2 July 2014

CMA's consultation on its guidance on the review of NHS Mergers
Response from Slaughter and May

1. Executive summary

1.1 We refer to the CMA's consultation on its guidance on the review of NHS mergers published on 9 May 2014 (the **'Guidance'**). This paper sets out the views of Slaughter and May on the Guidance.

1.2 We generally considered that the Guidance provided helpful insight into the CMA's approach to reviewing NHS mergers.

1.3 The remainder of this paper sets out suggestions on four areas covered by the Guidance that the CMA may wish to consider:

(A) Commissioner-led reconfigurations that give rise to mergers: it would be helpful if the Guidance clarified what impact, if any, the fact that a service reconfiguration that results in a merger is commissioner-led is likely to have on the CMA's approach to reviewing an NHS merger. In particular, it would be helpful if the Guidance explained what the CMA's approach to the counterfactual would be in such cases, given that the status quo may be an unlikely alternative to the merger.

(B) Informal advice: it would be helpful if the Guidance clarified whether the CMA is willing to provide informal advice to NHS providers only in the circumstances envisaged in the CMA's general mergers guidance (*Mergers: Guidance on the CMA's jurisdiction and procedure*), or whether informal advice will be available in a broader set of circumstances. It would also be helpful if the guidance gave an indication of the weight the CMA is likely to attach to informal advice provided by Monitor to NHS providers.

(C) Arrangements between PPUs and private hospital operators: in order to ensure equal treatment of arrangements between PPUs and private hospital operators, it will be important for the CMA to align the approach it takes to reviewing arrangements that do not constitute relevant merger situations under the Enterprise Act 2002 (and which are therefore reviewed pursuant to the CMA's remedies in its market investigation into private healthcare) with those that do.

(D) References to integration as driving mergers and the delivery of better outcomes: it would be helpful if the guidance clarified what is meant by integration in this regard and, in particular, whether integration is intended to refer to integration between providers or the delivery of different services to patients in a more integrated way. If the latter, the CMA may wish to consider referring to the delivery of integrated care, or using similar terminology.

2. Commissioner-led reconfigurations that give rise to mergers

Application of merger control to reconfigurations

2.1 The Guidance explains that merger control may apply to NHS service reconfigurations in certain circumstances.[1]

2.2 The Guidance suggests that NHS reconfigurations can take many forms, which may involve the transfer of an enterprise depending on the circumstances. The Guidance recognises that the role of commissioners in reconfigurations may vary: some reconfigurations may involve NHS commissioners and providers entering into-multi party agreements, some may involve providers agreeing between themselves to transfer assets and then asking the commissioner to transfer a contract and some may involve providers agreeing to merge following NHS commissioners' independent decisions to change who provides services.[2]

Procurement, Patient Choice and Competition Regulations

2.3 Commissioners are required to comply with the National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013[3] (the '**Regulations**') whenever they procure NHS health care services.

2.4 The Regulations impose a number of requirements on commissioners when procuring NHS health care services. In particular, the Regulations require commissioners:

(A) to act with a view to securing the needs of people who use the services and to improving the quality and efficiency of the services;[4]

(B) in acting with a view to improving quality and efficiency, to consider appropriate means of making such improvements including through enabling providers to compete to provide the services and allowing patients a choice of provider of the services;[5] and

(C) to procure the services from one or more providers that are most capable of delivering the objective set out in paragraph 2.4(A) above and that provide best value for money in doing so.[6]

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[1] See paragraph 5.17.

[2] Paragraph 5.18.

[3] SI 2013 No.500.

[4] Regulation 2.

[5] Regulation 3(4).

[6] Regulation 3(3).

2.5 Any procurement exercise run by a commissioner will have to be carried out in accordance with the Regulations, including where that procurement exercise results in a subsequent merger.

2.6 A commissioner may decide, for example, that it wants to purchase a particular health care service from fewer providers that will treat higher volumes of patients and may run a competitive tender process to select future providers of the service. Following the award of the contract, staff involved in the provision of the service that are employed by current providers that are unsuccessful may be transferred to the winning bidders. Under the Regulations, the commissioner would need to consider whether the service could be improved by allowing patients to choose who provides it and by enabling providers to compete before it decides to procure the service from a smaller number of providers.[7] The commissioner would also need to be satisfied that it awards the contract to the most capable providers that deliver best value for money.

2.7 Although the analytical framework that commissioners must follow under the Regulations is not the same as the CMA's approach in applying the substantial lessening of competition (SLC) test and considering relevant customer benefits under the Enterprise Act 2002, the Regulations do require commissioners to consider competition and patient choice when they procure services.

2.8 A person that considers that a commissioner has breached the Regulations can make a complaint to Monitor.[8] They can also launch legal proceedings.[9] Where a procurement decision that results in a merger is challenged, it is therefore possible that Monitor or the courts might consider similar issues during their review of the procurement decision as the CMA during its review of the subsequent merger (for example, if the challenge concerns the commissioner's decision to reduce the number of providers of the service).

2.9 Given that commissioners' procurement decisions can be the driver of mergers, and given the existence of legal regimes governing both procurement and merger control, it would be helpful if the Guidance could clarify what, if any, impact the fact that a reconfiguration is commissioner-led is likely to have on the CMA's approach to reviewing an NHS merger. In particular, it would be helpful if the Guidance explained what the CMA's approach to the counterfactual would be in such cases, given that the status quo may be an unlikely alternative to the merger.

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[7] See Monitor's substantive guidance on the Procurement, Patient Choice and Competition Regulations, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283505/SubstantiveGuidanceDec2013_0.pdf (see section 2.3.3).

[8] Regulation 13.

[9] Section 76(7) of the Health and Social Care Act 2012.

