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Competition issues in the Further
Education sector

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The views expressed in this report are the authors' and do not necessarily reflect those of the Department for Business, Innovation and Skills.

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1 Understanding competition

This paper provides practical information and guidance on the issues Further Education (FE) providers need to consider in relation to competition in the FE sector. It aims to help colleges and training organisations take advantage of the new freedoms and flexibilities introduced in ‘*New Challenges, New Chances Further Education and Skills Reform Plan: Building a World Class System*’.

Introduction

The examples and guidance presented in this paper have been developed to support effective competition in the FE sector. It is therefore of relevance for all staff in decision-making roles in colleges and training organisations, including principals, managing directors, chief executives, governors and curriculum heads. It is important to note that the paper does not provide an exhaustive list of activities that support or restrict competition. The impact of business decisions on competition need to be considered by providers on a case-by-case basis by understanding the impact on customers, competitors and local communities.

What the paper does, however, is highlight the potential impact that certain business decisions can have on competition and provides recommendations on how these risks can be mitigated. This is an important consideration for all providers. There have been competition cases in the education sector (such as the Office of Fair Trading’s decision in relation to the exchange of specific information on future pricing intentions by certain fee-paying schools). In extreme cases, criminal prosecutions can follow some of the most serious anti-competitive agreements (such as cartels).

Chapter 1 examines the characteristics of the FE market before providing general information on competitive conditions and competition rules. **Chapter 2** presents good practice approaches and practical steps providers can take to support effective competition in the sector.

The FE market

Characteristics of the FE market

For the purpose of this paper, the FE market is defined as the training that is delivered by providers in receipt of public funding¹. This includes:

- Classroom and work-based training offered to young people;

¹ Note that some specific elements of public funding, such as the Offenders’ Learning and Skills Services (OLASS), do not conform to the general market characteristics outlined here.

- Co-financed adult skills provision (including vocational training and adult apprenticeships);
- Fully employer or learner-funded training;
- Higher education provision;
- Employability, first steps and basic skills training; and
- Recreational and community learning.

FE generally operates as a series of local catchment areas, which are largely defined by travel-to-learn patterns. Learners and employers primarily choose training they can reasonably commute to on a regular basis. As a consequence, providers recruit the majority of learners from within a short distance (5 miles) of their institution. This pattern is largely consistent across rural and urban areas. There are, however, opportunities for providers to deliver provision in new geographical areas, for example by using outreach centres or offering online and distance learning.

Each local area is generally characterised as having a few large providers (usually colleges) and many smaller providers. Differences in provider size are typically a function of the level of public funding received. Colleges generally receive a higher proportion of their income (from 60% to 80%) from the Education Funding Agency to deliver classroom-based learning for young people. In addition, colleges have access to funding to deliver higher education provision, either by franchise arrangement with a University or directly from the Higher Education Funding Council for England (HEFCE). As a consequence, colleges can account for a relatively high proportion of a given local market.

The FE market differs from a purely commercial market as many providers also have wider objectives to support their local communities, recognising the key role played by education and training in supporting social mobility and the positive impacts of learning on individual health and well-being. Often, these social obligations are formalised in providers' mission statements. Consequently, providers deliver training to meet the needs of certain groups of learners, even when it is less profitable to do so.

The strong focus on social obligations means that many providers need to work closely with other local stakeholders and providers to develop a comprehensive skills offer that meets the needs of their community. While there can be important efficiency gains from working together, cooperation can provide an opportunity for anti-competitive agreements to be made.

Public investment in FE also has a strong influence on providers' business plans and priorities. For example, the Government's commitment to increase investment in apprenticeship provision encourages providers to grow their work-based training offer. The eligibility criteria for funding also encourage providers to work with certain groups of learners. Providers need to balance the need to draw down public funding with being able to innovate and attract learner and employer investment in training. The latter has become an increasingly important source of income at a time of reduced national FE budgets. It is important to note that the type of contract/funding agreement held by the provider depends

on their legal status. For example, private training organisations have a contract for services and colleges are paid on grant through a financial memorandum.

The impact of the FE reform programme on competition

In December 2011, the Government published its reform strategy for the FE and Skills system (*'New Challenges, New Chances'*²) to further position the sector to be able to effectively respond to learner and employer demand. The FE reform programme supports competition and innovation in the sector by giving providers greater control over how they manage their businesses.

