

RESPONSE TO CMA CONSULTATION: CMA GUIDANCE ON THE REVIEW OF NHS MERGERS

Baker & McKenzie LLP welcomes the opportunity to comment on the CMA Consultation: CMA guidance on the review of NHS mergers. Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on competition law.

- 1.1 The Draft Guidance is a welcome development as it provides much-needed clarity on the CMA's approach to assessing NHS mergers. This is particularly important given the concerns that were raised by the NHS that there could be a potential chilling of merger activity in the NHS following the Competition Commission's prohibition of the merger between the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust in 2013 ("RBCH/PH").
- 1.2 The Draft Guidance helpfully identifies issues that are specific to the review of NHS mergers, which will assist parties in their merger assessments. It would be most beneficial if the Draft Guidance could provide detailed guidance on the type of data that it would expect parties to provide, and how this data should be presented i.e. categorised correctly on internal systems. This may be useful to highlight now so expensive data cleansing can be avoided later. It is important to remember that NHS foundation trusts have only relatively recently become subject to merger control and as such, it would be useful to provide them with information on the expected data required from them. The need to provide, in particular, compelling evidence of relevant customer benefits was made clear in the Competition Commission's report on RBCH/PH, where lack of evidence was key to the prohibition of the merger.
- 1.3 The Draft Guidance refers to Monitor's Guidance on Merger Benefits, which sets out in some detail a non-exhaustive list of examples of relevant customer benefits and the type of evidence that parties might need to demonstrate these. Whilst the Draft Guidance also includes examples, the description is in more general terms. We suggest that the CMA explains further the level of detail that it would expect in terms of evidence from the parties. For example, the Monitor guidance gives the example of "staffing arrangements: improved rotas, recruitment and retention of staff" as a possible relevant customer benefit. It states that "in order for such benefits to be accepted it will be necessary for merger parties to provide details of the number of doctors pre and post-merger, the number of doctors that would be required to establish a 24/7 rota, details of current gaps in the rota, the services which will be improved and the benefits to patients. It will also be necessary to explain why rota benefits could not otherwise be achieved by SLAs or other staff-sharing arrangements. Merger parties may for example submit that their increased size will improve their ability to attract and retain staff by offering opportunities to sub-specialise. We note that there are several ways to attract and retain staff including offering more attractive terms of employment and therefore it will be important to demonstrate that the benefit is merger specific."
- 1.4 In contrast, the Draft Guidance states at paragraph 7.11 (with a footnote to the RBCH/PH report) that a benefit could be "Higher-quality services through increased consultant or staff cover. The CMA will be considering the extent to which existing services suffer from staffing problems and how staff increases will result in clinical improvements to patients."

- 1.5 In our view, it would be helpful if the Draft Guidance could give more detailed guidance on the type of data it expects, similar to the Monitor guidance.

BAKER & McKENZIE

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