3. Informal advice

Availability of informal advice from the CMA

3.1 In several places the Guidance suggests that merging providers may wish to approach the CMA for informal advice if they are 'in any doubt' or 'are unsure' as to whether the NHS merger may fall within the CMA's jurisdiction or raise competition concerns.[10] The Guidance also suggests that the mergers unit will give advice on how the CMA will approach the counterfactual in the particular case, including, for example, whether one of the merging parties could be regarded as an 'exiting provider'.[11]

3.2 The Guidance also makes reference to the CMA's *Mergers: Guidance on the CMA's approach to jurisdiction and procedure* for further information on the procedure for informal advice, including what to expect from informal advice.[12] This guidance explains that the CMA will reject requests for informal advice where the proposed merger does not raise a genuine issue as to whether the duty to refer is triggered save in exceptional circumstances (such as in pro bono cases, involving public bodies or private enterprises unable to afford external competition advice). This guidance also states that the CMA will expect advisers to articulate the theory of harm that the CMA might reasonably rely upon as a credible candidate case for reference before it provides informal advice.[13]

3.3 It would be helpful if the CMA could clarify whether the CMA will provide informal advice to NHS providers only in circumstances where the proposed merger raises a genuine issue as to referral and where the potential theory of harm has been articulated in the way described above, or whether informal advice will be available to NHS providers in a broader set of circumstances.

Status of informal advice provided by Monitor

3.4 The Guidance refers in several places to Monitor's role in providing informal advice and assistance to NHS providers contemplating a merger.[14] Monitor has also published details of arrangements to support NHS foundation trusts contemplating mergers.[15]

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[10] See paragraph 3.12 and 4.3.

[11] See footnote 12.

[12] See paragraph 4.11.

[13] See paragraphs 6.28 to 6.30

[14] See paragraphs 1.8, 3.12, 4.5 and 4.15.

[15] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288918/Letter_from_David_Bennett_on_mergers_24_January_2014.pdf. Following a public consultation on its proposed approach, Monitor has indicated that it intends to publish a new updated transactions guide in 2014, which will provide further clarity on the new arrangements to assist NHS foundation trusts contemplating a merger or acquisition (see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310284/Transactionsguidance.pdf).

These arrangements will involve Monitor providing advice to NHS foundation trusts on whether a proposed merger is likely to give rise to competition issues and on the assessment of relevant patient benefits before a decision is taken on whether to notify the merger to the CMA.

3.5 A joint statement by Monitor, the OFT and the Competition Commission in October 2013 setting out how the three regulators work together on hospital mergers, also indicated that Monitor would offer informal advice to providers on how they might assess the prospective benefits of any merger and the possible competition implications of any merger.[16] The joint statement also encourages hospitals to engage with Monitor and where appropriate the OFT at the earliest opportunity as both can offer help and guidance on the process of merger control and on the evidence that will be required.

3.6 Although the Guidance states that the CMA will place significant weight on Monitor's advice to the CMA on relevant patient benefits, it is silent on the status of other advice that may be provided by Monitor to NHS providers.

3.7 Given that it is envisaged that Monitor will provide informal advice to NHS providers on both the assessment of relevant patient benefits resulting from a merger and competition issues as a matter of course, but that ultimately the CMA is the decision-maker in merger cases, it would be helpful if the CMA could give some indication of the weight that it is likely to give to Monitor's advice on other issues.

4. Arrangements between PPUs and private hospital operators

4.1 The Guidance states that arrangements between private patient units (PPUs) and private hospital operators to operate or manage a PPU are subject to the possibility of CMA review.[17] Some of these arrangements may be caught by the Enterprise Act 2002. Those arrangements that are not caught will be reviewable pursuant to the remedies being implemented by the CMA in connection with its private health care market investigation.

4.2 In order to ensure equal treatment of arrangements between PPUs and private hospital operators, it will be important for the CMA to align the approach it takes to reviewing arrangements that constitute relevant merger situations under the Enterprise Act 2002 with those that do not in so far as is possible.

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[16] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283809/131017_oft_cc_monitor_merger_statement_final.pdf

[17] Paragraph 5.3.

5. 'Integration' as driver of mergers and the delivery of better outcomes

5.1 The preface to the Guidance refers to better 'integration' as one of a number of drivers for NHS mergers.[18] The preface also suggests that 'integration' is important to delivering better outcomes for patients or value for money for the taxpayer (although competition also plays an important role in incentivising providers to improve quality for patients and efficiency).[19]

5.2 It would be helpful if the CMA could clarify what is meant by integration in this regard and, in particular, whether integration is intended to refer to integration between providers or the delivery of different services to patients in a more integrated way.

5.3 We note that there is a drive for health care services to be delivered in a more integrated way. Integrated care in this context is generally referred to as person-centred care (i.e. services that are provided in a 'seamless' way from the perspective of the patient).[20] NHS providers and NHS commissioners have various legal obligations relating to the delivery of integrated care.[21]

5.4 To the extent that the references to 'integration' in the preface are intended to refer to the delivery of better integrated care, the CMA may wish to consider using this or similar terminology, to avoid the text being taken to refer to structural integration.

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[18] See paragraph 1.2

[19] See paragraph 1.4

[20] See for example http://www.nationalvoices.org.uk/sites/www.nationalvoices.org.uk/files/what_patients_want_from_integration_national_voices_paper.pdf.

[21] See sections13N and 14Z1 of the National Health Service Act 2006, Regulations 2 and 3(4) of the Procurement, Patient Choice and Competition Regulations and condition IC1 of the NHS provider licence standard conditions (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285009/Annex_NHS_provider_licence_conditions_-_20120207.pdf).