

Foundation Trust Network

FTN Response to Co-operation and Competition Panel Consultation Draft Interim Guidance on Merger Inquiries

I. General Comments on the Correspondence between the Guidelines and the Co-operation and Competition Rules

We appreciate that there is an absence of policy in relation to market definitions, and that the Panel is not in the business of setting policy. We also recognise that there is no definition of the use of the term “Co-operation” within the Co-operation and Competition Rules, whereas there is a body of literature and case law that surrounds competition. However, we believe that there are a range of areas in which the Panel could (and should) provide guidance to clarify the approach it will be taking in relation to both commissioning tendering decisions and co-operation- as one of the key principles within the rules themselves - within the market.

We understand that in the absence of such definitions, the Panel’s remit for clarifying the meaning of co-operation and competition will be through the application of the proposed benefits to patients’ test. The assessment of decisions by commissioners regarding whether or not to pursue a co-operative or competitive path in tendering decisions also needs to include an assessment of the likely risks and costs associated with decisions and their impact and the Panel needs to ensure that the guidelines make it clear that these factors will be taken into account.

Examples of issues that may arise includes where GP practice-based commissioning groups signs up with independent/private sector companies to help them bid for work – foundation trusts have cited examples where what such a partnership provides is only part of a service, not a comprehensive package such as that already provided by the incumbent provider – but is being seen as an attractive option by commissioners. In this situation, issues include the impact on continuity of care and Choice - how will patients be able to distinguish between a comprehensive service and a partial service and how will Choice be governed - will patients have any real choice?

Clearer guidance is required from the Panel in relation to the need for Chinese walls, particularly in relation to the transforming community services agenda, collaborative service specification development between commissioners and providers, where commissioners (including GPs under practice-based commissioning) seek to commission from themselves and in relation to the provision of financial incentives corresponding to referral patterns, whether this is by commissioners or providers.

We outline below the critical issues in brief and make a more detailed comment under the relevant questions below.

I.1 Getting the Right Balance between Co-operation and Competition

There is a key issue about the structuring of the guidelines between the twin principles of Co-operation and Competition. As the guidance currently stands foundation trusts believe that one principle (Co-operation) has been subordinated to another (Competition) and that this will ultimately distort the nature of the market as envisaged through the rules. The balance between them needs to be restored. If there were such

balance it ought to be possible to bring a complaint about breaching co-operation rules. This does not seem currently to be the case.

FTN believes that there should be a section in the final document about the rationale and policies for promoting co-operation – as set out in the Duties in the Health Act 1999 (NHS) and 2003 (for FTs). This could cover the drive for clinical networks, integrated care pilots, AHSCs and HIECs and should tackle the issue of ‘natural monopolies’ and economies of scope.

In addition there is a description of the rationale and policies for promoting competition but there is nothing about the risks of competition and market failures as established in economic literature. System managers and regulators should focus on preventing market failures as well as ensuring fair conduct. It should be within the scope of the competition Panel to consider whether market managers have taken the risks of competition into account when they make decisions. The Panel could make clear in the guidelines its commitment to take such risk into account when it considers referrals.

In addition the Panel has to be sensitive to the fact that unless the balance between the twin principles is perceived to be the basis upon which judgements about conduct in the market will be determined there is a great risk of increasing risk aversion and defensive behaviours on the part of all players.

For more detail on this issue see the answers to questions 9 and 14 below.

1.2 The Critical Goal is Competition on Quality not Price

The fundamental principle of the reform of the health Service, given greater expression and emphasis by Lord Darzi in the Next Stage Review is that in the NHS competition will be on the basis of quality- not price. In para 2.4 the document postulates that amongst the benefits of competition ‘costs are driven down’. This is placed as the first of such benefits from competition, but the purpose of having a rules based national tariff is to underpin the key policy objective of quality, not price as the developmental principle of the NHS as well as to create a fair remuneration system based upon detailed understanding of clinical activity. This has been further strengthened by CQUIN and other schemes for rewarding quality improvement, as well as being recognised as central within the Standard Contracts. In addition, a new regulatory authority, the Care Quality Commission has been set up to underpin the other drivers, Quality Accounts are about to be introduced through legislation and a National Quality Board is being set up to co-ordinate and make sense of these various drivers.

