



ME/6655/16

**COMPLETED ACQUISITION BY UNIVERSAL HEALTH SERVICES (UHS) OF THE
CAMBIAN ADULT SERVICES DIVISION OF CAMBIAN GROUP PLC**

RESPONSE TO PROVISIONAL FINDINGS

14 September 2017

INDEX OF ATTACHMENTS

Annex	Description
2.1	[X]
2.2	Sturdee Hospital Marketing Brochure
2.3	[X]
2.4	[X]
2.5	Planning permission for Camino Nuneaton dated May 2017
3.1	[X]
3.2	[X]
3.3	[X]

**COMPLETED ACQUISITION BY UNIVERSAL HEALTH SERVICES (UHS) OF THE
CAMBIAN ADULT SERVICES DIVISION OF CAMBIAN GROUP PLC**

1. INTRODUCTION

- 1.1 The CMA has provisionally concluded that, on the balance of probabilities, the Transaction gives rise to a substantial lessening of competition ("**SLC**") in two areas:
- (a) in relation to the provision of female LTMH services in the West Midlands (i.e. due to the overlap between CAS Raglan House and Middlemarch Ward at Cygnet Coventry); and
 - (b) in relation to the provision of male LTMH services in the East Midlands (i.e. due to the overlap between Cygnet Derby and three CAS sites: Storthfield House, Sherwood house and The Limes).
- 1.2 The CMA has not identified any other overlap areas where the Transaction would be expected to give rise to an SLC.
- 1.3 The focus of this submission is therefore on the two areas subject to the SLC finding, in respect of which the Parties consider that the CMA has erred in its conclusion.

2. FEMALE LTMH IN THE WEST MIDLANDS

- 2.1 The Parties each operate just one female LTMH site in the West Midlands, which are located 28 miles apart:
- (a) CAS Raglan House is located in Birmingham and has 25 beds; and
 - (b) Cygnet Hospital Coventry, which opened earlier this year, has one ward (Middlemarch Ward), with 16 beds, that treats female LTMH patients. The other wards at Cygnet Coventry provide either PICU services (Dunsmore Ward) or PD services to the Tier 4 level of service specification (Ariel Ward and Ariel Court as a step down unit).
- 2.2 The magnitude of the overlap between the Parties is therefore just 16 female LTMH beds in respect of the entire West Midlands and surrounding areas. This amounts to [X].
- 2.3 Notwithstanding the small scale of the overlap created by the Transaction in the West Midlands, the Parties consider that there are material flaws and evidential gaps in the CMA's analysis, which has resulted in the CMA reaching an incorrect conclusion. These include the following:
- (a) the Parties' combined market share is materially overstated. The CMA has incorrectly excluded a number of the Parties' competitors including NHS sites, and there are a number of clear gaps in the evidence set out in the competitive assessment, which has either resulted in the CMA applying assumptions, or excluding competitors whilst acknowledging that they are still under investigation;
 - (b) the market share analysis is sensitive to the scope of the relevant geographic market, reflecting the constraints from outside the catchment area which have not been considered by the CMA in the competitive assessment;
 - (c) re-centring the catchment area on the location of each of the CCGs referring patients to Raglan House and Middlemarch Ward at Cygnet Coventry (which better

reflects the choices facing customers) indicates that all CCGs have a wide range of options, other than the Parties, that remain post-merger;

- (d) there is a lack of evidence of any significant degree of competition between Raglan House and Middlemarch Ward since it opened in April 2017. In particular, there is:
 - (i) [redacted];
 - (ii) limited evidence of patients referred to Middlemarch Ward at Cygnet Coventry also being assessed by Raglan House [redacted];
 - (iii) no evidence of Middlemarch Ward admitting patients from the same CCGs as Raglan House [redacted];
 - (iv) [redacted];
 - (v) [redacted];
- (e) there is a lack of third party concerns from CCGs about the Transaction in the West Midlands. Despite the [redacted] customers not expressing any concerns with the Transaction, the CMA has focussed on the views of a single CCG that has referred [redacted] to Raglan House over an 18 month period. This suggests that there is a confirmation bias in the CMA's analysis; and
- (f) the CMA has placed incorrect weight on parts of Cygnet's internal documents in relation to the Coventry expansion, and failed to consider these documents in the appropriate factual context.

2.4 Each of these points is considered in further detail below. When considered in the round, and to the requisite legal standard for a Phase 2 investigation, the Parties consider that there is no reasonable basis to conclude that the Transaction would be expected to give rise to an SLC for female LTMH patients in the West Midlands.

Market shares are materially overstated

2.5 The market share calculations in the PFs suggest that, if the analysis is centred on Cygnet Coventry (which gives rise to higher market shares than if centred on Raglan House), the Parties would have a combined market share of [redacted] per cent on the basis of a 60 mile catchment area, which falls to [redacted] per cent at 65 miles.¹

2.6 The Parties strongly disagree with these calculations which they consider are based on an inaccurate and incomplete picture of the market.

The CMA has incorrectly excluded the Parties' competitors

2.7 The CMA's analysis of the Parties' female LTMH market shares in the West Midlands excludes a number of competitors identified by the Parties. The Parties disagree with a number of these exclusions and consider that the CMA needs to investigate the following sites in more detail:

- (a) Inmind Sturdee Community Hospital;
- (b) Priory 255 Lichfield Road;
- (c) Priory Beverley House; and

¹ Table 21 of the PFs shows that the Parties' market shares fall from 50-60 per cent at 60 miles to 40-50 per cent at 65 miles. However, in the text in paragraph 9.207, the CMA reports the Parties' combined market share as being 50-60 per cent on the basis of both a 60 mile and 65 mile catchment area, which is inconsistent with Table 21.

(d) Priory Lakeside View.

2.8 The CMA has also excluded Camino Healthcare's planned site in Nuneaton from its market share analysis despite this site being granted planning permission, and a clear statement on Camino's website that it intends to build a new 20-bed mixed gender LTMH facility at this site.

2.9 Each of these sites is addressed further below.

Inmind Sturdee Community Hospital

2.10 The CMA states at paragraph 9.198 of the PFs that including Inmind Sturdee Community Hospital "would reduce the Parties' combined share materially to [40-50]%", but states that it is still investigating whether to include this site as competitor (i.e. it has proceeded by excluding it from the market share calculations in the PFs). It is clear from the CMA's market share calculations for the West Midlands that the inclusion of this single site reduces the Parties' combined market share on a 60 mile catchment area from [X] per cent to [X] per cent (a reduction of [X] percentage points).² The CMA's market share calculations also show that, on the basis of a 65 mile catchment area, the inclusion of this single site results in the Parties having a combined market share of just [X] per cent, which is only [X] above the filter applied by the CMA.

2.11 It is disappointing that the CMA has been unable to confirm the activities of this site (which is just 22 miles from Cygnet Coventry and closer to Cygnet Coventry than CAS Raglan House) in advance of publishing the PFs, particularly given the material impact that it would have on the Parties' market shares and the CMA's competitive assessment.

2.12 [X] the Inmind website which notes that:

*"It is designed to cater for women between the ages of 18 and 65 who have diagnoses of Personality Disorder **and/or** Serious and Enduring Mental Illness."*³

2.13 The descriptions on the Inmind website about the services provided at Sturdee hospital are consistent with evidence in the most recent CQC report published just over a month ago (in July 2017). In this report the CQC describes Sturdee Community Hospital as "Long stay/rehabilitation mental health wards for working-age adults", and describes the hospital as providing "both locked and open rehabilitation for female patients with complex mental needs."⁴ In comparison, Cambian Alders, a PD only site, is clearly described by the CQC as a "Tier 3 personality disorder service".

2.14 [X]

2.15 [X]

2.16 This evidence is further corroborated by an Inmind marketing brochure that was recently in circulation to CCGs in relation to Sturdee Hospital. The brochure clearly states that "Sturdee Hospital is a 33 bedded rehabilitation hospital in South Leicester. It is designed to cater for women between the ages of 18 and 65 who have complex mental health problems that include diagnoses of Personality Disorder and Serious and Enduring Mental Illness. Our patients present with risks that are related to their mental disorder but not mandating treatment in a secure facility". A copy of this marketing brochure is attached at Annex 2.2.

² The CMA's market calculations that include Inmind Sturdee hospital are on the basis that the number of beds at this site are split 50:50 between LTMH and PD services. Clearly, if more beds are allocated to female LTMH patients, the Parties' combined market share is even lower.

³ <http://www.inmind.co.uk/sturdee-hospital>

⁴ http://www.cqc.org.uk/sites/default/files/new_reports/AAAG4727.pdf

- 2.17 [REDACTED].⁵ [REDACTED]
- 2.18 In addition, as the CMA suggests that the [REDACTED] at Middlemarch Ward creates a strong incentive to compete for patients in the West Midlands, it is also relevant to consider the [REDACTED] at other sites in the West Midlands. In this regard, the recent CQC report for the Inmind Sturdee hospital (from 3 July 2017) states that "*At the time of the inspection 15 patients were receiving care and treatment*".⁶ [REDACTED]
- 2.19 A relevant sensitivity test to the CMA's market share calculations should therefore be to consider the impact of this [REDACTED] being allocated to treat female LTMH patients, which would be consistent with the approach adopted by the CMA in relation to considering the impact of Priory Annesley House.⁷ On the basis of the CMA's market share calculations (i.e. not taking account of any further adjustments which the Parties consider are also relevant), this would reduce the Parties' combined market share to just [REDACTED] per cent on the basis of a 60 miles catchment and [REDACTED] per cent on a 65 mile catchment.⁸
- 2.20 As the CMA has also focussed its competitive assessment on whether the Parties' sites are close geographic competitors, it should also be noted that the Inmind Sturdee Hospital is located closer to Cygnet Coventry (at 22 miles) than CAS Raglan House (at 27 miles). It is, therefore, incorrect to state that there are "*no other providers located closer [to Cygnet Coventry]*" or that the Parties' sites are "*close geographic competitors*".⁹ The Parties also do not consider it is appropriate for the CMA to make this comment whilst acknowledging that it is still investigating whether Inmind Sturdee Hospital is a competitor. As mentioned further below, this point is also relevant in relation to Camino Healthcare's planned site in Nuneaton, which is also closer to Cygnet Coventry than Raglan House.
- 2.21 Accordingly, the Parties consider that the PFs have made a material error in their conclusions by failing to take this competitor site into account in the market share calculations and competitive assessment.
- Priory 255 Lichfield Road
- 2.22 The justification given by the CMA for excluding the mixed ward at 255 Lichfield Road seems to be that "*Priory submits that this ward is not a rehabilitation facility but a step-down facility comprising independent self-managed flats*".¹⁰ The Parties do not consider that this provides a sufficient justification for excluding this ward as a competitor from the analysis.
- 2.23 The CQC report for 255 Lichfield Road clearly states that "*255 Lichfield Road is a modern, purpose-built rehabilitation service for men and women with mental health and psychological difficulties*".¹¹ It also mentions that whilst there are "*two four bed flats (one male/one female) for those requiring more intensive therapy*", it also provides "*20 individual apartments for people to live more independently but with full multi-disciplinary team (MDT) support*." The CQC report also states that these 20 self-contained apartments have "*the safety of a therapeutic structure if needed*" and that "*Residents had access to 24-hour support as required*". [REDACTED]
- 2.24 [REDACTED]

⁵ Page 6. Document submitted as Appendix 20.1 in response to RFI 1.

⁶ http://www.cqc.org.uk/sites/default/files/new_reports/AAAG4727.pdf

⁷ Provisional Findings, paragraph 9.202.

⁸ This is based on the CMA's assumption that the beds for the [REDACTED] existing patients are split 50:50 between PD and LTMH, and the [REDACTED] beds of spare capacity are allocated to treat female LTMH patients.

