

## **Partnership Agreement between NHS Trust Development Authority and Monitor**

### **1. Joint Statement**

Through this agreement Monitor and the NHS Trust Development Authority (TDA) commit to work together and to support each other in carrying out their respective statutory and non-statutory roles and responsibilities for the benefit of patients and the general public.

The shared approach for working together will be characterised by openness, transparency, information sharing and timely engagement on issues of mutual interest and importance.

This document is not legally binding and cannot constrain either organisation in exercising their respective roles and responsibilities as set out in the Health and Social Care Act 2012, National Health Service Act 2006 and under direction from the Secretary of State.

### **2. Context and Shared Purpose**

This agreement sets out the nature of the working arrangements between the NHS Trust Development Authority (TDA) and Monitor. It summarises how the two organisations intend to work together to carry out their respective functions.

The agreement identifies a number of priorities for joint working which cover:

- Ensuring NHS Trusts comply with the relevant equivalent obligations in Monitor's Provider Licence
- Maintaining a high standard of applicants for FT status
- Maintaining a high standard of evaluating acquisitions involving NHS Foundation Trusts and NHS Trusts, and mergers involving NHS Trusts
- Developing a shared approach to better understanding local health economy risks that impact NHS foundation trusts and NHS Trusts
- Ensuring effective engagement across provider organisations to develop the best solution for patients when either an NHS trust or NHS foundation trust triggers our respective failure regimes.

Across each of these areas we will work together to ensure and plan the effective co-ordination of our communications.

Monitor and the TDA recognise the quality and financial challenges facing the NHS and share the vision of supporting and enabling the delivery of safe, high-quality and sustainable care to patients. Our shared vision of enabling improvements in the NHS provides the important strategic context within which this partnership agreement has been developed and will be implemented over the coming years.

This agreement is consistent with others partnership agreements both organisations have in place. We intend to review this document by April 2015, and update if necessary.

### **3. Roles and Responsibilities**

#### *Monitor*

Monitor is the sector regulator for health services in England and our job is to make the health sector work better for patients.

Before April 2013 Monitor's main task was to authorise and regulate NHS foundation trusts, currently 60% of all public providers of NHS services. However, under the Health and Social Care Act 2012 we were given a wide range of additional responsibilities. Our core responsibilities can be summarised under four main headings:

1. Making sure public providers are well led. From its inception, Monitor has been tasked with making sure public providers of NHS care are well led, delivering quality care on a sustainable basis. We do this in two ways: first by setting a required standard that all NHS providers must meet (our foundation trust authorisation standard or 'bar') and by working, most recently with the NHS Trust Development Authority, to ensure that, in due course, all NHS providers meet this standard; second, we seek to control the risk that foundation trusts, once authorised, fall back below the required standard. If they do, we take remedial action. We also work with others to support the ongoing development of foundation trust capabilities so that they are better able to deal with the challenges they face.
2. Making sure essential NHS services are maintained. If a provider of essential NHS services, whether an NHS foundation trust or an independent sector provider, gets into such serious difficulty that it is unlikely to be able to continue providing its essential services for much longer, we are responsible for making sure those services are maintained and protected for local patients. The services may continue to be provided by the failing provider while it restructures, or by alternative providers.
3. Making sure the NHS payment system promotes quality and efficiency. One of our new duties is to work with NHS England to design and operate the payment system for all NHS services. Monitor sets the rules that govern the prices paid for services, while the grouping of services for payment purposes is done by NHS England.
4. Making sure procurement, choice and competition operate in the best interests of patients. The purpose of promoting good procurement and, where appropriate, enabling patients and commissioners to choose between competing service providers is to support improvements in the quality of care and the efficiency with which it is provided. Our role is to help commissioners and providers make sure patients do not lose out through poor commissioning, restrictions on their rights to make choices or inappropriate anti-competitive behaviour by commissioners or providers.

Across all areas of our work we have a duty to enable better integration of services, both within health and between health and social care, where this is in patients' interests. We also seek to encourage innovation and beneficial change by carrying out research and analysis to identify what works and what doesn't, and to stimulate better ways of working.

*NHS Trust Development Authority*

The Government's vision is for a NHS with fully autonomous and accountable healthcare service providers (hospitals, ambulance services, mental health services and community services). The NHS TDA is a Special Health Authority that oversees, holds to account and supports improvement by NHS trusts, helping them to improve the quality and sustainability of services and thereby achieve Foundation Trust status or another more appropriate organisational form.

The TDA is responsible for oversight of clinical quality, performance and finance and for developing capacity and capability in NHS Trusts. It approves FT applications to proceed to Monitor, and can intervene to address issues concerning operational, clinical and financial delivery. The TDA makes non-executive appointments to NHS Trusts and support transactions and other provider-led organisational changes.