In 2012/13, the reform programme led to the following changes:

- Greater flexibility in the way that funding can be used. The single adult budget gives providers greater opportunity to alter annual plans during the year and move resources between funding streams. Providers therefore have greater freedom to develop new provision and respond to signals from the market;
- Removing targets for full level 2 and level 3 provision. Providers have increased flexibility in the training they can offer employers and learners;
- The removal of the link between funding and guided learning hours. This gives providers greater scope to be innovative in the delivery of training;
- The removal of restrictions on college corporations, which means providers can more swiftly implement new business models and set up or purchase new enterprises. This enables colleges to develop innovative new delivery vehicles and respond quickly to market signals.

The FE reform programme also empowers learners to make more informed decisions about their learning choices. The FE Choices website brings together performance data from providers in one place. In addition, the National Careers Service ensures that there is effective information, advice and guidance available to young people and adults.

The introduction of 24+ Advanced Learning Loans in 2013/14 will also put greater purchasing power in the hands of learners. Learners that meet the eligibility criteria will be able to go to a college or training organisation and access a loan to undertake certain courses. This means that, rather than funding being allocated to a provider, it is instead drawn down by the learner. The Government is also consulting on proposals to reform apprenticeships funding policy to place greater purchasing power in the hands of employers. The proposals give employers the opportunity to decide on the content and cost of training to reach industry standards.

In 2011/12, the Government also introduced minimum contract levels. The Skills Funding Agency no longer contracts directly with private training organisations receiving less than

² New Challenges, New Chances Further Education and Skills Reform Plan: Building a World Class System', BIS, 2011. This is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32313/11-1380-further-education-skills-system-reform-plan.pdf

£500,000 in funding. This is increasing the level of sub-contracting taking place in the sector, which could potentially effect competition. Chapter 2 presents some practical guidance to contracting with smaller providers in a way that supports competition in the sector.

Characteristics of a competitive market

Well-functioning markets are characterised by competing suppliers being responsive to their customers. In these markets, a customer has the ability to switch supplier if the alternative(s) provide a superior quality of service or offer the same product at a lower price. Suppliers therefore need to compete for customers, providing an incentive to increase choice, quality, innovation and the intensity of price competition.

In FE, an effective market helps to:

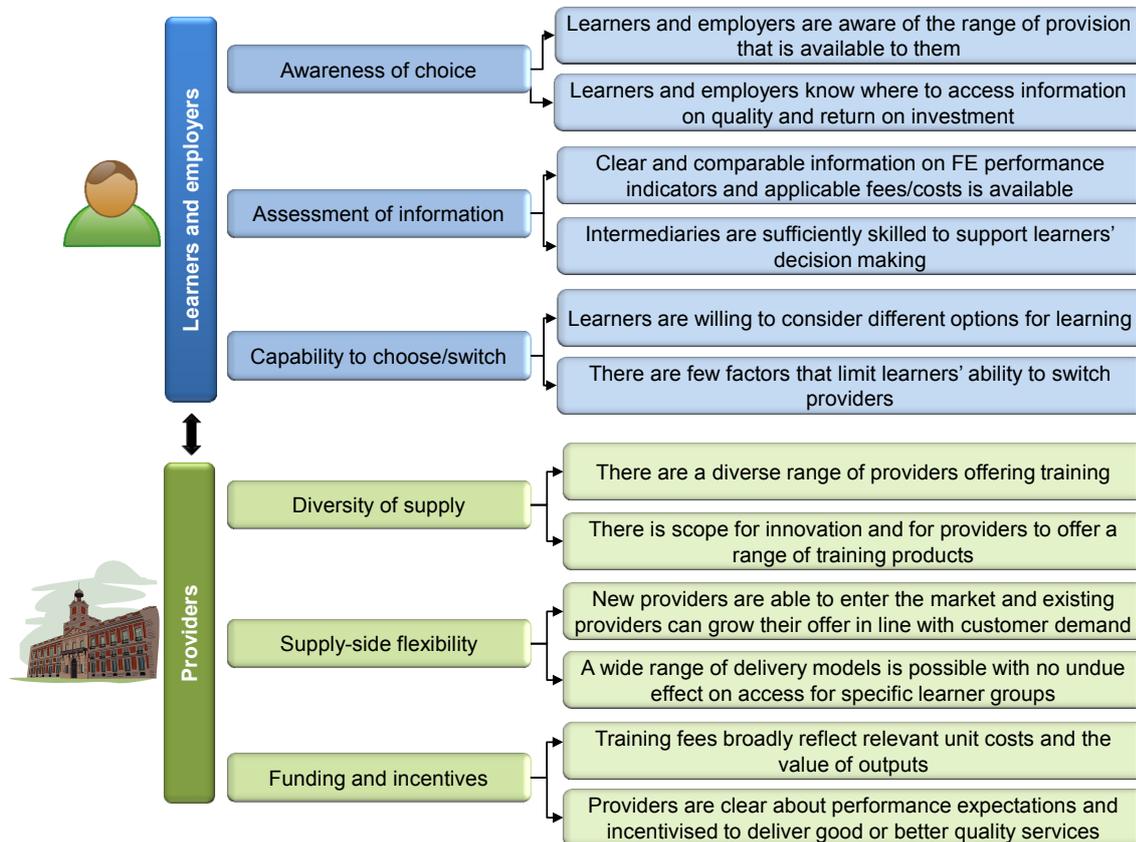
- ensure the fees charged to learners and employers are reasonable and provide value for money;
- provide more choice to learners and employers, so that they are able to select training that offers the right balance between price and quality;
- encourage innovation in the design and delivery of training programmes;
- support the continual improvement of teaching and the learner experience; and
- allow ambitious, high-quality providers to develop their 'offer' and grow their businesses in line with customer demands and needs.

