CMA guidance on the review of NHS mergers

Summary of responses to consultation

August 2014
CMA29resp

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This publication is also available at: www.gov.uk/cma.

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1. Introduction and summary

Background

1.1 The Competition and Markets Authority (CMA) has powers to review certain mergers between NHS providers under the provisions of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013 (the Act). However, whilst its powers come from the Act, the CMA and its predecessors (the Office of Fair Trading (OFT) and the Competition Commission) have only reviewed mergers between two public providers of healthcare since the Health and Social Care Act 2012 confirmed its role in relation to the same.

1.2 Mergers may adversely affect patient or commissioner interests by reducing incentives for the providers to maintain and improve services for patients, thereby leading to reduced quality or choice for patients or commissioners. Specifically, the aspects of quality which may be impacted by a reduction in incentives to compete include clinical factors such as infection rates, mortality rates, ratio of nurses or doctors to patients, equipment, best practice and non-clinical factors such as waiting times, patient experience, cleanliness and parking facilities.

1.3 A draft guidance document was therefore prepared to assist the advisers of organisations providing NHS services, the organisations themselves[1] and other interested parties in their interactions with the CMA in relation to NHS mergers. The CMA guidance on the review of NHS mergers (CMA29con) was published for public consultation on 9 May 2014 (the draft guidance).

1.4 The draft guidance described the substantive approach followed and procedure used by the CMA in exercising its merger control powers under the Act. The draft guidance sought to build on its own experience, the experience of the CMA's predecessors in assessing NHS mergers and existing guidance on the review of mergers published or adopted by the CMA.

Purpose of this document

1.5 The consultation page accompanying the draft guidance sought views of respondents on the CMA's approach to the review of NHS mergers within the existing statutory framework.

[1] The CMA and Monitor have jointly published a short guide for managers of NHS providers focusing specifically on issues that may be of most interest to them.

1.6 This document sets out a summary of the key issues addressed in the responses received following the consultation period of the draft guidance, and the CMA's views on those responses. It also explains any amendments and additions to the final CMA guidance on the review of NHS mergers (the Guidance).

1.7 The responses have been organised by themes following the index of contents of the Guidance.

Responses to the consultation document

1.8 The CMA received 11 responses to the consultation.[2] All respondents welcomed the draft guidance, noting that it was a positive step and overall a useful document.

1.9 The draft guidance was also discussed at the roundtable jointly organised by the CMA and Monitor on 15 May 2013 and attended by a representative group of senior management from NHS foundation trusts and NHS trusts, NHS England, NHS Trust Development Authority, the Foundation Trust Network and some legal and financial advisers active in this area.

1.10 This document is not a comprehensive record of all views expressed by the respondents. Respondents' full responses are available on www.gov.uk/cma. During its consultation the CMA received a number of comments which it considers fall outside of the scope of its Guidance on the procedure and general approach in its merger review of some providers of NHS services. For example:

- One respondent expressed concern about the possibility of a conflict in outcome between a CMA merger review and the Secretary of State's approval of a merger involving a NHS Foundation Trust in the TSA process. The Guidance discusses the CMA approach in the TSA process in the counterfactual section (paragraphs 6.15 to 6.32). The CMA further notes that it would conduct its application of the Guidance flexibly and may depart from the approach described in the Guidance where there is an appropriate and reasonable justification for doing so.

- The CMA received a number of comments asking for a detailed description of the evidence required to demonstrate specific points (including on entry of other providers and a checklist of required information). The CMA considers that the Guidance provides the relevant

[2] Annex A lists the 11 organisations that provided responses.

general guidance to providers, and where specific points arise in relation to individual mergers the providers should approach to the CMA for advice.

1.11 Nor is this document a definitive statement of the CMA's policy and procedures in relation to the exercise of its merger control functions. Parties seeking guidance on those procedures should refer to the final published version of CMA Guidance on the Review of NHS mergers (CMA29).They can also contact the CMA Mergers Unit for advice in the circumstances explained in the Guidance.

2. Procedure and contacting the CMA

Informal advice

Summary of responses

2.1 Several respondents requested clarifications on the possibility of contacting the CMA's mergers unit for advice on an informal basis (informal advice). In particular, a respondent encouraged the CMA to include a broader range of evidence of a good faith intention to proceed that it would be willing to accept to consider that a merger is not merely speculative.

