# Consultation on draft Monitor guidance on merger benefits

Issued on: 27 March 2013
Deadline for responses: 25 June 2013

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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

## 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

1. Monitor is required to provide advice to the Office of Fair Trading (OFT) under the Health and Social Care Act 2012 (the Act).[1] This guidance sets out our approach to providing that advice.[2] The Act clarifies[3] that mergers between NHS foundation trusts and between NHS foundation trusts and other businesses will be subject to review by the OFT under Part 3 of the Enterprise Act 2002 (the Enterprise Act).[4]

2. Where the OFT is reviewing any merger under Part 3 of the Enterprise Act involving an NHS foundation trust, the Act[5] states that Monitor must advise the OFT on the effect of the merger on benefits (in the form of those defined in the Enterprise Act as relevant customer benefits)[6] for people who use health care services provided for the purposes of the NHS (benefits), and such other matters relating to the matter under investigation as Monitor considers appropriate.

3. The Enterprise Act requires the OFT to refer a merger to the Competition Commission where it believes that the merger has resulted or may be expected to result in a substantial lessening of competition.[7] The Enterprise Act also sets out that the OFT may decide not to refer a merger to the Competition Commission if any relevant customer benefits in relation to the merger outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition.[8] More detail on the statutory framework regarding relevant customer benefits is set out in Appendix 2.

4. Monitor's advice is just one of a number of inputs into the decision to be taken by the OFT and is not binding on the OFT. If the OFT finds a substantial lessening of competition it will take into account our advice when considering whether there are relevant customer benefits which outweigh that problem.[9]

5. Separately, in accordance with our role of monitoring compliance with the provider licence, Monitor will conduct a risk assessment of the merger from the perspective of governance as well as the continuity of services.[10]

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[1] Monitor is required to provide advice to the OFT under section 79(5) of the Act.
[2] 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.
[3] Section 79 of the Act which came into force on 1 July 2012.
[4] Further information on the OFT's jurisdiction to review mergers is available in the OFT's *Mergers: Jurisdictional and procedural guidance* (June 2009 OFT 527)
[5] Section 79(5) of the Act.
[6] Relevant customer benefits is defined in section 30(1)(a) of the Enterprise Act.
[7] Sections 22(1) and 33(1) of the Enterprise Act. What amounts to a substantial lessening of competition is discussed in Part 4 of the Competition Commission's and OFT's: *Merger Assessment Guidelines* (September 2010 CC2 (revised) and OFT 1254)..
[8] Sections 22(2)(b) and 33(2)(b) of the Enterprise Act.
[9] The Competition Commission has regard to relevant customer benefits when deciding what remedies are appropriate under section 41(5) of the Enterprise Act.
[10] See Monitor's draft *Risk Assessment Framework* for detail on how transactions such as mergers will be assessed by Monitor.

6. As Monitor gains more experience in advising OFT in relation to mergers, we also expect to update this guidance from time to time. Consistent with this, Monitor may find it necessary to deviate from this guidance if, for example, a merger raises novel issues. Where this is the case, Monitor will acknowledge that we have deviated from this guidance and will set out our reasons for doing so.

7. This guidance should be read alongside OFT publication *Mergers- Exceptions to the duty to reference and undertakings in lieu of reference guidance* (December 2010 OFT1122) and the OFT/Competition Commission publication *Merger Assessment Guidelines* (September 2010 CC2 (revised) and OFT 1254) which set out the UK merger control regime and the OFT's approach to relevant customer benefits.

8. The remainder of this guidance is structured as follows:

    1. Monitor process;

    2. Assessing relevant customer benefits;

    3. Types of relevant customer benefits;

    4. Appendix 1: Guidance on the content of submissions; and

    5. Appendix 2: Relevant customer benefits – statutory framework.

## 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

### By post

Send your response to: Guidance on merger benefits, 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 let us know by emailing 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

You can sign up to receive emails when we publish other engagement and consultation publications here on our website.

