



Cooperation and Competition Panel

Mergers Response to Consultation Document

04 October 2010

MERGER REVIEW GUIDELINES

Introduction

In 2009 the Cooperation and Competition Panel (CCP) undertook a three-month public consultation on its interim draft guidelines. The guidelines set out how the CCP exercises its responsibilities under the Principles and Rules for Cooperation and Competition (Principles and Rules).

The CCP had intended to publish a revised set of guidelines in autumn 2009, following the outcome of the initial consultation. However, this was postponed at the request of the Department of Health (DH) in order that any changes arising from the DH's review of the PCT Procurement Guide and Principles and Rules could be taken into account.

Following publication of the *Procurement Guide for Commissioners of NHS-funded Services* and the revised *Principles and Rules* on the 30 July 2010, the CCP amended its guidelines to reflect changes in DH policy. The draft guidelines, incorporating a number of changes resulting from comments arising from the earlier consultation, were reissued for a further period of consultation over the summer of 2010.

Following the completion of the consultation period the CCP has carefully considered the responses and has today published revised guidelines to come into effect immediately in line with the new Principles and Rules.

4th October 2010

Summary of responses

1. The CCP received a total of 31 responses which commented specifically on the Draft Interim Guidance on Merger Inquiries ("Interim Merger Guidelines"). The CCP welcomes the input provided by respondents including SHAs, PCTs, medical bodies, royal colleges, trade unions, law firms, representative bodies and individual members of the public. The feedback has been used to test the reliability and veracity of the Interim Merger Guidelines and has helped shape improvements to the document to ensure it is as useful and beneficial as possible. **Please note, in order to ensure consistency with the initial consultation process, this document should be read in conjunction with the original version of the Principle and Rules. These can be found on the CCP website here: <http://www.ccp-panel.org.uk/reports-and-guidance/consultations.html>**
2. This response document outlines the major issues raised by respondents in respect of each of the questions asked by the CCP in its consultation on the Draft Interim Merger Guidelines. It explains how the CCP has addressed such issues in the revised Merger Guidelines ("Merger Guidelines"). This document should be read in conjunction with the Merger Guidelines. This summary document is not exhaustive in relation to all issues raised in the responses received, and exclusion of a particular issue from this summary does not mean that we have not considered the issue.

Specific issues raised in response to individual questions

3. We set out below the specific issues raised by respondents in relation to individual questions to our Draft Interim Merger Guidelines. Where respondents commented on specific paragraphs in the Draft Interim Merger Guidelines, we have also referred to those. The CCP's response is set out in italics.

Section 3. Acceptance Criteria

Question 1: Are the acceptance criteria sufficiently clear?

4. The majority of the respondents found the acceptance criteria clear, although some respondents had some questions which are summarised below. We think that the concept of acceptance criteria is less relevant to what is effectively a mandatory merger regime than, for example, the process for submitting a conduct complaint¹. Accordingly, we have drafted a section dealing with the CCP's remit to review mergers which sets out the relevant threshold. We now have a separate section on the information which merger parties need to submit to the CCP to enable it to begin its investigation (see paragraph 4.24 and Appendix 1).
5. **Definition of "mergers":** Some respondents asked for clarification on whether the Merger Guidelines relate to acquisitions and joint ventures as well as mergers. *The CCP uses the term "merger" in the same way that the Office of Fair Trading, the Competition Commission and other competition authorities use the term. Accordingly, "merger" includes statutory mergers for example, the merger of two NHS Foundation Trusts, or an NHS Trust and an NHS Foundation Trust, into a single new NHS Foundation Trust under sections 56 and 57 of the NHS Act 2006 Act), as well as acquisitions, joint ventures and other similar transactions involving NHS providers [see para 1.3]. Accordingly "merger" includes statutory mergers, transfers of organisations or parts of organisations (e.g. transferring PCT provider arms to other organisations or combining PCT provider arms), hosting arrangements and integrations.*
6. **Definition of "joint ventures":** A respondent asked us to clarify the meaning of "joint ventures" for the purposes of the Merger Guidelines. *A joint venture is formed when two or more organisations integrate their assets, businesses or parts of businesses.*
7. **Notification thresholds:** Some respondents suggested that the acceptance criteria should include the notification thresholds. *The acceptance criteria now expressly refer to the notification thresholds.*
8. **No complaints procedure:** Many respondents, either in relation to questions 1 and 2, or more generally, referred to "complaints" in relation to mergers. *The relevant acceptance criterion has been amended to read that the subject matter of the "merger" (not "complaint") must fall within the ambit of the Principles and Rules.*