2.2 Another respondent asked the CMA to clarify whether the CMA would provide informal advice to NHS providers only in circumstances described in *Mergers: Guidance on the CMA's approach to jurisdiction and procedure* (that is, where the proposed merger raises a genuine issue as to referral and where the potential theory of harm has been articulated)[3] or in a broader set of circumstances.

2.3 Another respondent asked whether the informal advice would be shared with the Trust Development Authority (TDA) and Monitor.

The CMA's view

2.4 The draft guidance has been amended to make it clearer that the CMA is open and willing to engage with NHS providers even before they have decided whether to notify their transaction, and will provide general advice on how it assesses jurisdiction and undertakes its competitive assessment. In practice, this engagement may cover a specific merger or transaction but the CMA will only discuss those in general terms. If specific advice on a material issue expected to be raised by the merger is required, the merging providers should use the Informal Advice procedure. The Guidance also indicates that engagement with Monitor should generally take place before either advice is sought from the CMA or a notification is made to the CMA.

2.5 As noted in the draft guidance, paragraph 4.9, both the content of the advice and the fact that a merging provider has applied for it is strictly confidential to the provider(s) seeking that advice and their legal advisers, even after the transaction becomes public. Wherever possible, the CMA will seek the approval of the provider to disclose its discussions with Monitor. Nevertheless, as noted in the draft guidance, paragraph 4.15, the CMA may decide to disclose specified information to Monitor without the consent of the merging

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[3] *Mergers: Guidance on the CMA's approach to jurisdiction and procedure (CMA2)*, paragraphs 6.28–6.30.

providers. This may occur, for example, where it considers that disclosure is necessary to enable the CMA to exercise its statutory functions, including the need to have regard to Monitor's advice on benefits.

2.6 The CMA would seek consent from the merging providers before disclosing informal advice to the TDA. The CMA would only disclose the information obtained from the merging parties where they have not consented to disclosure to the TDA in a limited set of circumstances as set out in the CMA's transparency guidance.

Pre-notification

Summary of responses

2.7 In relation to the pre-notification phase, several respondents asked for greater clarity on the roles of Monitor and the CMA at the pre-notification phase. In particular, a respondent asked which of the CMA and Monitor had responsibility for deciding whether the CMA had jurisdiction to review a merger. Comments relating to engagement on relevant customer benefits are dealt with in Section 5 below.

2.8 In addition, some respondents requested that the CMA provide an indication/ time range that can be expected for this pre-notification phase.

2.9 Another respondent asked for clarification of the interaction and information sharing between Monitor and the CMA. In particular, the respondent asked the extent to which the dialogue between merging parties and Monitor may be shared with the CMA.

2.10 A respondent suggested that the CMA engage with commissioners at the pre-notification stage of a merger rather than following the submission of the Merger Notice and the start its formal investigation.

The CMA's view

2.11 The CMA recognises the benefit of early engagement between the CMA and the merging providers as soon as they have decided to notify to assist them in considering the information, evidence and analysis which may be relevant for their merger notification. To this end, and as stated in the draft guidance, the CMA strongly encourages merging providers to approach the CMA to discuss their merger as soon as they have decided to notify the CMA (before submitting a Merger Notice). The benefits of pre-notification, especially in the context of NHS mergers, are listed in paragraph 4.12 of the Guidance.

2.12 The CMA understands that NHS foundation trusts are in regular contact with Monitor in relation to Monitor's other regulatory functions. The role of Monitor, as sectoral regulator, includes assessing NHS providers' compliance with the provider licence. As part of this role, Monitor will review certain transactions (such as mergers) to ensure that foundation trusts comply with the governance and continuity of service conditions of their provider licence. The CMA understands that Monitor expects NHS foundation trusts to engage with it early when they are considering strategic options such as a merger, acquisition, joint venture or reconfiguration. Those contacts with Monitor may assist merging providers to identify at an early stage if the merger raises competition issues and so help the merging providers when considering whether to notify the CMA.

