

# Competition review of NHS mergers

A short guide for managers of NHS providers

## **About the Competition and Markets Authority**

The Competition and Markets Authority is the UK's primary competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries and enforcing competition and consumer law. From 1 April 2014 it took over the functions of the Competition Commission and the competition and certain consumer functions of the Office of Fair Trading, as amended by the Enterprise and Regulatory Reform Act 2013.

## **About Monitor**

As the sector regulator for health services in England, Monitor's 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, Monitor makes 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.

## **Foreword**

As those on the front line are only too aware, the NHS faces significant challenges to deliver safe, high quality and sustainable services to patients. In some circumstances, you will decide that a merger is the best way to meet these challenges.

Mergers can benefit patients by helping providers to improve the efficiency and quality of their services. At the same time, choice and competition also have an important role in encouraging providers to deliver better services. The merger review process described in this guide allows for both the competition effects and the benefits of mergers to be taken into account in order to determine what is in the overall best interests of patients. This ensures that only those mergers which do not have adverse effects on patients or taxpayers proceed, for example because the benefits of the merger outweigh any adverse effects from a loss of competition.

Mergers are likely to raise competition concerns if patients and/or commissioners view the merging providers as important alternatives to each other (for example, because they are located close to each other and provide similar services), and there are few, if any, other providers that patients could use.

Monitor and the CMA work together to ensure that the interests of patients are always at the heart of the merger review process. We want to ensure that the merger review process is well understood and operates as quickly and predictably as possible, both to serve the patient interest and to preserve public resources. We hope that this guide will be helpful to you in explaining the circumstances in which a merger review is likely to be necessary, and what you can do to make informed decisions about the future plans for your organisations.

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Competition and Markets Authority

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## About this guide

This short guide seeks to answer the questions merging providers often ask us about the UK merger review process. It is designed to highlight important aspects of the process of merger review and provide an overview of the substantive test. It is therefore not intended to be comprehensive. For further detail please refer to more in-depth guidance that the Competition and Markets Authority (CMA) and Monitor have published:

- The CMA's [guidance on the review of NHS mergers](#) which explains the CMA's approach to reviewing NHS mergers
- Monitor's [guidance on merger benefits](#) which explains Monitor's approach to assessing merger benefits and providing advice on benefits to the CMA
- Monitor's [transactions guide](#) which explains the regulatory framework governing transactions in the NHS and how NHS foundation trusts involved in transactions should engage with Monitor.

**Please note:** This short guide relates to merger control. It does not cover Monitor and the CMA's other competition-related powers (for example in relation to anti-competitive conduct, agreements and abuse of dominance, market investigations, or NHS commissioning). Separate guidance is available in relation to these topics on our respective websites.

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## 1. Overview of the merger control regime

‘Merger review’ is the process through which the effects of mergers on competition are assessed. In the context of the NHS, the merger review determines whether the merger is likely to have adverse effects on patients by reducing choice and competition between providers. In the UK, merger review is primarily the responsibility of the CMA. Monitor’s role is to provide advice to the CMA on the benefits of mergers involving NHS foundation trusts.

Patients and commissioners can choose between NHS-funded providers on the basis of quality of service and other factors (such as access). This encourages providers to maintain and improve the quality and value for money of the services they offer in order to attract patients and win contracts from commissioners. Providers might do this, for example, by investing in aspects of their service that matter to patients and commissioners, such as infrastructure and facilities, reducing infection or mortality rates, reducing waiting times, or improving the ratio of nurses or doctors to patients.

Competition is one of many factors that affect the quality and value for money of NHS services.<sup>1</sup>

Mergers between providers can reduce competition and undermine the incentives to improve quality and value for money. This can in turn lead to adverse effects on services offered to patients or commissioners, such as reduced quality, efficiency or innovation of services, or reduced access to services.