⁹ Provisional Findings, paragraph 9.206.

¹⁰ Provisional Findings, footnote 367.

¹¹ http://www.cqc.org.uk/sites/default/files/new_reports/AAAE3111.pdf

- 2.25 [REDACTED]
- 2.26 Whilst the CMA has excluded the flatlets at 255 Lichfield Road entirely from its market share calculations, it is of note that in Table 8 of Appendix E in the PFs, 255 Lichfield Road is classified as a LTMH/PD site. The Parties understand that this site [REDACTED] should be classified, and included in the market share calculations, as a LTMH only site.
- 2.27 Based on the CMA's market share calculations, the inclusion of just [REDACTED] of the [REDACTED] beds that have been excluded at 255 Lichfield Road (i.e. assuming that [REDACTED] per cent of the beds are allocated to female patients) reduces the Parties' combined market share by [REDACTED] from [REDACTED] per cent on the basis of a 60 mile catchment area. This increases to [REDACTED] percentage points if a 50:50 split between male and female beds is used.

Priory Beverley House

- 2.28 The CMA has excluded Priory Beverley House from its analysis of LTMH sites in the West Midlands on the basis that "*Priory has submitted that Beverley House specialises in PD and currently only treats PD patients*".¹² This appears to be based on information the CMA collected during Phase 1,¹³ and it is not clear if the CMA collected further information in relation to this site during Phase 2 (e.g. in relation to Priory's admission criteria, the primary diagnosis of patients admitted at this site to see if LTMH patients are now being rejected, or the views of CCGs in relation to the patients that they have referred to this site).
- 2.29 As the Parties have explained previously, most mental health patients have more than one medical diagnosis. In particular, it is common for female LTMH patients to have either a primary or secondary PD diagnosis. However, this does not necessarily mean the patient needs to be treated at a specialist PD site. In this regard, it is notable that both Raglan House and Middlemarch Ward at Cygnet Hospital Coventry treat [REDACTED] proportion of patients with a PD diagnosis. For example, since 1 January 2015, [REDACTED] patients have been admitted to Raglan House, [REDACTED] of these patients ([REDACTED] per cent) had a [REDACTED] of PD and [REDACTED] patients ([REDACTED] per cent) had a [REDACTED] of PD. These patients could also have been admitted to Beverley House.
- 2.30 Accordingly, the Parties disagree with the CMA and submit that Beverley House treats LTMH patients who may have a diagnosis of PD in a similar way to Raglan House or Middlemarch Ward at Cygnet Hospital Coventry. This is also consistent with:
- (a) the latest CQC report for Beverley House which describes it as a "*recovery/rehabilitation unit that only provides care for women who have a mental health problem or diagnosis*";¹⁴
 - (b) the Priory website which explains that "*Patients admitted to Beverley House may be informal or detained under the Mental Health Act with **a primary diagnosis of mental illness** and personality disorder with complex needs*";¹⁵
 - (c) the admission criteria for Beverley House set out on the Priory website as being: "*Women aged 18 years and over*", "*Have a primary mental health or personality disorder diagnosis*", "*Informal or detained under the Mental Health Act (1983)*" and "*Severe, complex and enduring mental health needs which might include treatment resistant conditions, dual-diagnosis or learning difficulty*"; and

¹² Provisional Findings, footnote 371.

¹³ For example, see footnote 65 of the Phase 1 decision.

¹⁴ http://www.cqc.org.uk/sites/default/files/new_reports/AAAG0008.pdf

¹⁵ <http://www.priorygroup.com/location-results/item/beverley-house>

(d) [REDACTED].

- 2.31 It also clear from the PFs that the CMA received evidence from Birmingham CrossCity CCG that in the last three years it had sent a substantial proportion of LTMH patients to Beverley House and it "*cited Beverley House as the next best alternative to Raglan House*".¹⁶ It is unclear why the CMA has chosen to disregard the views of Birmingham CrossCity CCG, [REDACTED]. This also provides an explanation as to why Birmingham CrossCity CCG was unconcerned about the merger (as discussed further below).¹⁷
- 2.32 It is also of note that there has been [REDACTED] in the number of patients admitted to Raglan House [REDACTED] (i.e. if the next best alternative to Raglan House for [REDACTED]). In this regard, data submitted to the CMA in response to the MQ indicates that in the [REDACTED],[REDACTED] patients were admitted to Raglan House [REDACTED]. This compares to [REDACTED]. Accordingly, there is [REDACTED], which is inconsistent with Beverley House switching to become a specialist PD service. [REDACTED]
- 2.33 Moreover, the views of Birmingham CrossCity CCG are consistent with [REDACTED].
- 2.34 The Parties understand that Priory may have told the CMA that Beverley House has recently changed use and now only accepts PD patients. However, if Beverley House is now only providing a specialist PD treatment service, this should be reflected in the site's CQC registration status.
- 2.35 In addition, as acknowledged by the CMA in its assessment of barriers to entry and expansion, reconfiguring a service from LTMH to specialist PD would have involved additional costs (e.g. in re-tooling the wards and recruiting specialist PD nursing staff), and it will take time (e.g. as set out in paragraph 12.32 of the PFs, it takes on average [REDACTED] to reconfigure a ward). [REDACTED]
- 2.36 Accordingly, the Parties consider that there is no justification for excluding all of the beds at Priory Beverley House, which further results in the Parties' combined market share being materially overstated.

Priory Lakeside View

- 2.37 The CMA has excluded Priory Lakeside View from its analysis of market shares, but has redacted the reason for this.¹⁸ It is therefore difficult for the Parties to comment on this site.
- 2.38 Priory Lakeside View treats patients aged 18-25. To the extent that the age of patients is the reason for excluding this site, the Parties disagree with the inference that it does not compete (at all) with Raglan House or Cygnet Hospital Coventry. In particular, [REDACTED] of patients at both of the Parties' sites in the West Midlands are aged 18-25, and therefore could have been referred to Lakeside View. For example:
- (a) [REDACTED]
- (b) [REDACTED]
- 2.39 It should also be noted that the CMA has not identified a separate market for the provision of LTMH services by age (with the exception of mental health treatment for elderly patients with age-related conditions). The Parties consider that there is no basis for identifying a separate market for patients aged 18-25 from those aged over 25 as the type of treatment provided is similar, and therefore it is easy for providers to adjust to changes in the age profile of patients. In this regard, it is notable that two of the

¹⁶ Provisional Findings, paragraph 9.212 – 9.213.

¹⁷ Provisional findings, Paragraph 9.214.

¹⁸ Provisional Findings, footnote 372.

specialisms/services registered with the CQC for Priory Lakeside View are "Caring for adults under 65 yrs" and "Caring for adults over 65 yrs",¹⁹ so treating adults aged over 25 would not require Priory to re-register the site with the CQC.

- 2.40 [REDACTED]
- 2.41 [REDACTED] On this basis the Parties submit that the CMA should consider whether some of the beds at Priory Lakeside View should be included in the market share calculations.
- 2.42 The Parties' advisers also note that [REDACTED].²⁰
- 2.43 However, the CMA also appears to have [REDACTED].
- 2.44 Accordingly, the Parties submit that although Priory Lakeside View is focussed on treating PD patients, the CMA should consider whether some of the beds should be included in the market share calculations. Nevertheless on a conservative basis the Parties have not included Priory Lakeside View in the market shares presented below.

Camino Nuneaton

- 2.45 In paragraph 9.229 of the PFs, the CMA states that "*Camino Healthcare, according to public information in its website 'is proposing to submit a planning application for a new 20-bed mixed gender LTMH facility in Nuneaton'*". The CMA also confirms that it is still investigating the progress and timeline for this new facility, and therefore has excluded it from the competitive assessment of the West Midlands. This is notwithstanding the fact that the site is located just 11 miles from Cygnet Coventry, and it is listed in Table 8 of Appendix E as the closest competitor site (by distance) to Cygnet Coventry.
- 2.46 The Parties have reviewed the Nuneaton and Bedworth Borough Council website and can confirm that planning permission was granted for this development in May 2017. A copy of the planning permission decision is attached at Annex 2.5 (see pages 23-42).²¹ Accordingly, the proposal is significantly more advanced than described by the CMA in the PFs (i.e. a planning application has been submitted and planning permission has now been granted).
- 2.47 Moreover, based on the Parties' experience of building new mental health hospitals, once planning permission has been obtained, a new 20 bed facility can be built and operational within [REDACTED]:
- (a) [REDACTED]
 - (b) [REDACTED]
 - (c) [REDACTED]
 - (d) [REDACTED]
- 2.48 [REDACTED] The Parties therefore consider that this site meets the CMA's timely, likely and sufficient criteria for assessing the impact of new entry.

¹⁹ <http://www.cqc.org.uk/location/1-2244014154/registration-info>

²⁰ [REDACTED]

²¹ Details of the planning application can be found at: https://www.nuneatonandbedworth.gov.uk/info/20025/planning_and_building_control/54/planning/2. The planning application Reference number is 034581.

The relative importance of the competitors set out above

- 2.49 In order to show the relative importance of the different competitors that have been excluded from the CMA's market share calculations, the following charts show the impact on the Parties' combined share of supply from each of these exclusions, on the basis of both a 60 mile and 65 mile catchment area.²²

Figure 2.1: Impact of the excluded competitors on the CMA's 60 mile base case

[X]

Figure 2.2: Impact of the excluded competitors on the CMA's 65 mile sensitivity

[X]

- 2.50 The above charts clearly show the sensitivity of the CMA's market share calculations to the exclusion of the different competitors listed above. If all of the excluded competitors set out above (with the exception of Priory Lakeside View) are included in the CMA's market share calculations, the Parties' combined market share falls from:

(a) [X]

(b) [X]

- 2.51 Accordingly, the CMA needs to have gathered evidence to the relevant legal standard that these sites do not compete with the Parties' sites for female LTMH patients, something which is not apparent in the Provisional Findings report.

CMA's analysis is based on assumptions and not facts

- 2.52 It is clear from the local area assessment for the West Midlands that the conclusion has been reached on the basis of a number of assumptions and partial evidence which could and should have been verified by customers and third parties. Given these are important factual pieces of evidence which have a material bearing on the competitive assessment, they must be tested with third parties to the requisite legal standard.

