

***Case No COMP/M.4367 -
APW / APSA / NORDIC
CAPITAL / CAPIO***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(2) NON-OPPOSITION
Date: 16/03/2007

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.03.2007

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) AND 6(2)
DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No COMP/M.4367 – APW/ Nordic Capital/ APSA/ Capio
Notification of 26 January 2007 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 26 January 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the Merger Regulation) under which Apax Partners Worldwide LLP (“APW”) acquires, together with Nordic Capital Fund VI (“Nordic Capital”) and Apax Partners SA (“APSA”), joint control over Capio AB (“Capio”).

I. THE PARTIES

2. APW is a UK limited liability partnership which provides investment management and investment advisory services to private equity funds investing primarily in Europe in a range of industry sectors. APW currently controls amongst others General Healthcare Group Limited (“GHG”), a provider of private healthcare services in the UK² and Mölnlycke Healthcare (“MHC”)³, a provider of amongst others surgical and wound care products to the professional healthcare sector. APW recently agreed to sell MHC to a consortium consisting of Cator Holding AB, Investor AB and Morgan Stanley Principal Investments, Inc. A sales and purchase agreement has been concluded on 25 January 2007⁴

¹ OJ L 24, 29.1.2004 p. 1.

² See Case M.4229 APHL/ Netcare/ General Healthcare Group.

³ Case M. 3816 Apax/Mölnlycke.

⁴ The transaction has been notified to the Commission on 20 February 2007 and has been registered as Case M. 4579 Investor/ Morgan Stanly/Mölnlycke.

3. Nordic Capital, part of the Nordic Capital Group, is a Jersey-based private equity firm focussing its investments mainly on the Nordic region. Nordic Capital has amongst others shareholdings in pharmaceutical companies such as Nycomed and - through Nycomed⁵ - Altana Pharma AG (“Altana”), as well as Unomedical, a supplier of sterile single use medical devices and Atos Medical, a manufacturer of ear, nose and throat medical devices.
4. APSA is a French provider of investment management and investment advisory services to private equity funds investing in a range of industry sectors, primarily in France. Amongst others, APSA has joint control over the French hospital chain Vedici.
5. Capiro is a Swedish provider of healthcare services for both public and private customers via its acute private hospitals, diagnostic centres and private psychiatric hospitals. It provides its services in a wide range of EEA Member States.

II. THE OPERATION

6. The operation consists of a public bid for Capiro by the parties, based on a joint bid agreement signed on 31 August 2006 and amended on 4 October 2006. The parties acquired the shares in Capiro using an acquisition vehicle, Opica AB, [...].

III. CONCENTRATION

7. Pursuant to a shareholders agreement of 31 August 2006, the board of Capiro consists of seven directors, [...]. Each of APW, Nordic Capital and APSA will however obtain veto rights concerning specific strategic decisions concerning Capiro (e.g. the adoption of the business plan, changes in the board⁶). The transaction therefore leads to the acquisition of joint control by APW, Nordic Capital and APSA, within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004.

IV. COMMUNITY DIMENSION

8. The combined aggregate worldwide turnover of the undertakings concerned is more than EUR 5 billion (APW EUR [...] billion, Nordic Capital EUR [...] billion, APSA EUR [...] billion, Capiro EUR [...] billion). The aggregate Community-wide turnover of each of the undertakings concerned is more than EUR 250 million (APW EUR [...] billion, Nordic Capital EUR [...] billion, APSA [...] EUR billion). Only APSA achieved more than two-thirds of its Community-wide turnover⁷ in one and the same Member State. The operation has therefore a Community dimension.

V. RELEVANT MARKETS

⁵ Case M. 4418 Nycomed Group / Altana Pharma.

⁶ [...].

⁷ References to market shares and turnovers all refer to the year 2005 unless specifically stated otherwise.

A. Relevant product markets

9. The notified transaction results in horizontally affected markets in the UK. It concerns the overlaps between Capio and APW's portfolio company GHG on the markets for private acute general hospitals and on the market for PPHO (public/private healthcare outsourcing services).
10. The vertically affected markets are linked to the activities of APW portfolio company MHC and Nordic Capital portfolio companies, Nycomed, Altana, Unomedical and Atos Medical, which are active upstream as suppliers of a wide variety of medical supplies (medical products and pharmaceutical products) to hospitals and providers of medical services downstream, such as Capio. The geographic markets concerned are the EEA⁸, Norway, Sweden, France, Spain, Germany and the UK.

