COMPETITION APPEAL TRIBUNAL

NOTICE OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE NO. 1228/6/12/14

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the "Rules"), the Registrar gives notice of the receipt on 30 May 2014 of an application for review under section 179 of the Enterprise Act 2002 (the "Act"), by AXA PPP Healthcare Limited (the "Applicant") of certain decisions of the Competition and Markets Authority (the "CMA") contained in a report published on 2 April 2014 entitled "Private healthcare market investigation: Final report" (the "Final Report"). The Applicant is represented by Linklaters LLP, One Silk Street, London EC2Y 8HQ (ref.: Simon Pritchard).

The Applicant is the second-largest private medical insurer ("PMI") in the UK, offering a range of healthcare insurance products to corporate and individual customers.

According to the Notice of Application, the CMA found, in the Final Report, that:

(i) *Private hospitals in central London*: central London was a separate geographic market for private hospitals, featuring high barriers to entry and expansion and weak competitive constraints. The CMA concluded that these features in combination gave rise to adverse effects on competition ("AECs"). These allowed HCA International Limited ("HCA") to exercise market power. To address these AECs in central London, the CMA proposed a package of remedies with four elements, which included: (a) the divestiture by HCA of either the London Bridge and the Princess Grace Hospitals, or the Wellington Hospital and the Wellington Platinum Medical Centre (the "PMC"); and (b) measures to ensure that arrangements between NHS trusts and private hospital operators to operate or manage a private patient unit ("PPU") will be capable of review by the CMA, which will be able to prohibit arrangements that substantially lessen competition in the relevant local area.

(ii) *Anaesthetists and other consultant groups*: some consultants – in particular anaesthetists – belonged to groups that had large local market shares and engaged in the collective setting of prices among their members. The CMA conducted various price analyses of anaesthetist groups and concluded that: (a) it did not find that the formation of anaesthetist groups or other consultant groups in general had a widespread adverse effect on competition across many local areas; and (b) it did not find that the formation of any individual anaesthetist group or other consultant group adversely affects competition in any local market.

The Applicant submits that the CMA's conclusions in relation to both private hospitals in central London and consultant groups were flawed on five grounds, which are summarised below.

(i) *Ground 1*: The CMA observed that even following divestiture of either the London Bridge and the Princess Grace, or the Wellington and the PMC, HCA would still retain a relatively high market share in oncology, which is a key component of the bundle of services over

which hospital operators and PMIs bargain. The CMA nevertheless concluded that the divestitures would be effective in achieving its aim, and considered that additional divestitures would be disproportionate and/or ineffective. The Applicant contends that the CMA's reasoning in support of these conclusions was inadequate in multiple respects and that it failed to take into account relevant considerations.

(ii) *Ground 2*: By limiting the PPU review remedy to future PPU arrangements, the CMA has excluded HCA's existing contract for a PPU at Guy's and St Thomas' NHS Healthcare Trust ("GST"), scheduled to open in 2016. The Applicant contends that this was irrational and represented a failure to take account of relevant considerations.

(iii) *Ground 3*: The Applicant argues that the CMA erred in its approach to the AEC test by taking the view that the combination of large local market shares and collective price-setting by anaesthetist groups did not give rise to a *prima facie* case or presumption of an AEC. A collective agreement to set common prices, between anaesthetists who would otherwise be setting prices individually and who collectively have a persistently high (in several cases, near-monopoly) market share, *prima facie* "prevents, restricts or distorts competition" within the meaning of section 134 of the Act.

(iv) *Ground 4*: The Applicant argues that the CMA's assessment of the overall evidence on anaesthetist groups was in any event irrational – as was its decision not to investigate the issue further. Far from showing a mixed picture (as the Final Report claims), the price analyses taken in conjunction with other relevant evidence already before the CMA points towards the conclusion that certain anaesthetist groups give rise to AECs. This conclusion is also reinforced, says the Applicant, by other relevant evidence (which the CMA ignored) about the effect of anaesthetist groups on competition.

(v) *Ground 5*: The Office of Fair Trading's terms of reference required the CMA to "investigate the various facets of the privately-funded healthcare sector". Those included the question of whether AECs arose at the consultant level. Having embarked upon that investigation under the Act, the CMA was then required to reach an informed decision as to whether there were AECs. The Applicant argues that it was not open to the CMA to decide not to investigate that issue fully and instead to conclude that the evidence did not show AECs.

By way of relief, the Applicant asks the Tribunal make an order that:

1. those passages of the Final Report that address the scope of the remedies required to address the AEC in relation to HCA's position in oncology in central London and/or the inapplicability of the PPU review remedy to the GST PPU be quashed;

2. those passages of the Final Report that address the assessment of anaesthetist consultant groups be quashed;

3. the matters referred to in 1 and 2 above be remitted to the CMA for reconsideration; and

4. the CMA pay the Applicant's costs of its application for review.

Any person who considers that he has sufficient interest in the outcome of proceedings may make a request for permission to intervene in the proceedings in accordance with rule 16 of the

Rules. Any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribinal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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