¹ The CCP's Conduct guidelines are available on the CCP's website at <http://www.ccp.org.uk/reports-and-guidance/index.html>

9. **Relationship between the CCP and the OFT:** In relation to the criterion that the CCP should be the most appropriate body to investigate a proposed merger, some respondents asked us to clarify which mergers will be investigated by the CCP and which will be investigated by the OFT. In this context, we were also asked whether the CCP will investigate mergers involving non-NHS entities. *These matters are addressed in the Working Arrangements between the OFT and the CCP (see <http://www.ccp-panel.org.uk/content/Working-arrangements-between-OFT-CCP.pdf>). In summary, the CCP reviews mergers, joint ventures or vertical integration involving entities offering NHS-funded healthcare services, regardless of whether they are NHS organisations, independent service providers or third sector providers, provided that certain thresholds are met and that the merger is notified to us. Pursuant to the Enterprise Act, the OFT also has a statutory duty to refer to the Competition Commission those mergers between enterprises where there is a realistic prospect that this may lead to a substantial lessening of competition in a market(s) in the United Kingdom. A relevant merger situation is, broadly, one where two or more “enterprises” have ceased to be distinct, or will cease to be distinct, and where one of the jurisdictional tests under the Act is met (either turnover or share of supply)..*
10. In relation to the same criterion, the OFT asked us to clarify that its jurisdiction to examine mergers under the Enterprise Act 2002 is not affected by the CCP's decision. *This criterion has been amended to read “The CCP considers that it is the most appropriate body to investigate a merger (i.e. over other bodies or regulators including the Office of Fair Trading (OFT)”, and the following footnote has been added “The jurisdiction of the OFT and the Competition Commission under the Enterprise Act or the European Commission under the EC Merger Regulation is not in any way affected by the CCP's decision”.*
11. **Requirement to make available all relevant and applicable information:** Some respondents asked for clarification on which parties are required to make available all relevant and applicable information. *The obligation to provide this information is on the merger parties.*
12. **Refusal to provide the relevant information:** In relation to the same criterion, some respondents expressed a concern that a merger investigation might be held up because one of the merger parties would refuse to provide the relevant information. *We expect that in most cases this is unlikely to be an issue because the parties will need the CCPs advice in order to proceed with their merger. In the event that an organisation refuses to provide us with information following a reasonable opportunity to do so, the CCP will normally stop the clock (i.e. suspend its timetable for examining a merger) if it cannot proceed without the information requested. A notice to this effect will be published on the CCP's website.*

Question 2: Should anything be added or excluded from the CCP's acceptance criteria and if so, why?

13. Most respondents did not suggest any changes to the acceptance criteria.

SHAs: A respondent suggested that the acceptance criteria should include a provision that “local merger procedures under the auspices of the relevant SHA have been considered” in order to ensure that the relevant SHA, as systems manager, takes into account competition considerations in its own assessment of a merger proposal. *Unlike procurement and advertising, there is no requirement for parties to follow local procedures before submitting a merger notification to the CCP. Accordingly, we have not incorporated this suggested amendment. We note, however, that transactions by an*

NHS Trust or PCT involving a movement of assets in excess of such organisation's delegated limits require SHA approval. In addition, transactions exceeding £35 million require Secretary of State for Health approval. Further safeguards include an obligation for novel, contentious or repercussive transactions involving an NHS Trust or PCT to receive HM Treasury approval and the tests set out in the February 2010 Department of Health guidance on Transforming Community Services (along with the supplementary questions as issued by the Department of Health in June 2010). Finally, SHAs must also apply the NHS Transaction Manual requirements to any proposed merger before granting approval.

Section 4. Merger Inquiry Process

Question 3: Is the planned informal review process useful? If not, what improvements would you suggest?