Broadly speaking, a competitive market is characterised by a sufficiently large number of buyers and sellers, such that no single buyer or seller is able to influence the price or control any other aspect of the market independently of buyers and competitors. In other words, no seller is able to abuse market power to the detriment of buyers (such as through charging excessively high prices, reducing quality, or limiting choice and/or innovation below competitive levels).

Similarly, buyers should be sufficiently numerous and able to constrain a seller's price-setting decisions (by seeking out and switching to lower cost or better-suited sellers to meet their needs). Buyers should also be able to signal changing tastes and needs to sellers, who should be responsive to them.

Figure 1 presents some of the consumer (learners and employers) and supplier (provider) factors that demonstrate effective competition in the FE sector.

Figure 1: Factors determining effectiveness of competition in the FE market³



In general, better functioning markets can be achieved by ensuring that, as far as possible, the above conditions are established. This helps to ensure that providers are, for example, motivated to generate efficiencies that reduce the cost of training, and are encouraged to improve the quality and range of training on offer to attract learners.

EU and UK competition law

There are a range of laws in place which set out rules on competition which generally apply to all markets, including the FE market. In the UK, undertakings⁴ are required to

³ Adapted from 'Choice and Competition in Public Services: A guide for policy makers', Office of Fair Trading, OFT1214, March 2010 http://www.of.gov.uk/shared_of/business_leaflets/general/of1214.pdf

⁴ The term undertaking has no single definition in UK or EU competition legislation law, but its meaning has been set out in EU law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, partnerships, firms, businesses, associations of undertakings (e.g. trade associations), non-profit making organisations and (in some circumstances) public entities that offer goods or services on a given market. For example, certain independent fee-paying schools have previously been deemed 'undertakings' for

adhere to the general competition rules contained in UK law (Competition Act 1998⁵ and Enterprise Act 2002⁶) and EU law (The Treaty on the functioning of the European Union). These laws aim to facilitate competition so that markets operate to the benefit of consumers.

In summary, these laws prohibit anti-competitive behaviour, prohibit cartel activity and regulate merger activity; they also provide for the investigation of markets by the appropriate authority. Currently, in the UK the Office for Fair Trading (OFT) and the Competition Commission (CC) each have a role in enforcing certain competition laws. From 1 April 2014, the OFT and the CC will be merged to form the Competition and Markets Authority (CMA).

Undertakings found to have breached applicable competition rules can be subject to a fine, for example. Individuals convicted of participation in a cartel offence could receive a prison sentence and/ or a fine.

These general competition rules are described further in Annex 1. The implications of these laws and how they relate to the FE sector are described below.

Preventing anti-competitive agreements/practices

Competition law prevents organisations from jointly making decisions that are not in the best interests of consumers, by restricting competition, increasing prices or limiting learner choice. This could include:

- A group of providers agreeing the fees that they will charge learners for courses in a certain area, which results in some providers charging higher fees than they would otherwise charge and/or in the providers' fees being harmonised.
- A group of providers prepare and circulate regularly information on their future intentions as regards fees that they will charge learners⁷.
- A group of providers agreeing the number of training places that will be offered by providers in a certain area in order to:
 - restrict supply so that providers can increase prices; or
 - restrict competition between providers for learners.
- A group of providers undertaking activity that restricts or prevents the entry of a new provider to the market.

