

COMPETITION AND MARKETS AUTHORITY GUIDANCE ON THE REVIEW OF NHS MERGERS

Foundation Trust Network response

June 2014

ABOUT THE FTN

The Foundation Trust Network (FTN) is the membership organisation and trade association for the NHS acute hospitals and community, mental health and ambulance services that treat patients and service users in the NHS. The FTN helps those NHS trusts deliver high quality, patient focussed, care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate.

The FTN has over 225 members – more than 90% of all NHS foundation trusts and aspirant trusts – who collectively account for £65 billion of annual expenditure and employ more than 630,000 staff.

INTRODUCTION

The FTN welcomes the development of specific guidance on NHS mergers by the Competition and Markets Authority (CMA). Whilst we recognise that the use of choice and competition can be one driver of quality and service improvement, we have been calling for a more nuanced approach to competition policy in the NHS, and the development of this guidance is a positive first step.

It is essential that Monitor and the CMA work transparently and collaboratively when applying competition policy in the NHS. We therefore also welcome the development of the CMA's and Monitor's joint NHS merger guidance for managers of NHS providers. We hope that it will complement the CMA's full guidance and provide a clear overview of the process. This submission does not attempt to reiterate the FTN's position on competition but focuses on providing constructive comments to improve the clarity of the draft full guidance. We would also be happy to provide specific comments on the shorter joint guidance if this would be helpful.

Please find below an overview of some suggested improvements that could be made to the structure of the document, followed by some fuller comments we have on the content of the guidance. These comments have been informed by the views of our members, prompted by some general questions about the value of the document and some more specific questions we circulated.

Key messages

- **The introduction of sector specific guidance about the application of competition law within the NHS is a significant and welcome step.** FTN has long argued for a more nuanced approach to competition within the NHS, and we particularly welcome the additional support Monitor is now offering for trusts. We look forward to reviewing how its implementation in practice aids a smoother and swifter merger process for foundation trusts
- **However, as colleagues within Monitor and the CMA will be aware, there remains a lack of clarity across NHS providers about the implications of competition and the requirements for proposed mergers and reconfigurations, and it will therefore be important to disseminate this guidance widely.** We would be keen to continue working with Monitor to ensure our members have access to the information and support that they require. To this

end we are drafting a complementary member briefing on competition which will include learning to date and case studies from those trusts which have gone through the process.

- **The document is clearly written however we would suggest the following improvements to the structure:**
 - The document would benefit from a full glossary clarifying the technical and legal terms used throughout the guidance. It will be important to include this in the shorter guide for NHS professionals as well
 - A checklist for providers embarking on a potential merger, outlining what is required at each stage of the process, would be welcomed.
 - An FAQ section as a quick reference guide for providers would be helpful, as well as some examples of what has constituted a merger in previous NHS transactions, for all types of NHS bodies.
 - Including the diagrams from annexes A and B within the main body of the document.

OVERALL CLARITY

The document is a good first step at providing some welcome clarity around the UK merger control regime, the role of the CMA, the overall process and the expectations on providers. On the whole, the document is clearly structured and easy to follow; however it may be helpful to include the diagrams from annexes A and B in the main body of the document to complement the overall narrative.

We are pleased that the CMA has made efforts to set out a very complex process in clear language. However, there are still some uses of legal and technical jargon within the document such as the use of the terms 'counterfactual', 'counter-veiling', 'product market definitions' and 'undertakings in lieu' that may benefit from either some clarification or re-wording, particularly as we assume that a range of professionals (executive directors, non executive directors, senior managers, clinicians) as well as governors within foundation trusts will read both the short, and full guidance if their trust is considering a merger.. The inclusion of a full glossary would therefore be of benefit.

In fact, it would be worth making the intended audiences of both the short and the full guidance clearer in the titles of the documents (i.e. NHS professionals and legal and other advisers respectively).

ROLES AND RESPONSIBILITIES

As previously mentioned, it is essential that the statutory bodies and the CMA work in a collaborative, streamlined and complementary way. Both the formal and informal roles and responsibilities of Monitor and the CMA are helpfully laid out within the guidance. It is particularly helpful to clarify what early advice that Monitor and the CMA are able to provide at the outset of providers considering a merger.

However, while the role of the TDA in mergers involving two trusts is excluded from this guidance and not covered by the Act, it would be worth making clear, the role of the NHS Trust Development Authority (TDA) in potential mergers involving a foundation trust and an NHS trust. Some clarification around specifically when the TDA would be involved in the process and what weight the CMA would attach to their views would be welcomed as well as the inclusion of their involvement in the flow chart at annex A.

CONFIDENTIALITY

There are some instances where proposed service changes or reconfigurations may potentially be either commercially or publically sensitive; therefore confidentiality at all times is crucial.

It is essential that providers are able to seek informal advice, without prejudice, from the CMA at an early stage of considering a potential merger. It is currently unclear within the guidance whether the CMA will share confidential informal advice (as per para 4.9) with Monitor, if “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” (para 4.16). We would therefore ask for confirmation that any informal advice provided by the CMA is kept confidential and not shared with Monitor, unless approved by the provider in advance. This is particularly important as members continue to raise queries about how the requirements they face to consult the public on proposed changes ‘fit’ with the merger process. Providers will of course wish to understand whether their proposed merger would raise competition issues, or be relatively straightforward, before seeking to consult the public, or their staff on proposed changes.

Members have also sought guidance on what forms of information can be shared between two organisations proposing to merge without compromising competition law – and the guidance document could be clearer on this point.

Some clarification on whether the CMA is subject to Freedom of Information requests, and how they would handle such requests, will also be helpful.

THE PATIENT BENEFIT

The CMA and Monitor need to adopt a comprehensive approach to determining the benefits and detriment of proposed NHS mergers. They should systematically assess the benefits for different patient interests and determine how these should be balanced and weighted in any decision.

The inclusion of some detail around what constitutes ‘patient benefit’ is helpful. However, it should not be lost within the overall narrative of the document and should be clearly signposted early on. Some clarity around what weight is attached to the possible patient benefits as opposed to any substantial loss of competition would be extremely helpful and an understanding that patient benefits may vary. We understand that Monitor is planning to produce a separate document on the ‘patient benefit’ and look forward to its publication. It would be helpful to link the forthcoming guidance on patient benefit with this guidance, or to host the full set of documents on one (Monitor) webpage.

NEXT STEPS

As previously mentioned, we recognise the role of competition as one of several drivers of quality; however we remain concerned that competition law be applied cautiously and proportionately within healthcare. It is a heterogeneous sector, with an under developed market, and is facing significant challenges. Although this guidance is a positive first step in recognising the unique nature of the NHS, it remains to be seen how well the regime will work when applied and how burdensome it may be on providers. It would be particularly useful to review the guidance after a year of operation, or as additional mergers go through the process. The application of competition law in the NHS must not stifle innovation or growth and must support the provider sector in developing new models of care to deliver a 21st century NHS.

We would be happy to discuss any part of our submission in more depth and hope that this continued dialogue is helpful in allowing the CMA to ensure that the use of competition policy in the NHS is carefully and sensibly applied to the ultimate benefit of patients.

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