To carry out its review, the CMA gathers information from various sources (including the merging providers, other relevant providers, patients and patient representative groups, commissioners and regulators such as Monitor and the Care Quality Commission) in order to understand the role that competition has in encouraging providers to improve quality and whether the merger will have a significant effect on these incentives. This includes an examination of whether the merging providers are seen as good alternatives to each other and which other providers patients and commissioners could choose from, if the quality of the merging providers’ services declined.

If the CMA determines that a merger is likely to raise competition concerns, it will consider whether these adverse effects for patients and commissioners are outweighed by any benefits that would arise from the merger. Monitor has a statutory duty to advise the CMA on the benefits of NHS mergers that are reviewed by the CMA. The CMA will place significant weight on Monitor’s expert advice on the benefits of a merger.

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<sup>1</sup> We recognise that other factors (such as quality regulation, capacity, remuneration, profitability of services and co-operation) may also affect providers’ incentives to improve services and we will take these into account in the context of a merger review where relevant. You can find further information about how the CMA takes account of these factors in the CMA’s guidance on the review of NHS mergers.

To reduce the burden on the merging providers, UK merger review has a voluntary notification system. This means that providers can choose whether to notify the CMA of their merger. The merger review framework is designed to target those mergers which can be detrimental to patients and commissioners, allowing those which are not detrimental to move ahead swiftly.

### **Which mergers may raise competition issues?**

If the merging providers are or could be important alternatives to each other (for example, because they are located close to each other and provide similar services) and there are few other providers in the local area for patients and commissioners to choose from, the merger is likely to raise competition concerns because it affects significantly the merging providers' incentives to improve quality.

The Competition Commission (one of the CMA's predecessors) previously found that an NHS merger raised competition concerns where the merging providers were important alternatives to each other, because (amongst other aspects) they were located close to each other, other providers were located significantly further away and they provided a similar range of services.<sup>2</sup> By contrast, in a case where there were a number of other strongly performing hospitals located near to the merging providers, the CMA concluded that the merger did not significantly affect the merging providers' incentives to improve the quality of services.<sup>3</sup>

## **2. Who is responsible for reviewing mergers?**

The CMA has primary responsibility for reviewing mergers in the UK under the Enterprise Act 2002 ('Enterprise Act 2002'). The CMA reviews mergers in all sectors of the economy, including healthcare, above certain jurisdictional thresholds (see Question 3 below).<sup>4</sup> In relation to NHS-funded healthcare services, the Health and Social Care Act 2012 confirmed that merger control applies and gave an important role in the process to Monitor, the health sector regulator.

The statutory framework gives the CMA jurisdiction to review mergers involving NHS foundation trusts (including mergers between an NHS foundation trust and an NHS trust) and mergers between NHS trusts and other enterprises. Monitor contributes to the merger review process by advising the CMA on the likely benefits of these mergers to patients and commissioners.

Mergers solely between NHS trusts are not reviewable by the CMA, but are reviewed by Monitor.

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<sup>2</sup> See a report on the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust, Competition Commission, 17 October 2013.

<sup>3</sup> See full text of decision on the anticipated acquisition of Heatherwood and Wexham Park Hospitals NHS Foundation Trust by Frimley Park Hospital NHS Foundation Trust, CMA, 3 June 2014.

<sup>4</sup> The term 'merger' in this short guide is used as a shorthand to refer to those transactions meeting the jurisdictional thresholds of the CMA unless specifically stated.

In this guide, mergers involving one or more NHS foundation trusts are referred to as ‘NHS mergers’.

### **Monitor’s review of mergers between two NHS trusts**

Monitor advises the NHS Trust Development Authority (TDA) on the impact mergers between NHS trusts will have on choice and competition. As far as possible, Monitor adopts an approach that is consistent with the approach taken by the CMA for NHS foundation trusts and other enterprises. TDA will take account of Monitor’s advice and any recommended actions when making its final decision on whether to proceed with a proposed merger. You can find further information in Annex B of the [partnership agreement between Monitor and TDA](#).

