

1 April 2016

Memorandum of understanding between the Competition and Markets Authority and NHS Improvement

Contents

	<i>Page</i>
Foreword	2
Summary points of the MoU	3
Memorandum of understanding between the Competition and Markets Authority and NHS Improvement.....	4
Part A – Cooperation in relation to the competition prohibitions (Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union)	11
Part B – Cooperation in relation to the market provisions: market studies and market investigations (Enterprise Act 2002).....	20
Part C – Cooperation in relation to UK merger control (Enterprise Act 2002)	22

Foreword

The Competition and Markets Authority (CMA) and NHS Improvement are committed to working together in the healthcare sector for the benefit of patients and service users. The CMA is the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. NHS Improvement is the operational name for the organisation that brings together Monitor, NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change Team and the Intensive Support Teams. NHS Improvement is a combination of the continuing statutory functions and legal powers vested in these bodies, including Monitor's functions in relation to competition.

This memorandum of understanding (MoU) describes how the CMA and NHS Improvement will work together. It draws on the legislation that sets out our functions, and sets out our commitment to look for opportunities to work together in the area of health. We shall do this by sharing expertise, information, ideas and experience. Each of us commits to doing this efficiently and with a mutual regard for each other's statutory position and strategic objectives.

Competition in the healthcare sector can be a powerful tool for improving quality of care. In exercising our functions, we will have regard to the distinctive characteristics of the sector and seek to ensure that our two organisations make the best use of our powers, skills and experience to make the sector work for patients and service users.

The CMA and NHS Improvement can both enforce provisions of the Competition Act 1998 and the Treaty on the Functioning of the European Union in the healthcare services sector in England. We can exercise our competition law powers to take action in relation to anti-competitive agreements and conduct.

The CMA and a sectoral regulator sharing powers in this way is referred to as concurrency. The CMA's competition law powers apply across the whole UK economy. Sectoral regulators such as NHS Improvement exercise their competition law powers in their own sector.

NHS Improvement also has concurrent powers with the CMA to refer features of markets in the healthcare services sector in England for investigation by the CMA's market reference group where we have concerns about competition in a market.

In addition to working together in relation to concurrency, the CMA and NHS Improvement will also work together in relation to mergers. NHS Improvement provides advice to the CMA on the effect of the merger on benefits for people who use NHS healthcare services and on such other matters relating to the merger as NHS Improvement considers appropriate.

We believe that this MoU offers a valuable framework for our cooperative working.

Summary points of the MoU

- The CMA and NHS Improvement will engage in open dialogue and continuing liaison with a view not only to handling specific cases but to making the healthcare sector work for patients. This cooperation will include regular meetings (both bilaterally and through the UK Competition Network (UKCN) (in which NHS Improvement has observer status)).
- The CMA and NHS Improvement will endeavour to share their resources with each other so far as is reasonably practicable, meet each other's requests for appropriate secondments, and provide other mutual support so that they can effectively carry out their functions in the healthcare services sector in England.
- The CMA and NHS Improvement will always consult each other before acting on a case (including instigating a market study) where it appears they have concurrent powers, and will apply the case allocation principles and procedures set out in this MoU.
- The CMA and NHS Improvement will share information relevant to their concurrent powers and relevant to their functions in relation to mergers.
- Improvement will cooperate with the CMA in relation to the CMA's preparation of an annual concurrency report, which will assess the operation of concurrency in all concurrent sectors. NHS

Alex Chisholm

CEO, CMA

Jim Mackey

CEO, NHS Improvement

Memorandum of understanding between the Competition and Markets Authority and NHS Improvement

Purpose

1. NHS Improvement is the organisation which brings together Monitor and the NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change Team and the Intensive Support Teams. This MoU applies in relation to the exercise of the functions conferred on Monitor under or by virtue of the provisions of Chapter 2 of Part 3 of the Health and Social Care Act 2012 (competition). References to NHS Improvement must be read accordingly.
2. This MoU sets out working arrangements between the CMA and NHS Improvement in relation to their concurrent powers in the healthcare services sector in England:
 - (a) to apply the prohibitions on agreements that prevent, restrict or distort competition and on the abuse of a dominant position, under Chapter I and Chapter II of the Competition Act 1998 and under Article 101 and Article 102 of the treaty on the Functioning of the European Union – referred to in this MoU as the ‘competition prohibitions’; and
 - (b) to undertake market studies, and to make references to the CMA to conduct an in-depth market investigation under the Enterprise Act 2002 – referred to in this MoU as the ‘market provisions’.
3. It also sets out working arrangements between the CMA and NHS Improvement in relation to the review of mergers involving NHS foundation trusts under the Enterprise Act 2002.
4. This MoU is not intended to have legal effect.
5. This MoU is to be read alongside the legislation that sets out the powers and duties of the CMA and NHS Improvement¹ and guidance related to these laws.² This MoU supplements and does not supplant that material.

¹ Including the Health and Social Care Act 2012, the Competition Act 1998, the Enterprise Act 2002, the Enterprise and Regulatory Reform Act 2013, the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, the Competition Act 1998 (Concurrency) Regulations 2014 (referred to in this MoU as ‘concurrency regulations’).