## Monitor process

9. Under the Act,[11] where the OFT decides to carry out an investigation under Part 3 of the Enterprise Act of a matter involving an NHS foundation trust, it must as soon as reasonably practicable notify Monitor. We will provide our final advice to OFT as soon as reasonably practicable after receiving formal notification from the OFT. In providing our advice, we will seek input from the Cooperation and Competition Panel members and the Clinical Reference Group.

10. If the parties think the merger will give rise to relevant customer benefits we strongly encourage the merger parties to engage informally with us at the earliest opportunity. This is likely to be in the period usually referred to as the pre-notification period.[12] Early engagement will reduce the likelihood that the assessment period will be delayed. The OFT and Monitor will require all the necessary information to fulfil their respective functions in a timely manner.[13]

11. Pre-notification contacts with us should start with a draft submission on benefits providing a description of the transaction and the services involved and a description of the benefits that may arise from the merger (see *Guidance on the content of submissions* in Appendix 1). As well as any draft submission on benefits, the merger parties should provide us with copies of all relevant materials that they intend to provide to the OFT.

12. Monitor will endeavour to provide comments on the draft submission including on its completeness within five working days of receiving it. We may also send further information requests to the merger parties and/or commissioners (subject to the prior consent of the merger parties). Monitor expects that the merger parties will provide their final submission on benefits and any additional information requested by Monitor at the same time as it notifies the merger to the OFT.

13. In order to address any potential issues early and constructively, Monitor will endeavour for this process to be as open as possible and encourages the merger parties to remain open and cooperative throughout.

14. Monitor may also hold meetings (by phone or in person) with the merger parties and the Clinical Reference Group of the Cooperation and Competition Directorate. A record of these meetings will be kept. Meetings with the merger parties will generally be held separately by Monitor and the OFT.

15. We expect to provide the merger parties with our provisional view on the benefits arising from the merger. The merger parties will be invited to comment on this provisional view. Monitor will take merger parties' responses to the provisional view into account when producing our final advice.

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[11] Section 79(4) of the Act.
[12] See OFT's *Merger- Jurisdictional and procedural guidance* at *para* 4.42. Pre-notification discussions take place when the parties to a merger have decided to notify the OFT and wish to engage with it, typically on the contents of a draft notification, prior to formal submission.
[13] See OFT's *Merger- Jurisdictional and procedural guidance* at para 4.7.6.

16. Monitor's advice may contain information that is confidential (either as regards the merger parties or other confidential information known to Monitor). Monitor may share such information with the OFT. To the extent that the merger parties consider that information they provide to us should not be shared with the OFT, they should identify this and provide reasons why they believe it should not be so shared. However, if we consider that disclosure of this information would assist the OFT in exercising its functions under the Enterprise Act, then consent to disclosure will not be necessary.[14]

17. Monitor will generally publish a non-confidential version of our final advice to the OFT on our website. Before it is published, the text of Monitor's advice will be circulated to the parties or their advisers to enable them to request the excision of sensitive confidential information from the text if necessary to protect confidentiality.

18. The non-confidential version of Monitor's advice must clearly set out the reasons for Monitor's advice. While ensuring this is achieved, Monitor will be mindful of the need to respect the confidentiality of sensitive confidential information provided to us. Monitor therefore asks that, when parties make requests on the excision of sensitive confidential information from the text, they justify each of those requests and do not make blanket claims that particular classes of information are confidential. Monitor will have regard to our obligations under the Freedom of Information Act 2000.

[14] Section 80(2) of the Act.

## Assessing relevant customer benefits

### What is a relevant customer benefit?

19. In order to constitute a relevant customer benefit within the meaning of the Enterprise Act:

    i. the benefit must be a benefit to relevant customers in the form of: lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom; or greater innovation in relation to such goods or services; and
    ii. 'relevant customers', as defined in the Enterprise Act, include customers of the merger parties, customers of such customers, and future customers.

