

Briefing note

The respective roles of Monitor, the Office of Fair Trading and the Competition Commission in relation to mergers involving NHS trusts and NHS foundation trusts

22 March 2013

Proposed mergers involving NHS foundation trusts are subject to review by the Office of Fair Trading (OFT). The OFT assesses the impact of the merger on competition.

As part of this process Monitor, the sector regulator, will advise the OFT about the patient benefits of the proposed transaction. This approach will apply to mergers between NHS foundation trusts, mergers between an NHS foundation trust and an NHS trust, and mergers between an NHS foundation trust and another organisation.

If the OFT decides that the merger might lead to a substantial lessening of competition, and this outweighs any patient benefits of the transaction, it will refer the merger to the Competition Commission.

This briefing note explains who is responsible for reviewing the following types of merger transactions:

- Mergers between two or more NHS foundation trusts
- Mergers between an NHS foundation trust and an NHS trust
- Mergers between two or more NHS trusts

In this briefing note, the term 'merger' is used to refer to all types of arrangements that may give rise to two or more enterprises ceasing to be distinct. Two enterprises will cease to be distinct if they are brought under common ownership or control. Such arrangements will generally include mergers, acquisitions and joint ventures, and may also include other transactions, such as the transfer or pooling of assets, divestments, vertical integration (e.g. transfer of a commissioner's provider arm to an acute trust), hosting arrangements, management alliances, management contracts, shared management arrangements, franchising arrangements and other integrations involving all or part of an organisation¹.

Whether such arrangements constitute a merger will depend on the circumstances of each case. If you are in doubt about whether a transaction is likely to constitute a merger, you may wish to contact the OFT.

¹ Monitor will publish a briefing note on the application of merger control rules to pathology service reconfigurations.

Mergers between two or more NHS foundation trusts

The Health and Social Care Act 2012 confirmed that mergers involving two or more NHS foundation trusts may constitute a relevant merger situation and be subject to review by the OFT under Part 3 of the Enterprise Act 2002². Further information about the OFT's review of mergers in the health sector can be found [here](#).

Where the OFT decides to carry out an investigation of a merger between two or more NHS foundation trusts under Part 3 of the Enterprise Act 2002, the OFT must notify Monitor as soon as reasonably practicable.

The Health and Social Care Act 2012 requires Monitor to provide advice to the OFT as soon as reasonably practicable after receiving a notification. Monitor must advise on:

- the effect of the matter under investigation on benefits (in the form of those within section 30(1)(a) of the Enterprise Act 2002 (relevant customer benefits)) for people who use health care services provided for the purposes of the NHS; and
- such other matters relating to the matter under investigation as Monitor considers appropriate.

Monitor will publish guidance on its approach to assessing relevant customer benefits under the Enterprise Act 2002.

If it finds that a merger will result in a substantial lessening of competition the OFT will consider whether this is outweighed by any relevant customer benefits.

Further information about the OFT and Competition Commission's approach to assessing mergers can be found in the [Merger Assessment Guidelines](#) (September 2010) or on the [OFT](#) and [Competition Commission](#) websites. The OFT has also published [jurisdictional and procedural guidance](#) on mergers.

Mergers between an NHS foundation trust and an NHS trust

The OFT has clarified that mergers between an NHS foundation trust and an NHS trust may constitute a relevant merger situation and be subject to review by the OFT under [Part 3 of the Enterprise Act](#).

The approach set out in paragraphs 7-10 above will apply to mergers between an NHS foundation trust and an NHS trust.

Mergers between two or more NHS trusts

Mergers between two or more NHS trusts only will be subject to review by Monitor. Monitor will provide advice to the NHS Trust Development Authority (NHS TDA) on the effect of the merger on choice and competition. This assessment will be undertaken for mergers involving all types of NHS trusts, including acute, mental health, ambulance and community services trusts.

² The Health and Social Care Act 2012 also confirmed that mergers involving NHS foundation trusts and other 'enterprises' (as defined by section 129 of the Enterprise Act 2002) may also constitute relevant merger situations.

Where Monitor considers that a merger between NHS trusts will have a material adverse impact on choice and competition which cannot be offset by benefits arising from the transaction for patients and taxpayers, we will consider whether this can be remedied. Where we consider that the impact cannot be effectively and proportionately remedied, we will advise that on competition grounds the merger should not proceed.

Monitor's advice to the NHS TDA will be published in the form of a report. The NHS TDA will take account of the advice, and any remedies that would be necessary to remedy any adverse impact, when making its final decision on whether to proceed with the proposed merger. However, we recognise that in exceptional cases the NHS TDA may decide that there are material factors which override the identified adverse impact on choice and competition, which mean it is in the wider public interest for a proposed merger to proceed. Where this is the case, the NHS TDA should publish its decision explaining what these reasons are and why the merger is in the interests of patients.

Monitor will publish guidance on our approach to assessing mergers between two or more NHS trusts only. Our approach is likely to be similar to the Co-operation and Competition Panel's (CCP) current remit under the Principles and Rules for Co-operation and Competition.

Monitor's risk assessment of significant transactions involving NHS foundation trusts

Monitor will continue to assess significant transactions (as defined by Monitor) including mergers involving NHS foundation trusts and to assign risk ratings to these transactions. The purpose of the risk evaluation process will be to consider the NHS foundation trust's post-transaction risk of non-compliance with certain conditions of its licence (as and when licensing comes into force). We do not take account of competition issues in the risk evaluation process. On completion of the risk assessment, where the indicative financial or governance risk rating indicates a level of concern, Monitor will provide the Board of the NHS foundation trust with details of the risks identified. In these circumstances Monitor would not expect a trust Board to enter into a binding contract without first having satisfied itself and Monitor that these risks can be mitigated and, in future, Monitor may consider regulatory action where appropriate. Monitor's role in relation to transactions will change as a result of the Health and Social Care Act 2012 and we will publish guidance on this soon. Further information about Monitor's current transaction assessment process is available [here](#).

Notifying the OFT of merger transactions

Mergers between two or more NHS foundation trusts or between an NHS foundation trust and an NHS trust may be [notified to the OFT](#). If you are in doubt about whether a transaction is reviewable further information about the OFT's review of mergers in the health sector can be found [here](#).

The OFT encourages NHS entities contemplating mergers reviewable by the OFT to engage with it openly and early for guidance, including through its informal advice and pre-notification routes (described in more detail [here](#)).