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Dear Sheldon

CMA GUIDANCE ON THE REVIEW OF NHS MERGERS
HEMPSONS' RESPONSE TO THE CONSULTATION DOCUMENT

Hempsons is a leading UK healthcare law firm. We provide legal services for healthcare providers from across the NHS, private and third sector. Our clients are healthcare organisations including Foundation Trusts and NHS Trusts, the Trust Development Authority, CCGs and NHS England LATs, general practitioners, dentists, regulatory bodies, charity and not-for-profit organisations and independent healthcare providers. Our Corporate/Commercial team advises on all aspects NHS transactions, assisted by specialist lawyers throughout the firm.

We set out below our comments on to the Competition and Markets Authority's (the CMA) consultation document on guidance on its review of NHS mergers (the Guidance). Where we have not commented on a section of the Guidance, it is because we generally accept what is stated or we do not have a particularly strong view.

Our point of contact for this response is Lindsay Draffan who is part of our Corporate/Commercial team and specialises in competition law (l.draffan@hempsons.co.uk, 020 7484 7648).

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1 GENERAL COMMENTS

1.1 The Guidance on the CMA's approach to NHS mergers is a welcome development following the confirmed application of the UK statutory merger control regime to Foundation Trust transactions as set out in the Health and Social Care Act 2012. Our comments relate largely to matters of process and jurisdiction rather than the CMA's approach to substantive assessment.

1.2 We would anticipate that further regulatory publications will assist parties to NHS mergers and their advisers such as the memorandum of understanding between the CMA and Monitor on Monitor's role in advising on patient benefits and Monitor's guidance on how it will assess patient benefits (as referred to in the OFT, Competition Commission and Monitor joint statement in October 2013).

1.3 In the Guidance, it is clear that the CMA recognises that the drivers behind NHS transactions can be varied and numerous. A significant number of transactions going forward will be driven by the acquisition of 'aspirant' NHS Trusts by Foundation Trusts. Although we appreciate it might not be appropriate to mention this type of transaction specifically in the Guidance, we presume that the CMA will conduct such reviews in the context of Government policy which is intended to ensure the clinical and financial stability of NHS Trusts going forward.

2 SECTION 2: SCOPE OF THE GUIDANCE

2.1 We note that the Guidance is intended to cover acute, community, mental health and ambulance trusts. Nevertheless, our overall impression from the Guidance is that it refers predominantly to mergers involving acute trusts. In due course, we would hope to see a growing body of CMA cases and materials in respect of other types of trust.

3 SECTION 3: MERGER REVIEW IN THE UK

Pre-notification process

3.1 Paragraphs 3.11-3.12 endeavour to give guidance as to whether the merging parties should approach Monitor or the CMA if they are in doubt as to whether to notify the merger to the CMA. We had hoped the Guidance would be definitive on this point but, in our view, it could still be much clearer.

3.2 The Guidance suggests that the merging parties should benefit from Monitor's involvement in determining whether to notify the transaction but then points out that Monitor has a non-statutory role in this respect. The Guidance advises that, if the merging parties are in doubt,

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they should approach the CMA anyway. This leads us to conclude that approaches should be made to both Monitor and the CMA i.e. a soft approach to Monitor followed by informal advice from the CMA where there is genuine doubt. The highly complex and specialist nature of NHS transactions is likely to give rise to a number of questions as to whether the jurisdictional thresholds for notification are met (and whether there are subsequently likely to be competition concerns).

3.3 This mixed approach is not very satisfactory in terms of process and we feel there should be a clearer steer on the pre-notification process. Presumably that is something which could be covered in a joint CMA/Monitor publication.

3.4 We appreciate that the decision to notify is ultimately a self-assessment process for the merging parties. However, whilst the CMA's responsibility for determining jurisdiction is addressed at paragraph 3.12, the Guidance does not make clear the implications to the merging parties where they rely on advice on notification from Monitor, which is not then 'supported' by the CMA. In favour of regulatory certainty, we feel that these implications should be made clearer (as we presume there can be no suggestion that the CMA will be bound by Monitor's views on jurisdictional matters).

