Monitor

Making the health sector work for patients

Supporting NHS providers: guidance on merger benefits

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About Monitor

As the sector regulator for health services in England, our job is to make the health sector work better for patients. As well as making sure that independent NHS foundation trusts are well led so that they can deliver quality care on a sustainable basis, we make sure: essential services are maintained if a provider gets into serious difficulties; the NHS payment system promotes quality and efficiency; and patients do not lose out through restrictions on their rights to make choices, through poor purchasing on their behalf, or through inappropriate anti-competitive behaviour by providers or commissioners.

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Introduction

In the current challenging financial climate, healthcare mergers can benefit patients by helping providers to deliver safe, high quality and sustainable care. However, some mergers can work against patients' best interests by reducing choice, and by curbing the drive to improve quality and value for money and to innovate that choice encourages. This is why proposed NHS mergers must be carefully considered by all parties concerned, with the patient firmly in mind.

As health sector regulator, one of our core responsibilities is to ensure that co-operation and competition work in the best interests of patients. When a merger involving an NHS foundation trust is reviewed, we have a duty to provide advice[1] to the Competition and Markets Authority (the CMA)[2] on the benefits of the merger for patients and commissioners. We also review mergers and other transactions involving foundation trusts as part of our on-going overall assessment of whether they meet the conditions of their provider licence.[3]

The purpose of this guidance

The guidance you are about to read is one of a set of documents explaining how we exercise our co-operation and competition functions, first published in March 2013 for a 12-week public consultation. We are grateful for all the feedback we received to help us further develop the guidance.

This guidance[4] is designed to help you make the best decisions for patients and will be helpful to any NHS organisation planning a merger. It should be read alongside other guidance explaining our new approach to transactions (see below).

How this guidance works with our new approach to transactions

Since our consultation on transactions in 2014, we have listened to the sector and looked more comprehensively at our approach to transactions, including mergers. We have been working with the CMA to develop a joint approach that will make sure patients' interests are at the heart of assessing merger proposals.

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[1] We are required to provide advice to the CMA by section 79(5) of the Health and Social Care Act 2012.

[2] The CMA is the UK's primary competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries and enforcing competition and consumer law. From 1 April 2014 it took over the functions of the Competition Commission and the competition and certain consumer functions of the Office of Fair Trading (OFT).

[3] See 'Supporting NHS providers: Guidance on transactions for NHS foundation trusts'.

[4] This guidance reflects our views 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. It may in due course be supplemented, revised or replaced. Our website will always display the latest version of the guidance. Within this document we cover most of the points about merger benefits likely to be of interest to NHS organisations and their advisers, but it is not comprehensive or a definitive interpretation of the law.

We are now implementing our new approach, which seeks to:

- better support NHS foundations trusts contemplating a merger or acquisition to navigate the relevant regulatory processes, from an earlier stage
- change the rules for reporting and reviewing transactions involving NHS foundation trusts (as part of our approach to risk assessing transactions to ensure compliance with licence conditions).

To support providers, we are publishing a range of complementary guidance documents that cover our new approach, comprising:

- this revised guidance on merger benefits
- 'Supporting NHS providers: Guidance on transactions for NHS foundation trusts' that updates and consolidates all our previous guidance on transactions; provides further detail and clarity on the new arrangements to assist NHS foundation trusts contemplating a merger or acquisition; and sets out our risk assessment process for transactions
- 'Competition review of NHS mergers: A short guide for managers of NHS providers', co-published with the CMA, explaining how statutory merger control applies to NHS mergers.

You may also find the 'CMA guidance on the review of NHS mergers' helpful.

Further help

If you have queries about this guidance, or about our new approach to transactions, please contact us at: cooperationandcompetition@monitor.gov.uk

How to use this guidance

This guidance explains how we will assess and provide advice to the CMA on the benefits of mergers involving NHS foundation trusts. It covers:

- our role in relation to merger benefits
- what is a relevant customer benefit
- how the CMA will take our advice into account
- our approach to assessing merger benefits
- examples of types of merger benefits.

The appendices contain supporting information on what should go into submissions to us, how we advise the CMA and the statutory framework around relevant customer benefits.

What is our role in relation to merger benefits?

We expect NHS foundation trusts to engage with us early on when they are considering their strategic options (such as a merger). We will advise them on the competition implications of proposed mergers and conduct a preliminary review of their approach to assessing and demonstrating merger benefits. Our guide 'Supporting NHS providers: Guidance on transactions for NHS foundation trusts' contains more information on how we will engage with NHS foundation trusts contemplating mergers.

As part of our early engagement with NHS foundation trusts contemplating mergers, we can help merging providers understand whether their merger is reviewable by the CMA. There is further information on which mergers the CMA will review in 'Competition review of NHS mergers: A short guide for managers of NHS providers' (published by the CMA and Monitor) and the CMA's guidance on the review of NHS mergers. If the CMA reviews a merger involving an NHS foundation trust, we have a statutory duty to provide advice to the CMA on the following matters:

- the effect of the merger on benefits (in the form of those defined in the Enterprise Act as 'relevant customer benefits')[5] for people who use NHS healthcare services and
- such other matters relating to the merger as we consider appropriate.

What is a 'relevant customer benefit'?

'Customer' is a term used in the Enterprise Act in relation to all the economic activities it covers.[6] In relation to the health sector, the term 'customer' means a current or future user of healthcare services (often but not always referred to as a 'patient') or a commissioner. In this guidance we use the terms 'merger benefits' and 'relevant customer benefits' interchangeably.