A.1 Horizontal overlap: downstream markets

A.1.1. Market for private acute general hospitals

11. The parties submit that there is a market for private acute general hospitals, or, alternatively, a combined market for private/public acute general hospitals. According to the parties, it varies per Member State whether separate product markets can be identified. This view is largely confirmed by the market investigation and reflects the differences in the organisation of the national health care systems and the regulatory environments in the individual Member States. There is however a number of differences between private and public health care services. Whereas private healthcare is paid for by the patient, usually through insurance with a private medical insurer operating on a national basis, public healthcare is generally partly or entirely funded through taxation and requires either a limited contribution of the patient or is offered for free, at the point of service delivery. Private acute hospitals also differentiate themselves from public acute hospitals in terms of the overall patient experience, waiting lists, clinical outcomes and physical comfort.
12. Considering the fact that the situation concerning acute general hospitals may vary per Member State the definition of the relevant product market can be left open in the present case, since in all alternative definitions considered, effective competition is not significantly impeded in the EEA or any substantial part of that area, except for the UK.
13. As for the UK, the transaction does raise serious competition concerns, namely in relation to the market for private acute general hospitals. On this UK market, private acute general hospitals play an important role and respond to a specific demand for such services which is different from the demand for public acute general hospitals. This was confirmed by the market investigation. Therefore, there are good reasons to define a separate market for private acute general hospitals for the UK.

A.1.2 Market for PPHO activities

⁸ Depending on the product and the definition of the related geographic market

14. In a number of Member States, Capiro is active as a provider of healthcare services under contract with the national public healthcare provider (PPHO services), i.e. the UK, Sweden, Norway, Denmark and Spain.
15. The purchase of PPHO services by the public healthcare authority from the private healthcare provider is often based on a tender procedure or public procurement procedure and can therefore, according to the parties, be distinguished from the provision of private healthcare services procured by patients themselves or their healthcare insurers. In a previous Decision, the Commission distinguished a market for the supply of PPHO services in relation to the UK, where such services are provided in the context of the NHS procurement programmes (Independent Sector Treatment Centres (“ISTCs”)) in which both Capiro and GHG are active. However, it left the market definition open⁹. The market investigation largely confirmed the identification of a separate product market for PPHO services. In any event in the present case, the market definition can be left open, since in all alternative definitions considered, effective competition is not significantly impeded in the EEA or any substantial part of that area.

A.2 Vertical overlap: upstream markets

16. The notified transaction leads to a large number of vertically affected markets. These markets concern the relationship between the private acute general hospitals chain Capiro, downstream, and the providers of medical supplies upstream (MHC, Nycomed, Altana, Unomedical and Atos Medical).
17. The vertically affected upstream markets can be split in five major groups of product markets: i) surgical products, ii) wound care products, iii) pharmaceutical products, iv) sterile single-use medical devices and v) ear, nose, throat medical devices.

A.2.1 Surgical products

18. APW, through MHC is active in a number of markets upstream from Capiro's activities. MHC is a supplier of surgical products. In previous decisions the Commission has split the market for surgical products in a number of sub-markets. In the present case, this split results in vertically affected markets for surgical textiles, surgical gloves and antiseptics¹⁰.
19. The market for surgical textiles may be split in further sub-markets. In the present case this would result in vertically affected markets for drapes, gowns, caps, masks, swabs, and scrub suits. Each of these sub-markets could be split in single use and multiple use versions of these products¹¹.

⁹ Case M. 4229 APHL/ Netcare/ General Healthcare Group.

¹⁰ Case No COMP/M.3816 - Apax/Mölnlycke.

¹¹ Case M.3816 Apax/Mölnlycke.

20. In relation to the market for surgical gloves a further distinction has been considered between powdered, un-powdered and synthetic gloves¹².