#### **4. Ways of Working**

The ways of working between the organisations will be at national and local trust level and will cover strategic, operational and cultural issues:

- **Strategic** –the organisations will seek to develop a shared vision for the NHS, align our strategies, and support each other to achieve our respective strategic objectives;
- **Operational** – where the organisations will develop clear approaches to dealing coherently and effectively with a range of operational matters (eg streamlining the end-to-end assessment process).
- **Cultural** – where the organisations will seek to promote common values, based on those in the NHS Constitution, and constructive behaviours.

The TDA and Monitor will both receive information, through formal and informal routes, about the quality of care and financial health of NHS Trusts and their wider local health economy. In discharging their responsibilities, the organisations commit to:

- Ensuring mutual understanding of the information received about applicant NHS Trusts by each organisation;
- Where appropriate, working together to adopt a consistent approach regarding information requests from NHS Trusts and Foundation Trusts;
- Early sharing of information, particularly soft intelligence, to support the respective roles of Monitor and the TDA;
- Share pertinent information about NHS trusts/ NHS foundation trusts that might have a consequent effect on another NHS foundation trust/ NHS trust

#### **5. Operational areas of coordination**

Monitor's assessment process considers an applicant FT on whether they are able to provide quality services for patients on a sustainable basis. The TDA is responsible for providing oversight of clinical quality, performance and finance and for developing capacity and capability in NHS Trusts before they proceed to FT status. In undertaking these roles, TDA and Monitor commit to a streamlined assessment process (end to end) for aspirant NHS FTs.

The following section outlines in more detail the relevant operational areas of coordination:

##### **1) Ensuring NHS Trusts comply with equivalent obligations to those to which licensees are subject through the relevant conditions in Monitor's provider licence**

Since April 2013, NHS foundation trusts have had a licence issued by Monitor. From April 2014, Monitor has issued licences to other providers of NHS-funded services. NHS Trusts are exempt from

the requirements to hold a licence, but in order to ensure fairness and coherence across the sector, are required by the TDA to comply with certain licence conditions (specifically, the conditions covering general obligations, pricing, choice and competition and integrated care).

Where it comes to Monitor's attention that an NHS Trust is potentially in breach of the licence conditions, Monitor may investigate and will inform the TDA of this. As the body accountable for NHS Trusts, the TDA will be responsible for determining how to act in light of Monitor's findings.

Annex A of this document sets out arrangements between Monitor and the TDA to ensure that NHS Trusts comply with equivalent obligations to those to which licensees are subject through the relevant conditions in Monitor's provider licence.

## **2) Maintain a high standard of applicants for FT status**

The TDA will assess whether NHS Trusts' applications for FT status are ready for submission to Monitor, who will subsequently consider the application and whether to authorise the Trust as an FT. To ensure a high standard of applicant FTs, the TDA and Monitor commit to:

- Ensuring our processes are not unnecessarily duplicative and streamlined
- Sharing insights, good practice and lessons learnt to applicant FTs from Monitor's assessment process.

Annex B describes how Monitor and the TDA will work together to maintain a high standard of applicants for FT status.

## **3) Maintain a high standard of evaluating acquisitions and mergers involving NHS Foundation Trusts and NHS Trusts**

### *Mergers involving NHS foundation trusts*

The Competition & Markets Authority (CMA) is responsible for reviewing the competition aspects of mergers and acquisitions involving an NHS foundation trust. Monitor has a statutory duty to provide advice to the CMA on the relevant customer benefits of these transactions.

Irrespective of whether a merger or acquisition involving an NHS foundation trust is reviewed by the CMA, Monitor also has a statutory duty to review and approve certain transactions which it discharges in part through a review of the NHS foundation trust's post-transaction risk of non-compliance with certain licence conditions.

The NHS TDA and Monitor will work together in the case of a proposed acquisition of a NHS Trust by a NHS Foundation Trust or a merger of two such trusts and will share information, where appropriate, that may have a bearing on potential transactions at an early stage.

An Annex describing how Monitor and TDA will work together in relation to the new arrangements introduced by Monitor to support NHS foundation trusts contemplating mergers (see [here](#)) will be developed in the forthcoming period.

### *Mergers between NHS trusts*

Monitor will examine and advise the NHS TDA on the choice and competition aspects of mergers between NHS Trusts. As the organisation accountable for NHS Trusts, the NHS TDA will oversee mergers between NHS Trusts having due regard for advice on choice and competition issues from Monitor.

Annex C of this document sets out the arrangements between Monitor and the NHS TDA regarding the assessment of choice and competition aspects of mergers between NHS trusts.

#### **4) Developing a shared approach to better understanding local health economy risks that impact NHS foundation trusts and NHS Trusts**

Monitor and NHS TDA are working to improve the quality of strategic planning in NHS Trusts and Foundation Trusts respectively. We will work together to develop a better understanding of how local health economy dynamics may impact on NHS providers' strategic plans and how this knowledge can best be used to improve strategic planning. Work underway includes developing and using a shared methodology and identifying and working together to resolve local health economy wide issues.