14. Most respondents found the informal review process useful, particularly given the novelty of the system in the context of the NHS.
15. **Volume of informal review requests:** Some respondents wondered whether the CCP would have the capacity to deal with the large volume of informal review requests that it is likely to receive, given the novelty of the system for the NHS. *The CCP provides informal advice at its discretion. If our case load is greater than our available resources the CCP will prioritise notified cases over requests for informal advice.*
16. **Requests for informal merger advice:** Some respondents asked who may seek informal advice. *The CCP does not wish to limit the category of people who may seek informal advice. However, as described above, deciding whether to give informal advice is at the CCP's discretion. We will usually give informal advice if it is appropriate to do so and if we have available resources.*
17. **Conflict between informal and formal advice:** Some respondents asked whether our informal advice may conflict with our subsequent formal advice. *Our informal advice is based on information provided to the CCP by the requesting party, is not tested externally (i.e. we do not seek the input of third parties such as competitors/customers) and is provided without undertaking a detailed merger analysis. Accordingly, it is possible that when we undertake a detailed formal investigation we will reach a different conclusion to that in our informal advice. Our informal advice is not binding on the CCP and is not a substitute for our formal assessment.*
18. **Conflict between the CCP's advice and the OFT's decision:** One respondent was concerned that where a merger involves independent service providers, the CCP's advice may conflict with the OFT's decision. *In practice it is unlikely that the same transaction would be reviewed by both the CCP and the OFT (see paragraph 9) The OFT assesses mergers under the merger control provisions of the Enterprise Act 2002 and the CCP assesses mergers under the merger control provisions of the Principles and Rules. In theory it might therefore be possible for the OFT and CCP to reach a different view about a transaction. This is because the OFT would be likely to assess the effects of the transaction on non-NHS funded services only and the CCP would assess the effects of the transaction on NHS-funded services only. In practice, however, the CCP would seek to work closely with the OFT and parties to ensure that there was a consistent view of the transaction or, if that were not possible, that any concerns were addressed.*

- 19. Business secrets or confidential information:** Some respondents asked for clarification on how business secrets or confidential information provided to the CCP during the course of either a formal or an informal investigation will be handled and commented that providing some degree of comfort in relation to this might ensure that we obtain complete and correct information. A respondent commented that its ability to make submissions would depend on whether the confidentiality of its submissions would be maintained. *Please see our publishing policy at <http://www.ccpanel.org.uk/cases/publishing-policy.html>. We will not publish any business secrets or confidential information provided to us during the course of a formal or informal investigation. Parties should identify business secrets or confidential information as such. We seek to operate a transparent process and accordingly will publish non-confidential versions of certain key documents.*
- 20. FOI requests:** A respondent raised a specific concern regarding Freedom of Information (“FOI”) requests. *We have published our approach to FOI requests on our website at <http://www.ccpanel.org.uk/freedom-of-information.html>.*
- 21. Confidential nature of informal advice:** A respondent asked who has responsibility for providing a copy of the informal advice to the relevant Sponsor. *Informal advice is provided in confidence to the requesting party and accordingly it must not be shared without the CCP’s express consent. The CCP will not disclose informal advice to any other party.*
- 22. CCP staff:** A respondent asked whether informal advice is provided by the CCP staff or the CCP (i.e. the Members). *Informal advice is provided by the CCP staff and is not binding on the CCP. The Director of the CCP, who is both a staff and CCP Member, may exclude himself from certain decisions taken by the CCP (i.e. the Members) if it is appropriate to do so.*
- 23. Jurisdictional questions:** A respondent asked whether, under the informal guidance process, we will be advising on jurisdictional as well as on substantive issues. *We will advise on both these issues. We recommend to parties that they take advantage of the informal guidance process to clarify any queries that they may have.*
- 24. Enterprise Act:** The OFT asked us to clarify that our informal advice will not preclude a possible merger assessment by the OFT or the CC under the Enterprise Act. *The CCP and OFT are responsible for reviewing mergers under separate regimes. We have addressed this in a new section in the Merger Guidelines headed “Relationship between the CCP and OFT Merger Reviews”.*

Question 4: Is the planned decision-making process for formal merger reviews sufficiently clear?

25. The majority of respondents found our process clear.
- 26. SHA involvement:** Some respondents asked that SHAs should have a more formal role in supporting the CCP, while some respondents also queried whether SHAs will be involved in the decision making process, for example in assessing whether a merger is consistent with the Principles and Rules. *Although we may seek the assistance of SHAs, the Department of Health or, in relation to Foundation Trusts, Monitor, during the merger inquiry process, we will provide our advice on the basis of our own analysis and independently of any views expressed by SHAs, the Department of Health or Monitor.*

27. **Publishing details:** A respondent requested further clarification as to the publishing details of a case on the CCP's website. *The CCP publish any material that helps to explain its decision and information that has been considered in its decision. This can include submissions, a notice of acceptance, an intention to proceed to the next phase of a case, (if appropriate), timetable amendments (if appropriate), notices of suspension of review or recommencement of review (if appropriate), a report explaining the CCP's analysis, advice and recommendations and media releases (if appropriate) Our publishing policy can be found at <http://www.ccp-panel.org.uk/cases/publishing-policy.html>.*

Question 5: Does the formal merger process afford merger parties sufficient opportunity to present their views to the CCP and to respond to the CCP's analysis and reasoning?

