The EU threat to our NHS

- In February 2016, leading barrister Michael Bowsher QC advised that the EU’s proposed Transatlantic Trade and Investment Partnership (TTIP): ‘poses a real and serious risk to future UKG decision-making in respect of the NHS’.
- In 2007, Ken Anderson, who had just stepped down as Head of the Department of Health’s Commercial Directorate, said: ‘once you open up NHS services to competition, the ability to shut that down or call it back passes out of your hands. At some point European law will take over and prevail... In my opinion, we are at that stage now’ (Financial Times, 16 January 2007, link).
- Leaked advice from the leading law firm Wragge and Co in October 2006 concluded it would be very difficult for the NHS to be returned to public hands, stating: ‘the NHS/DH will therefore continue to be exposed to the risk of investigations, possible damages actions and even, in serious cases, fines under EC/UK competition law’.

Despite the clear danger that the ‘Single Market’ poses to the NHS, the Government sought no protections for the NHS as part of its EU renegotiation and has made extending the ‘Single Market’ one of its key priorities. The European Commission and European Court’s control over the NHS will continue to grow in the event of a vote to remain in the EU.

2016 UNITE legal advice

In February 2016, the union UNITE released legal advice from Michael Bowsher QC of Monckton Chambers and Azeem Suterwalla of 1-2 Raymond Buildings (Unite the Union, February 2016, link). This advice dealt with the consequences of the proposed Transatlantic Trade and Investment Partnership (TTIP) on the NHS. It concludes that: ‘TTIP poses a real and serious risk to future UKG decision-making in respect of the NHS’ (p. 3).

The advice makes clear that the provisions of TTIP severely limit the ability of a future government to reduce the role of the private sector in the NHS:

'A future government might wish to repeal those sections of the Health and Social Care Act 2012 (HSCA), which brought into force the NHS (Procurement, Patient Choice and Competition (No.2) Regulations 2013, or amend the Regulations themselves... A foreign investor might invest in assets to deliver services under contract to NHS bodies. It may do so on the basis that in the long term there are a number of NHS bodies that will be putting contracts out to tender and that even though each contract will need to run its term and then be retendered, as long as all or most of these contracts have to be put out to tender under the Regulations, that investment retains value. That investor might argue that repeal of the relevant provisions of the HSCA and the Regulations had damaged its business because those changes seriously undermined the value of its investment, goodwill and long term profits' (pp. 14-15).

As the advice notes, investors will be able to - and can be expected to - take legal action to stop and/or reverse any sort of policy that the UK Government introduced to reassert public ownership:
'US investors can be expected to take a vigorous approach to exploiting opportunities under the agreement. This is the experience of US parties in using procurement legislation to open up opportunities in the NHS to commercial entities. It must be reasonable to assume that North American investors will be, by their nature, litigious and will seek to exploit any and all opportunities' (pp. 5-6).

The advice also demonstrated the breadth of the legal remedies available to investors, which amounted to ‘double recovery’ in English law (p. 18), and that ‘remedies under TTIP may exceed those available under domestic contract law, human rights law and European Union law’ (p. 3). Mr Bowsher states that the ‘safeguards’ recently inserted into the agreement are unlikely to have much impact and were ‘very unlikely to afford UKG any greater protection’ (p. 11).

The 2006 legal advice

TTIP will makes problems worse for the NHS, but the underlying threat that the EU’s ‘Single Market’ poses to the NHS has been clear for over a decade.

‘Legally privileged and confidential’ advice of Wragge and Co to the Department of Health, dated 9 October 2006, made clear the scale of the threat the EU poses to the NHS. This advice, running to 44 pages, was prepared when the EU’s control over the NHS was substantially less extensive. The legal advice has been known about for years and has been subject to repeated Freedom of Information requests – including during the passage of the Health and Social Care Bill from Lord Owen – but has never been released due to legal professional privilege.

The legal advice reveals the challenge that the EU’s ‘single market’ rules pose to the public sector. It noted that ‘EC law exerts considerable influence’ over the NHS, ‘as a result of the application of the free movement and competition rules’ (p. 29). It observed that the UK’s responsibility for running the NHS ‘can be qualified by the application of the provisions on free movement of services’ (p. 29). It explained that ‘there is clearly a policy desire at Commission level that health services should be included in the Commission’s current work streams vis-à-vis the facilitation of greater progress towards a single market for services’ (p. 29).

