

# Monitor

Making the health sector  
work for patients

**Our new  
approach to  
transactions:  
consultation  
responses and  
next steps**



## **About Monitor**

Monitor is the sector regulator for health services in England. Our job is to protect and promote the interests of patients by ensuring that the whole sector works for their benefit.

For example, we make sure foundation trust hospitals, ambulance trusts and mental health and community care organisations are well led and are run efficiently, so they can continue delivering good quality services for patients in the future. To do this, we work particularly closely with the Care Quality Commission, the quality and safety regulator. When it establishes that a foundation trust is failing to provide good quality care, we take remedial action to ensure the problem is fixed.

We also set prices for NHS-funded services, tackle anti-competitive practices that are against the interests of patients, help commissioners ensure essential local services continue if providers get into serious difficulty, and enable better integration of care so services are less fragmented and easier to access.

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## Introduction

In January this year we consulted the healthcare sector on a number of proposed changes to both how we work with NHS foundation trusts that are planning transactions and on our approach to transactions generally. These were:

- the introduction of new arrangements to support NHS foundation trusts contemplating a merger or acquisition navigate the relevant regulatory processes, as set out [in a letter to foundation trusts and others](#) from our Chief Executive David Bennett
- changes to the rules for reporting and reviewing transactions as part of Monitor's approach to risk assessing transactions to ensure compliance with licence conditions, as set out in a [consultation on Appendix C](#) of our 'Risk assessment framework'.

This document summarises the proposed changes, the feedback we received on them and the next steps.

Overall there was broad support for the proposed changes and we are now in the process of implementing them:

- We have published an updated version of the ['Risk Assessment Framework'](#), with an Appendix C that contains the revised rules which now apply to NHS foundation trusts for reporting and reviewing transactions.
- We are establishing a transactions team and have already started to apply aspects of the new approach to a number of proposed mergers.
- We are building these new approaches into a range of guidance material which will be issued in summer 2014. These documents will support NHS foundation trusts contemplating a transaction to understand and navigate the relevant regulatory processes, and will include:
  - A new, updated Monitor transactions guide. This will update and consolidate our previous guidance on transactions, and provide further detail and clarity on the new arrangements to assist NHS foundation trusts contemplating a merger or acquisition and on our risk assessment process and requirements. It should help to address many of the questions and concerns raised during the January consultation.
  - A joint document with the Competition & Markets Authority (CMA) explaining how statutory merger control applies to NHS mergers.
  - Revised guidance on how Monitor will assess and provide advice to the CMA on how changes resulting from NHS mergers will benefit patients.

## Summary of responses to the consultation

We sought feedback on the proposed changes to how we work with NHS foundation trusts planning transactions and our approach to transactions generally over the period 24 January 2014 to 28 February 2014.

The responses comprised 19 emails in total (the majority of which addressed both sets of proposed changes) and six online survey responses in respect of the revision to the transaction risk assessment approach (relating to Appendix C). The combined total of 22 respondents included 17 from NHS foundation trusts, 4 from representative bodies including the Foundation Trust Network, NHS Clinical Commissioners, Royal College of Nursing and NHS Confederation, and one from a professional services firm.

A full list of respondents is provided in Annex A of this document.

## **New approach to engaging with NHS foundation trusts contemplating a merger or acquisition**

### **Summary of proposed changes**

These proposed changes would see Monitor introduce a new phased approach to supporting NHS foundation trusts contemplating a merger or acquisition navigate through the relevant regulatory issues.

The phased approach would help to facilitate a smoother and swifter path for those mergers and acquisitions that work well for patients, by assisting as merger proposals are being developed and focusing on the key areas that can cause mergers to stall.

The approach would see us engaging with NHS foundation trusts contemplating a merger at an early stage to ensure any proposal works well for patients from good governance and competition perspectives. This would include providing our view on the extent to which the transaction might raise competition issues and undertaking our own assessment of how the changes brought about by the merger would benefit patients.