The Enterprise Act defines a 'relevant customer benefit' as one which:[7]

- is 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,[8] or greater innovation in relation to such goods or services and

[5] The term 'relevant customer benefit' is defined in Section 30 of the Enterprise Act 2002.
[6] 'Relevant customers', as defined in the Enterprise Act, are customers at any point in the chain of production and distribution and are therefore not limited to final consumers. Relevant customers include customers of the merger parties, customers of such customers, any other customers in a chain of customers beginning with the customers of the merger parties, and future customers.
[7] Section 30 of the Enterprise Act.
[8] Whether or not the market or markets in which the substantial lessening of competition concerned has, or may have, occurred or (as the case may be) may occur.

- the CMA believes has accrued, or may be expected to accrue, within a reasonable period as a result of the merger and
- the CMA believes was or is unlikely to accrue without the merger or a similar lessening of competition.

Appendix 3 contains more detail on the statutory framework for relevant customer benefits.

How will the Competition and Markets Authority take our advice into account?

The CMA assesses whether a merger is likely to have adverse effects on patients by reducing competition between providers. This reduction is known as a 'substantial lessening of competition'. The CMA's approach to this assessment is set out in 'Competition review of NHS mergers: A short guide for managers of NHS providers' and its guidance on the review of NHS mergers. If the CMA finds that a merger is likely to substantially lessen competition, it will consider whether the merger gives rise to any relevant customer benefits. There is a two phase process for merger review, and the CMA takes account of benefits in different ways at Phase 1 and Phase 2:

- At Phase 1 the CMA weighs the benefits of the merger against the substantial lessening of competition. If the benefits of the merger outweigh the adverse effects, the CMA can clear the merger (that is, decide not to refer the merger for a Phase 2 investigation).
- At Phase 2 the CMA takes benefits into account when deciding what remedies are appropriate.[9] The CMA will consider the impact of a remedy on the benefits expected to arise from the merger, and may modify or select a particular remedy to preserve these benefits.

In reaching its view on relevant customer benefits, the CMA will place significant weight on our advice.[10]

How will the Competition and Markets Authority weigh benefits against the substantial lessening of competition at Phase 1?

The merger benefits need not necessarily arise in the market(s) where the competition concerns have arisen. It is possible that a merger might lead to benefits

[9] The CMA will select a remedy it believes is effective and proportionate to address the adverse effects of the merger. The CMA can impose remedies such as prohibiting the merger, or requiring the merger parties to sell a business or assets, or to give supply commitments.
[10] Our statutory obligation to provide advice on relevant customer benefits applies at Phase 1 of the merger review process. We are not separately required to advise again at Phase 2 but the CMA will take account of any advice we have already provided at Phase 2.

for one set of patients but adverse effects as a result of a substantial lessening of competition for a different set of patients. An example of this could be a merger that substantially lessens competition in relation to urology services but leads to benefits in relation to maternity services. For the CMA to clear such a merger at Phase 1, the benefits in maternity services would need to outweigh the adverse effects on patients in urology services.

Weighing up the benefits against the adverse effect on patients involves a consideration of the facts and circumstances of an individual case. The CMA's approach to this assessment is explained in its guidance on the review of NHS mergers.

Our approach to assessing merger benefits

In this section, we explain the framework we apply when assessing whether proposals submitted by merger parties meet the statutory test for relevant customer benefits.[11] The illustrations and examples come from previous merger cases considered by us, the Competition Commission and the Co-operation and Competition Panel (CCP).[12] They are intended to be helpful but whether or not a proposal constitutes a relevant customer benefit within the meaning of the Enterprise Act will ultimately depend on the particular facts of the case.

In our assessment of merger benefits, we examine the following questions:

- Is the proposed change likely to represent a real improvement in quality, choice or innovation of services for patients[13] or in value for money for commissioners?
- Is the proposed change likely to be realised within a reasonable period as a result of the merger?
- Is the proposed change unlikely to accrue without the merger or a similar lessening of competition? (This is sometimes referred to as the benefit being merger dependent or merger specific.)

When an NHS foundation trust is considering its strategic options, and as soon as it believes there is a significant likelihood that it might want to undertake a merger, we suggest it enter into discussion with us. We will offer advice at this stage to ensure

[11] As discussed above, the CMA decides whether the relevant customer benefits of the merger outweigh the substantial lessening of competition.
[12] Before 1 April 2013, CCP was responsible for reviewing NHS mergers under the Principles and Rules for Co-operation and Competition. Unlike Monitor and the CMA, CCP did not apply the Enterprise Act test for relevant customer benefits. Nevertheless, CCP cases provide helpful illustrations of the types of benefits that may be identified.
[13] 'Patients' in this context refer to people who use healthcare services provided for the purposes of the NHS. See section 79(5)(a) of the Health and Social Care Act.

the robustness of the underlying strategy. We can also offer advice on the competition issues that might arise.

We expect parties to a merger to be able to identify and describe the improvements arising from their proposed merger, and present well thought through plans as to how these benefits will be realised. Parties should be able to explain the steps they will take to implement the proposed changes and the expected timing of these, the proposed staffing arrangements, the anticipated cost of delivery and how this will be funded, and any risks to delivery and how these will be mitigated.