### **3. Which transactions can the CMA review?**

Transactions which involve a ‘change of control’ and which meet the turnover and/or ‘share of supply’ test (see ‘relevant thresholds’), can be reviewed by the CMA.<sup>5</sup> These may include mergers of whole or parts of NHS providers, acquisitions, joint ventures, transfers of services, asset swaps and management agreements.

#### **Change of control**

For a transaction to be reviewable, 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.

#### **Relevant thresholds**

A transaction must also meet certain thresholds to be reviewed by the CMA. 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. See Annex 2 for further information on the ‘share of supply’ test.

#### **Advice and support**

We expect you to engage with Monitor at an early stage when considering strategic options such as a merger. Monitor can help you understand whether your merger is reviewable by the CMA. You can also approach the CMA for informal advice on whether a transaction is within its jurisdiction (seeking informal advice will not automatically trigger a review of the merger). Ultimately the CMA is responsible for deciding whether a merger is reviewable.

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<sup>5</sup> For further detail on which transactions the CMA can review see section 5 of the [CMA guidance on the review of NHS mergers](#).



If your transaction does not meet the relevant thresholds, you do not need to notify the CMA of it. Monitor will follow its usual process to review the transaction as part of its overall assessment of foundation trusts' compliance with the continuity of service and governance conditions of their provider licences.

If your transaction meets the relevant thresholds, you should consider whether the merger raises competition issues and whether to notify the CMA of it.

#### **4. Should I notify the CMA of the merger?**

The UK merger regime is voluntary. This means that you do not have to notify the CMA of your merger, even if it meets the thresholds for review.

However, the CMA can decide to review mergers that it has not been notified of, either on its own initiative or if it receives a well-reasoned complaint from a third party.<sup>6</sup>

##### **Please note:**

The CMA is likely to review a merger that it has not been notified of if it meets the relevant thresholds described in Question 3 and in addition the CMA considers that it appears to raise competition concerns.

Therefore, when deciding whether to notify the CMA of a merger, your focus should be on whether it may raise competition concerns (for example, because the merging providers are located close to each other and provide similar services). If it is clear that the merger will not raise concerns – perhaps because the merging providers do not provide the same services and have no plans to do so (for example, one providing mental health services and the other providing standard acute services) and the merger is unlikely to affect providers' incentives to improve quality – you may decide that notifying the CMA is unnecessary.

You can find further information about how to assess the competition effects of a merger in the answer to Question 6 below. While it will always be your decision whether or not to notify the CMA about a merger, we expect you to engage with Monitor at an early stage when considering strategic options such as a merger, joint venture, acquisition, or service reconfiguration. This will help ensure your merger proposal works well for patients and commissioners. Monitor can provide you with advice on whether a merger is likely to raise competition concerns, and on your approach to assessing merger benefits.

You can also approach the CMA for informal advice on jurisdictional, procedural and substantive questions on UK merger review and how it might affect your transaction (as described in the answer to Question 3, above).

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<sup>6</sup> See paragraphs 6.9 to 6.14 of the CMA Guidance on the CMA's [jurisdiction and procedure](#).

Understanding the competition implications of proposals early on will enable appropriate planning, help to avoid unnecessary costs, and ensure that competition review (if required) can be conducted quickly and efficiently.

You can find further information about how Monitor will engage with NHS providers at the early stages of a transaction in Monitor's [guidance on transactions for NHS foundation trusts](#).

### **If I decide to notify the CMA about a merger, what happens next?**

If you decide to notify the CMA formally about your merger, we encourage you to engage in pre-notification discussions with both the CMA and Monitor as early as possible. These discussions usually involve providing a draft submission to the CMA on the competition effects of the merger and a draft submission to Monitor on the benefits of the merger.

These discussions will help you to identify the information you will need to provide to the CMA and Monitor, and help ensure the merger review proceeds efficiently. Annex 3 describes the type of evidence you will usually be asked to provide.

