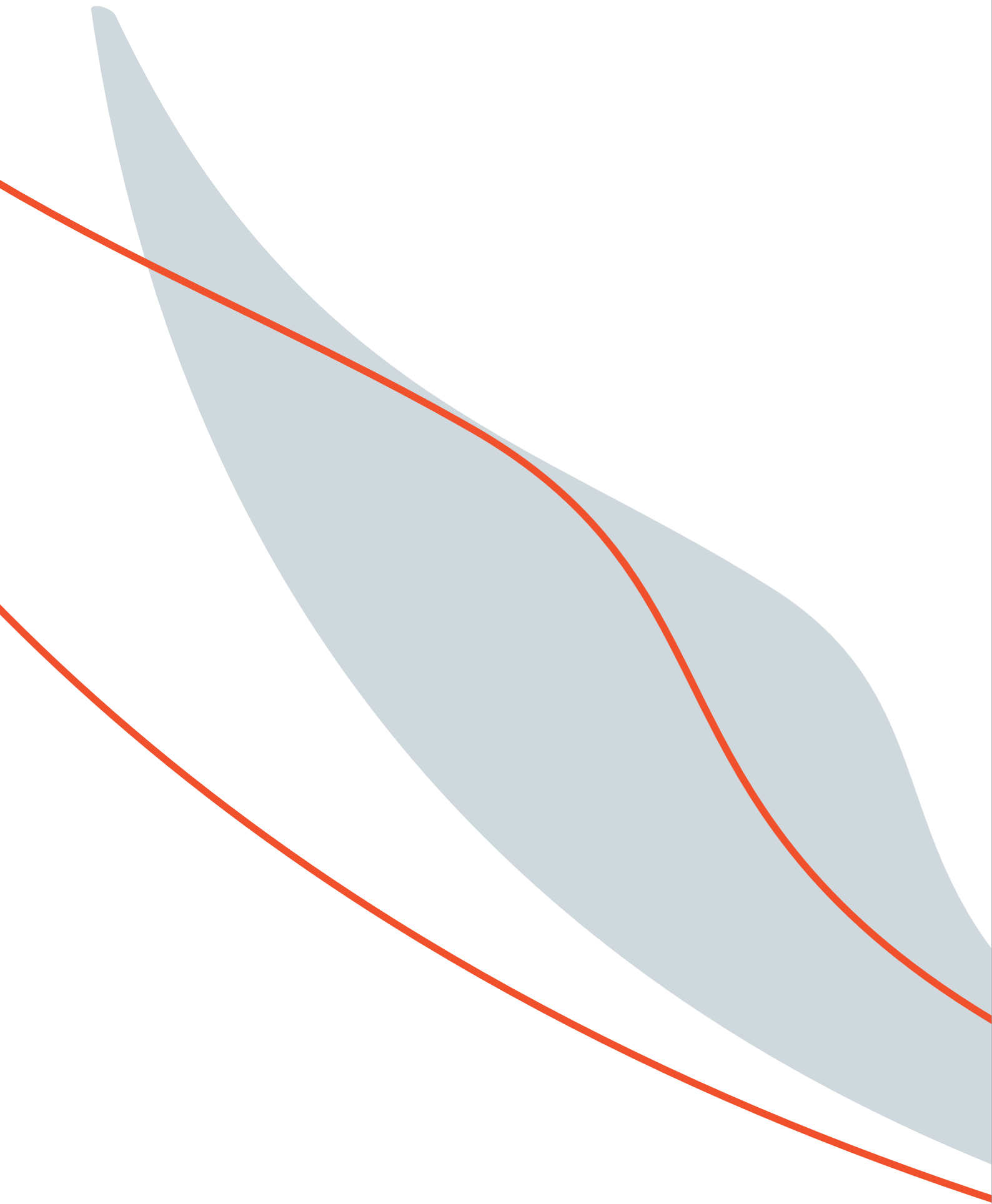




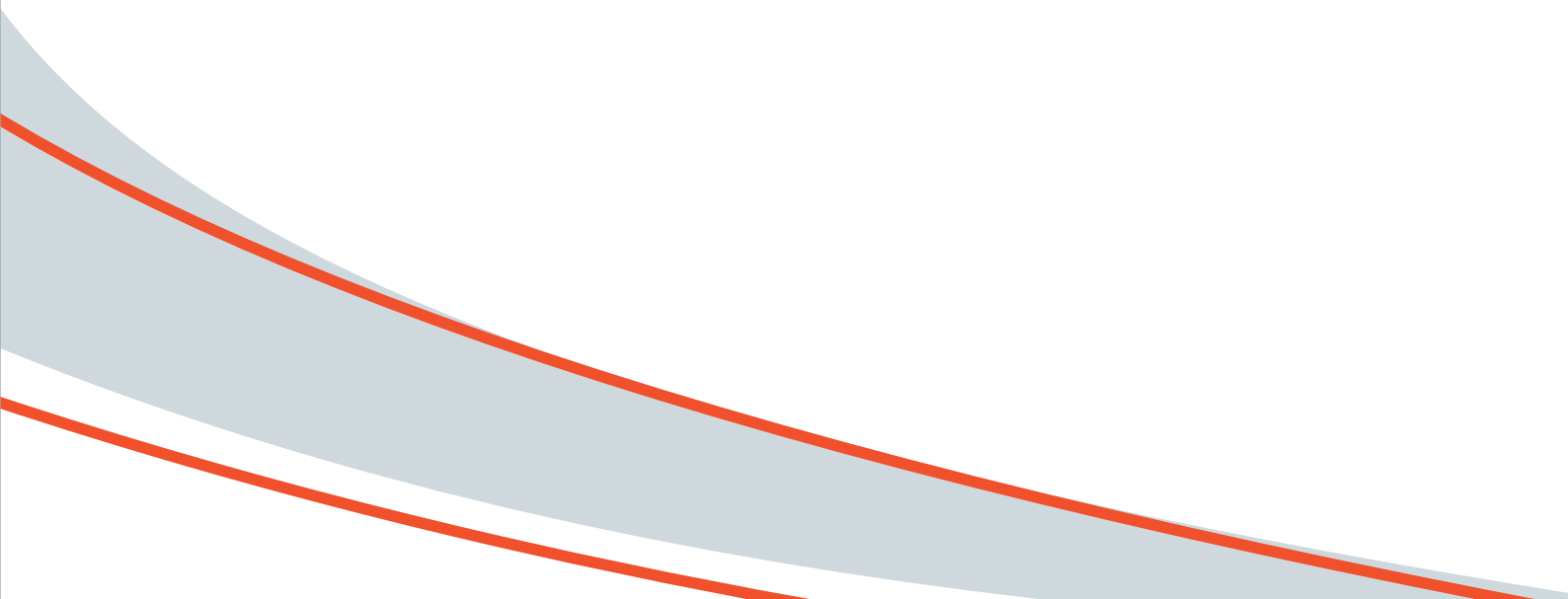
# COMPETITION REVIEWS IN THE NHS: WHAT DO PROVIDERS NEED TO KNOW?

**Where to find key information about  
the UK merger control regime,  
FAQs and case studies**



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# INTRODUCTION

The NHS is currently facing unprecedented challenges given the need to sustain high quality care amid rising financial and operational pressures. It is widely accepted that transformational change is urgently needed if the NHS is to sustain quality of care amid increased pressure to make efficiency savings, while also responding to the rising and changing demand across the health and care system.

NHS provider boards are actively pursuing this transformational change and taking strategic decisions on how to ensure the financial and clinical sustainability of their services for future years, often in discussion with their commissioners, and in collaboration with neighbouring trusts and partners within their local health economy.

Within this context, and given the focus on developing the new care models set out in the *Five year forward view*<sup>1</sup> (5YFV), ensuring that boards have access to relevant and timely information about possible competition issues arising from their plans becomes ever more important.

This briefing therefore aims to support NHS provider boards by:

- drawing together sources of key information with regard to the current competition regulatory regime in the NHS and the application of competition law when pursuing a merger, acquisition or other significant transaction such as a joint venture (known as the UK merger control regime) and the guidance published by Monitor and the Competition and Markets Authority (CMA); and
- sharing lessons learned and 'top tips' from a new collection of case studies from NHS providers which have recently pursued, or are pursuing, a transaction that has been subject to a competition review.

This briefing complements existing guidance and provides an insight into previous competition review cases involving NHS providers. However, members seeking to pursue a significant transaction which may hold competition implications will of course also need to engage appropriate legal and other advice about their particular case. This briefing does not cover all elements of competition in the NHS, such as procurement legislation. Please refer to our FAQs for an overview of other competition issues provider boards should be aware of.

The use of competition as a driver for improvement within the NHS clearly remains a source of political debate. This briefing aims to provide helpful information about the current regime, and to share useful learning about the wider ramifications of simply pursuing a significant transaction which we hope will remain beneficial for all providers.

## POLICY CONTEXT

The 5YFV, published in October 2014, set out a strategic vision and compelling case for change in the NHS. It promotes a health and care system focused on prevention with more integrated and flexible models of service delivery, operating with maximum efficiency. Described as a 'compass' rather than a 'roadmap', the 5YFV presented a number of new care models to achieve these changes.

