

Guidance on merger benefits: consultation response



About Monitor

As the sector regulator for health services in England, our job is to make the health sector work better for patients. As well as making sure that independent NHS foundation trusts are well led so that they can deliver quality care on a sustainable basis, we make sure: essential services are maintained if a provider gets into serious difficulties; the NHS payment system promotes quality and efficiency; and patients do not lose out through restrictions on their rights to make choices, through poor purchasing on their behalf, or through inappropriate anti-competitive behaviour by providers or commissioners.

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Introduction

In the current challenging financial climate, healthcare mergers can benefit patients by helping providers to deliver safe, high quality and sustainable care. However, some mergers can work against patients' best interests by reducing choice, and by curbing the drive to improve quality and value for money and to innovate that choice encourages. This is why proposed NHS mergers must be carefully considered by all parties concerned, with the patient firmly in mind.

As health sector regulator, one of Monitor's core responsibilities is to ensure that co-operation and competition work in the best interests of patients. When a merger involving an NHS foundation trust is reviewed, we have a duty to provide advice¹ to the Competition and Markets Authority (the CMA)² on the benefits of the merger for patients and commissioners. We also review mergers and other transactions involving foundation trusts as part of our on-going overall assessment of whether they meet the conditions of their [provider licence](#).³

This consultation response

On 27 March 2013 we launched a 12-week public consultation on several of our draft co-operation and competition guidance documents including our [guidance on merger benefits](#). We received 26 submissions from a range of stakeholders including NHS and independent sector providers, Royal Colleges, professional associations, charities, other regulators and academics.

This document gives an overview of the feedback we received in the consultation on our draft guidance on merger benefits and sets out our response to that feedback. We are grateful to everyone who participated in our consultation and we have carefully considered all the feedback.

¹ We are required to provide advice to the CMA by section 79(5) of the Health and Social Care Act 2012.

² The CMA is the UK's primary competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries and enforcing competition and consumer law. From 1 April 2014 it took over the functions of the Competition Commission and the competition and certain consumer functions of the Office of Fair Trading (OFT).

³ See '[Supporting NHS providers: Guidance on transactions for NHS foundation trusts](#)'

Our new approach to transactions

Since our consultation on this guidance in 2013, we have listened to the sector and looked more comprehensively at our approach to transactions, including mergers. We have been working with the CMA to develop a joint approach that will make sure patients' interests are at the heart of assessing merger proposals.

Now, after [consulting with the sector on our new approach to transactions](#), we are working to:

- better support NHS foundations trusts contemplating a merger or acquisition to navigate the relevant regulatory processes, from an earlier stage
- change the rules for reporting and reviewing transactions involving NHS foundation trusts (as part of our approach to risk assessing transactions to ensure compliance with licence conditions).

To support providers, we are publishing a range of complementary guidance documents about our new approach, comprising:

- [Supporting NHS providers: Guidance on merger benefits](#) (revised guidance on merger benefits)
- ['Supporting NHS providers: Guidance on transactions for NHS foundation trusts'](#) that updates and consolidates all Monitor's previous guidance on transactions; provides further detail and clarity on the new arrangements to assist NHS foundation trusts contemplating a merger or acquisition; and sets out our risk assessment process for transactions
- ['Competition review of NHS mergers: A short guide for managers of NHS providers'](#), co-published with the CMA, explaining how statutory merger control applies to NHS mergers.

You may also find the CMA's [guidance on the review of NHS mergers](#) helpful.

Further help

If you have queries about this guidance, or about our new approach to transactions, please contact us at: cooperationandcompetition@monitor.gov.uk

Feedback: common themes

The following common themes were raised in the consultation responses:

- **Examples of relevant customer benefits:**⁴ several respondents requested more detailed guidance on what constitutes a relevant customer benefit.
- **Consultation on service reconfiguration:** some respondents said we should take account of the consultation requirements for NHS organisations when determining the level of evidence required. They said we should consider that although consultation on service change might be theoretically possible without a merger, it could be more contested, publicly divisive, and produce later or smaller benefits. Where this is the case, they asked if we would assess the incremental benefit of the merger against the later or smaller benefits that might otherwise be achieved without the merger. Some respondents also asked how we would balance a benefit for one group of patients against the impact of service change for another group.
- **Commissioner-led service reconfiguration:** some respondents said that we should ensure that the opportunities and limitations of the commissioning system are realistically taken into account when considering whether benefits could be achieved by commissioner action.
- **Sustainability of healthcare services:** some respondents said that the guidance should describe how we will assess the benefits of mergers that address clinical or financial sustainability issues.
- **Financial savings:** some respondents said that because of foundation trusts' status as not-for-profit organisations, savings will be used for the benefit of patients and it should not be necessary to show that the savings will be returned to commissioners for reinvestment in services.