- 2.53 The following sets out a number of examples where factual pieces of evidence are either still under investigation or have not been appropriately tested with third parties:

- (a) as mentioned above, the CMA states that it is investigating further whether Inmind Sturdee hospital should be included as competitor, and acknowledged that including it would reduce the Parties' market shares materially (by [X] percentage points). Despite this clear evidential gap in the CMA's analysis, the CMA has proceeded to simply exclude this site from the market share calculations in the PFs;
- (b) the CMA appears to have received inaccurate or incomplete information in relation to a number of Priory sites, which have been incorrectly excluded from the market share calculations as a result (e.g. on the basis of being specialist PD sites). The CMA should seek the views of CCG customers for these sites and ask for lists of recent patient referrals and diagnosis (either from CCGs or from Priory) and exclusion criteria in order to confirm whether they admit female LTMH patients;
- (c) in paragraph 5.28 of the PFs the CMA states that "*In calculating shares of supply, if a competitor site provides treatment for both male and female patients (ie a mixed ward), we have sought to verify with the site owner the actual number of beds dedicated to each gender and the site owner's ability to flex this allocation between genders (this may vary from case to case)*". However,

²²

[X]

- (i) in relation to Camino Healthcare Cromwell House and Oak House, which are just 33 and 34 miles respectively from Cygnet Coventry and therefore within the catchment area for the West Midlands, the CMA states that "*we do not have specific information for these wards and so have allocated 35% of beds to female LTMH according to our standard assumption*".²³ It is unclear why the CMA has been unable to gather this information which further impacts on the Parties' combined market shares in the West Midlands;
 - (ii) in relation to Priory Annesley House, the CMA states that "*given that Priory had told us that Annesley House offers specialist PD services we did not consider it likely that it would flex many beds to LTMH*". However the CMA's own analysis confirms [X]. As PD and LTMH patients are sharing the same physical surroundings on both wards, there are no reasons why capacity could not be flexed (which the CMA seems to acknowledge by testing the sensitivity of the [X] beds being allocated to LTMH patients). [X]
- (d) in paragraph 9.229 of the PFs, the CMA states that it is still investigating the progress and timeline for the development of a new 20-bed mixed-gender LTMH facility in Nuneaton by Camino Healthcare, which has been excluded from the competitive assessment for the West Midlands. As set out above, planning permission has been granted for this development, which is located just 11 miles from Cygnet Coventry and, as listed in Table 8 of Appendix E, it will be the closest competitor site to Cygnet Coventry;
- (e) in paragraph 9.207 of the PFs the CMA states that "*Raglan House is 27 miles from Cygnet Coventry with no other providers located closer. In our view this suggests that the Parties are close geographic competitors*". This statement is clearly based on the assumption that Inmind Sturdee hospital (mentioned above) and other sites such as Camino Nuneaton, which the CMA acknowledges are still being investigated, do not provide female LTMH treatment;
- (f) in paragraph 9.209 of the PFs the CMA states that "*the Parties' combined market shares on a 60-mile basis are likely to understate the competitive constraint they impose on one another when taking into account their proximity and the absence of other competitors between 37 and 56 miles.*" However, the CMA has not provided any evidence to support a narrower geographic market definition in the West Midlands, nor has it asked customers an appropriate SSNIP question (i.e. how they would respond if prices increased at Raglan House/Cygnet Coventry by 5-10 per cent). There is a clear lack of factual evidence underpinning this statement; and
- (g) all competitors from outside the 60 mile catchment area (65 mile catchment area as a sensitivity test) have simply been excluded from the competitive assessment. As set out further below, this suggests that the CMA's analysis suffers from a binary fallacy as it simply excludes all the competitive constraints from outside the catchment area, even where they have a catchment area that overlaps. The CMA appears to have not sought to test with commissioners whether any of these sites are viewed as competitors to Raglan House or Cygnet Coventry.

2.54 In light of the clear factual gaps in the competitive assessment, it is unclear to the Parties how the CMA could have provisionally concluded that, on the basis of a balance of probabilities, the transaction would be expected to give rise to an SLC in the West Midlands.

²³ Provisional Findings, paragraph 9.203.

CMA's analysis of NHS sites is inconsistent and flawed

- 2.55 The CMA has excluded all NHS sites from its calculation of female LTMH market shares in the West Midlands. One of the reasons given for this is that the NHS Trusts the CMA contacted in this area "told us that their rehabilitation wards were covered by block contracts and that customers would use them before considering independent providers".²⁴
- 2.56 As explained previously, the Parties expect block contracts to be phased out over the next five years following the latest five year plan for mental health from NHS England and recent guidance from NHS Improvement.²⁵ This reflects the fact that block contracts are seen as restricting patient choice, and impairing the effort of NHS Trusts to find ways to improve. The CMA has dismissed this argument on the basis that it is speculative and inconsistent with evidence the CMA received from NHS Trusts.²⁶
- 2.57 However, the Parties strongly disagree with this view when the CMA is supposed to be conducting a forward looking assessment. The NHS England five year plan and NHS Improvement guidance on block contracts was only published in 2016. It is therefore unsurprising that NHS Trusts still have block contracts in place covering some of their beds. The CMA does not appear to have conducted any analysis, or spoken to any NHS Trusts, about how the use of block contracts may change over the next two years. Moreover, it is unclear whether the CMA has specifically discussed the implications of this policy shift with NHS Improvement.²⁷
- 2.58 [REDACTED]
- 2.59 Moreover, it is clear from paragraph 5.52 of the PFs that the CMA only contacted ten NHS Trusts across all of the overlap areas, despite [REDACTED].²⁸ This suggests that there are up to [REDACTED] NHS Trusts in the overlap areas which were not contacted by the CMA. As the CMA has redacted the names of the NHS Trusts it contacted, it is impossible for the Parties to comment on the likelihood that these Trusts have sites in the West Midlands that compete with the Parties. However, as the CMA has identified certain NHS sites as competitors in its assessment of the East Midlands, it is clearly not sufficient for the CMA to dismiss the constraint provided by all NHS providers on the basis of a sample of responses.
- 2.60 Accordingly, given that the CMA appears to have only included NHS sites in its competitive assessment which have been directly identified by the relevant NHS Trust, it is imperative that the CMA contacts any remaining NHS Trusts within the catchment area of Cygnet Coventry to confirm whether they operate rehabilitation sites that compete with independent providers.²⁹

Market shares are sensitive to the relevant geographic market

A 60-mile catchment is an overly cautious approach

- 2.61 The CMA has assessed female LTMH market shares in the West Midlands based on a 60 mile catchment area centred on Cygnet Hospital Coventry. The 60 mile catchment area corresponds with the area within which 75 per cent of all patient funding falls.³⁰ The CMA has justified the use of a 75 per cent catchment area (rather than the standard 80 per

²⁴ Provisional Findings, paragraph 9.224.

²⁵ See the Parties' response to the Working Papers, paragraphs 2.26 – 2.28.

²⁶ Provisional Findings, paragraph 5.56(d).

²⁷ There is no mention of a discussion on block contracts in the summary of the hearing with NHS Improvement published on the CMA's website.

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ Provisional Findings, paragraph 5.98(c).

cent catchment) *"due to the possible impact of capacity constraints in this market resulting in catchment areas wider than the actual geographic market"*.³¹

2.62 However, paragraph 5.101 of the PFs indicate that approximately 80 per cent of male LTMH patients come from within 60 miles. If the CMA were to adopt a similar 80 per cent threshold for female LTMH patients, the CMA's analysis indicates that the catchment area would be 80 miles. This highlights significant sensitivity to the relevant catchment area for female LTMH patients depending on whether a 75 per cent (60 miles) or 80 per cent (80 miles) threshold is used. At the very least the CMA should be testing the sensitivity of the market share calculations to this assumption, which is not based on any evidence.

2.63 The Parties have submitted on a number of occasions that a 60 mile catchment area represents an overly cautious basis on which to assess competition. This is for a number of reasons:

- (a) it is not consistent with the Parties' view of the market, the areas over which they draw patients, or the areas over which they develop relationships with CCGs;
- (b) as recognised in the CMA's Merger Assessment Guidelines, *"the geographic market identified using the hypothetical monopolist test will typically be wider than a catchment area"*.³² This is particularly the case in the context of a catchment area approach which has already excluded 25 per cent of the Parties' customers, and which therefore fails to consider the area over which competition takes place;
- (c) the CMA attempts to justify its approach to adopting a narrower and more cautious approach to the geographic market on the basis of *"the possible impact of capacity constraints in this market"*. However, the CMA's reasoning that the lack of capacity contributes to a wider catchment area is far too simplistic and fails to adequately explain the patterns of referrals by commissioners in the market or the commercial reality of providing rehabilitation services. Moreover, the Parties' own evidence on catchment areas is not consistent with the CMA's theory that hospitals in areas of short supply will have narrow catchment areas; and
- (d) the supply of rehabilitation services is a [X] and therefore [X]. Given the cost structure of running a mental health hospital, the Parties would [X]. Accordingly, the choices facing the [X] is highly relevant to the assessment. However, the [X].

2.64 Moreover, the CMA appears to recognise that the use of a 60 mile catchment area may not be suitable in all areas. For example, in Section 5 of the PFs the CMA notes that: *"To account for idiosyncratic customer behaviour in different areas, we consider evidence on how customers see their catchment areas in our local competitive assessment"*.³³ However, when it comes to the West Midlands local assessment, it is clear that the CMA gives no further consideration to the actual geographic market, or to the correct application of the SSNIP test, which is the test used by the CMA to define relevant economic markets.

2.65 In addition, in paragraph 5.5 of the PFs the CMA states that *"The geographic market definition does not lead mechanistically to the outcome of the local competitive assessment, which will take account of possible constraints both inside and outside of the market."* However, the only consideration of a wider catchment area in the East Midlands is a sensitivity check of extending the catchment area to just 65 miles, with no further consideration being given to the constraints from competitors outside of the catchment

³¹ Provisional Findings, paragraph 5.104(a)

³² Paragraph 5.2.25. Merger Assessment Guideline, A joint publication of the Competition Commission and the Office of Fair Trading, September 2010.

³³ Provisional Findings, paragraph 5.76.

area considered.³⁴ This is despite the CMA recognising that a 60 mile catchment area represents a cautious approach (as it excludes 25 per cent of the Parties' patients).³⁵

- 2.66 In any case, a 65 mile sensitivity check is not sufficient consideration of the actual geographic market in this area. Although the CMA appears to suggest the geographic market may be narrower than 60 miles, there is significant evidence that suggests the geographic market is wider than 60 miles:
- (a) first, as the CMA notes at paragraph 5.101 of the PFs *"the catchment areas for LTMH male, LTMH female and PD female differ"*. As noted above, the CMA's analysis confirms that the average catchment area for female LTMH services is wider than the average catchment area for male LTMH and PD patients, with 80 per cent of LTMH female patients coming from about 80 miles compared to just 60 miles for 80 per cent of male LTMH patients;
 - (b) second, the referral data for Middlemarch Ward at Cygnet Coventry suggests that the catchment area in this area may be [X] wider than 60 miles. Of the [X] patients referred for assessment to Middlemarch Ward at Cygnet Coventry since [X]:
 - (i) [X] per cent of patients come from within [X];
 - (ii) [X] per cent of patients come from within [X]; and
 - (iii) [X] per cent of patients come from within [X].

- 2.67 When the location of referrals is shown on a map it is clear that CCGs are referring patients to Middlemarch Ward at Cygnet Coventry over an area that is [X] wider than 60 miles. Accordingly, the approach to geographic market definition adopted by the CMA, which is based on its standard approach to filtering, fails to take account of the economic reality of the area over which Middlemarch Ward is competing for patients.

Figure 2.3: Map of CCG referrals to Middlemarch Ward at Cygnet Coventry

[X]

- 2.68 The Parties consider that it is vital the CMA conducts a proper investigation of the geographic market in this area as the estimated market shares are very sensitive to the catchment area. At the very least the CMA should consider a 70 mile sensitivity check, but also look at the market shares over an 80 mile radius, which is consistent with the area over which 80 per cent of female LTMH patients are drawn.

