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Sheldon Mills
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Dear Mr Mills

Consultation on Guidance on the Review of NHS Mergers

I am writing on behalf of Maclay Murray & Spens LLP ("MMS")in response to the CMA's consultation paper "CMA Guidance on the review of NHS Mergers".

MMS is a commercial law firm with a significant practice in competition law and regulation. We act for regulated businesses and have acted for several regulators. In the course of this work we have represented clients in merger and other proceedings before the Competition Commission. We were engaged by Monitor in connection with the drafting of the NHS provider licence. We have two interests in submitting this response. Firstly, we want to help to ensure that the best possible guidance is available to providers, commissioners and others who have an interest in merger control as it affects the NHS. Secondly, by reflecting on the draft guidance and preparing this response, we want to develop our own understanding of the issues.

Generally, we find the draft Guidance clear and well structured, providing a good indication of the work that needs to be done if a proposed merger of enterprises involved in the NHS is to receive merger clearance. Our response deals with the following issues:

- the need for wide communication of the application of the mergers regime to the NHS;
- greater clarity as to the organisations likely to be affected by the Guidance;
- the application of the regime to mergers involving NHS Trusts, and
- fees.

Communication of the application of the mergers regime to enterprises in the NHS

The application to the NHS of competition law, including merger control, is a very sensitive issue. Concern about the application of competition law in the NHS was one of the factors which contributed to the need for the pause in the passage of the Health and Social Care Bill through Parliament in 2011. Since then, a number of policy signals have emerged from the Department of

Health suggesting that competition law will not be applied to the NHS as rigorously as it is applied to other sectors. In particular:

- the promotion of effective competition was deleted from Monitor's main duty under what is now the Health and Social Care At 2012, and
- the repeal of the original National Health Service (Procurement, Patient Choice and Competition) Regulations before they had come into effect and their replacement by Regulations that gave more emphasis to providing services in an integrated way.

The CMA is an independent regulator and is not bound to move in the same direction as the Department; moreover the policy that has been signalled is not particularly clear and may not be cohesive. But we think that there is likely to be quite a widely held view within the NHS that competition law will be applied to it differently to the way it is generally applied, and an expectation that the need for NHS providers to cooperate to provide seamless care takes precedence over the avoidance of anti-competitive activity.

Against this background the realisation that mergers have to be justified in terms of "relevant customer benefits" may well come as an unwelcome surprise to many NHS managers and clinicians whose attention has been taken up, over the last four years, by adjusting to the unprecedented restructuring that has occurred with the abolition of PCTs, and by clinical priorities following the Francis Report.

We do not know who the respondents to your consultation will be, other than competition law practitioners. But we think the likely respondents in the NHS will be those, probably a minority, who are aware of the establishment of the CMA and who are not opposed to the application of competition law. We would doubt if the consultation paper will be more widely read, particularly given its short response time.

Given that the one of the purposes of the consultation must be to ensure that the application of the mergers regime in relation to the NHS goes as smoothly as possible, we would suggest that:

- some recognition is given in the Guidance to the fact that the application of competition law in the NHS is contentious and involves resolving the apparent tension between competition law and the need to co-operate, and
- continuing efforts are made to engage with NHS bodies, possibly following conclusion of the consultation, in a way which recognises their concerns about competition law, to increase awareness of the process that has to be gone through when NHS organisations merge; our concern is that without such efforts mergers which can be justified may be blocked because an effective case is not made for them.

Clarity as to the organisations likely to be affected by the Guidance

The title to the draft Guidance is very broad in scope, suggesting that it applies to all mergers related to the NHS. In contrast, Paragraphs 1.1 and 2.1 explain that the Guidance applies only to mergers involving public providers of NHS services. This begs the question of how mergers involving other NHS bodies are regulated. It may be the intention of the CMA that non-public NHS providers will be treated in the same way as private businesses in any other sector of the economy, except in the case of a merger with a Trust or Foundation Trust. But we cannot see that the issues arising in relation to mergers involving non-public providers of NHS services are

conceptually very different from the issues arising in relation to Trust and Foundation Trust mergers.