2.13 Ultimately, the CMA is responsible for deciding whether an NHS merger falls within its jurisdiction. Monitor may provide guidance to the merging providers on the CMA's jurisdiction, but that piece of guidance is not binding on the CMA. Therefore, if in doubt, merging providers and their advisers may wish to approach the CMA directly for advice. The CMA is also responsible for deciding whether an NHS merger may lead to adverse effects for patients/ commissioners arising from a loss of competition.

2.14 The CMA is not able to provide a precise timetable for pre-notification of NHS mergers as this will vary by case. The CMA will give an indication on the time that it may take to review any submission or request for advice submitted by the merging providers when they contact the CMA. Timing of pre-notification will ultimately depend, to some extent, on the responsiveness of the merging providers to the CMA's questions, together with the level of any analysis already undertaken in line with previous decisional practice. It will also depend on the status of the submission on relevant customer benefits to Monitor and the CMA in cases where the merging parties wish to put forward a relevant customer benefits case. In order to save time and costs, merging providers are encouraged to contact the CMA early if their merger is likely to raise complex issues or they intend to depart from previous decisional practice.

2.15 With respect to information sharing between the CMA and Monitor, the CMA notes that it is in regular contact with Monitor about transactions (including those currently being reviewed and upcoming). As noted in the draft guidance, paragraph 4.2, it is one of the sources from which the CMA obtains information about anticipated and completed mergers (together with third parties and through dedicated mergers intelligence staff). Where the CMA learns of a merger that has not been notified to it and that it believes might have adverse effects on patients or commissioners due to a loss of competition, the CMA may open an investigation on its own initiative.

2.16 The CMA has taken the respondents' comments into account. It has amended the draft guidance to clarify the roles of Monitor and the CMA at pre-notification, as set out above: see paragraphs 3.10 to 3.12 and 4.4 of the Guidance.

2.17 As stated in the draft guidance, to assist their merger planning, NHS providers and their advisers may choose to contact the CMA's mergers unit for advice on an informal basis.

2.18 The CMA clarified in the Guidance that where the merging providers consent, pre-notification allows the CMA to contact certain third parties, such as commissioners, for their views.

3. What is a relevant merger situation?

The CMA's jurisdiction

Summary of responses

3.1 It is well understood that the jurisdictional provisions of the Act apply to NHS mergers. This provides predictability, consistency and decisional practice and precedent from which to draw additional guidance.

3.2 Several respondents requested more guidance on the types of transactions which can be subject to UK merger control. These asked for: (i) greater consistency in several paragraphs listing the types of transactions which may be subject to UK merger control; (ii) a statement confirming that transactions between two individual services can be subject to UK merger control; and (iii) a list of the types of 'relevant merger situations' in previous NHS mergers.

3.3 A respondent disagreed with the CMA considering 'NHS trusts' to be 'enterprises pursuant to section 23 of the Act. Another respondent asked for further details on the application of the 'share of supply' test in NHS mergers.

The CMA's views

3.4 The content of paragraphs 1.8, 5.2 and 5.3 of the Guidance listing different types of NHS transactions subject to UK merger review have been aligned to provide greater consistency. In addition, paragraphs 5.19 to 5.22 provide further detail on specific transactions. These should alert providers and their advisers to the types of transactions which may be subject to UK merger review. However, given the variety of transactions involving NHS organisations, it is important to stress that NHS organisations are subject to the general jurisdictional principles and criteria listed in paragraph 5.1 of the Guidance and explained further in Chapter 5 of the Guidance. These are the criteria against which the CMA will determine its jurisdiction regardless of how the particular arrangement is described by the providers and other interested parties (such as commissioners).

3.5 These general principles will also apply to private patient unit (PPU) transactions and therefore the CMA has removed the paragraph specific to them. The PPU transactions that are not subject to merger control are not covered by the Guidance in any event.

3.6 The CMA has stated clearly in paragraph 5.19 of the Guidance that transactions between two providers involving two sets of services only (or even parts of services) can trigger a merger review. However, to assist

providers, it has also added footnote 37 guiding them to two recent cases: one related to pathology and another related to neurosurgery services.

3.7 The OFT's press release and note containing frequently asked questions of 22 March 2013, which was adopted by the CMA, explained the reasons why the UK competition authority considered at that time that NHS trusts can qualify as 'enterprises' for the purposes of UK merger control.[4] The CMA has not seen any reason to change that view. For the avoidance of doubt, the reasoning has been set out in the Guidance.