### **Feedback on proposed changes and Monitor's responses**

#### *1. Overall approach to merger support*

Overall, there was broad support for Monitor's new approach to mergers. It was noted that the phased approach should help ensure merger proposals are developed in a way that meets the regulatory frameworks used to assess mergers, and in doing so would help reduce the risk of any unnecessary delay or cost. It was felt that we have an important role to play in helping the competition authorities better understand the NHS but there was recognition that Monitor is not the decision-maker in relation to statutory merger control.

While supporting the overall approach, a number of respondents commented on certain aspects of it. The need to implement the new approach in such a way that NHS foundation trusts continue to develop a culture of operational independence was emphasised. It was also noted that Monitor should establish appropriate internal safeguards to ensure that we are not accused of a conflict of interest in having advised on, and subsequently assessed, proposed mergers. However, one respondent felt that we should go further and use this new approach to support mergers as they develop.

#### *Our response*

We welcome the positive feedback on the proposed phased approach. It is intended to support NHS foundation trusts navigate through the relevant regulatory processes and it will always be for the NHS foundation trust to decide whether or not to

proceed. In offering this support to the sector we recognise that some NHS foundation trusts will have more experience in taking risk-based decisions and that this is likely to evolve over time as the assessment of NHS mergers becomes more established.

We appreciate the potential risks associated with supporting particular options during the early stages which subsequently we would be required to assess. However, in developing the new approach we have been mindful to limit our advisory role to those issues relevant to the competition assessment undertaken during statutory merger review – a stage at which we are not the decision-making body.

## *2. The nature of the support and its requirements*

A number of respondents raised questions or comments on various aspects of the support and its requirements. These included: clarification on the likely timescales associated with the different stages; the level of detail and information requirements at each stage of the process; and the need to provide support on a confidential basis.

Several respondents emphasised the importance of ensuring that the process during the early stages remained light touch, particularly for those organisations with experience in developing strategy and assessing competition issues. Others queried whether Monitor would have the resources and expertise to meet the expected demand as, if not, this could lead to additional delay. One respondent requested a single named Monitor contact through which to engage on all merger-related issues.

Some felt that it would be important for us to try to identify or look for evidence of commissioner involvement in the development of merger plans.

### *Our response*

We will reflect on and address all the relevant comments received as we move to implement the new approach. We are planning to apply aspects of the approach to a number of proposed mergers before rolling out the support more widely and will incorporate early learning into the transactions guidance that we are currently developing.

This guidance document will set out the level of detail of submissions required from an NHS foundation trust at each stage. We do not intend to create significant additional work in the early stages of our engagement with trusts. We currently envisage that submissions in the first stage will only require information already held by the trust. We will aim to include a typical timeline in the guidance, noting the length of time we would expect each stage to take (however to a large extent this will be driven by the trusts themselves).

We are in the process of establishing a transactions team within Monitor to provide an appropriate level of support to trusts.

### *3. Wider issues relating to the assessment of NHS mergers by the competition authorities*

In addition to feedback on Monitor's new approach to mergers, we also received a number of more general comments and observations on the role of competition in the NHS and how mergers between NHS organisations should be assessed by the competition authorities. These include: the interaction between competition and wider health policy objectives; how financial and clinical sustainability issues are reflected in the assessment of NHS mergers; and how the competition authorities reach their decisions, especially how they take into account different impacts.

Some respondents provided specific comments on how the benefits of mergers should be assessed. These included: the nature of benefits that should be included in the assessment; the evidential requirements of the competition authorities (particularly around engagement with the public and staff); and the role of commissioners.

Respondents asked for additional guidance on how the competition authorities would assess mergers in the NHS, and suggested that the development of worked examples, drawing on learning from previous merger cases, would be helpful.

#### *Our response*

We know there is considerable concern about the impact of statutory merger controls on NHS foundation trusts seeking to reorganise through a merger; we have developed this new phased approach as part of our response to it.

We continue to work with the competition authorities to develop a shared understanding of how CMA will approach merger control in the NHS going forward. In particular, we are working with CMA on developing NHS-specific guidance which will explain how statutory merger control applies to NHS mergers.

