

To:
NHS Foundation Trust Chairs
NHS Foundation Trust Chief Executives
NHS Foundation Trust Finance Directors

Cc:
NHS Foundation Trust Secretaries for circulation to Governors
NHS Trust Chairs
NHS Trust Chief Executives
NHS Trust Finance Directors
CCG Accountable Officers
CCG Chairs
CSU Managing Directors
NHS England Area Team Directors
Competition Commission
Competition and Markets Authority
NHS England Chief Executive
NHS Trust Development Authority Chief Executive
Office of Fair Trading

24 January 2014

Dear colleague

Arrangements to support NHS foundation trusts contemplating mergers

I know there is considerable concern about the impact of statutory merger controls on trusts seeking to reorganise through a merger¹. Monitor, the national competition authorities² and the Department of Health have listened carefully to these concerns. In Monitor's recent joint statement with the Office of Fair Trading and the Competition Commission³, we committed to work together to ensure the interests of patients are always at the heart of this process.

In this letter I set out how Monitor proposes to put this commitment into practice and I would be grateful for your views on this (see final page of this letter for further

¹ The term merger covers both mergers and acquisitions

² The national competition authorities are the Office of Fair Trading (OFT) and the Competition Commission (CC). From April 2014, the Competition and Markets Authority will replace the OFT and CC and be responsible for reviewing mergers involving NHS foundation trusts.

³ Joint statement released 17 October 2013

information). However, I would like to begin by putting this matter into the broader context of competition policy and its application in the health sector.

Competition in health

In any sector competition should only be a means to an end; a mechanism for delivering benefits to people who use services or buy products. So should it be in health.

When patients choose which provider they prefer to use, or when commissioners choose between alternative providers when awarding a contract, providers are incentivised to make sure they are delivering high quality, value for money services so as to increase the likelihood that their services will be chosen. It is this competitive pressure that may be reduced if providers that are alternatives for patients or commissioners decide to merge. The job of the competition authorities is to make sure that any reduction in this pressure to improve services for patients is outweighed by the benefits accruing to patients as a direct result of the merger.

However, competition is just one of the tools available to commissioners to secure high quality health care services that are integrated around the needs of patients and represent value for money. Other tools include redesigning or better managing existing contracts.

The commissioning process is regulated in part by the Procurement, Patient Choice and Competition Regulations, also known as the Section 75 Regulations, which Monitor is responsible for enforcing. I recognise that there is significant interest in the application of these Regulations and as a first step to addressing this interest we published at the end of last year [our guidance](#) on how we plan to apply the Regulations. We will be providing further support to commissioners and others during the course of this year on the application of the Regulations to make sure they facilitate good commissioning decisions that benefit patients. However, this is not the focus of this letter.

Issues arising in health mergers

There are three aspects of mergers in health that I believe need to be addressed and where I think Monitor can play a useful role:

- (i) Making sure any merger is based on a sound analysis of the clinical and other sources of patient benefit that should accrue from the merger, and that there are robust plans in place to make sure those benefits are realised in practice.
- (ii) Ensuring that there is a realistic and shared understanding across the sector, and between the sector and the competition authorities, as to how to weigh such benefits of a merger against the costs to patients of any reduction in competitive pressures on providers arising from a merger.
- (iii) Ensuring that any statutory review of a proposed merger can take place swiftly and without excessive cost.

The purpose of this letter is to explain how I propose that Monitor should help address the first and third of these. I intend to continue our dialogue with the sector and competition authorities on the second.

Supporting trusts contemplating mergers

At the time of Monitor's joint statement with the OFT and CC, I indicated that I wanted Monitor in future to engage with trusts contemplating a merger at an early stage to ensure any merger proposal works well for patients from both good governance and competition perspectives. This would include providing our own view of the extent to which the transaction might raise competition issues as well as undertaking our assessment of relevant patient benefits. I believe this should help significantly to address issue (i) above.

It will always be for a trust to decide how to proceed when contemplating a merger, and whether or not to notify the competition authorities. I hope, however, that the additional support outlined above will mean that, in future, hospital mergers will only be advanced where there is clear evidence that they are in the overall interests of patients. This should reduce the number of mergers requiring notification to the competition authorities and, given that the OFT has said that it will give significant weight to our advice in its considerations should a merger be notified or called in for review, should also mean that the parties are better placed to engage with the process so that the review can be completed swiftly, with few transactions being subject to a second phase review (currently, by the Competition Commission).

The remainder of this letter sets out how we intend this new approach to work in practice and explains how we are inviting feedback on it.

Our proposals

We believe there are several areas where Monitor can help trusts considering a merger navigate through the relevant regulatory issues. In particular, we will aim to ensure that the process is as streamlined as possible and that any unnecessary cost is avoided by assisting as merger proposals are being developed, and by focusing on the key areas that can cause mergers to stall. Specifically, we propose to engage with trusts contemplating a merger at three stages.