UK competition law purposes by the Office of Fair Trading (OFT): <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools>

⁵ This can be viewed at: <http://www.legislation.gov.uk/ukpga/1998/41/contents>

⁶ This can be viewed at: <http://www.legislation.gov.uk/ukpga/2002/40/contents>

⁷ See, for example, a previous decision by the Office of Fair Trading (OFT) in relation to certain independent fee-paying schools having engaged in the exchange of specific information regarding future pricing intentions on a regular and systematic basis: <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools>

Anti-competitive agreements, whether formal or informal in nature, are prohibited under UK (and EU) law. Therefore, while cooperation and the sharing of certain information is encouraged and has positive outcomes for the FE sector and learners, care should be taken to ensure that information shared (such as on prices) or agreements (such as on joint working) do not result in infringements of the above provisions.

Abuse of dominance

Providers may have such a high degree of market power locally that they have the ability to act independently of customers and competitors, and could be deemed to occupy a dominant position. Where a provider has a high degree of market power and is not subject to strong competitive constraints, there is a risk that some of its actions may be considered an abuse of dominance. Examples of such abuses are set out below:

- **Excessive pricing.** This occurs where the incumbent provider deliberately sets fees at excessively high levels, i.e. well in excess of the relevant unit costs of providing the training or service, in order to earn higher than normal returns.
- **Predatory pricing.** This occurs where the incumbent provider deliberately sets fees below cost for a sustained period with the intention of forcing a new entrant (or another competitor) to exit the market. Following the relevant competitor's exit, the incumbent is then in a position to charge excessive prices. Care should be taken to distinguish predatory prices from a normal competitive response to entry (i.e. where intensity of competition has reduced prices).
- **Tying one product into the sale of another in a way that limits learner choice.** This generally provides a benefit to learners, as it means that they can access training at a lower price. For example, one provider may choose to offer discounted higher level apprenticeship places to learners who have undertaken an apprenticeship attached to their institution. However, this could potentially limit learners' ability to switch providers, which would make the market less competitive. It becomes a competition issue if providers do this for the purpose of preventing other providers from expanding their offer or entering the market.
- **Price discrimination.** Price discrimination means that the seller sets different prices for different types of buyers. A competitive market can naturally lead to price discrimination: learners are charged closer to what they are willing to pay for training. Social objectives can be difficult to achieve without price discrimination, as learners and employers may otherwise be priced out of undertaking some courses. However, it becomes an issue if prices are set excessively low for some learners or employers so they cannot access alternative provision, or where this type of pricing is used to cross-subsidise other FE courses to the extent that it is anti-competitive (i.e. it is intended to prevent, and/or has the necessary consequence of restricting or preventing the entry of other providers)..

2 Good practice and practical steps to support competition

This chapter sets out good practice and practical steps providers can take to support competition in their local area.

Assessing the market

To support effective competition, providers need to be able to clearly identify and respond to demand from customers and the local community. In the FE sector, signals for demand come from learners, employers, local and national stakeholders and funding agencies. Providers need to effectively identify the needs of these different constituencies to plan provision. In particular, providers need to:

- Critically assess their current offer to identify where current provision could be improved or expanded due to growing or changing learner demand. This can be done by gathering learner and employer feedback and analysing recruitment and retention rates. It is also useful to gather employer feedback on the appropriateness of the training and how it has prepared the learner for work.
- Identify new business opportunities by:
 - Consulting with local stakeholders. For example, many providers work with local authorities, Local Enterprise Partnerships and Jobcentre Plus to identify new skills priorities in their area;
 - Analysing labour market intelligence from local and national datasets such as the national employer skills survey series⁸ published by the UK Commission for Employment and Skills (UKCES) and job vacancy data provided by Jobcentre Plus. This provides information on skills gaps and shortages and future skills needs;
 - Reviewing secondary research conducted by Sector Skills Councils and other sector stakeholders articulating the skills needs of certain groups of employers; and
 - Consulting directly with learners and employers, through representation on boards of Governors, regular communication with local employers, attending business groups and/or periodic surveys or research with local learners and employers.

⁸ UKCES Employer Skills Survey and the Employer Perspectives Survey

- Regularly review pricing decisions by monitoring the prices charged by other organisations in the sector and testing with current and prospective learners how much they are willing to pay for services.