In addition, in para 2.5 the guidance states that benefits will *only* be realised through competition. Again, this places a disproportionate emphasis on competition; it is widely recognised that such benefits may also be realised through increased and effective collaboration and co-operation.

Foundation trusts will be very concerned if the emphasis of the Competition Panel results in placing price above quality because they do not understand this to be the policy emphasis of Government. It would go against the grain of all the drivers that have so painstakingly been embedded in the system. The way in which this section is written in the document seems to be fundamentally at odds with what the system is meant to be delivering.

1.3 Proportionately limiting the Burden of Information Demands

There will be an issue about the way in which the information demands of the Competition Panel will dovetail in with information already supplied through other regulatory channels so that it does not necessarily exacerbate the bureaucratic burden of complaints. Foundation trusts would welcome a statement that, where possible, the competition panel will use existing sources of information and will co-ordinate with the Sponsors to make this possible.

1.4 System regulation and conflicts of interest in role of system managers

System regulation needs to be aligned and overlap and conflicts removed. It is vital for the system regulation to be aligned and avoid regulatory overlap and duplication, particularly in the light of Monitor's new area of responsibility in implementing the Department of Health's competition policy. Whilst the Competition Panel has a limited remit within the system infrastructure its decisions will undoubtedly have significance for the market managers and decisions makers and will make clear conflicts of interest within the system. Many foundation trusts are beginning to be concerned by what they perceive to be a conflict of interest within the SHAs role, of driving market policy and performance managing PCTs, whilst also acting as the first point of appeal for providers.

1.5 Other comments

As a general point – the whole document refers to mergers and in particular, in para 1.7. refers to mergers as a potential solution for unsustainable providers. This is somewhat misleading; in the wider market, the majority of mergers are unsuccessful and it is highly unlikely that foundation trusts will want to merge with an unsustainable provider – it is likely that acquisitions rather than mergers will be the solution for unsustainable providers. The document should state upfront that it relates to both mergers and acquisitions for the avoidance of any confusion.

2. Answers to Specific Questions

2.1 Q1. Are the acceptance criteria sufficiently clear?

Yes.

2.2 Q2. Should anything be added or excluded from the Panel's acceptance criteria and if so, why?

No, although it may be useful to state precisely who can complain and at what stage of the process complaints should be referred to the Panel.

2.3 Q3. Is the planned informal review process useful? If not, what improvements would you suggest?

Yes. However, the paper does not discuss the issue of volume of calls for advice that the Panel may receive.

FTN believes that there will be a large volume of advice being sought from the Panel. The path to a more open market and competition in health services is likely to be tricky and the scope for opening unbalanced and unanticipated risk high. In this context the availability of advice will be critical to avoiding unacceptable and unintended levels of risk that could undermine public confidence in competition in the health sector provision.

This is an immature market and many players will be uncertain about how to apply the rules and the appropriate behaviours that go with this. Unlike other markets that have opened in the UK over the last 20-30 years, few players have any record as commercial entities. Even the oldest foundation trust has only been authorised for five years and the staging of the authorisation process has meant that many now authorised foundation trusts have far less commercial experience than their first wave colleagues. Half of the eligible NHS Trusts are still waiting in the wings to be authorised

In all other markets the players went through a process of privatisation before markets were created, hence they had an opportunity to commercialise their organisations before being subject to competition rules. In health there has been no such privatisation and even though foundation trusts are autonomous and self-governed they still have constraints upon their commercial freedoms. On the commissioning side there is still too little experience in creating and managing a more commercial set of processes for awarding contracts. Hence all players are likely to need a lot of support from the Competition Panel in its early years of operation and the organisation will have to scale up to ensure this demand can be met as an investment in reducing the number of cases downstream.

In addition, there should be an impact assessment that models the likely levels of formal referrals uptake the Competition Panel may receive in order to understand the scope and size of demand and inform the development of the service standards.

2.4 Q4. Is the planned decision-making process for formal merger reviews sufficiently clear?

Yes.

2.5 Q5. Does the formal merger process afford merging parties sufficient opportunity to present their views to the Panel and to respond to the Panel's analysis and reasoning?

Yes. It would also be useful here provide an indication as to timescales for responses.