The Dalton review of organisational forms *Examining new options and opportunities for providers of NHS care*,<sup>2</sup> published December 2014, then offered a range of organisational forms, covering collaborative, contractual and consolidation approaches, which could be used to practically support the delivery of the new care models described in the 5YFV.

These two publications send a strong message to the sector that more integrated care models and a collaborative approach to transformation are both supported and encouraged by the centre. Alongside this, regulators have sent a strong signal that competition can support and enable the introduction of new care models and that planned benefits patients will not be prevented by regulatory barriers. However it is important to note that, in some instances, these new approaches may have competition implications under the current regime and it is essential that provider boards are aware of this.

# COMPETITION IN THE NHS

**This short chapter provides a brief outline of the history and evidence around competition in the NHS, as well as an overview of the most recent changes to the operation of competition in the NHS brought about by the Health and Social Care Act 2012.**

Competition in the NHS is not new. In the 1990s we saw the introduction of an internal market, with the split in the commissioning and provision of healthcare services. Since then, a number of policy objectives have increased the role and importance of competition, and subsequently, patient choice in the NHS.<sup>3</sup>

In many sectors, competition and choice are assumed to be intrinsic drivers of benefits for consumers, such as improving the quality or efficiency of services and delivering better value for money, with anti-competitive behaviour or reduction in choice ('lessening of competition') generally regarded as detrimental to the interests of consumers. However there is not the same degree of consensus in the NHS and it is important to note that the market conditions in the NHS are particularly different to those in the other sectors. The NHS does not operate a fully open market, there is not the same degree of market entry and exit in the NHS as there is in other sectors, and competition is based on quality rather than price.

Nonetheless, there is some evidence that while it may not be appropriate for all NHS services in all locations, competition can help improve quality of care when prices are fixed and it is managed appropriately.<sup>4</sup>

Alongside the debate around increasing and safeguarding competition between providers, the effectiveness of mergers and consolidation of services is contested. Research undertaken by McKinsey & Company found that while at face value it may seem as though hospital mergers have not delivered the desired outcomes, there are many cases, in the UK and internationally, where mergers have produced substantial quality and financial improvements. McKinsey conclude that successful mergers are based on a compelling strategic rationale and effective pre- and post-merger management.<sup>5</sup>

NHS Providers' view is that while competition can be one driver of quality and service improvement in the NHS it must be applied carefully and sensibly to the ultimate benefit of patients. The application of competition law and the UK merger regime should not prevent the NHS provider sector from moving towards new patterns of service delivery and developing new care models through innovation, service reconfiguration and/or cooperation, which are needed to better integrate services for the benefit of patients and ensure the clinical and financial sustainability of NHS services.

While it can be argued that there has been a clear policy direction to encourage more competition and choice in the NHS over the past 15 years, there has been an underlying debate between the political parties about the degree to which competition should be allowed and what impact it has on patient care. This debate has become particularly polarised in the past five years since the passing of the Health and Social Care Act 2012.<sup>6</sup>

## THE HEALTH AND SOCIAL CARE ACT 2012

The Health and Social Care Act 2012 did not change EU or UK competition and procurement legislation, however it did create a more structured framework in which choice and competition can operate in the NHS. The Act formalised the role of the CMA in reviewing NHS transactions and established Monitor as the sector regulator for healthcare in England, awarding it new responsibilities as a competition authority.<sup>7</sup>

The Act also introduced a duty on commissioners to promote and protect patient choice as per the procurement, patient choice and competition regulations. According to these regulations, commissioners must act in a fair and non-discriminatory, transparent and proportionate way. They are required to procure services from one or more providers who are most capable of delivering the overall objectives and who provide best value for money. However, this does not mean that commissioners are required to put all service contracts out to tender, particularly where there is clearly only one qualified provider of a particular service. Monitor has published guidance<sup>8</sup> for commissioners of NHS services on how to adhere to these regulations.

### MONITOR'S ROLE IN COMPETITION

As the health sector regulator one of Monitor's roles is to make sure that **procurement, choice and competition in the NHS operate in the best interests of patients** and to take enforcement action if anti-competitive behaviour by NHS commissioners or providers goes against patients' interests.

Monitor has a range of powers and tools to do this. These include:

- the provider licence, including specific competition conditions;
- oversight of the operation of the procurement, choice and competition regulations, including investigating complaints about commissioner behaviour not in the interests of patients;
- powers to apply and enforce UK competition law provisions and EU rules to prohibit anti-competitive behaviour and abuse of dominance;
- providing advice to the CMA on the patient benefits of mergers involving foundation trusts (FT); and
- powers to undertake a market investigation and make market investigation references to the CMA under part 4 of the Enterprise Act 2002 if it suspects a feature or a combination of features market is preventing, restricting, or distorting competition.

As part of monitoring compliance with the provider licence, Monitor also has a role in approving significant transactions involving FTs. As part of this role, Monitor risk assesses significant transactions, including mergers, from the perspectives of governance and the continuity of services. This is separate from any assessment of the patient benefits which could be generated by a proposed merger as part of the UK merger control regime.

### ROLE OF THE CMA

The CMA is the UK's national competition authority responsible for ensuring that competition and markets work well for consumers, or for the benefit of patients and taxpayers in the healthcare context. The CMA took over the functions of the Competition Commission and the Office of Fair Trading from 1 April 2014.<sup>9</sup>

In the NHS in England, the CMA's functions include the review of transactions, involving at least one FT, that amount to a 'merger' under the UK merger control regime to judge whether they are in the best interests of consumers. They do this by assessing whether the transaction could lead to a substantial lessening of competition. The CMA conducts its review according to the UK merger control regime set out in the Enterprise Act 2002.

Mergers aside, the CMA is also responsible for the enforcement of the Competition Act 1998 prohibitions on anti-competitive agreements and behaviour and for conducting market wide investigations under the Enterprise Act 2002.

# THE UK MERGER CONTROL REGIME: MERGERS, ACQUISITIONS AND SIGNIFICANT TRANSACTIONS

This chapter outlines the main aspects of the UK merger control regime, which is the process through which the effects of transactions on competition are assessed, and the role of Monitor in this process. It signposts to the available guidance and highlights specific issues which providers should be aware of when considering a transaction that may be subject to a merger review.

## AVAILABLE GUIDANCE

Monitor and the CMA have published a suite of sector-specific guidance with which provider boards will wish to familiarise themselves. These guidance documents aim to support NHS providers considering transactions or mergers which could trigger merger control and help navigate their way through the process. Providers are also able to approach Monitor and the CMA for early informal advice and support to discuss their plans and understand any competition issues relating to a potential transaction.

This briefing is intended as a complement to the existing guidance from Monitor and CMA.

### **Monitor overall transactions guidance<sup>10</sup>**

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

This guidance:

- updates Monitor's approach to risk assessing transactions and provides more detailed guidance than has been published before;
- describes how to access informal support relating to choice and competition by engaging with Monitor early; and
- outlines good practice in complying with the regulatory framework for transactions including mergers and acquisitions.

### **Monitor and CMA short guide to competition<sup>11</sup>**

*Competition review of NHS mergers: a short guide for managers of NHS providers*

This guide is aimed at managers of organisations providing NHS services. It outlines the UK merger control process; it highlights the important aspects of the review process and provides an overview of the substantive assessment.

### **CMA in depth guidance<sup>12</sup>**

*CMA guidance on the review of NHS mergers*

This is the first 'sector-specific' guidance published by the CMA. It is aimed at advisers for organisations providing NHS services, the organisations themselves and other interested parties. It explains the UK merger control process, how the CMA assesses an NHS merger, what constitutes a competition concern and how it takes account of any benefits arising from the merger.

### **Monitor merger benefits guidance<sup>13</sup>**

*Supporting NHS providers: guidance on merger benefits*

This document outlines how Monitor will assess and provide advice to the CMA on the benefits of mergers involving NHS FTs. It covers:

- Monitor's role in relation to merger benefits;
- what is a relevant patient benefit;
- how the CMA will take Monitor's advice into account;
- Monitor's approach to assessing merger benefits; and
- examples of types of merger benefits.

## RELEVANT NHS TRANSACTIONS SUBJECT TO UK MERGER CONTROL

The UK merger control regime is described as 'voluntary'. This means that there is currently no legal requirement for merger parties to notify the CMA of a transaction, even if it does meet the legal thresholds for review. However boards should be aware of the following when considering whether to notify the CMA:

- The UK competition regime is a self-assessment regime. Responsibility therefore lies with all FTs to self-assess their agreements and practices for compliance with UK competition law, including assessing whether their proposals would trigger UK merger control and deciding if a notification should be made.
- The CMA can decide to review mergers that it has not been notified of, for example, as a result of receiving a well-reasoned complaint from a third party. For completed transactions the CMA has four months from when the transaction was made public to decide whether to clear the merger or refer it for a phase 2 review.

## THRESHOLDS FOR A REVIEW

For a transaction to fall within the jurisdiction of the UK merger control regime there must be a change in control over all or part of an organisation or an organisation's activities. In the NHS, the term 'merger' could include:

- 'acquisitions' regardless of whether any financial consideration is payable;
- joint ventures;
- the transfer of individual services or activities to another provider; and
- asset swaps.

In some circumstances a change in control may also result from a management agreement with another trust.

