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InHealth – Alliance/IBA Merger
Submission on the Provisional Findings
NON-CONFIDENTIAL VERSION

Introduction

1. The CMA has provisionally found that the merger has not resulted, or may not be expected to result, in a substantial lessening of competition within the market.
2. The CMA has provisionally found that the concerns raised, in particular those raised about horizontal and vertical effects, are not merger-specific as the CMA considers IBA would have exited the market in any event.
3. The CMA's provisional finding centres on its counterfactual analysis – specifically, the question of whether, in effect, IBA benefits from the exiting firm defence[1] (hereafter referred to as the "exiting firm defence").
4. The OFT's Merger Assessment Guidelines,[2] now adopted by the CMA, (the "Guidelines") sets out the criteria that should be met for the Authorities to consider and accept the exiting firm scenario. The CMA consider:
   A. Whether the firm would have exited (through failure or otherwise); and, if so,
   B. Whether there would have been an alternative purchaser for the firm so its assets to the acquirer under consideration; and
   C. What would have happened to the sale of the firm in the event of the exit.[3]
5. InHealth's submission is focused on the CMA's counterfactual analysis and specifically, the question of whether it is appropriate to allow a merger to benefit from the exiting firm defence in circumstances where a business owner has not marketed their business or sought to bring the relevant assets to market in any public way. By so doing, the vendor creates a situation of uncertainty: at this point, it is unknown what the outcome would have been, if SK Capital had sought offers for the business from plausible parties who might be interested in bidding (of which there are a number, [REDACTED].

[1] Also referred to in EU case law as the "rescue merger" situation
[2] Merger Assessment Guidelines CC2 (Revised), OFT1254, dated September 2010
[3] The Guidelines paragraph 4.3.8

6. There is a strong policy argument against allowing a vendor who has not made all reasonable efforts to establish the market position have 'the benefit of the doubt' in circumstances where there were plausible steps that could have been taken to test alternative approaches to the business.
7. The CMA appears to have applied a more liberal view of the rules/requirements for the exiting firm defence, at variance with case law which has rightly urged competition authorities to be cautious and to ensure that the facts are sufficiently clear to qualify for this defence.
8. Based on the information that we have seen, as a result of the uncertainty about the question of what would have happened if the business was brought to market in good order, we consider that Alliance/IBA's exiting firm defence is [REDACTED].
9. In taking this approach, we consider that the CMA have left a number of weaknesses in its decision.
10. This submission sets out the Guidelines that the CMA should follow, followed by an assessment of how these criterion have been met in the CMA's provisional findings.

The Guidelines

The Authorities approach to the counterfactual

11. The Guidelines set out that:

> *As a Phase 2 body, the [CMA] takes a different approach since it has to make an overall judgement on whether or not an SLC has occurred or is likely to occur. To help make this judgement on the likely future situation in the absence of the merger, the [CMA] may examine several possible scenarios, one of which may be the continuation of the pre-merger situation; but ultimately only the most likely scenario will be selected as the counterfactual. When it considers that the choice between two or more scenarios will make a material difference to its assessment,* ***the [CMA] will carry out additional detailed investigation before reaching a conclusion on the appropriate counterfactual****. However, the [CMA] will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it* ***seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight.*** *Given that the* ***counterfactual incorporates only those elements of scenarios that are foreseeable****, it will not in general be necessary for the [CMA] to make finely balanced judgements about what is and what is not the counterfactual (but see also paragraph 4.3.2 and footnote 39).*[4] [emphasis added]

A. Would IBA have exited through failure or otherwise?

[4] The Guidelines paragraph 4.3.6

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12. The Guidelines set out that:

> *consideration is given both to whether the firm **is unable to meet its financial obligations** in the near future and to whether it is **unable to restructure itself successfully**. The authorities will examine the firm's balance sheet to determine the profile of assets and liabilities. They will also consider **the action the management has taken** to address the firm's position and will review contemporaneous documents such as board minutes, management accounts and strategic plans.*[5] [emphasis added]
>
> *If the firm was a part of a larger corporate group, the Authorities will look at the **nature and value of the transactions** within that group to determine **the extent to which the losses were caused by intra-group charges, and whether the transactions were on arm's length terms**. The Authorities will apply the same principle in determining **whether a particular subsidiary or division would have exited the market without the merger**. They will examine the evidence as to why the parent company would have closed that subsidiary or division. Such cases require particularly careful analysis…*[6] [emphasis added]