A.2.2 Wound care products

21. MHC is also a large supplier of wound care products. In previous Commission decisions¹³ separate product markets have been defined for traditional wound care products and advanced wound care products.
22. Traditional wound care products include wound care products like surgical dressings, fixation products and swabs.
23. The market for advanced wound care products is to be split in sub-markets, one of which is the market for moist wound care products. This vertically affected market could be split in further sub-markets. In the present case this would result in vertically affected markets for foam dressings, contact layers and scar care dressings.

A.2.3 Pharmaceutical products

24. Nordic Capital, through Nycomed and Altana, is active in a number of markets upstream from Capiro's activities. Both Nycomed and Altana are suppliers of pharmaceutical products.
25. In previous Commission Decisions¹⁴ the Commission identified relevant product markets in the pharmaceutical industry using as a starting point the Anatomical Therapeutic Classifications (“ATC”) devised by the European Pharmaceutical Marketing Research Association (“EphMRA”). It considered that the third level of the ATC classification allows medicines to be grouped in terms of their therapeutic indications and can therefore be used as an operational starting point for market definition¹⁵. However, the Commission has also recognized that in certain cases it may be necessary to analyse pharmaceutical products at a higher, lower or mixed level or to further subdivide the ATC 3 classes on the basis of demand-related criteria.
26. The Commission has in the past¹⁶, where it was possible and relevant, further subdivided pharmaceutical products into separate markets for OTC pharmaceuticals (pharmaceutical products which can be sold over the counter as opposed to

¹² Case M. 3816 Apax/Mölnlycke.

¹³ Cases M. 3816 Apax/Mölnlycke and JV 54 Smith & Nephew/Beiersdorf.

¹⁴ Cases M. 1846 Glaxo Wellcome/ Smithkline Beecham and M. 3493 Yamanouchi/ Fujisawa.

¹⁵ Case IV/M.1378 Hoechst/Rhône Poulenc; Case COMP/M.1835 Monsanto/Pharmacia & Upjohn; Case COMP/M.1846 Glaxo Wellcome/SmithKline Beecham and Case COMP/M.1878 Pfizer/Warner-Lambert.

¹⁶ Case COMP/M.3751 Novartis/Hexal; Case COMP/M.4007 Reckitt Benckiser/Boots Healthcare International.

prescription) due to differences in their accessibility for patients, medical indications, legal framework, marketing and distribution.

27. On the basis of the "ATC 3" classification, in the present case the following vertically affected markets may be identified: A2B anti-ulcerants, A3A antispasmodics-anticholinergics, A3F gastroprokinetic drugs, A7G oral electrolyte replacers, A11E vitamine B complex, A11F plain vitamine B12, A11G vitamine C, A11X other vitamins, A12A calcium products, A12B potassium, A12C other mineral supplements, A13A tonics, B1A vitamin K antagonists, B1E direct thrombin inhibitors, B2A anti-fibrinolytics, B2F tissue healing preparations, C1A cardiac glycosides and combinations, C2A anti hypertension drugs, C5A topical anti-haemorrhoidal drugs, D10A topical anti-acne preparations, D11A other dermatological products, H2A plain corticosteroids, H3A thyroid preparations, K1F osmotic therapy solutions, M4A anti-gout preparations, R3B xanthines, R5C expectorants, R5D anti-tussives, R7C lung surfactants, S1A ophtalmological anti-infectives and T1A low osmolar angio-urography agents and T1F ultrasound agents. There is no need to further examine whether it is necessary to further subdivide these categories on the basis of demand-related criteria,¹⁷ as the competitive assessment would remain unaffected.

A.2.4 Sterile single use medical devices

28. Nordic Capital portfolio company Unomedical is active upstream from Capio in the field of sterile single use medical devices. In line with previous Commission Decisions this product group can be split in a number of sub-markets¹⁸. In the present case such a split results in vertically affected markets for PVC urology catheters, urine meters, open suction catheters, oxygen therapy devices, wound drainage systems, gastro feeding tubes and ECG electrodes.

A.2.5 Ear, nose, throat medical devices

29. Nordic Capital portfolio company Atos Medical, is active upstream as a supplier of ear, nose, and throat medical devices. The parties submit that this product group can be split in several sub-markets. The vertically affected sub-markets would consist of the markets for ventilation tubes, middle ear implants, voice protheses and heat and moisture exchangers. No relevant Commission precedents exist in relation to this product group. The market investigation confirmed however the product markets identified by the parties.