4 SECTION 4: PROCEDURE AND CONTACTING THE CMA

Pre-notification process

4.1 In connection with our comments made at 3 above on Monitor's role, Section 4 reinforces the importance of Monitor in facilitating providers as to whether they should notify and in identifying any choice and competition concerns. However, this section does not set out the appropriate process which merging parties should follow at the pre-notification stage. We would repeat our view that specific guidance on a Monitor pre-notification process should be published (with the support of the CMA), so there can be no doubt as to the appropriate process. The current proposals are rather ambiguous.

Informal advice

4.2 With regard to informal advice, the Guidance confirms that such advice from the CMA will be confidential to the provider seeking the advice (paragraph 4.9). It then continues that the CMA will inform, orally, the other provider to the merger with the terms of the informal advice "on request". Presumably this is only where the provider seeking informal advice has made this request to the CMA (as otherwise it will not be known to the other provider that informal advice has been sought in the first place). We presume that, in the case of NHS Trusts receiving oral confirmation of informal advice, this will also be made available to the TDA;

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likewise Monitor will be informed if a Foundation Trust receives oral confirmation of informal advice.

Status of merging providers

4.3 Paragraphs 4.12-4.13 on Pre-notification refer to "merging providers". It is not clear whether this refers to the acquirer, vendor or both. In mergers which are not joint ventures, it would be useful to understand whether the CMA will expect all parties to the merger, as opposed to solely the acquirer, to be involved in the pre-notification stages of the transaction. We share the view that that pre-notification discussions are of particular importance in the context of NHS mergers and serve to facilitate any eventual review process – to that end, the CMA's understanding of the relevant health economy; its identification of evidence; and the parties' engagement with the CMA on competition concerns and merger benefits will in most cases be benefitted by the engagement of all merging parties.

5 SECTION 5: WHAT IS A RELEVANT MERGER SITUATION?

Share of supply test

5.1 The Guidance addresses the share of supply test at paragraph 5.15. It is disappointing that the Guidance is so brief in this regard. As the share of supply test has rarely been the triggering factor for merger review under the Enterprise Act 2002, there is very little case law or guidance on how this test is applied. However, it could be very significant in triggering NHS merger reviews where turnover values are low but share of supply is high on an individual service basis.

5.2 The example of pathology services here does not seem very apt - this is one area where case law to date has shown a healthy competitive landscape. The example also gives the impression that an area covered by three proximate CCGs would constitute a substantial part of the UK and this is unlikely to be the case. In the absence of relevant case law, examples need to be carefully considered so they do not give misleading impressions.

5.3 We feel that the Guidance is an opportunity for the CMA to give further consideration as to what might constitute a 'substantial part of the UK' in the context of NHS mergers to help avoid genuine jurisdictional uncertainty.

Service reconfiguration as a trigger for merger control

5.4 We think it would be helpful if the Guidance pointed out very clearly to commissioners that they need to be aware of the potential application of merger control when reconfiguring services. Where reconfiguration results in a statutory merger and the CMA considers it

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worthy of review, the commissioner-led case for change will need to form part of the patient benefits analysis

6 SECTION 7: EXCEPTION TO THE DUTY TO REFER

Pre-notification process

6.1 In relation to Monitor's role is advising on patient benefits, paragraph 7.6 states that merging parties should approach the CMA and Monitor at the pre-notification stage. Again, this is not very satisfactory in terms of regulatory certainty and it is unclear how this would work in practice.

Reasoned submissions on RCB

6.2 Footnote 66 states that, if the parties decide not to make reasoned submissions on RCB, they will need to note this in the merger notification to the CMA and notify Monitor in writing. The Guidance does not state that the parties should explain why the parties have decided not to make reasoned submissions. It would be helpful if the CMA could clarify whether such an explanation should be included.

7 CONCLUSION

In general, we welcome the publication of the Guidance. We do feel some aspects, particularly regarding the pre-notification process, could be made clearer for merging parties. There is also an opportunity for the CMA to elaborate on areas of genuine jurisdictional uncertainty which are currently glossed over.

Yours sincerely,

HEMPSONS

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