For a transaction to be reviewable by the CMA, it must meet certain thresholds. These are:

- Two or more 'enterprises' cease to be distinct (an 'enterprise' could be on FT plus another FT(s), NHS trust(s) or other parties, such as a private provider or a company). At least one of the 'enterprises' must be an FT.

**and**

- The UK turnover of the acquired organisation exceeds £70 million

or

- The merged organisation will supply at least 25 per cent of particular goods or services in the UK or a substantial part of the UK.

This demonstrates that the regime does not just apply to transactions relating to whole organisations but can also apply to individual services or groups of services, if the above thresholds are met. Therefore reconfigurations, service level changes and rationalisations, structural cooperation arrangements, joint ventures and minority shareholdings may also fall within the jurisdiction of the merger control regime. Acquisition could involve as little as 10-15 per cent of an organisation, depending on financial turnover or share of supply of services, and some supply agreements or outsourcing agreements may also be covered. *For more information on how the CMA defines the 'share of supply' please see our frequently asked questions.*

## TRANSACTIONS INVOLVING NHS TRUSTS

Transactions only involving NHS trusts cannot trigger the UK merger control regime as all NHS trusts are already under the common control of the secretary of state for health and therefore there is no change in ownership. In these circumstances, the NHS Trust Development Authority (TDA) is the decision-making body, with Monitor inputting advice on any patient benefit (or detriment) arising from the merger.



## CMA TWO-PHASE UK MERGER CONTROL REGIME PROCESS

The merger control statutory timeline commences once the CMA is formally notified and accepts a 'merger notice'. The CMA's review provides an independent and evidence-based approach to assessing a merger's impact on consumers, comprising of two phases.

An illustration of the two-phase merger regime process can be found at appendix two.

### PHASE 1: INITIAL MERGER REVIEW

The CMA has a statutory deadline of 40 working days within which to complete phase 1 of the merger review process.

During phase 1 the CMA must decide whether a relevant merger situation will be created and whether there is a realistic prospect that the merger will result in a substantial lessening of competition (SLC). 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. To do this the main elements of the phase 1 review process are:

- Jurisdiction: the CMA establishes whether it has jurisdiction to review a transaction under the merger control rules.
- Frame of reference: the CMA defines the product and geographic parameters within which to conduct its competitive analysis. This will often involve seeking comments from third parties such as the merging parties' customers, commissioners and competitors.
- Counterfactual: the CMA considers what will happen to the businesses involved in the merger, and in the market in general, in the absence of the merger. *For more information on what constitutes a counterfactual please see our frequently asked questions.*
- If the CMA identifies a realistic prospect of an SLC, it will consider whether there are any relevant customer benefits arising from a merger that outweigh that SLC.

If a merger raises no serious risk of an SLC, the CMA can clear it without further investigation. If the CMA identifies a realistic prospect that the merger will result in an SLC, it has a duty to either refer it to a phase 2 in-depth investigation or exercise its discretion and not refer the merger in the following circumstances:

- Benefits to patients outweigh the potential adverse effects of the merger. The CMA is obliged to consider Monitor's expert advice on the benefits of the merger and has stated that it will place significant weight on this advice. Monitor has issued guidance on its approach to assessing merger benefits.
- The CMA has discretion not to refer where it deems that the market or markets in which the SLC arises is or are not of sufficient importance to justify a reference. The CMA can apply this exception where the total value of the market or markets in which the SLC arises is less than £3 million, although sometimes up to £10 million in some situations subject to certain criteria (see the CMA's guidance on the review of NHS mergers). This is known as the 'de minimis' exception.
- In the case of an anticipated merger, the CMA can take the decision not to refer to phase 2 if the arrangements concerned are not sufficiently far advanced, or are not likely to proceed, to justify the making of a reference.

Where the CMA considers that it is under a duty to refer a merger to a phase 2 investigation, it may accept enforceable undertakings from the merging parties to remedy, mitigate or prevent the SLC concerned. These are referred to as undertakings in lieu (UIL). *For more information on UIL please see our frequently asked questions.*

## PHASE 2: IN-DEPTH INVESTIGATION

Where the CMA finds at phase 1 that the proposals raise significant risk of an SLC and the exceptions to its duty to make a reference to phase 2 do not apply and the parties have not offered adequate UILs, it must undertake a phase 2 review, which involves an in-depth investigation. Phase 2 is limited to a statutory period of 24 weeks, during which the CMA will convene an independent 'Inquiry Group' which must decide:

- whether a relevant merger situation has been or will be created; and
- if so, whether the creation of that situation has resulted, or may be expected to result, in an SLC with worse outcomes for patients and/or commissioners within any activities which concern the provision of health care services in England.

This generally involves:

- further detailed information gathering;
- publication of an issues statement, reflecting theories of harm on which the CMA is focusing;
- analysis of evidence, including production of working papers, and consideration of alternative scenarios;
- hearings with the merger parties and (separately) with third parties on the provisional findings;
- publication of provisional findings and notice of potential remedies;
- hearings with the merger parties and (separately) with third parties on remedies; and
- publication of the inquiry's final report.

A phase 2 investigation usually takes at least six months. This includes up to 24 working weeks for the investigation and, if the decision is to implement remedies, the CMA has an additional 12 weeks to implement and administrate these remedies.

At phase 2, the CMA applies a 'balance of probabilities' threshold to its analysis to determine whether it is more likely than not that the merger would result in an SLC which is a higher legal threshold than the phase 1 test. If no SLC is likely to result, it can clear the merger unconditionally.

If the CMA finds that an SLC will result, it must then consider possible remedies. In considering remedies, the CMA must decide whether:

- an action should be taken by the CMA to remedy, mitigate or prevent the SLC concerned;
- the CMA should recommend the taking of actions by others for the purpose of remedying, mitigating or preventing the SLC concerned; and
- in either case, what those actions are and what they remedy.

Providers have an opportunity to offer undertakings to remedy the CMA's competition concerns after the provisional findings and before the publication of the final report. This usually takes place at weeks 16 to 24 of the phase 2 investigation. At phase 2, the CMA also takes account of any 'relevant customer benefits' when considering which remedies are most suitable to preserve the benefits. *For more information on 'relevant customer benefits' please see our frequently asked questions.*

The CMA may accept remedies put forward by the merging providers or impose its own, including a prohibition of the merger in circumstances where no suitable action can be taken to remedy the potential SLC. The CMA may also clear the merger unconditionally following the phase 2 investigation.

# THE COMPETITION REVIEW PROCESS FREQUENTLY ASKED QUESTIONS

**?** This chapter sets out the answers to some frequently asked questions that NHS provider boards may wish to consider when pursuing a transaction which may have competition implications and/or be subject to the CMA's UK merger control regime.

## What competition legislation applies to the NHS?

Six main aspects of competition law are relevant for NHS organisations:

- Anti-competitive agreements and practices (Competition Act 1998)
- Abuse of a dominant position (Competition Act 1998)
- EU Public procurement regime (Public Contracts Regulations 2006 and 2015)
- NHS procurement (Procurement, Patient Choice and Competition Regulations (No.2), 2013)
- Merger control (Enterprise Act 2002)
- Market investigations (Enterprise Act 2002).

## When does competition law apply to mergers or transactions in the NHS?

As can be seen above, UK competition law has many strands. One such strand is the Enterprise Act 2002 which includes the UK merger control regime.

As separate, autonomous public benefit organisations, providing economic services, foundation trusts (FTs) are regarded as 'enterprises' under the Enterprise Act 2002, even though they do not provide services for profit. This means FTs are currently subject to UK merger controls, and proposed mergers or other significant transactions involving one or more FTs (including mergers with an NHS trust or another body) may be subject to scrutiny by the CMA.

Merger controls can apply to transactions short of full mergers or 100 per cent acquisitions, with parts of an FT potentially being considered as separate enterprises. For example, cardiology services or pathology units.

Mergers only involving NHS trusts are not subject to the Enterprise Act 2002 as all NHS trusts are controlled by the secretary of state for health. Therefore, when these organisations come together or 'merge' there is no change in the control of the organisation. In these circumstances, the TDA is the decision-making body, with Monitor inputting advice on the competition aspects.

## Historically, what types of NHS transactions have raised competition concerns?

The recent guidance published by Monitor and the CMA states that if the merging providers are, or could be, important alternatives to each other and there are few other providers in the local area for patients and commissioners to choose from, the merger is more likely to raise competition concerns because the merger could affect the merging providers' incentives to improve quality.

While we cannot say with any certainty what the outcome of future merger reviews might be, as every case is assessed individually, it may be helpful to reflect on the transactions reviewed by the CMA to date. The large majority of NHS mergers are cleared at phase 1. Previous merger reviews<sup>14</sup> in the NHS have found that there were 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;
- they provided a number of the same services; and
- they were viewed as alternatives by patients and commissioners.

However in a later NHS merger review<sup>15</sup> 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 these services as the other hospitals would provide strong competitive constraints on the parties' activities following the merger.

## Where can boards go for early and informal advice?

Alongside any advice a board may wish to receive from competition law specialists and other advisors (such as a competition economist), both Monitor and the CMA emphasise the importance of providers seeking informal input and competition advice at the early stages of considering a transaction and encourage providers to contact them at an early stage. This can help the organisations to identify the main issues that need to be considered, whether the proposed transactions are likely to give rise to any competition concerns and should be referred to the CMA, and the evidence needed to support the business case and assess any relevant patient benefits arising from the transaction.