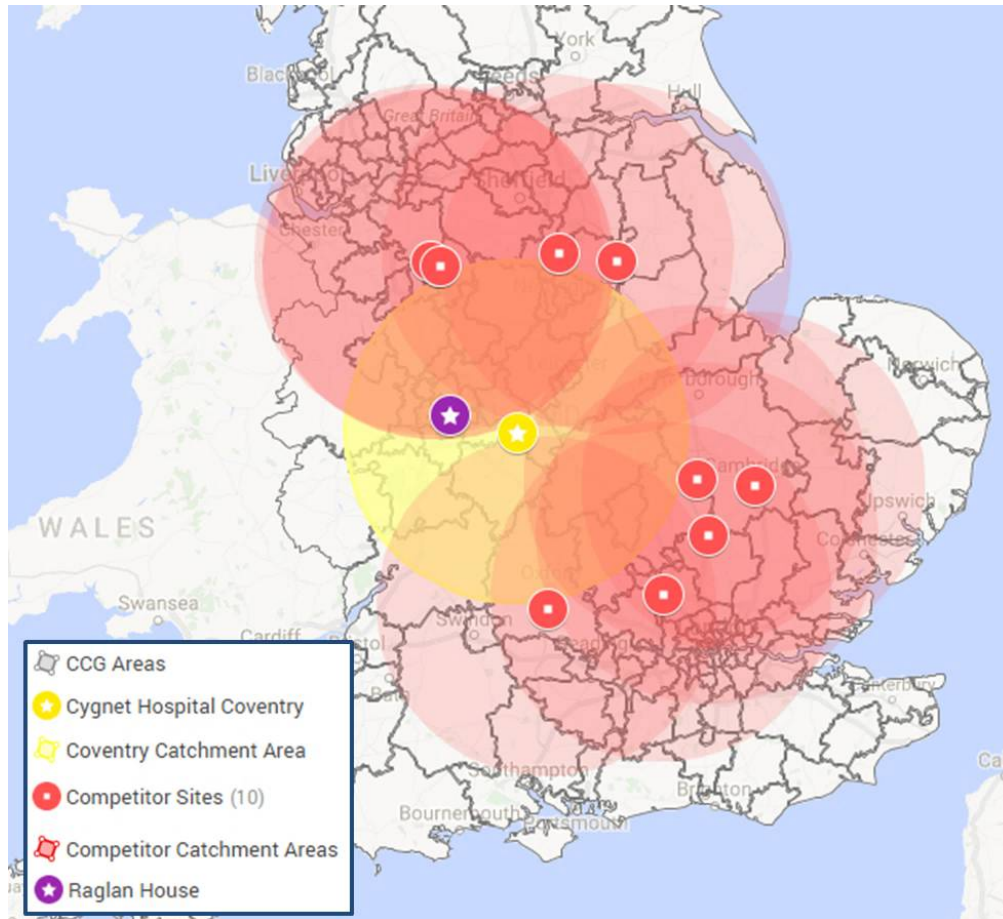
Competitive constraints from outside the catchment area have been ignored

- 2.69 It is notable that there are a number of competing sites located just outside the 60 mile catchment area:
- (a) between 60 and 70 miles from Cygnet Hospital Coventry there are three competing sites (Elysium, St Neots; Priory, The Willows; and Richmond Fellowship, 2 Care The Knowl) with a total of 55 LTMH beds; and
 - (b) between 70 and 80 miles from Cygnet Hospital Coventry there are seven competing sites with a total of 105 LTMH beds.

³⁴ In paragraph 9.207 the CMA incorrectly notes that "This resulted in the Parties' combined post-Merger market shares falling from [50-60]% to [50-60]%. However, Table 21 clearly shows that on the basis of a 65 mile catchment area the Parties have a combined market share of [40-50]%.
³⁵ Provisional Findings, paragraph 5.65.

2.70 These sites all have catchment areas that to a large extent overlap with the catchment area for Cygnet Hospital Coventry. To illustrate this point the Parties have shown the catchment areas of the ten sites located between 60 and 80 miles in Figure 2.4 below.³⁶

Figure 2.4: Map of catchment areas of competitor sites located between 60 and 80 miles from Cygnet Hospital Coventry



2.71 Figure 2.4 shows that nearly all of the Cygnet Hospital Coventry catchment area is overlapped by the catchment areas of competitors located more than 60 miles away, even though these have been excluded from the competitive assessment, and in many parts of the catchment area there are multiple overlaps. This means that, for the vast majority of CCGs that are located within a 60 mile catchment area of Cygnet Coventry, they have other suitable alternatives for female LTMH patients from outside the catchment area of Cygnet Coventry. It is not clear, therefore, why the PFs have entirely dismissed the constraint from these sites.

Market shares highlight the sensitivity of the geographic market

2.72 The following tables show the impact of extending the catchment area to 70 and 80 miles. The first table only includes those competitors taken into account in the CMA's market share calculations. The second table updates the CMA's market shares to include those competitors discussed in paragraphs 2.7-2.48 above.³⁷

³⁶ For simplicity the Parties have used a 50 mile radial catchment area as a proxy for a 60 mile road distance catchment area.

³⁷ Specifically [redacted].

Table 2.1: CMA market shares and number of competitors centred on Cygnet Hospital Coventry

	60 miles	70 miles	80 miles
CAS	[X]	[X]	[X]
Cygnet	[X]	[X]	[X]
Combined	[X]	[X]	[X]
Number of competing sites	5	8	15
Number of competitors	3	5	9

Table 2.2: Updated market shares and number of competitors centred on Cygnet Hospital Coventry

	60 miles	70 miles	80 miles
CAS	[X]	[X]	[X]
Cygnet	[X]	[X]	[X]
Combined	[X]	[X]	[X]
Number of competing sites	7	10	17
Number of competitors	4	6	10

- 2.73 Table 2.1 above shows that even if the market shares are not updated to reflect the additional evidence on the competitors that have been excluded by the CMA, the shares are very sensitive to the geographic catchment area. On the basis of a 70 mile catchment area the Parties have a combined market share of [X] per cent, only slightly above the 40 per cent threshold used for the CMA's initial filter. On the basis of an 80 mile catchment area the Parties have a combined market share of less than 25 per cent. This highlights the large number of competitor sites located between 60 and 80 miles from Cygnet Coventry (there are 3 competing sites between 60 and 70 miles, and a further 7 competing sites between 70 and 80 miles).
- 2.74 Moreover, if the market shares are updated to reflect the evidence in relation to the competitor sites described above, the Parties' combined share of supply falls significantly. On the basis of a 60 mile catchment area the Parties have a combined share of supply of just [X] per cent, significantly below the 40 per cent threshold used for the CMA's initial filter, [X] per cent on the basis of a 70 mile catchment and [X] per cent on the basis of a 80 mile catchment.

Catchment areas re-centred on each CCG indicates a wide range of options

- 2.75 The PFs have expressed a concern that following the Merger, certain CCGs in the West Midlands will not have a sufficient choice of providers, and therefore may face higher prices or lower quality as a result.
- 2.76 However, market shares centred on Cygnet Coventry (supply-based centring) are not indicative of the choices that each of the different CCGs face. In order to illustrate the choices faced by individual CCGs, the Parties have therefore re-centred the catchment area analysis on all CCGs that have admitted patients to Raglan House since 1 January 2016 (i.e. the Parties' customers), and calculated the Parties' respective market shares for each CCG. This analysis provides a more robust assessment of the choices that the Parties' customers face post-merger.
- 2.77 [X] Market shares have then been calculated on the basis of a 60-mile catchment area centred on the postcode address of each CCG, with market shares calculated based on (a) the CMA's approach to calculating market shares (as set out in the PFs); and (b) the updated market shares to include the additional competitors set out above.

Table 2.3: Market shares re-centred on CCGs that have admitted patients to Raglan House since 1 January 2016

CCG	Number of admissions to Raglan House	CMA market share	Updated market share
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]

2.78 The table above shows that, once the catchment areas are re-centred to focus on the addresses of each of the different CCGs that have referred patients to Raglan House, the Parties' combined market shares are much lower than reported in the PFs. This is illustrative of the wide range of choices that remain for the different CCG customers of Raglan House post-merger.

2.79 In this regard, Table 2.3 shows that, based on the CMA's approach to calculating market shares set out in the PFs (i.e. excluding certain competitors):

(a) [X]

(b) [X]

(c) [X]³⁸

2.80 Moreover, [X].

2.81 Accordingly, even on the basis of the CMA's market share calculations which have excluded a number of the Parties' competitors, the Parties consider that all of the customers of Raglan House retain a wide range of options post-merger. If the calculation of market shares is updated to include the additional competitors discussed above, the Parties' combined share of supply for each of the CCGs referring patients to Raglan House falls significantly, and none of the market shares are above 35 per cent.

2.82 Accordingly, the Parties consider that when catchment areas are re-centred and considered from the demand-side, which better reflects the options facing each of the customers of Raglan house, there are no CCG customers of Raglan House that would be adversely affected by the merger.

A lack of evidence of competition between Middlemarch Ward and Raglan House

2.83 The Parties note that there is a general lack of evidence contained in the PFs which considers the degree of competition between Middlemarch Ward and Raglan House. The CMA states in paragraph 9.205 of the PFs that "*Cygnnet Coventry, which only opened in March 2017, has lots of spare capacity. Pre-merger, it [Cygnnet Coventry] would have a strong incentive to compete for patients against Raglan House and the other providers in the area*". However, the CMA's local market assessment fails to consider any factual or

³⁸ [X]

empirical evidence in order to assess whether the Middlemarch Ward at Cygnet Coventry has indeed been competing for patients against Raglan House since it opened earlier this year.

- 2.84 In addition, the Parties note that there is no empirical evidence contained in the PFs to demonstrate that higher concentration in the West Midlands would be expected to lead to worse outcomes for CCGs or patients, either in terms of higher prices, lower quality or less choice. The lack of empirical underpinning means that the CMA has reached its provisional conclusion on the basis of nothing more than inference, without being able to demonstrate that customers or patients would be adversely affected in any way.

No evidence of an impact on Raglan House when Cygnet Coventry opened

- 2.85 The Parties have conducted an impact study in order to consider whether there was an associated impact [REDACTED] Raglan House in response to the opening of Middlemarch Ward at Cygnet Coventry.

2.86 [REDACTED]

2.87 [REDACTED]

Figure 2.5: Average [REDACTED] at Raglan House and Middlemarch Ward

[REDACTED]

Figure 2.6: Average [REDACTED] at Raglan House and Middlemarch Ward

[REDACTED]

- 2.88 The Parties consider that Figures 2.5 and 2.6 are consistent with the opening of Middlemarch Ward at Cygnet Hospital Coventry having very little impact on Raglan House. In particular:

(a) [REDACTED];³⁹

(b) [REDACTED];⁴⁰ and

(c) [REDACTED].

- 2.89 [REDACTED] The Parties consider that this analysis is consistent with the conclusion that they are not close competitors and there are a large number of competing LTMH providers in the area.

No evidence of patients being assessed at Cygnet Coventry and Raglan house

- 2.90 As Middlemarch Ward at Cygnet Coventry has only been open since April this year, the Parties have also considered the extent to which the patients that have been referred to Middlemarch Ward for assessment have also been assessed at Raglan House. If the Parties' sites are close competitors (as suggested by the CMA in the PFs), then there should be evidence of patients being assessed at both sites as CCG customers weigh up their options in advance of a patient being admitted.

2.91 [REDACTED]⁴¹

³⁹ [REDACTED]

⁴⁰ [REDACTED].

⁴¹ [REDACTED]

that it would have a strong incentive to compete aggressively for patients against Raglan House and the other providers in the area. [REDACTED]

2.97 [REDACTED]

2.98 [REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

2.99 Table 2.6 above shows that the [REDACTED].

2.100 [REDACTED]⁴³ [REDACTED]

2.101 [REDACTED]

Raglan House is [REDACTED]

2.102 One of the key factors taken into account in the CMA's local market assessment is in relation to capacity constraints.⁴⁴ The simple premise being that if a hospital is at full capacity then it has limited incentive to compete for additional patients since, even if successful, it would not have the capacity to admit those patients. This is also one of the principal reasons given in the PFs for excluding NHS competition in a number of areas.

2.103 In this regard, the CMA's own analysis has confirmed that [REDACTED].

2.104 [REDACTED]

Customer responses indicate a lack of concerns from the merger

2.105 As Middlemarch Ward at Cygnet Coventry only opened in April this year, the PFs state that the CMA focussed on evidence from customers referring patients to Raglan House, in particular Birmingham CrossCity CCG, [REDACTED].⁴⁵ More specifically, Birmingham CrossCity CCG, which is located just 2.5 miles from Raglan House, accounted for [REDACTED] ([REDACTED] per cent) of the admissions at Raglan House since 1 January 2015, and [REDACTED] admissions since 2016, [REDACTED].