Avoiding abuses of dominance

The FE reform programme recommends that any college considering and/or undertaking a major change in delivery model conducts a Structure and Prospects Appraisal. This examines the potential implications of any changes, including any impact on competition. 'New Challenges New Chances' states that the Structure and Prospects Appraisal should:

“Assess the impact of different delivery models on competition in the local area, drawing upon independent advice, and what steps will be taken to ensure diversity and choice and guard against anti-competitive behaviours in the selection of partners, choice and operation of delivery vehicles”.

There are certain situations that all providers need to avoid when making changes to delivery models. This encompasses any new delivery model that:

- **Restricts or prevent new entrants.** It is important to consider whether some new delivery models (such as a consortium model) allow new organisations to enter the market. Restricting entry to a consortium can potentially limit opportunities for existing providers to grow their offer or for new providers to enter the market, which could reduce competition.
- **Restricts providers' freedom to make pricing and delivery decisions.** When providers are working collaboratively, it is important to identify if joint working agreements prevent providers from working in new areas or setting, independently, competitive prices for provision.
- **Constitutes a merger which could be examined by competition authorities.** Mergers and joint ventures may increase a provider's share of the relevant market, and could potentially result in a substantial lessening of competition. Mergers (and some joint ventures) which meet applicable turnover and/ or 'share of supply' thresholds may be notified for approval under the Enterprise Act 2002 (EA02). The OFT has previously reviewed certain mergers involving the combination of FE institutions⁹.

Providers may also wish to consider the extent to which switching may be hindered or quality/ innovation reduced because new delivery models:

- **Result in any anti-competitive bundling of products.** For example, a provider that sets up an Apprenticeship Training Association (ATA) may offer discounts to learners that have been referred from the provider. When this occurs, it is important

⁹ See, for example, the previous decisions by the Office of Fair Trading (OFT) at <http://www.of.gov.uk/OFTwork/mergers/decisions/2005/university-manchester> and <http://www.of.gov.uk/OFTwork/mergers/decisions/2007/City>

for providers to consider whether this has a significant detrimental impact by preventing learners from switching to other providers.

- **Result in the tying of products.** For example, a provider may make a course accessible only to learners that have previously completed another specific course from the same provider. When this occurs, it is important for providers to consider whether this unjustifiably prevents learners from switching between courses or providers.
- **Reduce the transferability of qualifications.** For example, a provider may offer pre-apprenticeship provision which is only recognised by a few providers as a suitable entry route to a full apprenticeship. Learners that undertake the pre-apprenticeship course will therefore have a limited choice of providers that will enrol them on an apprenticeship course.
- **Restrict the choice available to learners.** When working with partners, it is important to assess the extent to which new working relationships influence the choice available to learners, for example by restricting providers from delivering courses in certain subject areas or through certain methods (such as e-learning).
- **Impact negatively on the quality of provision.** It is important to assess whether the introduction of new delivery methods compromise the quality of existing provision. This is a particularly important consideration when colleges are planning to set up new 'arms-length' companies or merging and taking over private training providers. It also needs to be reviewed when new delivery methods, such as online or distance learning, are being considered.

If a provider identifies that a new delivery model will have a negative impact on competition in the area, then it will need to consider how to address these issues. In some instances, a provider will need to ensure that controls to scrutinise business decisions are in place to ensure that decisions are in the best interests of learners and employers. For example, a provider can, based on publicly-available information, regularly monitor the fees charged currently and historically by other providers to ensure that its prices continue to respond to competition. In other instances, a provider may need to modify delivery models to ensure that they do not restrict competition, for example by developing more open methods for recruiting providers to consortia or removing restrictions that limit the areas delivery partners can work in.

Examples of effective practice

Example 1

A medium-sized college was considering a merger with another local college. The college conducted an appraisal to identify the risks associated with different options and the impact on the local area.

The appraisal identified that the merger would result in the new college having a large share of the local market and for some subjects it would be the only provider delivering training locally. This could potentially limit learner choice.

Examples of effective practice

The college decided to mitigate this risk by sub-contracting provision in some subject areas, where it was the only provider. This led to a new provider delivering training in the local area. In addition, the college also conducted termly reviews of the fees it charged for some subjects to ensure that they are in line with those charged by competitors for similar courses.

The college decided to mitigate the risks further by engaging with the OFT regarding the applicability of the Enterprise Act 2002 (EA02). Given in particular that the new college would in future be the only provider delivering certain training locally, the college ultimately considered the applicable 'share of supply' threshold to be met, and notified the anticipated transaction for approval under the EA02.