3.8 The Guidance now includes a simplified explanation of the turnover test and a reference to its general guidance which discusses the turnover test (see *Mergers: Guidance on the CMA's approach to jurisdiction and procedure (CMA2)*).

3.9 On the application of the 'share of supply' jurisdictional test, paragraph 5.17 of the Guidance has been expanded to provide more clarity on the CMA's discretion to define the services and/or goods and the relevant criteria to assert jurisdiction. In addition, the CMA encourages the notifying parties and their advisers to read this Guidance in conjunction with the significant number of published previous cases and general guidance on this topic (see *Mergers: Guidance on the CMA's approach to jurisdiction and procedure (CMA2)*).

Applicability of the UK merger control regime to NHS service reconfigurations

Summary of the responses

3.10 Several respondents asked for greater explanation on the application of the jurisdictional rules and the approach to the counterfactual when assessing transactions resulting or forming part of wider NHS service reconfigurations. Those respondents asked how the CMA would take into account the fact that commissioners' decisions to reorganise (or reconfigure) services triggered some of these transactions (commissioner-led reconfigurations).

The CMA's views

3.11 The CMA notes that this topic is very relevant in NHS mergers. Paragraph 5.19 of the draft guidance has been amended to add clarity on this as far as possible within the regulatory framework of the Act. Paragraphs 5.21 and 5.22 of the Guidance describe some of the features which bring some of these transactions within the jurisdiction of UK merger control.

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[4] See www.gov.uk/government/publications/nhs-mergers-reviews.

3.12 The CMA does not consider it appropriate to constrain the practical flexibility of the Act by developing prescriptive guidance on the types of transactions that are caught by the Act, in particular in a sector with such a wide variety of transactions and emerging organisation, network or service provision models as the current NHS. The CMA is prepared to discuss these issues with the parties during informal advice or pre-notification discussions.

3.13 A new paragraph 5.23 in the Guidance explains that the background and reasons behind commissioner-led reconfigurations are, in any case, taken into account when assessing the counterfactual and relevant customer benefits.

4. Merger assessment

Counterfactual

Summary of responses

4.1 Several respondents asked for greater clarity on the way the CMA intended to assess the relevant counterfactual in relation to transactions resulting from commissioner-led reconfigurations (see paragraph 3.10 above).

4.2 A respondent pointed out that the CMA may accept alternative counterfactuals at Phase 2 and consequently considered that paragraph 6.12 of the draft guidance was misleading.

The CMA's views

4.3 The CMA recognises that there are many drivers for NHS mergers. These include financial savings, sharing of best practices, better delivery of integrated care and service reconfigurations to generate better outcomes for patients and value for money for the taxpayers. The Guidance sets out the considerations that the CMA (having consulted with Monitor, commissioners and other interested parties) takes into account when identifying the appropriate counterfactual. Commissioner-led transactions are specifically mentioned in paragraphs 6.28 to 6.32 of the Guidance. Those paragraphs also refer to the type of evidence the CMA would expect to review when facing this type of situations.

4.4 In addition, the section on 'Identifying the appropriate counterfactual' has also been expanded with the addition of explanations on other possible counterfactuals (paragraph 6.33 on the loss of potential entrant and paragraph 6.34 on parallel transactions). Paragraph 6.12 of the draft guidance (now paragraph 6.14 of the Guidance) has been amended to make clear that these are possible rather than alternative counterfactuals.

Substantive assessment

Summary of responses

4.5 The CMA received a limited number of responses in relation to the merger assessment section of the draft guidance. One respondent welcomed the additional clarity provided by this section, such as the comments in paragraphs 6.62 to 6.66 of the draft guidance stating that generally vertical and conglomerate mergers are less likely to give rise to a substantial lessening of competition (SLC), but may occasionally harm competition.

