Monitor

Making the health sector work for patients

# Supporting NHS providers: guidance on transactions for NHS foundation trusts

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www.gov.uk/monitor

## 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.

# Contents


1. Introduction ..... 5
   1.1 Types of transactions included in this guide ..... 7
2. Regulatory framework governing transactions ..... 8
   2.1 The CMA's competition review of transactions ..... 8
   2.2 Our risk assessment of transactions ..... 10
3. Early engagement with Monitor ..... 13
   3.1 Stages of engagement with us ..... 13
4. Framework for significant mergers and acquisitions ..... 18
   4.1 Overview ..... 18
   4.2 Stage 1: Strategic options case ..... 20
   4.3 Stage 2: Outline business case ..... 22
   4.4 Stage 3: Full business case ..... 25
   4.5 Stage 4: Agreement and completion ..... 29
   4.6 Interaction with NHS Trust Development Authority assurance processes ..... 30
5. Framework for other significant transactions ..... 32
   5.1 Overview ..... 32
   5.2 PFI projects ..... 33
6. Monitor's risk evaluation guidelines ..... 36
   6.1 Post-transaction monitoring and compliance ..... 37
   6.2 Detailed review scope and good practice ..... 37
   6.3 Illustrative reduced review scope ..... 56
7. Statutory responsibilities and procedures ..... 58
   7.1 Responsibilities of directors and governors in transactions ..... 58
   7.2 Required governor approvals ..... 58
   7.3 Governor approvals in practice ..... 59
   7.4 Stakeholder communication ..... 60
   7.5 Merger procedures ..... 60
   7.6 Acquisition procedures ..... 63
   7.7 Governor liability ..... 65

Appendix 1: Thresholds for reporting and detailed review ..... 66

Appendix 2: Statutory transactions – other requirements ..... 70

Appendix 3: Investment policy good practice ..... 73

Appendix 4: Indicative due diligence scopes ........................................................ 77
Appendix 5: Monitor scope and submissions........................................................ 98
Appendix 6: Indicative timeline and flow chart ..................................................... 112
Appendix 7: Investment adjustments..................................................................... 115
Appendix 8: Board certification.............................................................................. 118
Appendix 9: Pro forma medical director certification............................................. 120
Appendix 10: Board statements ............................................................................ 121
Appendix 11: Independent reviews and opinions.................................................. 125

## 1. Introduction

An increasing number of NHS foundation trusts may plan transactions (which in this guidance includes mergers, acquisitions, significant investments, joint ventures and divestments) as they seek to reorganise, or respond to changes in the financial climate or the local health economy. This increase is likely to be driven by a wider strategy of innovation and growth, or by efforts to address clinical and financial issues that might affect patient care. In response, we have updated our approach to these transactions so we can better support NHS foundation trusts as they work through this option.

In particular, we are asking any foundation trust contemplating a merger or acquisition to contact us at an early stage so we can offer early advice on their proposals. Monitor will help providers make sure that any transaction proposal works well for patients from both good governance and competition perspectives. By involving Monitor early, providers considering a transaction will have access to our advice on the extent to which transactions might raise competition issues, and our assessment of merger benefits.

To ensure that proposed transactions work well for patients, and that the risks involved do not unduly threaten a trust's sustainability, transactions are governed by a regulatory framework which Monitor, as sector regulator, oversees. Some transactions involving foundation trusts are also subject to competition review by the Competition and Markets Authority (CMA) to ensure that they do not have adverse effects on patients by reducing competition between providers. The CMA review process allows for both the competition effects and the benefits of transactions to be taken into account in order to determine what is in the overall best interests of patients.

Our updated transactions guidance outlines our new, streamlined approach with greater engagement at the three stages of the process.

While well planned and executed transactions, based on sound strategic thinking, can deliver benefits for patients, there will always be risks involved, particularly in significant transactions. Some transactions may also reduce choice and competition and reduce incentives for providers to respond to the needs of their patients and commissioners.

Well planned and executed mergers and acquisitions have the potential to create real value for patients, but they can also introduce significant risks to an NHS foundation trust's ability to meet its licence conditions. So while we acknowledge the important role mergers and acquisitions can have in enabling trusts to innovate and change, given the risks involved we expect NHS foundation trusts to proceed carefully when considering such transactions, particularly high risk investments outside the core competency of the organisation. This guide is part of our offer of support to help you do this.

We hope that this guide will clarify the rules and requirements surrounding transactions, particularly significant transactions. It should help NHS foundation trusts negotiate the processes involved as smoothly as possible, using only the necessary time and resources. This guide:

- explains how the regulatory framework applies to relevant transactions of various types and circumstances, and when and how the trusts should interact with us
- provides good practice guidance for NHS foundation trusts planning transactions, to help ensure they comply with the regulatory framework.

This guidance reflects recent changes in our approach to transactions by NHS foundation trusts. It also replaces the following documents:

- 'Risk evaluation for investment decisions by NHS foundation trusts' ('REID', February 2006)
- 'Applying for a merger involving an NHS foundation trust' (August 2006)
- 'Transforming community services: transactions guidance for NHS foundation trusts' (September 2010).

This transactions guidance is published in conjunction with detailed guidance on how Monitor will assess the benefits of mergers, and alongside separate guidance from the CMA on NHS mergers. In addition, Monitor and the CMA will publish a joint short guide to the competition review of NHS mergers for NHS managers.

## 1.1 Types of transactions included in this guide

In this guide we look at different types of transactions in different contexts. Any transaction that meets one or more of the categories below is a 'relevant' transaction:

- **A transaction that should be reported to us under the threshold set out in Appendix C to our 'Risk assessment framework'.** This includes most mergers or acquisitions as well as larger capital investment projects and property transactions, private finance initiative (PFI)-funded projects and potentially some major service contracts. Potential transactions should be reported to us if the ratio of the gross assets, income or consideration attributable to the transaction exceeds 10%[1] of the foundation trust's gross assets, income or total capital respectively. These will be classified by us as either 'material' or 'significant' according to the criteria set out in Appendix C.

- **A statutory transaction.** These are defined in sections 56 to 57A of the NHS Act 2006 (as amended by the 2012 Act). In essence, they are mergers or acquisitions involving one or more foundation trusts, separations and dissolutions of foundation trusts.

- **A transaction that could be reviewed by the CMA (under the Enterprise Act 2002).** This includes transactions resulting in two or more enterprises ceasing to be distinct (such as mergers, acquisitions, joint ventures, transfers of services, asset swaps and management agreements).

[1] 5% where the transaction involves assets outside the UK or outside the healthcare sector.

## 2. Regulatory framework governing transactions

Transactions involving NHS foundation trusts are subject to a regulatory framework designed to ensure that proposed transactions work well for patients. There are two main components of this regulatory framework: competition review of mergers by the CMA and risk assessment of transactions by Monitor.

We work closely with NHS foundation trusts contemplating a relevant transaction to help them navigate the regulatory issues by engaging at several points as a transaction develops. This is to ensure the proposals work in the best interests of patients, from both good governance and competition perspectives. **NHS foundation trusts contemplating a relevant transaction should therefore engage with us at an early stage** (that is, as soon as they believe there is a significant likelihood that they will want to undertake a relevant transaction). Further information on how to engage with us can be found in Section 3 of this guide.

### 2.1 The CMA's competition review of transactions

The CMA[2] reviews certain transactions involving one or more NHS foundation trusts (including mergers between an NHS foundation trust and an NHS trust) to determine whether the transaction is likely to have adverse effects on patients by reducing competition between providers.

Not all transactions will be reviewed by the CMA (the text box on the next page explains which transactions the CMA can review). A transaction will only require competition review if it may raise competition concerns (for example, because merging providers are located close to each other and provide similar services). If it is clear that a transaction will not raise competition concerns – perhaps because merging providers do not provide the same services and have no plans to do so (for example, one provides mental health services and the other provides standard acute services) and the transaction is unlikely to affect providers' incentives to improve quality – the transaction is unlikely to be reviewed.

We can help NHS foundation trusts understand whether their transaction is reviewable, and provide advice to help them decide whether to notify the CMA of the transaction. NHS foundation trusts can also approach the CMA for informal advice on whether the transaction is within its jurisdiction (seeking informal advice from the CMA will not automatically trigger a review of the transaction).

[2] The CMA has primary responsibility for reviewing mergers in all sectors of the economy, including health, in the UK.

### Which transactions can the CMA review?

Several types of transaction could trigger a merger review. These include mergers, acquisitions, joint ventures, transfers of services, asset swaps and management agreements.

For a transaction to be reviewable by the CMA, there must be a change in the level of control over all or part of an organisation.

An organisation may comprise any number of components, most commonly including the assets and records needed to carry on the business, and the employees working in the business, together with the benefit of existing contracts and/or goodwill.

*Thresholds*

To be reviewable a transaction must meet certain thresholds. Broadly, if the UK turnover of the acquired organisation exceeds £70 million, or if the merged organisation will supply or acquire at least 25 per cent of particular goods or services in a substantial part of the UK and the merger increases that share.

The CMA reviews a merger in two phases:

- In Phase 1 (which lasts up to 40 working days), if the CMA finds that a merger is likely to raise competition concerns, it will consider whether these adverse effects are outweighed by any benefits to patients or commissioners that would arise from the merger. We have a statutory duty to provide advice to the CMA on the relevant customer benefits[3] of mergers involving NHS foundation trusts. If the CMA finds that the benefits of the merger do not outweigh its adverse effects, it has a duty to refer the merger for an in-depth Phase 2 review.
- If a merger is not cleared and the review progresses to Phase 2 (which is generally limited to 24 weeks), the CMA conducts a detailed assessment of the competitive effects of the merger. If the CMA finds that a merger is likely to raise competition concerns, it must decide what remedy is appropriate. The CMA has the power to clear the merger, prohibit the merger or allow it to proceed subject to conditions.

[3] The term 'relevant customer benefit' is defined in Section 30 of the Enterprise Act 2002. In relation to the health sector, customer means a current or future user of healthcare services (often but not always referred to as a 'patient') or a commissioner.

Further information and guidance on when and how the CMA will undertake its analysis and how we assess the benefits of mergers, respectively, can be found in the following documents:

- 'Competition review of NHS mergers: A short guide for managers of NHS providers'
- 'Supporting NHS providers: guidance on merger benefits'

In addition to our statutory role providing advice to the CMA on the relevant customer benefits of mergers, we give NHS foundation trusts informal advice on whether transactions are likely to raise competition concerns and require competition review. As a general rule, NHS foundation trusts should engage with us at an early stage when planning transactions that could be reviewed by the CMA.

Section 3 explains the benefits of early engagement with us more fully, and when and how to engage.

## 2.2 Our risk assessment of transactions

Our view is that transactions can succeed if they enable a material improvement in performance, from releasing economies of scale, to rationalising the estate or the pattern of services, to sharing overheads, to generating a level of income that can support a higher investment than either organisation could individually support. To achieve this success, transactions must be based on robust strategic thinking and the sound analysis of clinical and other patient benefits, and they should be meticulously researched and planned.

We also believe that transactions are seldom the solution to inherent organisational weaknesses. To enable a transaction to succeed, organisations must first address any problems they face in the short term, whether these involve improving models of care, improving efficiency, tackling weak governance or other issues. In addition to our role in the competition review of transactions (described above) we have the following responsibilities in relation to transactions:

- reviewing transactions that we consider could significantly alter the risk profile of a foundation trust (part of our broader responsibilities to ensure foundation trusts comply with the governance and Continuity of Service conditions of their provider licence)
- a statutory role in approving those transactions which are defined as 'statutory transactions' (see 'Types of transactions included in this guide', page 7).

**Our reporting and review requirements**

As described above, we assess any transaction that meets the reporting and review thresholds set out in Appendix C to the ‘Risk assessment framework’. We look at the impact of the proposed transaction on the risk profile of the foundation trust concerned.

The level of scrutiny we will apply to any proposed transaction depends on its perceived level of inherent risk. We assess the level of risk on the criteria described in the ‘Thresholds for reporting and detailed review’ section of Appendix C to the ‘Risk assessment framework’ (see Appendix 1 of this document). We classify each proposed transaction or investment as ‘small’, ‘material’ or ‘significant’ – all those classified as significant will automatically receive a detailed review.

In addition, we have a statutory role in granting formal approval for ‘statutory transactions’.[4] This covers mergers or acquisitions involving one or more foundation trusts, and separations and dissolutions of foundation trusts.

NHS foundation trusts must satisfy our requirements before entering into any legally binding commitments related to transactions; these are summarised below.

- For **material** transactions we require a board certification (as laid out in Appendix 8) to be submitted to and agreed with us.
- For **significant** transactions we require the opportunity to do a detailed review which will result in a transaction risk rating. NHS foundation trusts should only proceed with the transaction if the risk rating is green or amber (the processes and basis of which are set out in Sections 4, 5 and 6)
- For **statutory** transactions, in order to grant the formal application we must be satisfied that the trust has undertaken the necessary steps to prepare for the transaction, including:
  - approval by the governors
  - gaining a green or amber transaction risk rating from us[5] (see Appendix 2).

[4] This role is set out in under the National Health Service Act 2006 (‘2006 act’) as amended by the 2012 act; what constitutes a statutory transaction is defined in sections 56 to 57A of the 2006 act as amended by the 2012 act.

[5] See Annex II to Appendix C of the ‘Risk assessment framework’ (included here as Appendix 2).

In practice, our precise approach to risk assessing a significant transaction will be shaped by each transaction's specific profile and circumstances, and so may depart from some aspects of the scope and processes set out in this guide. As a basic rule most of the guidance on our risk assessment process in this document is aimed at foundation trusts considering a **significant acquisition or merger**, who are likely to find the scope and processes set out in Sections 3, 4 and 5, and Appendix 5, most applicable. Our approach to risk assessing **other types of significant transaction** may be more varied or further adapted in proportion to specific risks and circumstances, as described in Section 5.

**Good practice guidance**

NHS foundation trusts are strongly encouraged to consider the good practice processes described in this guide even for transactions and investments that do not trigger our review or reporting thresholds (in conjunction with independent professional advice where appropriate).

While following good practice guidance cannot guarantee a successful investment, foundation trusts that adhere to our advice can expect to reduce their chance of making an imprudent or inappropriate investment.

Investment risk remains solely with NHS foundation trust and nothing in this document should be construed as professional advice. Appendix 3 of this document sets out good practice guidance on governance and policy for all material investments.

# 3. Early engagement with Monitor

This section describes the initial stages of our engagement with NHS foundation trusts planning a relevant transaction. It primarily focuses on the rationale for the transaction, how it benefits patients and the potential competition issues.

Some aspects of the regulatory and legal framework will apply to most transactions but the level of scrutiny and review will depend on the circumstances of each transaction. For example, some transactions that meet the threshold for a detailed review by us may also cause concern in terms of competition and be reviewable by the CMA; others may raise competition issues but not meet our threshold for a detailed review.

Engaging early with us will help NHS foundation trusts ensure that any proposed transaction works well for patients from both good governance and competition perspectives. Transactions should only progress where the evidence that they are in the overall interest of patients is very clearly established.

Our early-stage scrutiny and advice will help to ensure that the underlying strategy for any transaction is sound and well considered.

Our advice and support will equip trusts with a better understanding of the regulatory issues, meaning they can make better informed decisions on how to proceed. In practical terms, we can scrutinise and challenge the strategic rationale for the transaction and provide informal support as described in this section.

Where a trust decides to formally notify the CMA of a transaction, our early advice should mean the trust is better prepared for the CMA review process and that this proceeds swiftly.

## 3.1 Stages of engagement with us

There are two main stages to our early, informal (that is, not binding) engagement with NHS foundation trusts contemplating relevant transactions:

- stage 1 is when an NHS foundation trust is evaluating its strategic options to proceed
- stage 2 is when an NHS foundation trust has identified its preferred option and developed an outline business case.

### Stage 1: Strategic options case

A foundation trust will find our engagement most effective if it starts talking to us when it is considering its strategic options and a specific transaction is emerging as the preferred choice.

First contact is usually with a senior regional manager or director in our provider regulation team. They will co-ordinate initial assessments to:

- determine if the proposed transaction would meet our thresholds for a detailed review
- help the trust understand whether the transaction is reviewable by the CMA.

Our team will also co-ordinate any informal discussions and meetings with the trust as we assess the initial strategic options.

At this point, we provide informal support and advice, with two objectives:

1. **Making sure the strategy behind a transaction is sound and well considered.** This is important because a strong underlying strategy will help the trust show how the potential transaction will benefit patients. At this stage we will pose key questions such as:

   - What challenges faced by the trust is the strategy seeking to address?
   - What other options were considered for addressing those challenges?
   - What was the basis for selecting the preferred approach?

   We will provide feedback on how robustly the trust has answered these questions, but how to proceed remains the trust's decision.

2. **Highlighting the type of competition issues that might arise.** We will advise whether the transaction might give rise to any competition issues and what the trust can do to determine more precisely the nature and extent of those. We will also offer advice on the trust's approach to assessing relevant customer benefits.

In addition to providing informal advice on the above matters, at stage 1 we consider what level of risk assessment review (if any) the transaction will require.

If our initial assessment finds that the transaction is 'material',[6] the trust's regular relationship team will liaise with the trust about the board certification required before the transaction is agreed (see Appendix 8). If we find that the transaction is 'significant' and will therefore require a detailed review, we will allocate resource from the provider appraisal team which will liaise with the trust, in the first instance, to agree the scope of work that the detailed review will require in stages 2 and 3. Early engagement with us will also help us prioritise and plan our resources to meet the requirements of the transaction timetable.

**Stage 2: Outline business case**

Once a trust has developed an outline business case (OBC) and identified its preferred option we will perform a further review of the case before the trust commits significant resources to the transaction.

At this stage, the trust should share its assessment of any competition issues with us. If the transaction is reviewable by the CMA, the trust may wish to provide us with a draft submission on the relevant customer benefits of the transaction. Appendix 1 to 'Supporting NHS providers: Guidance on merger benefits' provides guidance on the content of benefits submissions.

For significant transactions the trust may also be asked to submit a long-term financial model (LTFM) and an outline post-transaction integration plan (PTIP) as well as the results of any due diligence undertaken to date. Appendix 5B provides guidance on the content of these submissions.

Using the information the trust gives us, at this stage our focus is on:

- further reviewing and challenging the strategic rationale for the transaction, and, for significant transactions, conducting a preliminary review of the financial case and the trust's readiness for the transaction: the main purpose here is to identify any major problems that might prevent the transaction proceeding before significant resources have been committed
- reviewing the trust's assessment of any competition issues they foresee and comparing it with our assessment
- providing feedback on the trust's draft submission on relevant customer benefits, including on its completeness.

These activities will culminate in a meeting between us and the trust board, after which we will write to the trust to set out:

[6] According to the threshold described in Appendix C of the 'Risk assessment framework'.

- any strategic business issues that we feel need further attention
- whether the proposed transaction is likely to give rise to any competition issues and, if necessary, our suggestions for further work to examine them
- what, if any, further work is needed to complete the analysis and presentation of relevant customer benefits.

If the transaction is significant, the letter will highlight any risks identified in the outline business case, plus any recommendations to make the next stage – the full business case (FBC) review – more efficient. Once the board has received this advice, it is for the trust to decide whether or not to proceed with the proposed transaction and whether or not to notify the CMA of the transaction.[7]

We expect that in most cases a transaction will only proceed past this stage if it is unlikely to raise any competition issues, or if the likely adverse effects on patients are clearly outweighed by the benefits of the transaction.

Monitor can help trusts understand whether a transaction is reviewable by the CMA. Trusts can also approach the CMA for informal advice on jurisdictional, procedural and substantive questions on UK merger review and how it might affect the transaction.

If the CMA reviews a proposed transaction, we are required to advise it on the relevant customer benefits of the transaction. We expect that the trust will provide their final submission on relevant customer benefits and any additional information requested by us before submitting a merger notice to the CMA.[8] Our approach to assessing relevant customer benefits is explained in '<u>Supporting NHS providers: Guidance on merger benefits</u>'. Where appropriate, we would also share our views on the potential competition issues with the CMA.

Section 4 deals with these stages of engagement and the next stages in more detail.

[7] Trusts are not required to notify the CMA of a proposed transaction; it is for the trust to decide whether to do so. However, the CMA can initiate an own-initiative review (for example, following a well-reasoned complaint) up to four months following completion of the transaction. The CMA has four months from the transaction being made public or being completed (whichever is the later) to decide whether or not to launch an in-depth assessment of the transaction.
[8] The CMA's timetable for its review of the transaction will start when the CMA informs the trusts that the merger notice form is complete.

Further information and guidance on when and how the CMA will undertake its analysis and how we assess the benefits of mergers can be found in both 'Competition review of NHS mergers: A short guide for managers of NHS providers' and 'Supporting NHS providers: Guidance on merger benefits'.

# 4. Framework for significant mergers and acquisitions

This section sets out an illustrative framework for significant mergers and acquisitions, summarised in the table below. It focuses primarily on the processes and requirements of our risk assessment process. It incorporates the early stage engagement focusing on strategy, patient benefits and competition issues as described in Section 3. It also includes good practice in terms of the processes and procedures for the trust and Monitor to follow during the main stages of a significant acquisition or merger.

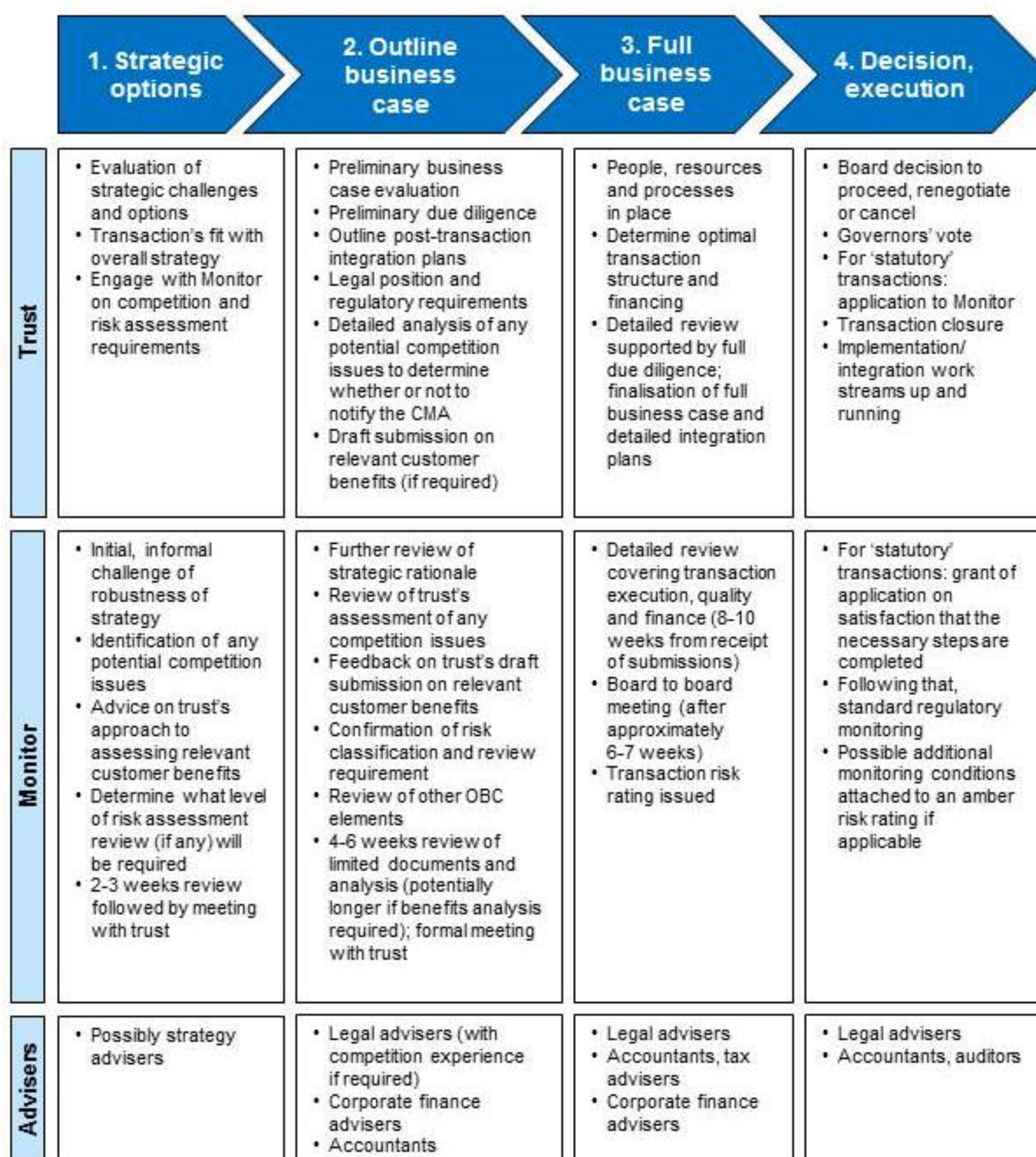
## 4.1 Overview

Each transaction will have a unique profile and be considered as an individual case, but the general framework set out here can help trusts to plan and evaluate their significant mergers and acquisitions.

