

# CMA guidance on the review of PPU arrangements under the Private Healthcare Market Investigation Order 2014

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# 1. Preface

- 1.1 This guidance provides an overview of the approach of the Competition and Markets Authority (CMA) when reviewing ‘PPU arrangements’, that is arrangements for a private hospital operator to operate, manage, or otherwise provide, privately-funded healthcare services at a private patient unit in England, Wales, Northern Ireland, or Scotland.
- 1.2 A private patient unit (PPU) is a facility within a national health service site providing inpatient, day-case patient or outpatient privately-funded healthcare services to private patients. In practice, these units may be separate units dedicated to private patients or be facilities within a main national health service site which are made available to private patients either on a dedicated or non-dedicated basis.
- 1.3 The CMA’s report *Private healthcare market investigation* (the Report)<sup>1</sup> found adverse effects on competition (AEC) in the private healthcare market. This included an AEC arising from high barriers to entry and expansion for private hospitals, and from weak competitive constraints on private hospitals in many local markets, including central London, in the provision of privately-funded healthcare by private hospital operators, including in PPUs.
- 1.4 The CMA found that, because PPUs are generally co-located with NHS facilities and benefit from their infrastructure and support facilities, partnering with an NHS trust<sup>2</sup> (or NHS health board) to manage a PPU may offer a low-risk means of market entry for private hospital operators. However, the CMA was concerned that if a private hospital operator which faced weak competitive constraints in a local area entered into a partnership or other business arrangement with a trust (or health board) to operate or manage a PPU in the same local area, this would prevent a new entrant from doing so and thereby prevent market concentration in that local area from being reduced.
- 1.5 To remedy the AECs identified in the Report, the CMA made the Private Healthcare Market Investigation Order 2014 (the Order),<sup>3</sup> which contains a

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<sup>1</sup> The Report is available on the CMA’s webpage relating to the private healthcare market investigation, see <https://www.gov.uk/cma-cases/private-healthcare-market-investigation>.

<sup>2</sup> Where we refer in this guidance to NHS trusts this refers to national health services sites and includes NHS Foundation Trusts.

<sup>3</sup> The Order and the Explanatory Notes are available on the CMA’s webpage relating to the private healthcare market investigation, at <https://www.gov.uk/cma-cases/private-healthcare-market-investigation>. Part 2 of the Order, which relates to PPU arrangements, entered into force on 1 October 2014.

market-opening remedy in the form of a scheme to enable the review of PPU arrangements.

- 1.6 The PPU scheme set out in the Order is intended to complement the merger control regime that applies to all market sectors. Thus, PPU arrangements which constitute ‘relevant merger situations’ under Part 3 of the Enterprise Act 2002 (the Act) are subject to review under the merger control regime.<sup>4</sup> However, where PPU arrangements do not constitute a relevant merger situation, the Order allows the CMA to review the impact on competition of those arrangements, having regard to the competitive constraints in the relevant local area and, if appropriate, take remedial action.

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<sup>4</sup> See *Mergers: Guidance on the CMA’s jurisdiction and procedure (CMA2)* and *CMA guidance on the review of NHS mergers (CMA29)*. Readers may also find it helpful to read NHSI’s guidance on relevant customer benefits, available at [https://improvement.nhs.uk/uploads/documents/Monitor\\_mergerbenefits\\_guidance\\_8NohSvz.pdf](https://improvement.nhs.uk/uploads/documents/Monitor_mergerbenefits_guidance_8NohSvz.pdf)

## 2. Scope of the guidance

- 2.1 This guidance is concerned with those PPU arrangements which do not constitute relevant merger situations under the Act and fall within the scope of Part 2 of the Order. It should be read alongside the Order and its explanatory notes, and the Report.
- 2.2 This guidance is not intended to be comprehensive.<sup>5</sup> It cannot, therefore, be seen as a substitute for the Order and the Report.
- 2.3 Furthermore, although the CMA will have regard to this guidance in handling PPU arrangements under the Order, the CMA will apply this guidance flexibly and may depart from the approach described in the guidance where there is an appropriate and reasonable justification for doing so.