4.6 Two respondents asked for further clarification on how the CMA would assess new entry, both in relation to the effect that merger has on entry and the extent to which entry could constrain the merged provider. One of these respondents also asked for further clarification on the following aspects of merger assessment:

- the statement that 'the provision of elective activities may be constrained to some extent by non-elective providers' (paragraph 6.36)
- the assessment of local geographic overlaps in the catchment areas of merging providers and how likely these are to raise competition concerns (paragraph 6.51)
- whether and how competition concerns can arise in relation to coordination in the context of the NHS (paragraphs 6.57 to 6.61)
- under which circumstances concerns are likely to arise in relation to vertical mergers and the assessment of potential efficiencies from such mergers (paragraph 6.63)

4.7 Another respondent disagreed with the interpretation of the reference test in case of 'genuine uncertainty' set out in paragraph 6.3 of the draft guidance.

The CMA's views

4.8 The CMA has made the following changes to the draft guidance:

- added a reference to potential competition in paragraph 6.46 as well as a reference to relevant sections of the CMA merger assessment guidelines
- clarified that the assessment may focus on local overlaps, since providers may be able to flex certain aspects of their offering at a local level. There is also a reference to a CMA decision which discusses local competition and may be useful to the sector[5]

4.9 The CMA has not made changes to the coordination and vertical sections of the draft guidance since it does not consider that further discussion is warranted. The draft guidance acknowledges that NHS providers have a duty to cooperate and that vertical mergers are less likely to give rise to an SLC than horizontal mergers.

[5] Paragraphs 72–80 of the CMA's report on the anticipated merger between Heatherwood and Wexham Park Hospitals NHS Foundation Trust and Frimley Park Hospital NHS Foundation Trust.

4.10 The CMA also considers that the further detail in footnote 57 of the Guidance explains what is intended in the discussion of the constraint that non-elective service imposes on elective services.

4.11 The Guidance also contains additional language explaining the factors the CMA will consider when determining whether entry or expansion is likely.

4.12 In light of the comments received, the CMA has sought to simplify paragraph 6.3 of the draft guidance.

5. Exceptions to the duty to refer

Relevant customer benefits

Summary of responses

5.1 A few respondents noted that this section was helpful and a useful summary of current thinking. However, respondents also asked for:

- further detail on the relevant customer benefits that would be accepted
- clarity on the pre-notification process and respective roles of Monitor and the CMA in relation to relevant customer benefits
- clarity over when benefits are taken into account
- clarification as to when the CMA will contact relevant third parties such as commissioners for their views

5.2 One respondent noted that there is no appeals process in the event that the CMA rejects Monitor's advice.

5.3 A respondent noted that the definition of relevant 'patient' benefits might be confusing as it also encompasses benefits to commissioners.

The CMA's views

5.4 The CMA's role in relation to relevant customer benefits stems from the statutory provisions set out in the Act. As set out in the Guidance, there are different tests and approaches set out in the statute across Phases 1 and 2. At Phase 1, relevant customer benefits provide a potential exception to the duty to refer a merger where they outweigh adverse effects on patients and/or commissioners of the SLC. At Phase 2 the CMA will normally take relevant customer benefits into account, as permitted by the Act, by considering the extent to which effective alternative remedies may preserve such benefits. The Guidance clarifies further how benefits are taken into account at Phase 1 and Phase 2.

5.5 It is important to note that, given the statutory tests, at both Phases 1 and 2, the CMA only takes a decision on relevant customer benefits when it believes that it is or may be the case that the merger results or may be expected to result in an SLC which may lead to adverse effects. Where no competition concerns arise, the CMA clears a merger without the need for such a discussion. The CMA has no further remit to review any aspects of the transaction. Monitor has a role, as sector regulator, to review the transaction

as a whole pursuant to its licensing arrangements. This has been clarified in the Guidance.

5.6 The Guidance also includes further information on the process and the respective roles of the CMA and Monitor.

Terminology

5.7 In this Guidance, to provide further clarity and to ensure alignment with the statutory wording, the CMA is now referring to relevant customer benefits instead of relevant patient benefits. This is because whilst relevant benefits of a merger should directly impact patient interests, they will also serve to benefit other interests, such as those of commissioners.

Further detail on relevant customer benefits

5.8 The CMA has clarified in paragraph 7.22 of the Guidance that it will contact third parties at the beginning of the Phase 1 inquiry for their views with the potential for more detailed follow-up questions throughout. With the merging providers' consent the CMA may contact third parties during pre-notification.