The framework below illustrates good practice in terms of processes and procedures for the trust and Monitor to follow during the main stages of a significant acquisition or merger. It incorporates the early stage engagement described earlier (aspects of which may apply to all transactions) and up to the risk assessment process. A summary of the framework is followed by more detailed illustrations of each of the four main stages.

Please note: Appendix 3 contains further guidance on good practice for the governance of investment more generally.

## Figure 1: Framework for significant mergers and acquisitions



| | 1. Strategic options | 2. Outline business case | 3. Full business case | 4. Decision, execution |
|---|---|---|---|---|
| Trust | • Evaluation of strategic challenges and options<br>• Transaction's fit with overall strategy<br>• Engage with Monitor on competition and risk assessment requirements | • Preliminary business case evaluation<br>• Preliminary due diligence<br>• Outline post-transaction integration plans<br>• Legal position and regulatory requirements<br>• Detailed analysis of any potential competition issues to determine whether or not to notify the CMA<br>• Draft submission on relevant customer benefits (if required) | • People, resources and processes in place<br>• Determine optimal transaction structure and financing<br>• Detailed review supported by full due diligence; finalisation of full business case and detailed integration plans | • Board decision to proceed, renegotiate or cancel<br>• Governors' vote<br>• For 'statutory' transactions: application to Monitor<br>• Transaction closure<br>• Implementation/ integration work streams up and running |
| Monitor | • Initial, informal challenge of robustness of strategy<br>• Identification of any potential competition issues<br>• Advice on trust's approach to assessing relevant customer benefits<br>• Determine what level of risk assessment review (if any) will be required<br>• 2-3 weeks review followed by meeting with trust | • Further review of strategic rationale<br>• Review of trust's assessment of any competition issues<br>• Feedback on trust's draft submission on relevant customer benefits<br>• Confirmation of risk classification and review requirement<br>• Review of other OBC elements<br>• 4-6 weeks review of limited documents and analysis (potentially longer if benefits analysis required); formal meeting with trust | • Detailed review covering transaction execution, quality and finance (8-10 weeks from receipt of submissions)<br>• Board to board meeting (after approximately 6-7 weeks)<br>• Transaction risk rating issued | • For 'statutory' transactions: grant of application on satisfaction that the necessary steps are completed<br>• Following that, standard regulatory monitoring<br>• Possible additional monitoring conditions attached to an amber risk rating if applicable |
| Advisers | • Possibly strategy advisers | • Legal advisers (with competition experience if required)<br>• Corporate finance advisers<br>• Accountants | • Legal advisers<br>• Accountants, tax advisers<br>• Corporate finance advisers | • Legal advisers<br>• Accountants, auditors |

This indicative framework demonstrates one of the benefits of early engagement with us: the opportunity to adapt and specify the procedures for the later stages according to individual circumstances. In particular, the need for and scope of an outline business case stage (stage 2) will vary according to the nature of the transaction. For example, stage 2 may be suitable when the trust board needs to resolve or clarify an aspect of the transaction (such as, for example, a CMA review) before committing the significant resources typically required for the full business case and decision and execution stages (stages 3 and 4).

Some transactions may not require a separate outline business case stage.

Appendix 5 includes examples of how our scope of work and the required submissions for a significant merger or acquisition may apply over the different transaction stages.

## 4.2 Stage 1: Strategic options case

**Figure 2: Stage 1: strategic options case**

**Stage 1: Strategic options case**

**Key trust considerations**

- Foundation trust's current strategy, strategic issues and challenges
- Strategic options analysis and evaluation:
  - Understanding the challenges faced by the trust
  - Basis/rationale for proposed transaction as preferred option (strategic fit, execution risk, affordability, risk-return, etc.)
  - Clear and comprehensive understanding of alternative opportunities and options
- Proposed transaction's fit with the underlying strategy
- Proposed transaction's fit with the current dynamics and forces at work in local health economy
- Alignment of strategy/goals of any other entities involved in the transaction with those of the trust
- Impact of proposed transaction on:
  - Patients
  - Trust
  - Local health economy
- Consider and engage with Monitor on the following matters:
  - What level of risk assessment review is required
  - Whether the transaction is reviewable by the CMA
  - Potential competition issues
  - Approach to assessing relevant customer benefits

**Monitor**

| Scope | Interaction |
|---|---|
| • Which challenges faced by the trust is the strategy seeking to address?<br>• What other options were considered for addressing those challenges?<br>• What was the basis for selecting the proposed transaction approach?<br>• Identification of any potential competition issues<br>• Advice on trust's approach to assessing relevant customer benefits<br>• Assessment of whether transaction is likely to be significant and require a detailed review:<br>- if significant, consider content and timing of detailed review scope | **Submissions**<br>• Summary of strategic rationale<br>• Strategic options analysis<br>• Any other analysis considered by the trust's board in the strategic options evaluation<br>**Timing, format, output**<br>• 2-3 weeks review of above submissions followed by an executive-level meeting in which the strategic basis of the proposed transaction and how it benefits patients are presented and discussed<br>• Initial views, feedback and advice provided at meeting<br>• If significant: trust provided with a draft detailed review scope for stages 2 and 3 if appropriate |

At stage 1, a trust may be asked to submit to Monitor the main documents it has already prepared for internal review. These should include:

- the strategic rationale for the transaction
- the strategic options analysis
- other analysis or information considered in the trust board's evaluation.

A trust will not be expected to commission any additional work to support this stage of our review.

After we have reviewed the submissions, we will request a meeting with selected trust board members. The format and agenda of this meeting, and its attendees, will vary according to individual circumstances, but normally the trust will discuss its strategic options evaluation and we will seek to understand the transaction's rationale in more detail to provide initial views and feedback.

If after the meeting we have concerns about the strategic rationale or identify potential competition issues that may require further investigation we will inform the trust and suggest what the trust can do to determine more precisely the nature and extent of the competition issues.

## 4.3 Stage 2: Outline business case

**Figure 3: Stage 2: Outline business case**

**Stage 2: Outline business case**

**Key trust considerations**

**Outline business case evaluation**
- Analysis of potential competition issues
- Draft submission on relevant customer benefits (if required)
- Strategic rationale and benefits to patients
- Engagement with, and views of, commissioners and other key stakeholders
- Timetable and resources for full business case review
- Preliminary/high level due diligence (commercial, financial, legal/regulatory) including:
  - Local health economy
  - Transaction costs and benefits (clinical, other patient, costs, revenues)
- Board's capability, capacity, experience to deliver transaction, including:
  - skills/capability gaps; changes/additions required to post transaction governance and management
- Preliminary transaction financials (LTFM), their key assumptions (activity, efficiency, CIPs, synergies, integration costs, funding)
- Identification of skills and expertise critical for transaction success
- Compliance with national access and outcomes targets
- Key transaction success factors, risks and mitigations
- Plans for dedicated resource to manage the execution and integration
- Key transaction terms expected/required

**Legal and regulatory requirements**
- Legal ability to undertake transaction
- Plans for regulatory processes and approvals

**Decision to proceed to full business case**
- Decision on whether or not to notify the CMA of proposed transaction
- Transaction affordability

**Monitor**

| Scope | Interaction |
|---|---|
| • Further review and challenge of the transaction's strategic rationale<br>• Review of trust's assessment of potential competition issues<br>• Feedback on trust's draft submission on relevant customer benefits<br>• Assessment of key financial assumptions in preliminary LTFM, and trust's capability, capacity and preparedness for the proposed transaction (see Appendix 5A for further illustrative detail) | **Key submissions**<br>• Finalised strategic options analysis and rationale for transaction<br>• Analysis of, and evidence of engagement with, commissioners and other key stakeholders<br>• Preliminary financials (LTFM), outline integration plan, planned transaction resources and governance, key transaction risks and mitigations (see Appendix 5 for further illustrative detail)<br>• Assessment of competition issues<br>• Draft submission on relevant customer benefits (if required)<br><br>**Timing, format, output**<br>• Typically 4-6 weeks review of submissions, including some meetings on site<br>• Patient benefits analysis if required (timing variable)<br>• Formal meeting between trust board and Monitor<br>• Letter to trust setting out any outstanding strategic issues, views on possible competition issues and relevant patient benefits |

At stage 2, the outline business case stage, both trusts and Monitor have the opportunity to determine whether the case for a proposed transaction is robust and workable enough to proceed to stage 3 (the full business case stage, which typically

requires significant resources). Stage 2 will inform the trust's decision on whether or not to notify the CMA of the transaction.

For significant mergers and acquisitions,[9] the scope of stage 2 varies according to circumstances. The figure above summarises the scope and activity during an illustrative, relatively extensive, outline business case stage. In this scenario our risk assessment team requests submissions, typically including the finalised strategic options analysis, draft long-term financial model (LTFM) which sets out the business case's financial case (the base case), preliminary post-transaction integration plan (PTIP) and the main outline business case elements (see Appendix 5B for further illustrative detail on submissions).

Our outline business case review typically takes between four and six weeks (potentially longer if an analysis of relevant customer benefits is required) and involves a number of meetings and interviews at the trust's premises, as well as separate discussions with the Care Quality Commission (CQC) and key commissioners. If the other party is an NHS trust we will also liaise with the NHS Trust Development Authority (TDA) during this phase to co-ordinate our approach and, if appropriate, share our analysis (see Section 4.6). In our review of the LTFM we look at the main assumptions underpinning the trust's base case (such as activity, efficiency, cost improvement plans [CIPs], synergies) but will not normally include a full analysis of sensitivities and mitigations. Our review at this stage will conclude with a formal meeting between us and selected members of the trust's board.

We will write to the trust identifying: any strategic business issues we feel need further attention; our view on whether the transaction is likely to give rise to any competition issues and, if necessary, our suggestions on where further work might be focused to examine these; and our view on what, if any, further work is needed to complete the analysis and presentation of relevant customer benefits.

At this point, it is the trust's decision whether to proceed with the proposed transaction and whether to notify the CMA of it. We expect transactions to proceed only if:

- they do not raise competition issues, or the adverse effects are outweighed by the benefits the merger will deliver to patients and/or commissioners
- the trust board is assured that any other issues raised by the outline business case review that could undermine the business case can be addressed.

[9] As decided based on the threshold set out in Appendix C of our 'Risk assessment framework'.

If the CMA reviews the merger,[10] we would give it our:

- advice on the relevant customer benefits of the transaction
- views on the potential competition issues where appropriate.

In these cases, the preparatory work done by the trust during its early stage engagement with us should mean that the CMA can conduct its review quickly. Our full business case review (stage 3) is unlikely to start until any CMA review has finished.

[10] This may happen even if the trust does not notify it: the CMA can initiate an own-initiative review (for example, following a well-reasoned complaint) up to four months following completion of the transaction. The CMA has four months from the transaction being made public or being completed (whichever is the later) to decide whether or not to launch an in-depth assessment of the transaction.

## 4.4 Stage 3: Full business case

**Figure 4: Full business case**

### Stage 3: Full business case

#### Key trust considerations

**Full business case evaluation**
- Finalised FBC including final post transaction integration plan (PTIP), which includes timetable, resources, leadership, budget, accountabilities
- Full due diligence (commercial, financial, clinical, operational, workforce, IT, estate, legal/regulatory)
- Full finalised LTFM, including finalised financing, and other key assumptions and downside risks and mitigations agreed
- Impact of transaction on liquidity and capital servicing ratios
- Transaction risk identification/collation, quantification, management and mitigation
- Cultural/behavioural alignment
- Managing and resourcing information requirements of external & internal due diligence and Monitor's detailed review
- Sufficiency of input from line/operational management to FBC, PTIP and external advice and due diligence
- Contingency plans (eg for key personnel loss)
- Communication plan

**Structure and finance**
- Evaluation of structuring/finance options
- Optimal financing structures/sources

**Deal process, negotiation**
- Heads of Terms
- Transaction Agreement
- Relevant staff, assets and liabilities to transfer

**Finalising the decision**
- Assessment of whether FBC stage has confirmed or changed the transaction's status as preferred strategic option
  - Check for any remaining information gaps
- Trust properly prepared for Day 1 and integration challenges

#### Monitor

**Scope**

If transaction is significant, a detailed review scope to be completed, covering, where relevant:

**Strategy**
- Robustness of transaction's strategic rationale (risk based update of work undertaken at stages 1 and 2 if required)

**Transaction execution**
- Review of all external and internal due diligence
- Board capability; management capacity
- Identification, quantification, mitigation and ongoing management of transaction's risks
- Robustness and comprehensiveness of the PTIP:
  - Benefits realisation plans
  - Transaction governance, lines of responsibility/ accountability, delivery milestones
  - Dedicated integration resource
  - Skills/capability gaps; changes/additions required to post-transaction governance and management
- Compliance with all regulatory and legal requirements

**Quality**
- Review of independent report and opinions on quality governance arrangements
- CQC views

**Finance**
- Financial viability and sustainability post transaction (including sensitivity analysis and review of mitigations
- Review of independent reports and opinions on working capital and financial reporting procedures
- See Section 6 and Appendix 5A for further detail

**Interaction**

**Key submissions (significant transactions)**
- Finalised LTFM; base and downside cases
- Due diligence reports (financial, legal, clinical, estate, workforce, IT)
- Full transaction risk assessment and framework for ongoing risk management and mitigation
- Full PTIP, including detailed project timeline, transaction governance, post-transaction governance, integration/PMO team, benefits realisation
- Board and medical director certifications (to be made by both parties jointly in the case of a merger)
- Board statements, memoranda and independent opinions on PTIP, quality governance, working capital, financial reporting procedures (to be made by both parties jointly in the case of a merger)
- See Appendix 5 for further detail

**Timing, format (significant transactions)**
- Typically 8-10 weeks for review of submissions, including various meetings on site
- Board to board meeting after approximately 6-7 weeks
- Transaction risk rating formally notified in a letter to the board

Stage 3 – our full business case review – usually begins shortly after:

- the main due diligence workstreams have been completed
- the funding and the heads of terms have been agreed
- the full business case documentation, including the LTFM, has been approved by the trust's board.

When a trust decides to proceed to the full business case stage of the evaluation, it will initiate several planning and evaluation workstreams, including the main due diligence reviews. The full business case documentation, LTFM and other submissions required for our detailed review are normally finalised once all the due diligence workstreams have finished and reported to the trust's board; they are given to us once the board has reviewed and approved them.

The scope of and submissions for our detailed review will have been outlined at stage 1 and agreed with the trust by the end of stage 2. We will agree with the trust a detailed plan and timetable for our stage 3 detailed review work, including the agreed content and timing of required submissions. It is important that submissions from the trust are made according to the agreed schedule so that all parties can keep to the agreed timetable. All significant transactions (including mergers and acquisitions) will be subject to a detailed review at stage 3. Our review will focus on the key questions listed on pages 37 to 54, with the work undertaken at stage 3 reflecting (and where necessary updating) the extent of work undertaken at stages 1 and 2 and their findings.

In stage 3, our risk assessment team usually spends a few days at the trust holding meetings and interviews. The team's project manager will advise the trust who they wish to interview and will agree a mutually convenient meeting schedule before the detailed review process gets underway. Our team will normally need to interview (among others):

- the board members
- the finance team
- clinical directors
- the integration committee or project management team responsible for the implementation and integration plans.

We are aware that many other demands also weigh on a trust management team's time and resources at this stage in a transaction. Our project manager will work closely with the appropriate manager at the trust to agree a timetable for submissions and meetings that is feasible, compatible with the rest of the trust's timetable and plans, and meets the requirements for the appropriate transaction risk rating.

**Next steps at stage 3**

*Interviewing important stakeholders*

As well as our meetings at the trust, our team will also discuss aspects of the trust and the proposed transaction with some external parties, usually including (but not limited to) CQC, local clinical commissioning groups (CCGs), internal auditors, external auditors and any funding providers.

*Long-term financial model*

As part of our detailed review of the full business case, we examine the trust's base case LTFM and present an adjusted case (assessor case) that tests the assumptions. It typically incorporates several generic sensitivities (reflecting our annually published views of cost inflation and efficiency) and any specifically identified sensitivities. This assessor case is the main basis for our assessment of the trust's post-transaction financial viability and sustainability.

We also present a downside case (which adjusts the trust's base case for a reasonable set of downside risks) to help assess whether the trust has effectively mitigated the transaction's key risks, with articulated plans aimed at the key risks and with the capability to deliver these plans.

*Review of third-party reports*

Our detailed review at stage 3 often runs in parallel with those of independent accountants or experts appointed by the trust to provide independent opinions (see Appendix 11). Our risk assessment team will want to review and discuss the findings of the independent accountants and any other third-party specialists from their due diligence and their reviews of working capital financial reporting procedures, the post-transaction integration plan and quality governance. These reports are required in draft form in advance of the board-to-board meeting (see below) and must be finalised and approved before we assign a transaction risk rating.

*Board-to-board meeting*

The board-to-board meeting between the trust board and the Monitor board takes place after we have largely completed our detailed review, around two months after we receive the trust's full business case submissions. We will usually require the full board of the trust (or in the case of a merger the steering group or 'shadow board')[11] to attend. The meeting will usually involve a short presentation by the trust followed by questions from our board on the areas identified as requiring challenge by the risk assessment team's detailed review. We will advise the trust of the format and key areas for discussion before the meeting.

[11] 'Shadow board' is defined in section 7, where we look at the transaction-related roles and responsibilities of directors and governors.

*Transaction risk rating*

After the board-to-board meeting our risk assessment team will finalise its papers to present at a decision meeting, at which a decision can be made to approve the issue of a transaction risk rating (green, amber or red). The methodology behind the transaction risk rating is explained more fully in Section 6; the outcomes are summarised below.

**Figure 5: Monitor's transaction risk rating categories**

| Risk rating | Finding |
|---|---|
| Green | No material concerns have arisen from Monitor's detailed review. |
| Amber | There are some significant issues that the trust will need to take action to address and that may require ongoing regulatory monitoring. However, none of the issues is sufficiently serious to stop or delay the transaction. |
| Red | Monitor considers the issues arising from the review to be sufficiently serious to delay the transaction. This will allow time for the trust to try to address the risks identified by restructuring the proposal. If this is not considered possible, we will use our regulatory powers to stop the transaction if required. |

## 4.5 Stage 4: Agreement and completion

**Figure 6: Agreement and completion**

**Stage 4: Agreement, completion**

**Key trust considerations**

**Decision, closure**
- Agree, re-negotiate, or withdraw
- Finalised transaction agreement, including agreed:
  - value, funding
  - working capital arrangements
  - transition arrangements
  - dispute resolution process
  - exit / break options
- Any material changes to agreements, assumptions or new information to be provided to Monitor and any changes agreed prior to closure
- Investment/transaction committee and board review and approval process
- Governors' vote
- Any other relevant stakeholder approval
- Internal and external communication

**Execution, implementation**
- Transitional arrangements and processes to completion/handover
- PTIP and integration management team/PMO and budgets ready in place
- Integration milestones and success measures defined and measurement frameworks in place:
  - metrics
  - data collection and presentation systems
  - frequency, review, accountability
- Post-transaction performance management
- Post-transaction risk management

**Monitor**

| Scope | Interaction |
| --- | --- |
| Propose and agree format, scope and timeframe of any enhanced monitoring attached to an amber transaction risk rating<br><br>For statutory transactions: review of the necessary preparatory steps for grant of application. If application granted, issue documents necessary to complete the transaction | **Key submissions**<br>• Final version of Business Transfer Agreement and any separate funding agreements<br>• Statutory transactions: formal application to Monitor, including proposed new/revised constitution (if applicable; see Appendix 2)<br><br>**Timing, format**<br>• Statutory transactions: after issue of Monitor transaction risk rating and governors' vote: receipt of formal application and grant thereof upon satisfaction that the necessary steps to prepare for the transaction have been completed (see Appendix 2 for details) |

A trust can proceed to this stage 4 once we have issued it with an amber or green transaction risk rating. This stage will typically involve finalising the transaction agreement and the trust board's final approval of the transaction before moving to completion. If the transaction is either a statutory transaction (see Section 1.2 for a definition) or meets the definition of a significant transaction given in the trust's constitution,[12] a formal vote of the council of governors will be required at this point to approve the transaction (see Section 7.3).

[12] Which may differ from our thresholds for significance (see Appendix 1).

**Statutory transaction procedures**

For a statutory transaction, after the governors' vote the trust must submit (jointly with the target trust[13]) a formal application to us, which we will approve as long as we are satisfied the necessary steps have been completed.

See Annex II to Appendix C of the 'Risk assessment framework' for guidance on requirements for statutory transactions (reproduced in Appendix 2 of this document); see also Section 7 of this document for guidance on the steps and procedures for directors and governors involved in completing statutory mergers and acquisitions.

**Enhanced monitoring**

If we issue an amber transaction risk rating, during stage 4 we may also propose the format, content and timeframe of enhanced post-transaction monitoring.

**Transitional arrangements and post-completion plans**

The completion element of stage 4 may include implementing any agreed transitional management arrangements for the period before completion (such as an interim board), and the activities and work streams in the integration plans needed to achieve objectives immediately after completion.

## 4.6 Interaction with NHS Trust Development Authority assurance processes

Where an NHS foundation trust is seeking to merge with or acquire an NHS trust, TDA will normally have a role as vendor.[14] In this instance, TDA's responsibilities include:

- confirming to the Secretary of State that assurances are in place for various aspects of the transaction (including quality, sustainability and taxpayers' value for money)
- working with the NHS trust to ensure it has the necessary support to navigate the transaction processes, and to maintain quality, operational and financial performance, board focus and risk management.

