

The concept of undertaking in the Health Care Sector

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Competition and Public Procurement Law Challenges in the Health Care Sector

Outline

- The system of healthcare provision in England
- The applicability of competition law to healthcare providers
- The challenge competition law poses to healthcare providers



TAX

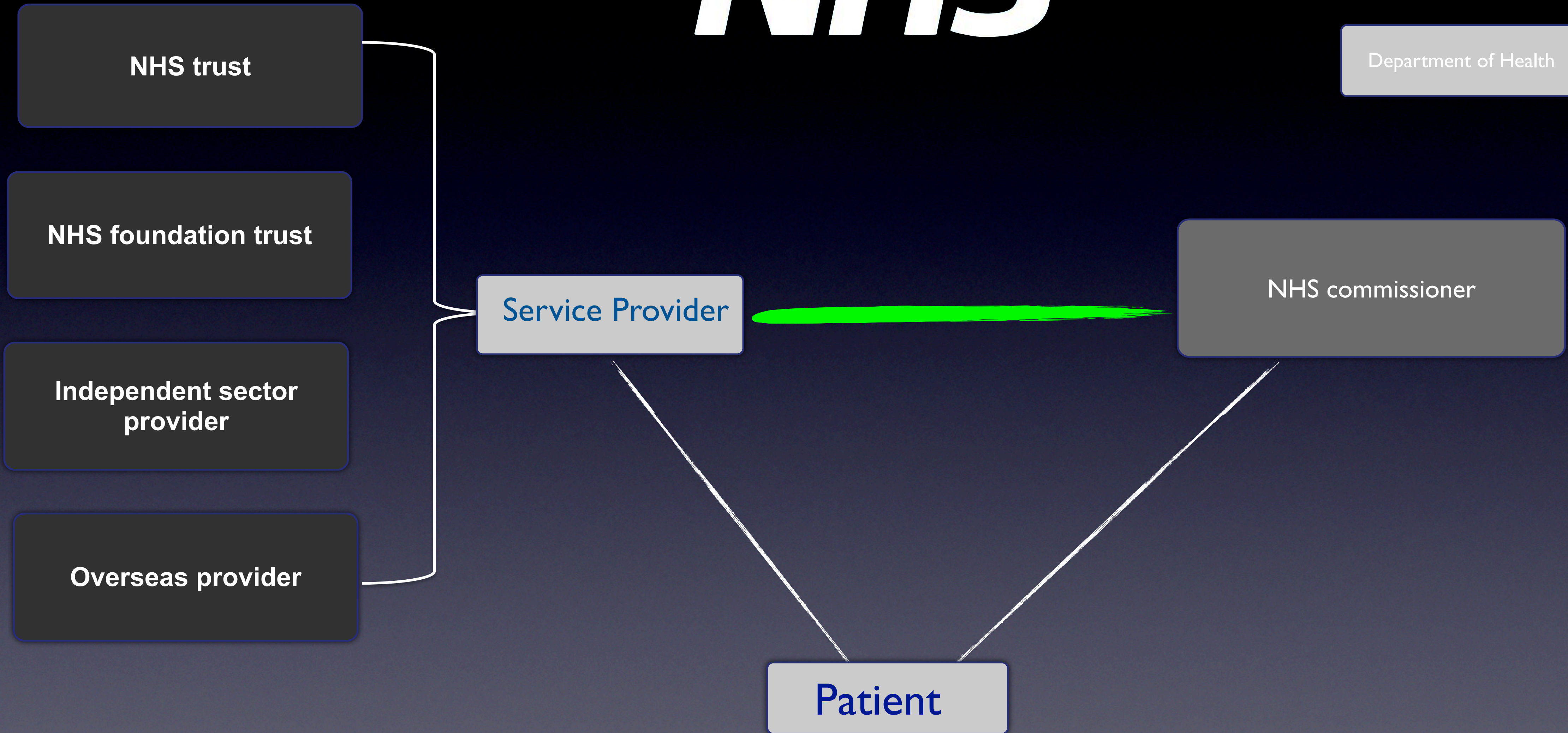
NHS

Patient

NHS

Secretary of State

Department of Health



Are state-healthcare providers
subject to competition law?

C-41/1990 *Höfner*

‘every entity engaged in an economic activity,
regardless of the legal status of the entity and
the way in which it is financed.’

economic activity

Two elements:

supply goods or services

potential to make profits

C-41/1990 *Höfner*

supply goods or services

‘Any activity consisting in offering goods and services on a given market is an economic activity.’ Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para. 19

supply goods or services

‘It should be noted in that regard that, **according to settled case-law**, medical services provided for consideration fall within the scope of the provisions on the freedom to provide services’. Case C-372/04 *Watts* [2006] ECR I-4324, para. 86

economic activity

Two elements:

supply goods or services

potential to make profits

C-41/1990 *Höfner*

potential to make profits

‘[i]n assessing whether an activity is economic in character, the basic test appears...to be whether it *could*, at least in principle, be carried on by a private undertaking in order to make profits. If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it.’ *Joined Cases C-264/01 etc AOK, AG Opinion, para. 27.*

Irrelevant Considerations?

Publicly owned service providers

Non-profit making entities

funded from direct taxation

Challenges?