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<sup>5</sup> This guidance reflects the views of the CMA at the time of publication and may be revised from time to time to reflect changes in best practice, legislation, and the results of experience, legal judgments, and research. It may in due course be supplemented, revised, or replaced. The CMA's webpages will always display the latest version of the guidance. Where there is any difference in emphasis or detail between this guidance and other guidance produced or adopted by the CMA, the most recently published guidance takes precedence.

### 3. Review of PPU arrangements under the Order

#### Preliminary decision whether to conduct a PPU review

- 3.1 If the CMA reasonably believes that PPU arrangements (as defined in the Order) have been created, or are in progress or contemplation and will be carried into effect, it will decide whether to conduct a review under the Order.<sup>6</sup>
- 3.2 In the first instance, this involves an assessment of whether the CMA reasonably believes it has jurisdiction to review the relevant arrangement under the Order. The CMA will have jurisdiction where:
- (a) PPU arrangements (as defined in the Order) have been created, or are in progress or contemplation and will be carried into effect<sup>7</sup>; and
  - (b) these arrangements do not constitute a relevant merger situation under Part 3 of the Act.
- 3.3 In deciding whether it is appropriate to conduct a review, the CMA will consider whether there is a realistic prospect of finding that the relevant private hospital operator faces weak competitive constraints in the relevant local area, such that the PPU arrangements have resulted, or may be expected to result, in a substantial lessening of competition (SLC) in the provision of privately-funded healthcare services in the relevant local area.<sup>8</sup>
- 3.4 The CMA will decide on a case by case basis whether it is appropriate to obtain representations from third parties at this stage. In contrast with mergers reviewed at Phase 1 under Part 3 of the Act, publishing an invitation for third parties to comment on whether a review should be conducted is not mandatory.
- 3.5 The preliminary decision on whether to conduct a review will be taken by a senior member of staff of the CMA.

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<sup>6</sup> Article 7.1 of the Order.

<sup>7</sup> In order to be satisfied that arrangements will be carried into effect, the CMA will generally expect to be satisfied that there is a good faith intention to proceed, as evidenced by, for example, a share purchase agreement or equivalent, adequate financing, heads of agreements or similar, or evidence of board-level consideration.

<sup>8</sup> Note that this will not be the case if the private operator is a new entrant in the local area. It is likely to be the case, however, if the private operator is an incumbent facing weak competitive constraints. For a discussion on how the CMA assesses whether an SLC is likely to arise, parties might find it useful to refer to the [Private healthcare market investigation final report](#) and [Merger Assessment Guidelines \(OFT1254/CC2\)](#).

## PPU review

- 3.6 If the CMA decides to conduct a PPU review, it is required to commence the review within four months after the day on which material facts about the PPU arrangements were given to the CMA or were made public.<sup>9</sup>
- 3.7 In its review, the CMA will need to decide within a reasonable time:<sup>10</sup>
- (a) Whether PPU arrangements<sup>11</sup> have been created, or are in progress or contemplation and will be carried into effect;
  - (b) Whether those arrangements have resulted, or may be expected to result, in an SLC in the provision of privately-funded healthcare services in the relevant local area; and if so
  - (c) Whether it should take action for the purposes of remedying, mitigating or preventing the SLC or any adverse effect which has resulted from, or may be expected to result from, the SLC and if so what action it is to take.<sup>12</sup>
- 3.8 As part of a PPU review, the CMA will invite representations from third parties.
- 3.9 In carrying out its review, and in deciding on remedies, the CMA may give directions. It may also revoke or vary directions given.<sup>13</sup>
- 3.10 The decision on a PPU review (and, if relevant, on appropriate remedial action see paragraphs 3.11 to 3.14) will be made by a senior member of staff of the CMA, though a different member of staff from the one who decided to commence the PPU review.

## Remedies

- 3.11 If the CMA decides that the relevant PPU arrangements have resulted, or may be expected to result, in an SLC, and that it should take remedial action, it may take such remedial action as it considers to be reasonable and practicable to remedy, mitigate or prevent the SLC, or any effect which has result from, or may be expected to result from, the SLC. The CMA will have a

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<sup>9</sup> See paragraphs 4.4 and 4.5 below. Further guidance on the circumstances in which arrangements are made public can be found in *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, paragraph 4.44.

