

CMA guidance on the review of PPU arrangements under the Private Healthcare Market Investigation Order 2014

Summary of responses to the consultation

© Crown copyright 2019

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Contents

	<i>Page</i>
1. Introduction	2
2. Issues raised in the responses to the consultation.....	4
Appendix A: Respondents.....	10

1. Introduction

Background and summary

- 1.1 Following its private healthcare market investigation (2014) the Competition and Markets Authority (CMA) made the Private Healthcare Market Investigation Order 2014 (the **Order**), which contains a market-opening remedy in the form of a scheme to enable the CMA to review Private Patient Unit (**PPU**) arrangements.¹
- 1.2 PPU arrangements are arrangements for a private hospital operator to operate, manage, or otherwise provide privately-funded healthcare services at a private patient unit in England, Wales, Northern Ireland, or Scotland.
- 1.3 The PPU scheme set out in the Order is intended to complement the merger control regime that applies to all market sectors. Thus, PPU arrangements which constitute 'relevant merger situations' under Part 3 of the Enterprise Act 2002 (the **Act**) are subject to review under the merger control regime.² However, where PPU arrangements do not constitute a relevant merger situation, Part 2 of the Order allows the CMA to review the impact on competition of those arrangements, having regard to the competitive constraints in the relevant local area and, if appropriate, take remedial action.
- 1.4 On 1 June 2018, the CMA consulted on a draft guidance on its approach when reviewing PPU arrangements under the Order (the **Draft Guidance**). This Draft Guidance is concerned with those PPU arrangements which do not constitute 'relevant merger situations' under the Act and fall within the scope of Part 2 of the Order.

Purpose of this document

- 1.5 This document sets out a summary of the key issues raised by the respondents to the CMA's consultation and the CMA's views on these key issues. It is not intended to be a comprehensive record of all views expressed

¹ The CMA's report on the private healthcare market investigation (April 2014) (the **Report**) and the Order are available on the [CMA's webpage relating to the private healthcare market investigation](#). Part 2 of the Order, which relates to PPU arrangements, entered into force on 1 October 2014.

² See [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#) and [CMA guidance on the review of NHS mergers \(CMA29\)](#). Readers may also find it helpful to read NHSI's guidance on relevant customer benefits, available at https://improvement.nhs.uk/uploads/documents/Monitor_mergerbenefits_guidance_8NohSvz.pdf

by respondents: the respondents' full responses are available on the consultation page.

- 1.6 The consultation document accompanying the Draft Guidance set out three questions on which respondents' views were sought:
- (i) Is the content, format and presentation of the Draft Guidance sufficiently clear? If there are any particular parts of the Draft Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
 - (ii) Is this Draft Guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional or revised content you would find helpful?
 - (iii) Do you have any other comments on the Draft Guidance?
- 1.7 This document should be read in conjunction with the consultation document, which contains further background and explanation on the Draft Guidance.

2. Issues raised in the responses to the consultation

- 2.1 The CMA received four written responses to the consultation. The list of respondents is set out at Appendix A, and non-confidential versions of all submissions are available on the [consultation page](#).
- 2.2 Overall, respondents welcomed the CMA's decision to publish guidance on its approach when reviewing PPU arrangements under the Order, and the added clarity that it will bring to the process. Summaries of responses are set out below, together with the CMA's views on the comments in question.

Information gathering

Respondent views

- 2.3 One respondent raised concerns about the CMA using formal information requests as standard when gathering information from the parties. The respondent stated that it would appear disproportionate given that the number of merger cases where the CMA faces difficulties in document gathering is very low. Instead, the respondent suggested that it would be more reasonable for this approach to be used only where: the CMA has doubts a recipient will comply with an informal request, it has concerns over the timeliness of the response, or where it believes that evidence may be destroyed.