Example 2

A group of local authorities decided to set up a consortium of providers to deliver community learning. All members of the consortium were to be given individual allocations of learners to recruit and each provider was expected to adhere to a common set of quality standards. The consortium members also considered developing a consistent pricing schedule for courses.

The consortium members conducted an appraisal to assess the potential competition implications of the new business model. Specifically, it assessed the potential impact of a common pricing schedule against the current fees charged by, and the known respective costs of, providers. The assessment identified that, for some members, the fees charged would increase significantly in excess of applicable costs. As a result, a common pricing schedule would not be in the best interests of learners.

The appraisal also identified that it was important that the consortium established a transparent and objectively applied system for recruiting new providers to the network. This would enable the consortium to grow over time and ensure that it recruited high-quality new providers. The consortium members engaged with the OFT regarding the applicability of the EA02. Following receipt of that advice, the members did not notify the establishment of the consortium for approval under the Enterprise Act 2002 (EA02).

Example 3

A private training provider recently began to deliver pre-employment provision through the Work Programme¹⁰. To help these learners progress to employment, the provider considered guaranteeing top-performing learners an apprenticeship placement with its partner employers.

The provider conducted an appraisal to assess the impact the change would have on competition. The appraisal found that the change might reduce opportunities for apprentice applicants not on the Work Programme. The provider therefore decided not to proceed with the proposal and instead decided to expand employer engagement to source sufficient places to meet demand.

¹⁰ The Work Programme provides support for benefits claimants to help them look for and stay in work. Further information on the Work Programme is available at: <https://www.gov.uk/government/policies/helping-people-to-find-and-stay-in-work/supporting-pages/managing-the-work-programme>

Commissioning and procurement

Commissioning behaviours and practices can have a significant influence on the functioning of a local market. As such, it is important that commissioners and procurers ensure that their practices do not breach competition law, and that tendering processes are open, transparent and competitive. Commissioners and procurers should also aim to ensure that their actions contribute to markets being open and contestable, both on the short and long term, by reducing barriers to entry and exit, encouraging a diverse supplier base and ensuring suppliers have the right incentives to make efficiency savings, raise quality and innovate¹¹.

Sub-contracting often provides an entry route for new providers to deliver training. With the introduction of minimum contract levels, it is likely that for many new providers, the first opportunity to access public funding will be through sub-contracting provision from another provider. Effective sub-contracting practices can help ensure a healthy range of providers in a local area, which can improve standards and provide greater choice to learners and employers.

Providers can adopt a range of approaches to sub-contracting provision. Some providers may choose to hold formal tendering competitions, whereas others may enter into more informal discussions with providers to establish new delivery partnerships.

There are effective approaches to sub-contracting that providers can employ to support competition and encourage new entrants to the sector. These include:

- **Running sub-contracts for a reasonably short length of time.** If sub-contracts run for a long period, there will be fewer opportunities for new providers to become delivery partners. Many providers run contracts for relatively short periods of time (often yearly), but there is an incentive to agree longer contracts with sub-contractors that have a proven track record for delivering high-quality training. In the long term, however, extended contracts can reduce competition between smaller providers and reduce the incentive for established sub-contractors to innovate and constantly strive to improve quality.
- **Ensure sub-contracting requirements potentially give new providers an opportunity to enter the market.** Understandably, sub-contracting providers may expect bidders to have previously delivered public-funded provision to demonstrate that they have a track record in achieving outputs. However, if this is an explicit tendering requirement, it can prevent new providers from entering the market, therein reducing competition. It is therefore recommended that providers ensure, where practicably possible, that tendering opportunities are open to new entrants, even though the bid scoring criteria may reasonably reward more experienced providers.

¹¹ The OFT has published two policy notes that provide further information on the types of issues that should be considered. A note on 'commissioning and competition in the public sector' is available at: http://www.of.gov.uk/shared_of/public-markets/Commissioning_and_competiti1.pdf and a note on 'Procuring to create Public Markets' is available at: http://www.of.gov.uk/shared_of/reports/comp_policy/Comp-public-markets.pdf.

- **Provide a clear indication of the quality assurance systems that delivery partners need to adhere to.** Quality assurance requirements can have significant resource implications for providers and may influence the prices quoted for delivering training. If expectations related to quality assurance are not clear upfront, providers may submit proposals to deliver services that are unrealistic. As good practice, providers should therefore clearly state in tender documents the processes that sub-contractors will need to follow to deliver training.
- **Employ transparent bidding and assessment processes.** Providers should try to ensure that a range of organisations are able to bid for work and all bidders clearly understand the scoring criteria that are used during the bid assessment. This helps ensure there is open access to sub-contracted provision.