² Including CMA (2014), [Regulated industries: Guidance on concurrent application of competition law to regulated industries](#) (CMA10), NHS Improvement’s [guidance on the application of the Competition Act 1998 in the health care sector](#), NHS Improvement’s [guidance on its approach to market investigation references](#), NHS Improvement’s [guidance on merger benefits](#), NHS Improvement’s and the CMA’s [short guide to the competition](#)

6. The arrangements covered by this MoU are, wherever possible, set out in terms providing sufficient flexibility for the relationship between NHS Improvement and the CMA to develop in the light of experience. The CMA and NHS Improvement commit to review these arrangements from time to time to evaluate their continuing fitness for purpose. This MoU may only be revised by agreement between the CMA and NHS Improvement.
7. Nothing in this MoU applies in relation to the functions of the CMA in its separate role of considering references related to proposed action by NHS Improvement under healthcare sector legislation, for example in relation to setting the national tariff for healthcare services. The CMA and NHS Improvement acknowledge the importance of maintaining the CMA's impartiality and fairness in carrying out those functions, and indeed of market or merger investigations undertaken by the CMA panel.

Context

8. This MoU operates within the framework of the legislative provisions referred to in paragraphs 2 and 3 and any other applicable sector-specific legislation from time to time.

Role of the CMA

9. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013.
10. The CMA works to promote competition for the benefit of consumers, both within and outside the United Kingdom (UK), to make markets work well for consumers, businesses and the economy.
11. The CMA's statutory responsibilities, in so far as relevant to the matters that are the subject of this MoU, include:
 - (a) investigating where there may be breaches of the competition prohibitions;
 - (b) conducting market studies and market investigations where there may be competition and consumer problems; and
 - (c) review of mergers under Part 3 of the Enterprise Act 2002.

12. In connection with its statutory responsibilities, the CMA will cooperate with sectoral regulators, including NHS Improvement, and encourage the sectoral regulators to use their powers, including their powers to apply the competition prohibitions, in the interests of competition and for the benefit of consumers. The CMA acknowledges that NHS Improvement's role is limited to preventing anti-competitive behaviour that is detrimental to patients' interests.

Role of NHS Improvement

13. The Health and Social Care Act 2012 conferred functions on Monitor in respect of competition and mergers in the healthcare sector. The Health and Social Care Act 2012 also provides that in exercising those functions, Monitor's main duty is to protect and promote the interests of people who use healthcare services by promoting the provision of healthcare services which is economic, efficient and effective, and maintains or improves the quality of the services. NHS Improvement brings together Monitor and the NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change Team and the Intensive Support Teams.
14. NHS Improvement's statutory responsibilities, relevant to the subject of this MoU, include:
 - (a) investigating where there may be breaches of the competition prohibitions that concern the provision of healthcare services in England;
 - (b) conducting market studies and making market investigation references to the CMA in relation to activities that concern the provision of healthcare services in England; and
 - (c) providing advice to the CMA on benefits and other matters relating to mergers involving NHS foundation trusts.
15. In addition to these powers and functions, NHS Improvement is responsible for overseeing foundation trusts, NHS trusts and independent providers, in particular through a licensing regime. It also oversees commissioners' responsibilities in relation to procurement, patient choice and competition, and regulates prices for NHS healthcare services.

General cooperation

16. In addition to the provisions for cooperation between the CMA and NHS Improvement specific to their powers, as set out in this MoU and elsewhere, the CMA and NHS Improvement are committed to the following general

principles and practices for cooperation between themselves in relation to the sector for which NHS Improvement has responsibility.

17. The CMA and NHS Improvement will consult each other at an early stage on any issues that might have significant implications for the other. For example, where the CMA undertakes a market study which relates to a sector other than healthcare services in England but which may have a significant impact on healthcare services in England, the CMA will inform NHS Improvement and share appropriate information relating to that market study with NHS Improvement to the extent permitted by law.
18. Officials of the CMA and NHS Improvement will meet and communicate, at appropriate levels of seniority, to discuss matters of mutual interest, both through the UKCN (in which NHS Improvement has observer status) and bilaterally. A framework for such meetings will, as far as possible, be determined in advance so as to ensure attendance at the appropriate level and expertise.
19. The CMA and NHS Improvement will engage in open dialogue and continuing liaison with a view not only to handling specific cases but to making the healthcare sector work for patients. The CMA and NHS Improvement recognise the importance of meeting regularly to share information relating to competition in the provision of healthcare services, and to keep each other abreast of relevant current or future work. The CMA and NHS Improvement will consult each other at an early stage on any issues that might have significant implications for the other.

Concurrency

20. The Enterprise and Regulatory Reform Act 2013, which established the CMA, made provision for the better working of concurrent powers in the regulated sectors.
21. The government's strategic steer to the CMA, issued on 1 December 2015, says that the CMA should build 'a strong dialogue with sectoral regulators using the UKCN to ensure that the overall competition regime is coordinated and regulatory practices complement each other'.³

³ Department for Business, Innovation and Skills, *Strategic steer for the Competition and Markets Authority*, in Annex A to the *Government's response to the Consultation on the Strategic Steer to the CMA*, 1 December 2015, page 11.