This approach reflects the fact that the merger parties, as the main actors in the transaction, are the organisations responsible for ensuring that the intended improvements are realised. It is consistent with the CMA's approach, which requires merger parties to produce detailed and verifiable evidence of any anticipated benefits.[14]

In addition to considering the evidence presented by the merger parties, we may gather further information from the merger parties and others, such as commissioners, local patients and/or their representatives and other providers. We will base our advice on evidence we receive from the merger parties and others and will pay particular attention to the informed views of clinicians and local commissioners on the specific improvements proposed by the parties (and the plans for local implementation of these).

We would generally expect improvements for patients and commissioners to be key drivers for merger proposals, so parties should be able to show that they have, from an early stage, identified and planned for the delivery of such improvements. We recognise that implementation plans are likely to be refined and developed as planning for the merger progresses. However, if there is apparent uncertainty in information we receive from merger parties (for example, about where services will be located after the merger), we may take this into account in our assessment of whether the improvement is likely to be realised.

Once a trust has decided to proceed with a merger that is subject to review by the CMA, it may wish to provide us with a submission on merger benefits that will form the basis of our advice to the CMA. The submission should include information about the transaction and a description of what improvements for patients and commissioners the parties expect to arise from the merger. Appendix 1 provides guidance on what to include in submissions and Appendix 2 explains how we provide advice to the CMA. The type of evidence we would expect parties to provide to demonstrate that proposed changes fall within the Enterprise Act's definition of relevant customer benefits is discussed in detail below.

[14] The CMA will consider evidence of benefits if it finds that a merger is likely to substantially lessen competition. See the CMA's guidance on the review of NHS mergers.

There may be cases where merger parties decide not to provide a submission to us on relevant customer benefits. This might be because, for example, the parties have decided not to notify the CMA of the merger or the parties' view is that the merger is unlikely to substantially lessen competition and so an analysis of benefits is unnecessary. In such a case, we would still be required to provide advice to the CMA if it decides to review the merger, but our advice would generally be that without information from the parties we have not identified relevant customer benefits. We would still need to conduct a risk assessment of the merger from the perspective of foundation trust governance and continuity of services in accordance with our role of monitoring compliance with the NHS provider licence.

Is the submitted benefit a real improvement?

Parties should provide information to demonstrate that the proposed intervention or change will lead to improvements for patients and/or commissioners. Such evidence may include clinical studies, Royal College guidance, academic papers and/or patient surveys. In assessing submissions we will also consider whether or not the proposed changes appear to be seen as improvements by patients and commissioners themselves.

For us to conclude that an improvement attributed to a merger represents a real improvement[15] in quality, choice or innovation of services for patients, or value for money for commissioners, parties to the merger should be able to describe in sufficient detail the existing situation that the merger will improve.[16] Implementing a particular model of care, for example, could lead to reduced length of stay, increased consultant cover or reduced mortality rates.

Where the delivery of proposed improvements may involve some reduction of access to the services available to patients, for example because it involves the rationalisation of services, we would consider the potential impact of these changes on quality of service. If some patients will have to travel further because of the consolidation of services, for example, we would consider factors such as the number of patients affected and the increase in travel time for these patients. The merger parties should conduct an assessment to understand the impact of these potential disadvantages.

Realising the benefit within a reasonable period

We will have greater confidence that a particular improvement is likely to be realised where the parties to a merger have a clear and detailed post-merger implementation plan that sets out how the merging providers' existing structures, processes and

[15] We will consider whether this represents an improvement compared with the likely situation if the merger does not happen.
[16] We will also take account of any evidence demonstrating there is likely to be some change to the existing situation if the merger does not proceed.

practices will be modified along with proposed timeframes.[17] Parties should also provide evidence that funds are available to implement the proposed changes. We are likely to place greater weight on the credibility of post-merger implementation plans where they have been scrutinised by clinicians and/or other experts, and where they have been developed for broader purposes than the CMA's or our consideration of the merger.

In assessing the credibility of any plans we will also look at the experience of the merger parties and their management teams in previous transactions and their success in realising improvements from those transactions.[18] We will consider the incentives that the merged organisation has to carry out the implementation plans. We may also look at other similar transactions and consider whether the parties to those transactions have been successful in realising similar improvements.

Where one or both of the merger parties is clinically or financially challenged this may have an impact on the merged organisation's ability to achieve substantial changes to models of care and service delivery while it implements the merger. Therefore it will be important in such a case for the parties to show that they have identified the risks of a merger involving a challenged provider or providers and planned effectively to mitigate these.

What is a reasonable period will vary case by case, depending for example on the nature of the proposed change and the circumstances of its implementation. We are likely to have greater confidence that improvements will be realised where their implementation is planned to take place soon after the merger. In previous merger cases, Monitor and CCP have typically found that a 1–2 year period to implement clinical changes or achieve cost savings following the merger is reasonable, although in some cases a longer period may be needed. For example, in its assessment of the merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust ('the Bournemouth and Poole merger'), the Competition Commission found that five years would, in the circumstances of that case, be a reasonable period for the construction of a new maternity unit.[19]

Where merger parties and/or commissioners submit that relevant customer benefits will be delivered by a reconfiguration of services which is subject to consultation, we will not expect the parties to have started or completed public consultation on the proposed reconfiguration, taken a firm decision to proceed with the reconfiguration,

[17] We also look at the credibility and robustness of the merger parties' post-merger integration plan as part of our risk assessment of the transaction.
[18] For example, where there have been changes in circumstances (such as a change in management) which mean that the merger parties' previous experience should not be relied on, we will take that into account.
[19] A report on the anticipated 'Bournemouth and Poole merger', Competition Commission, 17 October 2013, paragraph 9.84.