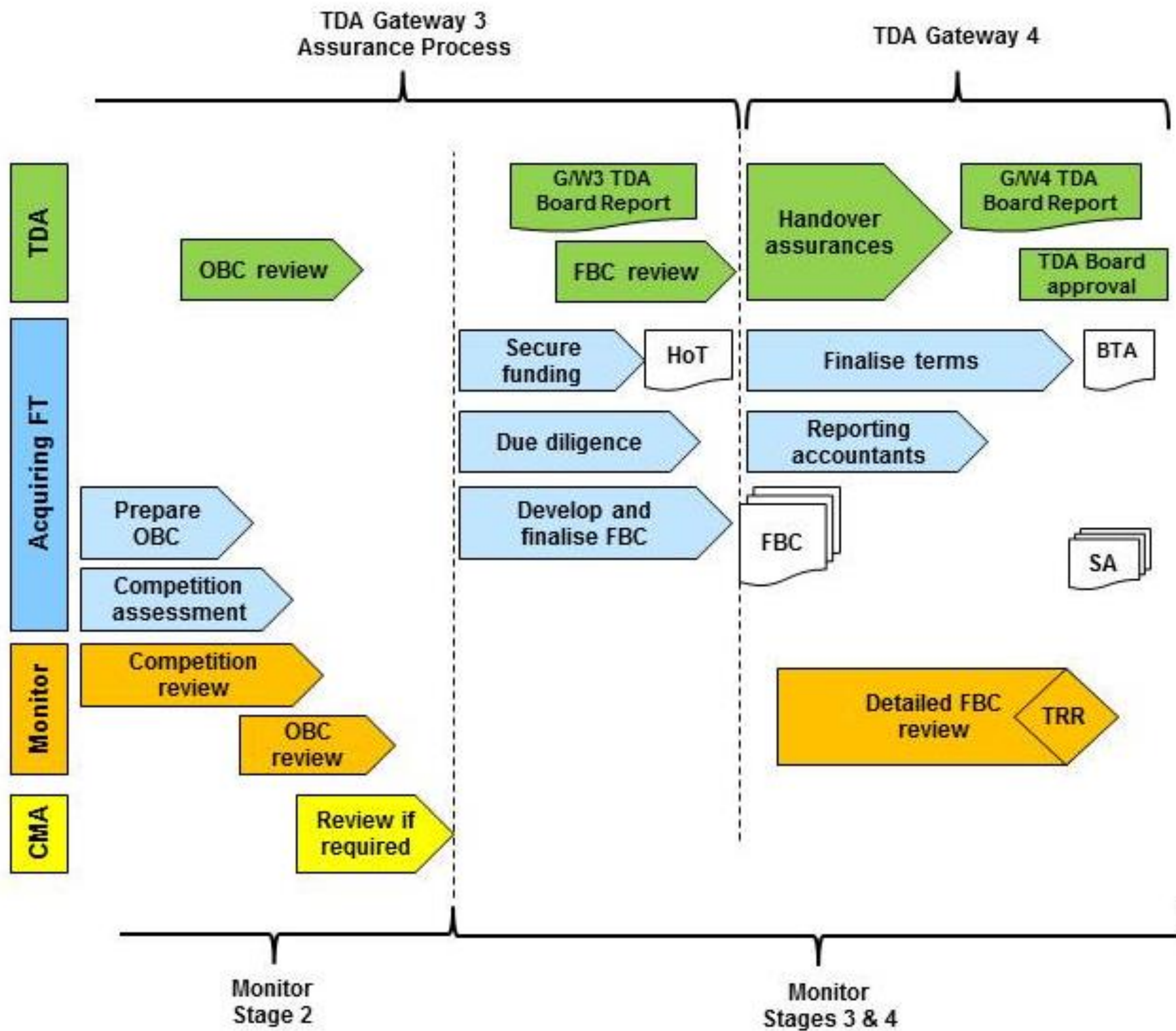
This means the NHS trust and the transaction will be subject to TDA's support and assurance processes. These processes apply during the later stages of TDA's transaction process (gateways 3 and 4), at the same time as Monitor's review stages 2, 3 and 4 (see figure below).

When TDA acts as vendor, its assurance process includes reviewing and commenting on the acquiring trust's outline business case and full business case before they are finalised and submitted to Monitor. The Monitor and TDA teams will

[13] Meaning the trust that will be acquired.
[14] Further detail can be found in TDA's '2014/15 Accountability framework for NHS trust boards'.

liaise during this stage of the process (TDA's gateway 3) and may share information and co-ordinate their review approaches to facilitate the process, and remove any unnecessary duplication

**Figure 7: Parallel timing of the processes in TDA's gateways 3 and 4 with Monitor's stages 2, 3 and 4**




**Glossary**

BTA – Business transfer agreement
FBC – Full business case
HoT – Heads of terms
OBC – Outline business case
SA – Statutory application
TRR – Transaction risk rating

## 5. Framework for other significant transactions

### 5.1 Overview

As explained in Section 4.1, each transaction has a unique profile that affects the level of review necessary to risk assess it. The framework set out in Section 4 is helpful for planning and evaluating significant mergers and acquisitions but other transactions that meet our threshold for being significant are likely to be treated differently.

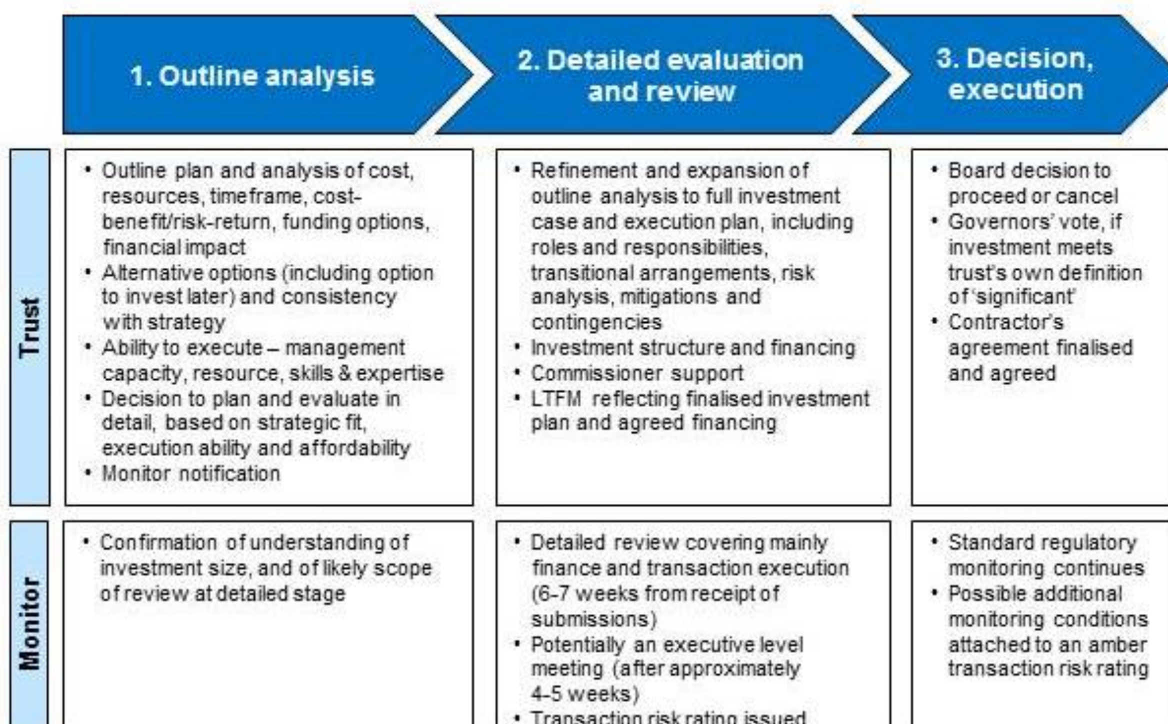
Significant capital or property investments and significant new service contracts are less likely to require review at stage 1 (earlier strategic options) or stage 2 (outline business case). The scope of Monitor's detailed review at stage 3 (full business case) may also be significantly smaller than for the review of a merger or acquisition, to be proportionate to the risks involved (see Section 6.3). The exception would be a significant joint venture, which may involve a degree of review at the earlier stages, depending on the relative size and risk profile.

Transactions that are not mergers or acquisitions (for example, joint ventures) may be reviewable by the CMA. It is therefore important for trusts to consider whether the transaction involves a change of control and meets the thresholds detailed on page 9.

**Significant (non-PFI) capital investments**

The figure below illustrates a process that may be appropriate for a significant (non-PFI) capital investment project.

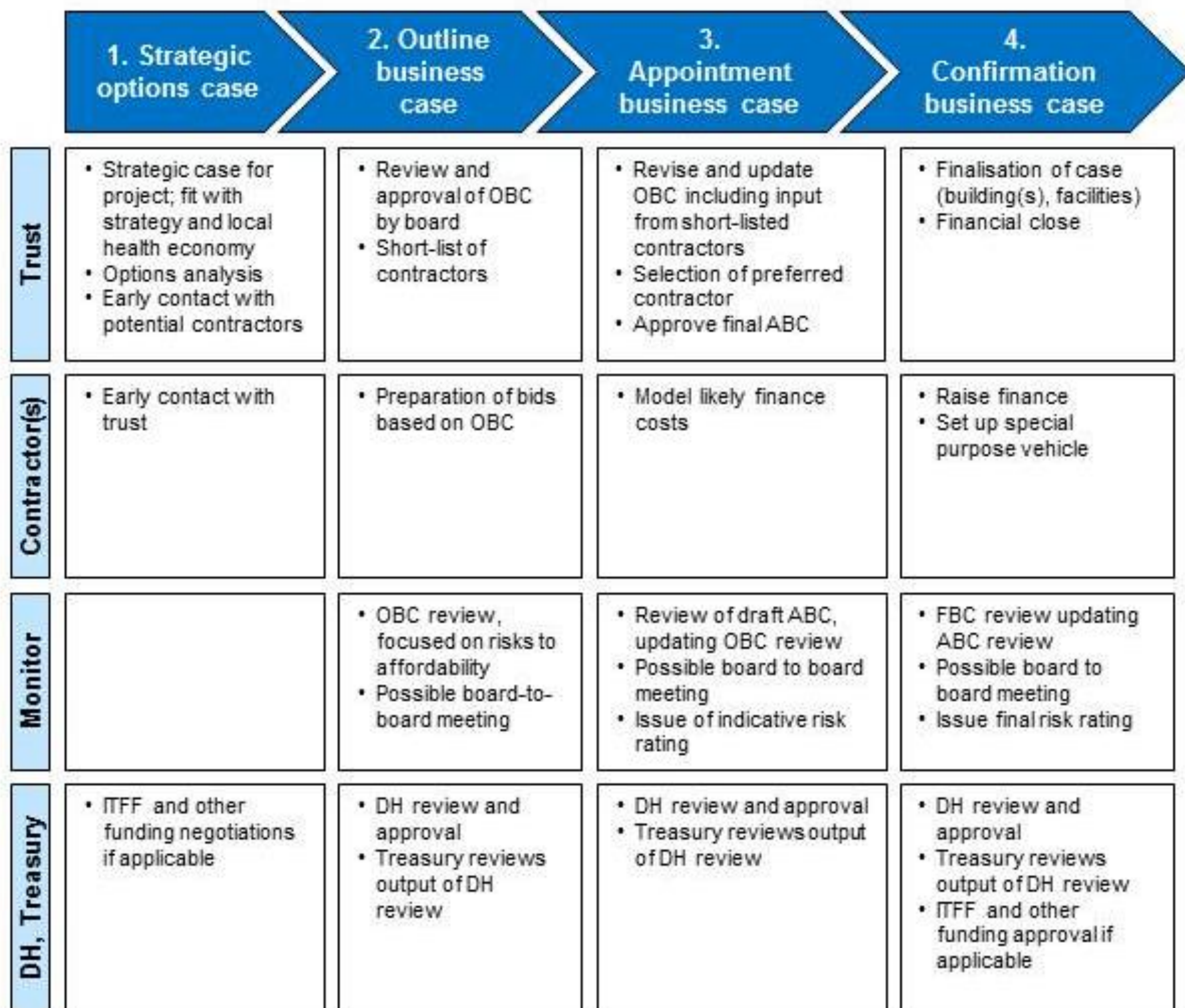
**Figure 8: Process for significant (non-PFI) capital investments**



## 5.2 PFI projects

PFI projects are typically substantial investments by trusts, involving financial commitments over many years and very likely to be classified as significant transactions under the thresholds set out in Appendix C of the 'Risk assessment framework' (see Appendix 1 of this document). The procurement process of selecting a contractor can be lengthy and involve significant cost. We summarise the process that trusts typically follow for capital investment projects funded by PFI in the figure below. This process is subject to review and potential change, and this section may be updated accordingly.

**Figure 9: Process for PFI projects**



### Outline business case

Our role in the financial review of a PFI scheme usually begins at the outline business case stage (stage 2), where we will undertake a preliminary affordability review.

Our role at this stage is not to approve or reject a scheme, or issue any risk rating, but to give a preliminary view as to whether the financial viability of the trust would be undermined if the scheme were to proceed.

Our financial review will highlight any risks to financial viability and we will advise the trust of these in writing. Before the procurement process begins we will expect the trust board to address these risks or be assured that they can be addressed as the scheme is developed.

At the request of the Department of Health (DH) and/or HM Treasury we will normally share our analysis with them.

### Appointment business case

If DH and HM Treasury approve a trust's outline business case, the procurement process begins and an 'appointment business case' is developed. At this stage, the trust will refine its project plans and LTFM with input from a shortlist of potential contractors.

Monitor would conduct a substantive review of the scheme at this stage. We will assess whether, based on the latest assumptions and financial information provided by the trust, its financial viability would be unacceptably undermined if the scheme were to proceed. Again, our role at this stage is not to approve or reject a scheme – we will provide an indicative transaction risk rating that we expect the trust to take into account as it decides whether the scheme should progress to confirmation business case stage.

### Confirmation business case

If DH and HM Treasury approve the appointment business case, the trust usually selects a preferred bidder and progresses to 'final terms'. These terms will be reflected in the confirmation business case. We do a final review of the scheme to assess whether, based on the information provided by the trust, the financial viability of the trust would be unacceptably undermined if the scheme were to proceed. As part of this review, we will look at whether the risks identified in earlier reviews (at outline and appointment business case stages) have been mitigated at the confirmation business case stage.

We then issue a final transaction risk rating (see Section 6) in a letter to the trust, copied to DH and HM Treasury. The final transaction risk rating of green or amber is required before a trust may enter into any legally binding commitment in relation to

the scheme. A red rated PFI scheme should be deferred or stopped, including by use of Monitor's regulatory powers if necessary.

**The limits of Monitor's role**

Our financial reviews of PFI schemes focus on the effects on financial viability. They **do not include**:

- any assessment of the increased benefit to patients in financial or other terms
- any assumption about the appropriateness or otherwise of any increase in payments to the trust in light of quality improvements
- a review of the clinical benefits of the scheme; considering whether a scheme is the most appropriate option to deliver quality improvements for patients is part of the value for money review completed by DH and HM Treasury as part of their approval process for a PFI-funded scheme.

## 6. Monitor's risk evaluation guidelines

When we review a transaction, we assess an NHS foundation trust's plans against good practice in up to four domains: strategy, finance, quality and transaction execution. We ask several questions for each domain (see Section 6.2).

We rate the answers to these questions against a four-point colour scale: green, amber-green, amber-red and red. The colour rating depends on the extent to which the trust has adhered to good practice guidance. The basis of these ratings is set out in Figure 10.

**Figure 10: Definitions of colour ratings**

| Rating | Definition | Evidence |
|---|---|---|
| Green | Meets or exceeds expectations. | Many elements of good practice and there are no major omissions. |
| Amber-green | Partially meets expectations but confident in management's capacity to deliver green performance within a reasonable timeframe. | Some elements of good practice, with no major omissions and robust action plans to address perceived shortfalls. Proven track record of delivery. |
| Amber-red | Partially meets expectations, but with some concerns on capacity to deliver them within a reasonable timeframe. | Some elements of good practice, with no major omissions. Action plans to address shortfalls are in early stage of development. Limited evidence of track record of delivery. |
| Red | Does not meet expectations. | Major omissions identified with concerns about management capacity to deliver. |

The ratings for the questions are aggregated to provide an overall rating for each domain.

The rating for each domain is consolidated into a **single transaction risk rating** of green, amber or red:[15]

- **green** – our detailed review has not found any material concerns
- **amber** – some significant issues have come out of our detailed review – the trust will need to take action to address these, and they may require ongoing regulatory monitoring; however, none of the issues that have arisen is sufficiently serious to stop or delay the transaction

[15] Ratings are given after applying an investment adjustment where relevant (see Appendix 7).

- **red** – the issues found by the detailed review are sufficiently serious to delay the transaction to allow time for the trust to restructure the proposal if possible, addressing the risks involved. If this is not considered possible, we will use our regulatory powers to stop the transaction if required.

## 6.1 Post-transaction monitoring and compliance

Once a transaction is complete, we will continue to monitor the NHS foundation trust for compliance with the continuity of services and governance conditions of the NHS provider licence, issuing risk ratings quarterly for continuity of service and governance under the 'Risk assessment framework'.

The potential short-term negative effects of a major transaction on a foundation trust's risks ratings (for either continuity of service or governance) can be alleviated by investment adjustments. Foundation trusts can apply to us for investment adjustments before we issue the transaction risk rating.

The application can be made during the full business case stage, and may be granted concurrently with the issue of the transaction risk rating. Guidance on the requirements, criteria and process for investment adjustments is set out in Appendix 7.

## 6.2 Detailed review scope and good practice

Here we set out:

- the questions we pose to assess a proposed significant transaction against good practice
- our requirements for submission of evidence to support each question.

However, each significant transaction has a unique profile and we adapt the scope of the questions and the required submissions to meet the specific circumstances and risk profile of each transaction. The questions and submissions set out below illustrate a full scope, most likely to be applied to a significant acquisition or merger.

In addition to the evidence below, we expect that trusts will have provided their analysis of potential competition issues and a draft submission on relevant customer benefits (if needed) during their early engagement with us (stage 2).

## Domain 1: Strategy

**Is there a clear strategic rationale for the transaction and does the board have the capability, capacity and experience to deliver the strategy?**

<table>
<tr><th>Key question</th><th>Good practice, green indicators of risk</th></tr>
<tr><td>1. Is the trust’s overall strategy well reasoned and can the board show how the transaction supports its delivery?</td><td>• The board can clearly articulate the trust’s overall strategy and show how the transaction supports its delivery<br>• The board can clearly articulate the financial and clinical synergies and benefits associated with the transaction, including the impact on workforce, and has undertaken sufficient analysis to demonstrate them<br>• The board can clearly articulate what challenges faced by the trust the transaction seeks to address<br>• Where relevant, the board can clearly articulate what opportunity the transaction represents</td></tr>
<tr><td colspan="2">Key submissions<br>• Summary paper on rationale for transaction, including details of how the transaction supports the acquiring trust’s strategy and strategic options analysis<br>• Analysis/work performed on identification of the synergies and benefits associated with the transaction (both financially and clinically, including the impact on workforce)<br>• Analysis of current challenges the trusts face that the transaction seeks to address<br>• Analysis of opportunities the transaction represents<br>• Evidence (eg board minutes and board papers) of board challenge on the decision-making process underpinning the transaction<br>• Evidence of engagement with key staff and stakeholders<br>• Evidence (eg board minutes and board papers) of consideration of potential barriers to success and how these have been reflected in final plans<br>• Details of issues raised during board and stakeholder engagement (if applicable) and how these have been resolved</td></tr>
</table>

<table>
<tr><th>Key question</th><th>Good practice, green indicators of risk</th></tr>
<tr><td>2. Has there been a detailed options appraisal and is there a clear rationale for the option that the trust has selected?</td><td>
<ul>
<li>The board has undertaken a detailed options appraisal covering a variety of alternatives, including the option to do nothing or a minimum</li>
<li>Appraisals include financial and clinical assessments as well as impacts on patients, workforce and other stakeholders, where relevant</li>
<li>The board can demonstrate how it has appraised the alternatives and chosen the option selected</li>
</ul>
</td></tr>
<tr><td colspan="2">Key submissions
<ul>
<li>Options appraisal, including analysis of relevant patient benefits</li>
<li>Evidence of the decision-making process that led to the option selected, including evidence of board challenge (eg board minutes and board papers) and consideration of potential barriers to success and how these have been reflected in the final plans</li>
<li>Summary paper on rationale for transaction</li>
</ul>
</td></tr>
</table>

| Key question | Good practice, green indicators of risk |
| --- | --- |
| **3. Does this rationale set out why it is the best option for patients, the trust and the local health economy?** | • The board can clearly demonstrate why the transaction is the best option for patients, the trust and the local health economy<br>• Plans are supported by key stakeholders in the local health economy<br>• The board has engaged with patients to gain their perspective and reflected this in its plans |

**Key submissions**

- Options appraisal, including analysis of relevant patient benefits
- Summary paper on rationale for transaction
- Evidence of engagement with key stakeholders in the local health economy, patients and key staff, and of views/issues raised from engagement with key stakeholders having been considered and incorporated into final plans
- Assessment of the level of support for the transaction in the local health economy, in particular the level of support received from CCGs and confirmation of their commissioning intentions
- Evidence (eg board minutes and board papers) of consideration of potential barriers to success and how they are reflected in final plans
- Evidence of continuing stakeholder engagement
- Analysis of local health economy and market

| Key question | Good practice, green indicators of risk |
| --- | --- |
| **4. Does the board have the capability, capacity and experience to deliver the trust's strategy?** | • The board has the necessary skills or experience to succeed in delivering its strategy, reflecting expected complexities where necessary |

**Key submissions**

- Current governance structure for the trust(s) including the board and its sub-committees
- Proposed governance structure for the combined organisation including the board and its sub-committees and rationale for changes (showing, where relevant, due consideration of continuity of relations with clinicians, local authorities, voluntary bodies, etc)
- CVs and biographies of proposed board members (highlighting any relevant experience in mergers and acquisitions)
- Skills-gap analysis of the proposed board and, if needed, a plan to fill any board positions that are vacant or will be vacant post-transaction
- Details of any external advice sought in respect of capability or change management

**Domain 2: Transaction execution**

**Does the trust have the ability to execute the transaction successfully?**

<table>
<tr><th>Key question</th><th>Good practice, green indicators of risk</th></tr>
<tr><td>1. Does the board have the appropriate capability and capacity to minimise execution risks?</td><td>• The board has the necessary skills or experience to succeed in delivering the transaction<br>• There are no governance concerns in the acquirer/investing organisation</td></tr>
<tr><td colspan="2">Key submissions<br>• Current governance structure for the trust(s) including the board and its sub-committees<br>• Proposed governance structure for the combined organisation including the board and its sub-committees and rationale for changes (showing, where relevant, due consideration of continuity of relations with clinicians, local authorities, voluntary bodies and so on)<br>• CVs and biographies of proposed board members (highlighting any relevant experience in mergers and acquisitions, integration management)<br>• Skills-gap analysis for enlarged proposed board and a plan to fill any necessary positions in the proposed board which are vacant or will be vacant post-transaction<br>• Details of any external advice sought in respect of capability or change management<br>• Details of engagement with target organisations' board and senior clinicians, including evidence of discussion/consideration of barriers to integration and attempts to resolve these<br>• Copy of information request list sent to target organisation<br>• Details of any existing governance issues of the acquiring organisation and action plans in place to address these within the plan<br>• Change management strategy, eg plan to manage cultural/behavioural harmonisation<br>• Details of additional integration arrangements, eg time-limited committees</td></tr>
</table>

