Monitor
Making the health sector work for patients

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Dear Tom, Paul and Steve,

Comments on Competition and Markets Authority Draft Guidance and Secondary Legislation

As discussed at your meeting with Jonathan Blackburn and Kristy Domitrovic on 5 November 2013, this letter sets out our comments on the following draft guidance documents and secondary legislation:

- The Enterprise and Regulatory Reform Act 2013 (Consequential and Transitional Provisions) Order 2014
- Competition Act 1998 (Concurrency) Regulations 2014
- Competition and Markets Authority, Regulated industries: guidance on concurrent application of competition law to regulated industries

Enterprise and Regulatory Reform Act 2013 (Consequential and Transitional Provisions) Order 2014

We refer to section 140 of Part 2 of Schedule 1 to the Order, which sets out proposed amendments to the Health and Social Care Act 2012. Specifically, we refer to the new sections 73(3)(b) and 73(3A)(a) which are proposed to be included in the Health and Social Care Act 2012.

It is our understanding that the effect of these sections is that the duty to publish a market study notice will apply whenever Monitor exercises its power to obtain, compile and keep under review information for the purpose of considering the extent to which a matter concerning the provision of health care services in England has or may have effects adverse to the interests of patients.

Our concern is that this obligation is relevant to potentially all of Monitor's functions, and that, as a result of the proposed amendments, the duty to publish a market study notice will arise more frequently than intended. We understand from the explanatory notes to the Enterprise and Regulatory Reform Act 2013 that the market study notice requirement is not intended to apply to work such as economic research and calls for evidence. In our view, sections 73(3)(b) and 73(3A)(a) as they are currently drafted may capture this work.

We wish to preserve the flexibility to exercise our functions without triggering the duty to publish a market study notice, and to determine in what circumstances it is appropriate to publish a market study notice.

We therefore propose that section 73(3A)(a) amend section 130A(2)(a) of the Enterprise Act 2002 insofar as it applies to Monitor to state: "The purposes are - to consider *whether to make a market investigation reference under section 131 of the Enterprise Act 2002*".

We refer to section 143(2)(b) of Part 2 of Schedule 1 to the Order, which substitutes the word "concurrent" for "respective" in section 80(1) of the Health and Social Care Act 2012. We note that Monitor has functions relating to the OFT which are not concurrent functions, including our duty to provide advice to the OFT on the relevant customer benefits of certain mergers, and therefore we propose that the duty to co-operate not be limited to our concurrent functions.

We are content with the proposed exclusion of section 174E of the Enterprise Act 2002 (statement of policy on penalties) from our concurrent functions.

Competition Act 1998 (Concurrency) Regulations 2014

Paragraph 4(3) of the Regulations, which provides that the CMA will inform the parties of which competent person is to exercise Part 1 functions, in our view appears to be redundant because the respective regulators will have already reached agreement.

We refer to paragraphs 5(5) and 8(1)(b) of the Regulations which provide that the CMA may only determine that a regulator other than Monitor is to exercise Part 1 functions in relation to a case where the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

The reference to 'principally' should be deleted from these paragraphs so that the CMA cannot without Monitor's agreement allocate or transfer any cases concerned with matters relating to the provision of health care services for the purposes of the NHS in England. The paragraphs should further be amended to indicate that it is Monitor, rather than the CMA, which should be satisfied that the case is not concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

These amendments would ensure that we, as the sector regulator, are primarily responsible for determining which cases fall outside our jurisdiction and which cases we are best placed to investigate. This does not exclude the possibility that Monitor and the CMA might agree that the CMA is best placed to address a particular case (for example a case which may have elements relating to issues outside our jurisdiction, such as pharmaceutical products). In our view it is appropriate in the scheme of the arrangements which flow from the Health and Social Care Act 2012 and consistent with the government's intention that it should be

Monitor which determines whether a case concerning NHS funded services is outside our jurisdiction on the basis of our expertise as the sector regulator, our experience with the application of competition rules to the NHS and our unique duty to protect and promote patients' interests.

I refer to paragraph 9(1)(a) of the Regulations which requires regulators to put in place arrangements for sharing details of any information in our possession that an infringement of Chapter I, Chapter II or Article 101(1) or 102 may have taken place. I note that the concurrency guidance indicates that this requirement will apply where the threshold under section 25 of the Competition Act 1998 is met. In order to ensure that paragraph 9(1)(a) does not require information to be exchanged where there are not reasonable grounds for suspecting an infringement, we suggest that reference to the section 25 threshold be included in the Regulations.

The remainder of paragraph 9 of the Regulations requires regulators to put in place arrangements to exchange various draft documents in relation to an investigation. In our view, the scope of information sharing should be agreed in memoranda of understanding between regulators, rather than prescribed in Regulations. Imposing statutory requirements to exchange several documents at various stages of the investigation increases the administrative burden associated with investigations and will delay investigations. It is not clear to us what the implications of sharing these types of information in this way will be. In particular, the sharing of information may create expectations with parties about what the regulators will do with the information, and this may create further scope for challenge and delay (see further below). In particular it is not clear whether regulators will be expected to review and approve drafts of documents and whether this would be shared with parties.

In our view, the use of staff provisions set out in paragraph 10 of the Regulations appear to be redundant as we are not aware of any current impediment to regulators agreeing secondments.

CMA Regulated Industries: guidance on concurrent application of competition law to regulated industries

The references to Monitor being a member of the UK Competition Network will need to be amended to reflect the nature of Monitor's participation in the UKCN, once this is agreed.

We note that the guidance identifies timeframes for the exchange of information pursuant to paragraph 9 of the Concurrency Regulations. We reiterate that it would be preferable for such details to be agreed between regulators in memoranda of understanding, taking account of the timing of each regulator's internal governance processes. We also note that the guidance provides that regulators will consider comments provided on draft documents that are exchanged. Such a requirement is likely further to increase the administrative burden associated with investigations. We are also interested to understand whether this may create the expectation for parties that any comments would be shared with them including reasons for accepting or rejecting comments.

Paragraph 3.49 of the guidance, which sets out other information that may be exchanged between regulators, in our view creates an expectation that such matters will be included in memoranda of understanding. We think it would be preferable for the reference to this

information to be deleted from the guidance and instead included in memoranda of understanding if agreed between regulators.

Paragraph 3.53 of the guidance indicates that information will be exchanged using a secured shared-electronic storage database. Given that this database has not yet been established, and may take some time to establish, in our view it would be preferable to delete reference to it from the guidance.

Please call Kristy Domitrovic on 0203 747 0210 if you would like to discuss this letter.

Yours sincerely

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