Seeking informal advice from the CMA will not automatically trigger a review of the merger. The CMA will provide informal advice on competition issues arising from a prospective merger situation and whether the proposed transaction falls within their jurisdiction to undertake a merger review. The content of any informal advice and the fact a merging provider has sought it remains strictly confidential to the provider(s), and may only be shared with the board, senior executive officers and their legal and financial advisors that are privy to the request.

Receipt of the informal advice is conditional on the merging parties agreeing to inform the CMA when and if the proposed transaction goes ahead. However, this does not constitute formal notification of the proposed merger or mean that the CMA will automatically review the merger.

## If the board chooses to notify the transaction to the CMA, when do we make the formal notification?

As previously mentioned the UK merger control regime is voluntary. This means that you do not need to notify the CMA of your merger, even if it does meet the thresholds for review.

### PRE-NOTIFICATION

Once an FT has decided to notify the CMA of a proposed merger, the CMA strongly encourages the parties to discuss their merger plans with them on a confidential basis before submitting a formal notification. This aims to smooth the formal processes and minimise information requests, as well as reduce time pressures associated

with the CMA's statutory timetable. It can also allow the CMA to develop its understanding of the local health economy, and ensure that the merging parties have early discussions with the CMA about any competition concerns and relevant benefits that may arise from the merger.

### FORMAL NOTIFICATION

If the parties decide to notify the CMA of a merger, they must submit a formal 'merger notice' to the CMA, providing detail of the merging parties, the services they provide and the proposed transaction. The merger notice can be submitted once the merger has been made public. Once the CMA confirms that it has received a satisfactory merger notice, the statutory timetable for the phase 1 merger review begins.

## How does the CMA assess the potential effects of a transaction on patients by assessing the impact on competition?

Fundamental to any competition assessment is an understanding of the markets in which the merger parties operate for different services, and the extent to which they compete with the other party or parties to the transaction.

Previous NHS cases reviewed by the CMA have defined product markets using the narrowest market. For mergers of whole trusts this has included:

- an individual specialty or even sub-specialty, with inpatient and outpatient services; sometimes being regarded as separate markets, despite their often significant overlap;
- elective and emergency care; and
- services provided for particular groups of patient served, such as mental health services for children or older people.

The CMA also considers a geographic market within which the services are being provided. This may vary according to the type of service or specialty. Geographic markets are particularly relevant when considering competition 'in the market' (for example, competition to attract patients) and 'for the market' (for example, competition for a commissioner tender). The CMA will also consider the impact of providers located outside the relevant geographic market on the merging providers.

Irrespective of the market definition adopted in a particular case, the CMA will consider the extent to which

the merging parties compete in the services that they provide and whether they present good alternatives to each other for particular services or specialisms from the perspective of patients and/or commissioners to the extent that combining providers through a merger would represent a substantial loss of choice. The CMA considers that a substantial loss of choice is one that would lead to some adverse effect, such as longer waiting times. The CMA will also consider the extent to which there are existing or potential alternative providers who could provide the same or similar services. The types of evidence used in past cases include GP referral data, bidding data for commissioner contracts or GP/trust contracts, internal documents, commissioner responses to CMA questionnaires and surveys of GPs and/or patients. It should be borne in mind that the evidence used varies from case to case. Further information is available in the CMA's *merger assessment guidelines*.

### How does the CMA define share of supply?

The CMA has broad discretion in describing the relevant set of services or goods for assessing whether the merger parties supply more than 25 per cent of the market. The share of supply can relate to any reasonable description of services or goods (e.g. pathology services or outpatient or inpatient services for a particular speciality) and the level of provision to local commissioners, and may differ from market share, which is determined through an economic analysis of market definition. This may bring certain service reconfigurations into the scope of UK merger controls.

### What evidence does the CMA gather from third parties when undertaking a review?

The CMA gathers market intelligence, scanning journals and newspapers, to identify potential cases and can be motivated by well-argued third-party complaints, including from other providers, patients and healthcare experts. Additionally, given Monitor's general oversight of FTs' transactions, Monitor is likely to notify the CMA if it feels that a transaction should be subject to review.

### What is a 'counterfactual'?

The counterfactual is the likely situation which would prevail if the merger did not take place. The phase 1 assessment includes an analysis of the likely situations

both with the merger and without the merger (the counterfactual). Identifying the appropriate counterfactual is an important part of establishing any SLC. Only developments that are likely to occur, based on the available evidence are accepted as part of the counterfactual. The CMA may take the views of third parties, such as commissioners and Monitor, into account as part of determining the relevant counterfactual.

### How much weight would an 'exiting provider'/'failing firm' counterfactual hold?

Merger parties must develop their counterfactual setting out what likely situation would prevail if the merger did not take place. Based on previous reviews undertaken by the CMA it is less likely that a counterfactual which argues that without the merger, one of the parties would cease to exist ('exiting/failing firm') would be accepted despite the state of many NHS organisations' finances, unless the trust special administrator process has already been triggered, as genuine 'market exit' (where a provider would effectively be allowed to fail by the centre) is seen to be particularly rare within the NHS.

### What are 'relevant customer benefits'?

If the CMA identifies a competition concern (SLC) that implies that patients might lose out from the proposed merger, it will consider whether there are any relevant customer benefits arising from the proposed merger that outweigh the SLC. Identifying the relevant benefits is therefore fundamental to the development of any merger proposals. In the context of healthcare the 'customer' means patients and taxpayers.

Monitor has recently published some guidance on this topic<sup>16</sup> which covers what their role is in relation to merger benefits, what a relevant customer benefit is, how the CMA will take Monitor's advice into account, Monitor's approach to assessing merger benefits and examples of different types of merger benefits. Please refer to this guidance for more detail.

A relevant customer benefit is defined within the Enterprise Act 2002 as one which:

- is a benefit to relevant customers in the form of: lower prices, higher quality or greater choice of goods or services in any market in the UK, or greater innovation in relation to such goods or services; and



- the CMA believes has accrued, or may be expected to accrue, within a reasonable period as a result of the merger; and
- the CMA believes was or is unlikely to accrue without the merger or a similar lessening of competition.<sup>17</sup>

Monitor will base their advice on a submission on merger benefits from the parties. However, it is expected that the parties pursuing a merger engage with Monitor at an early stage to discuss the expected benefits arising from the merger and how these benefits will be realised. Monitor will consider the following questions when considering its advice to the CMA:

- Is the submitted benefit a real improvement?
- Will the benefit be realised within a reasonable period?
- Does the benefit depend on the merger?

## What are potential types of merger benefits in the NHS?

In its guidance Monitor sets out some examples of merger benefits which have been submitted in previous cases for illustrative purposes. The guidance also includes information on the type of evidence that would be required for each of these examples in order for Monitor to advise the CMA that they are relevant customer benefits in a particular case.

The examples are not exhaustive however they form a useful guide about what has been acceptable as a 'patient benefit' in the past. They include:

- higher quality services through implementing a particular model of care;
- higher quality services through service reconfiguration;
- higher quality services through increased consultant or staff cover;
- higher quality services through access to equipment;
- greater innovation through research and development; and
- financial savings.

## How does the CMA take relevant customer benefits into account when reviewing mergers?

The CMA takes any relevant benefits into account differently at phase 1 and phase 2.

**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.

**Phase 2:** the CMA takes benefits into account when deciding what remedies are appropriate. The CMA will consider the impact of a remedy on the benefits expected to arise from the merger, and may modify or select a particular remedy to preserve these benefits.

The CMA will place significant weight on Monitor's expert advice on the benefits of the merger

## What are 'undertakings in lieu'?

Undertakings in lieu are commitments offered by the merging parties to take specific actions to remedy or mitigate the competition concerns identified by the CMA, 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.

## What information will the CMA publish as part of its review?

The CMA is required to publish its decisions and aims to publish the evidence used to support its decisions. Providers therefore need to be clear in identifying any information they regard as confidential, including information not to be shared between the CMA and Monitor. At phase 2, parties are expected to prepare non-confidential versions of all submissions at the same time as their full submissions, but in any case will be given the opportunity to make requests for redactions before any decision is published.

## Other than transactions, what other competition issues should provider boards be aware of?

Beyond merger control, particular care is needed to avoid agreements between providers or between providers and commissioners, which restrict competition or could be judged anti-competitive and against the interests of patients under the Competition Act 1998. This can include shared service arrangements, the exchange of commercially sensitive information, and coordinated attempts to influence the competitive market or commissioning process in a way that does not benefit patients. Cooperation to improve provision of integrated care to patients is likely to be regarded as being in the interests of patients even if it reduces competition.

# LESSONS LEARNED – A SELECTION OF CASE STUDIES

This chapter sets out a selection of case studies and lessons learned from providers who have experienced the UK merger review process.

