CMA investigates highly anticipated hospital acquisition

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The UK's competition watchdog, the Competition and Markets Authority ('**CMA**'), is currently investigating the anticipated acquisition by Aintree University Hospital NHS Foundation Trust ('**AUHFT**') of The Royal Liverpool and Broadgreen University Hospitals NHS Trust ('**RLBUHT**').

This follows a notice by the CMA on 28 June 2019 that the parties have duly notified the intended merger to it. The CMA usually has to decide within 40 working days (i.e. by 23 August 2019) following a notice to it whether to enter into an in-depth Phase 2 investigation of the merger.

The CMA has a statutory duty to refer relevant mergers for an in-depth phase 2 investigation if it believes that there is a realistic prospect that the merger would result in a substantial lessening of competition. For further information please click here.

Background to the merger

AUHFT and RLBUHT made their notification to the CMA following a series of events conducted earlier this year during which interested parties could share their view on the proposed merger.

At the moment two major acute hospitals work separately in Liverpool where some people have some of the highest levels of poor health outcomes and face some of the greatest health inequalities in the UK and the current set-up does not provide a full multi professional approach to help patients. The rationale for the merger is around improving outcomes for patients by bringing staff together as single services with city-wide delivery. The merger proposal is clinically led and is seen by the Trusts as the most effective way of developing single services to benefit patients. Click here for more information, including a list of benefits.

The plans for the proposed merger would see the new organisation, Liverpool University Hospitals NHS Foundation Trust, formed in October 2019, subject to regulatory approval.

Merger notification in the UK is voluntary. However, not doing so may carry risks if it turns out that the transaction has resulted, or may be expected to result, in a substantial lessening of competition ('**SLC**') within any market or markets for goods or services in the UK. The CMA may, for example, order divestment of all or part of the acquired assets to a suitable purchaser who can provide effective competition for a completed merger.

Should the CMA refer the intended acquisition of RLBUHT by AUHFT for a Phase 2 investigation, it will conduct a more detailed analysis. In this case, the Inquiry Group must, in particular, decide whether the creation of that situation may be expected to result in an SLC with worse outcomes for patients and/or commissioners within any market or markets in the UK for goods or services (where both limbs are satisfied, this is referred to as an 'anti-competitive outcome').

Background to the CMA's investigation powers

The CMA shares concurrent powers with NHS Improvement to review potentially anti-competitive conduct (such as market sharing) by NHS bodies under the Competition Act 1998, as long as these qualify as 'undertakings' and fall under the remit of the Act.

However, the CMA is the only regulator who can review intended mergers between two or several enterprises under the Enterprise Act 2002 – including mergers between NHS Foundation Trusts and NHS Trusts.

The CMA just recently confirmed this role in a submission to the House of Comments Health and Social Care Select Committee ('**Committee**').

The Committee had inquired with the CMA whether it would be happy to surrender its role in NHS mergers, as proposed by the NHS Long Term Plan.

In its response to the Committee, the CMA emphasised that with respect to mergers, its jurisdiction derives from the Enterprise Act 2002, and not the Health and Social Care Act 2012 ('**HSCA**'). The latter gave the CMA, inter alia, powers in relation to NHS pricing and NHS provider licence condition decisions.

The CMA clarified that for it to review a merger under the Enterprise Act, the decisive question is whether 'two or more enterprises cease to be distinct'. In this context it noted that foundation trusts as 'distinct enterprises' appeared to have

become less autonomous over time; and that the NHS Long Term Plan appeared to pursue this path.

It noted however that if the desire is for the CMA to have no ability to review mergers of foundation trusts, then the HSCA should be amended to contain a positive statement that foundation trusts are not enterprises for the purposes of the merger control provisions of the Enterprise Act 2002.

It is worth noting that the CMA (and its predecessor bodies) has reviewed a number of NHS mergers in recent years, with one being prohibited. In 2014, the CMA also issued detailed guidance on the review of NHS mergers.

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