2.106 It is not surprising therefore that the PFs confirm that "*Birmingham CrossCity CCG was not concerned about the Merger as it felt it had bargaining power*".⁴⁶ The PFs also confirm that the CMA received evidence from Birmingham CrossCity CCG that in the last three years it had sent "*a substantial proportion*"⁴⁷ of LTMH patients to Beverley House and it

⁴³ [REDACTED].

⁴⁴ Provisional Findings, paragraph 38.

⁴⁵ Provisional Findings, paragraph 9.211.

⁴⁶ Provisional findings, Paragraph 9.214.

⁴⁷ Provisional Findings, paragraph 9.212.

"cited Beverley House as the next best alternative to Raglan House".⁴⁸ Accordingly, [X] confirmed that it was not concerned about the merger, and that it had other options available.

2.107 However, notwithstanding this clear evidence from Birmingham CrossCity CCG, the CMA appears to have chosen to disregard its views. This seems to be on the basis that "Priory told us that Beverley House currently offers specialised PD services and only treats female PD patients".⁴⁹ [X] In particular:

- (a) as acknowledged by the CMA in its assessment of barriers to entry and expansion, reconfiguring a service from LTMH to specialist PD would have involved additional costs (e.g. in re-tooling the wards and recruiting specialist PD nursing staff), and it will take time (e.g. as set out in paragraph 12.32 of the PFs, it takes on average [X] to reconfigure a ward);
- (b) as set out above, [X]; and
- (c) [X].

2.108 [X]

2.109 The PFs confirm that only one customer of the Parties was concerned about the merger, accounting for just [X] of patient referrals since January 2016. As only [X]. It is not appropriate for the CMA to place weight on the views of [X] customer in relation to [X] over the views of the other CCGs accounting for [X] (including Birmingham CrossCity CCG) which did not express any concerns about the Merger. This suggests that there is a confirmation bias in the CMA's assessment.

Incorrect weight placed on the Cygnet business plan document

2.110 In its assessment of the West Midlands, the CMA considered Cygnet's Coventry Capital expenditure proposal document produced in 2014. This document included a review of competitors from which the CMA reached the conclusion that:⁵⁰

"In our view this evidence suggests that Cygnet saw Cambian (now CAS) and Choice Lifestyles as its key competitors for female LTMH in Coventry at the time the Coventry capital expenditure proposal document was produced. However, we note that Choice Lifestyles has since been bought by Priory and now specialises in PD."

2.111 However, the CMA's analysis has failed to take into account the timing and context of this document. [X]

2.112 [X]

2.113 The CMA's review of the document notes that a number of the competitors identified by Cygnet have since changed treatment type or gender. This is not surprising given the document was produced more than three years ago. However, the CMA's analysis fails to recognise that a number of new sites have also opened since 2014 including:

- (a) Camino Oak House which is 34 miles from Cygnet Hospital Coventry and according to the latest CQC report was first registered with the CQC in March 2014;⁵¹

⁴⁸ Provisional Findings, paragraph 9.212 – 9.213.

⁴⁹ Provisional Findings, paragraph 9.213.

⁵⁰ Provisional Findings, paragraph 9.219

⁵¹ http://www.cqc.org.uk/sites/default/files/new_reports/AAAD1835.pdf

- (b) 255 Lichfield Road which is 36 miles from Cygnet Hospital Coventry and opened in 2013. [REDACTED];
- (c) Camino Nuneaton which is 11 miles from Cygnet Hospital Coventry, has obtained planning permission, and is about to start being developed; and
- (d) the CQC reports for Inmind Sturdee hospital for 2012 and 2013 indicate that it was converted between those dates from providing treatment for trauma victims suffering with Complex PTSD (Post Traumatic Stress Disorder) and associated substance misuse, to providing locked rehabilitation services (for up to 39 people with complex mental health needs). [REDACTED]

2.114 It is evident from the [REDACTED] document that [REDACTED].

2.115 Moreover, the CMA's conclusion that Cygnet saw Cambian and Choices Lifestyles as its key competitors is clearly incorrect. The CMA fails to note that [REDACTED]:

[REDACTED]

2.116 [REDACTED]

2.117 At paragraph 9.218 of the PFs the CMA has considered Cygnet's analysis of NHS Trusts and CCGs' needs. The CMA refers to a number of comments regarding CCGs currently using Cambian services. However, the extracts presented by the CMA overstate the extent of competition Cygnet expected from Raglan House. In particular:

(a) [REDACTED]

(i) [REDACTED]

(ii) [REDACTED]

(b) [REDACTED]

2.118 It is also notable that the CMA has focussed on specific parts of the document and failed to include other aspects of the document that would support the Parties' arguments, for example:

(a) [REDACTED]

(b) [REDACTED]

3. MALE LTMH IN THE EAST MIDLANDS

- 3.1 The CMA has provisionally concluded that the Merger may be expected to result in an SLC in the provision of male LTMH rehabilitation services in the East Midlands. As set out at paragraph 9.152 of the PFs, this has been identified as a result of analysing the overlap between Cygnet Hospital Derby and CAS' sites at Storthfield House, Sherwood House and The Limes.
- 3.2 The CMA explains in paragraph 9.153 that whilst there are some other sites operated by the Parties within the 60-mile catchment area that provide male LTMH services (i.e. Cygnet Lodge Brighouse and the CAS facilities St Augustine's and The Oaks) which are included in the shares of capacity calculations, it states that "*our assessment here is not primarily focused on the overlaps with these wards.*" Moreover, as explained in footnote 334, Cygnet Brighouse and CAS The Oaks were both assessed in relation to the CMA's assessment of male LTMH in Yorkshire, which the CMA has provisionally concluded does not give rise to an SLC, and CAS St Augustine's was excluded by the CMA's filter and therefore also identified as not giving rise to any competition concerns.
- 3.3 Accordingly, the extent of the overlap in the East Midlands is in relation to just 19 beds at Cygnet Hospital Derby. It should be noted, however, that whilst the Parties have included all 19 beds in the market share calculations, 3 of these beds are step down flatlets at Wyvern Court that are designed to support independent living (with the other 16 male LTMH beds being on Wyvern Ward at Cygnet Hospital Derby).⁵² To the extent that the CMA excluded similar step-down self-contained flatlets from its assessment in other areas (e.g. in respect of Priory 255 Lichfield Road in the West Midlands),⁵³ the extent of the overlap between the Parties should be considered only in relation to the 16 beds on Wyvern Ward at Cygnet Derby. [X]
- 3.4 Notwithstanding the small scale of the overlap created by the Transaction in the East Midlands, the Parties consider that there are some material flaws and evidential gaps in the CMA's analysis, which has resulted in the CMA reaching an incorrect conclusion. These include the following:
- (a) the Parties' combined market share is overstated. The CMA has incorrectly excluded a number of the Parties' competitors, and there are a number of clear gaps in the evidence set out in the competitive assessment. The CMA's analysis of competition from NHS sites is also incomplete;
 - (b) the market share analysis is sensitive to the scope of the relevant geographic market, reflecting the constraints from outside the catchment area which have not been considered by the CMA in the competitive assessment;
 - (c) the constraint provided by the East Midlands Framework Agreement has been misunderstood and materially understated, [X]. It is also not the case that, [X];
 - (d) re-centring the catchment area on the location of each non-framework CCG that refers patients to Cygnet Derby, Storthfield House, Sherwood House and The Limes (which better reflects the choices facing customers) indicates that all non-framework CCGs have a wide range of options other than the Parties that remain post-merger, and therefore will not suffer from a substantial lessening in competition;
 - (e) there is a lack of evidence of any significant degree of competition between the Parties' sites. The analysis of patient referrals indicates that there is no evidence of competition between Cygnet Brighouse and CAS' sites at Storthfield House,

⁵² <https://www.cygnethealth.co.uk/content/uploads/2016/02/Wyvern-Brochure.pdf>

⁵³ Provisional Findings, paragraph 9.195 and footnote 367.

Sherwood House and The Limes, and whilst there is some evidence of competition between the CAS sites and Cygnet Derby, this competition is not material;

- (f) there is a lack of third party concerns from CCGs about the Transaction in the East Midlands. Despite [REDACTED]; and
- (g) it is of note that the CMA has not referred to any evidence from the Parties' internal documents that refers to the closeness of competition between the Parties' sites.

3.5 Each of these points is considered in further detail below. When considered in the round, and to the requisite legal standard for a Phase 2 investigation, the Parties consider that the evidence indicates that the Transaction would not be expected to give rise to an SLC for male LTMH patients in the East Midlands.

Market shares are materially overstated

3.6 The market share calculations in the PFs suggest that, if the analysis is centred on Storthfield House, the Parties would have a combined market share of [REDACTED] per cent on the basis of a 60 mile catchment area, and [REDACTED] per cent at 65 miles. The Parties disagree with these calculations which they consider are based on an inaccurate and incomplete picture of the market.

3.7 In addition, the CMA explains in paragraph 9.152 that it centred the market share analysis on CAS Storthfield House as this is where the Parties' market shares are highest (i.e. it gives rise to the worst case scenario). However, the CMA goes on to state that "*it makes little difference to the analysis as the market shares (shown in Table 20 below) are similar if centred on Cygnet Derby, CAS Sherwood House or CAS the Limes as they are all within 20 miles of each other*". However, as set out further below, the Parties disagree with this statement as there are material variations in market shares depending on where the catchment area is centred. [REDACTED]⁵⁴

The CMA has incorrectly excluded the Parties' competitors

3.8 The CMA's analysis of the Parties' male LTMH market shares in the East Midlands excludes a number of competitors identified by the Parties. The Parties disagree with a number of these exclusions and consider that the CMA needs to investigate the following sites in more detail:

- (a) Priory 255 Lichfield Road; and
- (b) Priory Hospital Cheadle Royal.

3.9 The CMA has also excluded:

- (a) St Andrews, Northampton and St Matthews on the basis that they fall outside the 60 mile catchment area [REDACTED];
- (b) Camino Healthcare's planned site in Nuneaton from its market share analysis (which is 49 miles from Storthfield House, and just 37 miles from Cygnet Derby) despite this site being granted planning permission, and a statement on Camino's website that it intends to build a new 20-bed mixed gender LTMH facility at this site; and
- (c) a number of NHS competitor sites listed by the Parties, on the basis of what appears to be an inconsistent approach to market testing.

3.10 Each of these exclusions is addressed further below.

⁵⁴ [REDACTED]

Priory 255 Lichfield Road

- 3.11 Priory 255 Lichfield Road is a 28 bed mixed gender LTMH facility, which is located 48 miles from Storthfield House, and 34 miles from Cygnet Derby. It consists of two 4-bed wards (one male and one female) and 20 mixed gender flat-lets. The only beds included in the CMA's market share calculations are in relation to one 4 bed male ward.
- 3.12 As set out above in relation to the West Midlands, the justification given by the CMA for excluding 255 Lichfield Road seems to be that "*Priory submits that this ward is not a rehabilitation facility but a step-down facility comprising independent self-managed flats.*"⁵⁵ However, as mentioned above, the step-down flats at Wyvern Court, Cygnet Derby which provide a similar service to that offered by 255 Lichfield Road have been included within the Parties' male LTMH market shares for the East Midlands. This provides an inconsistent approach to assessing competition in the area.
- 3.13 The CQC report for 255 Lichfield Road clearly states that "*255 Lichfield Road is a modern, purpose-built rehabilitation service for men and women with mental health and psychological difficulties*".⁵⁶ It also mentions that whilst there are "*two four bed flats (one male/one female) for those requiring more intensive therapy*", it also provides "*20 individual apartments for people to live more independently but with full multi-disciplinary team (MDT) support.*" The CQC report also states that these 20 self-contained apartments have "*the safety of a therapeutic structure if needed*" and that "*Residents had access to 24-hour support as required*". Accordingly, by having the full clinical structure in place and 24 hour access to a full multi-disciplinary team, these apartments are providing an LTMH rehabilitation service that is similar to that provided at a number of the Parties' sites.