#### **5) Ensuring effective engagement across provider organisations when either an NHS trust or NHS foundation trust triggers our respective failure regimes.**

Monitor and the TDA will ensure that where an NHS Trust or an NHS Foundation Trusts is failing, neighbouring NHS trusts and foundation trusts engage and participate in developing and implementing a solution that is best for patients.

An annex setting out how we work together when a NHS trust or Foundation trust is failing will be developed over the forthcoming period, taking into account lessons learned from past cases.

### **6. Culture and Behaviours**

We will promote the following culture when working together:

- Openness and honesty – 'no surprises';
- Understanding of respective statutory roles, duties and powers;
- Engagement on issues of mutual interest and importance, such as the diffusion of high value care models and joint learning and development;
- Early and pro-active information-sharing.

### **7. Governance for Delivering Joint Priorities**

#### *Formal Governance*

The Executive Teams of the two organisations will meet together at least once a year to discuss these working arrangements and common priorities. The Executive meeting will be the overall governance forum for this agreement, which will be refreshed annually to reflect changes and developments between us.

#### *Practical working arrangements*

We will ensure there is regular contact and close working at both national and sub-national levels of the organisations, including between professional leads and leaders covering common geographical areas.

Engagement at sub-national level will be primarily led by the Provider Appraisal<sup>1</sup> Directors in Monitor, and by the four Delivery and Development Directors at the TDA.

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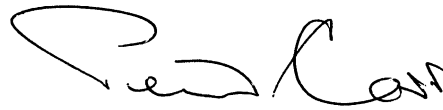
<sup>1</sup> Monitor's Assessment team is now called Provider Appraisal

At national level, regular meetings will be held at Director level, to co-ordinate on going work and priorities and review the effectiveness of partnership working. The lead director responsible for this working relationship at the TDA will be the Director of Strategy. The lead director for this working relationship at Monitor will be Executive Director of Provider Appraisal.

Annex D sets out a table of regular meetings attended by both organisations for either operational reasons or wider system alignment reasons.



Baroness Joan Hanham  
Interim Chair, Monitor



Sir Peter Carr  
Chair, NHS Trust Development Authority



Dr David Bennett  
Chief Executive, Monitor



David Flory CBE  
Chief Executive, NHS Trust Development Authority

## Annex A

### **Arrangements between Monitor and the NHS Trust Development Authority to ensure that NHS Trusts comply with equivalent obligations to those to which licensees are subject through the relevant conditions in Monitor's provider licence.**

#### **Purpose**

This annex to the partnership agreement between Monitor and the NHS Trust Development Authority sets out the working arrangements and describes the relationship between Monitor and the NHS Trust Development Authority (TDA) in relation to ensuring that NHS trusts comply with equivalent obligations to those to which licensees are subject through the relevant conditions in Monitor's provider licence (the provider licence).

#### **Background**

All providers of NHS-funded health care services in England will be required to hold a Monitor provider licence, unless granted an exemption in Regulations made by the Secretary of State for Health. The requirement to hold a provider licence has applied to NHS foundation trusts since April 2013 and to independent providers from April 2014.

Monitor will use the provider licence in the carrying out of its duties in relation to: setting prices for NHS-funded care; enabling integrated care; preventing anti-competitive behaviour which is against the interests of patients; supporting commissioners in maintaining the continuity of services; and overseeing the governance of foundation trusts.

NHS trusts have been granted an exemption from the requirement to hold a provider licence. In the response to its consultation on licence exemptions proposals, the Department of Health explains that the rationale for the exemption is that the bespoke performance management regime operated by the TDA on behalf of the Secretary of State, and supported by the Unsustainable Provider Regime (UPR), makes the application of the continuity of services licence conditions contained in the provider licence inappropriate.

However, the proposal to grant an exemption to NHS trusts from the requirement to hold a provider licence was made on the basis that the TDA will exercise its functions in a way that ensures that NHS trusts comply with equivalent obligations to those to which licensees are subject through the relevant conditions in the provider licence. This will be achieved through agreements between the Department of Health, the TDA and Monitor and underpinned by this partnership agreement.

This annex sets out: the scope of the obligations with which NHS trusts will be required to comply; the processes by which Monitor and the TDA will ensure that NHS trusts comply with the obligations; and the governance of these arrangements.

## **Scope of the obligations with which NHS trusts will be required to comply**

NHS trusts will be required to comply with the obligations contained in the relevant conditions of the provider licence as if they are holders of a licence.

The relevant conditions in the provider licence are specified below, for the purposes of this document we refer to these together as the Obligations:

- G4 – Fit and Proper Persons
- G7 – Registration with the Care Quality Commission
- G8 – Patient eligibility and selection criteria
- P1 – Recording of information
- P2 – Provision of information
- P3 – Assurance report on submissions to Monitor
- P4 – Compliance with National Tariff
- P5 – Constructive engagement concerning local tariff modifications
- C1 – The right of patients to make choices
- C2 – Competition oversight
- IC1 – Provision of integrated care

## **Ensuring compliance with the Obligations**

NHS trusts will be required to comply with the Obligations in the same way as the holders of a provider licence. NHS trusts' compliance with the Obligations should be assessed by reference to any relevant Monitor guidance about the relevant provider licence conditions.