<sup>10</sup> Article 7.2 of the Order.

<sup>11</sup> This applies only to PPU arrangements that do not constitute a relevant merger situation under Part 3 of the Act.

<sup>12</sup> See article 9 of the Order.

<sup>13</sup> See article 4 of the Order.



preference for the remedy which is the least-intrusive clear-cut way in which to fully effectively address the SLC.

3.12 Such remedial action may include:

- (a) prohibiting the PPU arrangements;
- (b) requiring the termination of PPU arrangements that have already completed;
- (c) requiring the parties to the PPU arrangements to take action which the CMA considers to be appropriate to remedy, mitigate or prevent the SLC and any adverse effect of the SLC concerned.

3.13 In deciding these questions, the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant PPU arrangements concerned. The CMA may consider the extent to which alternative remedy proposals may preserve such benefits.

3.14 Relevant customer benefits for these purposes are benefits to customers or future customers in the form of lower prices, higher quality, greater choice of, or greater innovation in relation to, private healthcare services in any market for private healthcare services in the UK.<sup>14</sup> However, in order for the CMA to take such relevant customer benefits into account, it must believe that the benefit has accrued as a result of the PPU arrangements concerned, or may be expected to accrue within a reasonable time as a result of the PPU arrangements. It must be the case that the benefit was, or is, unlikely to accrue without the creation of the relevant PPU arrangements or a similar lessening of competition.<sup>15</sup>

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<sup>14</sup> See article 8 of the Order. This includes benefits in markets other than those in which the SLC has been found. See *CMA guidance on the review of NHS mergers* (CMA29). This guidance is not directly applicable to the review of PPU arrangements – in particular, the process is different and neither NHSI nor any other NHS body has a statutory role. However, paragraphs 7.12 to 7.22 of this guidance indicate some of the factors which are likely to be taken into account in considering RCBs in the context of a PPU review.

<sup>15</sup> Article 8 of the Order.

## 4. Procedure and contacting the CMA

### Voluntary regime

- 4.1 Under the Order there is no requirement to notify PPU arrangements to the CMA.<sup>16</sup> It is for the parties to the PPU arrangement to assess whether planned PPU arrangements might give rise to competition concerns.
- 4.2 Hospitals, private providers or any other party to a PPU arrangement may inform the CMA, prior to entering into PPU arrangements, of material facts concerning the proposed arrangements. If hospitals or providers are unsure whether the CMA has jurisdiction to review their PPU arrangement under the Order or under Part 3 of the Act, or whether it may raise competition concerns, they can contact the CMA informally (see paragraphs 4.6 to 4.9). Providers are encouraged to inform the CMA about their PPU arrangement before completion where the arrangement could give rise to possible competition concerns.<sup>17</sup>
- 4.3 Where parties wish to notify a PPU arrangement to the CMA, they should provide the CMA with a clear, concise submission of no more than 5 pages setting out the relevant facts. This submission should summarise:
- (a) the background to the proposed PPU arrangement;
  - (b) details of the arrangements sufficient to establish whether the CMA has jurisdiction to review the arrangements under the Order;
  - (c) whether the private operator is a new entrant or incumbent;
  - (d) the key substantive issue(s) and information on the nature and extent of the competitive constraints in the relevant area and the extent to which these may be affected by the PPU arrangement.

### The CMA's Intelligence function

- 4.4 The CMA has a responsibility to keep PPU arrangements under review and it may choose to investigate, on its own initiative, arrangements that have not been notified (see paragraph 4.1). The CMA has four months from when

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<sup>16</sup> Article 6.4 of the Order.

<sup>17</sup> This avoids costs that might arise for merging parties from having to undo the relevant PPU arrangements if they are prohibited following a review.