3.14 [REDACTED]

Priory Hospital Cheadle Royal

- 3.15 In the CMA's market share calculations, it has included [REDACTED], and the description states that this is a male LTMH/PD site. As set out further below, the Parties consider this to be a male LTMH only site. This is consistent with the views of commissioners (as confirmed to the Parties by [REDACTED]), and the brochure for this site which states that the service user profile for this site is "*Males aged 18 and over with a primary diagnosis of a Severe and Enduring Mental Illness*".⁵⁷
- 3.16 The Parties also note from the brochure for this site that it consists of:
- (a) Elmswood House - a recently refurbished 11 bed locked house offering a more acute level of service with a higher level of support and observation; and
 - (b) Elmswood View – a newly opened unit with 6 beds and providing support in a less restrictive open facility.
- 3.17 However, the Parties note from Table 7 of Appendix E that only the 11 beds in Elmswood House have been included in the market share calculations. To the extent that the CMA has taken the view to exclude the 6-beds at Elmswood View on the basis that they are a step-down, the same approach should also apply to the step-down flats at Wyvern Court, Cygnet Derby which are included in the Parties' market shares.

Other East Midlands Framework providers

⁵⁵ Provisional Findings, footnote 367.

⁵⁶ http://www.cqc.org.uk/sites/default/files/new_reports/AAAE3111.pdf

⁵⁷ <http://www.priorygroup.com/docs/default-source/locations---pdf-resources/elmswood-house-and-view---brochure.pdf?sfvrsn=2>

- 3.18 As set out further below, there are at least 13 different operators of male LTMH services on the Framework (including both NHS and private providers).⁵⁸
- 3.19 It is noteworthy, however, that despite all these providers being accepted onto the Framework to provide male LTMH treatment, they have not all been included in the CMA's market share calculations. In particular, both St Andrews, Northampton (which is located 67 miles from Cygnet Derby) and St Matthews (which is located 59 miles from Cygnet Derby) are excluded from the market share calculations on the basis that they fall outside the 60 mile catchment area for Storthfield House. This is notwithstanding the fact that these sites are alternatives for all CCGs covered by the Framework, and, as noted in paragraph 9.178 of the PFs, Hardwick CCG (which administers the Framework) stated that it considers St Andrew's Northampton as an alternative to the Parties.
- 3.20 As explained further below, the Parties' market shares are sensitive to the geographic market considered. As both of these providers have been admitted onto the Framework, and therefore are available to all CCGs covered by the Framework, the relevant geographic market should at least extend as far as the sites that they operate.

Camino Nuneaton

- 3.21 In paragraph 9.186 of the PFs, the CMA states that "*Camino Healthcare, according to public information in its website 'is proposing to submit a planning application for a new 20-bed mixed gender LTMH facility in Nuneaton'*". The CMA also confirms that it is still investigating the progress and timeline for this new facility, and therefore has excluded it from the competitive assessment of the East Midlands.
- 3.22 As set out above in relation to the West Midlands, the plans for this site are significantly more advanced than described by the CMA in the PFs. In particular, a planning application has been submitted and planning permission has now been granted. Moreover, based on the Parties' experience of building new mental health hospitals, once planning permission has been obtained a new 20 bed facility can be built and operational within [§] months. The Parties therefore consider that this site meets the CMA's timely, likely and sufficient criteria for assessing the impact of new entry, and therefore should be taken into account.

CMA's analysis of NHS sites is incomplete

- 3.23 The CMA has included two NHS sites (Bracken House, Nottinghamshire Healthcare NHS Foundation Trust and Coral Lodge, Rotherham, Doncaster and South Humber NHS Trust) in its calculation of market shares in the East Midlands. This appears to be based on information the CMA received directly from these Trusts who explained that "*some of the beds in their rehabilitation wards would compete with independent provision*".⁵⁹
- 3.24 However, it is clear from paragraph 5.52 of the PFs that the CMA has only contacted ten NHS Trusts across all of the overlap areas. This is despite the Parties providing contact details for 20 NHS Trusts in the East Midlands, Yorkshire and The Humber, and West Midlands overlap areas alone following an information request from the CMA.⁶⁰ This suggests that there are up to [§] NHS Trusts in the overlap areas which have not been contacted by or responded to the CMA, and therefore it is not clear whether there are other NHS sites similar to Bracken House and Coral Lodge which should be taken into consideration.⁶¹ It is not sufficient for the CMA to simply exclude all these other facilities without collecting further evidence. In particular, the CMA should contact [§].

⁵⁸ The Parties understand that these include, [§].

⁵⁹ Provisional Findings, paragraph 5.52.

⁶⁰ [§]

⁶¹ As the CMA has redacted the names of the NHS Trusts it contacted, it is impossible for the Parties to comment on the likelihood that these Trusts have sites that compete with the Parties. In particular, it is not clear which of the

3.25 Given that the CMA appears to have only included NHS sites which have been directly identified by the relevant NHS Trust, it is imperative that the CMA contacts any remaining NHS Trusts in the East Midlands area to confirm whether they operate rehabilitation sites that compete with independent providers.

All male LTMH/PD sites should be considered LTMH only

3.26 The CMA has classified a number of Priory sites in the East Midlands as LTMH/PD sites, including:

- (a) Priory 255 Lichfield Road;
- (b) Priory Hospital Dewsbury;
- (c) Priory Hospital Cheadle Royal;
- (d) Priory Woodland View; and
- (e) Priory Mill Garth.

3.27 As submitted in response to the Working Papers, the Parties are not aware of any sites that provide specialist PD services for male patients below the level of prison or secure services.

3.28 Most men with a primary diagnosis of PD have anti-social or psychopathic type PD and are usually treated in prison or secure services. Some men are diagnosed with borderline PD (also referred to as emotionally unstable PD which often exhibits as self-harm), and these men are often referred to a locked rehabilitation unit. However, these sites are LTMH services and not specialist PD services.

3.29 [REDACTED]

3.30 Both Cygnet and CAS' male LTMH sites accept male patients with a PD diagnosis. For example:

- (a) [REDACTED] per cent of patients on Wyvern Ward, Cygnet Hospital Derby have a [REDACTED]; and
- (b) [REDACTED] per cent of patients at Cygnet Brighthouse have a [REDACTED].

3.31 Therefore, whilst the Parties' sites in the East Midlands treat patients with PD, they are considered to be LTMH sites as they do not provide specialist PD treatment. This is similar to the above Priory sites. In this regard, a number of CCGs have confirmed that the above Priory sites are focussed on providing LTMH treatment and do not provide specialist PD treatment. For example:

- (a) [REDACTED]
- (b) [REDACTED]

3.32 On this basis the CMA should include all of the male beds at the above Priory sites in the calculation of market shares as these sites do not provide specialist PD services and are direct competitors to the Parties' male LTMH sites in the East Midlands.

3.33 [REDACTED],⁶² [REDACTED].

NHS Trusts in the East Midlands the CMA contacted other than Nottinghamshire Healthcare NHS Trust and Rotherham, Doncaster and South Humber NHS Trust.

⁶² [REDACTED]

Market shares are sensitive to the relevant geographic market

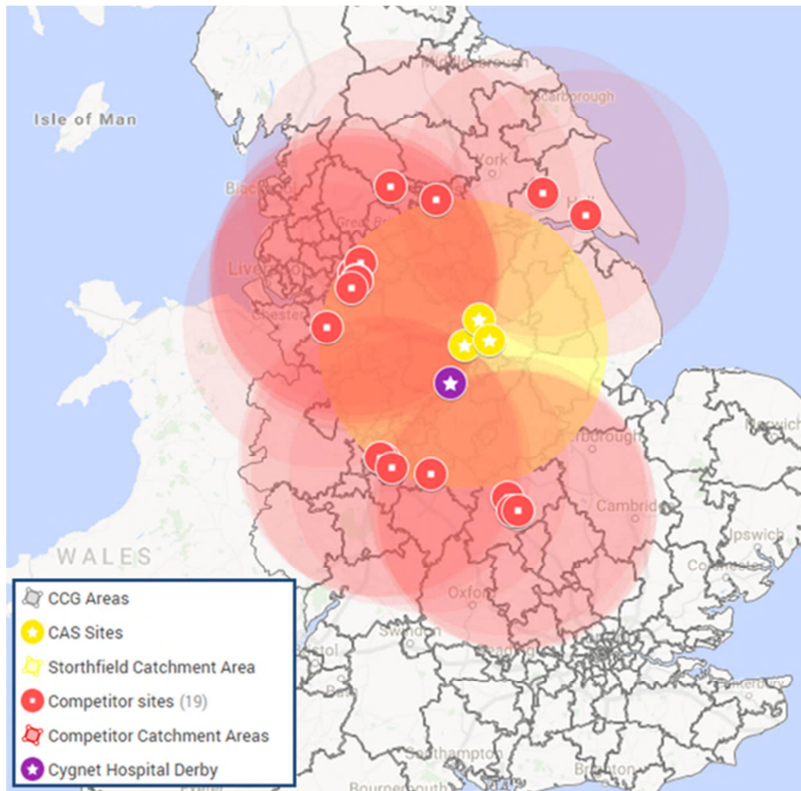
- 3.34 The CMA has assessed male LTMH market shares in the East Midlands based on a 60 mile catchment area centred on Storthfield House. As the Parties have explained previously and as summarised in paragraphs 2.58 to 2.62 above, the Parties consider a 60 mile catchment area to be an overly cautious basis on which to assess competition.
- 3.35 The only consideration the CMA has given to a wider catchment area is a 65 mile sensitivity check, which is clearly insufficient and fails to address the competitive constraints that exist from outside the 60 mile catchment area considered.

Competitive constraints from outside the catchment area have been ignored

- 3.36 It is notable that there are a number of competing sites located just outside the 60 mile catchment area:
- (a) between 60 and 70 miles from Storthfield House there are eight competing sites including two Priory sites, two Deepdene Care sites, two Camino Healthcare sites, one St Matthews Healthcare site and one Options for Care site. In total these eight sites include 97 male LTMH beds and 53 mixed gender LTMH beds; and
 - (b) between 70 and 80 miles from Storthfield House there are 11 competing sites with a total of 161 male LTMH beds and 65 mixed gender LTMH beds.
- 3.37 These sites all have catchment areas that to a large extent overlap with the catchment area for Storthfield House and even more so for Cygnet Hospital Derby, The Limes and Sherwood House. To illustrate this point the Parties have shown the catchment areas of the 19 sites located between 60 and 80 miles from Storthfield House in Figure 3.1 below.⁶³

⁶³ For simplicity the Parties have used a 50 mile radial catchment area as a proxy for a 60 mile drive distance catchment area. As a result, some of the sites that are more than 60 miles from Storthfield House by road appear within the 50 mile radial catchment area.

Figure 3.1: Map of catchment areas of competitor sites located between 60 and 80 miles from Storthfield House



3.38 Figure 3.1 shows that nearly all of the Storthfield House catchment area is overlapped by the catchment areas of competitors located more than 60 miles away, even though these have been excluded from the competitive assessment, and in many parts of the catchment area there are multiple overlaps. This means that, for the vast majority of CCGs that are located within a 60 mile catchment area of Storthfield House, they have other suitable alternatives for male LTMH patients from outside the catchment area of Storthfield House. However, the PFs have entirely dismissed the constraint from these sites.