22. NHS Improvement does not have a duty to promote competition. NHS Improvement will use its powers to prevent anti-competitive behaviour when it is against patients' interests.
23. This MoU sets out how the CMA and NHS Improvement can make the changes introduced by the Enterprise and Regulatory Reform Act 2013 work effectively, including through:
 - (a) cooperating and coordinating when dealing with cases of suspected anti-competitive behaviour and with market studies and market investigation references, for which they have concurrent powers;
 - (b) facilitating the efficient and effective handling of cases of suspected anti-competitive behaviour concerning the provision of healthcare services in England;
 - (c) avoiding duplicating activity, wherever possible; and
 - (d) ensuring transparency as to the respective roles of the CMA and NHS Improvement.
24. The CMA and NHS Improvement will, in respect of the healthcare services sector in England, always consult each other:
 - (a) before the initial exercise of concurrent competition law powers in all cases where it appears that they have concurrent jurisdiction and where there are reasonable grounds for suspecting an infringement of the competition prohibitions; and
 - (b) before launching a market study under the Enterprise Act 2002.⁴
25. Within the spirit of broader collaboration, the CMA and NHS Improvement will commit to discuss and share other relevant information relating to competition concurrency, where legally permissible to do so, but subject to the particular need not to impair the impartiality and fairness of the CMA in carrying out the functions referred to in paragraph 7 of this MoU.

Merger control

26. The CMA and NHS Improvement will cooperate with each other as appropriate in relation to UK merger control under the Enterprise Act 2002,

⁴ Instigation of a market study occurs on the publication of a market study notice, as defined in [section 130A](#) of the Enterprise Act 2002.

including on the benefits of mergers for patients and commissioners, as set out in Part C below.

Pooling resources

27. The CMA and NHS Improvement will endeavour, so far as is reasonably practicable and permitted by law, and in the light of their respective ongoing priorities and resource availability at the time, to share their resources with each other in the interests of the effective enforcement of competition law and effective review of mergers in the healthcare sector. More generally, the two authorities will work together to ensure that anti-competitive behaviour in that sector is prevented in the interests of patients and, for that purpose, they will ensure that their resources and expertise are used efficiently. This is subject to the proviso that, as stated in paragraph 7, this does not apply in relation to the functions of the CMA in its role of considering references related to proposed action by the sectoral regulators under the sectoral statutes.
28. As a consequence, where it has been agreed or determined that one of the authorities is to exercise its concurrent competition powers in relation to a case, that authority will, to the extent that there are resources available, receive appropriate practical assistance and support from the other in the handling of the case, as agreed on a case-by-case basis.

Secondments of staff

29. One means of the practical assistance and support that might be given, as referred to in paragraphs 27 and 28 of this MoU, is the secondment of staff, in accordance with regulation 10 of the concurrency regulations and paragraphs 3.33 and 3.34 of the CMA's guidance on concurrent application of competition law to regulated industries (CMA10), referred to in this MoU as the concurrency guidance.
30. The CMA and NHS Improvement are fully committed to the idea of secondments for this purpose, and will endeavour to meet each other's requests for secondments to the extent that they are appropriate and resources permit; this may include making provision for any secondee to be available to work for part of his or her time at his or her existing employer during the course of the secondment, for example on such cases that are in progress.
31. The CMA and NHS Improvement will develop appropriate arrangements for the pooling and secondment of staff. Such arrangements will have regard to the resource constraints of both parties and such calls for staff, therefore, will be made in reasonable time and with sufficient warning to enable appropriate

resource planning and management of other work commitments and appropriate sign-off procedures within each authority.

Other mutual support

32. In addition to the sharing of information, expertise and experience and the secondment of staff, the CMA and NHS Improvement are fully committed to providing each other with more informal forms of support to enable them to carry out their competition law enforcement and merger review functions in relation to the healthcare services sector in England. In each case, this will be to the extent that is appropriate and permitted by law, and that resources permit – including (but not limited to):
- (a) answering specific queries from time to time;
 - (b) providing information or views on a specific sector or market, or an area of competition law or policy; and
 - (c) providing training on a specific sector or market, or an area of competition law or policy.
33. Such support may be requested and provided in connection with a specific case or in relation to the general exercise of the CMA's and NHS Improvement's functions. In this regard, both the CMA and NHS Improvement will act reasonably, including by providing sufficient time and information for requests for support to be responded to fully and effectively, and for the relevant staff to be engaged.

Part A – Cooperation in relation to the competition prohibitions (Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union)

Background

34. The CMA and NHS Improvement are committed to ensuring that competition rules as they apply to the healthcare services sector in England operate in the interests of patients. The CMA and NHS Improvement share a mutual interest in ensuring competition law enforcement takes into account the specific circumstances of the healthcare sector. This will involve as frequent contact between the CMA and NHS Improvement as the circumstances require. The CMA understands that NHS Improvement has a duty to support providers and commissioners in their efforts to improve healthcare services in the interests of patients.
35. The Health and Social Care Act 2012 gives NHS Improvement concurrent powers with the CMA to enforce provisions of the Competition Act 1998 and the Treaty on the Functioning of the European Union in relation to the provision of healthcare services in England. Where it appears that the CMA and NHS Improvement may have concurrent jurisdiction, the CMA and NHS Improvement will always consult with each other before acting and cases will be investigated by the authority best placed to undertake the investigation, as set out below. The CMA and NHS Improvement will work closely together to ensure the competition rules are well understood.