<table>
<tr><th>Key question</th><th>Good practice, green indicators of risk</th></tr>
<tr><td>2. Is the board able to identify and quantify transaction risks appropriately? Is its approach to due diligence robust and is there evidence that key risks have been recorded?</td><td>• The board’s approach has identified all key risks and has included, where relevant to the nature of the transaction:<br>– clinical due diligence<br>– financial due diligence<br>– legal due diligence<br>– operational due diligence, including HR, IT and estates matters<br>– commercial due diligence<br>– understanding stakeholder perspectives<br>• The board is able to articulate the key risks of the transaction</td></tr>
<tr><td colspan="2">Key submissions<br>• Planned due diligence programme, including rationale for not carrying out certain aspects of due diligence if applicable<br>• All due diligence reports and summaries considered by acquiring board as part of the transaction<br>• Evidence of review and challenge of the due diligence carried out and agreed action plans addressing issues identified within the due diligence<br>• Details of engagement with target organisations board and senior clinicians, including evidence of discussion/consideration of barriers to integration and attempts to resolve these<br>• Copy of information request list sent to target organisation<br>• Post-transaction integration risk management plan<br>• Current corporate risk register for both the target trust and the acquiring trust and for transaction<br>• Independent accountant's report and signed opinion on post-transaction integration plan (PTIP), draft then final<br>• Board statement confirming its review and approval of the PTIP<br>• All board minutes and papers relevant to the proposed transaction</td></tr>
</table>

| Key question | Good practice, green indicators of risk |
| --- | --- |
| **3. Has the board effectively mitigated key risks and established effective processes for the continued management of these risks post transaction?** | • The board is able to evidence an effective process for managing transaction risk<br>• Key risks to the transaction are adequately mitigated; plans are in place to ensure a reasonable downside cash position for at least the first three years post-transaction |

**Key submissions**

- Details and quantification of downside risks
- Details of major action and contingency plans to mitigate risks, including details of key mitigation enablers
- Board minutes evidencing board approval of mitigations
- Draft business transfer agreement with evidence of agreement by all parties
- Post-transaction integration risk management plan
- Signed statement of internal control for acquirer and target including disclosures on non-compliance
- Copy of the latest integration plan monthly monitoring report to acquiring trust's board
- Details of any legal advice sought regarding the transaction
- Independent accountant's report and signed opinion on post-transaction integration plan, draft then final

<table>
<tr><th>Key question</th><th>Good practice, green indicators of risk</th></tr>
<tr><td>4. Is there a robust and comprehensive plan for delivery of the transaction, including integration and realisation of benefits?</td><td>A robust and comprehensive PTIP has been developed and clearly demonstrates:<br>• benefits to be derived from the transaction including synergies, cost reductions, and increases in revenue<br>• feasibility of the proposed organisational structure and changes from the current state<br>• plans for achieving cultural integration<br>• plans to deliver any transformation, or planned service changes<br>• detailed plans to address any current non-achievement of national targets or core standards as well as plans to ensure ongoing compliance with national targets and core standards<br>The plan has received an unqualified PTIP opinion (where relevant)</td></tr>
<tr><td colspan="2">Key submissions<br>• Plans to integrate quality governance systems (including patient experience, complaints and serious incident reporting arrangements), risk management systems, financial reporting procedures, performance management systems, IT systems, services and culture<br>• Post-transaction integration risk management plan<br>• Detailed post-transaction integration timeline with milestones and deadlines<br>• Organisation chart of the proposed enlarged trust<br>• Post-transaction management team structure/summary<br>• Copy of the latest integration plan monthly monitoring progress/status report to acquiring trust’s board<br>Continued</td></tr>
</table>

- Summary of reporting arrangements for patient experience and complaints at the acquiring trust including: (1) the author and distribution of the patient experience report (2) the names and membership of any groups that review patient experience and complaints and (3) the frequency patient experience data is reported to the board and any other applicable groups
- Serious incident policy and reporting arrangements at the acquiring trust including (1) the names and membership of any groups that review serious incidents (2) the frequency serious incident data is reported to the board and any other applicable groups (both internal and external to the trust)
- Independent accountant's report and signed opinion on post-transaction integration plan, draft then final
- Board statement confirming its review and approval of the PTIP
- Benefits realisation plan describing benefits (cost, revenue, patients, clinical and so on) arising from the transaction, including specific benefits by service line, timing and supporting evidence (persons responsible for capturing specific synergies should be clearly indicated), draft then final
- Communication plan for staff and key stakeholders
- Change management strategy, eg plan to manage cultural/behavioural harmonisation
- Decision and rationale on physical service configuration/location

<table>
<tr><th>Key question</th><th>Good practice, green indicators of risk</th></tr>
<tr><td>5. Is the integration plan sufficiently supported by clear lines of accountability, governance processes, delivery milestones and dedicated resource?</td><td>There is:<br>• a feasible timeline for implementation<br>• a means of measuring success in delivering the integration plan<br>• a risk management strategy for all risks considered material by the current board and qualified professional adviser(s) to the integration<br>• adequate capacity available<br>• governance processes in place to manage and implement the plan</td></tr>
<tr><td colspan="2">Key submissions<br>• Organisation chart of the proposed enlarged trust<br>• Detailed post-transaction timeline, with milestones and deadlines<br>• Specifications of changes to clinical services appropriately cross-referenced with the business plan with evidence of appropriate consultation of the changes<br>• Post-transaction management team structure/summary<br>• Post-transaction integration risk management plan<br>• Summary of accounting-related choices or issues presented by the transaction, and of their resolution<br>• Copy of the latest integration plan monthly monitoring progress/status report to acquiring trust's board<br>• Planned format for performance reporting for the enlarged trust<br>• Reports (including action plans where available) from third party inspectorates<br>• Details of additional integration arrangements, eg time-limited committees<br>• Proposed governance structure for the combined organisation including the board and its sub-committees and rationale for any changes</td></tr>
</table>

| Key question | Good practice, green indicators of risk |
|---|---|
| **6. Has the trust met all regulatory and legal requirements (including Monitor certification), and is it planning the transaction with reference to good practice guidance?** | • Unqualified and supported certification<br>• Transaction is planned in accordance with good practice guidance<br>• Legal requirements are fully satisfied |

**Key submissions**

- Written acknowledgement from the foundation trust/s of Monitor's risk rating where the transaction was classified as significant
- Certification and supporting board minutes and papers – see Annex I of Appendix C of the 'Risk assessment framework'
- Minutes of the board of directors and council of governors meetings confirming approval of the amendments to the constitution – the trust must also confirm that the meetings were quorate
- Proposals and timetable for the proposed membership and council of governor elections
- Membership strategy, including steps taken to ensure representative membership for the post-transaction organisation
- Subsequent update on implementation of membership strategy and election process
- Register of proposed directors' interests
- Register of proposed governors' interests (if applicable)
- Signed board statement and memorandum on quality governance arrangements, working capital and financial reporting procedures
- Schedule of commissioner requested services (CRS) – with any changes to services currently provided by the trust(s) clearly indicated; (changes to the provision of CRS resulting from the transaction must be undertaken in accordance with Continuity of Services Licence Condition 1). Note: Commissioners will be encouraged to review the CRS designations of services which are acquired as a result of a transaction.

**Domain 3: Quality**

**Is quality maintained or improved as a result of the transaction?**

| Key question | Good practice, green indicators of risk |
|---|---|
| **1. Has the trust received an unqualified quality governance opinion in relation to the transaction? (where relevant)** | • Unqualified quality governance opinion |
| **Key submissions**<br>• Independent accountant's report and signed opinions on quality governance, draft then final | |

| Key question | Good practice, green indicators of risk |
|---|---|
| **2. Has the medical director provided a certification?** | • Unqualified certification provided by medical director |
| **Key submissions**<br>• Certification on the service reconfiguration by medical director, with supporting board memorandum | |

| Key question | Good practice, green indicators of risk |
| --- | --- |
| 3. **What is CQC's view of both trusts and the impact of the planned transaction?** | • 'Good' rating and no enforcement action in last 12 months for both acquirer and target |

**Key submissions**

- Clinical due diligence report
- List of areas of non-compliance with CQC, from both acquiring foundation trust and target trust

<table>
<tr><th>Key question</th><th>Good practice, green indicators of risk</th></tr>
<tr><td>4. Would the enlarged organisation trigger any governance concerns under Appendix A of the ‘Risk assessment framework’?*</td><td>• No governance concerns triggered for the enlarged organisation under the ‘Risk assessment framework’ post-transaction after any agreed investment adjustments</td></tr>
<tr><td colspan="2">Key submissions<br>• Copy of the applicant trust’s self-assessment on existing healthcare standards<br>• Completed access and outcomes metrics template (provided by Monitor)<br>• Details of governance risk ratings at individual trusts with additional analysis showing the rating for the combined organisation over the period of the LTFM<br>• Details of mitigations to identified potential breaches of targets<br>• Signed board statement and memorandum on quality governance arrangements<br>• Completed workforce analysis and bridging template (provided by Monitor) to bridge movements in workforce in the forecast period<br>• Latest available signed annual governance statement for each trust<br>• Any public interest reports issues for either trust in the last 12 months<br>• Latest available Quality Account<br>• Up-to-date summary of complaints and serious incidents at acquiring and target trusts with comparative information from prior year, including details on the number of complaints received monthly or quarterly (however reported internally) and the categories these complaints relate to (to provide in summary form – that is, whatever gets reported to management/the board)<br>• Analysis of the complaints at both acquiring and target trusts for two historic years<br>• Latest available patient experience survey summary results for acquiring and target trusts; details of how frequently surveys are performed and to whom they are reported<br>• Quality committee reports for the six-month period<br>• Staff survey and its most recent analysis for both trusts, with comparison to prior year and key trends</td></tr>
</table>

**Domain 4: Finance**

**Does the transaction result in an entity that is financially viable?**

| Key questions | Good practice, green indicators of risk |
|---|---|
| **1. Does the trust's plan demonstrate financial viability and sustainability post transaction?*** | • Continuity of service risk ratio (CoSRR) ≥ 4 in years 1 and 2 post transaction in the assessor case<br>• Cash position positive at end of fifth year under an assessor case. |

**Key submissions**

- LTFM
- Summary of CIP plans
- Activity analysis – if not already detailed in the LTFM
- Details of major initiatives, such as cost reduction programmes, new investments or synergies from the transaction, including timeframe in which they will be achieved, key assumptions used and scenario analysis to demonstrate risks to achievement of plan
- Summary of the costs expected to be incurred to complete and implement the transaction, including assumptions used to calculate them and timings of when they are to be incurred
- Details and quantification of downside risks and mitigation actions
- Signed heads of terms
- Draft acquisition agreement
- Financial due diligence reports
- Reconciliation of acquirer base case to annual planning review (APR)
- Analysis of transaction funding, internal (operating cash flow) and external
- Details of ongoing discussions of funding sources; confirmation from all funding parties

*Continued*

- Completed contract templates for both acquirer and target trusts (as provided by Monitor) as reconciled to the LTFM
- Details of Commissioning for Quality and Innovation (CQUIN) targets and year-to-date achievement for target trust including any risks to achievement for the full year
- Finance committee reports (covering a six-month period)
- Latest audited accounts for both trusts
- Details of any outstanding contract disputes and potential financial impact (if applicable)
- Detailed cost improvement plans (CIPs) for outturn year and subsequent two years, and as much as is available beyond that for both trusts, (including projected whole time equivalent data) reconciled to the full business case
- Reconciliation of full business case CIP to actual CIP
- Latest board report on CIP achievement
- Minutes of the forum where CIPs are monitored (both trusts)
- Quality reviews of CIP schemes to verify they do not affect clinical quality
- Summary of accounting-related choices or issues presented by the transaction, and of their resolution
- Integrated estates plan for the combined organisation
- Analysis of asset disposal plans for the coming year
- Analysis supporting activity assumptions
- Completed current trading templates (provided by Monitor) for both acquirer and target trusts
- Completion of historical accuracy of budgeting template (as provided by Monitor) for both acquirer and target trusts
- Board statement and memorandum on working capital

* Post-investment adjustment as well as taking account of findings against strategic rationale and transaction execution criteria.

| Key question | Good practice, green indicators of risk |
|---|---|
| **2. Has the trust received an unqualified financial reporting procedures opinion? (where relevant)** | • Unqualified financial reporting procedures opinion (where relevant) |
| **Key submissions**<br>• Independent accountant's report and signed opinion on Financial Reporting Procedures, draft then final | |

| Key question | Good practice, green indicators of risk |
|---|---|
| **3. Has the trust received an unqualified working capital opinion, if relevant?** | • Unqualified working capital opinion (where relevant) |
| **Key submissions**<br>• Independent accountant's report and signed opinion on working capital, draft then final | |

| | |
|---|---|
| Note: The trust's board's ability to manage downside financial risk will be assessed as part of question 3 under 'transaction execution' review. Key question for consideration is:<br><br>Can the board articulate future mitigation plans and demonstrate the capability to deliver these plans? | • Trust has demonstrated that it can maintain a sufficient cash position in a plausible downside case by year three of the plan<br><br>• Trust has plans to mitigate any downturn in performance and there is capability and capacity on the board to deliver these plans |

**Key submissions**

- Details of major action and contingency plans to mitigate risks, including details of key mitigation enablers
- Board minutes evidencing board approval of mitigations
- Post-transaction integration risk management plan
- Signed statement of internal control for acquirer and target including disclosures on non-compliance

## 6.3 Illustrative reduced review scope

As already stated, we adapt the scope of the questions we pose to match the specific circumstances and risk profile of each transaction. For example, a capital investment project that meets our threshold for significance (for example, by increasing the trust's gross assets by more than 40%) but does not involve any significant change to services (for example, re-housing of existing beds/services in a new building) will be subject to a less detailed review. The figure below illustrates the reduced scope of the questions that we might pose for such a capital investment, in comparison to those that may be applied to a significant acquisition or merger.

**Figure 11: Illustrative reduced review scope**

| Domain | Illustrative full scope (mergers and acquisitions) | Illustrative reduced scope (capital investment with no significant service changes) |
|---|---|---|
| **STRATEGY**<br>Is there a clear strategic rationale for the transaction and does the board have the capability, capacity and experience to deliver the strategy? | 1. Is the trust's overall strategy well reasoned and can the board articulate how the transaction supports its delivery?<br>2. Has there been a detailed options appraisal and is there a clear rationale for the option that the trust has selected?<br>3. Does this rationale set out why it is the best option for patients, trust and local health economy?<br>4. Does the board have capability, capacity and experience to deliver the trust's strategy? | 1. Is the proposed capital investment consistent with the trust's strategy, current local health economy dynamics and patients' interests?<br>2. Is it supported by appropriate analysis and evaluation, including consideration of alternative options? |
| **TRANSACTION EXECUTION**<br>Does the trust have the ability to execute the transaction successfully? | 1. Does the board have the appropriate capability and capacity to minimise execution risks?<br>2. Is the board able to identify and quantify transaction risks appropriately (including any risks associated with competition rules)? Is its approach to due diligence robust and is there evidence that key risks have been recorded?<br>3. Has the board effectively mitigated key risks and established effective processes for the continued management of these risks post transaction?<br>4. Is there a robust and comprehensive plan for delivery of the transaction, including integration and realisation of other benefits?<br>5. Is the integration plan sufficiently supported by clear lines of accountability, governance | 1. Has the board given sufficient consideration to the project's execution risks?<br>2. Has the board identified and quantified project risks appropriately, and prepared effective mitigations and contingencies for the key execution risks? |

| | | |
|---|---|---|
| | processes, delivery milestones and dedicated resource?<br>6. Has the trust met all regulatory and legal requirements (including Monitor certification), and is it planning the transaction with reference to good practice guidance? | |
| **QUALITY**<br>Is quality maintained or improved as a result of the transaction? | 1. Has the trust received a clean quality governance opinion in relation to the transaction (where relevant)?<br>2. Has the medical director provided a certification to Monitor?<br>3. What is CQC's view of both trusts and the impact of the planned transaction?<br>4. Would the enlarged organisation trigger any governance concerns under Appendix A of Monitor's 'Risk Assessment Framework'? | 1. Would the enlarged organisation trigger any governance concerns under Appendix A of Monitor's 'Risk assessment framework'? |
| **FINANCIAL**<br>Does the transaction result in an entity that is financially viable? | 1. Does the trust's plan demonstrate financial viability post-transaction?<br>2. Has the trust received an unqualified FRP opinion? (where relevant)<br>3. Has the trust received an unqualified working capital opinion? (where relevant) | 1. Does the trust's plan demonstrate financial viability post transaction? |

For a significant transaction NHS foundation trusts must prepare financial plans in a suitable Monitor LTFM and should contact modelqueries@monitor.gov.uk to confirm the most suitable model to use.

## 7. Statutory responsibilities and procedures

### 7.1 Responsibilities of directors and governors in transactions

- **Executive directors** should make proposals for the future of the organisation. They should work with governors by providing them with sufficient information on a proposed transaction for the purposes of considering their required approval (see Section 7.2 below), explaining to governors why they believe the transaction is necessary, and providing evidence to support their view.

- **Non-executive directors** should challenge the executives to justify their recommendations, deal with the risks involved and seek assurance that the executive directors' decisions are the right ones.

- **Governors** must (according to legislation) hold the non-executive directors to account, both individually and collectively, for the performance of the board of directors, and represent the interests of the NHS foundation trust members and the public. Their majority approval is required for statutory or significant transactions (see Section 7.2 below); in order to give this governors are responsible for satisfying themselves that the board of directors (that is, executive and non-executive directors collectively) has:

  - been thorough and comprehensive in reaching its proposal (that is, has undertaken proper due diligence)

  - obtained and considered the interests of trust members and the public as part of the decision-making process.

  Provided appropriate assurance is obtained, governors should not unreasonably withhold their consent for a proposal to go ahead.

### 7.2 Required governor approvals

The following requirements stem from the Health and Social Care Act 2012.

- For statutory transactions:[16] more than half the members of the **full** council of governors must approve any application by the trust to:

  - merge with or acquire another trust

  - separate the trust into two or more new NHS foundation trusts

  - be dissolved.

[16] Mergers or acquisitions involving one or more foundation trusts, and separations and dissolutions of foundation trusts, as referred to in sections 56, 56A, 56B and 57A of the 2006 Act as amended by the 2012 Act.

This means more than half of the total number of governors must approve, not just half the number that attends the meeting at which the decision is taken. If the other party to the proposed transaction is also an NHS foundation trust, more than half the governors of that foundation trust must also approve the transaction.

- For other transactions: more than half of the members of the full council of governors of the trust **voting** need to approve the trust entering into any 'significant' transaction as specified in the trust's constitution (note that this is not the same as Monitor's definition of significant in Appendix C of the 'Risk assessment framework').[17] This means more than half of the governors who are in attendance at the meeting and who vote at that meeting must approve.

If a transaction requires both votes to take place, the trust may choose to combine the voting procedures.

### 7.3 Governor approvals in practice

The 2006 Act, as amended, states that a trust's constitution must "provide for all the powers of the corporation to be exercisable by the board of directors on its behalf". This means that whether a transaction should proceed must ultimately be decided by the board of directors.

Trust boards must help governors make good decisions by providing appropriate information on any proposed transactions and, consistent with the general requirement for NHS foundation trusts, ensure that the governors are equipped with the skills and knowledge they need to fulfil their role. Given that the planning for a transaction is likely to take place over a period of time, it is good practice for the board to engage with the governors about transaction plans in the earlier stages.

The trust needs to arrange a vote of the full council on the proposed transaction and to inform the directors of the outcome. Voting procedures (including any rules on the chair's vote, casting votes or abstentions) should be determined locally and are normally detailed in the trust's constitution.

Directors and governors must agree on a process for the approval of transactions by governors. Such a process might specify:

- the content and timing of information to be provided to governors

[17] An NHS foundation trust can decide for itself what constitutes a 'significant transaction' and may choose to define this in its constitution. Alternatively, if the governors agree, trusts may choose not to give a definition, but this would need to be stated in the constitution. Examples of a definition include any proposed contract valued over a certain monetary threshold or over a certain percentage of the trust's annual turnover, or alternatively using non-monetary terms.

- at what point in the process governors will be asked to approve the transaction(s)
- how the views of members will be sought and stakeholders kept informed.

Governors should be provided with as much information as reasonably possible for them to be able to make an informed judgement. So that the governors have sufficient information and are assured that the board has been through a thorough and comprehensive process before voting on the transaction, the governors' formal vote should take place after the finalisation of due diligence reports, after our issuance of its amber or green risk rating and soon after the board's approval. This places the vote shortly before completion in the process, after the full business case stage.

It should however be **before** the trust(s)' formal application to Monitor (required for statutory transactions), since governor approval is one of the necessary steps to have been completed before we can grant the application.

### 7.4 Stakeholder communication

Once the governors have approved a transaction and the chair has confirmed that it is not confidential, the council of governors should communicate the result to the trust's members and the public. Governors are likely to need the trust's help to do so, for example, through its website or at an advertised drop-in session with the governors. The communication method should be agreed locally.

### 7.5 Merger procedures

If two NHS foundation trusts decide to merge, the board of directors and council of governors of both organisations will be dissolved and one new board and one new council will be formed. New public, staff and, if applicable, patient, carer and/or service user electoral constituencies will need to be drawn up for the new council of governors, and elections will need to be held to elect governors to represent them.

Merging foundation trusts can carry forward their memberships to the new merged entity, provided the members are given the opportunity to opt out of membership of the new trust. Alternatively, the existing memberships can be disbanded and completely new membership recruited. The choice of approach rests with the trusts.

The constitution of a new foundation trust takes effect when Monitor grants the merger, at which point the new trust's governance structure comes into effect. The timing of elections for the new council of governors is a matter for the merging trusts to determine.

Elections held post merger should take place as soon as possible after the new foundation trust is formed. If elections are held before the new FT is formed, the governors will remain in shadow form until the merger is completed. Elections held

before the merger should only take place when the transaction is at a sufficiently advanced stage.

Trusts will also need to decide which organisations they wish to recruit appointed governors from. This will typically be decided by a joint working group of the two original boards of directors and councils of governors. Once fully constituted, the new governors will need to appoint the chairman and non-executive directors for the new board, who will in turn appoint the chief executive and other executive directors. Consideration should be given to the appropriate representation of both merging parties on the new board and to the appropriate skills mix required to bed down and run a successful merged entity. The new board will usually include some or all of those former members of the merging trusts' boards who are acting in the role of interim directors (see below).

**Interim directors**

Section 56(11) of the NHS Act 2006 allows for the existing directors of two merging foundation trusts to exercise control over the new merged trust until it appoints a board. In practice, a group of interim directors from the two merging trusts should be formed before the new trust is created (although this group will have no legal powers over either of the merging trusts in the period leading up to the merger). This interim director group, sometimes referred to as a 'shadow board', should be in place at or soon after the start of the full business case stage to take the lead on the governance of the transaction and engage with Monitor.

Once the new merged trust has been created, the interim directors should hand over to the new trust's board and disband as soon as possible. There is no legal time limit for this but it is poor practice for an interim director group to remain in place more than five months after the completion of a merger. This timescale allows for governor elections to be held after the merger and for new directors to be appointed.