or implemented the service reconfiguration. However, for the more extensive proposals (for example, accident and emergency reconfiguration), we would expect the parties to have taken a number of steps as outlined below:

- determined what the preferred proposal is and, where relevant, provided evidence of the need for change; for example, if the current service does not comply with relevant quality and safety standards or recommendations
- discussed plans with clinicians of the merger parties and relevant commissioners
- developed a model of care (a plan for the way in which services will be delivered following the reconfiguration) by engaging with clinicians of the merger parties and relevant commissioners, as well as any clinical experts and relevant advisory groups as appropriate
- produced an assessment of the clinical advantages (and any disadvantages) as well as a robust assessment of the financial or economic viability of the plans.[20]

Does the benefit depend on the merger?

To constitute relevant customer benefits under the Enterprise Act, improvements must be unlikely to occur without the merger or a similar lessening of competition. To determine whether or not this is the case we will examine whether there is evidence that the proposed changes are likely to occur in any event, for example if the merger parties have the ability and the incentive to deliver the proposed changes independently or together through an arrangement other than the merger.

Where there is evidence that services are likely to change as a result of commissioner-led or other centrally led changes (for example, to meet government recommendations), we will consider whether this action would have the same effect as the merger parties' proposals and how soon that action is likely to occur. If we find that the change to services could be realised within a reasonable period without the merger, it is likely that the proposed change will not meet the Enterprise Act test.

In our assessment of the benefits of the Bournemouth and Poole merger, for example, we found that improvements arising from the consolidation of haematology services were likely to be achieved by commissioner-led reconfiguration and therefore were not specific to the merger.[21]

[20] See also a report on the anticipated 'Bournemouth and Poole merger', Competition Commission, 17 October 2013, paragraphs 9.51 to 9.54.
[21] Our advice to the OFT under section 79(5) of the Health and Social Care Act on the anticipated 'Bournemouth and Poole merger', Monitor, 11 February 2013. In its report on the anticipated 'Bournemouth and Poole merger, Competition Commission, 17 October 2013, the Competition

In the context of healthcare mergers, many kinds of improvements for patients may be realisable without a merger. This is because NHS organisations have a legal duty to co-operate.[22] The culture of co-operation means that parties should think carefully about whether a particular improvement is really dependent on the merger. On the other hand, sometimes it may be possible to realise a particular improvement more quickly or more cost effectively because of a merger. If so, the time gained or money saved is the benefit that can be attributed specifically to the merger. If this is the case, merger parties should explain why a particular improvement will be realised more quickly with the merger than without, identify the time or money that will be saved, and the impact this will have on patients or commissioners.

Types of merger benefits

Below are examples of the types of improvements for patients and commissioners which merger parties have submitted would arise from healthcare mergers in previous cases. We set out the relevant issues and the type of evidence that would be required for us to advise the CMA whether there are relevant customer benefits in a particular case.

The examples are not exhaustive, nor are they suggestions of what we would expect to see in parties' submissions. Whether or not there are merger benefits in a particular case will depend on the facts of the case. These examples are for illustrative purposes only. We may adapt or build on them as our experience grows.

Higher quality services through implementing a particular model of care

To demonstrate that implementing a particular model of care or a particular working practice will improve the quality of services for patients, merger parties will need to:

- describe the model of care or working practices that will be implemented and any issues with the existing service provision that will be addressed
- identify the services and categories of patients that will be affected by the change
- provide evidence (such as clinical studies) demonstrating that the model of care or working practices will lead to better quality outcomes.

Merger parties should provide a plan showing how the changes will be implemented and the anticipated timeframe for delivering the model of care. They should also explain why the model has not or will not be implemented independently by the parties without the merger, or will be delivered faster and/or more effectively with the

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Commission determined that benefits were not likely to be achieved in this area, but on the basis of different reasoning due to a change in the evidence regarding this service between the period between our report on relevant customer benefits and its own review.

[22] Section 72, National Health Service Act 2006.

merger. Where the proposal is likely to disadvantage some patients (for example, by reducing their access to services), the merger parties should be able to explain what work has been done to assess and weigh the impact of the proposal.

In several previous cases, CCP accepted that implementing a particular model of care across a merged trust would improve the quality of services, for example, by reducing length of stay,[23] providing round-the-clock access to a dedicated treatment room,[24] reducing mortality rates, and delivering higher quality stroke services.[25]

In its assessment of the merger of North Cumbria University Hospitals NHS Trust (North Cumbria Trust) and Northumbria Healthcare NHS Foundation Trust (Northumbria Trust), CCP accepted that the merger would lead to quicker improvement of services at North Cumbria Trust by applying Northumbria Trust's models of care for various services. The parties submitted convincing evidence in support of their case including information about quality issues at North Cumbria Trust, Northumbria Trust's track record of high performance and experience in successfully implementing a service model to turn around a troubled trust across multiple sites, and a detailed implementation plan. CCP accepted that Northumbria Trust was uniquely placed to expedite implementation of the changes on the basis of its skills and experience, the rural nature of the areas served by the merger parties, and the ability for staff to move regularly between the parties' sites.

By contrast, in a different case CCP did not accept that delivering a particular new model for breast-care diagnostic outpatient services was a merger-specific benefit.[26] In particular, CCP noted that the proposed new model of care could have been adopted by the parties independently without the merger if it was likely to deliver significant quality improvements. It also did not appear that the model of care used before the merger was adversely affecting the quality of services for patients.