The TDA will notify Monitor if it has reason to believe that an NHS trust is or has been in breach of the Obligations.

Monitor may also become aware, independently, of reasons to believe that an NHS trust is or has been in breach of the Obligations.

Monitor may investigate any issue of which it becomes aware. It will consider whether to do so by reference to the prioritisation framework set out in its Enforcement Guidance. Monitor will notify the TDA if it decides to begin such an investigation.

If Monitor decides to begin an investigation of a potential breach of the Obligations, it will follow the case initiation, investigation and case updates procedures set out in its Enforcement Guidance in so far as possible and appropriate.

The TDA will support Monitor during its investigations. This includes, but is not limited to, assisting Monitor in procuring information necessary for its investigations from any NHS trust.

At any point during an investigation, Monitor may close a case without recommending further action if, for example, it considers that there is insufficient evidence of a breach of the Obligations or that an investigation should no longer be prioritised. If, following an investigation, Monitor decides that it will not recommend that the TDA takes action, it will notify the TDA, and any NHS trusts that had been notified that they were subject to the investigation, of this decision.



If, following an investigation, Monitor determines that an NHS trust is or has been in breach of the Obligations, it will provide advice to the TDA on the nature of the breach and any recommended action that the TDA should take.

The TDA will have regard to Monitor's advice and recommendations. The TDA will notify Monitor of any decision it takes in relation to Monitor's advice and recommendations.

### **Publication**

Monitor may publish information about investigations and any advice and recommendations provided to the TDA on its website, where appropriate. Monitor considers that publication of case details will generally be beneficial, as it will help to highlight issues that are of concern to Monitor and deter inappropriate conduct, and help ensure that all interested parties are aware of an issue and can provide relevant information.

The TDA may publish details of any decision it takes in relation to the advice and recommendations it receives from Monitor on its website.

### **Working arrangements**

Monitor and the TDA commit to maintaining regular contact between appropriate individuals in their organisations in order to ensure that NHS trusts comply with the Obligations. Regular contact will include quarterly meetings, attended by appropriate individuals, to discuss operational and governance issues relating to the arrangements set out in this annex.

### **Revisions to this annex**

This annex may be revised in the future subject to mutual agreement between the TDA and Monitor. Any revisions to this annex will be published on the TDA and Monitor's websites.

## Annex B

### **Agreement between Monitor and the Trust Development Authority on how Monitor and the TDA will work together on maintaining a high standard of applicants for FT status.**

#### **Purpose**

This annex sets out in more detail the ways in which Monitor and TDA agree to interact during 2014/15 with a view to ensuring the end to end process for assessing NHS Trusts for Foundation Trust status is efficient and effective, and also maintains a high standard of applicants for FT status.

#### **Background**

##### **I. Streamlining end to end assessment process**

During 2013/14 Monitor, the TDA and the CQC commenced a project to streamline the end to end assessment process. The first phase of this work concluded at the end of 2013 with the key conclusions being:

1. Assessment of quality – All FT applicants will be required to undergo a comprehensive inspection by the CQC prior to referral to Monitor. A rating of at least 'good' from the CQC inspection will be required in order to refer the applicant to Monitor for assessment.
2. Assessment of culture, leadership and governance – Monitor, CQC and the TDA will work together to agree a single assessment framework, for use both in the FT assessment process and Chief Inspector of Hospital inspections, to enable a shared view on whether an organisation is 'Well-led'. This will build on the Board Governance Assurance Framework (BGAF), Quality Governance Framework (QGF), 'Healthy NHS Board' guidance and the new CQC 'Well-led' methodology.
3. The current external test of quality governance will be replaced by a detailed review of Quality Governance undertaken by staff from Monitor's Provider Appraisal Directorate, working jointly with TDA's Clinical Directorate, carried out in the TDA phase. This work will be subject to a risk-based refresh during Monitor's assessment phase.
4. Further work will be undertaken between TDA and Monitor to agree the detail of external accounting firm input. The TDA and Monitor agree to work together to complete the review during Q1 2014/15 with joint engagement with accounting firms
5. Patient and Public Involvement (PPI) – TDA will undertake a review of applicants' PPI strategy and CQC will gather publicly available patient views on applicants to share with Monitor and the TDA. CQC will act as the gateway for collecting 3<sup>rd</sup> party views which will be shared with the TDA and Monitor.
6. An end state sequencing of the final end to end TDA and Monitor assessment process was set out with anticipated CQC inspection date to authorisation (assuming no material issues) of 6-9 months, with the Monitor phase expected to commence on the first day of first or second month following TDA referral, subject to volume of referrals or transactions.