The key procedures for statutory mergers (and the parties who should carry them out) are summarised in the figure below. It sets out the order of events where elections are held after the merger. If elections are held pre-merger, the timing of steps 7 to 12 can be adjusted accordingly.

**Figure 12: Actions needed to progress a statutory merger**

| | Party | Action | Good practice timescale |
|---|---|---|---|
| 1 | Boards and governors of both trusts | Select interim directors from the two boards | By the start of the full business case stage |
| 2 | Monitor | Issue transaction risk rating | Within a few weeks of the board-to-board meeting |
| 3 | Merging trusts (both boards) | Confirm that merger is to proceed | Following receipt of Monitor's transaction risk rating |
| 4 | Merging trusts (both councils of governors) | Vote to approve merger application | Following boards' confirmation of decision to proceed |
| 5 | Merging trusts (signed on behalf of both boards) | Make joint statutory application to Monitor | Following governors' vote |
| 6 | Monitor | Grant the statutory application, provided we are satisfied that the necessary steps have been completed.<br><br>Make statutory order to dissolve the two trusts and transfer assets, liabilities to newly formed trust | Completion of the merger will take place on the date stipulated in the grant document and statutory order, both issued by Monitor<br><br>(Completion date to be agreed by the merging trusts) |
| 7 | New trust (interim directors) | Manage new trust | Until step 12 below – ideally not more than five months |
| 8 | New trust (interim directors) | Hold elections for new council of governors | Within three months of new trust's creation |
| 9 | New trust (council of governors) | Appoint chair and other non-executive directors | First meeting of the new council of governors |
| 10 | New trust (non-executive directors) | Appoint chief executive with the approval of the council of governors | As soon as practicable following the non-executive directors appointment |
| 11 | New trust (chair, chief executive and non-executive directors) | Appoint new executive directors | As soon as practicable following appointment of chair, chief executive and non-executive directors |
| 12 | New trust (interim directors and new trust board) | Interim directors' handover of management of new trust to new board | Following appointment of the executive directors |

## 7.6 Acquisition procedures

If an NHS foundation trust acquires another NHS foundation trust or an NHS trust, the acquiring trust will continue to exist and its board of directors and council of governors may remain in place. The acquired trust's board of directors (and its council of governors, if a foundation trust) will be disbanded as a consequence of being acquired.

Trusts must keep in mind their duty (in Section 61of the NHS Act 2006) to ensure its membership is representative of the people to whom the enlarged trust provides services. Unless there is an overlap in the geographical areas served by the two trusts, the acquiring NHS foundation trust is likely to choose to extend its original public constituency areas to cover the areas served by the acquired trust. A foundation trust acquiring another foundation trust can either incorporate the acquired trust's membership into its membership (provided the members are given the opportunity to opt out), or it can disband the acquired trust's membership and recruit completely new members.

New governors will need to be elected to represent these additional public constituency areas. Individuals who served as governors of an acquired NHS foundation trust may stand for election if they are eligible to do so under the constitution.

An NHS foundation trust can reconfigure its council of governors at any time. A foundation trust preparing to acquire another trust may therefore wish to expand its public membership constituencies to take account of the area served by the target trust (ie the trust to be acquired) and hold elections for governors for those expanded constituencies before the acquisition is completed. However, it would be prudent to wait until the acquisition had been completed before holding public elections and Figure 13 sets out this order of events. With regards to staff members and governors, an acquirer cannot create a staff membership and elect staff governors for the target trust until the acquisition is completed and the staff have been transferred.

The key procedures for statutory acquisition are summarised in Figure 13 below.

**Figure 13: Actions needed to progress a statutory acquisition**

| | Party | Action | Good practice timescale |
|---|---|---|---|
| 1 | Monitor | Issue transaction risk rating | Within a few weeks of the board-to-board meeting |
| 2 | Both trusts' boards | Confirm that acquisition is to proceed | Following acquiring foundation trust's receipt of Monitor's transaction risk rating |
| 3 | Acquiring foundation trust's council of governors (and target trust's if a foundation trust) | Vote to approve the acquisition application | Following boards' confirmation of decision to proceed |
| 4 | Both trusts (signed on behalf of both boards) | Make joint statutory application to Monitor | Following governors' vote |
| 5 | Monitor | Grant the statutory application, provided it is satisfied that the necessary steps have been completed | Completion of acquisition will take place on the date stipulated in the grant document to be issued by Monitor (completion date to be agreed with the trusts) |
| 6 | Enlarged foundation trust | Take steps to populate any new constituencies created as a result of the acquisition, as per the new constitution<br><br>Hold elections to fill any new governor posts<br><br>Appoint any new non-executive directors and executive directors | Within five months of acquisition |

## 7.7 Governor liability

We recognise that governors may be concerned that they will be held responsible if a transaction damages the trust, financially or otherwise. The 2006 Act, as amended, does not make explicit reference to governors' liability in this regard.

However, governors' duty to 'hold the non-executive directors, individually and collectively to account for the performance of the board of directors' does not mean that governors are responsible for the decision itself, or the operational detail behind it. Responsibility for a decision remains with the board of directors, acting on behalf of the NHS foundation trust.

Trusts are not required to provide an indemnity for governors, or insurance to cover their service on the council of governors.

## 8. Appendix 1: Thresholds for reporting and detailed review

*(Taken in full from the updated Appendix C of the 'Risk assessment framework')*

**Threshold for reporting transactions to Monitor**

**Diagram 18: Monitor reporting requirements**

If a potential transaction meets any one of the criteria below, the NHS foundation trust should report it to Monitor.

| Ratio | Description | Reporting requirements: Non-healthcare/ International | Reporting requirements: UK Healthcare |
|---|---|---|---|
| Assets | The gross assets* subject to the Transaction, divided by the gross assets of the foundation trust | > 5% | > 10% |
| Income | The income attributable to: • the assets; or • the contract associated with the Transaction, divided by the income of the foundation trust | > 5% | > 10% |
| Consideration to total foundation trust capital | The gross capital** or consideration associated with the Transaction divided by the total capital*** of the foundation trust following completion, or the effects on the total capital of the foundation trust resulting from a Transaction | > 5% | > 10% |

* Gross assets is the total of fixed assets and current assets
** Gross capital equals the market value of the target's shares and debt securities, plus the excess of current liabilities over current assets
*** Total capital of the foundation trust equals taxpayers' equity

For capital investments, the investment may be made over a number of years, with revenue attributable to the investment potentially only being achieved in future years. For the asset ratio, estimated capital spend will be compared with the audited asset values, and for income ratio the full year impact of projected revenue from the investment will be compared with projected foundation trust revenue in that year.

Where an NHS foundation trust chooses to cease membership of the NHS Litigation Authority's various schemes, including the Clinical Negligence Scheme for Trusts (CNST), and enters into alternative indemnity arrangements, and this affects the capital (taxpayers' equity) on the trust's balance sheet, this may trigger a transaction review according to the thresholds set out in this section.

For any other transaction types, the data used for the transaction classification will be considered on a case-by-case basis. NHS foundation trusts should seek our guidance if there is any uncertainty.

Where there has been a material or significant transaction since the date of the last audited accounts (ie those accounts do not include that transaction), we will consider the data used for the transaction classification on a case-by-case basis. NHS foundation trusts should seek our guidance if there is any uncertainty.

In the case of an acquisition where there has been a material change in the financial position of either the NHS foundation trust or the business being acquired since the last accounts date, and the ratio at that time is not considered representative of the likely contribution of the acquired business to the foundation trust, we may, following discussions with the foundation trust, choose to recalculate the ratios on a pro-forma basis using current or future year data.

In all cases we may, following discussions with the foundation trust, choose to recalculate the ratios using data that we reasonably consider to be a more appropriate measure of the relative size of the transaction.

Even where a proposed transaction does not trigger the reporting requirements set out above, boards are encouraged to take account of best practice advice published by Monitor when evaluating the processes which they should undertake to ensure that reputational and financial risks are fully understood and governance obligations met.

*Threshold for detailed review*

Monitor's view of the risks inherent in a potential transaction will determine whether it is classified as 'small', 'material' or 'significant'.

Those transactions which do not meet the reporting requirements, as set out in Diagram 18 are classified as 'small' transactions. If the small transaction is nevertheless a statutory transaction, a trust must make a formal application to Monitor and demonstrate that it has taken the necessary preparatory steps, as set out in Annex II. In any other type of small transaction, we would not normally expect to be notified or otherwise involved.

All reportable transactions will be classified as either material or significant.

Once a transaction has been reported, we will seek to understand more about the risks associated with the transaction to determine its regulatory approach. Potential risks will include:

- the relative size of the transaction compared to the NHS foundation trust
- the leverage expected in the enlarged organisation following the transaction
- the degree of experience in the acquiring organisation of the services provided by the target (where relevant), or of any change in services following the investment
- the existing level of financial risk and quality risk in the target (where relevant)

- the existing level of financial risk and quality risk in the NHS foundation trust
- risks identified as part of our early engagement with the trust (where relevant), for instance, poor options appraisal or a lack of strategic rationale.

A non-exhaustive list of examples of risk factors is set out in the table below to provide trusts with an indication of what we may consider to be a major risk or otherwise.

| Risk factor | Example of major risk | Example of other risk |
|---|---|---|
| Leverage | Capital servicing capacity of enlarged organisation is <1.75 (as defined in the 'Risk assessment framework') | Capital servicing capacity of enlarged organisation is <2.5 (as defined in the 'Risk assessment framework') |
| Acquirer's experience of services provided by target | A significant change in scope of activity of acquirer | A minor change in scope of activity of acquirer |
| Acquirer quality | Governance at the acquirer is rated 'red' or subject to narrative with a 'formal investigation' underway | Governance at the acquirer is subject to narrative description of some concerns |
| Acquirer financial | Continuity of services risk rating ≤2 in the acquirer | Continuity of services risk rating of 2*/3 in the acquirer |
| Target quality | Target is rated 'inadequate' by CQC | Target is rated 'requires improvement' by CQC |
| Target financial | Target has significant current and/or historical deficits | Target has minor current and/or historical deficits |

We will look at each potential transaction on a case-by-case basis and we may change our relative weighting of the risks outlined above, if we consider this appropriate. Trusts should keep us informed if there is any change to the risk profile of the transaction. We may change our view of classification based on this information.

We will assess the nature and scale of these risks. Based on our assessment, we will determine whether a detailed review is required and, if so, the scope of the detailed review. If a detailed review is required, the transaction will be classified as 'significant'.

Those transactions which trigger the reporting requirements above but do not require a detailed review are classified as 'material' transactions.

We will decide to classify the transaction as significant, and therefore requiring a detailed review, according to whether the transaction meets one of the following criteria:

- arelative size of greater than 40% in any of the tests set out in Diagram 18 will always lead to a detailed review

- a relative size of between 25% and 40% of the tests set out in Diagram 18 will lead to a detailed review where an additional risk factor has been identified by Monitor and is considered relevant
- a relative size of between 10% and 25% of the tests set out in Diagram 18 will lead to a detailed review where, in Monitor’s view, one or more major risks or more than one other risk has been identified by us and is considered relevant.

## 9. Appendix 2: Statutory transactions – other requirements

*(Annex II to the updated Appendix C of the 'Risk assessment framework')*

NHS foundation trusts undertaking a statutory transaction are required under the 2006 Act, as amended by the 2012 Act, to make a formal application, which involves a number of statutory requirements. The application should be submitted after completing any applicable processes of assurance and risk assessment as specified elsewhere in this appendix.

**Mergers**

A joint application by two NHS foundation trusts, or an NHS foundation trust and an NHS trust, for a merger must be accompanied by:

- written acknowledgement from the foundation trust/s of Monitor's risk rating where the transaction was classed as significant
- evidence of approval by a majority of governors of each party which is an NHS foundation trust
- in the case of a merger with an NHS trust, a letter of support from the Secretary of State
- details of the property and liabilities being transferred
- the constitution of the proposed new organisation following the transaction.

If the application is granted, the two trusts will be dissolved and a new NHS foundation trust will be established.

**Acquisitions**

A joint application by two NHS foundation trusts, or a foundation trust and an NHS trust for an acquisition by the acquiring foundation trust must be accompanied by:

- written acknowledgement from the foundation trust/s of Monitor's risk rating where the transaction was classed as significant
- evidence of approval of the transaction by a majority of the governors of the NHS foundation trust(s)
- in the case of an acquisition of an NHS trust, a letter of support from the Secretary of State
- the constitution of the acquiring NHS foundation trust following the transaction.

Important Note: The legislation governing foundation trust acquisitions is being amended. Please seek further guidance from Monitor.

**Dissolutions**

An application by an NHS foundation trust for its dissolution must be accompanied by:

- evidence of approval of a majority of the trust's governors
- evidence that the trust has no liabilities.

**Separations**

An application by an NHS foundation trust for its separation into two or more new foundation trusts must be accompanied by:

- evidence of approval of a majority of governors of the NHS foundation trust
- specification of the property and liabilities proposed to be transferred to each new NHS foundation trust
- the constitutions for each proposed new NHS foundation trust.

Monitor will check applications and the accompanying documents for accuracy and completeness. We may seek additional supporting information if necessary, but will not conduct an in-depth review of the contents.

**Statutory transactions: steps necessary to prepare for the transaction**

We can only grant an application for a statutory transaction where we are satisfied that the trust(s) have undertaken the steps necessary to prepare for the transaction.

The table below sets out our view of what constitutes the necessary steps according to whether the transaction is small, material or significant.

| **Classification*** | **Necessary preparatory steps** |
|---|---|
| Small | • The trust(s) have submitted all the relevant documents for the statutory transaction |
| Material | • The trust(s) have submitted all the relevant documents for the statutory transaction<br>• The trust(s) have reported the transaction to Monitor<br>• The trust(s) have submitted the certifications to Monitor and we are satisfied with them |
| Significant | • The trust(s) have submitted all the relevant documents for the statutory transaction<br>• The trust(s) have reported the transaction to Monitor<br>• The trust(s) have submitted the certifications to Monitor and we are satisfied with them<br>• The transaction has been through Monitor's detailed review and has achieved a transaction risk rating of green or amber |

*For definitions of 'small', 'material' and 'significant', please refer to *Threshold for detailed review* section above.

## 10. Appendix 3: Investment policy good practice

A good practice policy for investments by NHS foundation trusts should contain the elements set out below.

### 1. Investment committee functions and structure

A clear policy and process for investment decision-making should be in place. Decision-makers may be a committee of the NHS foundation trust board, or the board itself in the case of smaller NHS foundation trusts. The investment committee should:

- comprise executive and non-executive directors
- have a majority of non-executive directors
- be chaired by a non-executive director with relevant investment decision-making experience.

The investment committee's functions typically include:

- approving investment and borrowing strategy and policies
- approving performance benchmarks
- reviewing performance against the benchmarks
- ensuring proper safeguards are in place for security of the NHS foundation trust's funds
- monitoring compliance with treasury policies and procedures
- approving proposals for acquisition and disposal of assets above a certain amount
- approving external funding arrangements within their delegated authority.

### 2. Investment strategy and objectives

A good practice statement of investment strategy and objectives should provide the criteria for selecting the trust's investments, and address:

- the principal purpose of the trust – the provision of goods and services for the health service in England
- the trust's corporate strategy (including geographic and service focus)
- target rates of return for investments and explanation of how rates of return will be calculated (eg return net of any cross-subsidies)
- a timeframe for realising the desired return on investments.

## 3. Attitude to risk and process for managing risk

Risk refers to the probability of an adverse outcome that is different from the expected outcome and the potential impact of such an outcome. Some major categories of investment risk include:

- **Strategic:** risks associated with a particular strategy, for instance, overcapacity, product or service line obsolescence, competitor reactions.
- **Financial:** risks associated with the financial structure of a business, the financial transactions made by the business, and the financial systems which are in place, for instance, interest rate risk, foreign exchange risk and credit risk.
- **Operational:** risks associated with the operational and administrative procedures of a business, such as clinical operations, supply-chain management, IT systems, recruitment, HR management and post-merger integration process.
- **Execution risk:** the risk that the financial and operational activities forecasts are not achieved as expected.
- **Regulatory and political:** risks posed by potential changes in the regulatory and political environment, such as changes in tariff policy or healthcare targets.
- **Reputational:** risks to the perceived quality or brand of an institution, for instance, through bad press resulting from association with a failed joint venture.
- **Contingent:** risks that arise only if a certain contingent event takes place, for instance, guarantees of a joint venture that are only payable if it defaults.

Risk management refers to the collective processes, working practices and tools used to minimise the probability and impact of adverse outcomes. It entails:

- identifying potential sources of risk
- assessing the value at risk, estimated as probability of loss multiplied by severity of loss
- implementing controls to minimise probability and severity of loss.

It is good practice to define in the investment policy the trust's principles for managing risk aligned with its corporate strategy. Examples of risk management principles include:

- guidelines on identification of different types of risk

- methodology for calculating value at risk
- expected returns of individual investments for a given risk level – higher risk investments require higher expected returns
- aggregate targeted rate of return across the portfolio of investments
- limitations on the locations and types of investments that can be pursued; (for instance, the policy may specify that overseas investments should only be within the 'core competence' of the organisation and within stated risk concentrations for each area)
- guidelines for asset diversification outside core operations; (for instance, specifying that either the organisation will not diversify outside the health sector in England, or specifying limits on concentration of risk in a particular technology or sector).

A good practice investment policy will provide the criteria for categorising investments by level of risk (eg high, medium and low risk). Criteria for assessing investment risk include:

- financial magnitude of deal
- probability of loss
- complexity of the deal structure
- distance from a trust's core capabilities and operations
- financing arrangements, for instance, type of debt finance
- geographic location, for instance, investment in a highly competitive, uncertain or unfamiliar territory will increase risk
- degree of operating risk assumed, (for example, construction risk or cost overrun risk)
- level of post-investment management required (eg post-acquisition integration)
- cultural and behavioural differences.

Trusts might find our approach to their risk assessment (as set out in Appendix C to the 'Risk assessment framework') a useful reference point when determining thresholds for each level of risk and associated scrutiny.

It is good practice for trusts to seek advice from independent external advisers (eg risk management consultants) when developing their approach to managing risk.

## 4. Decision rights

A good practice investment policy will define clearly the roles, responsibilities and approval limits of the various committees and individuals with investment oversight. These are likely to include the board, investment committee, finance director and business development group, if one exists. For example, the board might be required to approve the written investment policy and all 'high risk' investments, while the investment committee might approve all other investments and ensure that investment decisions follow the guidelines laid out in the written investment policy.

Good practice is to scrutinise investments in proportion to risk. For example, a trust board may accept 'routine scrutiny' for low-risk investments (eg decisions delegated to the investment committee, with a short-form business case), but require 'special scrutiny' for high-risk investments (eg engagement of external independent advisers for in-depth business case, and main board approval).

## 5. Process for evaluating and managing investments

A robust investment policy will explain the internal processes for evaluating, executing and performance-managing investments. The extent of review/due diligence needs to be appropriate for the investment proposed. For example, all material and significant investments would be expected to undergo detailed business case evaluation and challenge.

Section 4 of this document sets out an example of a robust framework for evaluating and managing significant mergers and acquisitions. This framework describes the key stages in making a major transaction decision: strategic options review, outline business case, full business case and detailed review, and decision and execution. For each of these phases it lists the main considerations and activities that board members need to attend to, as well as the nature and scope of our involvement in each stage (if appropriate). Section 5 sets out a similar framework for managing other types of significant transaction, such as capital investments and property transactions.

These risk evaluation frameworks are an indication of the type of analysis required at each of the stages of investment appraisal. If any trust is unclear about how to apply the framework to a particular investment appraisal they should seek professional advice.

# 11. Appendix 4: Indicative due diligence scopes

This section covers the scope for a range of due diligence activities that would typically be undertaken as part of a transaction. The exact scope will depend on many factors including the size, type and complexity of the transaction and the nature of the risks involved.

Please note that this guidance is not exhaustive and trusts should make their own judgement about the extent of the due diligence needed, depending on their view of the risks inherent in the transaction.

**Pre-merger information sharing and competition considerations**

Discussions between providers planning to merge are an important part of merger planning and due diligence. However, planned mergers do not always proceed, so it is sensible to have appropriate safeguards on the sharing of confidential and commercially sensitive information. Exchanging confidential and commercially sensitive information between competitors could breach competition rules if it prevents, restricts or distorts competition.[18] In general, exchanging information which is already in the public domain or is not confidential is unlikely to raise concerns.

'Commercially sensitive information' includes strategically useful information that would allow providers to co-ordinate their plans in terms of investment or service provision. This could include information about:

- bids or tenders to provide services, procurement of goods or services
- contracts with commissioners
- applications for university hospital status
- recruitment
- terms and conditions of employment
- staff sharing arrangements
- the costs or inputs of providing a service
- future strategy or plans for service provision.

Information obtained through due diligence is likely to be commercially sensitive if it is not in the public domain. Typically there is likely to be a greater competition risk in exchanging information that is detailed (as opposed to aggregated) and current or forward looking (as opposed to historical).

[18] Section 2 of the Competition Act 1998 and Article 101(1) of the Treaty on the Functioning of the European Union.

As a general principle, commercially sensitive information should only be shared when it is necessary for the purposes of the merger and then only with individuals who need to know the information for that purpose, such as advisers, the programme board, proposed board and merger finance group. In addition:

- information should not be used for purposes other than the merger
- providers should have a genuine intention to proceed with the merger
- if the merger is abandoned, commercially sensitive information that has been shared should be returned or destroyed
- individuals with access to commercially sensitive information should sign a non-disclosure agreement reflecting the conditions above.

Further information about the application of competition rules to information sharing can be found in Monitor's consultation on the application of the Competition Act 1998 in the health sector, and the Office of Fair Trading's guidance on agreements (which has been adopted by the Competition and Markets Authority).

**Indicative clinical due diligence**

Clinical due diligence requirements can be met and resourced internally and externally.

*Governance systems*

The due diligence should include a review of current and proposed systems of corporate governance and reporting. Examples of information for review include:

- board committee structures
- sub committees (in particular, the level of scrutiny and operational effectiveness)
- key risks as identified on the 'board assurance framework'/corporate risk register and assurance that these are effectively mitigated with action plans for effective control
- performance management of quality priorities and their alignment to strategic objectives
- the level of devolvement of governance arrangements to business units
- how information flows from operational business to corporate governance structures/trust board and back

- quality performance information, for example:
  - clinical audit plan
  - patient safety/incident reports
  - serious incident performance (including never events[19])
  - responsive action plans and assurance reports demonstrating learning from investigations
  - infection control reporting
  - safeguarding reports
  - national surveys
  - ward-to-board quality and key performance reporting including hospital standardised mortality rates, patient/user experience (friends and family test), incidents, complaints, staffing levels, sickness absence, training and appraisals
  - Commissioning for Quality and Innovation (CQUIN) performance
  - quality account
- work performed to implement the NHS Outcomes Framework
- patient outcomes monitoring process including implementation and effectiveness of early warning systems, and the risks to meeting performance targets
- analysis of patient outcomes performance and resultant recommendations and action plans to address issues
- consideration of plans to manage the patient outcomes monitoring process in the new organisation
- processes for collation and monitoring of acuity/staffing, reviewing most recent National Quality Board publication of data where available
- peer review processes
- details of any governance arrangements for integrated care working and how this feeds into the trust's own processes
- details of any current independent inquiries into clinical issues at the trust

[19] Never events are serious, largely preventable patient safety incidents that should not occur if the available preventative measures have been implemented.