A.2.6 Customer segmentation

30. In previous cases the Commission considered that a distinction could be made between two types of customers of medical supplies, i.e. hospitals on the one hand and community users (i.e. wholesalers, prescribers and recommenders) on the other hand. Such a distinction would reflect the differences in the competitive conditions

¹⁷ See, for example, as regards A2B, Case COMP/M. 4418 Nycomed/Altana.

¹⁸ Cases M. 2505 Tyco/ CR Bard and M. 2074 Tyco Mallinckrodt.

and in price between both customer groups¹⁹. This distinction would however not apply to, for instance, surgical products and all submarkets thereof which, by their nature, are essentially for use in hospitals only. Ultimately, the Commission left it open whether this distinction between the types of customers should lead to separate markets.

31. The majority of the respondents to the market investigation considered that a distinction between the two segments is justified. Amongst others, reference was made to differences in prices and product presentation (bigger product packages in case of sales to hospitals) and discount and price reduction systems which are applied in relation to community customers.

A.2.7 Conclusion on the upstream vertically affected product markets

32. For the purpose of this case, the definition of the relevant product markets can be left open, since in all alternative definitions considered, effective competition is not significantly impeded in the EEA or any substantial part of that area.

B. Relevant geographic markets

B.1 Downstream markets

B.1.1 Private acute general hospital services

33. The parties submit that the geographic market for private and/or public acute general hospital services is at best national but possibly narrower, depending on the particular competition issue one focuses on. Whereas, in relation to private medical insurers, the market is more likely to be national, from a patient's perspective the market has more local and regional elements. In addition, the differences in national health care regimes, may also affect the delineation of the geographic market. In previous cases the Commission has left it open as regards the UK whether the relevant geographic market should be defined as national or as regional/local²⁰.
34. From the perspective of the patients, the markets are local as most patients do not travel far for their treatment. This would seem different only in case of specific specialised treatment or treatment for which long waiting lists exist. In the UK, competition on these local markets is considered to take place in areas extending to a 30-minute drive in each direction starting from any one hospital (a so-called "isocrone")²¹.
35. If however one would focus on the relationship between private acute general hospitals and the private medical insurers, one could argue, as has been considered in the UK, that the nationally operating private acute hospitals which are part of a chain

¹⁹ Case M. 3816 Apax/Mölnlycke.

²⁰ Case M. 4229 APhL/ Netcare/General Healthcare Group.

²¹ See the decision by the UK Competition Commission of December 2000 in BUPA/Community Hospitals Group Plc.

of hospitals primarily operate on a national market as their price negotiations with the private medical insurers take place on a national basis²². The private medical insurers however also confirm that from their perspective the market may have local or regional aspects, as private acute general hospitals may be able to leverage their strong position on certain local markets in the negotiations of their national agreements with insurers.

36. In any event, the analysis of the competitive situation does not depend on either view, since, as regards the UK, under either delineation of the geographic market concerned competition concerns would be likely to be identified.

B.1.2. Market for PPHO activities

37. The parties submit that the relevant geographic market for PPHO activities is at best national and possibly regional/local in scope. This is in line with previous decisions by the Commission²³, which left the market definition open. The market investigation confirmed that while it is true that large national or international companies submit bids for these PPHO contracts, in particular in relation to the UK market, the PPHO market may also have local elements, in situations where the contracts that are put out to tender specify a specific region in which the services must be delivered.
38. For the purpose of this case, the definition of the relevant geographic market can be left open, since in all alternative definitions considered, effective competition is not significantly impeded in the EEA or any substantial part of that area.

B.2 Upstream Markets

39. In relation to the vertically affected upstream markets the following geographic market definitions can be identified

B.2.1 Surgical products

40. The parties agree with the conclusion of the Commission in previous cases²⁴ that the geographic market for surgical products is EEA-wide. This also applies to the vertically affected sub-markets in the present case. Surgical products are regulated by European standards and price levels are similar across the EEA. There are no significant barriers to trade in surgical products within the EEA (except transportation costs in some occasions) whereas the main suppliers are active throughout the area. Only with respect to one category of surgical products, i.e. antiseptics, the Commission has defined the geographic market as national in scope²⁵.

