

## Conflicts of interest in healthcare: NHS procurement rules must be clarified

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### About the research

For over 15 years, the Government has been rolling out a strategy to spur improvement in the provision of NHS healthcare services in England through patients' choice. Since the creation of this quasi-market for publicly-funded healthcare services, the existing strategy has resulted in legal challenges that go beyond well-established public law guarantees and require new solutions.

The rules applicable to the commissioning and procurement of NHS services in England have been subject to significant changes since the adoption of the Health and Social Care Act 2012. The subsequent adoption of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 and the Public Contracts Regulations 2015 have created a complex network of rules that also result in complex and parallel remedies. Conflicts of interest, which are unavoidable in a quasi-market, are one area where the rules are particularly complex and unclear. New measures introduced by drugs firms to reduce the potential for conflicts of interest when payments are made to NHS clinicians have been criticised by NHS England as not going far enough.

This project provided the opportunity to bring together academics, NHS practitioners and lawyers to share their experiences of working with the regulations. This policy briefing summarises some of their key insights and policy recommendations.

This research takes stock of recent developments in NHS governance and explores ways to clarify procurement rules.

### Policy implications

- NHS Trusts and CCGs can only avoid the existing legal risks by designing and implementing robust procedures for the identification, disclosure, documentation, and monitoring of conflicts of interest.
- There is a clear need for clarification, and possibly consolidation, of the procurement rules applicable to the healthcare sector, which would require a revision of the NHS (Procurement, Patient Choice and Competition) Regulations 2013 to coordinate their content with the Public Contracts Regulations 2015.
- A revision of the existing remedies system is necessary. Beyond the activity of NHS Improvement, the Government should explore alternative ways of providing effective independent administrative review e.g. through the creation of a procurement appeals tribunal, which could also have jurisdiction not only for the healthcare sector, but for procurement in all other sectors.
- NHS Trusts and CCGs should prioritise the effective management of conflicts of interest. The revised statutory guidance, released in June, should lead to a further revision of NHS Trusts' and CCG's commissioning and procurement structures and procedures.
- Alternative ways of incorporating clinical expertise and patients' input into the commissioning and procurement processes should be explored by NHS Trusts and CCGs, such as the creation of regional or national pools of experts available to NHS Trusts and CCGs.

## Key findings

The NHS (Procurement, Patient Choice and Competition) Regulations 2013 define conflicts of interest<sup>1</sup> in terms that diverge from the definition of conflicts of interest in the Public Contracts Regulations 2015<sup>2</sup>. Since 18 April 2016, both sets of rules apply concurrently to commissioning and procurement decisions taken by NHS Trusts and Clinical Commissioning Groups (CCGs). NHS England has issued new statutory guidance in June 2016<sup>3</sup>, but the current scenario still creates significant legal uncertainty and legal risks for NHS Trusts and CCGs.

If their decisions are affected by a conflict of interest, NHS Trusts and CCG decisions can be challenged in different settings. Breaches of the 2013 regulations can be brought before NHS Improvement (the sector regulator, previously Monitor). However, they can also be brought before the High Court, as can breaches of the 2015 regulations. The past nine months have seen NHS Improvement and the English courts making potentially divergent decisions on a number of cases concerning conflicts of interest.

1 Regulation 6(1)

2 Regulation 24(1)

3 <https://www.england.nhs.uk/commissioning/pc-co-comms/coi/>

## Further Information:

Sanchez-Graells, Albert, Monitor and the Competition and Markets Authority (November 20, 2014). Research Paper available at: <http://bit.ly/29rHglp>

Blog discussion: <http://bit.ly/29DDQiC>

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