- outstanding action plans for third-party inspections
- processes for the management of clinical negligence claims (identification of alleged clinical medical negligence claims identified as part of legal due diligence – see below); links to the serious incidents process and performance as reported by the NHS Litigation Authority
- trust's management of coroners' inquests
- links to the serious incident/claims process and any active 'Prevention of future death' reports and how this is being processed
- clinical records management and information governance systems and processes.

*Patient and user experience*

- systems for capturing complaints; patient advice and liaison service (PALS); litigation and any trends analysis performed (to include those named in complaints to enable consideration of any necessary supporting action, eg clinical practice)
- review of complaints; trends identified; demonstrable learning action plans/ re-open rates (that is, organisation culture of response)
- numbers referred and upheld by Parliamentary and Health Service Ombudsman
- any (clinical commissioning groups/commissioning support units) GP/primary care specific concerns
- patient experience surveys and patient feedback
- how users and stakeholders are involved in defining priorities for quality account

*Regulatory and compliance*

- compliance with our 'Risk assessment framework' governance indicators, and plans to address areas of underperformance
- Care Quality Commission (CQC) registration (and any conditions applied); reports of recent CQC review visits and resultant action plans/outstanding

actions; results of CQC healthcare intelligence monitoring[20] including respective action plans/outstanding actions

- compliance and/or implementation plans to comply (and status) with NICE guidance
- evidence of compliance with key mandatory training, for example, safeguarding, resuscitation and demonstrable compliance with local policies (workforce)
- statutory and mandatory training attendance figures (workforce)
- mandatory safeguarding training levels (particularly level 2 – key staff with enhanced responsibilities) and evidence of compliance
- details of any issues regarding Mental Capacity Act Deprivation of Liberty Safeguards applications (issues may be reflected in CQC issues)
- pharmaceutical manufacturing/Medicines and Healthcare Products Regulatory Agency (MHRA) licence and action plan to address any conditions
- external assessments/statutory requirements
- contractual key performance indicator (KPI) performance by service.

*Clinical leadership*

- quality governance leadership, roles and responsibilities, for example:
  - Caldicott guardian
  - director of infection, prevention and control
  - safeguarding lead
- current structures; roles and responsibilities; strategies; action plans and proposed structures; roles and responsibilities; issues including vacancies/potential vacancies that could affect patient safety
- policy frameworks in important areas, for example, for staffing levels and grades required to manage units with graded acuity

[20] At date of guidance publication, healthcare intelligence monitoring had only been introduced for acute and specialist trusts; however, it is likely to be introduced for all trusts. It aims to give a clear picture of the areas of care that need to be addressed.

- structures for how the leadership accesses the views of junior staff in quality improvement (as per recommendations made in the Berwick report into patient safety).

*Operational management*

- clinical audit programme, including action planning and reporting
- clinical audit training plans and resources
- results of recent national and local clinical audits, and any resultant action plans/outstanding actions
- current structures; roles and responsibilities; strategies; action plans and proposed structures; roles and responsibilities, including supporting IT infrastructure for recording and reporting (data validation)
- process for assessing staffing levels, ongoing review of staffing levels; areas of concern and how these are being managed
- review of clinical staff turnover
- analysis of numbers of permanent staff and agency staff
- escalation procedures for when staffing pressures arise
- staff survey: areas of concern and action plan
- issues including vacancies/potential vacancies which could impact on safety
- involvement in clinical networks and arrangements to manage this

*Safeguarding*

- safeguarding adults: structure; policy; annual report; current issues (eg current case reviews)
- safeguarding children: structure; policy; annual report; number of children on plans; any serious case reviews including outstanding actions; issues
- action plans since last review

*Infection control processes*

- structure and management; policies and procedures; annual report and action plan; any issues
- examination of surveillance for the other Health Protection Agency data (eg methicillin-sensitive Staphylococcus aureus (MSSA) and vancomycin-resistant enterococcus (VRE))

*Policy management process*

- policy management including review and archiving process; priorities for review
- Freedom of Information policy and requests
- alerts and cascading process and effectiveness
- evidence of compliance

*Research*

- research being undertaken; any research and development strategies
- policy for managing, reporting and monitoring the introduction of new interventional procedures and how it links into the clinical effectiveness pathway

*Pharmacy*

- structure; medicines management function and responsibilities; policies and procedures including practice in relation to controlled drugs and also safe storage of drugs
- annual report
- accountable officer for controlled drugs; sample control drugs exception reports
- training and education in place; nurse prescribing training and accreditation

*Workforce*

- information on support provided by training and development; clinical supervision systems; preceptorship; mentorship and competency frameworks
- revalidation process and numbers of medical staff being deferred or not put forward for revalidation
- numbers of medical staff being managed under ‘Maintaining high professional standards’
- numbers of staff being investigated by the Nursing and Midwifery Council, General Medical Council and Health and Care Professions Council
- training and supervisory issues being reported in the General Medical Council or university deanery reports, including action plans in place to address these issues

- appraisal rates.

**Indicative human resources and pensions due diligence**

*Human resources*

The information below should be reviewed in addition to the information in the workforce section of the indicative clinical due diligence above.

HR and pensions due diligence should consist of a review of:

- listing of all transferring staff and analysis of management and staff by number, grade, salary, pension and other benefits entitlements
- staff handbook
- details of union representation
- analysis of HR key performance indicators (KPIs) such as sickness, absence and staff turnover
- details of ongoing HR-related legal disputes (identified in legal due diligence)
- training programmes and training records
- job planning
- analysis of organisation's culture and values
- occupational health and wellbeing
- performance management systems
- education and training activities
- listing of all contractors and secondments
- details of any disciplinary action against employees
- details of any employment tribunal cases
- staff consultation and TUPE[21] arrangements
- mapping of HR policies and procedures between organisations

[21] Transfer of undertakings (protection of employment) Regulations 2006 (SI 2006/246)

*Pensions*

- summary of the main pension and other post-retirement benefit arrangements, early retirement allowances, retirement indemnities, termination indemnities, death-in-service benefits, jubilee awards and summary of employee participation
- analysis of the funding and balance sheet position
- summary of past cash and accounting costs and analysis of budgeted/projected costs with a view to commenting on whether they are realistic
- main financial risks associated with the plans
- separation issues and costs.

**Indicative financial due diligence scope**

*Historical and projected trading results*

Financial due diligence should cover three years of historic data, the outturn year and two years of financial projections.

Financial due diligence should consist of a review of the following:

*Overview*

- summary of results
- analysis of revenue and profitability by hospital/unit
- revenue, direct costs and margins, gross profit, overheads, earnings before interest, tax, depreciation and amortisation (EBITDA)
- explanation of historical trends by hospital/unit, including:
  - pricing trends with payers and tariffs
  - contractual arrangements
  - volume and operation type (including analysis of day and outpatients)
  - bed numbers, occupancy and utilisation
  - trends in average length of stay
- overview of direct and indirect costs including employee and agency costs (and associated KPIs)
- to the extent possible, analysis of the fixed vs variable nature of the cost base

- impact of seasonality
- summary of any cost saving initiatives included within the budget and projections
- adjusted/underlying EBITDA and rent (EBITDA[R]), explanation of adjustments, including any standalone adjustments, non-recurring revenues and costs (including redundancy costs), accounting policy changes
- view on last 12 months, pro forma and run-rate EBITDA
- any central or public sector charges/income applied that may change post transaction
- overview of projections made for the forecast years, and review of the main assumptions in the projections
- summarise conclusions on the achievability of the projections incorporating the views of the commercial and operational due diligence work

*Current year trading and full year outturn*

- summary of current year budget/forecast
- summarise the budget/forecast, key lines in the profit and loss account, and compare to historical results and current year outturn
- key assumptions
- analysis of year to date trading (including comparison with prior year)
- views on the achievability of the current year forecast, including any vulnerabilities and upsides

*Balance sheet review*

For historic years and the latest available date:

- statement of net assets
- significant trends, change in accounting policies, any assets with a book value significantly different from market value
- any non-trading items, basis of valuation in the accounts and alternative market valuation (if available)
- significant off balance sheet items (including any guarantees)

*Fixed assets*

- summary by type of asset and by location/activity
- summary of owned and leased property and land
- basis of valuation; depreciation rates; profits/losses on disposals
- fixed asset impairment/write-downs
- fixed assets held under finance leases
- nature of any intangible assets; valuation; amortisation policy; own costs (research and development, other) capitalised
- capital expenditure plans and capital commitments

*Working capital*

- key ratios and trends
- analysis of inventory; reserves/provisions
- analysis of trade debtors – ageing (with comparatives), bad debt reserves and experience
- analysis of trade creditors – ageing (with comparatives)

*Other assets and liabilities*

- summary of other assets and liabilities; unusual items; significant fluctuations
- analysis of provisions
- litigation pending; claims not settled (overlap with legal due diligence)
- details of any security, retention of title or other restrictions relating to fixed and current assets

*Financing*

- analysis of net interest bearing debt by component and maturity
- summary of property lease commitments
- other financing (including financial instruments)

*Cash flow review*

For the historic years, budget for the outturn year and projections for forecast years:

- summary cash flow statement

- analysis of historical capital expenditure, by type and unit
- monthly trends in working capital
- cash flow seasonality including intra-month swings

*Cost improvement plans*

- analysis of historical performance and delivery
- current year performance
- future cost improvement plans
- mitigations plans

*Other matters*

- key accounting policies (eg revenue recognition) and any significant changes in past three years
- accounts, relevant management letters and audit reports for the preceding two to three years
- bank account details
- management information
- content and frequency of board/executive committee management reports
- accuracy/integrity of management information
- reconciliation of historical results to audited accounts
- normalising adjustments and the trust's normalised/underlying position
- analysis of the historical accuracy of budgeting
- overview of budgeting, re-forecasting and medium-term planning process
- group organisation, including legal structure, key locations and premises, management and organisational structure
- headcount overview and full time equivalency overview by function and by division
- overview of remuneration policies

*Charities*

- details of any endowment funds received

- details of any NHS umbrella charities and associated subsidiary charities established together with amounts held
- copy any deeds and deeds of variation from predecessor organisation
- details of arrangements to manage charitable funds internally.

**Indicative contract due diligence scope**

Contract due diligence should consist of a review of the following:

- healthcare
- supplies
- partnerships
- other agreements
- details of all proposed and current tenders to bid for and issue.

**Indicative legal due diligence scope**

Legal due diligence should consist of a review of the following:

- asset register and maintenance records
- all relevant non-property leasing agreements
- insurance
- material contracts (both NHS and otherwise), including consideration of any change in control provisions
- regulatory compliance
- clinical negligence claims
- judicial reviews
- other litigation and non-clinical disputes
- intellectual property rights
- criminal litigation
- coroners' inquests.

**Indicative commercial due diligence**

Commercial due diligence should consist of a review of the following:

*Trust review*

- overview of the services and geography covered by the trust to include
  - procedures and service volumes by type, revenue, profitability and capacity
  - review of the geographic catchment area as defined by referral patterns from GPs and others
  - analysis to understand what services are being paid for by which clinical commissioning groups and to understand the geographic reach of particular services
- assessment of the benefits of the acquisition of the target NHS organisation
  - how does the geographic, service and CCG combination benefit each trust?
  - what service synergies can be achieved through extending previously not-offered services to the new trust and vice versa?
  - what services could be rationalised across the two organisations and what cost reduction opportunities may be presented?
  - does the acquisition give access to CCGs that previously were unserved?

*Demand*

- macro assessment of the development for services in the catchment area
  - population analysis trends and dynamics, historic and expected future development including, where available and appropriate, specific population health needs
  - GP referral network – historic and expected development
  - how the models of treatment are likely to develop – in particular the balance of inpatient and outpatient procedures
  - what other service delivery models are likely to affect the demand for services (eg primary care initiatives, community hospitals, etc)?

*Competition*

- overview of the local supply base which competes for patients (other NHS trusts and, where appropriate, private providers)
- understand the size and focus of the providers – what services are offered, what are their expansion strategies?
- market share of patients by service area
- what does the combined entity look like in terms of the competitive position?

*Business plan*

- provide a view on the key revenue drivers underpinning the business plan
- indicative operations due diligence
- review and comment on certain key areas of hospital operations, including:
  - non-staff costs
  - staff costs
  - organisational capabilities (management and staff)
  - capital expenditure plans (historical and forecast) and estates strategy, linking in to financial analysis above
  - operational relationships with NHS and private medical insurance healthcare providers
  - supplier relationships
- review and comment on relationship-building measures with NHS consultants
- where reviews have been conducted or improvement projects initiated, review and comment on efficiency of patient journey and clinical pathways through the hospitals and interdependency with IT systems
- where available, review management information, and completeness and timeliness of KPIs versus comparative data. This work would link in to financial analysis referred to earlier. Example KPIs that could be considered include:
  - in-house KPIs relating to initial coding/billing of procedures
  - conversion rate of referrals to procedures
  - length of stay by procedure

- utilisation by theatre
- tests per procedure, test costs
- outpatient clinic utilisation
- consultant efficiency/profitability (all KPIs by consultant)
- nursing over-contract hours and unfilled duties
- pharmacy costs per procedure
- profit per procedure
- billing days, debtor days, etc

- review of strategic plans for the target as well as the strategic plans and commissioning intentions of the broader local health economy
- service development strategy and plans.

*Opportunities for upside*

- review and comment on management's plans for improving performance across the business
- consider potential for increase in income or efficiency through high level review of KPIs and targeted data analysis, where such data is available and provided; potential areas for consideration include:
  - reduction in length of stay and bed optimisation
  - increased efficiency of outpatient clinics
  - improvement in theatre utilisation or increase in day case rates
  - rationalisation of back office functions
  - consideration of administration levels
  - VAT planning and tax efficient salaries
  - transport, facilities and estates planning and clinical space optimisation
  - procurement opportunities
  - planned diagnostics
  - consideration of nursing levels or scheduling (including specialist nurses)
  - reduction in pharmacy costs or waste levels

  - faster recovery of debts or more accurate billing and management of working capital

- Note: upsides are likely to be in a range and will require further detailing to be specific.

**Indicative estates/property due diligence**

Estates/property due diligence should consist of a review of:

- list of properties, to include details of any relevant charges such as rates; insurance; value; length of ownership
- freehold title deeds
- lease agreements (head lease, sub lease, when they expire, etc)
- reverse lease premiums
- rent agreements
- restrictive covenants for both land and buildings
- rights of way
- mortgage deeds
- ground rents
- concessionaire contracts
- contiguous boundary assessment
- details of any capital projects committed to eg Local Improvement Finance Trust (LIFT); PFI schemes (see below for specific due diligence for PFI arrangements)
- planning applications
- existing licenses and permits and details of any applications outstanding
- backlog maintenance
- soft and hard facilities management
- latest six facet surveys
- sustainability strategy

*PFI specific*

- details of any estate, soft and hard facilities management and equipment PFI arrangements
- PFI contractual and legal relationships
- finance schedules for PFI impact on historical, current and future income and expenditure, balance sheet, capex, public dividend capital and invoice timing
- details of the design, construction and maintenance of PFI assets
- details of relevant supporting contracts and variations.

**Indicative IT due diligence**

IT due diligence would consist of a review of the following:

- overall view of adequacy of core IT systems, both clinical and non-clinical
- extent to which the current systems provide management with timely and accurate information to run the business on a day-to-day basis and to support business planning over the next one to two years
- evaluation of the status of IT projects in process and the adequacy of plans, budgets, staffing and the risk of failure (in particular, projects relating to the integration of acquired businesses)
- review of the adequacy of IT governance, business continuity and disaster recovery plans
- review of IT carve-out requirements, including technical service agreements, ongoing projects as well as shared infrastructure
- IT strategy, policies and procedures
- IT governance structures, staffing and reporting lines
- listing of all IT infrastructure
- review of data extraction and systems migration (if applicable)
- IT security and regulatory compliance
- data protection
- user support services
- IT project pipeline.

**Indicative taxation due diligence**

- Review corporation tax computations for all years still open to audit and related working papers and correspondence in the files of the transacting NHS organisation and those provided by the transacting NHS organisation's tax advisers.
- Analyse the transacting NHS organisation's corporation tax position on the basis of discussions with the transacting NHS organisation's management and tax advisers. The analysis will cover:
    - procedures for administering corporation tax affairs
    - historical and prospective tax charges and
    - the extent to which the transacting NHS organisation has complied with relevant statutory, regulatory or other legal requirements.
- Discuss with the transacting NHS organisations' management and tax advisers:
    - the key issues in the transacting NHS organisation' corporation tax position and the key judgements which they have made in determining the tax charge included in the transacting NHS organisation' accounts and in preparing its tax returns
    - any potential material exposures of which they are aware in the transacting NHS organisations' corporation tax position
    - any other matters arising which require further explanation.

*Other taxes*

- In connection with withholding taxes, payroll taxes, social security contributions, and sales taxes (VAT), discuss with the target organisation’s management and their advisors:
    - the procedures for administering the taxes concerned
    - the extent to which the transacting NHS organisation has complied with relevant statutory, regulatory or other legal requirements, the key issues in the transacting NHS organisation's tax position and the key judgements which have been made in preparing tax returns
    - any material potential exposures of which they are aware.

**Indicative environmental due diligence**

- Overview of key environmental, health and safety (EHS) risk issues relevant to the trust, current EHS management arrangements, and commentary on level of controls in place
- Overview of key EHS regulatory requirements, commentary on compliance record (last three years), compliance issues, significant incidents, and any significant expenditures anticipated in respect of regulatory requirements
- Discussion of any actual and potential EHS exposures (eg contaminated land liabilities, etc)
- Commentary on anticipated EHS regulatory developments affecting the trust
- Hazardous substances
- General environmental issues.

**Health and safety due diligence**

- Written statement of health and safety policy
- Health and safety management structure
- Individual responsibilities, including job descriptions that include health and safety duties
- Safety committees
- Health and safety rules
- Reporting, recording and investigating accidents and incidents
- Risk assessments
- Manual handling operations
- Hazardous substances
- Information and training to employees and non-employees
- First aid information
- Fire and other serious and imminent dangers
- Monitoring and auditing health and safety arrangements
- Details of any claim, complaint, prosecution, investigation or enquiry concerning health and safety matters.

**Carve-out specific due diligence**

- Analysis and disaggregation of:
  - balance sheet and assets and liabilities
  - income and expenditure
  - estate
  - contracts
  - HR and workforce
  - Cost improvement plan allocation
  - IT
  - business plans and strategic
  - activity
- Underlying assumptions of the carve-out
- Identify significant operational changes required for the business to operate on a standalone basis (with costs identified), the nature of the changes required, the related timing and the technical service agreements that are being proposed. This would include:
  - IT/telephony (scope discussed in IT section)
  - finance
  - pensions
  - insurance
  - HR
  - procurement
  - shared sites and property
  - commercial impact of any significant change of control clauses
- Consider one-time/transitional costs associated with the above (capex and opex)
- Provide ongoing programme management assistance as necessary to co-ordinate development of all transitional plans to deal completion.

# 12. Appendix 5: Monitor scope and submissions

## A. Indicative Monitor detailed review full scope by transaction stage

| Domain | Stage 1 scope (SOC) | Stage 2 scope (OBC) | Stage 3 scope (FBC) |
|---|---|---|---|
| **STRATEGY**<br>Is there a clear strategic rationale for the transaction and does the board have the capability, capacity and experience to deliver the strategy? | a. What challenges faced by the trust is the strategy seeking to address?<br>b. What other options were considered for addressing those challenges?<br>c. What was the basis for selecting proposed transaction approach? | 1. Is the trust's overall strategy well reasoned and can the board articulate how the transaction supports its delivery?<br>2. Has there been a detailed options appraisal and is there a clear rationale for the option that the trust has selected?<br>3. Does this rationale set out why it is the best option for patients, trust and local health economy?<br>4. Does the board have capability, capacity and experience to deliver the trust's strategy? | Update as necessary |
| Does the transaction raise any competition issues? | • Has the trust appropriately determined the potential nature and extent of any competition issues which may be raised by this transaction? | • If relevant, review of trust's completed assessment of any competition issues; comparison to Monitor's own assessment<br>• If relevant, preliminary review of trust's approach to assessing relevant patient benefits, robustness of plans for their realisation, and the fit with local commissioning intentions | |
| **TRANSACTION EXECUTION**<br>Does the trust have the ability to execute the transaction successfully? | | Is the trust sufficiently prepared and equipped for this transaction?<br>- Are there any governance concerns or early indicators of concern in the acquirer?<br>- Does the board understand the transaction's key risks and is a sufficient, robust due diligence | 1. Does the board have the appropriate capability and capacity to minimise execution risks?<br>2. Is the board able to identify and quantify transaction risks appropriately (including any risks associated with competition rules)? Is its approach to due diligence robust and is there evidence |

| | | | |
|---|---|---|---|
| | | programme planned?<br><br>- Has the board identified mitigations to the key risks?<br>- Is there a vision for the post-transaction organisation's structures and governance; a strategy for benefits realisation, and an outline implementation plan (including high-level timeline, dedicated resource for implementation management/programme management office (PMO) and identified integration workstreams)?<br>- Has the trust sought legal advice on the transaction, with no indicators of risk that transaction could not legally proceed? | that key risks have been recorded?<br>3. Has the board effectively mitigated key risks and established effective processes for the continued management of these risks post-transaction?<br>4. Is there a robust and comprehensive plan for delivery of the transaction, including integration and realisation of other benefits?<br>5. Is the integration plan sufficiently supported by clear lines of accountability, governance processes, delivery milestones and dedicated resource?<br>6. Has the trust met all regulatory and legal requirements (including Monitor certification), and is it planning the transaction with reference to good practice guidance? |
| **QUALITY**<br>Is quality maintained or improved as a result of the transaction? | | 3. What is CQC's view of both trusts and the impact of the planned transaction?<br>4. Would the enlarged organisation trigger any governance concerns under Appendix A of Monitor's 'Risk assessment framework'? | 1. Has the trust received a clean quality governance opinion in relation to the transaction (where relevant)?<br>2. Has the medical director provided a certification to Monitor?<br><br>} Update as necessary |
| **FINANCIAL**<br>Does the transaction result in an entity that is financially viable? | | What are the trust's key assumptions in the OBC LTFM, and what are their bases? (Activity, efficiency, CIPs) | 1. Does the trust's plan demonstrate financial viability post-transaction?<br>2. Has the trust received an unqualified FRP opinion? (where relevant)<br>3. Has the trust received an unqualified working capital opinion? (where relevant) |

## B. Indicative Monitor detailed review full scope submissions by stage

This appendix contains a comprehensive list of expected submissions against each of the scope domains for each stage. All submissions are relevant for a stage 3 review should a stage 2 review not have been performed.

### Strategic rationale

**Is there a clear strategic rationale for the transaction and does the board have the capability, capacity and experience to deliver the strategy?**

*Stage 1 submissions*

- summary paper on the rationale for the transaction, including details of how the transaction supports the acquiring trusts strategy and strategic options analysis
- analysis of current challenges the trusts face that the transaction seeks to address.