In its assessment of another merger, CCP examined whether the merger would be likely to lead to higher quality services through the parties implementing a particular model of care but found that the information provided by the parties was not sufficient to reach a view. In particular, the parties had not explained what each organisation did well and what they would roll out in terms of best practice improvement.[27]

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[23] Merger of Barts and the London NHS Trust, Newham University Hospital NHS Trust and Whipps Cross University Hospital NHS Trust, CCP, 15 December 2011.
[24] Merger of parts of University Hospitals Bristol NHS Foundation Trust and North Bristol NHS Trust, CCP, 20 September 2013.
[25] Merger of North Cumbria University Hospitals NHS Trust with Northumbria Healthcare NHS Foundation Trust, CCP, 21 December 2012.
[26] Merger of parts of University Hospitals Bristol NHS Foundation Trust and North Bristol NHS Trust, CCP, 20 September 2013.
[27] Merger of Dartford and Gravesham NHS Trust with Medway NHS Foundation Trust, CCP, 10 October 2012.

Higher quality services through service reconfiguration

To show that service reconfiguration will improve the quality of services for patients, merger parties will need to provide details of the reconfiguration proposed, identify the patients and services affected, including any effects on interdependent services, and explain the quality improvements arising from the reconfiguration and the timeframe for implementation. It will also be necessary to explain why the improvements in quality depend on, or will be realised more quickly or more effectively through, the merger and why these have not been or will not be implemented by the merger parties without the merger (either independently or together, for example, through a service level agreement between them).

In some previous cases merger parties have submitted that the merger provides them with a sufficient volume of patients to enable them to reconfigure services. This is linked to the expectation that improved outcomes can be achieved in certain treatment groups where a larger volume of patients is treated in a particular centre. 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 applicable to the services the parties have described. They will also need to provide evidence of the predicted outcome improvements for the group of patients who will benefit.

In our view it would not be appropriate to make a service viable artificially by distorting patient choice through a merger if the service is not valued by patients and commissioners. We will therefore consider whether a service improvement that depends on an increased number of patients could be achieved by one of the parties independently providing a high quality service that would attract a sufficient volume of patients. If it appears that a service operated by one of the merger parties could not be expected to attract sufficient referrals, this may indicate either that the demand for that local service is not sufficient or that patients and commissioners do not value the service.

As discussed under ‘Is the submitted benefit a real improvement?’, if the proposed reconfiguration is likely to disadvantage some patients (for example, by reducing their access to services), we would consider factors such as the number of patients affected and the increase in travel time for these patients. In its assessment of the Bournemouth and Poole merger, the Competition Commission found that reconfiguring accident and emergency services could create both benefits and disadvantages for local patients and that the scope and nature of these was likely to differ depending on where the service would be located. The Competition Commission did not find that the proposal was an overall benefit to patients as the

merger parties had not yet undertaken an assessment of the impact of the proposal.[28]

If the proposed reconfiguration of services is subject to consultation, we would expect the parties to demonstrate that they have taken the steps outlined in the section on 'Realising the benefit within a reasonable period' above. In particular, where consultation will be required, evidence that commissioners and clinicians have been involved in the development of the proposal will be important.

In previous cases, CCP and Monitor have found that reconfiguring services may improve quality of care for patients by reducing or eliminating transfers of patients between hospitals,[29] or by providing a comprehensive service enabling patients to be treated closer to home.[30]

In some cases, rationalising services without a merger may be better for patients because it will preserve choice in relation to other services and the associated incentives on providers to improve quality and value for money. It is therefore important to show that improvements arising from service rationalisation or consolidation are merger specific. In some previous cases, Monitor and CCP have found that improvements arising from service reconfiguration were not specific to the merger, for example because they were likely to be achieved by commissioner-led reconfiguration even without a merger[31] or by the wider London programme to improve cancer care.[32] In another case CCP found that a proposed co-location of diagnostic outpatient services and the associated improvement in quality of services could have been carried out by one of the parties independently without needing the merger.[33]

[28] A report on the anticipated 'Bournemouth and Poole merger' merger, Competition Commission, 17 October 2013, paragraphs 9.105 to 9.111.
[29] Our advice to OFT under section 79(5) of the Health and Social Care Act on the anticipated 'Bournemouth and Poole merger', Monitor, 11 February 2013, paragraph 44(a). In its advice to OFT, we found that this would be a relevant customer benefit. However, when the merger was reviewed by the Competition Commission the merger parties indicated that they no longer intended to reconfigure the relevant service in the way they had originally proposed and which we had found to be a benefit to patients (see report on the anticipated 'Bournemouth and Poole merger', Competition Commission, 17 October 2013, paragraphs 9.92 to 9.100); See also Merger of parts of University Hospitals Bristol NHS Foundation Trust and North Bristol NHS Trust, CCP, 20 September 2013.
[30] Merger of Nuffield Orthopaedic Centre NHS Trust and Oxford Radcliffe Hospitals NHS Trust, CCP, 30 September 2011.
[31] Our advice OFT under section 79(5) of the Health and Social Care Act on the anticipated 'Bournemouth and Poole merger', Monitor, 11 February 2013. In its report on the anticipated 'Bournemouth and Poole merger', Competition Commission, 17 October 2013, the Competition Commission determined that benefits were not likely to be achieved in this area, but on the basis of different reasoning due to a change in the evidence regarding this service between the period between our report on relevant customer benefits and its own review.
[32] Merger of Barts and the London NHS Trust, Newham University Hospital NHS Trust and Whipps Cross University Hospital NHS Trust, CCP, 15 December 2011.
[33] Merger of parts of University Hospitals Bristol NHS Foundation Trust and North Bristol NHS Trust, CCP, 20 September 2013.