With regard to GP and dental practices and pharmacies, we would question why the Guidance does not concern them (paragraph 2.1). If the reason is that they are not public providers we would question the rationale for that justification, in the light of what we say immediately above. If the reason is that mergers of these enterprises are unlikely to trigger the turnover or share of supply thresholds of the regime, we think that there may be GP and dental practices or practice groups which reach the turnover threshold and that it is possible in principle that the share of supply test might be triggered in some cases.

We therefore think that it would be helpful for the Guidance to say a more than it does about the application of the mergers regime to other NHS providers. Similarly, a few sentences dealing with mergers of CCGs (which we think are likely to happen over the next few years) would be of assistance and would complete the picture.

The application of the regime to mergers involving NHS Trusts

We are having difficulty with the generality of the statement in paragraph 2.1 that the Guidance is concerned with (and therefore that the CMA has jurisdiction in relation to) mergers involving at least one public benefit organisation providing NHS services in England, where that organisation is an NHS Trust.

We think that the argument in paragraph 5.7 that a merger between two NHS trusts is not deemed to create a merger because such trusts are under common control is good. But we think that there is a related argument, that NHS Trusts are not "enterprises" which needs to be addressed, but which is not dealt with in the draft Guidance.

At footnote 25 the Guidance says, correctly, that "The term enterprise is defined in section 129 of the Act". That definition is that "enterprise" means the activities, or part of the activities, of a business. "Business", as you will be aware, "includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods are services are provided otherwise than free of charge". "Undertaking" is not defined.

There are issues arising from the definition of "business" and the use of the word "undertaking" that call into question whether NHS trusts are "enterprises".

- There is a lot of jurisprudence on the meaning of "undertaking" in the context of competition law which arguably is relevant, even though it derives from decisions of the EU courts. In particular activities which fall within the exercise of public powers have been held to be not of an economic nature and entities have been held not to be undertakings to the extent that they are carrying out those activities[1].

- The constitution of NHS Trusts suggests that they are not businesses. All are established by statutory instrument for specific statutory purposes, recently framed as "to provide goods

[1] See for example SELEX Sistemi Integrati SpA v Commission of the European Communities (European Organisation for the Safety of Air Navigation (E)), intervening) Case C-113/07 P [2009] 4 C.M.L.R. 24

and services for the purposes of the health service"[2]. Gain and reward appear not to be part of the functions of NHS Trusts.

- NHS Trusts provide services to NHS patients free of charge, although payment is made for those services by a commissioning body.

There appears to us, therefore, to be a reasonable argument that NHS Trusts are not "enterprises" that are within the scope of the mergers regime. If this is right, then neither is a merger between an NHS Trust and a commercial organisation, because it would not be the case that two enterprises have ceased to be distinct. Awkward though this argument is, it is given credence by section 79 of the Health and Social Care Act 2012, which would not be necessary if there was no doubt that NHS Foundation Trusts are "enterprises". If there was doubt on this point in relation to NHS Foundation Trusts, we think that there must be even more doubt in relation to NHS Trusts.

We therefore suggest that the Guidance should address how this issue has been resolved, so that there is confidence that remedies required by the CMA following consideration of mergers involving NHS Trusts are safe from review.

Fees

Most probably, the existence and the level of merger review fees is not widely known among NHS organisations. In the context of a document which is intended to provide an overview of the CMA's approach we think that the fees which will have to be paid to the CMA should be set out.

We hope that these points are of assistance to the CMA in finalising its Guidance.

Yours sincerely

William Sprigge
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[2] See for example 2007 No 2755, Imperial College Healthcare National Health Service Trust (Establishment) and the Hammersmith Hospitals National Health Service Trust and the St Mary's National Health Service Trust (Dissolution) Order 2007