To notify the CMA formally of your merger you will need to complete a merger notice form, the template for which is available at <https://www.gov.uk/government/collections/cma-mergers-guidance>.

### **Please note:**

Not all of the information requested in the template about your organisation and the merger will be needed in all circumstances, which is why it is important to engage with the CMA early on (so it can help you identify the information you will need to provide). The timetable for the merger review will start when the CMA informs you that the merger notice form is complete.

### **If I decide not to notify the CMA about a merger, what happens next?**

If you decide not to formally notify the CMA about your merger, you will have no further contact with the CMA unless it decides to initiate a review. The CMA can initiate a review without your notification (for example following a well-reasoned complaint) up to four months following completion<sup>7</sup> of the merger. The merger may, in any case, require risk assessment by Monitor, as this forms part of its overall assessment of foundation trusts' compliance with the continuity of service and governance conditions of their provider licences. You can find further information about how Monitor conducts this review in Monitor's [guidance on transactions for NHS foundation trusts](#).

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<sup>7</sup> The CMA has four months from the merger being made public or it being completed (whichever is the later) to decide whether or not to launch an in-depth assessment at Phase 2.

## 5. What does a merger review involve?

Once a merger has been formally notified, the CMA merger review process can comprise two phases. You can find a diagram of the merger review process in Annex 1.

### Phase 1

In Phase 1 (which lasts up to 40 working days), the CMA must decide whether there is a realistic prospect that the merger will result in a substantial lessening of competition (SLC). As described in Question 1, this means that the CMA assesses whether the merger will have an adverse effect on patients and/or commissioners by significantly reducing their choice of provider, and undermining the merging providers' incentives to improve the quality of their services.

If the CMA believes that the merger will not result in a realistic prospect of a substantial lessening of competition, it will not refer the merger for a Phase 2 review and that would conclude the CMA's review of the merger.

If the CMA identifies a realistic prospect that the merger will result in a substantial lessening of competition, it has a duty to refer the merger for an in-depth Phase 2 review. However, the CMA can exercise discretion and may not refer the merger for a Phase 2 review if:

- The benefits of the merger outweigh the substantial lessening of competition. The CMA will place significant weight on Monitor's expert advice on the benefits of the merger; Monitor's approach to assessing merger benefits is set out in Monitor's [guidance on merger benefits](#).
- The merging providers have offered, and the CMA has accepted, 'undertakings in lieu' of referring the merger for a Phase 2 review. Undertakings in lieu are a commitment to take specific actions to resolve the competition concerns, such as excluding certain services from the merger or transferring certain assets to a third party. You can find further information about undertakings in lieu in the CMA's [guidance on the review of NHS mergers](#).
- The total value of the market or markets in which the substantial lessening of competition arises is less than £10 million, subject to certain criteria (see the CMA's guidance on the review of NHS mergers).

- The arrangements are not sufficiently advanced to justify a reference (for example, the merger has not been publicly announced and the providers are not committed to implementing it).<sup>8</sup>

## Phase 2

If a merger is not cleared at Phase 1, the review progresses to Phase 2 (which is generally limited to 24 weeks). In Phase 2, the CMA conducts a detailed assessment and must decide whether the merger is reviewable and whether it is expected to result in a substantial lessening of competition.

If it does find a substantial lessening of competition, the CMA must decide what remedy is appropriate. It can impose either a **structural** remedy (such as prohibiting the merger or requiring the divestment of all or part of the acquired assets to a suitable purchaser) or a **behavioural** remedy (normally ongoing measures that are designed to regulate the behaviour of merger parties). The CMA generally has a preference for structural remedies.<sup>9</sup> When considering remedies, the CMA will normally take benefits into account by considering the extent to which alternative remedies may preserve such benefits.

Further information on the CMA's merger review process can be found in the CMA's [guidance on the review of NHS mergers](#).