General lessons that can be learnt from experience of commissioning and procurement in public services – and a framework to help policy makers – can be found in guidance published by the OFT¹².

Partnership working

There is generally a high level of collaboration between local providers and stakeholders. These partnerships can be formal (through committees and working groups) or informal (through bilateral discussions and the sharing of information). These partnerships often develop organically and therefore it can be challenging to ensure that they reflect the diversity of providers that are operating in a local area.

When entering into a partnership agreement, there are a set of questions that providers should consider to be clear about any possible competition implications:

Why is a partnership agreement necessary? There are many reasons for providers to collaborate. It is often desirable to do so and may well have no impact on competition. For example, it is widely felt to be important that local stakeholders and providers work together to ensure provision meets their communities' needs. When considering partnership agreements it is, however, important that there is a clear rationale for joint working.

Is there an effect on competition? Providers should consider whether any proposed partnership will impact on competition in the local area. This is most likely to occur when agreements encompass the prices charged for provision or set conditions for what provision is supplied by whom. The focus should always be on ensuring that any impacts on competition are as limited as possible. There are good practice principles that providers can adopt to support this ambition, including:

- **Regularly reviewing the membership of and the continuing rationale for stakeholder or provider groups** and ensuring, where practicable, that new providers and, in particular, private providers have an opportunity to participate.

¹² Choice and Competition in Public Services' OFT1214
http://www.of.gov.uk/shared_of/business_leaflets/general/of1214.pdf

This helps to ensure an effective cross-section of providers are informing local planning and helping to address local skills issues. It can be achieved by reviewing the membership of existing groups and networks at regular intervals (for example, annually).

- **Ensuring all providers retain the freedom to set prices that relate to the unit cost for delivering provision.** Some groups of providers may, for example, consider agreeing a common fee strategy for provision such as apprenticeships to leverage higher employer contributions to the cost of training. However, this may mean that some providers set artificially-high fees to the detriment of employers and learners. Agreeing fees may also remove the incentive for providers to develop innovative new approaches to bring efficiency to the delivery of training or attract learners through lower prices.
- **Avoiding entering into formal agreements on the number of learners that can be recruited for certain courses or in certain geographical areas.** In areas where there are a few providers delivering provision this generally reduces competition and means learners and employers have less choice of training.
- **Ensuring joint decision-making does not restrict other providers from expanding their offer** and entering into new markets. For example, it is important for providers to avoid exclusivity arrangements, such as local stakeholders agreeing only to commission new work from a small group of providers.

Is the affect on competition justified? Where effects on competition have been identified, providers should also consider whether these are justified. There may be a justification because the scope of the competition distortion has been made as limited as possible. There may be a justification because the partnership agreement provides benefits to consumers. Examples of possible consumer benefits from joint working are provided below:

- **Creating an infrastructure through which local providers can respond quickly to emerging needs.** The local economic environment can change quickly and regular communication is necessary to ensure that providers can respond to changes in demand. For example, if a large local employer closes then local providers and stakeholders may need to quickly develop a set of training programmes tailored to the re-skilling of workers who have been made redundant.
- **Enabling providers to deliver training that would not otherwise be viable.** In some specialist sectors there are a small number of learners that request training, and therefore training only becomes viable if one provider is able to attract learners from a wider geographical area. In these cases local providers agree to specialise in certain sectors.

Annex 1: Summary of UK and EU competition law

UK and EU Competition Law

Anti-competitive behaviour – legal framework:

In the UK, anti-competitive behaviour is prohibited by the general competition rules contained in the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union (TFEU).

Anti-competitive agreements between undertakings¹³ are prohibited, in certain circumstances, by Chapter I of the CA98 and Article 101 of the TFEU. This includes restrictive practices engaged in by companies operating within the UK that distort, restrict or prevent competition – for example, fixing purchase or selling prices, limit innovation or investment, and sharing markets. Exemptions from prohibition are available if the relevant undertakings can demonstrate that the practices at issue are either covered by a block exemption adopted under EU or UK law, or benefit consumers thorough advancing technical or economic progress. Further details on the laws prohibiting anti-competitive agreements in the UK are available in existing OFT guidance¹⁴.