Our response

4 The term 'relevant customer benefit' is defined in Section 30 of the Enterprise Act 2002. 'Customer' is a term used in the Enterprise Act in relation to all the economic activities it covers. In relation to the health sector, the term 'customer' means a current or future user of healthcare services (often but not always referred to as a 'patient') or a commissioner. In our guidance and this consultation response we use the terms 'merger benefits' and 'relevant customer benefits' interchangeably.

Examples of relevant customer benefits

In order to provide more detailed guidance on relevant customer benefits we have included examples, drawing from our experience (and that of the Co-operation and Competition Panel) in previous cases. We hope these examples will be helpful for merger parties.

Consultation on service reconfiguration

We have included further detail in the guidance on the type of evidence we would expect merger parties to provide to support a submission that a reconfiguration of services that was subject to consultation would deliver relevant customer benefits. We will not expect the parties to have started or completed public consultation on the proposed reconfiguration, taken a firm decision to proceed with the reconfiguration or implemented the service reconfiguration. However, for the more extensive benefit proposals (for example, accident and emergency reconfiguration), we would expect the parties to have taken the steps outlined below:

- determined what the preferred proposal is and, where relevant, provided evidence of the need for change, for example if the current service does not comply with relevant quality and safety standards or recommendations
- discussed plans with clinicians of the merger parties and relevant commissioners
- developed a model of care (a plan for the way in which services will be delivered following the reconfiguration) by engaging with clinicians of the merger parties and relevant commissioners, as well as any clinical experts and relevant advisory groups as appropriate
- produced an assessment of the clinical advantages (and any disadvantages) as well as a robust assessment of the financial or economic viability of the plans.

If the proposed reconfiguration is likely to disadvantage some patients (for example by reducing their access to services), we would consider factors such as the number of patients affected and the increase in travel time for these patients.

In assessing whether any identified improvements depend on the merger (that is, are unlikely to accrue without the merger), we will take account of how quickly service reconfiguration could be achieved without the merger. Where

improvements would be delivered more quickly or more cost effectively with a merger than without, the time gained or money saved is the benefit that can be attributed specifically to the merger.

Commissioner-led service reconfiguration

Where there is evidence that services are likely to change as a result of commissioner-led or other centrally led changes (for example, to meet government recommendations), we will consider whether this action would have the same effect as the merger parties' proposals and how soon that action is likely to occur. The extent to which commissioners have developed plans to reconfigure services will be relevant to our assessment of whether the improvements would be delivered without the merger.

Where commissioners' proposals to reconfigure services are subject to consultation we take account of whether they have undertaken the steps outlined earlier under 'Consultation on service reconfiguration'.

Sustainability of healthcare services

Where hospitals are in clinical or financial difficulty, Monitor and the NHS Trust Development Authority (where this involves an NHS trust) will be closely involved with the hospitals developing a strategy for safeguarding patient services. This should ensure that any merger proposal considers the implications for quality of services and patient safety from the outset.

Where one or both of the merger parties is clinically or financially challenged we recognise that this may have an impact on the merged entity's ability to achieve substantial changes to models of care and service delivery while it implements the merger. Therefore it will be important in such a case for the parties to show they have identified the possible risks and planned effectively to mitigate these. The guidance provides further detail about the type of evidence we would expect merger parties to provide to demonstrate that a merger will improve the quality of services.

Financial savings

In order to constitute relevant customer benefits, financial savings generated by the merger parties must be used for the benefit of customers. We would generally expect any savings made by a foundation trust to be reinvested in healthcare services, so that they benefit patients through higher quality, greater choice or innovation of services and/or benefit commissioners through lower prices.