## 6. How does the CMA assess the competition effects of a merger?

In most cases the CMA's review of mergers focuses on two points:

1. whether the merging providers are seen as good alternatives to each other by patients and commissioners
2. whether there are other providers which patients and commissioners could choose to use if the quality of the merging providers' services declined.

This approach seeks to ensure that mergers between NHS providers do not significantly limit patient or commissioner choice, and in doing so undermine provider incentives to improve the quality of services.

The type of information that will be relevant to the CMA's review includes:

- overlaps between the merging providers (for example, if they supply the same services to patients and in the same area)
- views and evidence from patients, commissioners and other providers about whether the merging providers and other providers are good alternatives to each other

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<sup>8</sup> This provision is to ensure the unnecessary expense of a reference where it is still uncertain whether the merging providers will proceed with the merger. The merger will become reviewable once the arrangements between the merging providers reach a more advanced stage.

<sup>9</sup> See section 8 of the CMA guidance on NHS mergers.

- information about which providers patients and commissioners regularly choose between (such as referral data or results of previous tenders)
- documents demonstrating the marketing and strategic behaviour of the merger parties and other providers.

The CMA starts its review by identifying which services both the merging providers provide and the geographic area from which they draw the majority of their patients. Generally, merging providers located close to each other and providing similar services are likely to be important alternatives to each other for patients and commissioners.

The CMA will gather a broad range of information during its merger review to assess the impact of the merger on competition and ultimately on patients and/or commissioners. It will consult with a wide range of stakeholders. In addition to examining submissions by the merging providers, the CMA engages with numerous third parties who may include commissioners, competitors, local patient groups, Monitor, GPs and Royal Colleges. Typically, the CMA will also examine internal documents, survey information (this is more likely in Phase 2), patient referral patterns and bidding data where relevant. It can require providers to supply information throughout the review; and if its deadlines are not met, the deadline for reaching a decision might also be extended. Further explanation of the information that the CMA may gather is set out in Annex 3.<sup>10</sup>

An important aspect of the CMA's review is understanding the impact that the merger will have on patients in terms of the choice of providers available to them. GP practices' referral patterns are a significant part of the CMA's assessment, as they shed light on the choices made by patients and GPs, and how the merger could affect them. For example, where both merging providers receive a large share of referrals from the same GP practices and referrals to alternative providers are limited, this may indicate that the merger will significantly limit the choices available to patients. However this would be assessed alongside other wide ranging evidence (see Annex 3).

For services where patients do not choose their provider and commissioners contract exclusively with a single provider, the CMA also looks at the parties' bidding history (and the strength of those bids) and the services for which they are likely to be able to bid in future. The CMA then considers which other providers would be likely to bid for the same contracts based on their ability to provide the service, their previous bidding activity and any plans they have formed in relation to future tenders.

If a merger involves the transfer of particular services (rather than all of a provider's services), the CMA will focus on how the merger will affect the services being transferred.

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<sup>10</sup> See also CMA [guidance on the review of NHS mergers](#), Section 7.

Some mergers bring together providers and/or services that do not directly compete but may be related to each other. These are often called ‘non-horizontal’ mergers. They include, for example, mergers between a primary healthcare provider (such as a GP practice) and an acute provider or mergers between social and mental health providers. These types of mergers do not involve a direct loss of competition between organisations in the same market. It is a well-established principle that most non-horizontal mergers do not raise competition concerns.<sup>11</sup>

Other factors that affect the CMA’s assessment are explained in Annex 2. You can find further information in the CMA’s guidance on the review of NHS mergers.

If the CMA identifies competition issues in Phase 1 or 2 of its review, it will describe these in detail. This will allow the opportunity for the merging providers to then submit further evidence and views in support of their case before the CMA makes a decision on the merger.