The advice stated that ‘certain services provided by NHS bodies could be classified as economic activities’ within the meaning of EU law (p. 26). It noted that ‘the opening up of certain healthcare services to the private sector may have the effect that public providers of those services should be regarded as an economic activity. We think that these arguments are, in time, likely to prevail in relation to specific areas of NHS activity which have been opened up to competition from the independent sector’ (p. 31).

As a result, it concluded that ‘the NHS/DH will therefore continue to be exposed to the risk of investigations, possible damages actions and even, in serious cases, fines under EC/UK competition law.’ It stated that it would ultimately be for the European Court in Luxembourg, not the UK courts, to determine whether this would be the case (p. 28).
It identified ‘particular areas of competition law risk for NHS bodies’, including ‘situations where NHS bodies may enjoy a dominant position on the relevant market’ and ‘joint venture arrangements [which]… foreclose particular markets’. It also warned that ‘any form of collusion… to share our markets is likely to constitute a serious infringement’ of competition law (p. 28).

The leaked legal advice observed that ‘the DH should be aware that any infringement decisions taken against NHS bodies may create unhelpful precedents for DH… and may serve to heighten awareness of the application of competition law in the health sector’ (p. 41). The advice also warned that ‘there is potential for a finding that GPs, or GP practices, could be found to be undertakings’, meaning that they would be subject to EU competition and state aid law (p. 27).

It questioned the legality of NHS Trust’s ‘exemption from corporation tax’ under EU state aid law (p. 36). It noted that ‘many (most) NHS providers do not currently have separate accounting policies which allocate costs and benefits in a sufficiently transparent manner to satisfy the conditions’ from exemption from EU law on illegal state aids (p. 37).

The legal advice also suggested that private companies could have the right under EU law to sue the NHS for ‘abuse of a dominant position’ or ‘collusion’ in the ‘Single Market’ and that GPs constituted economic ‘undertakings’, making them subject to EU competition law.

**EU law and the NHS**

Certain fundamental principles of EU law pose a major obstacle to keeping the NHS in public hands. These include the freedom to provide services and EU public procurement, competition and state aid law (TFEU, art 56, 101-102, 107-109; Parliament and Council Directive 2014/24/EU, link).

Since 2006, the EU has extended its ability to regulate healthcare. In 2011, for example, the EU introduced the ‘patients’ rights directive’, which makes detailed provision on the rights of access to healthcare in other member states (Parliament and Council Directive 2011/24/EU, link). This is in spite of the fact that the directive was strongly opposed in the UK, with Labour MPs claiming in 2007 that it could lead ‘to the demise of the publicly-funded National Health Service’ (BBC News, December 2007, link).

The previous Labour Government exposed the NHS to EU competition law through the introduction of independent sector treatment centres, patient choice, and payment by results. In 2007, Ken Anderson, the former Head of the Department of Health’s Commercial Directorate, said: ‘My personal conviction is that once you open up NHS services to competition, the ability to shut that down or call it back passes out of your hands. At some point European law will take over and prevail . . . In my opinion, we are at that stage now’ (Financial Times, January 2007, link). Anderson also stated that the more that private companies became involved in the NHS, it raised ‘almost exponentially the likelihood that they will challenge in the courts procurements that they feel do not follow appropriate procurement law’ (Financial Times, January 2007, link).
In 2014, the EU introduced a new and more extensive procurement directive. The Government admits that the purpose of this Directive is to ‘to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition’ (Crown Commercial Service, October 2015, link). In short, the problems that have been created for the NHS already are likely to only get worse.

**Conclusion**

Government Ministers have known about the threat to the NHS from the EU’s ‘Single Market’ for over a decade. Nevertheless, protections for the NHS formed no part of the renegotiation – the issue was not mentioned in either the Prime Minister’s Chatham House speech or his letter to the President of the European Council, Donald Tusk, of 10 November. In the former, the Prime Minister welcomed the EU’s ‘new plans to deepen the single market in services’, which will only expose the NHS to greater risk (Chatham House Speech, 10 November 2015, link).

Today, EU law constitutes a serious obstacle to the return of the NHS to public ownership. Any attempt to do so while the UK remains in the EU will be challenged in the UK and EU courts by well-funded private healthcare companies who stand to lose lucrative contracts as a result. If such challenges succeed, companies might win damages out of the NHS budget and the UK could be fined by the European Commission and European Court for attempting to return the NHS to the public sector. This danger will only increase if the EU’s proposed Transatlantic Trade and Investment Partnership (TTIP) is agreed to. The safer choice for the NHS is to Vote Leave.