Market shares highlight the sensitivity of the geographic market

3.39 The following tables show the impact of extending the catchment area to 70 and 80 miles. The first table only includes those competitors taken into account in the CMA's market share calculations. The second table updates the CMA's market shares to include those competitors discussed in paragraphs 3.8-3.22 above.⁶⁴

Table 3.1: CMA market shares and number of competitors centred on Storthfield House

	60 miles	70 miles	80 miles
CAS	[REDACTED]	[REDACTED]	[REDACTED]
Cygnet	[REDACTED]	[REDACTED]	[REDACTED]
Combined	[REDACTED]	[REDACTED]	[REDACTED]
Number of competing sites	10	18	26
Number of competitors	8	12	16

⁶⁴ [REDACTED]

Table 3.2: Updated market shares and number of competitors centred on Storthfield House

	60 miles	70 miles	80 miles
CAS	[X]	[X]	[X]
Cygnnet	[X]	[X]	[X]
Combined	[X]	[X]	[X]
Number of competing sites	11	19	30
Number of competitors	9	12	17

3.40 Table 3.1 above shows that even if the market shares are not updated to reflect the additional evidence on the competitors that have been excluded by the CMA, the market shares are very sensitive to the geographic catchment area. On the basis of a 70 mile catchment area the Parties have a combined market share of [X] per cent with an increment below 10 per cent, only slightly above the 40 per cent threshold used for the CMA's initial filter. On the basis of an 80 mile catchment area the Parties have a combined market share of less than 35 per cent. This highlights the large number of competitor sites located between 60 and 80 miles from Storthfield House.

3.41 Moreover, if the market shares are updated to reflect the evidence in relation to the competitor sites described above, the Parties' combined share of supply falls significantly. On the basis of a 60 mile catchment area the Parties have a combined share of supply of just [X] per cent, [X] per cent on the basis of a 70 mile catchment and [X] per cent on the basis of a 80 mile catchment.

3.42 The Parties also note that if the catchment area is narrower than 56 miles, Cygnnet Brighthouse does not overlap with Storthfield House. The CMA therefore needs to be confident that a 60 mile catchment area represents the correct geographic market, because both a narrower or wider catchment area would significantly change the CMA's analysis.

Market shares centred on Cygnnet Derby are much lower

3.43 As mentioned above, the CMA explains in paragraph 9.152 of the PFs that it centred the market share analysis on CAS Storthfield House as this is where the Parties' market shares are highest (i.e. it gives rise to the worst case scenario).

3.44 However, the CMA goes on to state that *"it makes little difference to the analysis as the market shares (shown in Table 20 below) are similar if centred on Cygnnet Derby, CAS Sherwood House or CAS The Limes as they are all within 20 miles of each other"*. However, the following tables show that this is not factually correct. When the analysis is centred on Cygnnet Derby (i.e. the Cygnnet site that gives rise to the overlap), the Parties' combined market shares are significantly lower.

Table 3.3: CMA market shares and number of competitors centred on Cygnnet Hospital Derby

	60 miles	70 miles	80 miles
CAS	[X]	[X]	[X]
Cygnnet	[X]	[X]	[X]
Combined	[X]	[X]	[X]
Number of competing sites	15	19	22
Number of competitors	11	13	16

Table 3.4: Updated market shares and number of competitors centred on Cygnnet Hospital Derby

	60 miles	70 miles	80 miles
CAS	[X]	[X]	[X]
Cygnnet	[X]	[X]	[X]
Combined	[X]	[X]	[X]
Number of competing sites	16	21	24
Number of competitors	11	14	16

- 3.45 Table 3.3 above shows that even on the basis of the CMA's market share calculations, the Parties' combined market share falls from [X] per cent to [X] per cent on the basis of a 60 mile catchment area, with an increment of just [X] per cent (as Cygnnet Brighthouse falls outside the catchment area), only slightly above the 40 per cent threshold used for the CMA's initial filter. On the basis of a 70 mile catchment area, the Parties' combined market share falls from [X] per cent to just [X] percent (i.e. [X] the CMA's filter) with an increment of just [X] per cent.
- 3.46 Moreover, if the market shares are updated to reflect the additional competitors that have been excluded by the CMA, the Parties' combined market share falls from [X] per cent to [X] per cent on the basis of a 60 mile catchment area, and from [X] per cent to the [X] per cent on the basis of a 70 mile catchment area (again with a small increment as Cygnnet Brighthouse falls outside the catchment area).
- 3.47 Accordingly, by focusing its analysis on Storthfield House, the CMA's analysis has failed to recognise the additional competitive constraints that are relevant to Cygnnet Derby (i.e. the overlap site), or to consider the impact of such a low increment to market share in its competitive assessment.

Market shares are sensitive to whether drive times or road distances are used

- 3.48 In the PFs the CMA has provided maps of each of the areas that fail the initial filter. As a proxy for a road distance catchment area the CMA has shown on the map drive time catchment areas, using a 90 minute drive time catchment area as a proxy for a 60 mile road distance catchment area on the basis that "90 minutes' travel time approximates to 60 miles' road distance on average across the country".⁶⁵
- 3.49 However, in the East Midlands, it is clear that the competitive assessment would differ significantly depending on whether a 90 minute drive time or 60 mile road distance catchment area is used, with the drive time catchment area capturing a number of additional competitors. For example, a comparison of Figure 28 of the PFs (90 minute drive times) with the CMA's market share calculations (based on 60 mile road distances) indicates that the following sites are within the 90 minute drive time catchment area, but fall outside a 60 mile road distance catchment area, and therefore have not been included in the CMA's market share calculations:
- (a) Priory Woodland View, which is 62 miles from Storthfield House;
 - (b) Priory Mill Garth Hospital, which is 63 miles from Storthfield House;
 - (c) Options for Care Montague Court, which is 64 miles from Storthfield House;
 - (d) Priory Market Weighton, which is 70 miles from Storthfield House; and
 - (e) St Matthews Hospital, which is 73 miles from Storthfield House.
- 3.50 The CMA's market share calculations in this area are therefore sensitive to the methodology used for defining the relevant catchment area (with 90 minute drive times bringing in a number of additional competitor sites compared to an approach based on a

⁶⁵ Provisional Findings, paragraph 9.32(d).

60 mile road distance). In this regard, the Parties have estimated the Parties' market shares on the basis of a 90 minute drive time centred on Storthfield House (based on the sites shown in Figure 28 of the PFs). On this basis, the Parties would have a combined share of supply of:

- (a) [X] per cent (increment [X] per cent) based on the CMA's market share calculations (i.e. excluding a number of competitors); and
- (b) [X] per cent (increment [X] per cent) if the market shares are updated to include the additional competitors set out above.

3.51 Accordingly, to the extent that the CMA is using 90 minute drive times as a proxy for defining the relevant catchment areas, it needs to consider the sensitivity of its competitive assessment to this variation in approach.

Constraint from the East Midlands Framework has been understated

3.52 As acknowledged by the CMA, the East Midlands Framework agreement (the "**Framework**") is an agreement administered by Hardwick CCG that covers 17 CCGs in the area, and it accounts for a [X] of the patients treated at the Parties' sites in the East Midlands.⁶⁶ The Framework provides a mechanism (by competitive tender) for these customers to collectively negotiate terms with providers of rehabilitation services.

3.53 However, despite the CMA acknowledging that "*while the aggregation of customer volume may improve the negotiating position of those customers using the Framework to some extent,*" it goes on to conclude that "*it does not follow that the Framework would be sufficient to offset the adverse effects of the Merger.*"⁶⁷ Notwithstanding the fact that the CMA has not sought to demonstrate how an increase in concentration by 16 beds would lead to adverse effects to customers and patients, the Parties consider that the CMA has materially understated the constraint provided by the Framework.

3.54 In this regard, the CMA seems to have reached this conclusion on the basis of the following:

- (a) a comparison of prices for customers on the Framework compared to prices for customers not on the Framework, which the CMA says shows that those customers with pre-negotiated agreements outside of the Framework are paying [X] those on the Framework;⁶⁸
- (b) an incomplete assessment as to the effect that the Merger may have on competition when the Framework is renegotiated in 2019;⁶⁹
- (c) the view that the presence of at least [X] other providers bidding to be on the Framework is not sufficient competition on the basis that it is not a "*traditional bidding market where there is competition 'for the market' and a single winner*";⁷⁰ and
- (d) that buyer power (as a result of the Framework) can only constrain suppliers to the extent that there are sufficient alternatives to switch to.⁷¹

⁶⁶ As set out in paragraph 9.156 of the PFs, the Framework accounts for [X]% of patients at Cygnet Hospital Derby, [X]% of patients at Storthfield House, [X]% of patients at Sherwood House and [X]% of patients at The Limes.

⁶⁷ Provisional Findings, paragraph 9.188.

⁶⁸ Provisional Findings, paragraph 9.158.

⁶⁹ Provisional Findings, paragraph 9.159.

⁷⁰ Provisional Findings, paragraph 9.160.

⁷¹ Provisional Findings, paragraph 9.189.

3.55 Before addressing each of these points below, it is important to reiterate that the overlap between the Parties in the East Midlands Framework area is in relation to Cygnet Derby, which provides just 16 male LTMH beds on Wyvern Ward. Accordingly, to the extent that the bargaining position of the 17 CCGs covered by the Framework could be adversely affected post-merger, it needs to be considered in the appropriate factual context.

Prices on the East Midlands Framework are [X] outside the Framework

3.56 The PFs note that [X].⁷² However, as the Parties have explained previously, a [X].

3.57 In this regard, the East Midlands Framework agreement includes favourable terms that are not reflected in the daily rate reported by the CMA. In particular, the Framework includes two terms [X]:

(a) [X]; and

(b) [X].

3.58 [X]

3.59 [X]

3.60 [X]

The effect on competition when the Framework is renegotiated in 2019

3.61 The CMA acknowledges in Paragraph 9.159 that "*the Framework sets binding terms specifying price and quality*", which suggests that it accepts that the ability of providers to change prices and vary quality under the terms of the Framework are limited. However, it goes on to state that in its view, it is still relevant to consider what effect the Merger may have on competition via the renegotiation of these terms with individual providers when it is renegotiated in 2019. However, no such forward looking analysis has been carried out.

3.62 To the extent that the CMA is trying to predict the outcome of a tender process that may happen at some point in the future, the CMA cannot simply assume that the facts as of today would remain constant (and relevant to that assessment). In this regard, there is so much uncertainty with this type of forward looking assessment that there is no plausible basis for the CMA to be able to conclude that, on the basis of the balance of probabilities, the transaction would be expected to give rise to an SLC when the Framework is re-tendered in two years' time.

3.63 In this regard, as set out in relation to the CMA's assessment of the West Midlands, the dynamics of the market are constantly changing. Indeed the CMA's Provisional conclusion for the West Midlands is largely based on an assessment that a number of competitors providing female LTMH treatment identified by Cygnet in 2014 have since switched to provide an alternative treatment type, or to treat a different gender. This shows that the market is dynamic and continues to evolve, with all providers looking for a profitable opportunity to enter and expand in the market.

3.64 In addition, not only are there at least [X] other providers currently on the Framework, but there are also numerous other local facilities that are not on the Framework. [X]⁷³

3.65 It is also of note that, even where a facility is accepted onto the Framework, the CCGs covered by the Framework have significant scope to vary the number of patients that they

⁷² Provisional Findings, paragraph 9.158.