2.6 Q6. Does the formal merger process afford other parties sufficient opportunity to present their views to the Panel and to respond to the Panel's analysis and reasoning?

Yes, however, FTN would question the Panel's proposed means of inviting PCTs and SHAs to comment. Although they will almost certainly be aware of the complaint, and therefore be aware that they need to check the CCP website for information, it would seem good practice to actively seek information from all relevant parties, including PCTs and SHAs to ensure all parties have the maximum amount of time in which to respond and therefore ensure a robust process.

There should be greater clarity about how the Panel will determine which 'other' parties will be approached where it decides it needs further particulars. Foundation Trusts think that FT Boards of Governors ought to be a specifically named party amongst the parties to be afforded greater involvement in the Panel's process for investigation.

It would also be useful here provide an indication as to timescales for responses.

2.7 Q7. Does the proposed formal review process facilitate expedient reviews of non-complex mergers (during Phase One) while also providing sufficient time for complex mergers to be subject to an appropriate review (during Phase Two)?

The process is clear in the main; comments on specific items are provided below.

Para 4.21 in relation to publishing details of a case on the website – FTN would like further clarity as to what these might include.

Para 4.22 in relation to ‘significant concerns’ it would be helpful for the Panel to define in this further or to provide examples of what these might include.

Para 4.23 it would be useful for the Panel to include an indicator of the timescales for providing information within the overarching timescale of 40 days for Phase One.

Para 4.23 the Panel may wish to consider providing clarification as to the term ‘relevant’ parties.

Para 4.25 FTN is concerned about the number of times parties are required to provide information, as highlighted above; it would be extremely useful at each stage, to identify what type of information may be requested and what this might include. For example, how will the information requested in Phase Two differ to that provided in Phase One and how long will parties have in order to provide this? What will be the timescales for providing final comments (para 4.25)?

Para 4.25 in relation to the extension of the timescales for assessment during Phase Two, FTN would question the reason for responsibility for this to be placed with Sponsors? As the process will be run by the Panel, it would make more sense for this decision to be placed with the Panel.

2.8 Q8. Is the statement regarding the notification thresholds sufficiently clear?

Yes.

It would also be useful for the Panel to clarify at what stage of the process of a transaction it expects either the Secretary of State or Monitor to seek a formal merger assessment from the Panel.

The guidance states that it only wishes to consider transactions that are likely to be ‘material’ however, the thresholds are relatively low in terms of turnover for healthcare services and therefore, are likely to capture the majority of services, whether they have a large impact on patients and taxpayers or not. Foundation trusts already have a requirement to report to Monitor any significant transactions and FTN would recommend that this guidance complements the Compliance Framework (paragraphs 103-112) in relation to investments and transactions and assessing material transactions.

2.9 Q9. Do the notification thresholds strike a good balance between limiting the Panel’s reviews to material transactions while at the same time capturing smaller transactions that may give rise to concerns?

The notification thresholds could be a lot higher given the size of current organisations. If the measure is the gross turnover of the combined organisations, then it is very

unlikely that any Acute Trusts, for example, would average out at £35m in terms of turnover.

2.10 Q10. Is the proposed methodology for the analysis of mergers between healthcare service providers sufficiently clear?

In relation to pages 20 - 27 the methodology seems clear.

However, in relation to para 5.36 on conditions which facilitate coordinated effects/tacit collusion – these describe much of the health service and existing providers within it and therefore seem a little meaningless; if, as stated in para 5.37 not all of the factors need to be present for coordinated effects and the existence of such factors will not necessarily equate to the presence of coordinated effects, it is slightly confusing as to when exactly the Panel will deem coordinated effects to have taken place.

In relation to para 5.44 it is unlikely that much of the information the Panel would wish to consider when determining the likelihood of entry or expansion is available or will be very difficult to obtain – how does the Panel envisage doing this? Will parties to the case be expected to provide any of this information?

In relation to unsustainable providers, para 5.48 bullet 3 – the benefits of an acquisition where patients would be able to transfer to a single provider need to be recognised. Such an acquisition would prevent fragmentation and enable greater continuity of service provision.

In relation to para 5.50, it would be helpful to know how the Panel will define and assess “credible” providers.