B. Whether there would have been an alternative purchaser for IBA or its assets to the acquirer under consideration

13. The Guidelines set out that:

> *Even if the Authorities believe that the firm would have exited, **there may be other buyers whose acquisition of the firm as a going concern, or of its assets, would produce a better outcome for competition than the merger under consideration**. These buyers may be interested in acquiring the firm or its assets as a means of entering the market.*[7] [emphasis added]
>
> *When considering the prospects for an alternative buyer for the firm or its assets, the Authorities will look at **available evidence supporting any claims that the merger under consideration was the only possible merger (i.e. that there was genuinely only one possible purchaser for the firm or its assets). The Authorities will take into account the prospects of alternative offers for the business above liquidation value.** The possible unwillingness of alternative purchasers to pay the seller the asking purchase price would not rule out a counterfactual in which there is a merger with an alternative purchaser.*[8] [emphasis added]

C. The Counterfactual

14. The Guidelines state that:

> ***If the Authorities believe that the firm and its assets would have exited, they will consider what would have happened to the sales of the firm.** They will consider whether sales would have been redistributed among the firms remaining in the*

[5] The Guidelines paragraph 4.3.14
[6] The Guidelines paragraph 4.3.15
[7] The Guidelines paragraph 4.3.16
[8] The Guidelines paragraph 4.3.17

> *market and, if so, how.* ***If sales were likely to have been dispersed across several firms, the merger, by transferring most or all of the sales to the acquirer, may have a significant impact on competition. If, on the other hand, the majority of the sales were expected to have switched to the acquiring firm, the merger may have little effect on competition***.[9] [emphasis added]

15. There is also a series of OFT, Competition Commission and CAT cases which have set out further guidance on how CMA should interpret the Guidelines and its statutory duties.

A. Would IBA have exited through failure or otherwise?

Was IBA unable to meet its financial obligations?

16. The CMA has provisionally concluded that the most likely outcome is that IBA Molecular would have ceased to supply FDG in the market as IBA's PET business had not been sustainable on a stand-alone basis and noted that it had previously been supported by a parent company, IBA Molecular, for strategic reasons. SK Capital advised that it would have mothballed the site in order to reduce the annual operating losses.[10]

17. In the *Long Clawson Dairy Crest Limited/Millway*[11] merger, the Competition Commission asked the Monitoring Trustee to report on the profitability and viability of the business, rather than simply relying on the submissions of the parties. The CMA's provisional findings suggest that the CMA did not commission this sort of analysis of IBA's and SK Capital's business, instead relying on the evidence provided by the merging parties.

Was there compelling evidence that IBA would be closed and not restructured?

18. The CMA have accepted that SK Capital would not have sought either to restructure the UK PET business or to support the Guildford site in the longer term. SK Capital did not consider that it was worth investing significant additional management time in seeking to improve its performance. SK Capital advised that given the relatively small size of IBA's PET business in the context of the overall IBA Molecular business, limited consideration was given to restructuring it during the early stages following SK Capital's acquisition of IBA Molecular.The CMA requested internal documents discussing IBA Molecular UK's attempts at restructuring IBA's PET business but were informed that there were no such documents.[12]

[9] The Guidelines paragraph 4.3.18

[10] The Provisional Findings paragraphs 11, 13(a), 3.17, 5.5, 5.6, 5.14, 5.15, 5.16, 5.18, 5.19, 5.27, 5.28, 5.29, 5.31

[11] Completed acquisition by Long Clawson Dairy Limited of Millway Limited: ME/3794/08, Competition Commission, 14 January 2009

[12] Provisional Findings paragraphs 3.17, 5.9, 5.19, 5.33

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19. As noted above, during the investigation of the *Long Clawson Dairy Crest Limited/Millway*[13] merger, the Competition Commission found that Dairy Crest would have closed down the business in the very near future (in light of a long history of loss making combined with previous unsuccessful attempts to restructure the company) as it was failing and that it could not be reconstructed to become economically viable. The Competition Commission asked the Monitoring Trustee to investigate to review the restructuring options offered and also the financial viability of the company.

