

# Consultation on guidance on Monitor's approach to market investigation references

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## Monitor's role

Monitor's main duty is to protect and promote the interests of patients. We do this by promoting the provision of health care services which is effective, efficient and economic, and which maintains or improves the quality of services.

We assess NHS trusts for foundation trust status and ensure that foundation trusts are well led, in terms of both their quality and finances. We license foundation trusts (other eligible providers of NHS services will be licensed from April 2014) and we:

- set prices for NHS-funded care in partnership with the NHS Commissioning Board;
- enable integrated care;
- safeguard choice and prevent anti-competitive behaviour which is against the interests of patients; and
- support commissioners to protect essential health services for patients if a provider gets into financial difficulties.

Further information on our role can be found on our website: [www.monitor.gov.uk](http://www.monitor.gov.uk)

## Monitor's role in choice and competition

Choice and competition have existed in the NHS in England for many years and the Government sees them as powerful incentives for improving the quality of care provided to patients.

Local commissioners decide if and when to use competition as a tool to improve services for patients, within a regulatory framework under which Monitor has a duty to protect and promote the interests of patients.

This means operating a regulatory regime that enables patients to make choices about their health care – which hospital to attend for a planned operation, for example, or which care provider to choose when commissioners have decided to have more than one in their local area.

It also involves ensuring that commissioners and providers of health care follow rules designed to ensure patients do not lose out as a result of anti-competitive behaviour.

Monitor will inherit these choice and competition functions on 1 April 2013 as a result of the Health and Social Care Act 2012. The will of Parliament, expressed during the passage of the Bill, was that the sector regulator should not promote competition for its own sake.

We take that responsibility seriously. This means we will police the competition rules affecting health care services to ensure that they operate fairly in the interests of patients, and to help both NHS providers and NHS commissioners meet the needs of patients.

When we are doing this we will explain how any breach of these rules might affect patients adversely. We will also explain how we would expect our intervention to maintain or improve quality or innovation, or deliver better value for money.

We are therefore publishing for discussion and consultation a series of documents that set out how we propose to discharge our new statutory duty from 1 April 2013.

This includes draft guidance on the choice and competition conditions of the licence that is being issued to all NHS foundation trusts and in due course to other NHS-funded providers.

The documents show how Monitor will apply the provisions of the Competition Act 1998 to health care services, and set out our approach to providing advice to the Office of Fair Trading on the benefits to patients of mergers involving NHS foundation trusts.

They also include draft guidance about how we propose to enforce the Procurement, Patient Choice and Competition Regulations (№2) 2013 currently before Parliament.

Monitor's approach builds on the work of the Co-operation and Competition Panel, which will in future advise Monitor; its former staff have become employees of Monitor.

## Introduction to this guidance

1. The aim of this guidance<sup>1</sup> is to inform patients, health care providers, commissioners, patient groups and other interested parties on Monitor's approach to our powers under Part 4 of the Enterprise Act 2002 (Enterprise Act) to make market investigation references.<sup>2</sup>
2. Although this guidance covers most of the points likely to be of interest to organisations and their advisers, it makes no claim to be comprehensive and cannot be cited as a definitive interpretation of the law. Although we will have regard to this guidance when exercising our powers under Part 4 of the Enterprise Act, we will apply it flexibly and may depart from the approach described here where it is appropriate to do so.
3. As Monitor gains more experience examining markets, we also expect to update this guidance from time to time. We may also find it necessary to deviate from this guidance and where this is the case we will acknowledge that we have done so and will set out our reasons.
4. This guidance is structured as follows:
  - legislative background;
  - market investigation references;
  - undertakings in lieu of a market investigation reference; and
  - consulting on proposed market investigation references and on accepting undertakings in lieu.

## Feedback on this draft guidance

Monitor welcomes feedback on the views expressed in this guidance. Please submit any suggestions and your comments by **5pm, Tuesday 25 June 2013**. There are a number of ways to send us feedback.

### By email

You can email your response to [cooperationandcompetition@monitor.gov.uk](mailto:cooperationandcompetition@monitor.gov.uk)

### By post

Send your response to: Market investigation references consultation, Monitor, Cooperation and Competition Directorate, Wellington House, 133-155 Waterloo Road, London, SE1 8UG.

### Confidentiality

If you would like your name, or the name of your organisation, to be kept confidential and excluded from the published summary of responses or other published documents, please

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<sup>1</sup> This guidance reflects the views of Monitor at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. Monitor's website will always display the latest version of the guidance.

<sup>2</sup> References to the OFT in Part 4 of the Enterprise Act, except in sections 166 and 171 of that Act, shall be construed as including references to Monitor – see section 73(2) of the Health and Social Care Act 2012.

let us know by emailing [cooperationandcompetition@monitor.gov.uk](mailto:cooperationandcompetition@monitor.gov.uk). If you send your response by email or post, please don't forget to tell us if you wish your name, or the name of your organisation, to be withheld from any published documents.

If you would like any part of your response - instead of or as well as your identity - to be kept confidential, please let us know and make it obvious by marking in your response which parts we should keep confidential - an automatic computer-generated confidentiality statement will not count for this purpose. As we are a public body subject, for example, to Freedom of Information legislation we cannot guarantee that we will not be obliged to release your response even if you say it is confidential.

### **What we will do next**

After considering all the feedback received on the draft guidance, we intend to publish final guidance.