28. The majority of respondents considered that the formal merger process affords merger parties with sufficient opportunity to present their views and respond.

29. **Timescale for responses:** Some respondents asked for an indication on the timescale afforded to merger parties for making submissions and responding to information requests during Phase I and Phase Two investigations. Some respondents also argued that that the timescale for responding might be too tight in light of the amount of information and data that will be submitted to us (see also question 7 below). *Generally, we expect interested third parties to make submissions within 10 working days from the publication of notice of acceptance on our website. The CCP will give parties a reasonable period of time in which to respond to requests for information. If parties are unable provide information within the time period we specify we could suspend our processes temporarily pending receipt of the information required (i.e. "stop the clock"). We also have the ability to request an extension of the review period from the relevant Sponsor. Our case experience to date suggests that information requests do not generally create problems for parties, and the timescales which we set for the provision of that information seem to be sufficient in most cases.*

30. **Holding meetings:** A respondent suggested that a meeting with the relevant parties should be held in all Phase I investigations. We were also asked to identify who meetings would be held with. *It is likely that CCP staff will communicate frequently with merger parties during the 40 working day investigation period (Phase I investigations) and there will normally be meetings with the merger parties and others, such as commissioners at the beginning of an investigation as well as towards the end of Phase I if seems likely that the transaction will proceed to a Phase II review. The guidance already allows for such meetings to be held when appropriate.*

Question 6: Does the formal merger process afford other parties sufficient opportunity to present their views to the CCP and to respond to the CCP's analysis and reasoning?

31. Generally respondents were happy that third parties are afforded sufficient opportunity to present their views.

32. **Seeking representations:** A large number of respondents commented that we should actively seek information and representations from PCTs and SHAs, and not rely on general invitations to comment on our website. *We have clarified in the Revised Guidelines that we may ask PCTs and SHAs, as well as other third parties, to provide information or make representations.*

33. All parties are welcome to present their views: Some respondents asked us which parties, in addition to the merger parties, may submit their views. Some Foundation Trusts as well as the Foundation Trust Network asked that the relevant Foundation Trust Board of Governors should be allowed to submit its views; UNISON argued that trade unions should also be allowed to submit their views; while another respondent argued that Overview and Scrutiny Committees should not. *We welcome submissions on competition issues from everyone with an interest in the outcome of a merger investigation. As set out in relation to question 7 below, to the extent that third parties make submissions, they should seek to substantiate and support any points raised by examples, documents and other factual evidence. Foundation Trust Boards of Governors are welcome to make their views known to the CCP.*

Question 7: Does the proposed formal review process facilitate expedient reviews on non-complex mergers (during Phase I) while also providing sufficient time for complex mergers to be subject to an appropriate review (during Phase II)?

34. Mandatory merger filing regime: A respondent argued that the mandatory nature of merger filings to the CCP is too onerous given that under the Enterprise Act there is a voluntary filing regime to the OFT. *Where there is a voluntary filing regime, the merger parties need to decide where the risk lies of an adverse finding by the Competition Commission which at worst might require the transaction to be undone. Commonly the purchaser bears this risk. A decision was taken by DH [?] that such risks were not appropriate in the healthcare sector.*

35. Investigation periods: We received conflicting views on whether our formal review process will facilitate the expedient review of non-complex mergers (during Phase I) while also providing sufficient time for the investigation of complex mergers (during Phase II). While many respondents considered that the investigation periods strike a good balance, some respondents argued that that they may be too tight, while others argued that they may be too long. *We have decided to maintain the existing investigation periods but we have now introduced a fast track process because our experience indicates that certain categories of mergers are very likely to be consistent with the Principles and Rules for Cooperation and Competition. We intend to deal with these more quickly, in a shorter procedure, which requires less input from the merging organisations.*

36. Reducing the investigation periods in exceptional circumstances: Moreover, some respondents commented that the guidelines should make provision for reducing the investigation period in exceptional circumstances, for example, in the case of financially or clinically failing organisations or where only a minority of the services affected would be subject to choice or competition. *The investigation periods set out in the guidelines are maximum periods. The CCP will endeavour to reach decisions in a shorter period when appropriate. It is important in cases where a speedy decision is preferred that the merger parties provide us with the information we need to carry out our assessment as quickly as possible. In addition, the CCP has introduced a fast-track procedure because its experience indicates that certain categories of mergers are very likely to be consistent with the Principles and Rules. The CCP's intention is to deal with these more quickly, in a shorter procedure, which requires less input from the merging organisations.*