²² UK Competition Commission, December 2000 in BUPA/ Community Hospitals Group Plc. It considered that the relevant geographic market could be defined as national, regional or local depending on the particular competition issue.

²³ Case M. 4229 APhL/ Netcare/General Healthcare Group.

²⁴ Cases M. 1075 Nordic Capital/Mölnlycke and M. 3816 Apax/Mölnlycke.

²⁵ Case M. 4007 Reckitt Benckiser/Boots Healthcare international.

The geographic delineations of the above markets were confirmed by the market investigation.

B.2.2 Wound care products

41. The Commission has defined the market for traditional wound care products as national due to large discrepancies in the market shares of leading players between individual Member States, large price variations and customers' national sourcing and specifications²⁶. This also applies to the vertically affected sub-markets in the present case.
42. With respect to advanced wound care products the Commission left open whether this market, including possible sub-segments thereof are national or EEA-wide²⁷. On the one hand, the regulatory framework for advanced wound care products is similar across the EEA and leading suppliers market the same products all over the EEA. On the other hand, sales patterns vary between countries depending on awareness and penetration of advanced wound care techniques and reimbursement schemes. The results of the market investigation on this point are mixed. The majority of the respondents indicated that the markets for advanced wound care products were still national. However, some of the respondents indicated that these markets are becoming more EEA-wide due to, inter alia, the use of pan European tenders, cross border trade and the increasing presence of pan European or regional buyer groups.

B.2.3 Pharmaceutical products

43. The parties submit that the geographic product market for the vertically affected pharmaceutical markets is national. While the harmonization of technical legislation and marketing authorization proceedings at EU-level has contributed to the creation of an EU-wide market for pharmaceutical products, at this stage such a market is still imperfect. Variations between Member States in relation to price setting, conditions of reimbursement and channels of distribution mean that, geographically, the market for pharmaceutical products is still national in many respects. This is in line with previous decisions of the Commission²⁸.

B.2.4 Sterile single-use medical devices

44. The parties submit that the relevant geographic markets for the vertically affected markets for sterile single-use medical devices, i.e. the markets for PVC urology catheters, urine meters, open suction catheters, oxygen therapy devices, wound drainage systems, gastro feeding tubes and ECG electrodes is EEA wide. Nonetheless, the market shares of the different companies tend to vary significantly from one country to another, with some instances of players holding particularly important positions in certain countries and being less strong in others. There are also price

²⁶ Case JV 54 Smith&Nephew / Beiersdorf.

²⁷ Case M. 3816 Apax/Mölnlycke.

²⁸ E.g. Cases M. 1846 Glaxo Wellcome/Smithkline Beecham and M. 3493 Yamanouchi/Fujisawa.

differences between EEA countries for some products, which may be linked to the differences between national reimbursement schemes within the EEA, as well as to the impact that the specific features of the products used in the different countries have on prices.

B.2.5 Ear, nose, throat medical devices

45. In relation to the medical devices for ear, nose and throat the parties submit that the relevant geographic market is EEA wide. They refer in particular to the lack of regulatory barriers at a national level because of the Medical Devices Directive and the low transportation costs. However, on the other hand price differences may exist between the Member States. They are mainly a result of different reimbursement systems in different Member States. There are no relevant Commission precedents concerning this market.

B.2.6. Conclusion on the upstream vertically affected geographic markets

46. For the purpose of this case, the definition of the relevant geographic markets can be left open, since in all alternative definitions considered, effective competition is not significantly impeded in the EEA or any substantial part of that area.