### **Merger benefits**

If the CMA identifies a competition concern, it will consider whether the merger gives rise to relevant customer benefits as defined in the Enterprise Act. Relevant customer benefits are benefits to patients and/or commissioners in the form of lower prices, higher quality of services, greater choice or innovation of services.<sup>12</sup>

The CMA takes account of relevant customer benefits in different ways at Phase 1 and Phase 2:

- At Phase 1 the CMA weighs the benefits of the merger against the substantial lessening of competition. If the benefits of the merger outweigh the adverse effects, the CMA can clear the merger (that is, decide not to refer the merger for a Phase 2 investigation).
- At Phase 2 the CMA takes benefits into account when deciding what remedies are appropriate. The CMA might, on the basis of its assessment of the relevant customer benefits, decide that remedies that maintain some or all of these benefits are appropriate.

Monitor will advise the CMA on benefits at Phase 1, and the CMA will place significant weight on Monitor’s expert advice. You can find further information on Monitor’s approach to assessing benefits in Monitor’s guidance on merger benefits and the CMA guidance on the review of NHS Mergers.

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<sup>11</sup> However, in some circumstances non-horizontal mergers can raise competition concerns (for example if they distort patient choice by enabling the merged provider to direct referrals to itself to the detriment of other providers).

<sup>12</sup> Relevant customer benefits must be likely to accrue within a reasonable period as a result of the merger and unlikely to accrue without the merger.

## **7. Can merging providers integrate or share information before entering into the transaction?**

It is possible to complete a merger without prior clearance by the CMA. However, if the CMA decides to review the merger on its own initiative or after a complaint (which it can do up to four months after the merger is completed or made public whichever is the later), it has the power to prevent or unwind any steps that have been taken to implement the merger (such as transferring services, establishing joint governance or conducting joint procurement). Providers are therefore encouraged to consider whether a merger may raise competition concerns and take steps to avoid implementation of the merger. They should also take steps to control what confidential and commercially sensitive information they share with each other until the CMA completes its review.

Similarly, if a transaction requires risk assessment by Monitor under the provider licence (see Monitor's Transactions Guide for further advice), providers should not begin implementing the transaction until Monitor has completed its assessment.

Discussions between providers that are planning to merge are an important part of merger planning and due diligence. However, planned mergers do not always proceed, so it is sensible for merging providers to have appropriate safeguards in place to ensure that they do not integrate their activities or share confidential and commercially sensitive information in a manner which would impair their ability to operate independently of each other or affect their commercial behaviour if the merger did not proceed.

To avoid pre-merger integration concerns, merging providers should not:

- transfer ownership or control of all or parts of their business or assets
- carry out actions which impair their abilities to compete with each other going forward
- make substantive changes to their organisational structure or management responsibilities
- make changes to service provision together, or
- merge service lines or parts of the business or use a single set of branding.

However, any urgent action required in order for the providers to act in the best interest of patients should be discussed with the CMA and Monitor.

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 including plans regarding service or bed rationalisation, expansion plans, plans for marketing to GPs or targeting particular service areas.

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 greater competition risk in exchanging information that is detailed (as opposed to aggregated) and current or forward looking (as opposed to historical).

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.

You can find further information about the application of competition rules to information sharing in Monitor's guidance 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 CMA).