Case allocation

Basis of allocation

36. The CMA and NHS Improvement will endeavour to reach agreement on which authority will exercise its concurrent competition powers in respect of any particular case, under regulation 4(2) of the concurrency regulations. They will do so in a spirit of constructiveness and cooperation, while acknowledging the CMA's powers under regulations 5 and 8 of the concurrency regulations, noting regulation 5(5) and regulation 8(1)(b) as regards NHS Improvement.
37. Their determination of which authority will exercise its powers will be based on assessing which of them is better placed to exercise those powers, having regard to the following factors:
 - (a) Securing the maximum benefit for healthcare service users.
 - (b) The sectoral knowledge of NHS Improvement and the CMA.

- (c) Whether the case affects more than one regulated sector and/or non-regulated sectors not subject to concurrent competition law.
 - (d) Previous contacts between the parties or complainants and NHS Improvement or the CMA.
 - (e) Experience in dealing with any of the undertakings that may be involved in the proceedings.
 - (f) Experience in dealing with any similar issues that may be involved in the proceedings.
 - (g) Whether the CMA considers it necessary to exercise concurrent competition powers in relation to a case in order to develop UK competition policy or to provide greater deterrent and precedent effect for the benefit of competition and consumers either within the relevant regulated sector, or more widely.
 - (h) Whether the case being allocated to the CMA and supported by NHS Improvement (or vice versa) will provide the best combination of competition and sector-specific expertise.
38. The CMA and NHS Improvement envisage that other factors may appear relevant in the light of practical experience and, if so, such factors may be chosen to supplement or supplant the above factors.

Procedure for allocation

39. Where either the CMA or NHS Improvement has decided, on the basis of information in its possession, that there are reasonable grounds for suspecting that one of the competition prohibitions has been infringed (the reasonable suspicion test)⁵ in relation to the healthcare sector, it will disclose to the other (ie the receiving authority) sufficient information:
- (a) to enable the receiving authority to understand the basis on which the disclosing authority has decided that the reasonable suspicion test is met; and
 - (b) for there to be an informed discussion on which authority (if either) is best placed to proceed in respect of the case.

⁵ As provided in [section 25](#) of the Competition Act 1998.

40. In practice, it may be helpful for the CMA and NHS Improvement to have discussed the case prior to such a decision having been reached, subject to paragraph 53 below. The disclosing authority will provide the information described in paragraph 39 within ten working days after it has decided that the reasonable suspicion test is met, whether or not it proposes to exercise concurrent powers.⁶
41. Within seven working days from receipt of this information, the receiving authority will respond in writing, setting out its initial view on the case and how it should be allocated and identifying any further information that it requires.
42. The CMA and NHS Improvement will endeavour to agree which authority will exercise its concurrent competition powers in relation to the case, as provided for in regulation 4(2) of the concurrency regulations, as soon as possible and in any event no later than one month from disclosure of the information as described under paragraph 39. Other than in exceptional circumstances (which shall be set out in writing) and subject to regulation 5(5) of the concurrency regulations, the CMA will initiate the procedure set out in regulation 5 of the concurrency regulations if agreement is not reached within two months of the disclosing authority first receiving sufficient information in connection with a complaint to enable it to decide that the reasonable suspicion test is met.
43. The procedure for agreeing the transfer of a case that is already in progress from the CMA to NHS Improvement, or from NHS Improvement to the CMA is as set out in regulation 7 of the concurrency regulations and in paragraph 3.32 of the concurrency guidance.
44. The procedure for the CMA to direct the transfer to itself from NHS Improvement of a case already in progress is as set out in regulation 8 of the concurrency regulations.

Implications of allocation

45. Any agreement or determination as to case allocation, under regulations 4, 5, 7 or 8 of the concurrency regulations, shall be notified to the person who has provided the information resulting in the case (for example, the person making a complaint), and so far as appropriate and lawful to any other affected person, by the authority that is exercising its concurrent competition powers in relation to the case, as soon as reasonably practicable.

⁶ As provided in [regulation 9](#) of the concurrency regulations.

46. Case allocation determines which of the CMA and NHS Improvement is to exercise concurrent functions and make any decisions under the competition prohibitions. The CMA or NHS Improvement will be publicly identified as having such responsibility if and when any such investigation is announced. The CMA and NHS Improvement envisage that, whichever authority has responsibility for a particular case, they and their officials will work cooperatively with each other on the case, pooling their expertise including as described in paragraphs 27 to 33 of this MoU and in paragraphs 3.33 to 3.35 of the concurrency guidance.

Sharing information

Principles of information sharing

47. The effective sharing of information between the CMA and NHS Improvement is fundamental to the successful exercise of their concurrent competition powers. It is needed both for the appropriate allocation of cases, as described in paragraphs 39 to 44 of this MoU, and for the successful handling of cases once allocated to make optimal use of the complementary experience and expertise of the two authorities.
48. The CMA and NHS Improvement are committed, in addition to their legal obligations to share information (set out in regulation 9 of the concurrency regulations), to open dialogue and continuing liaison, both bilaterally and through the UKCN (in which NHS Improvement has observer status), with a view not only to handling specific cases but to preventing anti-competitive behaviour, for the benefit of patients in the healthcare services sector.