37. **Wider merger process:** Some respondents asked that our investigation process and timeframes should tie in with the statutory consultation periods, the wider process set out in the Transactions Manual and REID and the Health Act 2009 which received Royal Assent on 12 November 2009. *The CCP expects its sponsors to make every effort to ensure that this happens.*
38. **“Significant concerns” giving rise to a Phase II investigation:** Some respondents requested further clarification on what would constitute “significant concerns” giving rise to a Phase II investigation. *A merger gives rise to significant concerns if the CCP’s view is that there is a realistic prospect that the merger will result in a material adverse effect on patients and taxpayers.*
39. **Existing sources of information:** Some respondents also suggested that, where possible, we should use existing sources of information and that SHAs and PCTs should provide some of the relevant information. *The CCP agrees with this view. Our experience to date is that we have been able to use existing sources of information and our processes are deliberately designed so as not to be too burdensome to parties whilst ensuring the CCP has the information it needs to carry out a rigorous analysis.*
40. **Information submitted pursuant to a Phase II investigation:** One respondent also sought clarification on how information provided during Phase I would be different from information provided during Phase II. *When a merger investigation proceeds to Phase II, we will carry out a more in-depth investigation and, accordingly, we may require further data and information input to allow us to do so. In such a case, we will identify to the relevant parties the areas that give rise to competition concerns and require further input. During a Phase II investigation, we also expect parties to provide information and evidence on the benefits to patients and taxpayers resulting from their merger.*

Question 8: Is the statement regarding the notification thresholds sufficiently clear?

41. The majority of respondents found the notification thresholds clear.
42. **Distinction between “primary care providers” and “community service providers”:** Some respondents asked us to define “primary care providers” and “community service providers”. *We have not provided such a definition in the Revised Guidelines as we wished to retain the flexibility of looking at this on a case by case basis. However, in most circumstances we will ascertain whether a provider is a primary care providers or a community service providers by reference to the types of contracts the organisation in questions holds.*
43. **Mergers between different types of providers:** A small number of respondents were confused as to which threshold will apply in the case of mergers between different types of service providers. *In the case of mergers between healthcare service providers in different sectors, the lowest applicable threshold will apply. We have amended the guidelines to make this clearer.*
44. **Rationale:** A small number of respondents suggested including the rationale for the different thresholds. *We do not consider it is necessary to set out the rationale for each threshold. Generally, our intention is to capture mergers that may give rise to adverse effects on patients and taxpayers without reviewing small mergers that are unlikely to do so (see question 9 below).*

45. **Queries on whether a proposed merger satisfies the acceptance criteria:** A couple of respondents asked us to clarify what they should do if they are unclear as to whether a proposed merger meets the acceptance criteria. *In such a situation, merger parties should approach us for informal advice on the issue. We have clarified the Revised Guidelines to reflect this.*

Question 9: Do the notification thresholds strike a good balance between limiting the CCP's reviews to material transactions while at the same time capturing smaller transactions that may give rise to concerns?

46. We received conflicting responses to this question: while some respondents considered that the notification thresholds strike the right balance, some found them too high, while others found them too low. *Given the differences in opinion, we will maintain the existing thresholds but as noted above at paragraph 35 we have now introduced a fast track process to deal with certain mergers more quickly, in a shorter procedure, and with less input from the merging organisations.*

47. **Foundation Trusts:** In relation to mergers involving Foundation Trusts specifically, the Foundation Trust Network and a number of Foundation Trusts suggested that the relevant threshold is too low and that account should be taken of Monitor's guidance on "significant transactions". *The relevant notification threshold was set in consultation with Monitor and we have not amended it.*

48. **Size of transaction test:** A couple of respondents suggested using a different jurisdictional test rather than the turnover test, and one respondent suggested incorporating a "share of supply test" (which is used in the merger control provisions of the Enterprise Act 2002). *Although we see the merit in these suggestions, we consider that the existing thresholds are easier and simpler to apply.*

49. **No review of smaller mergers:** A respondent asked whether mergers which do not satisfy the relevant merger thresholds because the merging entities' combined turnover is too low will be investigated if they give rise to concerns. *Such mergers will not be investigated – mergers which fall below the relevant thresholds are not reviewable by the CCP.*

Section 5. Assessment of the effects of a merger

Question 10: Is the proposed methodology for the analysis of mergers between healthcare service providers sufficiently clear?

