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NORTON ROSE FULBRIGHT

CMA consultation: CMA guidance on the review of NHS mergers

Response submitted by Norton Rose Fulbright LLP

Norton Rose Fulbright LLP thanks the Competition and Markets Authority for the opportunity to comment on the CMA's review of its guidance on NHS mergers.

The comments made by Norton Rose Fulbright in this paper represent our views based on our general experience of advising clients on aspects of the CMA procedures, and do not reflect the views of any particular client.

In **summary**:

- We welcome the guidance as a helpful starting point for public providers of NHS services and their advisers in understanding the CMA's approach to merger control within the sector. Given the peculiarities of NHS mergers[1] the value of a standalone guidance document on merger control should not be underestimated. As practitioners with significant experience in dealing with mergers across a broad range of sectors, however, we consider that the guidance would benefit from drawing out more clearly how the sector specific aspects affect the treatment of such mergers. The document largely summarises the CMA's general merger guidance while adding specific examples as to the approach of the UK competition authorities in previous NHS mergers. We think a shorter guidance document with greater focus on the specific differences for NHS mergers would be preferable. Alternatively, the guidance would benefit from the addition of an overview section to draw out the key differences in the CMA's approach.

- The guidance would also benefit from a clearer and definitive, single section at its outset explaining the types of mergers which it does (or does not) apply to. The current draft has an initial explanation in section 2 but this is not entirely consistent or as definitive as the further explanations found in section 5. We think simply reordering and consolidating this existing content would add significant value.

- The examples taken from previous NHS merger cases add helpful colour to the CMA's likely approach to reviewing future NHS mergers. Notwithstanding the existing caveats in the document, however, we would favour an additional specific caveat that these examples are illustrative and not binding as to the CMA's future approach. This would address our concern that mere inclusion in the guidance may (wrongly) be perceived to give greater precedential value to those examples.

- The guidance contains some mixed messages about the steps that parties might (or must) take before deciding whether to notify an NHS merger to the CMA. We suggest that the drafting be tightened to improve consistency and accuracy in this regard to avoid any possible misunderstanding and limit the risk of the CMA being burdened with unnecessary requests for informal advice.

We set out below in more detail our views on these points and also provide comments on some additional more minor points.

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[1] For ease of reference we refer to the mergers covered by the guidance as "NHS mergers".

1 Types of mergers covered by the guidance

1.1 We think the guidance would benefit from making clearer at its outset the type of NHS mergers that it covers, to help readers more easily identify whether the guidance is relevant to the merger they may be considering. Paragraph 2.1 gives examples of mergers which would (or would not) be covered, but is not definitive or entirely clear, whereas more helpful, certain and specific guidance is given later in the document in section 5. In particular:

(a) Paragraph 2.1 states that the merger must involve at least one "*public benefit organisation*" providing NHS services, but does not fully explain this term (other than noting it would capture NHS hospitals and certain trusts).

(b) Whereas paragraph 2.1 explains that mergers between "*other providers of healthcare services to the NHS*" are not covered, paragraph 5.3 notes that arrangements between private patient units (PPUs) and private hospital operators to operate or manage a PPU are subject to the possibility of CMA review. The implication is that a PPU is part of an NHS hospital and therefore a public benefit organisation (as opposed to in the "other" category of healthcare services provided to the NHS), but this is not explicit. Also it is not clear why this additional single example is provided at paragraph 5.3 (and whether there are other relevant examples which it would also be useful to mention?).

(c) Paragraph 5.16 is clear that the merger must involve at least one NHS foundation trust or one other type of NHS trust. Thus, this paragraph is more definitive than paragraph 2.1, which suggests that the involvement of an NHS trust is not an absolute requirement.

(d) It would be helpful if paragraph 5.16 noted that the merger need only involve part of an NHS trust – e.g. to capture the above PPU example. Possibly this is intended to be covered in paragraphs 5.17 – 5.19 concerning the possible application of UK merger control to NHS service reconfigurations, but we are unclear. It would also be helpful if paragraphs 5.16 – 5.19 reiterated the point made in paragraph 5.7 that a merger between two NHS trusts would be intra-group (as NHS trusts are under the common control of the Secretary of State for Health) and therefore not a relevant merger situation.

1.2 Certainty as to the type of mergers covered by the guidance is naturally a key element of the guidance's usability. We suggest that section 2 dealing with "scope" might be enhanced by some additional wording to make it clear upfront which mergers are covered.

2 Divergence from the general approach

2.1 We welcome the guidance as a useful guide to this type of merger, given the peculiarities of the sector and the interrelationship with Monitor's functions. However, in our view the guidance would benefit from drawing out more clearly how the sector specific aspects of NHS mergers affect their treatment.

2.2 In large part the guidance replicates or summarises the CMA's generally applicable merger guidance, often referring the reader to that general guidance for further information. We note that in doing so the guidance provides specific examples of relevance to the CMA's review of NHS mergers, which are informative. However, it would be beneficial if the guidance:

(a) Had greater focus on highlighting the differences (at least the key ones) in process and approach to the substantive assessment where the CMA is reviewing an NHS merger as opposed to any other merger; and

(b) Related to this, made clearer why it has been necessary or desirable to publish this more specific guidance for NHS mergers, and why equivalent specific guidance is not appropriate for all other (regulated) sectors.

2.3 At 52 pages[2] the guidance is relatively long and, in our view, greater focus on the actual differences compared to the general approach – and reducing some of the repetition of the general guidance – would result in shorter and more user friendly guidance. To the extent the CMA considers that would entail too substantial a revision (and that the guidance needs to standalone for stakeholders in the sector and their advisers), another option would be to include a simple overview highlighting the differences between the regimes.