##### **II. Interaction during Monitor's assessment process**

### *Debrief meeting*

Monitor's Directorate and TDA Delivery and Development Directorate, and representatives of TDA Finance, Clinical directorates agree to meet within 2 weeks of referral from TDA to Monitor of an applicant to enable the TDA to share intelligence and the rationale for their support of the FT application. This meeting will include Director level representation from both organisations and will usually cover:

- The Local Health Economy;
- Assessment of Trust Board and management;
- The test of financial viability
- Quality of service issues, including Ombudsman complaints information
- Performance against national and contractual targets

### *Ongoing interaction*

It is agreed that high level information on progress of individual assessments will be shared by Monitor with the TDA in the regular monthly regional update calls.

Accountability for performance and quality oversight of an applicant resides with the TDA for the duration of an assessment, and until an applicant passes an assessment and becomes an NHS foundation trust. Monitor will continue to direct individuals wishing to pass information about an NHS trust to the TDA for the TDA to address in line with its oversight role. Monitor will also offer to forward on an individual's concerns direct to the TDA, if the individual gives their consent to do so. Similarly, the TDA will direct individuals wishing to pass on information about foundation trusts to Monitor, and will offer to forward concerns direct to Monitor if the individual gives their consent to do so.

The TDA will share with Monitor the outcome of any investigation in respect of any information provided to it at the request of the Provider Appraisal Directorate. It is acknowledged by both parties that in such cases Monitor may seek direct information from the applicant NHS Trust to support its assessment work.

In all cases this agreement to share of information will not supersede the legal obligations of either party

### *Letter of confirmation prior to authorisation decision*

The TDA will provide Monitor with letter setting out that the TDA is not aware of issues that would alter the recommendation to support the trust's FT application one week prior to the scheduled Monitor Provider Appraisal executive at which an applicant Trust is due to be considered.

### *Assessment decision*

Monitor's Provider Appraisal Directorate will copy in the relevant TDA regional director of Delivery and Development into any formal correspondence from Monitor communicating the outcome of an assessment to an applicant Trust.

### **III. Information sharing**

#### *Regular communication*

It is agreed that monthly calls or meetings will take place at Director level between Monitor Provider Appraisal Directorate and the TDA Delivery and Development Directorate. Representatives of TDA Finance, Clinical directorates may also participate in these calls/meetings.

Monitor's Executive Director of Provider Appraisal and the TDA's Director of Strategy agree to typically meet on a six weekly cycle, to discuss the pipeline of applicant trusts and progress on FT assessments.

#### *Lessons learned from applicants*

Monitor's team will invite a TDA Delivery and Development Directorate representative to attend any feedback meeting held with any deferred, postponed or unsuccessful FT applicant after completion of the relevant Monitor phase of work.

Monitor and the TDA agree to work together early in 2014/15 to develop a plan for the dissemination of lessons learned from the Monitor phase for FT applications on an ongoing basis during 2014/15.

#### *Developments*

##### **i. Quality Governance pilots**

By the end of May 2014, TDA and Monitor will work together to evaluate the Q4 2013/14 piloting of Quality Governance (QG) assessments undertaken by Monitor in the TDA phase and also agree a process for prioritising and timing any future QG assessments.

##### **ii. Modifications in approach**

Monitor will notify the TDA in advance of any significant modifications to the assessment process and will provide an opportunity to for the TDA to express its views before consultation.

## Annex C

### **Agreement between Monitor and the NHS Trust Development Authority regarding assessment of competition effects of mergers between NHS trusts**

#### **Purpose**

This annex sets out the working arrangements and describes the relationship between Monitor and the NHS Trust Development Authority (TDA) in relation to the advice and assistance that Monitor will provide to the TDA during the assessment of mergers between NHS trusts.

#### **Background – review of mergers involving NHS trusts**

The TDA is responsible for working with NHS trusts and other stakeholders to support NHS trusts in achieving foundation trust status, or another sustainable organisational form. The TDA will have a number of options to help an NHS trust achieve foundation trust status, of which merger with one or more NHS trusts and/or NHS foundation trusts is one.

In some circumstances a merger may lead to a significant and permanent reduction in choice and competition. Such a reduction in choice and competition may lead to less innovation, lower quality and less efficient services which would be detrimental for patients and taxpayers. It could also increase the need for costly future regulatory intervention.

The Competition & Markets Authority (CMA) has exclusive jurisdiction to decide on the competition aspects of qualifying mergers<sup>2</sup> between NHS foundation trusts, between NHS foundation trusts and NHS trusts, and between NHS foundation trusts and other enterprises.<sup>3</sup>

No specific role is set out under the 2012 Health & Social Care Act for Monitor to assess mergers of NHS trusts to NHS trusts. However, the Secretary of State for Health has indicated that where these mergers are not subject to Enterprise Act merger controls, the Secretary of State would be able to seek advice from Monitor on the impact of the merger on competition before reaching a decision<sup>4</sup>. Therefore it has been agreed that Monitor will provide advice to the TDA on the impact on choice and competition of mergers between NHS trusts.