'material facts'<sup>18</sup> about the PPU arrangement is made public or communicated to the CMA to commence a PPU review.<sup>19</sup>

- 4.5 The CMA's Mergers Intelligence Committee (MIC) will identify PPU arrangements advertised in the Official Journal of the EU and the trade press. It may then liaise with the NHS trust (or NHS healthcare board) which is party to the PPU arrangement, and possibly the relevant NHS body such as NHS Improvement (NHSI) in England or the appropriate body in the Devolved Nations to gather more information about the arrangement. When a winning bidder has been identified following an invitation to tender, MIC may obtain information directly from the bidder.

### **Informal engagement with the CMA**

- 4.6 The CMA is willing to assist parties to a PPU arrangement before they have decided whether or not to notify their PPU arrangement.
- 4.7 In particular, parties to a PPU arrangement may wish to contact the CMA for general advice on how it assesses jurisdiction or undertakes its competitive assessment. In this situation, the CMA will generally explain how it conducts its assessment, what considerations may be relevant, and what type(s) of evidence it would typically require. The CMA will not provide a definitive view on whether or not a PPU arrangement raises competition concerns as part of this informal process.
- 4.8 Where parties to a PPU arrangement have discussed a particular transaction informally with the CMA, they will be requested to inform the CMA if, and when, the proposed transaction goes ahead.
- 4.9 Any views expressed by the CMA through this informal engagement are not decisions of the CMA and cannot bind the CMA. Any views expressed by the CMA during this process must be kept confidential to the parties concerned and their advisers, even after the transaction becomes public.<sup>20</sup>

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<sup>18</sup> For the purposes of the Order, 'material facts' means sufficient facts to enable it to decide whether there are grounds to carry out a review. This includes sufficient facts on jurisdiction and whether the private operator is a new entrant or if an incumbent, information about the type of competitive constraints that it is facing in the local area. For more detail, see CMA2 paragraph 4.44. (although note the different interpretation of 'material facts' under the Act).

<sup>19</sup> Article 7.4 of the Order

<sup>20</sup> In case of doubt, providers should confirm with the CMA the identity of the persons with whom they are permitted to share the advice received.

## Investigating a PPU arrangement

### ***Pre-notification***

- 4.10 As soon as parties to a PPU arrangement have decided to notify the CMA, and before making their submission, they are encouraged to discuss their arrangement (and any drafts of the submission) with the CMA by completing and submitting the form in Annex A. This should take place before the arrangement has completed.

### ***Information exchange between the CMA and NHS bodies***

- 4.11 Sharing of information (including data) between the CMA and NHSI, or the appropriate NHS body in a Devolved Nation, may be necessary for the effective fulfilment of the CMA's functions under the Act or the Order. The CMA may, where appropriate, wish to discuss with such NHS bodies matters such as the PPU arrangements, informal views the CMA will be providing or has provided, the parties' draft submissions, and information obtained throughout the CMA's investigations.
- 4.12 If a party to a PPU arrangement believes that the CMA should not share with NHSI (or the appropriate NHS body in a Devolved Nation) some or all of the information or data it has submitted to the CMA, it should submit a non-confidential version of this information or data which can be shared and it should state clearly what information should remain confidential to the CMA, together with the reasons for this.<sup>21,22</sup>

### ***Timescales for the review process***

- 4.13 If the CMA decides to conduct a PPU review, it is required to reach a decision within a reasonable time. There is no statutory deadline.

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<sup>21</sup> In certain circumstances, whilst having regard to the confidentiality requests, the CMA may nonetheless decide to disclose information to the relevant NHS body, without the consent of the parties. This may occur, for example, where it considers that disclosure is necessary to enable the CMA to exercise its functions.

<sup>22</sup> For further information on the treatment of confidential information by the CMA, see Transparency and disclosure: Statement of the CMA's policy and approach (CMA6), which also explains how the CMA will deal with a request under the Freedom of Information Act 2000 and CC7 (Revised) *Chairman's Guidance on Disclosure of Information in merger inquiries, market investigations and review of undertakings and orders accepted or made under the Enterprise Act 2002 or Fair Trading Act 1973*.