20. Similarly, during the investigation into the completed merger of *Thermo Electron and GV Instruments*,[14] the Competition Commission instructed Insolvency Experts to determine the financial position of the company.

> *Thermo submitted that, were it not for its acquisition of GVI, GVI would have imminently failed and gone into liquidation. Thermo considered that some of GVI's assets might have been bought by small UK IRMS competitors, but argued that the increase in the competitive constraint on Thermo which would have arisen from these small acquisitions would not have been material. Thermo submitted that, compared with this counterfactual, its acquisition of GVI had not led to a substantial lessening of competition.*
>
> ***We obtained and considered evidence from several sources relating to GVI's financial condition**. We concluded that it was likely that GVI would have failed and that it was unlikely to have been successfully independently restructured. In our provisional findings we expressed our view at that time that GVI would, most likely, have gone into administration, where it would have been sold either as a whole or in parts. **Following submissions from Thermo, and an insolvency practitioner instructed by Thermo, we consulted another insolvency expert who had some familiarity with the IRMS market, having handled the administration of PDZ Europa in 2004**. This expert believed that GVI was most likely to have been marketed on an accelerated basis and then sold out of administration. He considered the likelihood of GVI having been put immediately into liquidation was 'remote'. Having considered the evidence from Thermo, its insolvency practitioners, a further insolvency expert, and all the other relevant parties, we concluded that an administration was the most likely outcome for GVI.* [15]

21. In these cases, the Competition Commission's approach incorporated elements that provided a third-party or arms-length view to calibrate the evidence provided by the merging parties. This recognises that the merging parties have a strong incentive secure a clearance for the merger. In these cases, the Competition Commission identified the

[13] Completed acquisition by Stagecoach Group PLC of Preston Bus Limited: ME/4032/09, Stagecoach Group PLC v Competition Commission case reference: 1145/4/8/09, [2010] CAT 1
[14] The Competition Commission's report on the completed merger of Electron Manufacturing Limited and GV Instruments Limited merger inquiry, dated 30 May 2007
[15] Op.cite – footnote 14, paragraphs 16-17

importance of seeking external independent input which fed into their decision on the impact of the merger.

22. The CMA also provisionally concluded that SK Capital would have sought to exit the production of FDG-18 as soon as possible and that it was likely that this would have occurred before the NHS procurement process for PET-CT scanning services started in spring 2014.[16] However, when the CAT reviewed the Stagecoach merger decision, it advised that

> *The correct comparison is between the situation post merger, and the situation which, on the balance of probabilities, is the situation which would have developed in the market in the absence of the merger. It therefore involves a **forward looking**, hypothetical exercise.*[17] [emphasis added in bold]

23. It appears that the CMA, again, discounted the prospect of the upcoming tender process significantly influencing the outcome, without consulting external advice and based essentially upon the evidence provided by the merging parties. The provisional findings do not, at present, prove that IBA would exited prior to the national procurement process, nor that they would not have won any contracts as part of the tender process.
24. [REDACTED]
25. The CMA's approach seems out of line with both the Guidance, and the approaches taken by the Competition Commission and European Courts in recent years.

The commercial reasons and implications for the transaction

26. Alliance set out that by December 2012 it had become concerned about IBA Molecular's commitment to FDG production and started negotiating a deal that would involve Alliance acquiring IBA's PET business in return for Alliance switching its FDG purchases in Europe to IBA Molecular. On the same day as the completion of the sale of the IBA operation to Alliance, IBA Molecular and Alliances also entered into a framework supply arrangement for the former to have exclusive rights to supply the latter (and its affiliates) in Italy, Spain and Germany with FDG. Alliance also had additional strategic reasons for acquiring the IBA operation.
27. SK Capital's reason for the sale was an economic decision given their own obligations to their investors.[18] The CMA appears to accept the statements from SK Capital about its financial constraints. We urge the CMA to consider the fact that by setting the bar low in an exiting firm scenario in this case, the CMA seems to adopt an approach that is more liberal than UK competition authorities have taken in the past. Previously, the CMA's predecessor institutions have been at pains to emphasise that they will not simply accept the evidence of the merging parties that exit is inevitable, recognising that

