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Dear Sirs

**CMA draft guidance/PPU arrangements consultation document**

We refer to the CMA's consultation on the review of PPU arrangements under the Private Healthcare Market Investigation Order 2014 (the "Order"). We are submitting comments on behalf of HCA International on the CMA's draft guidance (CMA83).

HCA welcomes the CMA's intention to provide guidance on its procedure in carrying out reviews of PPUs under the Order. The draft guidance provides some helpful clarification about the processes to be followed by parties to a PPU arrangement when engaging with the CMA.

1. As the CMA recognises, the review scheme under the Order is intended to complement the merger control regime. PPU arrangements which constitute relevant merger situations fall to be considered under the mergers regime, while other PPUs may qualify for review under the Order. In the CMA's Final Report in the private healthcare market investigation, the CMA noted (paragraph 11.323) that this remedy was designed to mirror the competition test in the mergers regime and that the review process is therefore substantially the same. Although the Order establishes a separate regime for PPUs which are not qualifying mergers, it would be appropriate for the CMA to harmonise its procedures for examining both types of transactions, as far as reasonably possible.
2. The draft guidance declines to say anything about the timescale for the review process, other than that it must be "reasonable". The CMA's report on the market investigation notes (paragraph 11.330) that "*a review should allow for a full analysis of the relevant facts*" and that the time frame should "*reflect the particular circumstances of the case*". The CMA ought to be able to indicate what administrative time frames it will work to, rather than leaving this completely open-ended. In many cases, it should be possible for the CMA to complete its review within the 40 working-day

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phase 1 deadline applying to merger notifications under the mergers regime. HCA recognises that there will be cases which may require a longer period, and that in the absence of a formal two-stage phase 1/phase 2 review process it is not possible to lay down deadlines for all cases, but in the interests of good administration the CMA should aim to deal with most cases within an administrative deadline of 40 working days. There will no doubt be straightforward cases which the CMA will be able to process well within this timeframe, and if so the CMA should commit to issuing its decision as soon as possible.

3. Paragraph 4.3 of the draft guidance states that when PPU arrangements are notified to the CMA, the parties should provide a clear, concise submission "*of no more than 5 pages*". While a 5-page submission may be merited in a relatively straightforward case, it is likely that some cases will require a longer, more detailed analysis of the potential competition issues, including for example catchment area analysis and admissions data. If the parties have already held informal discussions with the CMA (as envisaged in paragraph 4.10), the CMA is likely to have indicated the sort of areas it would wish to probe, which may well require a full and detailed submission with supporting evidence.
4. It would also be helpful for the CMA to set out in the guidance how it will engage with the parties during the review. At present, the draft guidance says nothing about the review process itself. There is no reason why the CMA should not follow broadly similar processes and procedures *mutatis mutandis* to those applying to mergers to ensure sufficient transparency, e.g. "state of play" discussions, feedback from third party comments, where appropriate, an "issues" meeting, and formal case review meetings. It is important that the parties are aware of any competition concerns and are afforded a fair opportunity to deal with them well in advance of any decisions being taken.
5. Finally, paragraph 3.10 of the draft guidance states that the decision on a PPU review and on any remedies is to be taken by "*a senior member of staff of the CMA*". The guidance provides no indication of who the "senior member of staff" would be, and under what process he or she would take any decisions. Under the mergers regime, there are a number of internal procedural safeguards to ensure that there is sufficient internal scrutiny of CMA mergers decisions. For example, issues meetings are to be chaired by the Director or Deputy Director of the Mergers Unit; a CMA official outside the Mergers Unit is responsible for reviewing case team decisions; and the Director of the Mergers Unit attends the case review meeting. There should be comparable internal checks and balances in place which govern decisions relating to PPU arrangements. Again, the CMA should follow comparable processes to those set out in its mergers guidance.

HCA looks forward to the final version of the guidance, and if we can be of any further assistance on any of these points, please let us know.

Yours faithfully

A handwritten signature in black ink, consisting of the letters 'CMS' in a stylized, cursive font.

**CMS Cameron McKenna Nabarro Olswang LLP**