## ***Information-gathering powers***

- 4.14 The information provided by the parties in the initial submission will enable the CMA to commence its investigation. However, the CMA may ask for additional data, information, or documents as its investigation progresses.
- 4.15 In deciding whether to conduct a PPU review, the CMA may request information and views from third parties but it is not required to do so (see paragraph 3.4). Before making a decision under Article 7.2, the CMA will, so far as reasonably practicable, consult with relevant third parties (see paragraph 3.8).
- 4.16 While the CMA may issue requests for information informally, it also has the power under section 174 of the Act to issue a notice requiring a person to provide information or documents, or to give evidence at a specified time and place.<sup>23</sup> In general, the CMA will use section 174 notices as standard where it is seeking the production of documents from the parties to the PPU arrangements.<sup>24</sup> In addition, it is likely to use the section 174 power where it has doubts that the recipient will comply with an informal request, or where it has concerns over the timeliness of the response, or where it believes that evidence may be destroyed.
- 4.17 The CMA may also request information by issuing a notice under article 6 of the Order.<sup>25</sup>

## ***Publication***

- 4.18 The CMA is mindful of the need to respect the confidentiality of commercially sensitive information provided to it. At the same time, it is required by article 11.2 of the Order to publish any decision taken under article 7 (review), article 9 (remedial action) or article 10 (cancellation). As a result, the gist of evidence that is key to the reasoning and outcome of its decision will be included within the public version of the decision.<sup>26</sup>

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<sup>23</sup> Article 3.1 of the Order.

<sup>24</sup> Failure to comply with a notice under section 174 of the Act without reasonable excuse can lead to the imposition of a fine.

<sup>25</sup> The CMA may bring enforcement action under section 167 of the Act in relation to any failure to comply with such a request. This may include civil proceedings brought by the CMA for an injunction or for interdict or for any other appropriate relief or remedy.

<sup>26</sup> For guidance on the CMA's wider approach to confidentiality, see *Transparency and disclosure: Statement of the CMA's policy and approach (CMA6)* and CC7 (Revised) *Chairman's Guidance on Disclosure of Information in merger inquiries, market investigations and review of undertakings and orders accepted or made under the Enterprise Act 2002 or Fair Trading Act 1973*.

4.19 In the event of a disagreement concerning a proposal by the CMA to publish information, parties may make representations to the CMA's Procedural Officer.<sup>27</sup>

### ***Cancellation***

4.20 The CMA shall cancel the review of any arrangements if it considers that they have been abandoned.<sup>28</sup>

### ***Fees***

4.21 There are no fees payable for a CMA review of a PPU arrangement.

### ***Contact Information***

4.22 For the purposes of beginning discussions with the CMA about a PPU arrangement, the CMA can be contacted at: [mergers@cma.gsi.gov.uk](mailto:mergers@cma.gsi.gov.uk). Please complete and return the PPU arrangements form, set out in Annex A.

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<sup>27</sup> See <https://www.gov.uk/guidance/procedural-officer-raising-procedural-issues-in-cma-cases>.

<sup>28</sup> Article 10 of the Order. In such circumstances, the CMA will apply the procedure set out in CMA2.

## Annex A: PPU arrangements information form

To be sent by email to [mergers@cma.gsi.gov.uk](mailto:mergers@cma.gsi.gov.uk)

1. Your contact details	
Name:	
Private hospital operator/ law firm:	
Telephone number:	
Email:	

2. Parties to the PPU arrangements	
Name of parties	1.
	2.
	3.
	4.
Address of the PPU	
Address of other private hospital facilities operated by any of the parties in the same geographic area as the PPU	
Describe any overlapping treatments or services provided by the parties at private hospitals in the same geographic area as the PPU	

### 3. Brief description of the arrangements

### 4. Confidentiality

*Information submitted in connection with the CMA's PPU Arrangements remedy functions is protected by Part 9 of the Enterprise Act 2002 and such contacts are kept confidential. Nevertheless, please indicate whether the private hospital operator's involvement in the arrangements has been publicly announced.*

Publicly announced:            Yes/No

Date of announcement:

*Please include a link to the announcement, or a copy of the announcement*

### 5. Any other information you would like to submit at this stage