Higher quality services through increased consultant or staff cover

Where parties submit that a merger will improve staffing and provide better coverage of staff absences, they should be able to explain the way in which existing services are provided and the impact and extent of any staffing problems, as well as how improvements to staffing levels and staff coverage will result in clinical improvements to patients. Without this information we will not be able to assess the existence or size of any improvement in services. Parties should also be able to explain whether they have explored other ways to achieve the same improvements, for example by agreeing staff sharing arrangements or joint rotas.

The Competition Commission, OFT, Monitor and CCP have previously considered cases in which merger parties submitted that establishing a dedicated rota for a particular service (for example, a cardiology rota,[34] an upper gastrointestinal bleed rota,[35] a spinal rota[36]) would provide increased consultant cover (in terms of hours of cover or the number of consultants in attendance) and improve quality outcomes for patients. Due to the prevalence of staff sharing and other co-operative arrangements (such as service level agreements) in the healthcare sector, parties will need to think carefully about whether any benefits arising from a joint rota could be achieved without a merger.

To demonstrate that increased consultant or staff cover will be realised it will be necessary for merger parties to provide details of the number of relevant clinical staff pre- and post-merger, the number of clinical staff that would be required to establish a joint rota for a given service, and details of current gaps in the rota. It will also be necessary to explain why improvements to rotas could not otherwise be achieved by service level agreements, other staff-sharing arrangements or by employing more staff. Where parties submit that a merger will improve their ability to recruit staff, 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 why recruitment could not be improved without a merger.

Factors we may take into account when considering whether increased consultant or staff cover could be achieved without the merger include: previous attempts by the parties to enter into a service level agreement or other staff sharing arrangement; whether such arrangements are in place (either with each other or other providers) with respect to other services; and the feasibility of establishing a joint rota (and the parties' financial incentives to do so) in the absence of the merger.

[34] Our advice to OFT under section 79(5) of the Health and Social Care Act on the anticipated 'Bournemouth and Poole merger', Monitor, 11 February 2013; a report on the anticipated 'Bournemouth and Poole merger', Competition Commission, 17 October 2013.
[35] Merger of Dartford and Gravesham NHS Trust with Medway NHS Foundation Trust, CCP, 10 October 2012.
[36] Our advice to OFT under section 79(5) of the Health and Social Care Act on the transfer of neurosurgery services from the Royal Free London NHS Foundation Trust to University College London Hospitals NHS Foundation Trust, Monitor, 6 March 2013.

Even if we find that increased consultant or staff cover could be achieved without the merger, we would still take into account any costs that would be avoided by merging. In that context, it will be important for parties to show that these cost savings will not be achieved in a way which would have an adverse impact on the quality of services.

Higher quality services through access to equipment

To demonstrate that a merger will improve access to equipment, and thereby deliver higher quality services, the parties will need to explain what the equipment is used for and provide evidence (such as clinical studies) that this leads to better outcomes for patients. The parties should provide a plan showing how the merger will enable the purchase of new equipment, or better utilisation of existing equipment, and explain why this could not be achieved without the merger.

CCP previously considered cases in which parties submitted that the merger would enable them to share equipment and thereby improve the quality of services for patients. In the merger of parts of University Hospitals Bristol NHS Foundation Trust and North Bristol NHS Trust, the parties submitted that the quality of a breast screening service would be improved by having two mammography machines in one location instead of in separate locations. The CCP did not accept that this constituted a relevant benefit because the merger parties did not explain how the machines would be staffed, and how additional capacity would be created by having both mammography machines in the same place.

In the merger of Dartford and Gravesham NHS Trust (Dartford and Gravesham Trust) and Medway NHS Foundation Trust (Medway Foundation Trust), the parties submitted that patients at Dartford and Gravesham Trust would benefit from having access to a specialist gamma camera that Medway Foundation Trust was planning to purchase. However, Medway Foundation Trust had committed to the investment regardless of the merger and the service would be provided anyway. Patients would be able to choose to go to Medway Foundation Trust if they wanted to receive the service. CCP therefore concluded that the improvement in services for patients could be achieved without the merger.

Greater innovation through research and development

Merger parties may submit that the increased size of the merged organisation will improve their ability to attract research and development funding. To demonstrate this is a relevant customer benefit, they will need to identify the improvements in research and development that will result from the merger and explain why these could not be achieved without the merger.

We note that research and development can often be facilitated or co-ordinated by local research networks. Therefore it will be necessary for parties to demonstrate that the merger will bring some improvement which would not be achieved this way,

for example, due to the complementary nature of the different research expertise of the parties and the patients or clinical areas affected by the merger.

In CCP's assessment of the merger of the Nuffield Orthopaedic Centre NHS Trust and Oxford Radcliffe Hospitals NHS Trust, some of the improvements in research and development were not specific to the merger, since they flowed from collaboration between the parties' research centres, which was already occurring before the merger.

Financial savings

There are a number of ways in which financial savings may arise from a merger, as outlined below.