50. Although many respondents replied that the proposed methodology was clear, some found particular parts complicated while others raised specific comments which we address below. We have also sought to clarify further our methodology in the Revised Guidelines. Finally, we invite merger parties to take advantage of our informal guidance process in order to raise at an early stage any substantive (or other) queries that they may have.

51. **Service homogeneity:** A respondent asked whether our proposed methodology is appropriate in the absence of service homogeneity in the healthcare sector. *The CCP's methodology is*

modelled on the approach used by the Office of Fair Trading and the Competition Commission as well as other competition authorities. We accept that in the healthcare sector, services may not be homogeneous but we consider that our proposed methodology still holds. Many products or services are differentiated and the proposed methodology is considered to be appropriate by other competition authorities in these situations. If there is a variation in the extent to which different service providers constrain one another, we will take this into consideration.

- 52. Confusion surrounding “hypothetical monopolist test”:** Some respondents were confused by our explanation of the hypothetical monopolist test which is an analytical framework commonly used in the assessment of mergers. *We have sought to clarify our explanation of this analytical framework in the Revised Guidelines.*
- 53. Establishing entry or expansion:** One respondent was concerned that the information required to establish the likelihood of entry or expansion will be difficult to obtain and asked whether we would expect the merger parties to provide it to us. *We recognise that the merger parties are unlikely to have information about the plans for entry or expansion of other service providers. If the merger parties do have evidence or data on entry or expansion by other relevant service providers they should provide it to us. We will also seek evidence from organisations other than the merger parties themselves and we will ask providers about their future bidding intentions in the geographic areas affected by the merger.*
- 54. Unsustainable providers:** *Some respondents commented that unsustainable service providers should include both financially and clinically failing providers. We have explained in the Revised Guidelines that), We will carry out an assessment of whether or not a merger involving that organisation may have an adverse effect on patients or taxpayers as a result of a loss of choice and competition. In carrying out our assessment we will take into account advice from the CQC and advice from the CQC and other relevant organisations.*
- 55.** Some respondents argued that where a merger involves an unsustainable service provider, the benefits accruing from the merger should include the creation of a single provider and continuity of service. *It is not clear how the creation of a single provider in itself necessarily gives rise to benefits to patients or taxpayers. Continuity of service might be a relevant benefit, but the CCP only takes into consideration benefits which are specific to the particular merger in question. Continuity of service might be likely to arise regardless of the identity of the acquiring organisation.*
- 56.** *A respondent asked for clarification of the meaning of alternative “credible” acquirers in the context of unsustainable service providers. We consider this phrase generally to be well understood, but we are referring to another service provider who we believe would have been likely to have acquired the failing organisation if the merger party had not.*
- 57. State Aid:** Some respondents asked whether a merger between NHS organisations where one of them is an unsustainable service provider may give rise to state aid concerns. *The European Commission is the appropriate body to address any state aid issues under the EU Treaty, while the OFT is the appropriate body to address any other issues arising under UK or EC competition law.*

58. **Merger benefits:** A number of respondents asked what would be considered a “reasonable” period for benefits resulting from a merger to accrue. Moreover, a respondent argued that while we may consider that it is appropriate to take a longer-term view on the benefits accruing from such a merger, PCTs/commissioners generally accept some long-term risks against benefits in the short term (under 5 years). *It is not possible to define “reasonable period” with any certainty as the exact period will depend on the facts of a particular case. The period of time when the adverse effects are likely to arise is also relevant. Generally merger benefits are expected to accrue in the foreseeable future and as a rule of thumb this is often considered to be 2-3 years.*
59. **Merger resulting in monopoly:** A respondent asked for our approach in the situation where there is a merger between the only two providers of a service, such that post-merger there would be no alternative providers. *In such a case we would assess whether there were barriers to entry and any potential new providers of services. A merger resulting in a monopoly would be very likely to result in costs to patients and taxpayers. We would look carefully at any benefits arising from the proposed merger and consider whether those benefits might exceed costs to patients and taxpayers arising from the loss of choice and competition.*
60. Another respondent also argued that our analysis would need to take into account that national policy supports the promotion of monopolies in areas such as stroke, emergency and cancer as well as more specialist facilities such as paediatric intensive care because of the perceived advantages in terms of better quality achieved through greater specialisation and effective use of expensive facilities. *We will take such factors into account when considering benefits to patients and taxpayers arising from a merger.*
61. Another respondent argued that there are few efficiencies of size in healthcare and that there are minimum sizes for viability. *We will consider clinical scale efficiencies where these benefits are well supported by evidence and where there is evidence to support submissions that such benefits would arise.*