A number of providers have already experienced the UK merger control process, either led by the CMA or the previous competition authorities (Competition Commission and Office of Fair Trading) and while each individual case is different, we wanted to capture some of the learning and share it with the wider membership of NHS Providers. Each case study outlines the background to the transaction, their experience of the competition review process and their top tips. It is important to note that some of these cases predate the existence of the CMA and took place before the current merger control laws were amended. Therefore, some of their experiences may not reflect the current process. For example, all phase 1 mergers undertaken by the CMA are now subject to a statutory deadline of 40 working days. However, we felt that valuable lessons learned can be drawn from their experiences.

## TOP TIPS

- 1 Engage with the competition authorities and Monitor at an early stage to consider any competition concerns and relevant patient benefits.
- 2 Engage meaningfully in CMA's UK merger control process; use it to confirm your own analysis and hypothesis, and to test the strength of your business case.
- 3 Invite the CMA to visit and experience the services offered by each organisation.
- 4 Be open with the CMA from the outset about any competition concerns you may have.
- 5 Do not attempt to convince the CMA that there are no competition concerns without the supporting evidence.
- 6 Be consistent with your narrative around patient benefits and your business case throughout the process, including how the benefits outweigh any SLC in your view.
- 7 Ensure you have a paper trail and enough evidence to support your business case.
- 8 Be aware that the competition authorities take a narrow view of the market.
- 9 Enlist the support of expert advisors, but don't underestimate the cost of this.
- 10 Do not underestimate the time and resources that are involved in a competition review.

# FRIMLEY PARK HOSPITAL NHS FOUNDATION TRUST ACQUISITION OF HEATHERWOOD AND WEXHAM HOSPITALS NHS FOUNDATION TRUST

The Frimley Park Hospital NHS Foundation Trust (FPH) and Heatherwood and Wexham Hospitals NHS Foundation Trust (HWPH) acquisition was the first FT to FT acquisition approved by Monitor and the CMA under the current regime. In total the process took around 18 months. The process of planning the merger first began in April 2013, the CMA was notified in March 2014, approved the transaction in May 2014 and the transaction was completed in October 2014, forming Frimley Health NHS Foundation Trust.

NHS Providers spoke with Andrew Morris, chief executive, and Jane Hogg, integration director, Frimley Park Hospital NHS Foundation Trust.

## BACKGROUND

- Although a high performing FT, as a smaller acute provider FPH was concerned about its longer term clinical and financial sustainability.
- Despite HWPH's ongoing clinical and financial challenges, the acquisition of HWPH was identified as an opportunity that would allow FPH to help secure future sustainability.
- The case for change in the outline business case was "in the absence of the transaction, ongoing financial and operational challenges are forecast to make both FTs clinically and financially unsustainable in the medium term".

## MONITOR'S INVOLVEMENT

- Both Monitor and the Department of Health were involved at an early stage and were supportive of the transaction.
- Monitor provided support throughout the transaction process, including helping to coordinate some discussions across the stakeholder groups.

## THE CMA PROCESS

- FPH felt that although the CMA merger review process was resource intensive, including a substantial investment by the chief executive, the process was a valuable one.
- FPH had already undertaken their own competition analysis and the CMA's process confirmed their own conclusions.
- To assist the CMA in defining the market, FPH invited the CMA to visit the two FTs and spent one day showing them the services offered by each organisation, the physical estates used and the travelling distances between the two sets of facilities.

## PATIENT BENEFITS CASE

- FPH did not submit a patient benefits case to the CMA, as the parties decided not to submit one at phase 1 as they believed an SLC did not arise and the review did not reach the phase 2 stage.
- Monitor therefore advised the CMA that, based on the information available, it was not able to determine that any relevant customer benefits would arise.
- However, Monitor did advise that in light of HWPH's sustainability, quality and management challenges, the merger appeared to be the best available solution for HWPH and the most likely way of achieving the necessary improvements to services for patients.

## THE CMA ANALYSIS OF COMPETITION

- The CMA found that there would be no realistic prospect of a substantial lessening of competition as a result of the merger and approved the merger in May 2014.
- HWPH was not FPH's closest competitor in any specialty they provide, and although FPH was HWPH's closest competitor for a number of limited specialties, other third parties also competed strongly.
- Where there was an overlap in CCG commissioning, there were also a number of other providers (and private providers) offering a similar range of services. No CCGs raised concerns that the merger would reduce their choice of provider for services. There was no overlap in the delivery of specialised services.



## USE OF ADVISORS

- FPH employed the use of three consultancies/legal firms at various points of the process:
  - one consultancy was used to support the production of the outline and full business cases;
  - a different consultancy provided specific advice on the CMA merger review process;
  - a legal firm provided general legal advice throughout the transaction and specific advice on the CMA merger review process;
  - a second legal firm carried out some of the commercial elements of contract negotiation during the transaction.

## CHALLENGES

- Being the first FT to FT acquisition under the new merger regime there was little precedent to follow. Therefore there were some processes which were unclear, particularly around whether to submit a patient benefits case. FPH took advice from their advisors on this, but also listened carefully to the CMA about their expectations and provided them with as much information as possible without committing to a formal benefits case.
- FPH's main challenge was the lack of clarity around the funding for integration costs required from CCGs and NHS England as part of the transaction.

## TOP TIPS

- Engage meaningfully in the CMA's UK merger review process. Use it to confirm your own analysis and hypothesis, and to test the strength of your business case.
- Invite the CMA to visit and experience the services offered by each organisation.
- Be open with the CMA from the outset about any competition concerns you may have.

## PATHOLOGY JOINT VENTURE: BASILDON AND THURROCK NHS FOUNDATION TRUST, SOUTHEND UNIVERSITY HOSPITALS NHS FOUNDATION TRUST AND INTEGRATED PATHOLOGY PARTNERSHIPS LIMITED

This joint venture (JV) between Basildon and Thurrock NHS Foundation Trust (BTUH), Southend University Hospitals NHS Foundation Trust (SUH) and Integrated Pathology Partnerships Limited (IPP) was approved by the CMA in August 2014, following phase 1 of the merger review process. The venture became operational on 1 October 2014.

NHS Providers spoke with Mark Magrath, commercial director, Basildon and Thurrock NHS Foundation Trust.

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### BACKGROUND

- Following the former NHS East of England's Operations Board's decision to transform pathology services there was a risk that Basildon and Thurrock NHS Foundation Trust and Southend University Hospitals NHS Foundation Trust could lose their primary care pathology contracts.
- In response to this risk the trusts pursued the JV which involved merging their residual pathology services with a private sector partner. Their aim was to:
  - reduce or avoid losses through greater economies of scale;
  - maintain a local service with high clinical standards;
  - obtain investment to modernise, particularly in a new pathology IT system for the entire south Essex pathology service;
  - develop a base from which to provide pathology services profitably, both within and beyond the geographical boundaries of south Essex.
- The reorganisation of primary care pathology services eventually collapsed in south Essex, but local CCGs stated they would procure a new pathology service themselves if the local trusts could not offer significant price reductions.
- The two FTs were sufficiently convinced by the benefits of working with a private sector partner that they agreed to continue to ensure a sustainable future for pathology services in south Essex.

### MONITOR'S INVOLVEMENT

- The two FTs engaged with Monitor for advice on the JV prior to embarking on the procurement process for selecting the private sector partner.
- Monitor advised that the JV would not be considered a significant or material transaction and explained why.
- Monitor provided advice on patient benefits and advised that those highlighted by the parties were not reliant on the transaction and therefore would not make a strong relevant customer benefits case and Monitor would advise the CMA to this effect.

### THE CMA PROCESS

- At the pre-notification stage the CMA advised that the JV would trigger phase 1 of the formal review process, as it would result in a share of supply of goods/services greater than 25 per cent and that, absent the merger, the parties may compete independently for the provision of pathology services.
- The CMA submitted a high numbers of requests for additional information, following the formal submission by the parties (the requests covered both economic and clinical evidence).
- The 'clock' on the formal review process did not start until the CMA had gathered all the additional information they required.
- The parties received a 'state of play' phone call on day 18 of phase 1 and were informed that unless concerns were raised by any 3rd parties the JV would be cleared.
- The CMA was happy to provide informal advice at all stages of the transaction.

## PATIENT BENEFITS CASE

- A patient benefits case was not submitted as Monitor advised that the patient benefits highlighted could be achieved without the transaction.

## THE CMA ANALYSIS OF COMPETITION

- The CMA observed that the proposed transaction would lead to enterprises ceasing to be distinct, that the share of supply test is met, and accordingly that it is or may be the case that a relevant merger situation has been created.
- However, the CMA concluded there would be no realistic prospect of a substantial lessening of competition as a result of the transaction.
- Therefore, it was not necessary for the CMA to consider relevant customer benefits as the transaction did not give rise to a realistic prospect of a significant lessening of competition.

## USE OF ADVISORS

- The two FTs used one consultancy throughout the CMA process. The cost was high, however they felt it was necessary.

## CHALLENGES

- The CMA required a lot of evidence to support the submission, including both economic and scientific evidence for the two hour drive time market – this was quite intensive work.
- The competition review process is resource intensive – the parties submitted five lever arch folders to support the CMA submission and the whole transaction process resulted in the production of 23 separate legal documents.