- The merged organisation may be able to achieve efficiencies from having a larger scale of operation, for example by making more efficient use of clinical staff and equipment or sharing back office functions.
- The merged organisation may be able to achieve efficiencies from supplying a broader scope of services, for example by making the care pathway more efficient or making the treatment of patients with multiple healthcare needs more efficient.
- The merged organisation may be able to achieve efficiencies across its portfolio of services from the more efficient clinical or managerial processes or working methods of one of the merger parties.
- Other possible savings may be generated by improved recruitment and retention of staff.
- By merging, the merger parties may be able to avoid costs which would otherwise be incurred.

To be treated as merger benefits, financial savings generated by the merger parties must be used for the benefit of patients or commissioners. We would generally expect any savings made by a foundation trust to be reinvested in healthcare services, for example through lower prices to commissioners or investment in services for current and future patients (leading to higher quality, greater choice or innovation of services). Nevertheless, where merger parties can explain how they will use any financial savings this will help to demonstrate that the benefit to patients will be realised. For example, identifying which aspects of services would benefit from improvement, and providing details of the work undertaken to identify this and what would happen without the investment, will enable merger parties to make a stronger case that the identified cost savings from the merger are in practice likely to be realised within a reasonable time period. In addition, an explanation of how savings will be reinvested will help the parties make a stronger case that the

identified cost saving is likely to represent a real improvement for patients or commissioners.

The parties will also need to quantify any savings and explain how these will be achieved. We would expect parties to be able to provide a business case or implementation plan that describes and explains how the savings will be achieved. The parties' plans will also need to take into account any costs associated with implementing financial savings (eg redundancy costs). If savings involve service rationalisation, the parties will also need to consider whether there is any associated reduction in quality for patients, for example as a result of reduced access or increased waiting times, and may wish to conduct a quality impact assessment to enable any potential impact on quality to be understood and assessed (see above in relation to reconfiguration).[37]

We will consider whether the savings could be achieved without the merger, for example through service level agreements or the merger parties independently investing in or rationalising services. Monitor and CCP have found in some previous cases back office savings did not depend on the merger in question because they could have been delivered by a merger with another provider which would not have given rise to competition concerns, or a shared services arrangement.[38] Where parties submit that savings could be achieved by improving the care pathway or the way that patients with multiple healthcare needs are treated, we note that there are many initiatives in the sector intended to ensure the delivery of more integrated care to patients and many of these are also intended to generate cost savings. Many of these initiatives do not depend on the services in question being delivered by a single organisation so the parties will need to explain why the savings from their proposals would not be achieved without the merger.

[37] A report on the anticipated 'Bournemouth and Poole merger', Competition Commission, 17 October 2013, paragraphs 9.119 to 9.128.
[38] Our advice to OFT under section 79(5) of the Health and Social Care Act on the anticipated 'Bournemouth and Poole merger', Monitor, 11 February 2013; Merger between Norfolk and Waveney Mental Health NHS Foundation Trust and Suffolk Mental Health Partnership NHS Trust, CCP, 8 March 2011.

Appendix 1: Guidance on the content of submissions

Once a trust has decided to proceed with a merger that is reviewable by the CMA, they may wish to provide us with a submission on merger benefits that will form the basis of our advice to the CMA. Merger benefits will be considered by the CMA if it finds that a merger is likely to substantially lessen competition. This appendix is intended to assist merger parties preparing submissions to Monitor in relation to relevant customer benefits that may arise from a merger.

Background information

In their submission merger parties should provide the following background information:

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

Benefits case

As well as the background information set out above, the merger parties should identify and describe the improvements for patients and commissioners arising from the merger and include the information outlined below. For each benefit the parties attribute to the merger the benefits case should explain:

- how the change represents a real improvement in quality, choice or innovation of services for patients or value for money for commissioners. This should include:
    - an explanation of the existing situation that the merger will improve, including the nature and scale of current problems, if any, that the changes are expected to address
    - evidence of why this represents an improvement (eg clinical studies, Royal College guidance, academic papers, patient surveys, views from patients and commissioners)
    - an identification of the services and categories of patients that will be affected by the proposed changes including any effects on interdependent services
    - when and how the benefit will be realised as a result of the merger and whether the benefit has a degree of longevity (rather than a temporary or one-off gain). This should include a well-developed post-merger

implementation plan setting out the steps that will be taken to implement the benefit, and how the merging providers' existing structures, processes and practices will be modified

    - the expected timing of these steps
    - proposed staffing arrangements
    - anticipated cost of delivery and how this will be funded
    - any risks to delivery and how these will be mitigated

- why, in the merging providers' view, the period in which the changes will be implemented is a reasonable period.
- why the improvement is unlikely to be delivered without the merger. This should include an explanation of why the change would not be implemented without the merger (by the merger parties either independently or in co-operation, or by a third party).

Where the delivery of the proposed changes may have an adverse impact on some patients (for example, because it involves rationalisation of services), the merger parties should do further work to understand these disadvantages and the impact on patients.

For the more extensive proposals (for example, accident and emergency reconfiguration), the merger parties should provide evidence that they have:

- determined what the preferred proposal is and, where relevant, provided evidence for the need for change; for example, if the current service does not comply with relevant quality and safety standards or recommendations
- discussed plans with clinicians of the merger parties and relevant commissioners
- developed a model of care (a plan for the way in which services will be delivered following the reconfiguration) by engaging with clinicians of the merger parties and relevant commissioners, as well as any clinical experts and relevant advisory groups as appropriate
- produced an assessment of the clinical advantages (and any disadvantages) as well as a robust assessment of the financial or economic viability of the plans.