[16] Provisional Findings paragraph 11 and 5.40
[17] Op. cite – footnote 13, paragraph 20
[18] Provisional Findings paragraph 3.1, 3.4, 3.5, 3.7, 3.8, 3.9, 3.10, 5.31

the parties have better information and a strong incentive to secure clearance. For example, the CC/OFT noting in a commentary on the UK market that:

> *"there is no good reason why owners of struggling businesses should be permitted to sell to another close competitor in the market simply because it is prepared to pay the highest price for the target business. Businesses wishing to exit the market must be aware of the implications of choosing to try to sell to a close competitor. To advance a failing firm' argument, they will need to adduce evidence to demonstrate the absence of any realistic and substantially less anti-competitive alternative purchaser. In terms of execution risk for a deal, the quickest and least risky sale is to a purchaser that raises no competition issues, if such a purchaser exists, even if the price that purchaser offers is lower than that which was offered by a close competitor."*[19]

28. InHealth has not seen the confidential material provided to the CMA; however the simple fact that SK Capital's shareholders meant that SK Capital wanted to cut its losses should not be a material consideration when determining whether IBA met the exiting firm defence, nor the fact that IBA Worldwide and Alliance Medical have agreed to enter into a separate framework agreement at the same time as the acquiring IBA. As set out below, IBA was not marketed, and there is not sufficient evidence to suggest that there was an absence of any realistic and substantially less anti-competitive alternative purchaser.

29. This is contrary to the facts observed in the other cases noted above and also, for example, in the *Stagecoach/Preston Bus* case where that business was the subject of an information memorandum and offers sought from a number of interested parties (as noted in, for example, Annex H to the decision on the Stagecoach merger – analysis that was cited with approval by the CAT in the subsequent appeal).[20]

30. In its provisional findings, the CMA does not appear to have considered the implications of the fact that a monopolist does not act in the same way as a company operating in a competitive environment.[21] The CMA's conclusions on this section form part of its analysis on the counterfactual and having made certain assumptions on the market, noting that the CMA did not perform the required "detailed investigation" of the market. The CMA's approach therefore appears at odds with the strict tests applied in the recent merger decisions where the exiting firm defence has been argued.

B. Whether there would have been an alternative purchaser for IBA or its assets to the acquirer under consideration

[19] OCED Policy Roundtables - The Failing Firm Defence dated 2009, at page 169
[20] Op. cite – footnote 13
[21] Op. cite – footnote 13 at paragraph 91

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31. Recent case law also sets out further considerations for the CMA to review when considering whether there would have been an alternative purchaser.

    a) In the case of the *HMV/Zavvi* merger[22], the Competition Commission looked at whether there was sufficient awareness of the sales process through targeted marketing to potentially interested parties.

    b) *BASF/Pantochim/Eurodiol* IV/M.2314 EC [2002] OJ L132/454, at follows the general framework and the concept of the rescue merger set out in IV/M.308 Kali and Salz/MDK/ Treuhand, OJ L 186 where the ECJ confirmed the Commission approach which shows the following criteria as relevant for the application of the concept of the rescue merger (failing/exiting firm defence):

    (a) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking,

    (b) there is no less anti-competitive alternative purchase, and

    (c) the assets to be acquired would inevitably exit the market if not taken over by another undertaking.

    The judgment went on to say that the application of the concept of the rescue merger requires that the deterioration of the competitive structure through the merger is at least no worse than in the absence of the merger.[23]

Was there was not an alternative purchaser that would produce a better outcome for competition than the merger under consideration?

32. The CMA has provisionally concluded that the most likely outcome is that there would not have been an alternative purchaser that would have produced a better outcome for competition.[24] After seeking evidence from a number of parties that it identified as potential purchasers, the CMA found that it was unlikely that the IBA operation would have found an alternative purchaser due to the difficulties associated with improving the performance of the business, which was a structural disadvantage and had never returned a profit.[25, 26]

33. As set out above, the Guidance dictates that the CMA will carry out "additional detailed investigation before reaching a conclusion on the appropriate counterfactual". The Guidelines, and the approach taken in previous merger situations has seen the Competition Commission hold merging parties to a strict standard of proof.