VI. PRELIMINARY ASSESSMENT

1. Horizontally affected market

1.1 Market(s) for private acute general hospital services in the UK

47. On the UK market for private acute general hospital services the parties have a joint market share of [30-40]% (Capio [0-10]% and GHG [20-30]%). Their biggest competitors on the UK market are BUPA [10-20]% and Nuffield [10-20]%²⁹.
48. If one were to focus on the private acute general hospital chains which offer services all over the UK, the transaction would lead to a reduction of the number of nationally operating hospital chains from four to three. On such a national market the parties would have a combined market share of [40-50]%. In a previous national procedure, the UK's OFT considered that each of these private acute general hospital chains could be considered as practically indispensable trading partners for private medical insurers³⁰. The market investigation showed that in order to be attractive for customers, private medical insurers must offer products which offer a wide choice of access to hospitals. In practice this means that the private medical insurance product must be built around a core consisting of a private acute hospital group operating on a network basis, supplemented with other local independent hospitals to complete the offering. As, post-merger, there would be only three of such nationally operating chains of private acute general hospitals, private medical insurers would have little

²⁹ If one would look at a market including private and public acute hospitals the joint market shares of the parties would be significantly lower.

³⁰ See the press release of the OFT of 14 March 2001 concerning the proposed acquisition by GHG of the Community Hospitals Group (now part of the Capio group).

choice but to deal with the combined GHG Capiro chain. It was a general concern expressed by the private medical insurers responding to the market investigation that this circumstance would create a scope for a price increase post-merger.

49. The principal private medical insurers in the UK fear in particular that Capiro would increase its price level to the higher price level currently applied by GHG. Small providers like Capiro are usually more flexible in negotiations because they are more growth oriented. This incentive may disappear following the implementation of the transaction.
50. If one would look at the UK market on a regional/local level, defined on the basis of circles of a 30 minutes drive in each direction starting from any one hospital (isochrones), the transaction would result in significant horizontal overlaps. Out of the 21 private acute hospitals operated by Capiro in the UK there are seven hospitals active on individual regional local markets where Capiro and GHG would have a combined market share of more than [40-50]%. Ashtead/Surrey [40-50]% (Capiro [10-20]%, GHG [30-40]%), Euxton Hall/Lancashire [80-90]% (Capiro [40-50]%, GHG [40-50]%), Fulwood/Preston [60-70]% (Capiro [30-40]%, GHG [30-40]%), North Downs/Surrey [70-80]% (Capiro [20-30]%, GHG [50-60]%), Oaklands/Manchester [60-70]% (Capiro [0-10]%, GHG [50-60]%), West Midlands [90-100]% (Capiro [10-20]%, GHG [70-80]%), Woodland/Northamptonshire [90-100]% (Capiro [40-50]%, GHG [50-60]%).
51. Further, there are seven geographic markets where the circles representing the regional/local markets, where either Capiro or GHG are active, overlap and the parties have combined market shares of [40-50]% or more: Reading hospital [50-60]% (Capiro [0-10]%, GHG [50-60]%), New Hall/Wiltshire [50-60]% (Capiro [10-20]%, GHG [30-40]%), Park Hill/Yorkshire [90-100]% (Capiro [10-20]%, GHG [70-80]%), Renacres/Lancashire [60-70]% (Capiro [20-30]%, GHG [30-40]%), Rowley/Staffordshire [40-50]% (Capiro [0-10]%, GHG [30-40]%), Winfield/Gloucester [50-60]% (Capiro [20-30]%, GHG [20-30]%), Yorkshire [60-70]% (Capiro [10-20]%, GHG [40-50]%).
52. The above market shares form a strong indication that the transaction could also lead to a significant impediment of effective competition at local /regional level for both insured and self-pay patients. Considering that patients generally have a strong preference to obtain their medical services in their local area, the transaction will significantly reduce their choice in private acute general hospital services in those identified areas where GHG and Capiro have high joint market shares. For the reasons set out above, patients in these areas may also be faced with higher costs for their medical treatment, either because of an increase of the premiums for their private medical insurance or because of an increase in the hospital bills in case of self-pay patients.
53. The respondents to the market investigation identified another source for concern, being the fact that the increase in the number of local areas where the combination of GHG and Capiro faces almost no competition from alternative national private acute hospitals (around [20-30]% of all identifiable regions in the UK) would further increase their negotiating position at national level. As it is in the interest of the insurer to have as wide as possible coverage of the UK for its policy holders, the fear

was expressed that the parties would be able to leverage their strength in specific local/regional areas nationally to achieve higher prices and resist cost cutting initiatives from insurers. Alternatively, the parties could use their position to insist on exclusivity in geographic regions where they have a strong representation.