Stage 1

As a trust is considering its strategic options, and as soon as it believes there is a significant likelihood that it might want to undertake a merger, we propose that it should enter into discussion with Monitor. We would offer relatively informal support and advice at this stage, with two objectives:

1. **To ensure the robustness of the underlying strategy.** This is important because the quality and thoroughness of the underlying business case will help the trust demonstrate the benefits which specifically arise from the merger (the 'relevant patient benefits'). Our intention is not to approve the proposed strategy at this stage, but to pose key questions that might include:

- a. What challenges faced by the trust is the strategy seeking to address?
- b. What other options were considered for addressing those challenges?
- c. What was the basis for selecting the proposed (merger) approach?

We will offer views on how robustly the trust has answered these questions, but it will be for the trust to decide how to proceed.

2. **To highlight the type of competition issues that might arise.** At this stage we would also advise as to whether we believe the merger might give rise to any competition issues and, if so, what the trust should do to determine more precisely the nature and extent of those. We would also advise in general terms on how to assess relevant patient benefits.

Stage 2

Once a trust has developed an outline business case and identified its preferred option we would undertake a further review of the case, before the trust commits significant resources. This would focus on:

1. A further review and challenge of the strategic rationale for the transaction, and potentially a high-level review of the financial case if the transaction triggers the reporting thresholds under Monitor's *Risk Assessment Framework*. The purpose here would be to identify any 'show stoppers' before significant resources have been committed.
2. A review of the trust's own assessment of any competition issues resulting from the proposed transaction, comparing these with Monitor's assessment.
3. A preliminary review of the trust's approach to assessing relevant patient benefits, including the robustness of plans to realise those benefits and the fit with commissioning intentions in the local area.

These discussions would culminate in a more formal meeting between Monitor and the trust board, after which we would send a letter to the trust setting out:

- Any strategic business issues that we feel need further attention.
- Our view as to whether the proposed 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.
- Our view as to what, if any, further work is needed to complete the analysis and presentation of relevant patient benefits.

It would be for the trust to decide whether or not to proceed with the proposed merger and whether or not to notify the OFT⁴. We hope that in many cases a

⁴ Trusts are not required to notify the OFT of a proposed merger. It is for the trust to decide whether to do so although the OFT may still choose to call the merger in for review.

proposed transaction would only reach this stage if it was unlikely to raise any competition issues, or if these were clearly outweighed by the relevant patient benefits.

Should the OFT decide to investigate the merger, we would provide the OFT with our assessment of the relevant patient benefits identified by the trust, in line with our statutory obligations. We would also share our own assessment of the potential scale and impact of any reduction in competitive pressure. In such cases we hope the preparatory work undertaken by the parties would mean that any investigation by the authorities could be conducted quickly and at limited additional cost to the parties.

Stage 3

At the final business case stage Monitor would review the proposed transaction as part of our overall assessment of foundation trusts' compliance with the continuity of service and governance conditions of their licences, much as we do today. However, the amount of work required by an FT and by Monitor at this stage should be rather less than is the case today as a result of the significant engagement between us in Stages 1 and 2 of this revised approach. This final review would involve testing the final strategic logic, examining the state of due diligence and preparedness for post-merger integration, and assessing the overall risk to the trust of the proposed transaction.

As now, risks would be highlighted, but only in the most extreme cases would Monitor consider using its regulatory powers to block a transaction on governance grounds. It is not within Monitor's remit to block a merger involving an FT on competition grounds. This power remains with the economy-wide competition authorities - today the Competition Commission and from April 1st the CMA.

Implementing this approach

As part of our preparations for introducing these proposals we intend to update and consolidate our existing transactions guidance in order to reflect the assessment of relevant patient benefits and incorporate competition considerations. Where transactions involve NHS trusts we will work with the Trust Development Authority to ensure that our respective processes are joined up.

We propose to set up a dedicated team to engage with trusts involved in any merger process as outlined here. We aim to begin that engagement over the coming months. Providing this additional support to the sector will have resource implications for Monitor, and I would appreciate your understanding as we build up our capabilities. To help with our planning, I would be grateful if any FT contemplating a significant merger could give an indication of its current stage of development, and whether it is just one of a number of potential options being considered or is already identified as the preferred option. Please let your relationship manager know by Friday 7 February 2014.

In the meantime our Co-operation and Competition Directorate will continue to provide trusts with informal advice on the potential competition implications of

proposed transactions, and will help trusts understand the evidence needed to assess relevant patient benefits.

Alongside implementing these proposals we will continue to work closely with the competition authorities to ensure the merger review process is well understood, and operates as quickly and predictably as possible.

Inviting feedback

I would be very grateful for your views on the proposals set out in this letter. Please email consultation@monitor.gov.uk putting 'Mergers approach' in the subject line, by 5pm on **Friday 28 February 2014**. We will take account of any feedback before we finalise our approach.

I hope this letter is helpful and goes some way to allaying the concerns I know many have. I look forward to receiving your feedback and working with you to make sure competition works as it should, for the benefit of patients.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Bennett', with a long horizontal line extending to the right.

David Bennett

Chief Executive