you to please consider these reasons in your scrutiny of the proposed legislation.

References

[1] NHS Providers (2017). Understanding competition in the NHS: the governor role. 27th January https://nhsproviders.org/media/2586/understanding-competition.pdf

[2] Kamau-Mitchell, C. (2021). GPs need awareness about post-covid ME/CFS. *British Medical Journal,* 374:n1995.

[3] NICE, RCGP & SIGN (2022). COVID-19 rapid guideline: managing the long-term effects of COVID-19. 1st February https://www.nice.org.uk/guidance/ng188/resources/covid19-rapid-guideline-managing-the-longterm-effects-of-covid19-pdf-51035515742

[4] UK Government. £7 billion for NHS and social care for COVID-19 response and recovery. 18th March https://www.gov.uk/government/news/7billion-for-nhs-and-social-care-for-covid-19-response-and-recovery

15 February 2022

Response from BEIS

The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2022 is a very short-term measure, put in place for a strictly limited period, to enable only the required response to an immediate and pressing need.

The Order has been made to facilitate national arrangements between NHS England and independent sector healthcare providers which were essential in preparedness for tackling the Omicron variant of COVID-19. The Omicron variant was observed to be highly transmissible and the rapid and unprecedented levels of growth in infection put considerable pressures on the NHS in England. It was vital to provide additional capacity to the NHS in order to ensure it was not overwhelmed.

This Order is needed to enable the cooperation that is essential to deliver an effective response to coronavirus pressures. The arrangements this Order facilitates have provided up to 3,000 additional staffed beds to the NHS from independent healthcare providers to be called upon as needed.

A similar Order (The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020, S.I. 2020/368, (now revoked)) was put in place in March 2020 to facilitate the previous national contracting arrangements with the independent sector. There is no evidence that it disincentivised quality control, or reduced patient choice, compliance with clinical standards or value for money. Conversely, both the current and previous Order, and the actions they enable, were sought to ensure that the NHS was not overwhelmed and unable to treat all patients needing urgent care. Ultimately, if all available NHS capacity is exhausted, patients end up being unable to access care of any description at all, with devastating impact.

Being a measure put in place to deal with a specific and urgent need, The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2022 has been made for a very limited period, expiring on 31st March 2022. The Order also only covers activities which are part of arrangements to support the NHS in responding to this specific need. The limited duration and scope are in place so as to ensure the Order facilitates the actions necessary for tackling this urgent situation, but minimises wider or longer-term impacts on the healthcare market:

- Competition within healthcare has an important role to play in promoting higher quality of care. However, we do not believe this short period where this Order will apply will have any impact on the incentives for providers to continue to improve. The arrangements underpinned by the Order still incentivise providers to deliver a high standard of care to receive additional activity-based payments, and after the very short term of the arrangements, they will still need to be able to compete with other providers.
- During the normal running of the contracts related to this Order ("pre-surge"), NHS services and independent sector services will both operate largely as usual, with the same patient choice as ever. In the event of surge being activated, this will be because NHS capacity in a system is being overwhelmed. In such circumstances, the absence of available capacity already removes choice – such arrangements to acquire capacity ensure there is access to treatment maintained.
- All the same regulatory mechanisms which ensure healthcare providers are complying with clinical standards are unaffected by this Order, and so healthcare providers in the NHS and independent sector will still be required to deliver high quality care for all of their patients.
- The Order explicitly does not allow providers to share information relating to costs or prices.

The Order requires that agreements made before the date the Order comes into force (9 March 2022) are notified to the Secretary of State in writing within 14 days of that date. The Secretary of State is required to compile and maintain and publish a register of agreements notified under the Order. The register will be published in due course.

The agreements with the 10 independent sector providers expire on 31 March 2022, at the same time the Order expires.

22 February 2022