54. In conclusion, it follows from the market investigation that there are serious doubts that the proposed transaction would significantly impede effective competition on the market for private acute general hospitals on a national and regional/local level in the UK.

1.2 Market(s) for PPHOs (ISTC) in the UK

55. The only horizontally affected PPHO market concerns the UK. The UK government launched the first ISTC procurement phase to outsource certain elective surgery in 2003, followed by a second phase, which began in 2005 and which has been completed at the end of 2006. The only potential overlap between Capiro and GHG relates to phase two contracts that have not yet been awarded and for which they have both put in bids and future ISTC phases that have not yet been announced by the NHS.
56. In bidding markets, such as the ISTC markets, the Commission generally considers that, it is not the market shares of the parties that are central to the competition analysis but rather the question whether there are a sufficient number of credible, established competitors to guarantee competition for future contracts³¹. According to the parties, at least seven bidders can be identified, which have bid in most phase two contracts and can be expected to bid in future ISTC programme phases.
57. Considering that the bidding for the ISTC contracts ended in 2006, the transaction is not likely to affect competition in relation to such contracts, even if they have not yet been awarded. A competition concern could therefore only arise in relation to future ISTC contracts. Currently, it is not clear when such further contracts will be tendered. However even if such ISTC contracts will come up for tender it is not clear whether the transaction will raise competition concerns, as many nationally and internationally undertakings could be expected to take part in the bidding process. Even if GHG and Capiro would stop bidding against each other, sufficient competition would remain. This would be different only if the tendering conditions would require a pre-existing local presence of the potential bidders. These views were largely confirmed by the market investigation.
58. However, for the purpose of this decision it can be left open, whether such a situation is likely to occur, as the parties have submitted commitments in relation to the UK market which also remove any possible competition concerns in this respect.

2. Vertical overlaps

59. The transaction results in vertically affected markets in the UK, Sweden, Norway, France, Spain and Germany. In these countries there are vertical links between the

³¹ Case M. 2139 Bombardier/Adtranz.

upstream activities of the APW and Nordic Capital portfolio companies MHC, Nycomed, Altana, Unomedical and Atos Medical concerning the supply of medical products and the downstream activities of Capiro as purchasers of such products.

60. The parties have on many of the identified vertical markets significant market shares of well over 40%.. On these markets there is no horizontal overlap in the activities of the parties. The parties submit that their sometimes high market shares will not entail a risk of customer or input foreclosure³².

2.1 Customer foreclosure

61. For customer foreclosure to be an issue in this case it would be necessary that a decision by Capiro to cover all its requirements for medical supplies with the products supplied by MHC, Nycomed, Altana, Unomedical and Atos Medical, would significantly reduce the potential customer base for competing suppliers of medical products. However, this is highly unlikely considering Capiro's demand for these products on the respective national or EEA market (depending on the product concerned) only represents a tiny part³³ of the overall demand for these products. This implies that the parties would lack the ability to foreclose. Suppliers of medical products sell the bulk of their products to public health care providers, and only a relatively small part to private acute general hospitals such as Capiro. In addition, certain medical supplies are predominantly sold outside the hospital environment. This would in particular apply to the pharmaceutical products of Nycomed and Altana. Considering that the parties lack the ability to foreclose there is no need to look at the incentives they may have to adopt such a strategy, or to look at the effects which such strategy may have.
62. The market investigation provided strong support for the parties' submission that customer foreclosure is not a concern in the present case.

2.2 Input foreclosure

63. For input foreclosure to be an issue in the present case, it would be necessary that a decision by MHC, Nycomed, Altana, Unomedical and Atos Medical to solely supply Capiro, or to provide it with more favourable trading conditions than Capiro's competitors, would have a significant effect on the ability of Capiro's competitors to compete downstream on the market for private acute general hospitals.
64. Such a significant effect can only be brought about if the medical supplies concerned constitute an important input for the private acute general hospitals. This would for instance be the case if the medical supplies would represent a significant cost factor for the hospitals, which is not the case. This is illustrated by the fact that the total value of the purchases by Capiro of the products of MHC, Nycomed, Altana, Unomedical and

³² It should be noted that APW is in the process of selling MHC (see footnote 4) which represents a significant number of vertically affected markets.