20. In addition, the OFT must believe that the benefit has accrued as a result of the merger or may be expected to accrue within a reasonable period as a result of the merger, and the benefit was, or is, unlikely to accrue without the creation of the merger or a similar lessening of competition.

21. Relevant customer benefits are different from efficiencies that may enhance rivalry. Rivalry-enhancing efficiencies are effects of a merger which may result in enhanced competition, for example, a merger of two of the smaller organisations in a market resulting in efficiency gains might allow the merged entity to compete more effectively with larger organisations. The Competition Commission / OFT *Merger Assessment Guidelines* set out the OFT's and Competition Commission's approach to efficiencies which may enhance rivalry.[15]

22. Generally, Monitor will not advise on potential efficiencies arising from the merger that may enhance rivalry. Assessing this type of rivalry-enhancing efficiency requires forming a view on the incentive of the merger parties to deliver benefits post-merger. Rivalry enhancing efficiencies are relevant to the question of whether or not there has been a substantial lessening of competition in a case and are accordingly part of OFT's assessment as to whether the merger creates a competition problem rather than whether there are relevant customer benefits that might offset that problem.

### Demonstrating relevant customer benefits

23. Merger parties need to identify the benefits that potentially arise from the merger and provide evidence in support of these submissions. This approach reflects the position of the merger parties as the proponents of the transaction and the organisations responsible for ensuring that the intended benefits are realised. This approach is consistent with OFT guidance on its approach to merger control which requires merger parties to produce detailed and verifiable evidence of any anticipated benefits.[16] Monitor will base our advice on benefits on evidence which has been presented to us by the merger parties and third parties, e.g. commissioners.

[15] See Competition Commission/OFT, *Merger Assessment Guidelines* at paras 5.7.
[16] See OFT, *Mergers: exceptions to the duty to refer and undertakings in lieu of reference guidance*, paras 4.8 to 4.12 and Competition Commission/OFT, *Merger Assessment Guidelines* at paras 5.7.4 and 5.7.5.

24. For us to be satisfied that a benefit attributed to a merger constitutes a relevant customer benefit the parties must show:

    i. that the benefit is likely to represent a real improvement in quality of services to patients or value for money for taxpayers;
    ii. that the benefit is likely, in practice, to be realised and that it is likely to be realised within a reasonable period as a result of the transaction; and
    iii. that the benefit is likely to be dependent on the merger (this is sometimes referred to as the benefit being merger specific).

**Improvement in quality of services or value for money**

25. For Monitor to conclude that a benefit attributed to a merger represents a real improvement in quality of services to patients or value for money, the merger parties to the merger should be able to describe in sufficient detail the pre-existing situation which the merger will improve. For example, if it is suggested that a merger will improve staffing and provide better coverage of staff absences, then the extent to which existing services suffer from staffing problems should be set out. In the absence of this information, Monitor will find it difficult to form a judgement as to the existence or size of the benefit in question. In relation to improvements to value for money, any cost savings which the merger parties submit are likely to be achieved must be quantified and supported by a business case or implementation plan that describes and explains how the savings will be achieved.

26. In order to constitute relevant customer benefits for patients, potential improvements in value for money must accrue to patients or be returned to commissioners. We will therefore seek to establish whether claimed improvements will be passed on as a benefit to patients based on evidence provided by the merger parties. It is possible that such benefits accrue to a different group of patients to those affected by the merger.

**Realising the benefit**

27. We will have greater confidence that a particular merger benefit is likely to be realised where the parties to a merger have a clear and detailed post-merger integration plan that sets out how the merging organisations' existing structures, processes and practices will be modified to realise the benefits in question. We are likely to place greater weight on the credibility of post-merger integration plans where these have been scrutinised by independent third party experts, and where these plans have not been developed specifically for the purpose of Monitor's consideration of the merger.