2.4 To expand on the above point, as currently drafted, it is not always easy to appreciate what exactly is different compared to the general regime, and the language of the guidance sometimes gives the impression of a difference when this not the case. For example, paragraph 5.1 sets out the CMA jurisdictional thresholds in general terms, but concludes regarding the "share of supply" test: "*The NHS merger must also result in an increment to the share of supply or acquisition*". This implies that the need for an increment is an additional requirement for NHS mergers to satisfy the share of supply test, whereas, of course, this is the case for all mergers.

2.5 In summarising the generally applicable merger guidance there is also a danger that clarity or important detail is lost. For example:

(a) Paragraph 5.13 explains that turnover is calculated for the purposes of the £70 million "turnover test":

> "*…by adding the turnover of all the enterprises involved in the transaction and either deducting the turnover of those enterprises which remain under the same ownership and control after the merger or, where no enterprises remain under the same ownership after the merger, by deducting the lower of them.*"

While this statement is technically correct it overcomplicates the position in most cases, given that for a standard acquisition this just involves calculating the target's turnover.

(b) Footnote 21 states that transactions which do not give rise to a relevant merger situation are still subject to general competition provisions contained in the Enterprise Act 2002 and Competition Act 1998, but does not elaborate further. In contrast, the CMA's general merger guidance explains the importance of merging parties remaining independent (e.g. not engaging in unlawful information exchange) until the merger completes, and provides commentary on ancillary restraints.

2.6 We also note that if readers need to refer to the CMA's generally applicable merger guidance for further information (as the NHS mergers guidance often suggests), they may find it more

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[2] In contrast the current FAQ guidance on NHS mergers is only 17 pages.

beneficial just to review the relevant sections of the general guidance – i.e. instead of first reviewing any summary version in this guidance.

3 Examples of approach for previous NHS mergers

3.1 As noted above, the guidance often includes specific examples regarding NHS mergers, including as to the CMA's likely approach to the substantive assessment, such as market definition. Usually it is clear that this commentary is based on OFT/Competition Commission findings from previous NHS merger reviews.[3]

3.2 These examples are helpful in adding colour as to the CMA's likely approach when assessing NHS mergers, but cannot be comprehensive – e.g. previous reviews of NHS mergers will not necessarily have dealt with all possible issues of relevance to future mergers. In practice, we note that the examples are generally caveated along the lines "*the CMA may*" (rather than will) and there is the usual general caveat (at paragraphs 2.4 and 2.5) that the guidance is not intended to be comprehensive and the CMA will apply this flexibly and may depart from it.

3.3 Despite this, we have concerns that the very fact that the examples are included in the guidance may mean that they are treated as more than usually strong precedent by the parties and/or the CMA, and this may constrain the freedom and flexibility of the CMA to develop new approaches to issues in this sector, even where there are compelling reasons to do so. To avoid this possibility, we would favour the inclusion of a specific statement in the guidance (possibly as a new paragraph 2.6) that any examples drawn from previous NHS mergers reflect cases pre-dating the guidance, are intended to be illustrative of the CMA's likely approach in future cases, but are not comprehensive and will not necessarily reflect the CMA's future approach if a different approach is more appropriate. This is a particular concern given that the examples are derived from only a handful of previous NHS merger reviews. Again, we think this would require a small change but deliver a significant benefit.

4 Basis of a decision to notify

4.1 The guidance contains some mixed messages as to how parties may reach a decision about whether to notify an NHS merger to the CMA. For example:

(a) Paragraph 1.8 states: "*It is up to providers, with advice and assistance from Monitor and the CMA, to decide whether or not to notify.*" This implies (wrongly) that parties should always seek informal advice from the CMA, and fails to mention the more usual approach of obtaining advice from a party's own legal advisers.

(b) In contrast, paragraphs 3.12, 4.3 and 4.4 – 4.11 recognise that approaching the CMA for informal advice about whether to notify is an option but not a requirement.

(c) Paragraph 4.3 states that parties are expected to determine for themselves – but "*possibly with their advisers and/or following a discussion with Monitor*" – whether they should notify the CMA. Paragraph 4.4. repeats the same, but without mentioning any involvement of Monitor, although paragraph 4.5 states that Monitor expects NHS

[3] This is not always the case – e.g. paragraph 6.77 comments on the lack of negotiating strength of individual GPs/patients, but is silent about whether this is based on findings in any previous merger decision.

foundation trusts to engage with it at an early stage when considering strategic options such as a merger.

(d) Paragraph 4.12 indicates that a party's decision to notify the CMA would be based on either discussions with Monitor or an assessment made by the party and its advisers.

4.2 We therefore suggest that the drafting be tightened to improve consistency and accuracy regarding the steps parties may take before deciding whether to notify a merger to the CMA. This would help to avoid any possible confusion in this regard and limit the extent to which the CMA's vital resource might be tied-up by unnecessary requests for informal advice.

5 Disclosure of information to Monitor

5.1 Paragraph 4.16 states that in certain circumstances the CMA may disclose information to Monitor without the consent of merging parties – e.g. where the CMA considers this necessary to exercise its statutory functions, including having regard to Monitor's advice on benefits.

5.2 We would expect merging parties to generally agree to disclosures necessary for the CMA to undertake its merger review, especially if non-disclosure would jeopardise or significantly delay obtaining competition clearance. However, it would be helpful if the guidance elaborated on how a non-consensual disclosure might take place in practice – e.g. whether the parties would be forewarned before the disclosure and have any option to challenge this.

6 Exceptions to the duty to refer

6.1 Section 7 covers exceptions to the duty to refer, but fails to mention that this is only relevant if the CMA has identified a realistic prospect of an SLC. It would therefore be helpful if the start of section 7 acknowledged this point.

Norton Rose Fulbright LLP
Antitrust, Competition and Regulatory Group
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