[22] Completed acquisition reference: ME/4036/09
[23] Judgment paragraph 142 - 143
[24] Provisional Findings paragraph 13(b)
[25] Provisional Findings paragraph 12
[26] Provisional Findings paragraph 5.43-5.62

34. Yet, in the CMA's provisional determination, it does not appear to be held the parties' evidence to that strict standard of proof.

35. Critically, IBA was not marketed by SK Capital prior to the merger: this means that when determining whether there was in fact an alternative purchaser, the CMA could not look at documentation from the other potential buyers to review alternative bids, nor be party to the discussions held between SK Capital and other potential purchasers in the market.

36. This in turn led to a gap in the CMA's analysis. In light of this gap, the CMA should take additional care to ensure that it is not inadvertently enabling Alliance to benefit as a result of the decision to structure the transaction in a way that excluded any market testing of the value of IBA. In the *Dairy Crest*, *HMV/Zavvi* and *Stagecoach* mergers the business was marketed to interested parties and the Competition Commission was able to review the commercial implications of each of those companies, who were aware of the financial viability of the business in question, acquiring the business. Despite marketing the companies in both of these cases, the companies were required to prove that alternative purchasers had been sought and that the merger proposed had the least detrimental impact on competition.

37. In this case the CMA appears to be contemplating allowing SK Capital and Alliance to adopt a strategy that reduces the evidence available to the CMA, and then to obtain the 'benefit of the doubt' in relation to the resulting uncertainty. This has the unintended result that the parties appear to have been able to benefited from the uncertainty in the market that they themselves created when entering into a merger agreement without considering alternative purchasers in the market.

38. In respect of InHealth, the CMA correctly states that InHealth perceives a value in maintaining diversity in its supply base and that this may have provided a rationale for either acquiring IBA's PET business or for providing some form of financial support. The CMA also noted that InHealth had the financial ability to make an acquisition of this size. Yet the CMA provisionally concluded that InHealth would not have been a likely purchaser of the IBA operation in the situation where SK Capital chose to close the Guildford RPU.[27]

39. [REDACTED][28]

40. These conclusions are not based on any direct evidence. [REDACTED]

[27] Provisional Findings paragraph 5.54-5.57
[28] Provisional Findings paragraph 5.54-5.55

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41. InHealth provided the CMA with details of acquisitions it had considered in the past [REDACTED][29,30] InHealth advised the CMA of the importance, in its view, of there being choice of suppliers in the market.

42. The CMA state that although it was possible that InHealth would have been willing to provide some financial support to IBA's PET business in the short term, it was not able to provide sufficient information on this scenario to convince the CMA that this support would have been sufficient to persuade SK Capital to continue to operate the Guildford site, particularly as it was clear from SK Capital's representations to the CMA that it was not prepared to allocate significant management time to what it regarded as a small part of its business.[31]

43. InHealth provided the CMA with as much information as it could based on the facts put before it. The CMA did not come back to InHealth and ask for any further evidence on mergers undertaken or further analysis on whether it would have contemplated buying IBA during the CMA process. In our view, there appears to be a significant leap from the information provided by InHealth based on the information presented to make the provisional conclusions made by the CMA.

44. The provisional findings do not set out a sufficient basis to reach the provisional conclusion to a standard that is appropriate for the exiting firm defence.

45. In terms of assessing if PETNET had been the alternative purchaser and whether it would have produced a better outcome for coopetition than the merger under consideration, the CMA provisionally concluded that PETNET, as the purchaser, was unlikely to have produced a better outcome for competition than the acquisition by Alliance.[32] [REDACTED]

Would the Alliance have taken over the market share of the acquired undertaking if IBA were forced out of the market?

46. On the basis of the evidence put before it, the CMA provisionally concluded that it could not exclude the possibility that had the Guildford RPU ceased to supply FDG-18, some of its customers would have transferred their purchases of FDG-18 to PETNET and some to Alliance.[33] Therefore the CMA is unable to conclude that Alliance would have acquired the market share (derived from the merger) if IBA were forced out of the market.

Would the concentration lead to a loss of quality? Would the concentration lead to a deterioration in a similar fashion if the merger hadn't taken place?