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<sup>2</sup> Section 79 Health and Social Care Act 2012 clarifies the application of Part 3 of the Enterprise Act 2002, which sets out the merger control regime in the UK, to mergers involving NHS foundation trusts. Part 3 of the EA applies to qualifying mergers, also known as ‘relevant merger’ situations. These include several types of transactions and arrangements, including joint ventures that meet one of the relevant jurisdictional thresholds. See further Part 4 of the CMA’s Mergers: Guidance on the CMA’s jurisdiction and procedure available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270256/CMA2\\_Mergers\\_Guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270256/CMA2_Mergers_Guidance.pdf) and Part 3 of the Merger Assessment Guidelines, a joint publication of the Competition Commission and the Office of Fair Trading, September 2010, (OFT1254) available at:

<http://www.offt.gov.uk/OFTwork/mergers/publications/#named2>.

<sup>2</sup> See Monitor’s briefing sheet: Mergers involving NHS trusts and NHS foundation trusts available at:

<http://www.monitor-nhsft.gov.uk/home/news-events-and-publications/our-publications/monitors-new-role/briefing-sheet-mergers-involvin>.

<sup>4</sup> Liberating the NHS: Legislative framework and next steps, December 2010, Cm 7993

This annex sets out the principles governing Monitor's advice; the scope and purpose of the advice; the process for provision of advice and assistance; aspects related to requesting and sharing information and the publication of advice.

### **General principles governing Monitor's advice**

The key principles governing Monitor's advice to the TDA will be as follows:

- Monitor's advice<sup>5</sup> will set out the effects of a merger on choice and competition, the material benefits to patients and taxpayers that could be expected from the merger, and recommend any action that could be taken to mitigate any adverse impacts.
- Monitor's analysis and advice in relation to mergers involving NHS trusts will draw on the previous experience of the Cooperation and Competition Panel in providing advice on the effect of mergers in health care sector and Monitor's experience in providing advice to the CMA on the benefits to patients of mergers involving foundation trusts.
- So far as is appropriate, Monitor will adopt an approach that is consistent with the merger review process previously undertaken by the Cooperation and Competition Panel and with the merger review process undertaken by the CMA under the Enterprise Act 2002.
- The views that Monitor presents in its advice will be its own, independent of the TDA.
- The TDA will take account of the advice, and any recommended actions when making its final decision on whether to proceed with the proposed merger.

### **Scope and purpose of Monitor's advice**

Monitor will provide assistance and advice to the TDA with regard to mergers between NHS trusts. The term 'merger' is used inclusively to refer to mergers, acquisitions, joint ventures and other transactions between NHS trusts that result in two previously independent organisations (or parts of organisations or of an organisation's activities) coming under common management or control. Control arises when one organisation acquires the ability to materially influence the policy of another organisation, or it acquires de facto control or legal control. So far as possible, this approach is consistent with the merger review process undertaken by the CMA under the Enterprise Act 2002.<sup>6</sup>

Monitor will provide assistance and advice to the TDA on mergers between NHS trusts that meet either of the following thresholds:<sup>7</sup>

- the turnover associated with the organisation (or part of the organisation or the organisation's activities) being acquired exceeds £70 million; or
- the organisations (or parts of the organisations or the organisations' activities) coming under common management or control together supply at least 25% of all the

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<sup>5</sup> Monitor has two expert members whose advice will help inform Monitor's advice to the TDA

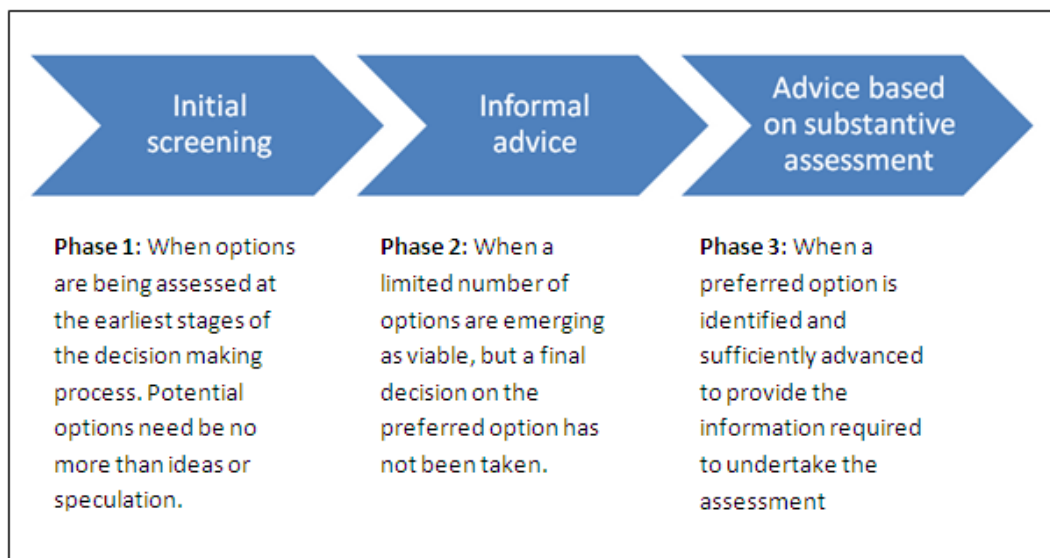
<sup>6</sup> [http://www.offt.gov.uk/shared\\_offt/mergers\\_ea02/oft527.pdf](http://www.offt.gov.uk/shared_offt/mergers_ea02/oft527.pdf)