*Stage 2 submissions*

- analysis/work performed on identification of the synergies and benefits associated with the transaction (both financially and clinically, including the impact on workforce)
- analysis of opportunities the transaction represents
- details of any issues raised during board and stakeholder engagement and how these have been resolved
- analysis of relevant patient benefits
- evidence of the decision process undertaken to conclude on option selected, including evidence (eg board minutes and board papers) of board challenge and consideration of potential barriers to success and how these have been reflected in final plans
- evidence of engagement with key stakeholders in the local health economy, patients and key staff, and of views/issues raised from engagement with key stakeholders having been considered and incorporated into final plans
- assessment of the level of support for the transaction in the local health community, in particular the level of support received from CCGs and confirmation of their commissioning intentions
- evidence of continuing stakeholder engagement
- analysis of local health economy and market.

*Stage 3 submissions*

A transaction's strategic rationale is normally reviewed in full over the course of stages 1 and 2, but if not it will be reviewed at stage 3.

**Transaction execution**

**Does the trust have the ability to execute the transaction successfully?**

*Stage 2 submissions*

- details of any existing governance issues in the acquiring organisation and action plans in place to address these within the plan
- details and quantification of downside risks
- details of major action and contingency plans to mitigate risks, including details of key mitigation enablers
- planned due diligence programme, including rationale for not carrying out certain aspects of due diligence if applicable
- current governance structure for the trust(s) including the board and its sub-committees
- proposed governance structure for the combined organisation including the board and its sub-committees and rationale for changes (showing, where relevant, due consideration of continuity of relations with clinicians, local authorities, voluntary bodies, etc)
- draft post-transaction integration plan (see good practice guidance below)
- details of any legal advice sought regarding the transaction.

*Stage 3 submissions*

- all due diligence reports and summaries considered by acquiring board as part of the transaction
- evidence of review and challenge of the due diligence carried out and agreed action plans addressing issues identified within the due diligence
- draft business transfer agreement with evidence of agreement by all parties, including details of assets liabilities and staff to transfer
- benefits realisation plan describing benefits (cost, revenue, patients, clinical, etc) arising from the transaction, including specific benefits by service line, timing and supporting evidence (persons responsible for capturing specific synergies should be clearly indicated), draft then final

- organisation chart of the proposed enlarged trust
- CVs and biographies of proposed board members or interim directors (highlighting any relevant experience in mergers and acquisitions)
- skills-gap analysis of board performed for enlarged proposed board and if relevant, a plan to fill any necessary positions in the proposed board members which are vacant or will be vacant post-transaction
- details of any external advice sought in respect of capability or change management
- details of engagement with target organisation's board and senior clinicians, including evidence of discussion/consideration of barriers to integration and attempts to resolve these
- change management strategy, eg plan to manage cultural/behavioural harmonisation
- details of additional integration arrangements eg time-limited committees
- post-transaction integration risk management plan
- current corporate risk register for both target and for transaction
- all board minutes and papers relevant to the proposed transaction, including minutes evidencing board approval of mitigations
- copy of the latest integration plan monthly monitoring progress/status report to acquiring trust's board
- summary of reporting arrangements for patient experience and complaints at the acquiring trust including (1) the author and distribution of the patient experience report, (2) the names and membership of any groups that review patient experience and complaints, (3) the frequency patient experience data are reported to the board and any other applicable groups
- serious incident policy and reporting arrangements at the acquiring trusts including (1) the names and membership of any groups that review serious incidents, (2) the frequency serious incident data are reported to the board and any other applicable groups (both internal and external to the trust)
- plans to integrate quality governance systems (including patient experience, complaints and serious incident reporting arrangements), risk management systems, financial reporting procedures, performance management systems, IT systems, services and culture
- detailed post-transaction integration timeline, with milestones and deadlines

- post-transaction management team structure/summary
- communication plan for staff and key stakeholders
- decision and rationale on physical service configuration/location
- specifications of changes to clinical services appropriately cross-referenced with the business plan with evidence of appropriate consultation of the changes
- planned format for performance reporting for the enlarged trust
- reports (including action plans where available) from third party inspectorates
- self-certification and supporting board minutes and papers
- minutes of the council of governors and board of directors meetings confirming approval of the amendments to the constitution or proposed new constitution, with trust's confirmation that the meetings were quorate
- membership strategy, including steps taken to ensure representative membership for the post-transaction organisation
- proposals and timetable for the proposed membership and council of governors and elections
- subsequent update on implementation of membership strategy and election process
- schedule of commissioner requested services - with any changes to commissioner requested services currently provided by the trust(s) clearly indicated; (changes to the provision of CRS resulting from the transaction must be undertaken in accordance with Continuity of Service Licence Condition 1)
- board statement confirming its review and approval of the PTIP (pro forma provided in Appendix 10)
- independent accountant's report and signed opinion on PTIP, draft then final
- signed board statements and memorandum on financial reporting procedures
- independent accountant's report and signed opinion on financial reporting procedures, draft then final
- details of interim/shadow directors (see Section 7), mutually agreed by both boards and reflecting the expected future composition of the new trust's board

- details of the selection process for non-executive directors
- details of the proposed external and internal auditor of the new trust should be provided.

**Finance**

**Does the transaction result in an entity that is financially viable?**

*Stage 2 submissions*

- LTFM (see below)
- summary of CIP plans
- activity analysis − if not already detailed in the LTFM
- details of major initiatives, such as new investments, or synergies from the transaction, including timeframe in which they will be achieved, key assumptions used and scenario analysis to demonstrate risks to achievement of plan
- where the other merger/acquisition party has a significant financial deficit, a summary of the key initiatives and components of the plan to eliminate the deficit
- summary of the costs expected to be incurred to complete and implement the transaction, including assumptions used to calculate them and timings of when they are to be incurred
- details and quantification of downside risks and mitigation actions.

*Stage 3 submissions*

- finalised LTFM, with reconciliation to stage 2 LTFM
- signed heads of terms
- draft business transfer agreement
- financial due diligence reports
- reconciliation of acquirer base case to annual plan review (APR)
- analysis of transaction funding, internal (operating cash flow) and external
- details of ongoing discussions of funding sources and confirmation from all funding parties

- completed contract templates for both acquirer and target trust (as provided by Monitor) as reconciled to the LTFM
- details of CQUIN targets and year-to-date achievement for target including any risks to achievement for the full year
- finance committee reports (covering a six-month period)
- latest audited accounts for both trusts
- details of any outstanding contract disputes and potential financial impact (if applicable)
- detailed CIP plans for outturn year and the subsequent two years, and as much as is available beyond that for both trusts, (including projected WTE data), as reconciled to the FBC
- where the other merger/acquisition party has a significant financial deficit, details and analysis of the plans to address and, over time, eliminate the deficit
- reconciliation of FBC CIP to actual CIP
- latest board report on CIP achievement
- minutes of the forum where CIPs are monitored (both trusts)
- any quality reviews performed on the CIP schemes to verify they do not impact on clinical quality
- summary of accounting-related choices or issues presented by the transaction, and of their resolution
- integrated estates plan for the combined organisation
- analysis of asset disposal plans for the coming year
- analysis supporting activity assumptions
- completion of current trading templates (as provided by Monitor) for both acquirer and target trust
- completion of historical accuracy of budgeting template (as provided by Monitor) for both acquirer and target trust
- board statement and memorandum on working capital (see Appendix 10)
- independent accountant's report and signed opinion on working capital, draft then final (see Appendix 11).

**Long-term financial model (LTFM)**

We will provide a transaction long-term financial model (LTFM) which should be completed to support the business plan. This model can be obtained by emailing modelqueries@monitor.gov.uk. The transaction LTFM has similar functionality as the standard LTFM. The model includes three years of historic data, the current year outturn and five years of forecast data. The first two to three years of projections are on a monthly basis and checks are incorporated into the model to ensure consistency between monthly projections and the annual projections. For trusts with major PFIs or other major investments opening in future years, there is a need to incorporate their projections and assumptions over a 10-year period and the model has been constructed to allow for this where necessary.

**Quality**

**Is quality maintained or improved as a result of the transaction?**

*Stage 2 submissions*

- list of areas of non-compliance with CQC, both acquiring trust and target
- copy of the applicant trust's self-assessment on existing healthcare standards
- completion of access and outcomes metrics template (as provided by Monitor)
- details of governance risk ratings at individual trusts with additional analysis showing the rating for the combined organisation over the period of the LTFM
- details of mitigations to identified potential breaches of targets.

*Stage 3 submissions*

- clinical due diligence report
- completion of workforce analysis and bridging template (as provided by Monitor) to bridge movements in workforce in the forecast period
- latest available signed annual governance statement for each trust
- any public interest reports issues for either trust in the last 12 months
- latest available Quality Account
- up-to-date summary of complaints and serious incidents at acquiring and target trust with comparative information from prior year, including details on the number of complaints received monthly or quarterly (however reported internally) and the categories these complaints relate to (to provide in summary form – that is, whatever gets reported to management/the board)

- analysis of the complaints at both acquiring and target trusts for two historic years
- latest available patient experience survey summary results for acquirer and target trust; details of how frequently surveys are performed and to whom they are reported
- quality committee reports for the six-month period
- staff survey and most recent analysis thereof for both trusts with comparison with prior year and key trends
- self-certification on the service reconfiguration by medical director, with supporting board memorandum
- signed board statement and memorandum on quality governance arrangements
- independent accountant's report and signed opinions on quality governance, draft then final.

**Specific submission requirements for statutory transactions**

The submissions detailed above relate to all transactions where a detailed review is carried out by Monitor. For all 'statutory' transactions as defined in section 1.2 of this document, the following statutory submissions will also be required:

- a letter from the trusts asking Monitor to consider the application
- a letter from Secretary of State supporting the application on behalf of the NHS trust.

In particular, for statutory mergers or acquisitions the following additional submissions will be required:

- constitution of the proposed new or enlarged organisation
- council of governors meeting minutes documenting approval of the application
- for mergers: list of property and liabilities to be transferred to new foundation trust.

**Guidance on the contents of a post-transaction integration plan**

The plan should span from the current state of the trust(s) as they exist today, to the post-transaction entity after it has completed all activities necessary for consolidation. Plans should include

*Organisation chart of the proposed enlarged trust*

- composition of proposed council of governors
- composition of board of directors of proposed enlarged trust including decisions on all key named posts
- relevant experience of directors in conducting successful transactions, if any
- clear plan to fill any necessary positions in the above which are vacant or will be vacant post-transaction
- contact information for all persons specified in the organisation chart
- composition and relevant experience of the proposed integration team.

*Implementation timeline*

- activities for transitional period leading up to completion date – to meet objectives for 'Day 1' (such as addressing any critical clinical issues raised in due diligence, ensuring safe Day 1 staffing across the enlarged organisation, staff engagement/induction)

- timing of all key post-completion work streams and objectives (milestones); specific milestones are left to the applicants' discretion but should include events such as management changes, closures or movements of sites, significant changes to service provision, and significant costs, cost savings or revenues incurred as a result of the transaction
- projected dates of all management changes (or changing lines of authority), service reconfigurations, site closures, or any other post-transaction events material to the financial plan or provision of clinical services
- timetable for service-line consolidation, laid out by the individual service line. In general the timetable should provide:
  - a clear path from the current state of affairs to the future structure of the post-transaction NHS foundation trust's clinical services
  - guidance as to the timing of costs, cost savings and revenues specifically deriving from the post-transaction programme
  - a clear layout so that we (or anyone reviewing the plan) can verify, after the merger, whether the post-transaction integration is proceeding according to plan and on schedule.

*Specifications of changes to clinical services appropriately cross-referenced with the business plan with evidence of appropriate consultation of the changes*

- plan for how clinical services will be distributed post-transaction, including a complete list of planned changes to clinical services from those currently offered by trust(s)
- timing and location of sites to be shut, moved, or where time of service provision will be affected.

*Post-transaction management team summary*

This is a team dedicated to overseeing the PTIP and solving problems that arise, and is directly accountable for the results of the integration:

- composition of post-transaction management team with roles/responsibilities for delivery of the PTIP
- contact information for all members of the post-transaction management team.

*Post-transaction integration risk management plan*

- summary of key risks inherent in the plan including magnitude of risks, nature of risks, and their likelihood

- risk management strategy to mitigate risks identified in the post-transaction integration, including fall-back plan for accomplishing significant elements of the plan if, for example, the schedule slips, or in the case of unforeseen events that prevent achievement of key milestones.

*Summary of accounting-related choices or issues presented by the transaction, and of their resolution*

- advice obtained from outside accounting firms (where applicable).

**Guidance on the contents of a full business case**

We will review the applicants' business plan to understand the assumptions driving the plan, to identify key risks and to determine whether there are adequate processes in place for the proposed merged entity to achieve its goals and manage its risks. We will also seek to ensure that commissioner requested services are being provided and will verify compliance with relevant statutory requirements. We will also closely compare the assumptions post-transaction with current values for the applicant trusts to check that their derivation makes sense.

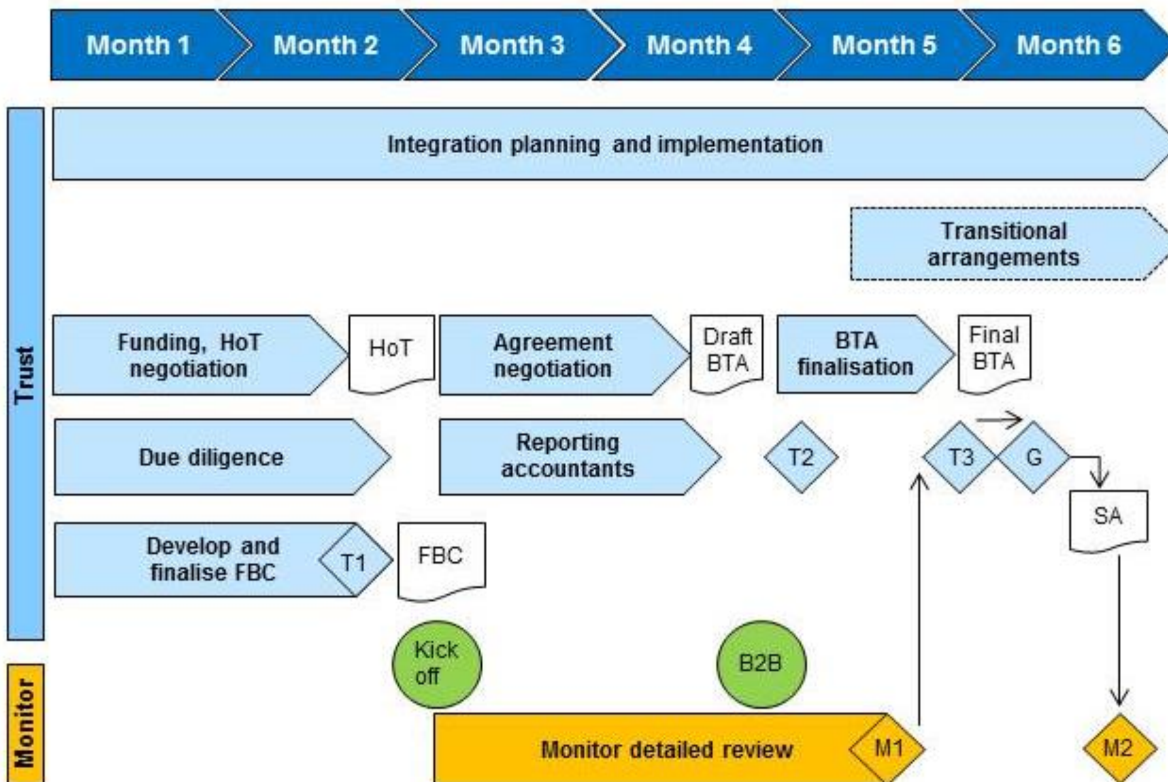
The business plan is a key document that should:

- detail the rationale for the transaction, including details of how the transaction supports the acquiring trust's strategy
- detail the synergies and benefits associated with the transaction (both financially and clinically, including the impact on workforce)
- detail the current challenges the trusts face that the transaction seeks to address
- detail the opportunities the transaction represents
- include options appraisal, including analysis of relevant patient benefits
- identify key risks to execution of the post-transaction strategy
- clarify major action and contingency plans to mitigate key risks
- detail the level of consultation and engagement with key stakeholders, including details of feedback and how this has been incorporated into proposals
- detail continuing stakeholder engagement
- explain the level of support for the transaction in the local health community, in particular the level of CCG support

- detail the financial plan, identifying key assumptions underlying projections and their relationship to the local health economy; include details of funding sources
- set out clearly how any restructuring costs (including treatment of accumulated deficits or debts) will be handled, and how it is proposed that they will be funded
- identify the impact of patient choice and competition for services on the activity assumptions
- the submitted plan should demonstrate continued provision of commissioner requested services for all patients currently serviced by the transaction parties, or detail and explain the rationale for significant changes to be made post-transaction
- highlight major changes to the property portfolio post-transaction, with particular emphasis on property material to provision of commissioner requested services
- summarise key themes of any due diligence carried out for the transaction
- summarise planned delivery of the proposed transaction, including proposed timeline.

## 13. Appendix 6: Indicative timeline and flow chart

The indicative timeline below illustrates the main concurrent work streams of the trust alongside our detailed review during the full business case and execution stages of a significant transaction (stages 3 and 4). The actual timelines for these stages of significant transactions will vary significantly and will depend on many factors including the size and complexity of the transaction and the interactions of other stakeholders.

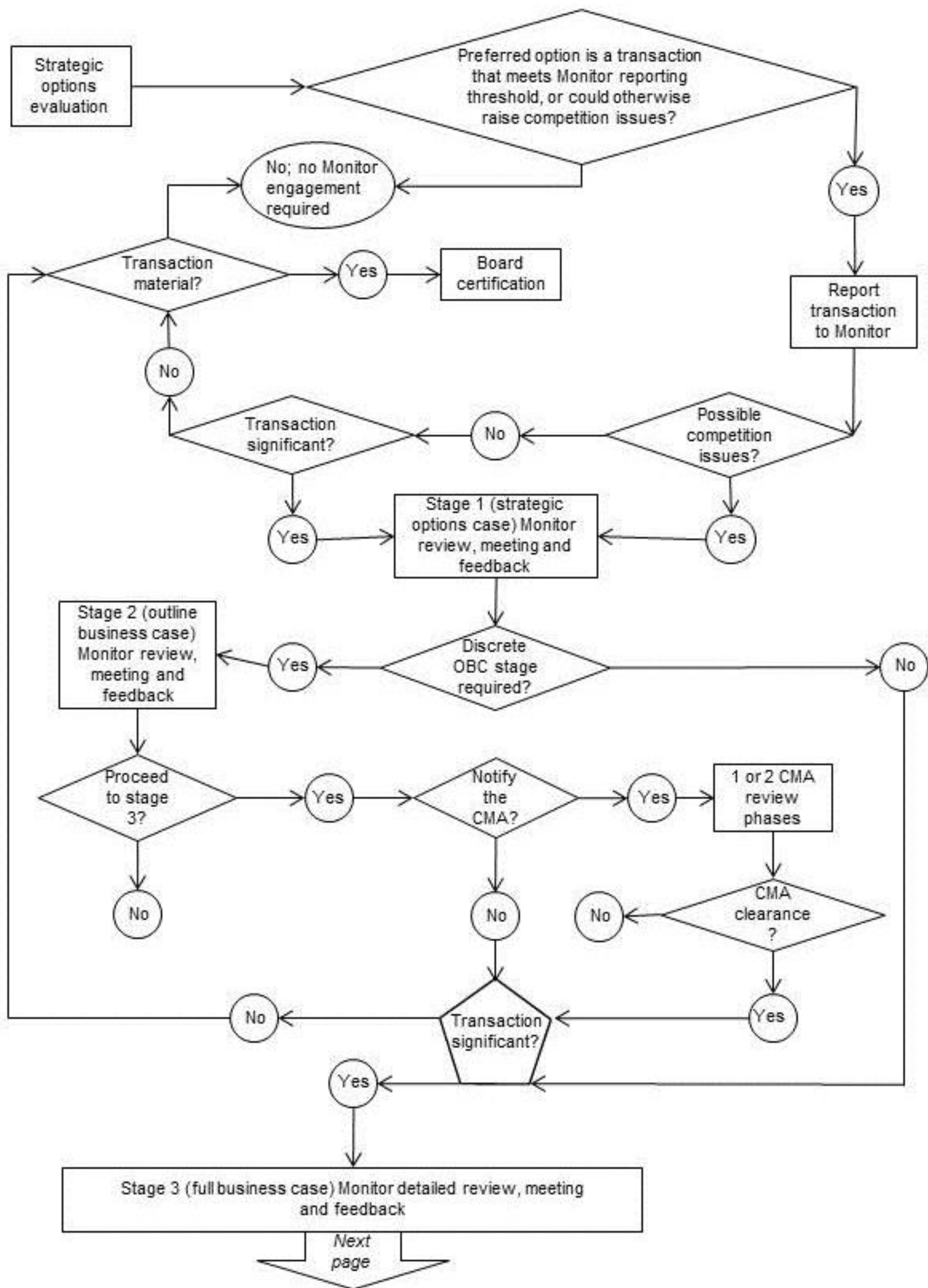


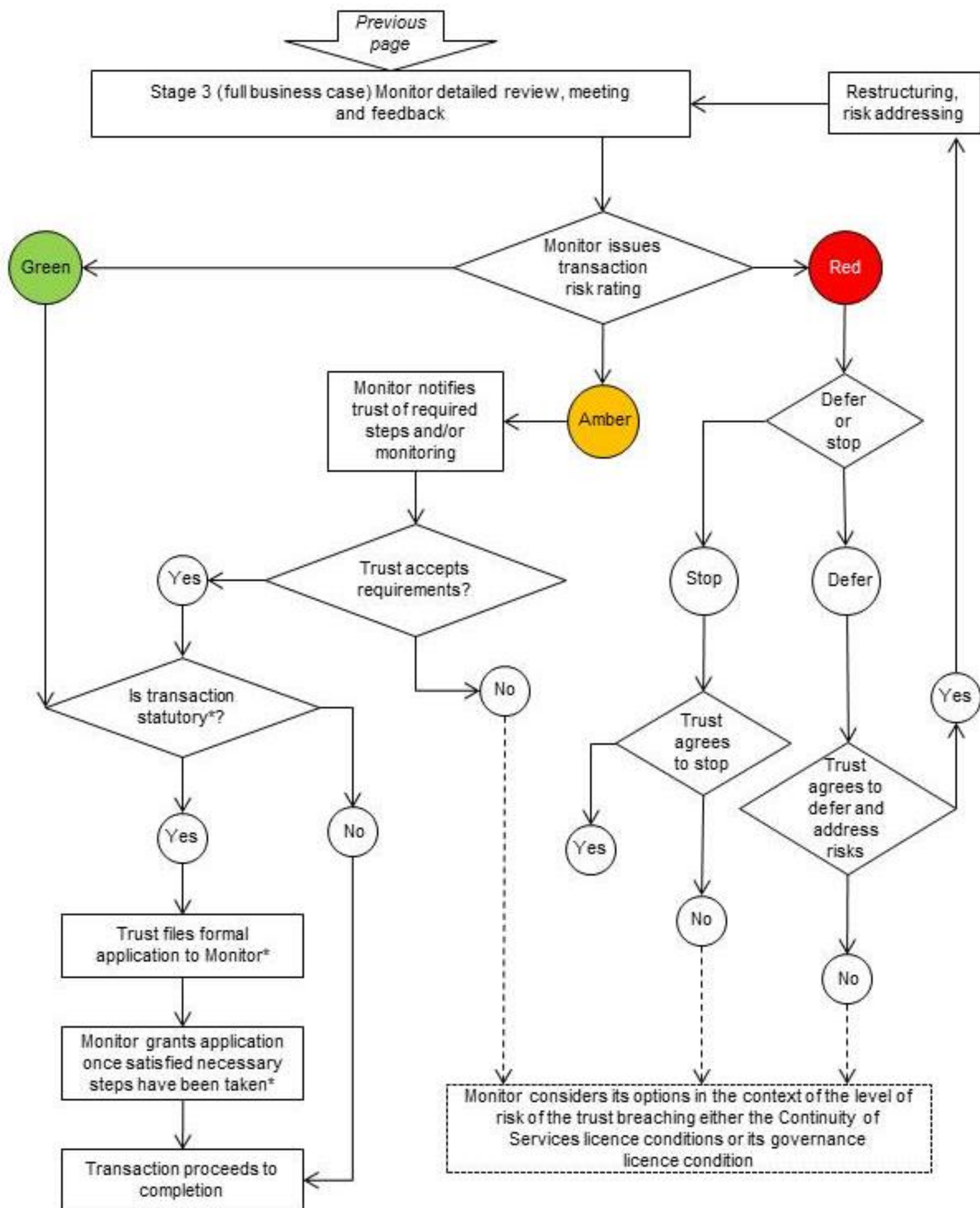

**Decisions and approvals**

T1 – Board approves final full business case documents for submission to Monitor
T2 – Board approves certification, board statements, memoranda and final reports from reporting accountants/experts
T3 – Board decision to approve transaction
G – Governor's formal vote on the transaction
M1 – Monitor approves and issues transaction risk rating
M2 – Monitor grants formal application for statutory transaction, makes Statutory Order (if applicable)

**Glossary**

B2B – Board-to-board meeting
BTA – Business transfer agreement
FBC – Full business case
HoT – Heads of Terms
SA – Statutory application (if applicable)


Strategic options evaluation
Preferred option is a transaction that meets Monitor reporting threshold, or could otherwise raise competition issues?
No; no Monitor engagement required
Yes
Transaction material?
Yes
Board certification
Report transaction to Monitor
No
Transaction significant?
No
Possible competition issues?
Yes
Stage 1 (strategic options case) Monitor review, meeting and feedback
Yes
Stage 2 (outline business case) Monitor review, meeting and feedback
Yes
Discrete OBC stage required?
No
Proceed to stage 3?
Yes
Notify the CMA?
Yes
1 or 2 CMA review phases
No
No
No
CMA clearance ?
No
Transaction significant?
Yes
Yes
Stage 3 (full business case) Monitor detailed review, meeting and feedback
Next page




* *See Annex II to Appendix C of the Risk Assessment Framework for statutory transaction requirements (reproduced in Appendix 2)*

## 14. Appendix 7: Investment adjustments

### Introduction

This appendix provides guidance for NHS foundation trusts which are considering applying for an investment adjustment in advance of Monitor assigning their planned significant investment a risk rating. The context for investment adjustments is set out in Appendix C to the 'Risk assessment framework' to which trusts should refer.