⁷³ As the Framework accounts for [X] per cent of patients on Wyvern Ward at Cygnet Derby, in reality the CCGs would only need to replace them with [X] beds from another provider.

send to different sites. For example, as noted by the CMA, across the four sites operated by the Parties in the East Midlands, the proportion of patients accounted for by the Framework vary between [X] per cent and [X] per cent. [X]

Constraint from the bidding process

- 3.66 The CMA has expressed the view in the PFs that the presence of at least [X] other providers bidding to be on the Framework is not sufficient competition. This is on the basis that it is not a "*traditional bidding market where there is competition 'for the market' and a single winner. Rather, it sets out a basis for aggregating customer volume to negotiate common terms with providers, several of whom are needed to join the agreement to meet the substantial aggregate supply requirements of the customers on the Framework.*"
- 3.67 The Parties consider this analysis to be far too simplistic. Operators are added to the Framework through a competitive tender process, which determines both the price levels and sets out the service specifications which must be met by operators. Whilst there are at least [X] different operators of male LTMH services on the Framework (including both NHS and private providers), there are numerous other providers that have not been accepted onto the Framework. [X]
- 3.68 Moreover, once prices and service specifications are set at the bidding stage, they cannot be adjusted unilaterally by operators once admitted to the Framework (until the next tender process). This means that, unless the price set at the bidding stage is sufficiently competitive, it is unlikely that the provider will be referred many patients by CCGs even if it is accepted onto the Framework (i.e. just because a provider is accepted onto the Framework, this does not guarantee referrals). In this regard, even where a facility is accepted onto the Framework, the CCGs covered by the Framework have significant scope to vary the number of patients that they send to different sites.
- 3.69 Accordingly, the competition that takes place at the bidding stage is not just in relation to the possibility of being added to the Framework, but it also impacts on how successful that provider will be in relation to the number of patient referrals obtained once on the Framework. This creates a competitive dynamic that is similar to a traditional bidding market (as the price submitted at the tender will impact on how successful that provider is in winning patient referrals). The fact that there are at least [X] different providers on the Framework also indicates that CCGs covered by the Framework have a significant amount of choice of provider. As set out above, the competitive dynamic from the Framework [X].

Customers have buyer power

- 3.70 In the Buyer Power Working Paper the CMA recognised that Framework agreements "*may be one way to help ensure that buyer power could effectively protect all CCG customers*".⁷⁴ However, in the PFs the CMA indicates that buyer power (as a result of the Framework) can only constrain suppliers if there are sufficient alternatives to switch to.
- 3.71 As set out above there are numerous alternative providers for CCGs covered by the Framework to choose from. In particular, there are at least [X] different operators of male LTMH services on the Framework (including both NHS and private providers). The Parties understand that these include, *inter alia*, the following: [X]. It is noteworthy, however, that despite all these providers being accepted onto the Framework to provide male LTMH treatment, they are not all included in the CMA's market share calculations, which suggests that the CMA has adopted an overly cautious approach.

3.72 [X]

⁷⁴ Buyer Power Working Paper, paragraph 19.

3.73 It is implausible, therefore, to suggest that the 17 CCGs covered by the Framework do not benefit from buyer power due to a lack of choices available. This is also consistent with the views of Hardwick CCG (which administers the Framework and [X]) which was not concerned about the Merger, which suggests that it considers that there are sufficient choices available. Moreover, Hardwick CCG explained that both Cygnet and CAS are aware of the pressures on them (as a result of the Framework), and "if they attempted to do something too outrageous we might start placing people further away".⁷⁵

Market shares re-centred on non-framework CCGs indicate a range of options

Non-framework CCGs all have a range of options

3.74 One of the reasons the CMA has concluded that the SLC in the East Midlands will not be offset by countervailing factors is that the East Midlands Framework would not protect customers who are not part of the Framework. However, these customers have a range of other options of where to send male LTMH patients.

3.75 Since 1 January 2016 [X] (The Limes, Storthfield House, Sherwood House or Wyvern Ward at Cygnet Hospital Derby). The figure below shows the location of these CCGs (in green) and competitor male LTMH sites (in red).

[X]

[X]

3.76 It is clear from the Figure above that [X].

Catchment areas re-centred on each CCG indicates a wide range of options

3.77 The PFs have expressed a concern that following the Merger, certain CCGs that are not on the East Midlands Framework will not have a sufficient choice of providers, and therefore may face higher prices or lower quality as a result.

3.78 However, market shares centred on Storthfield House (supply-based centring) are not indicative of the choices facing CCGs outside of the Framework. In order to illustrate the choices faced by these CCGs the Parties have re-centred the catchment area analysis on all CCGs outside of the Framework that have admitted patients to the Parties' male LTMH sites in the East Midlands (i.e. Storthfield House, The Limes, Sherwood House and Cygnet Hospital Derby), and calculated the Parties' respective market shares for each CCG. This analysis provides a more robust assessment of the choices that the Parties' customers outside of the Framework face post-merger.

3.79 [X] Market shares have then been calculated on the basis of a 60-mile catchment area centred on the postcode address of each CCG, with market shares calculated based on (a) the CMA's approach to calculating market shares (as set out in the PFs); and (b) the updated market shares to include the additional competitors set out in paragraphs 3.8 to 3.22 above.

Table 3.5: Market shares re-centred on CCGs that have admitted patients to the Parties' male LTMH sites in the East Midlands since 1 January 2016

CCG	Number of admissions	CMA market share	Updated market share
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]

⁷⁵ Provisional Findings, paragraph 9.179.

conclusion on the basis of inference, without demonstrating that customers or patients would be adversely affected in any way.

Limited evidence of patients being assessed at both Parties' sites

- 3.86 The Parties have considered the extent to which the patients that have been referred to Cygnet Derby and Cygnet Brighthouse for assessment have also been assessed at CAS' sites at Storthfield House, Sherwood House and The Limes.⁷⁶ [X]
- 3.87 In this regard, Cygnet provided the Parties' advisers with patient referral data for Cygnet Brighthouse and Wyvern Ward at Cygnet Derby from May 2016 [X]. The patient referrals were then matched with the patients referred to CAS' sites at Storthfield House, Sherwood House and The Limes over the same period. This analysis shows that:
- (a) [X]⁷⁷; and
 - (b) [X].
- 3.88 [X], despite it just falling within the 60 mile catchment area considered by the CMA, and therefore being included within the CMA's market share calculations as a result.
- 3.89 In relation to Cygnet Derby, the Parties' referral data suggests that [X].

All of the Parties sites in this area are [X]

- 3.90 One of the key factors taken into account in the CMA's local market assessment is in relation to capacity constraints.⁷⁸ The simple premise being that if a hospital is at full capacity then it has limited incentive to compete for additional patients since, even if successful, it would not have the capacity to admit those patients. This is also one of the principal reasons given in the PFs for excluding NHS competition in a number of areas.
- 3.91 In this regard, the CMA's own analysis has confirmed that [X]:⁷⁹

"Each of CAS' sites in and just outside the 60-mile catchment area has an occupancy rate of [X] averaged over a three-year period 2014 to 2016 and also in 2017. The same is true for Cygnet's Derby site, which is the closest Cygnet site to the CAS sites at the centre of the catchment area."

- 3.92 Accordingly, [X]. The Parties note that the CMA has concluded that the extent to which capacity constraints affect competition is limited.⁸⁰ However, if this is the case then the CMA should apply this reasoning consistently and should not exclude NHS sites on the basis that they are often at full capacity.

The CMA's assessment of competition on quality is inconsistent

- 3.93 One of the reasons the PFs identify an SLC in the East Midlands is because the Parties' sites are "close competitors in terms of quality with each of their sites having 'Good' CQC ratings".⁸¹

⁷⁶ The Parties have also included Cygnet Brighthouse in this analysis on the basis that it just falls within the CMA's 60 mile catchment area, even though it is not a key focus of the competitive assessment in the East Midlands.

⁷⁷ [X]

⁷⁸ Provisional Findings, paragraph 38.

⁷⁹ Provisional Findings, paragraph 9.166.

⁸⁰ Provisional Findings, paragraph 9.28.

⁸¹ Provisional Findings, paragraph 9.183.

- 3.94 However, this fails to recognise that Debdale Thistle Hill Hall, which is located just eight miles from Storthfield House, has an 'Outstanding' CQC rating. If competition in terms of quality is a key determinant of customer choice, Thistle Hill Hall should be considered a strong competitive constraint on Storthfield House that has been understated by the CMA.
- 3.95 In addition, at paragraph 9.175 of the PFs, the CMA notes that *"Priory told us that occupancy at Dewsbury was negatively affected by its 'Requires Improvement' rating but it is hoping for this rating to be upgraded soon"*. A new CQC report for Priory Dewsbury was published on 23 August 2017, with a 'Good' rating.⁸² Moreover, the site received an 'Outstanding' rating in relation to quality of care. On this basis, Priory Dewsbury should be considered a strong competitive constraint rather than, as the CMA suggests, a weaker competitive constraint.
- 3.96 These two examples illustrate that the CMA needs to give proper consideration to competition in terms of quality in this area. It is incorrect to conclude that all of the Parties' sites are close competitors on quality just because they share 'Good' CQC ratings, whilst failing to consider the constraint from other competitors, some of which have a higher quality rating.

Customer responses indicate a lack of concerns from the Merger

- 3.97 As noted above, a [redacted] of patients at the Parties' sites in the East Midlands are referred under the East Midlands Framework agreement, which is administered by Hardwick CCG. The PFs confirm that Hardwick CCG *"was not concerned about the merger... Hardwick CCG said that both providers were aware that there are pressures on them and 'if they attempted to do something too outrageous we might start placing people further away."*⁸³
- 3.98 The CMA notes that Hardwick CCG is *"[redacted] of CAS Storthfields and Cygnet Derby and [redacted] customer for CAS The Limes"*. However, [redacted].
- 3.99 It is therefore surprising that the CMA has chosen to dismiss the views of Hardwick CCG on the basis that *"it is underestimating the situation"*. On the contrary, the Parties consider that the CMA is materially overstating the competition concerns, which amounts to an increment of just 16 male LTMH beds. Moreover, the fact that Hardwick CCG set out the options to refer patients to other providers on the Framework or refer patients over greater distances provides direct evidence that it considered the situation carefully. Accordingly, as Hardwick CCG is [redacted], the views of this commissioner should be given much greater weight in the report.
- 3.100 The PFs confirm that only three customers, responsible for just 9 per cent of referrals to the Parties' sites in this overlap area expressed concerns about the Merger, which is described in the CMA's conclusions as *"several customers are concerned about the impact of the Merger in this area"*.⁸⁴ In this regard, the CMA seems to be giving greater weight to the views of these customers, which account for a small minority of referrals, over the views of the largest customers in the area who are unconcerned about the merger.
- 3.101 It is also of note that all three of these customers raised concerns about the loss in variation in the services provided by the Parties. However, there is no evidence provided in the PFs to support this statement. The rationale for the Merger was to broaden the reach of Cygnet across the care pathway, and across different treatment types. It is therefore unclear why the Parties would have an incentive to reduce the variation in services across the sites in the East Midlands.

⁸² http://www.cqc.org.uk/sites/default/files/new_reports/AAAG5909.pdf

⁸³ Provisional Findings, paragraph 9.179.

⁸⁴ Provisional Findings, paragraph 9.183.

Cygnets Brighthouse does not compete with the Parties' sites in the East Midlands

- 3.102 The PFs have identified an SLC in the East Midlands on the basis of *"the overlap between Cygnets Hospital Derby (Wyvern Ward) and three CAS sites (Storthfield House, Sherwood House and The Limes)"*.⁸⁵ Although Cygnets Brighthouse and the CAS facilities St Augustine's and The Oaks fall within the 60 mile catchment area of Storthfield House, these sites have been explicitly excluded from the SLC finding.
- 3.103 In this regard, the Parties would like to reiterate that Cygnets Brighthouse does not compete with the Parties' sites in the East Midlands. This is consistent with the evidence presented above and the evidence in the PFs, notably:
- (a) Cygnets Brighthouse is located 56 miles from Storthfield House and is therefore on the periphery of the 60 mile catchment area, and it is located outside the area covered by the East Midlands Framework;
 - (b) the CMA considered Cygnets Brighthouse in its assessment of male LTMH services in Yorkshire and did not identify an SLC in this area. In particular, the Parties have a combined market share of supply of [%] per cent centred on CAS The Oaks (which is closer to Storthfield House than Brighthouse) and [%] per cent centred on Cygnets Brighthouse; and
 - (c) there is no evidence that patients [%].

⁸⁵ Provisional Findings, paragraph 9.152.