

**COMPETITION AND MARKETS AUTHORITY**  
**CONSULTATION:**  
**GUIDANCE ON THE REVIEW OF NHS MERGERS**

**RESPONSE OF HOGAN LOVELLS INTERNATIONAL LLP**

**2 JULY 2014**

**Hogan Lovells International LLP**  
**Atlantic House**  
**Holborn Viaduct**  
**London**  
**EC1A 2FG**  
[www.hoganlovells.com](http://www.hoganlovells.com)

## 1. INTRODUCTION

1.1 This document sets out the response of Hogan Lovells to the CMA's consultation on its Guidance on the Review of NHS Mergers (the "draft Guidance").

1.2 We welcome the opportunity to respond to the draft Guidance, which we believe is an important development and is a helpful document overall. We have not sought to comment on every aspect of the draft Guidance. Rather, our comments focus on the issues that, in our view, are of key importance and where the final Guidance would benefit from further consideration and/or revision. These fall into the following broad categories:

- (a) the role of Monitor;
- (b) informal advice;
- (c) the merger notice;
- (d) evidencing and evaluating benefits as against identified dis-benefits; and
- (e) scope for review of the final Guidance.

## 2. THE ROLE OF MONITOR

2.1 Paragraphs 3.9-3.14 at the draft Guidance set out the framework for the role of Monitor: (a) in the context of "supporting" NHS foundation trusts considering a merger; and subsequently (b) within the formal merger control process. The final Guidance would benefit from further detail as regards this two-step process, particularly in relation to the issues set out below.

- (a) Given Monitor's formal role in providing advice to the CMA as regards the claimed benefits of a merger, the case for engaging with Monitor at an early stage on this point is clear. Such pre-notification contact should: (i) ensure the case for claimed benefits is made in the most compelling terms; and (ii) pre-empt and close-off problems that could otherwise arise as part of the formal merger control process. It may be a matter of semantics but the particular choice of words used ("scrutinising and challenging") appears to imply a degree of confrontation which is unnecessary. We would suggest that the final Guidance more accurately reflects the less confrontational and more collaborative role that Monitor considers that it will play in this context (see, for example, the document published by Monitor "Our new approach to transaction: consultation response and next steps" May 2014).
- (b) It would also be helpful for the final Guidance to provide further delineation of Monitor's remit at the pre-notification stage, the status of Monitor's views/preliminary conclusions and the extent to which this dialogue may be shared with the CMA, so that parties can evaluate any risks associated with approaching Monitor, as well as the advantages.
- (c) As the draft Guidance implicitly acknowledges, it is not clear what role Monitor can usefully play in establishing jurisdiction or providing certainty to the parties on this point. As such, parties should be encouraged to engage with the CMA at an early stage on these issues, rather than be steered to engage with Monitor on questions that must ultimately be referred to the CMA in the event of genuine ambiguity.

2.2 In general it would be useful for there to be more guidance in this document (to the extent possible) on the pre-notification timing, processes relating to Monitor and to the interaction and information-sharing between Monitor and the CMA.

### 3. **INFORMAL ADVICE**

- 3.1 Paragraphs 4.4-4.11 of the draft Guidance relate to informal advice that may be provided by the CMA. The draft Guidance states that informal advice is not available for mergers that are purely speculative, but does not first set out the general rule that there must be a good faith intention to proceed. While noting that the draft Guidance refers to the CMA's Guidance paper CMA2 (*Mergers: Guidance on the CMA's approach to jurisdiction and procedure*), paragraph 4.6 of the draft Guidance would benefit from closer tracking of the language at paragraph 6.27 of CMA2 to avoid ambiguity caused by omission.
- 3.2 Given the limited role Monitor can play in reaching a view on jurisdiction (discussed above), and in consideration of the nature of the parties involved in an NHS merger (ie, the public benefit corporations), we consider the CMA would be justified in taking a modified approach to the provision of informal advice in the context of NHS mergers. In particular, we would encourage the CMA to include a broader range of evidence of a good faith intention that it would be willing to accept. This would reduce the "dampening effect" on innovation where the parties are not in a position to provide a heads of agreement or evidence of board level consideration (and cannot justify advancing a transaction further without additional clarity on merger control) but where talks are nevertheless sufficiently advanced as to be beyond mere speculation.

### 4. **MERGER NOTICE**

- 4.1 We note that the merger notice is extremely detailed and that certain parts of the form may not be appropriate in the context of an NHS merger or may have a more nuanced application. It would be helpful for the CMA to provide additional guidance (based on past experience) on the expected treatment of the merger notice in the context of NHS mergers, which sections the CMA is likely to agree in advance with the parties during pre-notification need not be completed, and/or which sections ought to be interpreted or dealt with in a specific way. This would helpfully reduce the amount of time devoted to this issue at the pre-notification stage.

### 5. **EVIDENCING AND EVALUATING BENEFITS AS AGAINST IDENTIFIED DIS-BENEFITS**

- 5.1 Section 7 of the draft Guidance relates to relevant customer benefits. It is closely related to paragraphs 6.2-6.8 of the draft Guidance on the substantial lessening of competition ("SLC") test.
- 5.2 Paragraphs 7.18-7.19 of the draft Guidance relate to the steps the CMA would expect to be taken in order to evidence relevant claimed benefits. In the light of recent NHS precedent and the fact that (to date) no merger has been cleared at Phase I on the grounds of claimed benefits, there is a case for additional elaboration. We would welcome more specific discussion of the types of evidence required for each of the typical heads of benefit claimed. We note that Monitor's draft Guidance on merger benefits does provide some of this detail. However, given that the CMA must reach its own conclusions on this important issue, it is appropriate that similar detail is provided in any final Guidance.
- 5.3 Paragraph 7.24 of the draft Guidance provides some detail on weighing up the benefits against any perceived SLC. However, this set of bullet points is relatively generic and does little to clarify how the benefits and dis-benefits may be weighted conceptually. Nor does it clarify how the CMA might set one against the other in the specific context of NHS. As such, the final Guidance would benefit from a discussion of the unique starting point of the NHS, where public funds for healthcare are devoted solely for the benefit of NHS

users and – set against this backdrop – a discussion of the evaluation process. For instance, we would welcome discussion of the factors the CMA would likely consider (and what weight would be attributed to them) when evaluating whether (for example) reduction in patient choice may be offset by quality factors such as clinical outcomes, location, waiting times, or efficiency.

**6. REVIEW OF THE FINAL GUIDANCE**

- 6.1 Lastly, many aspects of the final Guidance are likely to be clarified by practice over time, as the body of case law builds under the new regime. We would welcome a review of the final Guidance within three years of its publication, or a commitment by the CMA to publish supplementary notes as may be appropriate as the CMA gains more experience in this area.

**Hogan Lovells International LLP**

**2 July 2014**