[29] [REDACTED]
[30] [REDACTED]
[31] Provisional Findings paragraph 5.57
[32] Provisional Findings paragraph 5.44
[33] Provisional Findings paragraph 5.77

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47. The CMA also set out that the transaction was structured as an asset purchase and therefore customer contracts were not transferred to Alliance automatically but needed to be formally novated. This process required the consent of all parties involved, including the customer. Following the merger, existing IBA Guildford customers still have the option to continue to be supplied from the site, whereas under the counterfactual they would not, as the site would have ceased to operate. A customer would only choose the option to stay with Guildford if it is the most attractive option available.[34]

48. Alliance submitted that the relevant counterfactual in this case was a situation in which the Dinnington RPU remained mothballed and the Guildford RPU would have also exited the market. In addition, Alliance put forward the view that even if the Guildford site had not exited the market, it had already become an ineffective competitor in the South of England and was becoming progressively weaker, such that a counterfactual in which it did not formally exit the market would effectively be based on competition between two firms.[35] The CMA also concluded that it may also be the case that other customers may attach some value to the fact that in future tenders they may be able to source FDG-18 from one additional site, compared with the counterfactual scenario.[36]

49. The CMA has ignored the fact that if IBA had exited the market, customers would have had the choice about who had access to their confidential information and who was their preferred supplier for the remainder of the contract. InHealth is of the view that this option would have been preferable in terms of competition in the market as suppliers would have to compete to win the contracts.

C. The Counterfactual

50. Recent case law also sets out further considerations for the CMA to review when considering the counterfactual.

    a) *Newscorp/Telepiu Case IV/M.2876 EC [2004] OJ L110/73*, the Commission again referred back to the Kaliz and Salz criteria, including looking at what would have happened to the exiting company's market share if it had not been merged with the other company. The commission referred to the *French Republic and others v Commission C-68/94 and 30/95 Court of Justice [1998] ECR I-1375* judgment which said "The introduction of this criterion (the acquiring undertaking would gain the market share of the acquired undertaking) if it were forced out of the market is intended to ensure that the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate

[34] Provisional Findings paragraph 6.6-6.7
[35] Provisional Findings paragraph 5.2
[36] Provisional Findings paragraph 6.8

> in similar fashion even if the concentration did not proceed. The criterion of absorption of market shares, although not considered by the Commission as sufficient in itself to preclude any adverse effect of the concentration on competition, therefore helps to ensure the neutral effects of the concentration as regards the deterioration of the competitive structure of the market. This is consistent with the concept of causal connection set out in Article 2(2) of the Regulation".[37]

Would the Alliance have taken over the market share of the acquired undertaking if IBA were forced out of the market?

51. The Guidelines set out that "*If sales were likely to have been dispersed across several firms, the merger, by transferring most or all of the sales to the acquirer, may have a significant impact on competition. If, on the other hand, the majority of the sales were expected to have switched to the acquiring firm, the merger may have little effect on competition*."[38]

52. As set out above, on the basis of the evidence put before it, the CMA provisionally concluded that it could not exclude the possibility that had the Guildford RPU ceased to supply FDG-18, some of its customers would have transferred their purchases of FDG-18 to PETNET and some to Alliance.[39] Therefore the CMA is unable to conclude that Alliance would have acquired the market share (derived from the merger) if IBA were forced out of the market.

53. The CMA do not appear to have properly concluded on part of the counterfactual analysis as it has been unable to fully "foresee future developments" in the market as required by the Guidelines and the Stagecoach decision.

What is the result of the exit of the firm and its assets? Are the effects substantially less anti-competitive outcome than the merger?

54. The CMA reasoned that, in the absence of the merger or the acquisition of IBA's PET business by another party, SK Capital would have chosen to cease to operate the Guildford site.[40]

55. The CMA therefore concluded the most likely counterfactual scenario was that the IBA operation would have exited the market and that there was no likely alternative purchaser that would have produced a better outcome for competition.[41] As set out

[37] Judgment paragraph 115
[38] The Guidelines paragraph 4.3.18
[39] Provisional Findings paragraph 5.76-5.77
[40] Provisional Findings paragraph 5.36
[41] Provisional Findings paragraph 5.62

above, the evidence supporting the provisional finding that there would not have been an alternative purchaser of IBA's assets seems to be based on a lack of evidence.