5.9 The CMA has provided a non-exhaustive list of benefits that it would accept in principle provided there is compelling evidence. It is not able to provide a comprehensive list since the statute must be applied in an open and flexible manner to allow for consideration of a wider range of potential benefits. In addition, the rationale for transactions and benefits to patients and/or commissioners may be very diverse. Therefore, merging providers are not precluded from submitting relevant customer benefits that have not been considered previously by the CMA or Monitor. A restricted and comprehensive set of benefits would not therefore be in the interests of applying the regime in a fair and equitable manner.

5.10 If the evidence is compelling, the CMA would be prepared in principle to accept any and all of the benefits listed in the Guidance. In relation to financial savings, the CMA would expect the parties to explain how those savings would be used to benefit patients or commissioners directly. However, the benefit need not be in the same area as that in which the SLC is identified. This has been clarified in the Guidance.

5.11 Monitor has already developed some detailed guidance on the type of evidence that merging providers may wish to submit in support of their

relevant customer benefits submission.[6] The CMA does not consider that there is material benefit in replicating this in its Guidance given the length of the document. It considers that it is more appropriate for the Guidance to set out how the CMA interprets the legislative provisions and the principles it will apply when reviewing benefits.

5.12 The Guidance contains a description of the types of factors the CMA would take into account when assessing whether the benefits outweigh the adverse effects of the loss of competition in paragraph 7.26. The CMA has, however, modified the language to align with its general guidance on Exceptions to the duty to refer and undertakings in lieu. Given that each decision is fact specific, the CMA is not able to provide more guidance on this matter. However, the CMA would expect future decisional practice to provide further clarity on the application of these principles to specific facts.

Respective roles of Monitor and the CMA

5.13 Where providers wish to submit that their merger will result in benefits, they are encouraged to do so in pre-notification (paragraph 7.7 of the Guidance explains why).

5.14 Providers will need to engage with both Monitor and the CMA for different reasons: (i) so that Monitor can advise the CMA on benefits and (ii) so that the CMA can determine if it has sufficient information to start its statutory clock as it is the decision-maker on relevant customer benefits. However, the CMA is keen to ensure that this is not burdensome on merging providers. As such, it recommends that the majority of discussions on benefits should be conducted with Monitor, with the CMA copied on draft submissions once the merging providers have decided they will notify the CMA. This will avoid delays to the CMA starting its statutory clock. Where the CMA has questions for the merging providers on benefits, it will as far as possible seek to ask these through Monitor to avoid merging providers having to interact with both regulators on relevant customer benefits. In any event, the CMA and Monitor will be liaising closely in relation to relevant customer benefits. The inter-actions have been clarified in the Guidance.

5.15 These pre-notification discussions can take place in parallel to the pre-notification discussions the merging providers will have with the CMA on the competitive assessment. This will save time for merging providers in their overall timetable.

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[6] See Monitor Guidance on Merger Benefits.

Appeals process

5.16 The CMA and Monitor envisage that Monitor will provide its preliminary advice to the CMA prior to any issues meeting with the merging providers. Where this is the case, the CMA will have the opportunity to include Monitor's views and its consideration of Monitor's advice in the issues letter which is sent to the merging providers. The merging providers will thus have the ability to respond to the CMA's assessment of Monitor's advice in the issues letter.

5.17 Further in the event that the CMA refers the case to Phase 2 (whether or not this is because of a difference of opinion with Monitor's advice), the merging providers will have another opportunity to put forward their arguments to an Inquiry Group of at least three people, selected for each case from the independent experts appointed by the Secretary of State to the CMA's panel. In addition, any person aggrieved by a decision in connection with a reference of possible reference in relation to a relevant merger situation may apply to the Competition Appeal Tribunal for review of that decision.[7]

[7] Section 120 of the Enterprise Act 2002.

6. Remedies

Summary of responses

6.1 Only one respondent provided comments on the assessment of remedies in the draft guidance. They asked for further examples of structural remedies and when these might be accepted. Structural remedies are generally one-off measures that seek to restore or maintain the competitive structure of the market such as, for example, the divestment of assets. These can be contrasted with behavioural remedies, which are normally ongoing measures designed to regulate or constrain the behaviour of merger parties. The respondent also noted that behavioural remedies had been accepted by the Cooperation and Competition Panel and Monitor in the past and noted that Monitor was well placed to monitor compliance with such remedies.