Information sharing – general liaison

49. The CMA and NHS Improvement recognise the importance of meeting regularly to share information on matters relevant to competition in the healthcare sector, and to keep each other abreast of relevant work that they are considering or currently undertaking.
50. The CMA and NHS Improvement will meet regularly at multiple levels, bilaterally and through the UKCN (in which NHS Improvement has observer status).
51. The CMA and NHS Improvement will each designate in its organisation a relationship manager or key contacts to support effective collaboration between the two authorities, including by (but not limited to) assisting with:

- (a) maintaining an overview of joint projects between the two authorities and matters of mutual interest;
 - (b) maintaining an overview of the authority's contacts from all areas of joint working and mutual interest; and
 - (c) holding meetings with the key contacts in the other authority from time to time (whether bilaterally or in the context of the UKCN (in which NHS Improvement has observer status)) to identify potential new issues with a view to circulating information to appropriate individuals within each organisation.
52. The existence of relationship managers or points of contact does not in any way preclude direct communication between other staff at the CMA and NHS Improvement.
53. For the purposes of sharing information pursuant to paragraph 39, ie in circumstances where the reasonable suspicion test is met, such information will be disclosed by the disclosing authority to the extent permitted by law and whether or not it proposes to exercise concurrent powers.⁷ Where disclosure would be appropriate and permitted by law, the CMA and NHS Improvement may also share information regarding potential infringements of the competition prohibitions in advance of having reached a view as to whether the reasonable suspicion test is met. In circumstances where either the CMA or NHS Improvement has taken the view that a matter is not an administrative priority, irrespective of whether a view has been reached on whether the reasonable suspicion test is met, each may share the details of the matter with the other, or with any other authority which would be able to exercise concurrent competition powers in relation to that matter, to the extent permitted by law. Where leniency information is being shared under this paragraph, special considerations apply, as set out in paragraphs 61 and 63.

Information sharing mechanism – handling specific cases

54. Where either the CMA or NHS Improvement exercises its concurrent powers, the CMA and NHS Improvement will, to the extent permitted by law, engage with each other in open dialogue and by sharing relevant information as appropriate. This engagement may include attendance at internal meetings held by the investigating authority (ie the authority to which a case is allocated) by the supporting authority (ie the other authority which would be

⁷ For the avoidance of doubt, this does not entail an obligation to inform the other party if the regulator is carrying out general monitoring activity, where there is no consideration of exercising its concurrent powers.

competent to exercise concurrent powers in relation to the case), in order to discuss the case as envisaged at paragraph 3.31 of the concurrency guidance.

55. The supporting authority will not generally attend the investigating authority's constitutional decision-making meetings, meetings of governance bodies or meetings with external parties such as those under investigation or complainants. Attendance by the supporting authority at any meeting is at the discretion of the investigating authority, but requests to attend should be considered by the investigating authority in the spirit of cooperation underpinning the concurrency regime.
56. The procedures for information sharing for the purpose of case allocation shall be as set out in paragraphs 39 to 41 and 47 to 63 of this MoU.
57. When either the CMA or NHS Improvement is exercising its powers in respect of the competition prohibitions in a particular case in the healthcare services sector in England, each of them will share with the other any of the following information in its possession (to the extent permitted by law and subject to the confidentiality obligations set out in paragraphs 60 to 63 of this MoU):
 - (a) as a minimum, the matters referred to in regulation 9(1)(b) – (i) of the concurrency regulations, and in paragraph 3.49 of the concurrency guidance, complying with the time limits specified in paragraph 3.49;
 - (b) all other information that it reasonably believes to be relevant or helpful to the other in the conduct of the case; and
 - (c) in the case of the authority that is exercising its powers, reports to the other on the progress of the case with sufficient frequency and detail to enable the other to be appropriately informed; the means and frequency of such reporting will be decided on a case-by-case basis and in the light of experience as this enhanced framework of collaboration and its supporting arrangements develop over time.

Information sharing mechanism – for know-how purposes

58. The CMA will maintain on its webpages a central database of decisions taken in cases under the competition prohibitions in the regulated sectors, with a view to having an accessible body of know-how that will help ensure the effective and consistent application of competition law. The CMA and NHS Improvement will, to the extent permitted by law, contribute information to that in the way best calculated to achieve that objective.

59. In any event, the CMA will report on cases in the regulated sectors under the competition prohibitions in the annual concurrency report which it is required under statute to issue.⁸ Further provisions on the annual concurrency report are in paragraphs 64 to 66 of this MoU.

Information sharing – confidentiality constraints

60. Any disclosure of information under paragraphs 39 to 41 and 47 to 59 of this MoU, and any use by the recipient of such information, shall only be to the extent permitted by law, including by reference to the provisions of Part 9 of the Enterprise Act 2002, relevant sector-specific legislative provisions and any other provisions relating to the disclosure, handling and use of information (such as the Data Protection Act 1998 and section 118 of the Financial Services and Markets Act 2000, to the extent relevant).
61. Prior to disclosing information to each other, the CMA and NHS Improvement will not generally give the person to whom the information relates prior notice of its intention to make the disclosure. However, if the CMA or NHS Improvement consider it necessary or appropriate to pass leniency information to each other (or to another UK authority with concurrent powers), the transmitting authority will inform the applicant or its legal adviser first. Leniency information for the purposes of this MoU is any information which came into the possession of any of the CMA, its predecessors, NHS Improvement or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency. It also includes any information obtained (whether by the transferring or receiving authority) as a result of investigative measures resulting directly or indirectly from an application for leniency.
62. Where the provision of leniency information to either the CMA or NHS Improvement affords or might, under certain conditions, afford the leniency applicant, its subsidiaries or its employees protection from sanctions (including a reduction in penalties) under the leniency programme operated by that authority and that information has been passed to the other authority, the receiving authority shall afford the leniency applicant, its subsidiaries or its employees no lesser protection.
63. Any disclosure of leniency information between the CMA and NHS Improvement will be subject to agreement on appropriate protections regarding the use of that information for other purposes.