The CMA's view

- 2.4 The CMA can issue requests for information '*informally*' or using its section 174 powers. When requesting information, the CMA will generally follow its approach for mergers reviewed under Part 3 of the Act.³ That is, the CMA will use section 174 notices as standard where it is seeking the production of **internal documents** from the parties to the PPU arrangements.⁴ In addition, it is likely to use the section 174 power where it has doubts that the recipient will comply with an informal request, or where it has concerns over the timeliness of the response, or where it believes that evidence may be destroyed. The CMA will typically request information from third parties informally in the first instance.⁵

³ [Guidance on requests for internal documents in merger investigations](#), (CMA100), paragraph 16.

⁴ Failure to comply with a notice under section 174 of the Act without reasonable excuse can lead to the imposition of a fine.

⁵ [Guidance on requests for internal documents in merger investigations](#) (CMA100), paragraph 17.

2.5 As noted in the Draft Guidance, the CMA may also request information by issuing a notice under article 6 of the Order.

Length of the submissions

Respondent views

2.6 Two respondents indicated that for more complex cases, submissions on PPU arrangements may be longer than the 5 pages indicated in paragraph 4.3 of the Draft Guidance. This is because some cases will require a more detailed and complex analysis of the potential competition issues, and the parties should be allowed to explain their full views on these issues.

The CMA's view

2.7 The CMA notes that when notifying a PPU arrangement to the CMA, the parties should provide the CMA with a clear and concise submission of the relevant facts. The CMA has clarified at paragraph 4.3 of the Draft Guidance that parties may provide longer submissions in more complex cases. Parties are encouraged to discuss the content of the submission with the CMA before notification, as set out at paragraph 4.10 of the Draft Guidance.

Approach to competition assessment

Respondent views

2.8 Two respondents requested that the Draft Guidance include more detail on the factors that the CMA is likely to take into account when assessing whether to conduct a review of a PPU arrangement and, in the event that a review is initiated, whether competition concerns are likely to arise.

2.9 In particular, the Draft Guidance should include:

- The approach to assessing the relevant product market,
- The approach to assessing the relevant local area over which competition is to be assessed, and
- The approach to assessing whether an operator faces weak competitive constraints, including eg, the approach to market shares and the assessment of barriers to entry.

The CMA's view

2.10 The CMA has clarified in the Guidance that it will follow the 'relevant local area' approach set out in the Report.⁶

Procedural framework

Respondent views

- 2.11 Respondents requested that the Draft Guidance provide more detail on the expected timeframes to (i) decide whether to conduct a review of a PPU arrangement and to (ii) complete a PPU review, and on the main stages of the procedure.
- 2.12 One respondent indicated that it would be appropriate in their view for the CMA to harmonise its procedures for examining PPU arrangements as much as possible with the merger control regime.
- 2.13 Some respondents noted that the decision on a PPU review and on any remedies would be taken by a 'senior member of staff' but that there was no indication of who the 'senior member of staff' would be, and under what process he or she would take any decisions.
- 2.14 In addition, some respondents highlighted that the Draft Guidance does not indicate what procedural safeguards would be put in place to ensure that there is sufficient internal scrutiny of CMA decisions. They suggested following internal checks and balances comparable to those in its mergers process to govern decisions relating to PPU arrangements.
- 2.15 One respondent commented that the pre-notification process should be undertaken when a party is on the shortlist of preferred bidders, rather than having to wait until they are the selected bidder.

The CMA's view

2.16 The review of PPU arrangements under the Order differs from the review of mergers under Part 3 of the Act in that it involves a 'one-stage' decision⁷ and

⁶ Paragraphs 11.312-11.322 and chapter 5 of the Report (note the distinct market conditions in central London). See also [Merger assessment guidelines](#), CC2/OFT1254, in particular paragraph 5.2.2, and CMA decisions on PPU arrangements available on the [CMA's webpage](#).

⁷ Paragraph 11.330 of the Report.

there is no 'safe harbour' or 'de minimis' exception.⁸ The Order does not set statutory deadlines (i) for deciding whether to conduct a review of a PPU arrangement⁹ and (ii) to complete a PPU review.¹⁰ Nevertheless, the CMA aims to review cases expeditiously.¹¹ It will generally follow the same procedure as applicable to Phase 1 mergers, with some adaptations to take into account the specificities of a PPU review.