6.2 One respondent asked for clarity on the role of Monitor in Phase 2.

The CMA's views

6.3 The draft guidance included an explanation of the type of remedies which may be accepted by the CMA. The CMA does not consider that there is any benefit in providing a comprehensive list of remedies that would be acceptable, given that remedies are (i) case specific and (ii) providers may come up with novel remedies for the CMA to consider. Merging providers are encouraged, in relation to mergers which are likely to raise competition issues, to consider the possibility of remedies. If they consider a merger to be capable of being effectively remedied, merging providers are encouraged to then discuss any remedy proposals with the CMA as early as possible.

6.4 The CMA has removed references to the likelihood of each type of remedy being implemented given that remedies have to date been considered by the CMA or its predecessors in only one case in relation to NHS mergers. However, it has set out further principles that it will take into account when deciding whether or not to accept undertakings from the merging providers in Phase 1 or 2 or impose remedies, where necessary, in Phase 2.

6.5 The CMA considers remedy proposals on a case-by-case basis. The CMA has a preference for structural remedies because they address the change to the market structure that gives rise to the competition concerns and do not normally require monitoring and enforcement once implemented. In relation to behavioural remedies, the CMA notes that these are very complex to design and monitor and are generally not as effective as structural remedies. They may be liable to circumvention. As noted in the Guidance, behavioural remedies may not have an effective impact on the significant lessening of

competition and its resulting adverse effects, and may create significant costly distortions in market outcomes. In order to assist merging providers, the CMA has added a reference to the CC's report on the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust, which considered the behavioural remedies put forward by the merging providers and included a discussion of the behavioural remedies accepted by the Cooperation and Competition Panel in the past.

6.6 Additional information on how Monitor's views on relevant customer benefits will be treated or sought in Phase 2 are set out in the Guidance.

7. Further comments

Summary of responses

7.1 A few respondents noted that the scope of the draft guidance was unclear.

7.2 One respondent suggested adding a glossary of terms. Further, a respondent asked for further clarification around the role of the TDA.

7.3 A respondent also asked whether the CMA is subject to Freedom of Information Act requests and how it would handle these.

The CMA's views

7.4 The Guidance clarifies its scope, namely which types of mergers are covered, in Chapters 2 and 5. It also makes clearer that it applies to NHS mergers in England. The Guidance does not cover mergers between GPs, dentists and pharmacies, as the procedure and evidence for analysis of these differs from those for transactions involving hospitals or service lines. In particular, Monitor does not have a statutory duty to advise on such transactions. The CMA's predecessors have, however, considered such transactions in the past and providers may find the following decisional practice useful:

- the OFT decision in award of contracts to SSP Health Ltd to manage and operate 22 General Medical Practices in Merseyside, ME/5822/12, dated 8 August 2013, which discusses jurisdictional issues
- the anticipated acquisition by a merger between the Carlyle Group and Palamon Capital Partners LP of Integrated Dental Holdings Group and Associated Dental Practices, ME/4926/1, dated 10 June 2011
- the CMA decision in the completed acquisition by Oasis Dental Care (Central) Limited of JDH Holdings Limited, ME/6446-14, which will shortly be available on the CMA's website

7.5 Drafting amendments have been made in order to make the Guidance more user friendly and a glossary of terms is set out at the end of the Guidance.

7.6 Unlike Monitor, the TDA has no statutory role in advising the CMA. However, the CMA values the views of the TDA on the merger in relation to mergers involving NHS trusts.

7.7 The CMA is subject to the Freedom of Information Act 2000 and its Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) guidance explains how the CMA will deal with a request under the

Freedom of Information Act 2000 in Chapter 8. The Guidance contains a cross-reference to this detailed guidance on transparency and disclosure.

ANNEX A: List of respondents to the consultation on the draft guidance

Baker & McKenzie LLP
Clifford Chance LLP
Foundation Trust Network
Frontier Economics
The King's Fund
Hempsons
Hogan Lovells International LLP
Maclay Murray & Spens LLP
NHS England
Norton Rose Fulbright LLP
Slaughter and May