## TOP TIPS

- Do not attempt to convince the CMA that there are no competition concerns without the supporting evidence.
- Be consistent with your narrative around patient benefits and your business case throughout the process, as the CMA will identify any inconsistencies (i.e. releasing press statements reassuring the public that nothing will change, while also submitting patient benefits case to CMA).
- Be aware that the competition authorities take a narrow view of the market.
- Enlist the support of expert advisors, particularly if you're pursuing a transaction such as this for the first time, but don't underestimate the cost of this.

# ROYAL FREE NHS FOUNDATION TRUST ACQUISITION OF BARNET AND CHASE FARM NHS TRUST

The Royal Free London NHS Foundation Trust (Royal Free) acquisition of Barnet and Chase Farm Hospitals NHS Trust was the last transaction reviewed by the former Cooperation and Competition Panel (CCP)<sup>18</sup> and the first to involve the TDA as a vendor on behalf of an NHS trust and exercising the role of the secretary of state for health. In total the process took around 24 months. The process started with the Barnet and Chase Farm Hospitals NHS Trust board deciding to seek a preferred partner, having recognised the impracticality of achieving FT status as a standalone organisation in July 2013, the CCP completed their review in August 2013 and the transaction was completed in July 2014.

NHS Providers spoke with John Ashcroft, head of planning, Royal Free London NHS Foundation Trust. John acted as the acquisition programme manager during the transaction review and managed the competition review process on behalf of the Royal Free.

## BACKGROUND

- The backdrop of the transaction was:
  - the broader policy context that required all NHS trusts to become NHS foundation trusts by April 2014; and
  - the implementation of the Barnet, Enfield and Haringey clinical strategy left Barnet and Chase Farm Hospitals NHS Trust as an unviable organisation.
- In June 2012 a report commissioned by Barnet and Chase Farm Hospitals NHS Trust concluded that the trust would be unlikely to satisfy the requirements for foundation trust status. Shortly afterwards the trust invited expressions of interests for a partner organisation.
- Expressions of interest were received and from September 2012 the Royal Free was selected as the 'preferred partner'.

## MONITOR'S INVOLVEMENT

- Monitor was engaged throughout the process and undertook a three month formal assessment to risk assess the proposed acquisition.
- At the time of this transaction the CCP formed part of Monitor's Cooperation and Competition Directorate, therefore Monitor did not provide any separate advice on competition.

## THE CCP PROCESS

- The parties informed the CCP of their intention to merge at an early stage, in December 2012. The CCP then embarked on phase 1 of its merger review process in February 2013.
- Although the Office of Fair Trading took over

responsibility for reviewing mergers in the NHS from 22 March 2013, it was decided that the CCP would continue with this review.

- In April 2013 the CCP announced that it would proceed to phase 2 of the merger review process.
- Following the phase 2 review, on 13 August 2013 the CCP concluded that the merged organisation would continue to face a range of competitors for its services, and therefore the merger was unlikely to give rise to material costs to patients or taxpayers as a result of loss of choice and competition.
- Throughout the competition review the Royal Free had daily conversations with their case manager to maintain contact, rather than awaiting information requests.
- There were 40 requests for specific information, many of which were significant in size. Following these requests there were numerous ad hoc requests for clarification and further detail in addition to request for new information.

## PATIENT BENEFITS CASE

- The Royal Free's proposed acquisition of Barnet and Chase Farm Hospitals NHS Trust was not referred to phase 2 by the CCP and, as such, was not required to submit a separate patient benefits case as a part of the competition review. The parties decided not to submit a patient benefits case at phase 1.
- However, the parties were asked about the counterfactual (if the merger was not to take place). The Royal Free was of the view that, without the merger, it would continue to provide the services it currently provided independently of other providers. Barnet and Chase Farm Hospitals NHS Trust was of the

view that, without the merger, it would no longer be financially viable and would have to either:

- merge with an alternative provider;
  - have a trust special administrator appointed; or
  - undergo some form of reconfiguration.
- As part of the counterfactual the CCP concluded that, although Barnet and Chase Farm Hospitals NHS Trust would not be considered financially viable in the long term as a foundation trust, it did not see any indication that it would stop providing any services it currently provides.

## THE CCP ANALYSIS OF COMPETITION

- Despite the transaction moving into a phase 2 review, the CCP concluded that although the merger would be likely to remove a strong competitive constraint (a lessening of competition), the 'merged organisation' would continue to face a range of competitors for its services, and therefore the merger was unlikely to give rise to material costs to patients or taxpayers as a result of a loss of choice or competition.
- The CCP therefore completed their review on 13 August 2014 concluding that the acquisition was not likely to result in a loss of choice and competition for patients. In total the competition review process took approximately six months.

## USE OF ADVISORS

- The Royal Free took competition advice at the early stages of the transaction process.
- The Royal Free was advised by a number of professional services advisors throughout the transaction, including: management and financial consultancy, specific competition economic advice and legal advice.

## CHALLENGES

- Being the first acquisition where the TDA were acting as a vendor, there were some overall challenges for the transaction in general around clarity of process, as well as the roles and responsibilities of all the parties involved.
- There were some concerns around the sharing of commercially sensitive information as part of the competition review process. This was because if the acquisition did not go ahead then the two providers would once again be competitors.

## TOP TIPS

- Engage with the competition authorities early on and regularly – not just when they are requesting information.
- Establishing a relationship with the competition authorities and gaining within the trust team a practical understanding of the regulator's approach (now CMA) is important. By doing this the Royal Free was better able to respond appropriately to queries and requests for information through understanding the provenance of and thinking behind the request for information.
- Ensure that you have confidence in and familiarity with the market data. The internal team should understand the market position and anticipate the questions that will be posed.
- Clarify governance arrangements and confidentiality agreements upfront around the sharing of commercially sensitive information.
- Do not underestimate the time and resources that are involved.

# UNIVERSITY COLLEGE LONDON HOSPITALS NHS FOUNDATION TRUST ACQUISITION OF ROYAL FREE FOUNDATION TRUST NEUROSURGERY SERVICES

University College Hospitals London NHS Foundation Trust (UCLH) acquisition of the Royal Free London NHS Foundation Trust (Royal Free) neurosurgery services was approved by the Office of Fair Trading (OFT) in February 2013. The transaction was completed in two phases. The first phase was completed in June 2012 and was retrospectively assessed by the OFT. The second phase was prospectively assessed by the OFT and was completed in March 2013. The transaction was not referred to Competition Commission for review.

This transaction review took place prior to the merger of the OFT and Competition Commission (now the CMA).

NHS Providers spoke with Ravi Baghirathan, formerly senior project manager - strategic development, and David Probert, director of strategic development, UCLH and John Ashcroft, head of planning, Royal Free.

## BACKGROUND

- Due to the size of the neurosurgery unit at the Royal Free, the London Deanery had concerns about the quality of training for junior doctors and was therefore considering removing these posts. This would render the Royal Free's neurosurgery unit non-viable
- At this time UCLH was providing services at the National Hospital for Neurology and Neurosurgery, the UK's largest dedicated neurological and neurosurgery hospital. All parties agreed this transaction offered an opportunity to centralise neurosurgical services for North Central London patients in a single, highly specialist location.
- Phase 1 of the transaction was completed in June 2012 and this involved the transfer of intracranial, complex spine and all acute neurosurgery activities transferred from Royal Free to UCLH.
- Phase 2 of the transaction involved the transfer of routine spinal work and was completed in March 2013.

## MONITOR'S INVOLVEMENT

- Monitor was engaged at an early stage of the transaction and was supportive of the proposal.
- The London Deanery was also happy with the proposed merger of the two services as a way of improving training for junior doctors.

## THE OFT PROCESS

- Phase 1 (which has a statutory requirement to be completed within 40 days) took around four to five months. This was because the competition authorities

are able to 'stop the clock' at any point when requesting information.

- The process was clear and transparent, however it did feel quite resource intensive due to the multiple number of additional requests for information and relatively short timescales.
- Overall, the process was considered to be another approval required. If managed appropriately the competition review process does not need to be onerous.
- Engaging meaningfully in the process can help improve the quality of the business case.
- The review did not impact on the critical path of the project and helped with organisational learning.

## PATIENT BENEFITS CASE

- The parties coproduced and submitted a concise patient benefits case. The key benefit submitted was that, following the transaction, patients receiving neurosurgery treatment would be receiving a higher quality of service due to the centralised provision of neurosurgical services.
- Monitor did provide advice to the OFT on the relevant patient benefits. However, its advice stated that as the Royal Free confirmed that it would cease to provide neurosurgery services regardless of the transaction, it would be difficult to establish whether any benefits were dependent on the merger, for the purposes of the OFT's assessment under the Enterprise Act 2002.



- Monitor did however include the below matters which would be advantages for patients and taxpayers if the transaction took place:
  - preservation of the expertise of the neurosurgery staff from the Royal Free as a team and continuation of the services they provide in an organised and predictable way for those patients who would have chosen the Royal Free; advantages to patients who would have been treated at the Royal Free of ensuring that the neurosurgery staff from the Royal Free are transferred to another provider ; and
  - the avoidance by the Royal Free of possible redundancy costs and resultant cost to the taxpayer.
- The parties took the decision to focus on assessing the impact of the merger on competition and that there is no the ‘substantial lessening of competition’ argument, rather than a detailed patient benefits case, as it was felt that the counterfactual argument of no neurosurgery services being provided at the Royal Free would be sufficient and a patient benefits case would not be needed.