<sup>7</sup> These are equivalent to the 'turnover' test and 'share of supply' test applied by the CMA under section 23 of the Enterprise Act 2002.

particular health care services of that kind supplied in England or in a substantial part of England (for example, in a particular town or city, or in a CCGs area) . The merger must also result in an increment to the share of supply.

Monitor will provide three types of assistance to the TDA as appropriate. These are set out below in figure 1.

**Figure 1: Assistance and advice to the TDA on the potential competition effects of mergers between NHS trusts**



Monitor will assist the TDA with initial screening and informal advice on potential mergers between NHS trusts. The purpose of these steps is to provide the TDA with information relevant to the likely costs of pursuing a particular merger option. In process terms, the costs of selecting a merger partner that raises competition concerns are the resources expended in, and delay resulting from a more detailed substantive competitive assessment.

When providing advice based on substantive assessment, Monitor will advise the TDA on whether a merger gives rise to material adverse effects (material costs) for patients and/or taxpayers as a result of a loss in patient choice or competition. Where Monitor finds material costs it will consider the material benefits to patients and taxpayers that could be expected from the merger. Monitor will then consider the magnitude of the adverse effects on patient choice and competition against the benefits to patients and taxpayers. Where Monitor finds that the costs to patients and taxpayers are likely to exceed the benefits (i.e. the merger gives rise to material net costs), it may recommend that changes be made to the transaction (by way of assurances or remedies) to ensure that there is a net benefit to patients and taxpayers. Where this is not possible, Monitor may recommend that a transaction should not be permitted.

#### **Process for the provision of advice and assistance**

Monitor will assist the TDA with an initial screening of possible mergers between acute NHS trusts. Initial screening will not be practicable for possible mergers involving other types of trust, such as

mental health, ambulance and community services trusts. Where a potential merger involves these types of trust the assessment should move directly to informal advice.

Initial screening will provide a high level identification of potentially problematic mergers between acute NHS trusts based on the proximity of the acute hospital sites to the local population. This screening is intended to give the earliest indication as to whether a merger may give rise to choice and competition concerns.

This screening can be undertaken at a stage when multiple possibilities are being explored and any particular merger may still be purely speculative. It is important to note that a possible merger could pass the initial screen but competition concerns could still be identified in later phases of the competition assessment.

### **Informal advice**

The TDA may request from Monitor informal advice on the competition issues that may arise with respect to a merger between NHS trusts.

Informal advice will allow decision makers to make a more informed assessment of the competition risks associated with different options which can inform the decision on whether to devote time and resource to developing a proposal further.

Monitor and the TDA expect that informal advice will be requested at a stage where a limited number of merger options are emerging as viable options. The value of the advice is much reduced if there only remains a single viable merger partner and no other options under consideration although it can still be used to help identify the key issues that are likely to be analysed as part of the substantive competitive assessment and therefore enable the merger parties to plan resource accordingly.

When making a request for informal advice, the TDA will provide Monitor with the following information:

- Identity of the merging parties;
- High level description of services provided by each of the merger parties and where they currently provide these services from; and
- Details of any plans to reconfigure existing services in area.

Monitor's informal advice will consist of an email setting out the key issues that have been identified based on the information provided. The content will be tailored to the issues being considered and range of potential merger options upon which advice is being sought.

Informal advice is not determinative or binding on Monitor. For practical reasons the advice will not be subject to review and/or approval by the Monitor board or the members of Monitor's co-operation and competition panel.

Monitor expects that in the majority of cases it will be able to provide informal advice within 10 working days of receiving the information it requires. However, the exact timing will depend on,



amongst other things, the available resources within Monitor at the time, the number of potential merger options on which advice is being sought and whether any of the options raise new or novel issues which Monitor has not considered in detail in previous reviews.

### **Advice based on substantive assessment**

The TDA will notify Monitor when a merger between NHS trusts has been identified as the preferred option for those trusts.

Monitor will provide the TDA with advice based on a substantive assessment of the merger. This advice will be provided for mergers between all types of NHS trusts, including acute, mental health, ambulance and community services trusts.