We are also preparing revised guidance on how Monitor will assess and provide advice to CMA on how the changes resulting from NHS mergers will benefit patients. This will incorporate the feedback we received on a [draft version](#) and reflect the expectations of the competition authorities, including those set out in the [Competition Commission's final report](#) on the proposed merger between Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust, as well as learning from past experience. Our broader transactions guidance will refer to this document at relevant points.

Our aim is that the additional early support and guidance, as well as the development of precedent, as merger control in the NHS becomes more established, will help reduce uncertainty and lead to a more predictable regulatory environment where NHS foundation trusts are better able to take risk-based decisions on how to proceed.

## Revised approach to risk assessing transactions by NHS foundation trusts

### Summary of changes

The key changes proposed in the revised approach to transactions risk assessment include:

- a revised threshold for 'significant' transactions requiring a detailed review, bringing other risk factors into consideration in addition to a transaction's relative size
- for transactions that cross this revised threshold, undertaking some elements of our detailed review at an earlier stage as part of the new support arrangements outlined above
- the introduction of more clarity and transparency on the scope of Monitor's detailed reviews, along with guidance on best practice for transactions
- the introduction of a single transaction risk rating, in place of the previous dual 'indicative' risk ratings for continuity of service and governance.

### Feedback on proposed changes and Monitor's responses

#### *1. Survey questions*

The consultation on the revised approach to risk assessing transactions included six questions:

1. Do you agree with the proposal to amend the threshold triggering a detailed review?
2. Is the approach to identifying risks for the threshold clear?
3. Do you agree with the detailed scoping questions and good practice against which we will assess a transaction?
4. Do you agree that, when a transaction is rated 'amber', it may be appropriate to require some degree of enhanced monitoring by Monitor to ensure specific risks are addressed?
5. Do you agree that a single transaction risk rating would be helpful to the sector?
6. Do you agree with the proposed changes to the certification requirements?

**Table 1: Survey questions sector response analysis**

|                 | Q1   | Q2  | Q3  | Q4   | Q5   | Q6   |
|-----------------|------|-----|-----|------|------|------|
| <b>Yes</b>      | 100% | 67% | 83% | 100% | 100% | 100% |
| <b>No</b>       | -    | -   | -   | -    | -    | -    |
| <b>Not sure</b> | -    | 33% | 17% | -    | -    | -    |

## *2. The transaction risk assessment process and requirements*

A number of respondents raised questions or concerns on various aspects of the processes and their requirements. These included requests for more clarity over: the different types of transaction to which Monitor's processes apply; the likely time scales associated with each stage; the nature and level of detail of information required at each stage; and some of the terms and descriptions used in the indicators of good practice. Some respondents also emphasised the importance of considering the impact of transactions on, and communication with and support for, staff.

### *Our response*

We will reflect and address all the relevant comments and suggestions received in the new transactions guide as appropriate. This document will provide much more detail on the nature of the process and the submissions required at each stage, and guidance on typical time lines. We will incorporate early learning into a 'lessons learnt' document to be published in 2015/16.

## *3. Clarity on roles and involvement of stakeholder parties*

A number of respondents commented on the lack of guidance or clarity on the appropriate roles, duties or other involvement in transactions of relevant parties including trust governors, commissioners, staff, members and the public.

### *Our response*

The nature and timing of the roles and involvement of governors, commissioners and staff will all be covered in new transactions guide. Trusts will need to ensure they comply with any relevant consultation requirements under Section 242 of the NHS Act 2006.

## *4. Potential burden of Monitor's risk assessment process*

There were some concerns in this area. Some respondents noted that the proposed threshold criteria may require Monitor to carry out a detailed review of most transactions between 25% and 40% in size, and some expressed concern about the risk of Monitor's requirements on transactions becoming too burdensome and

time-consuming, and possibly acting as a barrier to necessary changes, developments and innovation.

#### *Our response*

A key benefit of our involvement in the earlier stages of transactions (when we apply early focus to the key areas that can cause transactions to stall or fail) should be the avoidance of unnecessary cost. Furthermore, we will aim to streamline our process as much as possible; the volume of information and work required at the Final Business Case stage will be less than at present due to our earlier engagement.