Question 11: Is the proposed methodology for the analysis of mergers under the AEP/AET test sound

62. Generally respondents found the proposed methodology sound, although some asked for further clarification on how it will be applied in practice.
63. **AEP vs. AET:** A number of respondents asked how the AEP and AET will weigh against each other and what criteria will be used to resolve any tension between the two. One respondent suggested that we should place greater emphasis on improved patient outcomes even if they are more costly, for example, in relation to stroke care. *We carry out our substantive test as follows: we first assess any costs to patients and taxpayers which flow from the merger. If there are such costs, we assess the benefits to patients and taxpayers; if the costs outweigh the benefits, there is an AEP/AET. In weighing up costs and benefits, the CCP relies on the expertise of the Panel members.*
64. **Providing a worked example:** One responded suggested providing a worked example in order to explain how we will apply the test. *However, we have decided not to provide a worked example as our approach has been set out in a number of reports that are published on our*

website. The most recent case that we have published, and reviewed our approach to ascertaining benefits arising from a transaction is Buckinghamshire²

65. **Willingness to travel:** A respondent asked how certain softer elements, such as patients' willingness to travel and future patient behaviour changes will be taken into account during a merger investigation. *We will take into consideration patient preferences of this nature as part of the exercise of identifying the services and geographic area in which the merger parties compete (i.e. the relevant market).* In undertaking our analysis, we envisage using data containing patient referral patterns and possibly also national patient surveys.

Question 12: Should the assessment of a merger's effect on patients or taxpayers take account of any other factors that are not included in the draft guidelines?

66. Many respondents did not suggest the inclusion of any additional factors.

67. **Value for money vs. costs:** One respondent suggested that our analysis should focus on value for money rather than costs. *Value for money reflects the monetary cost of a given quality of service. Both cost and quality factors will be relevant in our assessment.*

68. **AEP:** A respondent asked for further clarity on how patient benefits will be assessed. *However, our approach has been set out in a number of reports that are published on our website, the most recent case that we have published, and reviewed our approach to ascertaining benefits arising from a transaction is Buckinghamshire*

69. Additional factors suggested by respondents:

- One respondent suggested including improved clinical outcomes and their benefits to the long term economy in the AET analysis. Another suggested including clinical improvements, system benefits, service integration, workforce development and emergency planning into the analysis. *Improved clinical outcomes would fall to be considered as part of our assessment of the benefits of a merger, assuming there was evidence to support submissions that such benefits would arise. We will consider any relevant benefits but before we can take them into account, they must be clearly articulated and accompanied by supporting evidence.*
- Another respondent suggested taking into account retention levels associated with mergers (i.e. the loss of valuable expertise/trained staff), as they have a direct effect on patient care and the local health community. *When considering a proposed merger, we assess whether it may give rise to costs to patients or taxpayers as a result of a loss of choice or competition, and where this is the case, whether these costs are offset by benefits to patients or taxpayers arising from the merger.*

² http://www.ccpnel.org.uk/content/cases/Transfer-of-Buckinghamshire-PCTs-provider-services-arm-to-Buckinghamshire-Hospitals-NHS-Trust/100813_Bucks_FINAL_EXCISED.pdf

Question 13: Are there any issues specific to the healthcare sector that should be specifically addressed within the guidelines which are currently not?

70. Such issues are addressed in answer to question 12 above.

Section 6. Panel advice and recommendations to the relevant Sponsor

Question 14: Do you have any views on the substantive content of this section regarding CCP advice and recommendations to the relevant Sponsor?

71. **advisory nature of advice:** Some respondents raised a concern that the non-binding nature of the CCP's advice may undermine its process and credibility. *Given that the Department of Health and Monitor have established the CCP, we hope they will not routinely reject our advice.*

72. **Examples of remedies:** A number of respondents asked for further clarity and examples on the possible remedies that we may recommend in order to address AEP and/or AET. We were also asked how and by whom remedies will be monitored. The CCP has received assurances and required behavioural remedies in a number of cases that it has considered, in order to protect patient choice and competition (for example, see the merger of the provider services arm of Croydon PCT and Mayday Healthcare NHS Trust, April 2010, paragraph 79). Additional behavioural and structural remedies will be likely to address similar issues but in ways appropriate and proportionate in the circumstances of each particular case. In those cases where assurances have been accepted, the PCT and SHA have been responsible for monitoring compliance, although any person or organisation might raise the issue of compliance with the CCP.