Pre-notification process

- 2.17 As regards the request that the pre-notification process should start when a party is on the shortlist of preferred bidders, the CMA notes that it is willing to assist these bidders so that they can prepare for the review process. Such bidders may, therefore, contact the CMA for general advice on how it assesses jurisdiction or undertakes its competitive assessment, as set out in the Draft Guidance.

Preliminary decision whether to conduct a PPU review

- 2.18 The preliminary decision whether to conduct a PPU review will be taken by a senior member of staff of the CMA (ordinarily by a Director from the Mergers Group).
- 2.19 The CMA will aim to decide whether to conduct a review of a PPU arrangement within 15 to 20 working days from the time it considers that it has received all the necessary information to decide whether to conduct a review.¹² Timing will depend on the complexity of the case.

PPU Review

- 2.20 The CMA will aim to complete a PPU review within a reasonable time. In some cases, the CMA may be able to complete a PPU review within 40 working days from the time it has received all the necessary information to commence the review.¹³ As noted by one respondent, there will be cases which may require a longer period. For instance, this is likely to be the case if

⁸ Paragraph 11.317 of the Report.

⁹ Note that if the CMA decides to conduct a PPU review, it is required to commence the review within four months after the day on which material facts about the PPU arrangements were given to the CMA or were made public.

¹⁰ Other than having to decide within a 'reasonable time'. See also para 11.330 of the Report.

¹¹ Paragraph 11.330 of the Report.

¹² In particular, where clear and complete evidence is provided within set deadlines by parties and third parties.

¹³ The specific nature and extent of information required will vary from case to case, and will depend whether the private operator is a new entrant or incumbent and the extent of the competitive constraints in the relevant local area.

the CMA decides that the relevant PPU arrangements have resulted, or may be expected to result, in a substantial lessening of competition and that it should take action in accordance with article 7.2 (c) of the Order.

- 2.21 The decision on a PPU review (and, if relevant, on appropriate remedial action see paragraphs 3.16 to 3.19 of the Draft Guidance) will be made by a Senior Director of Mergers or another senior member of CMA staff,¹⁴ supported or challenged by a further two individuals with the appropriate level of skill and expertise.
- 2.22 The CMA has provided more detail on the process in the Guidance.

Invitation to comment (ITC)

Respondent views

- 2.23 One respondent noted that the CMA's default position should be to issue an ITC for third parties to comment on whether to conduct a review of a PPU arrangement, unless there are particular reasons not to do so.
- 2.24 In addition, the CMA should make it clearer in the Draft Guidance that, once review is underway, it will publish an ITC (ie, publish details of the review and invite comments, consistent with its approach in merger reviews).

The CMA's view

- 2.25 The CMA remains of the view that it will decide on a case by case basis whether it is appropriate to obtain representations from third parties on whether to conduct a review of a PPU arrangement. For instance, it may not be necessary to issue an ITC where the PPU provider is a new entrant.
- 2.26 Once it has decided to start a PPU review, the CMA will usually publish an ITC.

Publication of CMA's decisions on PPU arrangements

Respondent views

- 2.27 One respondent suggested that it would be helpful for the CMA to create a separate page with links to the Order, the Draft Guidance and the CMA's

¹⁴ A different member of staff to the one who made the decision to commence the PPU review.

decisions on PPU arrangements, as they consider that it is difficult to find the PPU reviews conducted by the CMA on its website.

The CMA's view

2.28 The CMA has created a separate webpage with links to the key documents mentioned above in relation to the review of PPU arrangements under the Order.¹⁵

¹⁵ <https://www.gov.uk/government/collections/review-of-private-patient-unit-ppu-arrangements-key-documents>

Appendix A: Respondents

- CMS Cameron McKenna Nabarro Olswang LLP (on behalf of HCA International)
- Linklaters (on behalf of AXA PPP)
- NHS Partners Network (NHSPN)
- Nuffield Health