It is not necessary to show that savings will be returned to commissioners but where merger parties can explain how they will use any financial savings this will help to demonstrate that the benefit to patients will be realised. For example, if merger parties identify which aspects of services would benefit from improvement and provide details of the work done to identify this and what would happen without the investment, they will be able to make a stronger case that the identified cost savings from the merger are likely to be realised within a reasonable time. In addition, an explanation of how savings will be reinvested will help the parties make a stronger case that the identified cost saving is likely to represent a real improvement for patients or commissioners.

Feedback on the merger control process

Some respondents requested further detail on the CMA's role in the process and said that the guidance should reflect the changes to merger control resulting from the Enterprise and Regulatory Reform Act 2013. A number of respondents emphasised the importance of our advice to the CMA's assessment and requested further detail of how we expect to give advice to providers about the merger control process generally.

Individual respondents raised the following more general merger control issues:

- Would a different approach apply to referring certain types of mergers (for example, joint ventures, single service line changes and other types of collaboration beyond whole organisation mergers)?
- Do the CMA and Monitor need to agree a definition of a failing organisation?

Our response

We have included more detail in the guidance on the CMA's role in the merger control process and the changes to the process resulting from the Enterprise and Regulatory Reform Act 2013. We have also amended the guidance to reflect the joint statement published by Monitor, the Office of Fair Trading and the Competition Commission, which explains that the CMA will place significant weight on Monitor's advice on the patient benefits of a proposed transaction.

['Supporting NHS providers: Guidance on transactions for NHS foundation trusts'](#) sets out information about how we will engage with providers contemplating a merger.

The decision to refer mergers falls within the CMA's jurisdiction, not Monitor's, and the CMA's approach to assessing NHS mergers (including service reconfigurations) is set out in its [guidance on the review of NHS mergers](#).

This guidance explains how they will assess the competition impact of mergers involving a failing organisation. It is outside the scope of this guidance for us to comment on whether a different approach to referring certain types of mergers (see above) would apply.

Other feedback given by respondents

The following issues were raised by individual respondents:

- It is crucial that Monitor is open and transparent in documenting cases and the rationale underpinning its advice, and publishes this advice and supporting rationale promptly and in full.
- Monitor should safeguard commercially confidential information using the same protocols that are applied in competition and merger cases more widely.
- Monitor needs to ensure that the requirements of Part 3 of the Enterprise Act 2002 (which deals with merger control) are rigorously and consistently applied. Monitor should exercise great caution in accepting propositions that merging providers will result in improved integration of care and outcomes for patients.
- Mergers must not be allowed to be used to avoid what would otherwise be legally required tendering or re-tendering of contracts.
- The guidance should discuss the overlap between Monitor and the Care Quality Commission.
- Monitor should take care not to give too much weight to considerations such as the previous experience of the merging parties or similar mergers that have taken place elsewhere, as previous transactions may have been carried out under different senior leadership teams or in different circumstances.

Our response

Our approach to publishing decisions is set out in Appendix 2 to '[Supporting NHS providers: Guidance on merger benefits](#)': that is, we will publish the non-confidential version of our advice following the CMA's Phase 1 investigation. Before it is published, we will circulate the text of our advice to the parties or their advisers so that they can request redaction of sensitive confidential information from the text if necessary to protect confidentiality. Our approach to handling confidential information is consistent with that applied in merger cases by the CMA.

The CMA is responsible for merger review under Part 3 of the Enterprise Act. We will apply the relevant customer benefits test as set out in Part 3 of the Enterprise Act rigorously and consistently. We will examine proposals submitted by merger parties carefully and expect parties to provide convincing evidence of their nature and scale and to demonstrate that they fall within the Enterprise Act's definition of relevant customer benefits.

The procurement obligations of commissioners are set out in Monitor's substantive guidance on the [National Health Service \(Procurement, Patient Choice and Competition\) \(No.2\) Regulations 2013](#). It is outside the scope of this guidance for us to comment on the proposition that a merger must not be used to avoid tendering or re-tendering of contracts.

Our interaction with the Care Quality Commission is described in the [Memorandum of Understanding](#) between the two organisations.

In assessing the credibility of any plans we will also look to the experience of the merger parties in previous transactions and their success in realising improvements from those mergers. We have amended the guidance to indicate that where there have been changes in circumstances (such as a change in management), meaning that the merger parties' previous experience should not be relied on, we will take into account evidence of the changed circumstances.



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