28. In assessing the credibility of any plans to realise merger benefits we will also look to the experience of the merging parties in previous transactions and their success in realising benefits from those mergers. We may also look at other similar transactions and consider whether the parties to those transactions have been successful in realising similar benefits. We will also consider the incentives that the merged organisation has to carry out the implementation plans that are presented to it.

**Dependent on the merger**

29. In order to constitute relevant customer benefits under the Enterprise Act, the benefits must be merger specific, that is, they must be unlikely to accrue without the creation of the merger or a similar lessening of competition. This is a question of fact to be determined on a case by case basis. In order to determine whether or not this is the case Monitor will examine whether there is evidence that the submitted benefits are likely to occur in any event; for example whether the merger parties would have the ability and the incentive to achieve the benefits independently or together through an arrangement other than the merger.

30. The merger parties and commissioners may have separate proposals to make changes to the same services. In such cases we will consider whether any benefits submitted by the merger parties are in any event likely to arise within a reasonable period due to commissioner-led reconfiguration. We will also consider whether commissioners would be likely to take action which would have the same effect as the submitted benefit, and how soon that action is likely to occur.

## Types of relevant customer benefits

31. Set out below are examples of the types of benefits which merger parties have submitted were likely to arise in the context of health care mergers. We set out the issues that we consider to be relevant and the type of evidence which will be required for such benefits to be accepted in future.

32. The examples below are not an exhaustive list of the types of benefits that might be relevant nor do they reflect the particular types of benefits we expect to be submitted.

***Rollout of best practice across the merged trust:*** in order for this to constitute a relevant customer benefit it will be necessary for merger parties to specify the practices that will be rolled out, the proposed timeframe, which services and patients will be affected, and why the practice couldn't be implemented independently by the merger parties.

***Reconfiguration/integration of services:*** it will be necessary for merger parties to provide details of the reconfiguration proposed, for which services and patients, the benefits to patients from the reconfiguration and the timeframe for implementation. It will also be necessary to explain why reconfiguration could not be implemented independently by the merger parties, jointly pursuant to a service level agreement, or led by commissioners. Merger parties may for example submit that the merger provides them with a sufficient volume of patients to reconfigure services. In order for this to constitute a relevant customer benefit, the merger parties will need to provide evidence of the link between minimum volumes and quality outcomes, and ensure that the combination of patient catchment areas will not artificially distort patient choice.

***Improved research and development:*** merger parties may for example submit that the increased size of the merged organisation will improve its ability to attract research and development funding. We note that research and development can be facilitated or co-ordinated by local research networks, and therefore it will be necessary for parties to demonstrate that the merger will provide unique synergies, for example, due to the complementary nature of the different research expertise of the parties and the patients affected by the synergies.

***Staffing arrangements – improved rotas, recruitment and retention:*** in order for such benefits to be accepted it will be necessary for merger parties to provide details of the number of doctors pre and post-merger, the number of doctors that would be required to establish a 24/7 rota, details of current gaps in the rota, the services which will be improved and the benefits to patients. It will also be necessary to explain why rota benefits could not otherwise be achieved by SLAs or other staff-sharing arrangements. Merger parties may for example submit that their increased size will improve their ability to attract and retain staff by offering opportunities to sub-specialise. We note that there are several ways to attract and retain staff including offering more attractive terms of employment and therefore it will be important to demonstrate that the benefit is merger specific.

***Financial benefits*** *(*e.g. arising from economies of scale enabling the merged provider to operate at a lower short-run variable cost and possibly to reduce fixed costs, economies of scope, reduction of duplicative assessments where patients are treated within one organisation, reduced transaction costs from vertical integration, reduced costs of borrowing): in order for such benefits to be accepted, merger parties will need to provide detailed costings, demonstrate why the savings cannot be achieved without the merger and how the surplus will be passed on to benefit relevant customers.

## Appendix 1: Guidance on the content of submissions

33. This is intended to assist merger parties when preparing submissions to Monitor in relation to relevant customer benefits that may arise from a merger.