⁸ Enterprise and Regulatory Reform Act 2013 [Schedule 4](#) paragraph 16.

Annual concurrency report

64. The CMA is required by statute to publish a report every year, starting after its first year of operation in 2014/15,⁹ containing an assessment of how the concurrency arrangements between the CMA and the sectoral regulators, as regards both the competition prohibitions and the market provisions, have operated during the year. This MoU refers to that report as the annual concurrency report. There is further provision on the annual concurrency report in paragraphs 3.55 to 3.62 of the concurrency guidance.
65. The CMA will consult, and cooperate with, NHS Improvement and other sectoral regulators in preparing the annual concurrency report. In connection with this, the CMA will:
- (a) prepare a draft annual concurrency report that it will send to NHS Improvement and other sectoral regulators seeking comments or suggestions on the content or conclusions of the annual concurrency report, giving them adequate time to comment or make suggestions;
 - (b) take into account any comments or suggestions it receives from NHS Improvement and other sectoral regulators and the CMA may seek further clarification on those comments and suggestions as appropriate;
 - (c) prepare a final version of the annual concurrency report for publication that takes account of its consultation with NHS Improvement and other sectoral regulators as appropriate; and
 - (d) make the annual concurrency report available on the CMA webpages.
66. NHS Improvement will cooperate with the CMA in preparing the annual concurrency report. This includes (but is not limited to):
- (a) providing information and data on general market conditions and on the application of the competition prohibitions and the market provisions in the healthcare services sector in England;
 - (b) responding to requests for information and data; and
 - (c) providing to the CMA any comments and suggestions it may have in connection with the process described in paragraph 65 of this MoU;

⁹ Enterprise and Regulatory Reform Act 2013 [Schedule 4](#) paragraph 16.

in each case promptly so as to facilitate the timely production and publication of the annual concurrency report.

Voluntary redress schemes

67. In cases relating to investigations under the competition prohibitions in the healthcare services sector in England, both the CMA and NHS Improvement have the power to approve voluntary redress schemes. When either authority proposes to exercise these powers, it shall liaise with the other authority as appropriate and will have regard to its own guidance.¹⁰

Short form opinions

68. The CMA shall inform NHS Improvement following an initial enquiry for a short form opinion relating to the provision of healthcare services in England. Where the CMA is considering providing such an opinion, it will discuss with NHS Improvement before deciding to do so. If the CMA then decides to produce an opinion, it will engage with NHS Improvement, the nature and degree of that engagement to be considered on a case-by-case basis, having regard, in particular, to the extent to which the opinion has a multi-sector rather than single sector dimension. In all cases, the CMA will give NHS Improvement the opportunity to provide comments on a draft opinion.

¹⁰ The CMA's guidance on the [approval of voluntary redress schemes](#) (CMA40) states at footnote 7: 'The CMA expects that regulators will take this CMA guidance into account when producing their own guidance on the approval power.'

Part B – Cooperation in relation to the market provisions: market studies and market investigations (Enterprise Act 2002)

Background

69. NHS Improvement also has the power, concurrently with the CMA, to carry out market studies and to make market investigation references, agree undertakings in lieu of a reference and make recommendations to the government in relation to activities concerning the provision of healthcare services in England under Part 4 of the Enterprise Act 2002 (as do other sectoral regulators in relation to the sectors for which they are responsible).
70. Under the Enterprise Act 2002, the CMA and NHS Improvement may, in relation to activities concerning the provision of healthcare services in England, undertake market studies, and make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the UK. The purpose of these investigations is to examine the market(s) and (where required) implement appropriate remedies where the CMA determines that the structure of the market(s) or the conduct of the suppliers or customers is harming competition.
71. When making a reference, the CMA or NHS Improvement, as applicable, must have reasonable grounds for suspecting that any feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition in relation to the supply or acquisition of any goods or services in the UK (or in a part of the UK).
72. The cooperation between the CMA and NHS Improvement provided for in this Part B shall not extend to conduct that could reasonably be expected to impair the impartiality or the fairness of the CMA panel in conducting market investigations.

Mutual consultation

73. NHS Improvement and the CMA have a duty to consult each other before exercising concurrent functions under the market provisions.

Sharing information

74. The provisions of paragraphs 49 to 53, 57 (excluding 57(a)) and 59 of this MoU apply to information sharing under the market provisions as they do under the competition prohibitions.

Pooling resources

75. The provisions of paragraphs 27 to 33 of this MoU apply to pooling resources under the market provisions as they do under the competition prohibitions.
76. Where the CMA and NHS Improvement intend to pool resources in order to exercise powers under the market provisions of the Enterprise Act 2002, they shall, at the outset of any such project, discuss the arrangements for how they will pool resources and work jointly.