Prior to commencing its assessment, Monitor will require detailed information about the merger parties including on the services the merger parties provide and where they provide them from, as well as strategy documents and other reports which have been undertaken by each of the merger parties in recent years. The TDA will provide this information to Monitor or assist Monitor in procuring this information from the NHS trusts concerned.

Monitor may also seek the views of third parties, including commissioners, providers and patient groups.

Having received the necessary information Monitor will commence its substantive assessment of the merger. The process for this assessment will reflect the two phase process used previously by the Cooperation and Competition Panel:

- Monitor expects to complete the Phase I assessment within 40 working days of receiving the information required to perform the assessment. During Phase I, Monitor will evaluate the information provided by the TDA, the merging parties and third parties. If at the end of Phase I Monitor does not believe the merger will have material adverse effects on patients and taxpayers, it will advise the TDA accordingly. If Monitor decides there is a realistic prospect that the merger may give rise to material adverse effects on patients and taxpayers, the merger will proceed to Phase II. Monitor will inform the TDA and the merger parties and a non-confidential version of the decision will be published on Monitor's website.
- During a Phase II assessment, Monitor will undertake further analysis based on data, information and submissions provided by the merging parties and third parties such as competitors and commissioners. Monitor may request additional information from the parties and third parties. Monitor expects to complete the Phase II assessment within 80 working days of the commencement of Phase II.

As well as further information about the effects on patient choice and competition, where a merger proceeds to Phase II Monitor will require a well developed benefits case which articulates and evidences the rationale for the merger and the associated benefits to patients and taxpayers that are expected to materialise. The TDA will provide Monitor with such a benefits case or procure that the merger parties provide Monitor with such a benefits case.

If Monitor identifies concerns about choice and competition during Phase II which may result in a finding that a merger will have material adverse effects for patients and taxpayers, it will inform the TDA and merging parties of these concerns in writing and identify any remedies which it believes would be likely to address them. The TDA and merging parties will have an opportunity to respond. Following the TDA and merging parties' response, Monitor will decide whether or not it expects (on the balance of probabilities) the merger to have material adverse effects on patients and taxpayers. Monitor will also decide whether any remedies are appropriate. Monitor will then provide its final advice to the TDA.

## **Information and Publication**

### *Obtaining information required for merger review*

Monitor will provide the TDA with guidance on the type of information that is required for Monitor to conduct a merger assessment.

The TDA will provide Monitor with regular updates on those NHS trusts for which merger with another NHS trust is being considered as an option.

Monitor will engage with NHS trusts that are proposing to merge with a view to ensuring they understand the requirements of the merger review process and the impact of not meeting them.

The TDA will assist Monitor in procuring information necessary for a merger assessment from any NHS trust.

### *Publication*

Where the TDA has notified Monitor that a merger between NHS trusts has been identified as the preferred option for those trusts, Monitor will publish a notice that it is reviewing the proposed merger on its website.

Following provision of its final advice to the TDA, Monitor will publish a non-confidential version of its advice on its website. Informal advice will not be published on Monitor's website.

Where having received Monitor's advice, the TDA decides there are material factors which override the identified adverse impacts on choice and competition that mean it is in the wider public interest for a proposed merger to proceed notwithstanding the recommendations contained in Monitor's advice, the TDA will publish its decision explaining what these reasons are and why the merger is in the interests of patients.

## **Revisions to this annex**

This annex may be revised in the future subject to mutual agreement between the TDA and Monitor. Any revisions to this annex will be published on the TDA and Monitor's websites.

### Annex D – Regular meetings

| <b>TDA attendance</b>                 | <b>Monitor attendance</b>                     | <b>Aim</b>                                    | <b>Frequency</b> |
|---------------------------------------|---|---|------------------|
| Executive team                        | Executive team                                | Oversee governance<br>Agree common priorities | Annually         |
| Director of Strategy                  | Executive Director of Provider Appraisal      | Discuss pipeline and progress on assessments  | Every 6 weeks    |
| Directors of Delivery and Development | Provider Appraisal Directors                  | Discuss pipeline and progress on assessments  | Monthly (Calls)  |
| Directors of Delivery and Development | Provider Appraisal directorate                | Debrief meeting                               | As required      |
| Director of Strategy                  | Director of Strategy and Policy               | ALBs strategy meeting                         | Monthly          |
| Director of Finance                   | Director of Strategy and Policy               | Shared finance meeting                        | Monthly          |
| Chief Executive                       | Director of Strategy and Policy               | National Quality Board                        | Monthly          |
| Director of Strategy                  | Director of Strategy and Policy               | System alignment quad                         | Monthly          |
| Director of Finance                   | Financial Reporting and Risk Director         | Co-ordinate system work on finance            | Monthly          |
| Director of Finance                   | Financial Reporting and Risk director         | Monthly transactions board                    | Monthly          |
| Director of communications            | Executive Director of Strategic Communication | ALBs communications meeting                   | Weekly           |