Abuse of a dominant position on any market is prohibited by Chapter II of the CA98 and Article 102 of the TFEU. Abuses generally consist of conduct which exploits customers or suppliers (for example, excessively high prices), or conduct which removes or weakens competition from existing or potential competitors (such as excessively low prices). Neither EU nor UK law provides for any exemptions to the prohibition on abuse of a dominant position, but in some circumstances conduct may not be regarded as an abuse where the relevant undertaking(s) can demonstrate an appropriate objective justification for the conduct at issue. Further details on the laws prohibiting abuses of dominance in the UK are available in existing OFT guidance¹⁵.

The prohibitions contained in Chapters I and II of the CA98 and Articles 101 and 102 of the TFEU are similar but not the same: the CA98 prohibits anti-competitive behaviour affecting trade in the UK, which Articles 101 and 102 prohibit anti-competitive behaviour

¹³ The term undertaking has no single definition in UK or EU competition legislation law, but its meaning has been set out in EU law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, partnerships, firms, businesses, associations of undertakings (e.g. trade associations), non-profit making organisations and (in some circumstances) public entities that offer goods or services on a given market. For example, certain independent fee-paying schools have previously been deemed 'undertakings' for UK competition law purposes by the Office of Fair Trading (OFT): <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools>

¹⁴ See, for example, 'Agreements and concerted practices' OFT401 http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of401.pdf

¹⁵ See, for example, 'Abuse of dominant position' OFT402, http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of402.pdf

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affecting trade within the EU. Any undertaking that intentionally or negligently infringes Chapter I or Chapter II of the CA98, or Article 101 or Article 102 of the TFEU, may be subjected to a financial penalty of up to 10% of the undertaking's worldwide turnover.

Cartel offence

In the UK, Chapter I of the CA98 and Article 101 of the TFEU prohibit cartels. In addition, the Enterprise Act 2002 (EA02) makes it a criminal offence for individuals to take part in the most serious types of cartels. Anyone convicted of the cartel offence could receive a maximum of five years imprisonment and/or an unlimited fine.

Merger control – legal framework:

The EA02 also provides that mergers (and some joint ventures) meeting certain turnover and/ or 'share of supply' thresholds can be investigated by the appropriate competition authority, either on an own-initiative basis or in response to a submission. Anticipated and, in some circumstances, completed mergers (or joint ventures) may be investigated. An organisation or its parent organisations may notify, for approval, a merger (and some types of joint venture) which set out in the EA02; the OFT also offers a range of points of contact to discuss process, procedure or anticipated transactions¹⁶.

Ultimately, any merger deemed capable of resulting in a substantial lessening of competition within any market in the UK may be prohibited altogether, or approved subject to remedies such as an obligation to divest part of the merged business or to offer licences or access to facilities to preserve competition.

Investigation of markets:

The EA02 establishes a framework for the enforcement and promotion of competition in the UK. The EA02 also gives the Office for Fair Trading (OFT) certain general functions regarding obtaining information and conducting research. Under these general functions, the OFT may actively investigate markets that do not appear to be meeting the needs of consumers and publishes the results. Further details on OFT market studies are available in existing OFT guidance¹⁷.

UK bodies with competitive law responsibilities:

The EA02 provides that a number of independent bodies are responsible for, for example, investigating anti-competitive behaviour, potentially anti-competitive

¹⁶ There are two main types of discussions to be aware of: pre-notification discussions and informal advice. Informal advice is used to obtain information about the OFT's views of likely competition issues in a future transaction, but does not trigger an actual investigation leading to a public decision. Pre-notification discussions are a preliminary stage for cases where the parties wish to proceed to notify the merger. Further details on when the OFT will provide informal advice is set out in detail in existing OFT guidance in this area (see, for example, 'Mergers Jurisdictional and procedural guidelines' OFT527, paragraphs 4.28 to 4.41, http://www.of.gov.uk/shared_of/mergers_ea02/of527.pdf)

¹⁷ See, for example, 'Market studies' OFT519 http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/of519.pdf

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transactions and raising the profile of competition policy in the UK. In the UK currently, anti-competitive behaviour is investigated in the UK by the OFT and certain transactions can be reviewed by the OFT as well as the Competition Commission (CC), a second-stage review body. Further details on these institutions are available on their respective websites, www.oft.gov.uk and www.competition-commission.gov.uk. From 1 April 2014, the Enterprise and Regulatory Reform Act 2013 will result in the OFT and the CC being merged to form the Competition and Markets Authority (CMA).

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