*Background information*

34. Merger parties should provide in their submission to Monitor the following background information:

- the parties to the transaction, including their status;
- the structure of the transaction;
- the services, assets and liabilities transferring; and
- the rationale for the transaction.

*Benefits case*

35. As well as the background information set out above, the merger parties should submit a benefits case for the transaction which should include the information outlined below. The benefits case for the transaction should explain, for each benefit attributed to the transaction:

- whether the benefit attributed to the transaction represents a real improvement in services to patients or value for money for taxpayers. This should include:
    - an explanation of the current problems that the benefit is expected to address;
    - how the benefit comes about (please describe each step in the process by which the benefit will be achieved);
    - if the benefit is a cost saving please explain how the saving will be passed on to commissioners or used to benefit patients;
    - a description of the basis for expecting the benefit to occur (e.g. clinical studies, precedent in other transfers or other organisations);
    - an explanation of whether the benefit requires additional resources that are not generated by the transaction; and
    - a review of the likelihood that the benefit might be achievable (e.g. implementation plans/financial modelling), in what time period they are achievable, and whether they will be passed on to either patients or taxpayers (in contrast to simply being of benefit to the organisation we are looking for an incentive for the organisation to pass on the benefit).

- when the benefit will be realised and whether the benefit has a degree of longevity (rather than a temporary or one-off gain).

- whether the benefit is dependent on the transaction. This should include an explanation of:

    - whether the benefit is dependent on this particular transaction and would not be expected in an alternative transfer/merger;

    - whether the benefit could be delivered through cooperation rather than the transaction; and

    - whether the benefit could be achieved by the relevant commissioner(s) (without the transaction).

36. The merger parties should submit any documentary evidence supporting the assessment and/or quantification of the benefits outlined in the benefit case.

## Appendix 2: Relevant customer benefits – statutory framework

37. Section 30(1)(a) of the Enterprise Act provides that for the purposes of Part 3 of the Enterprise Act (which deals with mergers), a benefit is a relevant customer benefit if it is a benefit to relevant customers in the form of:

    i. lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom; or
    ii. greater innovation in relation to such goods or services.

38. For the purposes of section 30(1) of the Enterprise Act, 'relevant customers' are defined as:

    i. customers of any person carrying on an enterprise which, in the creation of the relevant merger situation concerned, has ceased to be, or will cease to be, a distinct enterprise;[17]
    ii. customers of such customers;[18] and
    iii. any other customers in a chain of customers beginning with the customers mentioned in paragraph (i).[19]

39. For the purposes of section 30(1) of the Enterprise Act, 'customers' includes future customers.[20]

40. In order to constitute a relevant customer benefit within the meaning of section 30 of the Enterprise Act, the OFT must believe that the benefit:[21]

    i. has accrued as a result of the merger or may be expected to accrue within a reasonable period as a result of the merger; and
    ii. the benefit was, or is, unlikely to accrue without the creation of the merger or a similar lessening of competition.

41. Under section 79(5) of the Act, Monitor is required to provide the OFT with advice in relation to mergers involving NHS foundation trusts that are investigated by the OFT. In particular, Monitor must provide advice on:

    i. the effect of the merger on relevant customer benefits (in the form of those within section 30(1)(a) of the Enterprise Act) for people who use health care services provided for the purposes of the NHS;[22] and
    ii. such other matters relating to the merger as Monitor considers appropriate.[23]

[17] Section 30(4)(a) of the Enterprise Act.
[18] Section 30(4)(b) of the Enterprise Act.
[19] Section 30(4)(c) of the Enterprise Act.
[20] Section 30(4) of the Enterprise Act.
[21] Section 30(1)(b) of the Enterprise Act.
[22] Section 79(5)(a) of the Act.
[23] Section 79(5)(b) of the Act.

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Publication code: IRCP 26/12