If you have any questions about this process please contact Luke Dealtry on 0207 270 5359 (until 12 April 2013) / 0207 972 4610 (from 13 April 2013) or [luke.dealtry@monitor.gov.uk](mailto:luke.dealtry@monitor.gov.uk).

You can sign up to receive emails when we publish other licensing engagement and consultation publications [here](#) on our website.

## Legislative background

5. Pursuant to section 73 of the Health and Social Care Act 2012 (the Act), Monitor has concurrent powers with the Office of Fair Trading (OFT) to make a reference to the Competition Commission (CC) under Part 4 of the Enterprise Act if we have reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in the UK or part of the UK (a market investigation reference).
6. Monitor's concurrent powers to make market investigation references apply in so far as they relate to activities which concern the provision of health care services in England.<sup>3</sup> Further information on concurrency is available at paragraphs 3.15 and 3.16 of the guidance published by the OFT on Market Investigation References<sup>4</sup> (the OFT Guidance).
7. Section 131(2) of the Enterprise Act states that a feature of a market is to be construed as a reference to:
  - the structure of the market concerned or any aspect of that structure;
  - any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
  - any conduct relating to the market concerned of customers or any person who supplies or acquires goods or services.
8. Section 131(3) notes that 'conduct' includes any failure to act (whether intentional or not) and any other unintentional conduct.
9. Section 154 of the Enterprise Act enables Monitor to accept undertakings instead of making a market investigation reference (undertakings in lieu). In exercising this power to accept undertakings in lieu, Monitor must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effect on customers so far as they result or may be expected to result from such adverse effects. We may also have regard to the effect of any action on any relevant customer benefits of a feature or features of the market concerned.<sup>5</sup>
10. Upon a market investigation reference, the CC must decide whether competition is prevented, restricted or distorted, and, if so, whether any action should be taken to remedy the adverse effect on competition or any detrimental effect on customers resulting from it. These detrimental effects can take the form of higher prices, lower quality or less choice of goods or services, or less innovation in relation to goods or services in any market in the UK.<sup>6</sup>

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<sup>3</sup> See section 73(2) of the Act.

<sup>4</sup> OFT 511, *Market investigation References*, dated February 2006.

<sup>5</sup> See section 154(4) of the Enterprise Act.

<sup>6</sup> See section 134 of the Enterprise Act.

## Market investigation references

11. Monitor will initially consider making a market investigation reference based on information coming from a very wide range of sources. We may do so following a complaint or on the basis of information acquired in the context of an informal review of a market, for example.
12. When determining whether the statutory criteria for a market investigation reference are met, Monitor will have regard to the OFT Guidance, taking into account the specific characteristics of the health care sector. Where we do not follow this guidance, we will explain our reasons for not doing so.
13. Monitor has discretion to decide whether to make a market investigation reference where the statutory criteria appear to be met. In deciding whether to do so, Monitor will consider whether any of the matters set out in sections 62 and 66 of the Act are relevant to this decision and will take into account the following factors:
  - the nature and the seriousness of the competition issues which we believe exist in the market in question;
  - whether a market investigation reference would be a proportionate response to the competition issues that were identified;
  - whether we could accept undertakings in lieu<sup>7</sup>;
  - whether, in the alternative, we have other powers to address the issues identified; and
  - whether the CC is likely to be able to impose appropriate remedies; or
  - in the event that the CC is unable to impose appropriate remedies, whether the CC may contribute a report which might constitute a helpful alternative contribution.
14. Monitor has certain investigatory powers conferred under section 174 of the Enterprise Act which we can use where we believe that we have the power to make a market investigation reference, i.e. when we have reasonable grounds for suspecting that any feature of the market prevents, restricts or distorts competition. Monitor may exercise these investigatory powers to assist us in deciding to make a market investigation reference or to accept undertakings in lieu. Further information on the OFT's concurrent investigatory powers is available at paragraphs 3.1-3.5 of the OFT Guidance.

## Undertakings in lieu of a market investigation reference

15. Monitor has the power to accept undertakings in lieu as explained above at paragraph 9. When considering whether to accept undertakings in lieu, we will have regard to the OFT Guidance, taking into account the specific characteristics of the health sector. Where we do not follow this guidance, we will explain our reasons for not doing so.
16. Prior to accepting undertakings in lieu, Monitor must publish a notice stating, among other things, that Monitor proposes to accept the undertakings, the purpose and effect of the undertakings, the adverse effect on competition and any resulting detrimental effect on patients identified by Monitor that the undertakings are seeking to deal with. The

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<sup>7</sup> See section 154 of the Enterprise Act.

notice must also mention any other facts which Monitor considers justify the acceptance of the undertakings.<sup>8</sup> Monitor must take into account any representation arising from the publication of the notice. Further information on OFT's concurrent power to accept undertakings instead of making a market investigation reference is set out at paragraphs 2.20-2.24 of the OFT Guidance.

### **Consulting on proposed market investigation references and on accepting undertakings in lieu**

17. When Monitor is proposing to make a market investigation reference or to accept undertakings in lieu, we are required under the Enterprise Act<sup>9</sup>, so far as practicable, to consult with those people whose interests we consider are likely to be substantially affected by our decision. We must consult before making the decision and, so far as is practicable, we must give our reasons for our proposed decision.
18. Monitor has a duty, when considering whether to make a market investigation reference, to bring to the attention of the Secretary of State any case that Monitor considers raises public interest issues specified in the legislation.

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<sup>8</sup> See section 155(2) of the Enterprise Act which details all the points to be included in the notice.

<sup>9</sup> See section 169 of the Enterprise Act.



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