73. **Proportionality:** A respondent queried our rationale in not pursuing a remedy where the costs would be disproportionate to the AEP/AET. *As explained in the guidelines, where there are equally effective remedies, we will always seek to recommend a remedy that imposes the least cost or that is the least restrictive. As it would not be appropriate to impose remedies which are too costly or onerous compared to the AEP/AET.*

74. **Presentation:** A respondent found the grey boxes in the Draft Interim Merger Guidelines confusing. *We have reformatted the Revised Guidelines.*

Section 7. Guidance on content of submissions by merger parties to the CCP

75. The majority of respondents found the guidance on the content of submissions clear and useful.

76. **Information to be provided:** One respondent was concerned that, given the capacity and financial constraints faced by them, NHS organisations are likely to be disadvantaged when compared to independent service providers in both understanding the requirements of this section and producing a sound submission. *The CCP is happy to assist the merger parties with any queries that they may have when they are putting together information to provide to us. Merger parties should also take the opportunity for informal guidance to raise any such queries with us during the pre-notification stage.*

Question 16: Is the guidance on the content of submissions absent of any substantive issues or information that would assist in the preparation of submissions and if so, what?

77. Generally respondents were happy with the guidance on the content of submissions.
78. **Timing of merger notifications:** Some respondents asked at what stage of a transaction process merger parties should submit a formal merger notification to the CCP. *This is clarified at paragraphs 4.17 – 4.19 of the Revised Guidelines.*
79. **Contact person:** A respondent asked us to clarify the responsibilities of the named contact in order to identify the most suitable person for the task. *This will be the person within the relevant organisation with oversight of the transaction.*
80. **Maps:** A respondent asked whether the map setting out the location of the merger parties' and their main competitors' activities should include their international activities. *We do not require information on parties' activities outside England.*
81. **Group of companies:** A respondent asked whether the companies which are part of a party's group only include internal trading arms or whether they also include separate legal entities. *All separate legal entities owned or controlled by a party as well as those entities that own or control it should be listed as part of its group. The relevant threshold is the combined turnover of both organisations involved in the transaction, we would consider each case on its merits but as a general rule of thumb the relevant turnover would be any turnover which would form part of the consolidated accounts of a merged entity.*
82. **Market definition information:** A respondent asked whether the merger parties should be providing the information on market definition. *Merger parties should provide any information they have which assists the CCP's understanding of how patients choose the services they need and where they go to receive services.*
- Financial accounts:** A respondent suggested that we should expressly ask merger parties to submit financial accounts (or surpluses/deficits) and financial plans (ideally independently reviewed e.g. by auditors). *When considering the financial strengths of acquiring organisations, the CCP relies on evaluations made by regulators responsible for assessing these matters, in particular, the Care Quality Commission and the relevant SHA. The CCP also usually reviews a range of published documents, including audited financial accounts, where this is relevant to a case.*
83. **Patients:** A respondent asked whether we will (either formally or informally) consult with patients or patient representatives (e.g. LINC or OSCs). *We are happy to receive comments on the competition elements of a merger from any interested party and once we receive a formal notification, we will publish on our website an invitation to comment.*
84. **Change in status of organisations:** A respondent asked whether changes in the status of organisations which do not involve a merger (e.g. where an NHS Trust becomes a community interest company or a Foundation Trust) are covered by the Merger Guidelines. *The CCP does not consider changes of status alone to constitute a merger.*

ANNEX

We list below the 31 respondents that submitted responses to the draft guidelines during the consultation process:

- Foundation Trust Network
- Sandwell PCT
- Hertfordshire Partnership NHS Foundation Trust
- NHS East & North Hertfordshire and NHS West Hertfordshire (PCT)
- Independent Reconfiguration Panel
- UNISON – Sussex Community and Mental Health
- East of England SHA
- East of England PCT Network
- The Shrewsbury and Telford Hospital NHS Trust
- South West SHA
- South Essex Partnership University NHS Foundation Trust
- Royal College of Physicians
- Department of Health
- NHS Bournemouth and Poole (PCT)
- Primary Care Trust (PCT) Network
- West Midlands SHA
- BMA
- NHS Norfolk (PCT)
- NHS North West (SHA)
- NHS Eastern & Coastal Kent (PCT)
- Allied Health Professions Federation
- Somerset Partnership NHS Foundation Trust
- Wragge & Co LLP

- Cambridgeshire Community Services
- Anthony Harrison (Research Associate, King's Fund – comments made in his private capacity)
- UNISON Health Care
- NHS Partners Network [represents major IS providers of NHS-funded services]
- Royal College of Nursing
- NHS Confederation
- Royal College of General Practitioners
- OFT