## **8. Relevant contacts**

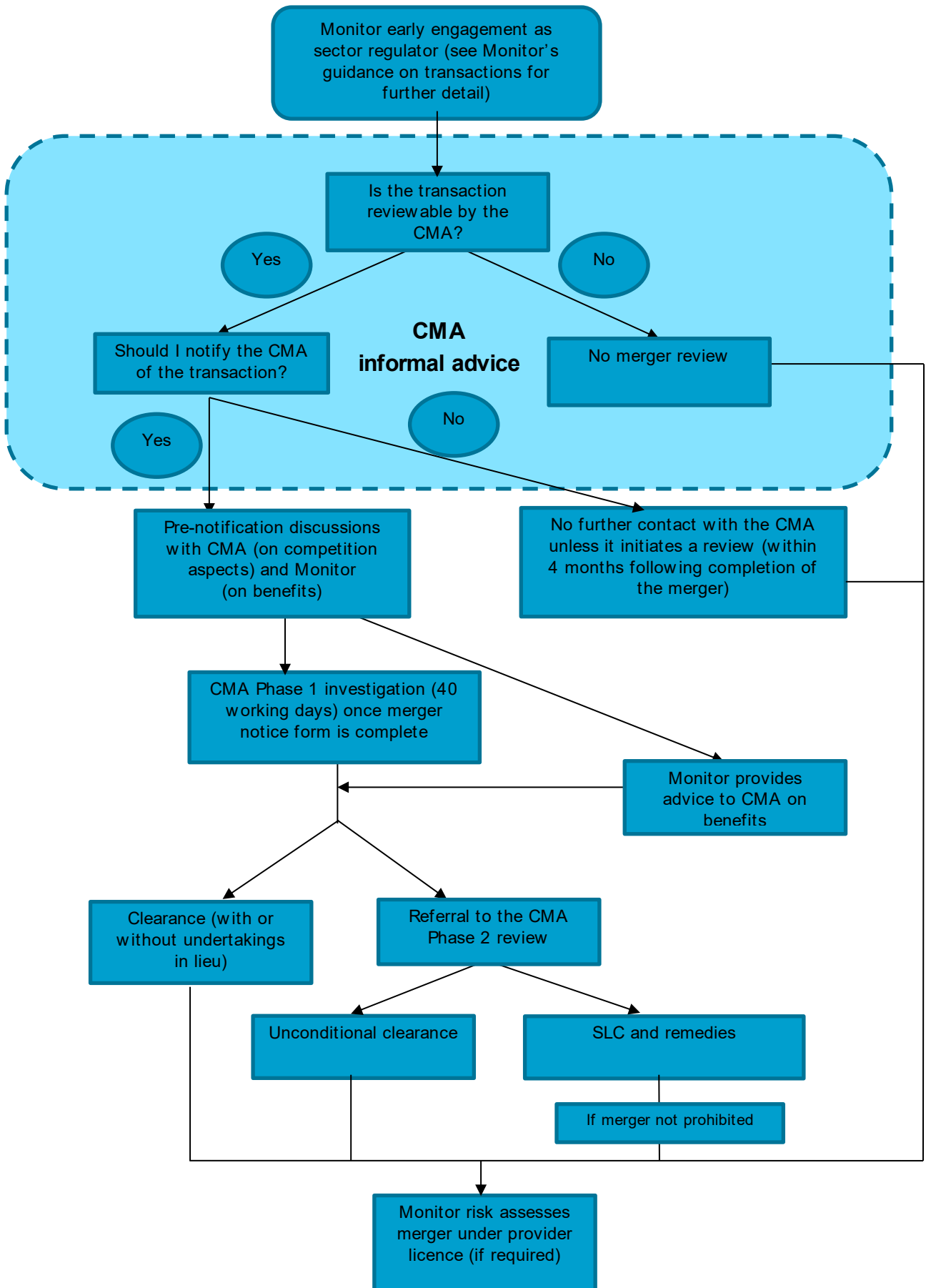
The CMA has a dedicated unit dealing with NHS mergers who are well placed to deal with queries. The unit may be contacted:

Email: [healthcare.mergers@cma.gsi.gov.uk](mailto:healthcare.mergers@cma.gsi.gov.uk)

Monitor's Co-operation and Competition Directorate can be contacted at:

Email: [cooperationandcompetition@monitor.gov.uk](mailto:cooperationandcompetition@monitor.gov.uk)

# Annex 1: Merger process diagram



## Annex 2: Other factors relevant to the CMA's assessment

- Share of supply:** The merging providers' share of supply or acquisition must be 25% or more in the UK or a substantial part of the UK. For the purposes of the share of supply test, a substantial part of the UK could be a borough (see the Competition Commission's report on the acquisition of the Co-operative Group Limited's store at Uxbridge, Slough by Tesco plc (28 November 2007). The merger must also lead to an increment to the share of supply, meaning that the merging providers must supply or acquire the same category of services or goods (of any description).
- Counterfactual:** The CMA examines the likely effects of the merger against what would happen without the merger (this is known as the counterfactual).  
  