## THE OFT ANALYSIS OF COMPETITION

- The OFT did not accept the argument that the Royal Free would halt provision of neurosurgical services as the counterfactual, but did accept that it was a weak competitor in neurosurgery services.
- The OFT found that the parties were close competitors with regard to the services involved in the transaction.
- The OFT assessed the transaction using the counterfactual of a separate neurosurgery unit at Royal Free as it existed prior to the phase 1 transfer. The OFT did not accept that if the transactions did not go ahead then the neurosurgery services at Royal Free would exit the market.
- However, the OFT did take into consideration the removal of the London Deanery funding issue to inform its view on the level of competitive constraint imposed by the Royal Free on UCLH absent the merger. On this basis, the OFT concluded that Royal Free would be a weaker competitor going forward absent the merger.
- The OFT assessed the remaining competitive constraints within the catchment area and found that there would be a sufficient number of alternative competitors post-transaction to mitigate any competition concerns arising.
- The OFT therefore concluded that there was no realistic prospect of a substantial lessening of

competition and approved the transaction. Because of this the OFT did not need to take into account the preliminary advice received from Monitor with respect to relevant customer benefits and the case did not need to be referred to the Competition Commission.

## USE OF ADVISORS

- The parties did not use external economic advisors and coproduced the analysis of competition and development of the patient benefits case internally.
- A solicitors firm did provide general advice and support throughout the process and for the OFT process; this involved some project management and the drafting of documents.

## CHALLENGES

- The parties experienced challenges to produce enough evidence that the Royal Free neurosurgery services would exit the market if the London Deanery removed training posts, as the conversations with the Deanery took place either over the phone or in person.
- It was felt that at this time the OFT did not have a firm understanding of the challenges facing the NHS or why the Royal Free were not able to staff their rota with junior doctors of another specialty, consultants or locum doctors.
- There were challenges around proving that the patient benefits were contingent on the transaction taking place and that the organisations could not reconfigure these services without pursuing a merger.

## TOP TIPS

- Engage with the competition authorities and Monitor at an early stage to consider any competition concerns and relevant patient benefits.
- Ensure you have a paper trail and enough evidence to support your business case.
- Consider engaging in a competition review of a smaller transaction in order to gain corporate understanding of the process.
- Use the merger review process to improve the quality of your business case.

# APPENDIX 1

## RELEVANT STAGES OF MONITOR'S FRAMEWORK FOR RISK ASSESSING TRANSACTIONS RE: COMPETITION <sup>19</sup>

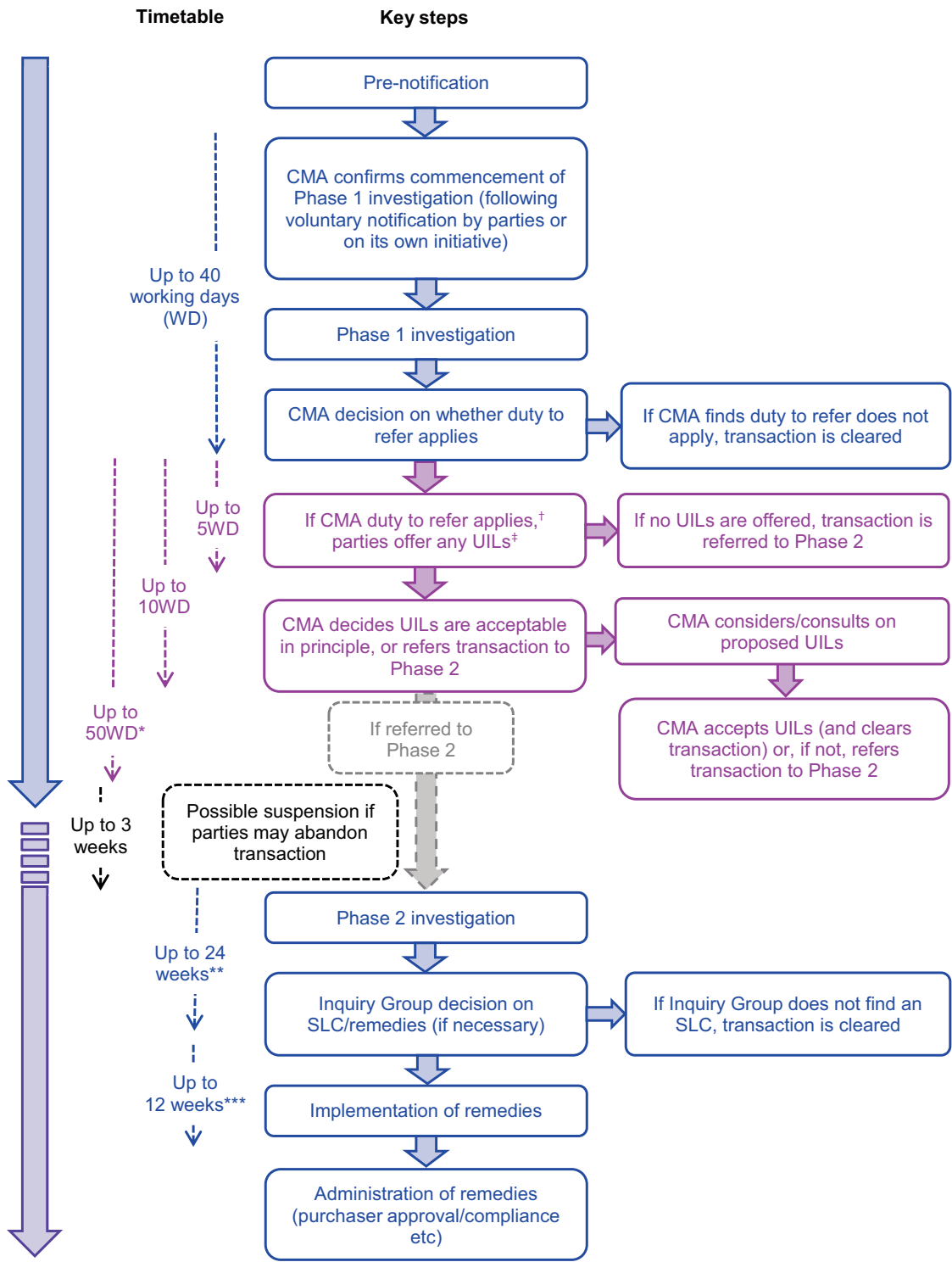
	1. Strategic options	2. Outline business case	3. Full business case	4. Decision, execution
Trust	<ul style="list-style-type: none"> <li>Evaluation of strategic challenges and options</li> <li>Transaction's fit with overall strategy</li> <li>Engage with Monitor on competition and risk assessment requirements</li> </ul>	<ul style="list-style-type: none"> <li>Preliminary business case evaluation</li> <li>Preliminary due diligence</li> <li>Outline post-transaction integration plans</li> <li>Legal position and regulatory requirements</li> <li>Detailed analysis of any potential competition issues to determine whether or not to notify CMA</li> <li>Draft submission on relevant customer benefits (if required)</li> </ul>	<ul style="list-style-type: none"> <li>People, resources and processes in place</li> <li>Determine optimal transaction structure and financing</li> <li>Detailed review supported by full due diligence; finalisation of full business case and detailed integration plans</li> </ul>	<ul style="list-style-type: none"> <li>Board decision on proceed, renegotiate or cancel</li> <li>Governors' vote</li> <li>For 'statutory' transactions: application to Monitor</li> <li>Transaction closure</li> <li>Implementation/ integration work streams up and running</li> </ul>
Monitor	<ul style="list-style-type: none"> <li>Initial, informal challenge of strategy robustness</li> <li>Identification of any potential competition issues</li> <li>Advice on trust's approach to assessing relevant customer benefits</li> <li>Determine what level of risk assessment review (if any) will be required</li> <li>2-3 weeks review followed by meeting with trust</li> </ul>	<ul style="list-style-type: none"> <li>Further review of strategic rationale</li> <li>Review of trust's assessment of any competition issues</li> <li>Feedback on trust's draft submission on relevant customer benefits</li> <li>Confirmation of risk classification and review requirement</li> <li>Review of other OBC elements</li> <li>4-6 weeks review of limited documents and analysis (potentially longer if benefits analysis required); formal meeting with trust</li> </ul>	<ul style="list-style-type: none"> <li>Detailed review covering transaction execution, quality and finance (8-10 weeks from receipt of submissions)</li> <li>Board to board meeting (after c. 6-7 weeks)</li> <li>Transaction risk rating issued</li> </ul>	<ul style="list-style-type: none"> <li>For 'statutory' transactions: grant of application on satisfaction that the necessary steps are completed</li> <li>Thereafter standard regulatory monitoring</li> <li>Possible additional monitoring conditions attached to an 'Amber' risk rating if applicable</li> </ul>
Advisers	<ul style="list-style-type: none"> <li>Possibly strategy advisers</li> </ul>	<ul style="list-style-type: none"> <li>Legal advisers (with competition experience if required)</li> <li>Corporate finance advisers</li> <li>Accountants</li> </ul>	<ul style="list-style-type: none"> <li>Legal advisers</li> <li>Accountants, tax advisers</li> <li>Corporate finance advisers</li> </ul>	<ul style="list-style-type: none"> <li>Legal advisers</li> <li>Accountants, auditors</li> </ul>



# APPENDIX 2

## AN OVERVIEW OF THE CMA'S MERGER CONTROL REGIME<sup>20</sup>

### Principal stages of a CMA merger investigation



\*Extendable by up to 40 working days. \*\*Extendable by up to eight weeks. \*\*\*Extendable by up to six weeks.  
 †Exceptions to the duty to refer considered including relevant customer benefits.  
 ‡Undertakings in lieu of reference to Phase 2.