56. The CMA provisionally concluded that PETNET was a strong competitor for the Guildford customers in the event that Guildford ceased to supply FDG-18. PETNET also considered whether it had enough spare capacity to be able to supply them.[42] Therefore the CMA is unable to conclude that Alliance would have acquired the market share (derived from the merger) if IBA were forced out of the market.

57. The CMA went on to say that it may also be the case that other customers may attach some value to the fact that in future tenders they may be able to source FDG-18 from one additional site, compared with the counterfactual scenario.[43] The CMA did not consult any of the stakeholders in the market to determine whether this was the case.

58. The CMA does not address the fact that the redistribution of assets to existing market participants may actually be better for competition than selling the assets to a single market participant. The CMA did not SK Capital's disinterest in restructuring IBA, nor challenged its decision not to. The CMA did not consider restructuring counterfactual. The CMA have ignored the additional commercial implications that result from the merger.

59. In light of the fact that the CMA found that SK Capital would have either mothballed or decommissioned its Guildford site under the counterfactual, the CMA considered that none of the points made raised by InHealth and other parties were merger specific (i.e. in both the counterfactual situation and following the merger situation, the IBA operation will not be an independent supplier of FDG), and that the merger is therefore unlikely to give rise to vertical effects. The CMA considered that any vertical effects in the supply of FDG would have been a product of horizontal effects in the supply of FDG. The fact that the CMA have not found vertical effects was therefore found to be consistent with the fact that the CMA have not found any horizontal effects.[44] InHealth does not agree that the competitive structure resulting from the concentration would deteriorate in a similar function even if the concentration did not proceed.[45] InHealth's concerns with respect to vertical foreclosure are directly linked to the CMA clearing the merger.

[42] Provisional Findings paragraph 5.36
[43] Provisional Findings paragraph 6.8
[44] Provisional Findings paragraph 6.30
[45] French Republic and others v Commission C-68/94 and 30/95 Court of Justice [1998] ECR I-1375 paragraph 115

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Conclusions

60. InHealth in its submissions, was concerned about the analysis of the counterfactual. In its analysis above, InHealth has set out where it considers that the CMA's provisional findings are at odds with the established approach (as set out in the case law) with respect to the exiting firm defence.

61. In particular, InHealth is concerned at the seemingly new and liberal view that the CMA appear to have adopted and its provisional findings that rely on points that are, ultimately, driven by a lack of evidence, not a positive evidential picture. The gaps in the evidence are in key areas products of the merging parties own decisions. The scope for their incentives to obtain clearance to skew the evidential picture make it more important that the CMA make every effort to find other ways to calibrate that picture and to avoid allowing parties to obtain a benefit (in terms of the outcome) that is driven by their own failure to act in ways that would give the CMA the evidence it needs to assess the merger.

62. Most significant of these decisions are the decision not to market the business – with the CMA now discounting InHealth and others as plausible buyers on the basis that those prospective buyers have not been able to produce evidence of their plausibility.

63. The CMA's provisional findings seem to be based in large part on the evidence of the merging parties, and could benefit from further detailed analysis (as required by the Guidelines) to determine the validity of the assertions made. This has meant that when determining the counterfactual for this merger, the CMA has not considered the appropriate parameters and ultimately come to a provisional view that is, in InHealth's view, incorrect.

64. In particular, InHealth notes that the CMA have not considered the full impact of the following in its provisional findings:

    a) What would have happened if IBA had actually been restructured?

    b) Could IBA have been restructured and whether it would have been able to win back business as part of the current national tender process? Under the current scenario, IBA has missed a considerably profitable opportunity, especially when considering that InHealth may have considered helping the business in the short term while it worked on its business model;

    c) If IBA had been marketed appropriately, whether other parties would have contemplated buying the business with better outcomes for competition?

    d) What would have happened to IBA's contracts if it exited the market? The CMA did not reach a conclusion on this, meaning that it remains possible (and in InHealth's view, likely) that even if exit was inevitable, an effect on competition fails to be assessed.

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65. InHealth asks the CMA to amend the provisional findings to take these points into account.