2.11 Q11. Is the proposed methodology for the analysis of mergers under the AEP/AET test sound?

In relation to pages 15 – 19, the reasoning provided seems tautologous and it is not clear what it will mean in practice.

The methodology again places the importance of competition over that of co-operation and does not recognise the risks of increased competition, for example, fragmentation of service delivery or the benefits that co-operation can offer, for example, through more streamlined care pathways and it may be possible to offer choice within the pathway.

In addition, there is no recognition that foundation trusts now have a responsibility to publish quality accounts. These should be taken explicitly into account as part of the analysis, as if these demonstrate quality of service, concern about a potential merger affecting quality can be somewhat alleviated.

Finally, it would be useful to know what the approach of the Panel will be where a potential merger reduces competition and is able to maintain or improve upon the quality of services but where there are no alternative providers?

2.12 Should the assessment of a merger’s effect on patients or taxpayers take into account any other factors that are not included in the draft guidelines?

The assessment seems to focus largely on cost rather than value for money. There will be distortions in evaluating whether an AET is present from any merger if short-term costs is over emphasised. For example, if merger is proposed (in part due to service or financial

failure) with natural expectations of improvements to critical mass, enhanced expertise or the range of services on offer, but costs marginally more than an alternative looked at in isolation, then any consideration of AET must consider:

- gross combined operating costs against like for like services **as well as**
- the downstream economic benefits of improved diagnostic and treatment services (for example) and the benefit in the longer term to the economy through better outcomes, reduced morbidity/mortality.

2.13 Q13. Are there any issues specific to the healthcare sector that should be specifically addressed within the guidelines which are currently not?

No.

2.14 Q14. Do you have any views on the substantive content of this section regarding Panel advice and recommendations to the relevant Sponsor?

Yes – although, it would be helpful for Sponsors to be named.

2.15 Q15. Is the guidance on submission content sufficiently clear and useful?

Yes.

In relation to para 5.51 it would be helpful if the Panel could provide an indication of what it would deem a “reasonable” period in which for benefits from an merger to accrue.

In relation to para 5.54 and price paid by commissioners for services, many of the services provided by foundation trusts will be under tariff and therefore will not be affected by competition. In addition, it must be recognised that even if this were not the case, the price paid by commissioners also depends on their skill as commissioners and is not solely dictated by the market. In the case if an acquisition of an unsustainable provider, there may be no cost reduction or other efficiency benefits to taxpayers within the short to medium term and this should be taken into account.

In relation to remedies, it would be very useful if the guidance could include some examples of the types of remedies the Panel envisages using. Para 6.7 refers to the Panel the costs of remedies to the parties involved; it is suggested that this should include some reference as to how the Panel will handle cases involving unsustainable providers, who will have less ability to pay and will effectively have been driven to a merger as a result of national policy and therefore should be dealt with differently.

In relation to para 6.9 although we understand the logic of not pursuing a remedy where the costs are disproportionate to the AEP/AET – it is nonsensical to rule a case as anti-competitive and then not to apply any remedy. Or would the Panel not class such a case as anti-competitive?

2.16 Q16. 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?

It would be helpful for the Panel to clarify here at what stage of the merger or acquisition process parties should submit a merger notification to the Panel.

In relation to para 7.4:

Bullet 3 – it would be helpful for the Panel to explain the purposes for which this contact will be used, in order that foundation trusts can ensure the most appropriate details are provided

Bullet 5 – would this include international activities, if these exist?

Bullet 6 – would this include internal trading arms of a foundation trust? Or does this only include separate legal entities?

In relation to para 7.9 should it not be the responsibility of the parties who are claiming anti-competitive behaviour to submit this information rather than the parties to the transactions?

The guidance requests a significant amount of information, much of which is market information and specialist in nature and the FTN's concerns about this have been highlighted above. Where possible, it would be helpful if the Panel could use existing information and/or ensure that parties are allowed sufficient time in order to gather this information.

The guidance refers to the provision of information on numerous occasions throughout the documentation. It would be very useful overall if the Panel could clarify which parties are responsible for providing which information, in which circumstances (i.e. where there has been a complaint and where parties are submitting a merger notification and where Sponsors have referred a case) and at what time.

FTN April 2009