## End notes

- 1 <http://www.england.nhs.uk/ourwork/futurenhs/> [accessed 9 March 2015]
- 2 <https://www.gov.uk/government/publications/dalton-review-options-for-providers-of-nhs-care> [accessed 9 March 2015]
- 3 Ham C (2014). *Reforming the NHS from within*. London: The King's Fund. Available at: <http://www.kingsfund.org.uk/publications/reforming-nhs-within> [accessed 9 March 2015]
- 4 Office of Health Economics (2012). *Report of the Office of Health Economics Commission on Competition in the NHS*. London: Office of Health Economics. Available at: <https://www.ohe.org/publications/report-office-health-economics-commission-competition-nhs> [accessed 12 March 2015]
- 5 Dash P, Dimson J, Meredith D, White P (2012). *Marry in haste, repent at leisure: when do hospital mergers make strategic sense?* London: McKinsey & Company. Available at: [http://www.mckinsey.com/global\\_locations/europe\\_and\\_middleeast/united\\_kingdom/en/our\\_work/healthcare\\_systems\\_and\\_services](http://www.mckinsey.com/global_locations/europe_and_middleeast/united_kingdom/en/our_work/healthcare_systems_and_services) [accessed 12 March 2015]
- 6 Spencelayh E, Dixon J (2014). *Mergers in the NHS*. London: The Health Foundation. Available at: <http://www.health.org.uk/publications/mergers-in-the-nhs/> [accessed 12 March 2015]
- 7 Health and Social Care Act 2012. (c.2) Available at: <http://www.legislation.gov.uk/ukpga/2012/7/part/3/chapter/2/enacted> [accessed 13 April 2015]
- 8 <https://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance> [accessed 9 March 2015]
- 9 <https://www.gov.uk/government/organisations/competition-and-markets-authority/about> [accessed 12 March 2015]
- 10 Monitor (2014). *Supporting NHS Providers: guidance on transactions for NHS foundation trusts*. London: Monitor. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417799/Transactions\\_guidance\\_2015\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417799/Transactions_guidance_2015_FINAL.pdf) [accessed 7 April 2015]
- 11 Monitor and Competition and Markets Authority (2014). *Competition review of NHS mergers: a short guide for managers of NHS providers*. London: Monitor and Competition and Markets Authority. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/339830/CMA-MonitorShortMergerGuide-1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339830/CMA-MonitorShortMergerGuide-1.pdf) [accessed 7 April 2015]
- 12 Competition and Markets Authority (2014). *CMA guidance on the review of NHS mergers*. London: Competition and Markets Authority. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/339767/Healthcare\\_Long\\_Guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339767/Healthcare_Long_Guidance.pdf) [accessed 7 April 2015]
- 13 Monitor (2014). *Supporting NHS Providers: guidance on merger benefits*. London: Monitor. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/340823/Monitor\\_mergerbenefits\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/340823/Monitor_mergerbenefits_guidance.pdf) [accessed 7 April 2015]
- 14 Competition Commission (2014). *A report on the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust*. London: Competition Commission. Available at <http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/royal-bournemouth-and-christchurch-poole> [accessed 9 March 2015]
- 15 Competition and Markets Authority (2014). *Anticipated acquisition of Heatherwood and Wexham Park Hospitals NHS Foundation Trust by Frimley Park Hospital NHS Foundation Trust*. London: Competition and Markets Authority. Available at: <https://www.gov.uk/cma-cases/heatherwood-and-wexham-park-hospitals-nhs-foundation-trust-frimley-park-hospital-nhs-foundation-trust> [accessed 9 March 2015]
- 16 Monitor (2014). *Supporting NHS providers: guidance on merger benefits*. London: Monitor. Available at: <https://www.gov.uk/government/publications/supporting-nhs-providers-considering-transactions-and-mergers> [accessed 9 March 2015]
- 17 Enterprise Act 2002. (s.30) Available at: <http://www.legislation.gov.uk/ukpga/2002/40> [accessed 13 April 2015]
- 18 Although the Office of Fair Trading took over responsibility for reviewing mergers in the NHS from 22 March 2013, it was decided that the CCP would continue with this review. It is important to note that this merger was not reviewed under the Enterprise Act 2002 but under a previous non-statutory process. Many of the principles of assessment are similar however.
- 19 Monitor (2014). *Supporting NHS providers: guidance on transactions for NHS foundation trusts*. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/386708/MonitorTransactionsGuidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386708/MonitorTransactionsGuidance.pdf) [accessed 13 March 2015]
- 20 Competition and Markets Authority (2014). *CMA guidance on the review of NHS mergers*. Available at: <https://www.gov.uk/government/publications/review-of-nhs-mergers-cma29> [accessed 13 March 2015]

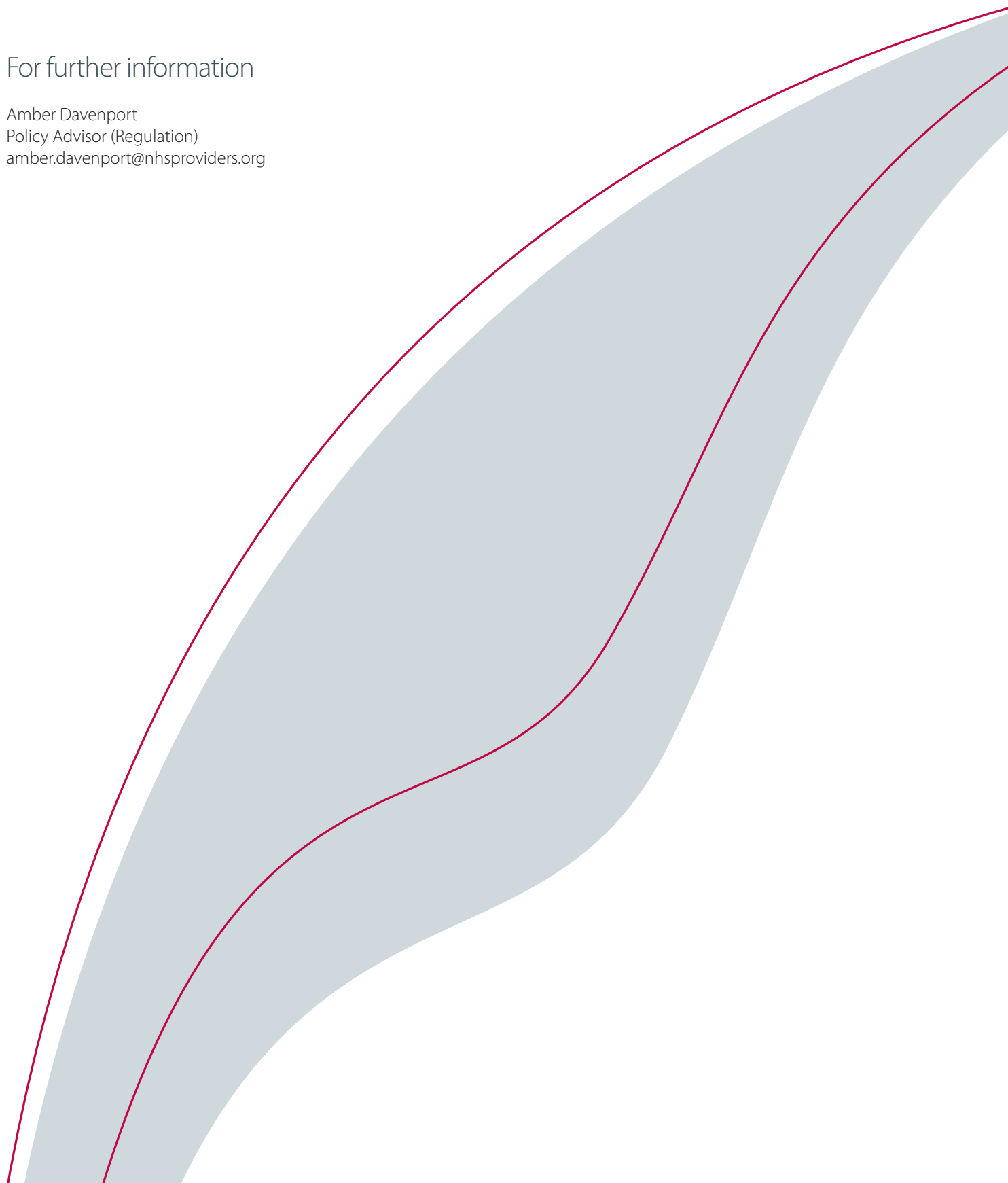
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**NHS Providers** is the membership organisation and trade association for the NHS acute, ambulance, community and mental health services that treat patients and service users in the NHS. We help those NHS foundation trusts and trusts to deliver high quality, patient focused, care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate.

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