Annual concurrency report

77. The provisions of paragraphs 64 to 66 of this MoU apply under the market provisions as they do under the competition prohibitions.

Part C – Cooperation in relation to UK merger control (Enterprise Act 2002)

Background

78. The CMA and NHS Improvement are committed to ensuring that mergers in the NHS are well planned and work well for patients. To this end, the CMA and NHS Improvement will work closely with each other to ensure the merger review process is well understood, and operates as quickly and predictably as possible. This will involve as frequent contact between the CMA and NHS Improvement as the circumstances require. During pre-notification discussions and throughout the formal merger review process, the CMA and NHS Improvement will provide each other with timely and reasoned explanations of their views and/or requirements.
79. NHS Improvement supports merger parties to develop a sound rationale for their anticipated transaction, ensuring the strategy is well considered and helps them determine whether a notification should be filed to the CMA, identifying potential competition issues and patient benefits. NHS Improvement will help merger parties understand the merger control process, to make informed decisions and to engage effectively with the CMA if the parties choose to notify the merger. Merger parties may also approach the CMA for informal advice on jurisdictional, procedural and substantive questions on UK merger review and how it might affect the transaction. The CMA and NHS Improvement will each update the other on a regular basis on forthcoming mergers relevant to the healthcare sector.
80. Section 79(5) of the Health and Social Care Act 2012 requires NHS Improvement to provide advice to the CMA on relevant customer benefits¹¹ and on any other matter which it considers appropriate in relation to merger cases that are reviewed by the CMA under Part 3 of the Enterprise Act 2002:
- (a) The first case is where the activities of two or more NHS foundation trusts cease to be distinct activities.
 - (b) The second case is where the activities of one or more NHS foundation trusts and the activities of one or more businesses cease to be distinct activities.

¹¹ [Section 30](#) of the Enterprise Act 2002.

NHS Improvement will provide this advice to the CMA in phase 1 of the CMA's review.

81. Merger parties may submit further evidence on relevant customer benefits at phase 2 to the CMA or, in the event that they did not submit any relevant customer benefits during phase 1 of the CMA's review, they may make such submissions for the first time in phase 2. The CMA will seek NHS Improvement's views regarding the phase 2 relevant customer benefits proposal recognising its expertise as a sectoral regulator.

General principles

82. The CMA and NHS Improvement will observe the following general principles in relation to NHS Improvement's advice to the CMA pursuant to section 79(5) of the Health and Social Care Act 2012:
- (a) the CMA and NHS Improvement will cooperate with each other in the exercise of their respective functions under Part 3 of the Enterprise Act 2002 and section 79(5) of the Health and Social Care Act 2012;
 - (b) the final conclusion on all aspects of the competitive analysis of the merger case under Part 3 of the Enterprise Act 2002 is for the CMA;
 - (c) NHS Improvement's analysis and advice in relation to such merger cases will draw on its expertise across the healthcare sector;
 - (d) the views that NHS Improvement presents in its advice will be its own, independent of the CMA;
 - (e) NHS Improvement's advice is not binding on the CMA; however, in phase 1 of its review, the CMA will place significant weight on NHS Improvement's expert advice on the relevant customer benefits of a merger;
 - (f) where NHS Improvement has provided advice to the CMA in phase 1, the CMA will attach such weight to that advice in phase 2 as it considers appropriate in the light of any changes to the proposed customer benefits and/or relevant evidence gathered and analysis undertaken during the course of its investigation; and
 - (g) the cooperation between the CMA and NHS Improvement provided for in this Part C shall not extend to conduct that could reasonably be expected to impair the impartiality and fairness of the CMA decision-maker and/or CMA group, as the case may be, in conducting merger reviews.

Process for the provision of advice in phase 1 of the CMA's review

83. Under section 79(5) of the Health and Social Care Act 2012, NHS Improvement must provide its advice, including on relevant customer benefits, as soon as reasonably practicable after receiving notice that the CMA has decided to review a merger. NHS Improvement recognises the importance of its advice being provided in good time.¹²

Pre-notification period

84. The CMA will not commence a merger review until it considers that the merger parties have provided sufficient information on relevant customer benefits or indicated in the Merger Notice that they will not be making a submission in relation to relevant customer benefits in phase 1.
85. The CMA will liaise closely with NHS Improvement as to whether the information received with respect to relevant customer benefits will allow NHS Improvement to start its assessment of relevant customer benefits and provide advice to the CMA within the CMA's timetable.
86. If the merger parties decide not to make reasoned submissions in relation to relevant customer benefits and indicate their decision in writing to NHS Improvement, NHS Improvement will inform the CMA of the merger parties' decision as soon as reasonably practicable.

Phase 1 assessment period

87. As described above, the CMA and NHS Improvement will maintain close contact and dialogue throughout the pre-notification and formal merger review process. As part of this ongoing dialogue, NHS Improvement will share its developing thinking (written or oral) including in relation to relevant customer benefits with the CMA as early as reasonably practicable and will supplement any initial advice on an ongoing basis as may be appropriate in the circumstances. Wherever possible, NHS Improvement will act with a view to the CMA being able to refer to NHS Improvement's advice on the 'state of play' call with the merger parties as well as reflect it in the issues letter.¹³

¹² NHS Improvement notes that, in all cases, the CMA commits that, generally in the period between working days 15 and 20 of phase 1 of its review, it will have a 'state of play' discussion with the merger parties, typically by conference call. The purpose of this discussion is to give the merger parties information on any competition concerns, including feedback from the CMA's market test, whether or not the CMA is to send the merger parties an issues letter, and the theories of harm that the CMA proposes to include in the issues letter. The case team will also provide an update on the likely timetable for the case going forward.