This guidance covers:

- the application process for trusts and submission documents
- our process of review
- criteria for costs eligible for adjustment.

### Purpose of the adjustment

NHS foundation trusts considering major transactions or investments may be disincentivised by the potential for a short-term negative impact arising from a major transaction or investment on their Continuity of Service Risk Rating (CoSRR) or their governance risk rating (GRR). Appendix C to the 'Risk assessment framework' seeks to address this by providing for investment adjustments to the CoSRR and the GRR to be agreed with us.

An investment adjustment will be considered by us on a case-by-case basis and may apply only in the following circumstances:

- the relevant investment is a material or significant investment
- written application is made by the trust to us requesting an investment adjustment and providing supporting information, as explained in more detail below.

### Application for adjustments and supporting documents required

Trusts will need to apply to us in writing for an adjustment to their CoSRR or GRR before the trust has committed to a legally binding agreement in respect of the transaction.

In assessing a potential investment adjustment, we may require a presentation from the trust setting out the basis on which it considers the adjustment appropriate.

For CoSRR adjustments trusts will need to provide:

- detailed financial projections (income, cash flow and balance sheet) for the acquired business and for the combined entity; this should be for the period

of the proposed adjustment until the trust has stabilised its financial position and CoSRR

- a separate analysis, on a quarterly basis, of the amount of qualifying costs for which the trust wishes to make an adjustment to its CoSRR calculation
- demonstration of the investment's risk and potential rewards and their likely timing in accordance with the good practice outlined in this transactions guide
- evidence of the investment plan's identification of the potential risk adjusted costs and returns over the period of the investment.

For GRR adjustments trusts will need to provide:

- a proposed threshold trajectory for each national governance indicator for the acquired business by quarter, with management plans showing how the trust will recover performance to the target threshold within an appropriate timeframe to be agreed with us
- a proposed threshold trajectory for each indicator against which the enlarged, post-transaction trust should be scored
- a rationale for the above thresholds.

In the case of a material transaction we may request to review the relevant documents that form the basis of the trust's self-certification (eg due diligence work or advice the trust received from external advisers).

**Monitor's process**

Investment adjustments need to be approved by the appropriate Monitor committee. We will therefore aim to complete the review within two months from the trust's application to us. This time period will also allow for a possible presentation to us of the proposed transaction and corresponding investment adjustment.

**Qualifying criteria**

The objective of the investment adjustment is to ensure that trusts are not disincentivised from undertaking investments which generate a long-term benefit to patients by a potential negative impact on their CoSRR or GRR. We will approve an investment adjustment which is in line with this objective, while ensuring that the CoSRR still captures any significant short-term risk to a trust's liquidity position or its existing operations.

We may approve an application only if the adjustment:

- is limited to the impact of the transaction
- Is short-term and time-limited

- is not applied to the liquidity metric in the CoSRR calculation.

These three non-exhaustive criteria are explained in further detail below.

*Costs or losses are limited to the impact of the transaction*

Only costs that are non-recurring and which can be directly attributed to the acquired operations will qualify for an adjustment to the CoSRR. These may include:

1. transaction or integration costs arising from the investment
2. restructuring costs required to turn around an acquired business
3. short-term trading losses or dilution of margin during the period of restructuring (specific direct costs only).

Restructuring costs can already be adjusted for in our quarterly CoSRR calculations if a trust separates these costs out in the reporting template. Trusts can only report these non-operating costs where they are restructuring costs that would have qualified as an exceptional item under UK GAAP (Generally Accepted Accounting Practice). For the purposes of the CoSRR adjustment all restructuring costs are included within the scope regardless of their materiality to the annual accounts.

We will adjust the CoSRR at each quarter for the planned non-recurring costs or short-term trading losses submitted and approved by us at the time of the application, unless the actual costs in the quarter are lower.

*Adjustments are short-term and time-limited*

As the purpose of the investment adjustment is not to permanently adjust a trust's CoSRR for a long-term deterioration caused by a transaction, the maximum of time for which a trust can apply and will be granted an adjustment to its CoSRR is limited to eight annual quarters.

We will need to be assured that the effects of the transaction are time-limited and that the trust has a credible planned trajectory for the recovery of the CoSRR to at least a three.

**Adjustments will not apply to the liquidity metric**

We will not approve an application for an investment adjustment of the liquidity metric in the CoSRR calculation, as liquidity concerns, no matter how short-term, should be reflected in the trust's financial risk rating.

## 15. Appendix 8: Board certification

*(Taken from Annex I, updated Appendix C of the 'Risk assessment framework')*

For a merger the board certification should be made jointly by both parties.

Where a potential transaction is deemed to be material, as defined in the 'Risk assessment framework', Monitor will, as part of its overall assessment of financial risk and governance, request evidence that the board is satisfied that it has:

- considered a detailed options appraisal before deciding that the transaction delivers benefits for patients and the trust in delivering its strategy
- assured itself that a proposed transaction will meet the requirements of the choice and competition licence conditions
- conducted an appropriate level of financial, clinical and market due diligence relating to the proposed investment or divestment
- considered the implications of the proposed investment or divestment on the resulting entity's continuity of service risk rating, having taken full account of reasonable downside sensitivities
- conducted appropriate inquiry about the probity of any partners involved in the proposed investment or divestment, taking into account the nature of the services provided and likely reputational risk
- conducted an appropriate assessment of the nature of services being undertaken as a result of the investment or divestment and any implications for reputational risk arising from these
- received appropriate external advice from independent professional advisers with relevant experience and qualifications
- taken into account the good practice advice in Monitor's transaction guidance or commented by exception where this is not the case
- resolved any accounting issues relating to the investment or divestment and its proposed treatment
- addressed any legal issues, including those associated with the transfer of staff (either via an acquisition, divestment or fixed-term contract)
- complied with any consultation requirements
- established the organisational and management capacity and skills to deliver the planned benefits of the proposed investment or divestment

- involved senior clinicians at the appropriate level in the decision-making process and received confirmation from them that there are no material clinical concerns in proceeding with the investment or divestment, including consideration of the subsequent configuration of clinical services
- in the case of a contract of a specified period, ensured appropriate legal protection in relation to staff, including on termination of the contract
- ensured relevant commercial risks are understood
- made provision for the transfer of all relevant assets and liabilities
- at the time of the acquisition, a corporate governance statement (see Appendix D of the 'Risk assessment framework') for the acquirer
- at the time of the acquisition, a board statement that plans are in place to be able to make the corporate governance statement (see Appendix D of the 'Risk assessment framework') in the new organisation within six months, with the exception of the following statement concerning quality governance for which an appropriate timescale for compliance should be determined by the trust board and agreed with Monitor:

"The board is satisfied:

(f) that there is clear accountability for quality of care throughout [insert name] foundation trust including but not restricted to systems and/or processes for escalating and resolving quality issues including escalating them to the board where appropriate."

## 16. Appendix 9: Pro forma medical director certification

**Private and confidential**

**Monitor**

[Date]

Dear Sirs

**[Applicant trust(s)] ('the trust[s]')**

In connection with the trust['s/s'] proposed transaction [detail transaction], I have reviewed the business plan. The results of this review are set out in the attached memorandum dated [date] which has been prepared after due and careful enquiry.

In my opinion, taking into account the business plan and all changes to the clinical service configurations that are proposed to be made following the transaction, there is no reason based in clinical practice to object to the service configuration set out in the business plan.

Yours faithfully

[Proposed medical director of the enlarged trust]

## 17. Appendix 10: Board statements

In addition to the board certification (Appendix 8), the medical director's certification (Appendix 9) and the board's corporate governance statement (see Appendix D of the 'Risk assessment framework'), for significant transactions Monitor will often seek, on a discretionary basis, additional evidence for the level of assurance the board has obtained in respect of the sufficiency and adequacy of following aspects of the transaction plans:

- working capital
- financial reporting procedures
- post-transaction integration plan
- quality governance.

The board will need to produce statements (in the case of a merger of two trusts, joint statements approved by both boards), the standard form of which are set out subsequently in this Appendix 10.

**Board memoranda**

Each of these statements must be supported by a board memorandum or plan that sets out in some detail the basis of the board's statement, which must be reviewed and approved by the board(s). The table below summarises the regular contents of these supporting memoranda.

| | |
|---|---|
| Working capital board memorandum | Financial projections for the first two years post-transaction, key assumptions, downsides and sensitivity analysis. |
| Financial reporting procedures board memorandum | The post-transaction organisation's proposed corporate governance arrangements, high level controls, risk management processes, management reporting framework |
| Post-transaction integration plan | Post-transaction management and governance; integration management, governance, workstreams, timeline; integration risk management, benefits realisation. See Appendix 5 |
| Quality governance board memorandum/ plan | The post-transaction organisation's proposed quality governance arrangements, covering all aspects of Monitor's quality governance framework (Appendix B of the 'Risk assessment framework') |

**Pro forma board statements**

The board statements for which pro forma wording is set out below, should be addressed to Monitor and signed for and on behalf of the board of directors (for a merger, both boards).

**A. Working capital**

In connection with the trust['s/s'] proposed transaction [describe brief summary of transaction], (post transaction, 'the enlarged trust') the board[s] of directors [of both applicant trusts] [has/have] reviewed the enlarged trust's future working capital requirements following the proposed transaction from [date] to [1 year from date]. The results of this review are set out in the attached board memorandum dated [date] which has been prepared after due and careful enquiry.

In the opinion of the board[s] of directors [of both applicant trusts], taking into account the enlarged trust's [existing and proposed new] working capital facilities, the working capital available to the enlarged trust is sufficient to meet the requirements of the enlarged trust, that is at least the 12 months from [date].

**B. Financial reporting procedures**

The board[s] of directors of [name(s) of applicant trust(s)] confirm that [it has/they have] established procedures for the enlarged trust which provides a reasonable basis for [it/them] to reach proper judgement as to the financial position and prospects of the enlarged trust.

The basis of the board[s] of directors['] confirmation is set out in the attached board memorandum dated [date]. This describes a range of financial reporting procedures for the enlarged trust for which plans have been drawn up by the board[s] of directors, but which the board[s] of directors [have/has] not brought into operation as at the current date. The board[s] of directors confirm[s] that [it is/they are] committed to ensuring that these financial reporting procedures are brought into operation and subsequently operated in accordance with the plans.

**C. Post-transaction integration plan**

In connection with the trust['s/s'] proposed transaction [detail transaction] the trust['s/s'] board[s] of directors [have/has] reviewed the post-transaction integration plan.

This plan has been prepared in accordance with applicable Monitor guidance and good practice, including the principles set out in Monitor's 'Supporting NHS providers: Guidance on transactions for NHS foundation trusts' and after due care and consideration and is supported by appropriate evidence.

In particular, the trust['s/s'] board[s] of directors believes that the post-transaction integration plan (where applicable) addresses and outlines:

- benefits to be derived from the transaction including synergies, cost reductions, and increases in revenue
- feasibility of the proposed organisational structure and changes from the current state
- feasibility of the timeline
- risk management strategy for all risks considered material by the current board of directors and the qualified professional advisor to the integration
- plans to resolve any service development problems
- detailed plans to address any current non-achievement of national targets or core standards as well as plans to ensure ongoing compliance with national targets and core standards.

**D. Quality governance framework**

In connection with the trust['s/s'] proposed transaction [detail transaction], (post transaction, 'the enlarged trust'), the trust['s/s'] board[s] of directors confirm that:

The board[s] are satisfied that, to the best of their knowledge and using their own processes (supported by CQC information, their own information on serious incidents, patterns of complaints, and including any further metrics they choose to adopt), the [trust has/trusts have], and will keep in place, effective arrangements for the purpose of monitoring and continually improving the quality of healthcare provided by the enlarged trust to its patients, including:

- ensuring required standards are achieved (internal and external)
- investigating and taking action on substandard performance
- planning and managing continuous improvement
- identifying, sharing and ensuring delivery of best practice
- identifying and managing risks to quality of care.

This encompasses an assurance that due consideration has been given to the quality implications of future plans (including the integration of the two organisations, service redesigns, service developments and cost improvement plans), and that processes are in place to monitor their ongoing impact on quality and take subsequent action as necessary to ensure quality is maintained.

The basis of the board[s] of directors['] confirmation is set out in the attached board memorandum dated [date] and the quality governance plan, both of which have been prepared after due and careful enquiry.

The memorandum and quality governance plan describe the quality governance arrangements for the enlarged trust which have been planned by the board[s] of directors. The board[s] of directors confirm that they will ensure these plans are brought into operation, and subsequently operated in accordance with the plans.

## 18. Appendix 11: Independent reviews and opinions

Each of the statements and supporting board memoranda or plan will be the subject of a review by an independent accountant or expert, to be selected and appointed by the trust. On conclusion of their reviews the reporting accountant or expert will issue a report and a formal opinion on each of the four board statements. Each opinion should conclude that the respective board statement has been made 'after due and careful enquiry/consideration'.

The independent accountant's or expert's reports and opinions must be made available to us but should be addressed only to the trust (or, in the case of a merger of two trusts, addressed jointly to both trusts).

**Use of accounting firms**

In order to avoid potential conflicts of interest over the use of independent accountants, trusts should note the following:

- We consider that no conflict arises where an accounting firm acts as both an adviser to the foundation trust and the independent reporting accountant on a significant transaction.
- Where an accounting firm is also the foundation trust's external auditor, the trust's attention is drawn to section 2.12 of the 'Audit Code for NHS Foundation Trusts' (March 2011) which states that 'the auditor may, with the approval of the board of governors, provide the NHS foundation trust with services which are outside the scope of the audit as defined in the code (additional services). The trust shall adopt and implement a policy for considering and approving any additional services to be provided by the auditor'. Where an accounting firm has an internal audit role at a trust, we consider that it should not act as the independent reporting accountant on a significant transaction.

Potential conflicts of interest are ultimately an issue for contracting foundation trusts to manage jointly with their appointed independent accountants. We should be consulted where foundation trusts and their independent accountants consider that it would nevertheless be appropriate for the independent accountant to perform the services contrary to the relevant guidelines set out above.

**Pro forma opinions**

**A. Working capital**

Dear Sirs

**[Post-transaction NHS foundation trust] ('the enlarged trust')**

We refer to the board memorandum dated [date] which has been prepared by the board[s] of directors of [the/both] trust[s] in connection with their statement relating to the sufficiency of working capital ('the board statement') contained in the letter dated [date] to Monitor. Copies of the board memorandum and the letter, for which the directors of [the/both] trust[s] are solely responsible, are attached to this report and have been initialled by us for the purpose of identification.

We also refer to our commentary report dated [date] (the 'working capital report') which was prepared in accordance with our engagement letter dated [date]. This letter should be read in conjunction therewith.

In accordance with the terms of our engagement letter dated [date], we have reviewed the board statement. We attach copies of letters from [bank] regarding borrowing facilities that we have relied upon in arriving at our opinion.

On the basis of our work we report that, in our opinion, the directors of [the/both] trust[s] have made the board statement in the form and context in which it is made, after due and careful enquiry.

Yours faithfully

For and on behalf of [independent outside qualified professional adviser]

## B. Financial reporting procedures

Dear Sirs

**[Post-transaction NHS foundation trust] (‘the enlarged trust’)**

We are writing in connection with the [brief description of the transaction], (together, ‘the enlarged trust’).

We refer to the attached letter dated [date] from the board[s] of directors of [the/both] trust[s] addressed to Monitor and the attached board memorandum dated [date] confirming that the board[s] of directors have established procedures which provide a reasonable basis for them to make proper judgements as to the financial position and future prospects of the proposed trust.

We also refer to our report dated [date] which was prepared in accordance with our engagement letter dated [date]. This report contains a description of and commentary on the proposed trust’s financial reporting procedures. This letter should be read in conjunction with that report.

We note and draw to your attention that the board memorandum describes a range of financial reporting procedures for the proposed trust for which plans have been drawn up by the board[s] of directors of [the/both] trust[s], but which the board[s] of directors of [the/both] trust[s] have not brought into operation as at the current date. We also draw to your attention the commitment made by the board[s] of directors of [the/both] trust[s] as recorded in the board memorandum that they will ensure that the financial reporting procedures are brought into operation, and subsequently operated, in accordance with the plans. In providing this letter we are relying on this commitment of the board[s] of directors of [the/both] trust[s].

All financial reporting procedures are dependent for their effectiveness on the diligence and propriety of those responsible for operating them and are capable of being overridden by persons holding positions of authority and trust. Although we can therefore provide no assurance as to the day-to-day operation of those procedures, we can confirm that, in our opinion, the directors have provided their written confirmation after due and careful enquiry.

Yours faithfully

For and on behalf of [independent outside qualified professional adviser]

## C. Post-transaction integration plan

Dear Sirs

**[Post-transaction NHS foundation trust] ('the enlarged trust')**

We are writing in connection with the [brief description of the transaction], (together, 'the enlarged trust'). We refer to the statement made by the board[s] of directors of [the/both applicant] trust[s] to the effect that the post-transaction integration plan has been prepared after due care and enquiry.

The statement, together with the basis of belief of the directors for making the statement, the sources of information supporting the statement and the directors' analysis and explanation of the underlying constituent elements, are set out in the post-transaction integration plan prepared, considered and approved by the board[s] of directors of [the/both] trust[s].

We have discussed the statement and post-transaction integration plan together with the underlying plans with senior management and the board[s] of directors. We have also agreed the financial and other supporting data in the report to supporting information where appropriate and where such information has been made available to us. We refer to our commentary report on the post-transaction integration plan dated [date]. This letter should be read in conjunction therewith.

We do not express any opinion as to the achievability of the benefits identified by the board[s] of directors in the post-transaction integration plan. Because of the significant changes to the enlarged trust's operations expected to flow from the integration and because the post-transaction integration plan relates to the future, the actual integration benefits achieved are likely to be different from those anticipated in the statement and the differences may be material.

We draw your attention to the assumptions set out in the post-transaction integration plan and to the comments in our report as to the extent that these assumptions are supported by evidence.

On the basis of the foregoing, we report that in our opinion the board[s] of directors of [the/both applicant] trust[s] have made the statement, in the form and context in which it is made, with due care and enquiry.

Yours faithfully

For and on behalf of [independent outside qualified professional adviser]

### D. Quality governance framework

Dear Sirs

**[Post-transaction NHS foundation trust] ('the enlarged trust')**

We are writing in connection with the [brief description of the transaction], (together, 'the enlarged trust').

We refer to the attached letter from the board[s] of directors of [the/both] trust[s] and the attached board memorandum dated [date] confirming that the trust[s] [has/have], and will keep in place, effective leadership arrangements for the purpose of monitoring and continually improving the quality of healthcare provided by the enlarged trust to its patients, and encompassing an assurance that due consideration has been given to the quality implications of future plans (including service redesign, service developments and cost improvement plans) and that processes are in place to monitor their ongoing impact on quality and take subsequent action as necessary to ensure quality is maintained.

We also refer to our commentary report dated [date], which was prepared in accordance with our engagement letter dated [date]. This report contains a description of and commentary on the enlarged trust's quality governance arrangements and future plans. This letter should be read in conjunction with that report.

We note and draw to your attention that the board memorandum describes the quality governance arrangements for the enlarged trust for which plans have been drawn up by the board[s] of directors of [the/both] trust[s], but which the board[s] of directors of [the/both] trust[s] have not brought into operation as at the current date. We also draw to your attention the commitment made by the board[s] of directors of [the/both] trust[s] as recorded in the board memorandum that they will ensure that the quality governance arrangements are brought into operation, and subsequently operated, in accordance with the plans. In providing this letter we are relying on this commitment of the board[s] of directors of [the/both] trust[s].

All quality governance arrangements are dependent for their effectiveness on the diligence and propriety of those responsible for operating them and are capable of being overridden by persons holding positions of authority and trust. Although we can therefore provide no assurance as to the day-to-day operation of those procedures, we can confirm that, in our opinion, the board[s] of directors have provided their written confirmation after due and careful enquiry.

Yours faithfully

For and on behalf of the [independent outside qualified professional adviser]

Making the health sector
work for patients

## Contact us

Monitor, Wellington House,
133-155 Waterloo Road,
London, SE1 8UG

Telephone: 020 3747 0000
Email: enquiries@monitor.gov.uk
Website: www.gov.uk/monitor

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