We are nevertheless conscious of the demands that our involvement on significant transactions can make on the time and resources of trusts. We certainly do not intend to increase the burden on the sector or discourage innovation as a result of the changes. We will continue to look for ways to streamline the process further, and we commit to reviewing this new approach in 2015/16 to ensure the regulatory approach remains appropriate.

#### *5. Detailed review threshold risk factor definitions*

Several respondents commented on the additional risk factors introduced into the criteria for determining whether a transaction is classified as 'significant' and so will require a detailed review. Concerns included:

- the leverage factor, being measured on the post-transaction leverage, appears to disadvantage trusts with existing high debt levels and does not take account of whether leverage would increase or decrease as a result of the transaction
- the criteria appear to raise the hurdle for, and could potentially discourage, capital investment
- the distinctions between major and other risk factors are loosely defined
- other factors, including some positive ones, should be taken into account
- generally the approach to identifying additional risk factors for the threshold is unclear, with their consideration on a 'case by case basis' potentially leading to inconsistency.

#### *Our response*

We agree with the importance of our approach being consistent and transparent, while recognising that each transaction is different; this is why we will need to retain discretion to amend our view in exceptional circumstances. For example, an acquiring trust might have high levels of debt due to an historic estate build financed by a private finance initiative (PFI). If we considered this to be stable and if the transaction reduced leverage and did not, in our view, increase risks in other areas,

then we may consider it appropriate to change the weighting of the leverage risk when determining the transaction classification. Because the classification of the transaction will necessarily be before our detailed review work it is important that the risks considered are objective and measurable.

We will review our approach to assessing additional risk factors after one year and include our conclusions in a 'lessons learnt' document to be published in 2015/16.

#### *6. Derivation and meaning of the single transaction risk rating*

Some respondents questioned how the single transaction risk rating would be derived in practice, including how the risk assessment takes account of counterfactual scenarios (such as the comparative impact of not doing the proposed transaction). Some sought clarity as to how the single transaction risk rating, investment adjustments and the ongoing continuity of service and governance risk ratings all relate to each other.

#### *Our response*

All relevant factors will be taken into appropriate consideration in deriving the overall transaction risk rating. There are no pre-determined formulas, overrides or methods for aggregating the assessments of the individual review areas. We will assess the overall risk rating of each transaction on its own individual factors and circumstances. Comparative counterfactual scenarios, as considered by the trusts in their strategic options evaluations, will be considered by us as part of the strategy area of the detailed review scope of work.

Investment adjustments, where approved by Monitor, will have an impact on both the final transaction risk rating and on the ongoing risk ratings (continuity of service or governance) as applicable. The new transactions guide will include further guidance on this.

## Annex A: Consultation respondents

|   |
|---|
| <b>NHS foundation trusts</b>  |
| Central Manchester University Hospitals NHS Foundation Trust        |
| Gloucestershire Hospitals NHS Foundation Trust                      |
| Harrogate and District NHS Foundation Trust                         |
| Norfolk and Suffolk NHS Foundation Trust                            |
| Poole Hospital NHS Foundation Trust                                 |
| Royal Devon and Exeter NHS Foundation Trust                         |
| South Essex Partnership University NHS Foundation Trust             |
| South West Yorkshire Partnership NHS Foundation Trust               |
| Tameside Hospital NHS Foundation Trust                              |
| The Newcastle upon Tyne Hospitals NHS Foundation Trust              |
| The Royal Bournemouth & Christchurch Hospitals NHS Foundation Trust |
| The Walton Centre NHS Foundation Trust                              |
| University College London Hospitals NHS Foundation Trust            |
| Warrington and Halton Hospitals NHS Foundation Trust                |
| West Midlands Ambulance Service NHS Foundation Trust                |
| Western Sussex Hospitals NHS Foundation Trust                       |
| Wirral University Teaching Hospital NHS Foundation Trust            |
| <b>Others</b>   |
| Deloitte  |
| Foundation Trust Network  |
| NHS Clinical Commissioners  |
| NHS Confederation   |
| Royal College of Nursing  |



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