¹³ Following the 'state of play' call and in the event that the case raises complex or material competition issues, an issues letter is sent to the merger parties, which they are given the opportunity to respond to at an issues

88. In any case where the CMA intends to proceed to a case review meeting,¹⁴ and consequently sends an issues letter to the merger parties, the CMA will give NHS Improvement as much advance notice as is possible. NHS Improvement will share its developing thinking throughout and will communicate its advice to the CMA as soon as practicable following the start of the statutory timetable for the merger review. When providing its advice, NHS Improvement will be mindful of the CMA's timetable and the importance to the CMA of:
- (a) being able to reflect NHS Improvement's views in the CMA's issues letter and at the case review meeting; and
 - (b) being able to reflect NHS Improvement's final advice at the CMA's decision meeting.¹⁵
89. NHS Improvement and the CMA will discuss NHS Improvement's views in relation to relevant customer benefits on an ongoing basis and in any event prior to the CMA's issues meeting and case review meeting.
90. Before providing its final advice to the CMA, NHS Improvement expects to provide the merger parties and the CMA with its provisional view on the relevant customer benefits arising from the merger. The CMA will be given the opportunity to seek clarifications on this provisional view within an appropriate period of time depending on the nature of the advice.
91. NHS Improvement staff involved in producing its advice, including on relevant customer benefits, will be available to meet the CMA case team to explain the reasoning and analysis underlying the advice provided. The CMA may ask NHS Improvement to provide further advice in relation to arguments raised in NHS Improvement's advice or in relation to additional evidence provided by the merger parties in response to the issues letter.

Meetings with the merger parties

92. Meetings with the merger parties will generally be held separately by NHS Improvement and the CMA. Where appropriate, however, joint meetings may

meeting. Issues letters are normally sent approximately 20 working days from the start of the CMA's phase 1 review and followed a few days later by an issues meeting.

¹⁴ The case review meeting is an internal meeting held by the CMA following the issues meeting with the merger parties.

¹⁵ NHS Improvement notes that the CMA's decision meeting is normally held approximately 30 working days from the start of the CMA's phase 1 review and involves the decision-maker on the case, who is usually a senior member of CMA staff, deciding whether to clear the transaction or to refer it to phase 2 for further investigation.

be held between the merger parties, the CMA and NHS Improvement in order to facilitate the review and ensure administrative efficiency.

Process for the provision of advice in phase 2 of the CMA's review

93. As described in paragraph 81, merger parties may submit further evidence on relevant customer benefits at phase 2 to the CMA or, where they did not make submissions relating to relevant customer benefits during phase 1 of the CMA's review, they may make such submissions for the first time at phase 2. In the event that the CMA seeks NHS Improvement's views regarding the phase 2 relevant customer benefits, NHS Improvement will provide this advice after receiving notice from the CMA that the merger parties have made submissions relating to relevant customer benefits by the deadline specified in such notice.

Requesting and sharing information

94. Paragraphs 49 to 53, 57 (excluding 57(a)) and 59 of this MoU apply to information sharing under the merger provisions as they do under the competition prohibitions.
95. To minimise the burden on merger parties, where appropriate, NHS Improvement and the CMA will coordinate information requests.
96. Sharing of information (including data) between the CMA and NHS Improvement is crucial for the effective fulfilment of their respective merger duties and should reduce the burden on merger parties which could otherwise arise, for example from duplicative information requests. The CMA and NHS Improvement may, where appropriate, discuss with each other anticipated or completed mergers that are brought to their attention; informal advice they will be providing or have provided; pre-notification drafts; and information obtained throughout the review.
97. The information and data sharing from the CMA to NHS Improvement will include any confidential information which the CMA considers will facilitate the effective fulfilment of its merger control statutory functions. In certain circumstances, whilst having regard to the confidentiality requests of the merger parties, the CMA may decide to disclose information to NHS Improvement without the consent of the merger parties. This may occur, for example, where it considers that disclosure is necessary to enable the CMA to exercise its statutory functions, including the need to have regard to NHS Improvement's advice on relevant customer benefits.

98. NHS Improvement's advice may contain information that is confidential (either as regards the merger parties or other confidential information known to NHS Improvement). NHS Improvement may share such information with the CMA.
99. NHS Improvement will provide the CMA with a confidential version of its advice for the purpose of the CMA's decision on the merger. For publication purposes, NHS Improvement will also provide the CMA with a non-confidential version of its advice.

Pooling resources

100. The provisions of paragraphs 27 to 33 of this MoU apply to pooling resources under the merger provisions as they do under the competition prohibitions and market provisions.
101. Where the CMA and NHS Improvement intend to pool resources in order to exercise powers under the merger provisions of the Enterprise Act 2002, they shall, at the outset of any such project, discuss the arrangements for how they will pool resources and work jointly. NHS Improvement will provide as much support as is practicable throughout the course of a merger control review, including meeting requests for additional expert resource as the need may arise.