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

Appendix 2: Process for our provision of advice to the Competition and Markets Authority

If the CMA decides to carry out a Phase 1 review of a merger involving an NHS foundation trust, it must notify us as soon as reasonably practicable. We will then provide our advice to the CMA as soon as reasonably practicable after receiving that notification.

We will provide the CMA with our assessment of the relevant customer benefits identified by the merger parties, in line with our statutory obligations. Where appropriate, we will also share our views on the potential competition issues.

We expect NHS foundation trusts to engage with us early on when they are contemplating strategic options (such as a merger). We can help merging providers understand whether their merger needs to be reviewed by the CMA.

If providers decide to formally notify the CMA of their merger, they should engage in pre-notification discussions with both the CMA on the competition aspects and Monitor on the benefits of the merger. These discussions will help them identify the information they will need to provide to the CMA on the competition aspects and Monitor on the benefits of the merger, and so help ensure the merger review proceeds efficiently. Pre-notification discussions usually involve providing a draft submission to the CMA on the competition effects of the merger and a draft submission to us on the benefits of the merger. Guidance on the content of submissions can be found above (in relation to us) and in the CMA's guidance on the review of NHS mergers (in relation to the CMA).

We will provide comments on the draft submission on benefits including on its completeness. We will gather further information from the merger parties and relevant third parties such as commissioners by sending information requests and/or holding meetings (by phone or in person). We will keep a record of these meetings. Meetings with the merger parties and relevant third parties will generally be held separately by Monitor and the CMA.

We expect that the merger parties will provide their final submission on benefits and any additional information requested by us before submitting a merger notice to the CMA. In order to address any potential issues early and constructively, we will endeavour for this process to be as open as possible and encourage merger parties to remain open and co-operative throughout.

We will share our thinking (written or oral) with the CMA in order for the CMA to be able to refer to it on the 'state of play' call with the merger parties as well as reflect it

in the issues letter.[39] The CMA may ask us to provide further advice in relation to additional evidence provided by the merger parties in response to the issues letter.

We will discuss our views in relation to relevant customer benefits with the CMA on an on-going basis and in any event prior to the CMA's issues meeting and case review meeting.[40]

Before providing our written advice to the CMA, we expect to provide the merger parties and the CMA with our provisional view on the relevant customer benefits arising from the merger. The merger parties will be invited to comment on this provisional view. The merger parties will be given an appropriate period of time to comment depending on the nature of the advice (generally no less than 48 hours). We will take responses to the provisional view into account when producing our final advice.

Our advice may contain information that is confidential (either as regards the merger parties or other confidential information known to us). We may share such information with the CMA. To the extent that the parties consider that information they provide to us should not be included in the published version of our advice, they should submit a non-confidential version of such submission and state clearly what information should remain confidential to us, together with the reasons for this.

We will provide the CMA with a confidential version of our advice for the purpose of the CMA's decision on the merger. Following the CMA's decision we will generally publish a non-confidential version of our advice on our website.

Before it is published, the text of our advice will be circulated to the parties or their advisers to enable them to request the redaction of sensitive confidential information from the text, if necessary to protect confidentiality.

The non-confidential version of our advice must clearly set out the reasons for our advice and as such, we would expect to describe the nature of any benefits that the parties submit are likely to arise from the merger. We therefore ask that, when parties make requests on the redaction 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.

[39] In all cases, the CMA commits that, generally in the period between working days 15 and 20 of Phase 1 of its review, it will have a 'state of play' discussion with the merger parties, typically by conference call. The purpose of this discussion is to give the merger parties information on any competition concerns, including feedback from the CMA's market test, whether or not the CMA is to send the merger parties an issues letter, and the theories of harm that the CMA proposes to include in the issues letter. The case team will also provide an update on the likely timetable for the case going forward.

[40] The case review meeting is an internal meeting held by the CMA following its issues meeting with the merger parties.

Appendix 3: Relevant customer benefits – statutory framework

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:

- lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market or markets in which the substantial lessening of competition concerned has, or may have, occurred or (as the case may be) may occur); or
- greater innovation in relation to such goods or services.

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

- customers of any person carrying on an enterprise which, in the creation of the relevant merger situation concerned, has ceased to be, or (as the case may be) will cease to be, a distinct enterprise[41]
- customers of such customers[42] and
- any other customers in a chain of customers beginning with the customers mentioned in section 30(4)(a).[43]

For the purposes of section 30(1) of the Enterprise Act, 'customers' includes future customers.[44]

In order to constitute a relevant customer benefit within the meaning of section 30 of the Enterprise Act, the CMA must believe that the benefit:[45]

- has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation and
- the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.

Under section 79(5) of the Health and Social Care Act, we are required to provide the CMA with advice in relation to mergers involving NHS foundation trusts that are investigated by the CMA. In particular, we must provide advice 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

[41] Section 30(4)(a) of the Enterprise Act.
[42] Section 30(4)(b) of the Enterprise Act.
[43] Section 30(4)(c) of the Enterprise Act.
[44] Section 30(4) of the Enterprise Act.
[45] Section 30(1)(b) of the Enterprise Act.

benefits)) for people who use health care services provided for the purposes of the NHS[46] and

- such other matters relating to the matter under investigation as Monitor considers appropriate.[47]

[46] Section 79(5)(a) of the Health and Social Care Act.
[47] Section 79(5)(b) of the Health and Social Care Act.

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