At Phase 1, the CMA generally adopts the pre-merger situation as the counterfactual unless there is evidence that this is unlikely to continue (for example, because a provider will cease to provide some or all services). At Phase 2, the CMA may examine several possible scenarios but only the most likely scenario will be selected as the counterfactual. You can find further information on how the CMA identifies the appropriate counterfactual in its [guidance on the review of NHS mergers](#).
- Entry/expansion:** Where other providers are able and have incentives to begin supplying or expanding their service offering such that it limits the risk of harm from the merger.
- Buyer power:** Where commissioners enjoy significant negotiating power (for example because they account for a significant proportion of revenues of the provider and have good alternatives) such that it limits the risk of adverse effects, from the merger.
- Integrated care:** Typically, mergers between providers that supply different parts of the patient care pathway (for example, GPs and acute hospitals) are less likely to give rise to competition concerns. However, they may do so if they distort patient choice (for example by enabling the merged provider to direct referrals to itself to the detriment of competitors).
- Service reconfigurations:** The CMA will have regard to the context of the service reconfiguration in its assessment (for example, it may be relevant to the counterfactual or benefits of the merger). The CMA's jurisdiction to review mergers

does not extend to the award of a contract by a commissioner, provided that there is nothing more attached to the contract award (that is, no transfer of assets such as equipment or staff from one provider to another).

## Annex 3: Evidence that the CMA and Monitor typically use in relation to NHS mergers

This table gives examples of the type of information that the CMA and Monitor may request in relation to a merger (regarding the competition assessment and merger benefits respectively). It is not an exhaustive list of all of the information which may be relevant, nor will we require all the information in all cases. In practice, it is recommended that providers allocate resources to respond to information requests in order to avoid delays during the review.

| Evidence   | Source  |
|--|---|
| Merging providers' options appraisal underpinning the decision to merge  | Merging providers' internal documents (eg business plan)  |
| Information on financial performance by service line   | Overall performance: financial statements, annual reports<br>Service-specific performance: merging providers' management accounts   |
| List of services provided by the merging providers, including the site from which the services are provided, and any recent changes or future plans to change services | Information requested from the merging providers and third parties  |
| Costs of starting to provide services or switching capacity between services   | Information requested from the merging providers (cost data, accounts, board papers/plans)  |
| Quality of services provided in the local area   | Information from providers, commissioners and regulators  |
| Strategy documents (eg, market analysis, business plans, provider landscape)   | Merging providers' internal documents (eg, Business Plan)<br>Information requested from third-party providers   |
| Patient referral patterns  | Quantitative evidence from providers, Hospital Episode Statistics data, purchased data, NHS England data<br>Qualitative evidence from merging providers' internal documents |
| Survey evidence  | A survey of patients or other users (e.g. GPs) prepared in the normal course of business<br>Bespoke survey  |
| GP marketing activity  | Merging providers' internal documents including any analysis commissioned from external consultants   |
| Current and projected capacity utilisation   | Operational data requested from the merging providers and third parties (eg, bed/ward occupancy statistics at an overall level and by service)                              |
| Waiting times  | NHS England data<br>Information requested from the merging providers  |
| Co-operative arrangements  | Merging providers' service level agreements   |
| Commissioners' ability and plans to issue services to competitive tender   | Commissioners' plans<br>Sustainability of current service provision (information from commissioners, merging providers and third party providers)                           |

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| Tender bidding data  | Commissioners' and healthcare providers' tender documentation including information on participation and rank of shortlisted bidders |
| Contract information | Commissioners' and healthcare providers' contract documents  |
| Benefits case        | Merging providers' internal documents including strategy documents, implementation plans, integrated business plan                   |

For further information please contact:

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