³³ On the market for the sales to hospitals alone Capiro's demand represents less than [0-10]% of total demand. If one would also include the demand for these products from the community users this figure would be even lower.

Atos Medical which are covered by the vertically affected markets only represents a very small part of its total expenditures³⁴. Even if the medical supplies concerned would constitute a key input for some of the medical activities of private acute general hospitals, input foreclosure is not likely to be a concern. In spite of the sometimes high market shares of the portfolio companies of the parties, in most cases, competing products from internationally operating competitors are readily available on the market. Even in cases, where a very narrow market definition would suggest that no substitutable products would be available on certain national markets, the parties submit that there would be no input foreclosure concerns, as the products at issue may also be available from wholesalers operating on such markets.

65. However, even if the parties would have the ability to foreclose, they would lack the incentive to foreclose. It would go against their commercial interest to stop supplying Capiro's competitors, or to charge them less favourable terms, in view of the insignificant part which Capiro's demand represents for their total sales³⁵. The possible drop in revenue resulting from such a foreclosure strategy would not be outweighed by the competitive advantage Capiro may gain over its competitors as result of such a strategy.
66. Should the parties nonetheless apply a foreclosure strategy vis à vis Capiro's competitors, this would only be an issue if such a strategy would be capable to significantly impede competition on the downstream market. As explained, the total value of the purchases by Capiro of the products of MHC, Nycomed, Altana, Unomedical and Atos Medical which are covered by the vertically affected markets represents only a very small part of its total expenditures³⁶. There is no reason to believe that this situation would be substantially different for Capiro's competitors, which implies that the application of less favourable commercial terms for the purchase of the medical supplies concerned, would only provide Capiro with an insignificant cost advantage over its competitors. This is confirmed by the market investigation. Most of Capiro's competitors which responded to the market investigation considered that input foreclosure was not a concern.
67. In view of the above it can be concluded that the vertical overlaps in this case are not of such a nature as to seriously reduce effective competition on the national or EEA markets concerned.

VII. COMMITMENTS SUBMITTED BY THE PARTIES

Description of the commitments

68. In order to remove the serious doubts identified in this decision, the parties have submitted on 26 January 2007, i.e. the date of notification, commitments pursuant to Article 6(2) of the Merger Regulation. Modified commitments were submitted on 23 February 2007. A consolidated version of the modified commitments was submitted

³⁴ On average less than [0-10]%.

³⁵ On average less than [0-10]%.

³⁶ On average less than [0-10]%.

on 12 March 2007. The commitments are attached to this decision and form an integral part thereof.

69. As a remedy to the identified concerns the parties propose to divest:
- i) the entire share capital in Capiro Holdings Plc, the holding company of the following operational businesses carried out by Capiro in the UK: all private acute general hospitals, the NHS Independent Sector Treatment Centres ("ISTC"), the Capiro Eye Hospital, the two pathology laboratories at the Capiro Reading Hospital and the Capiro Yorkshire Clinic, the MRI unit at the Capiro Rivers Hospital, certain Transfusion Management Services and six mobile radiology units (together referred to as the "OpCo Divestment Business"); and
 - ii) the entire share capital in UK Capiro Healthcare Properties Ltd, a distinct property owning group within the Capiro group holding Capiro's UK freehold properties (referred to as the "PropCo Divestment Business").
70. [...] the PropCo Divestment Business and the OpCo Divestment Business [...] divested as two distinct going concerns, [...]. [...] the Commission, without being bound by but taking into account information from and the specialist advice of the Monitoring Trustee, [...] the terms of the lease agreements between the PropCo Divestment Business and the OpCo Divestment Business [...] in line with market conditions [...].

VII. ASSESSMENT OF THE COMMITMENTS

71. The commitments eliminate the entire overlap in the UK market for private acute general hospitals and are thus prima facie capable of removing the competition concerns identified in this decision.
72. The market test of the commitments focussed amongst others on the viability of the divested businesses, in particular in view of the preference expressed by the parties to sell the Opco Divestment Business and the Propco Divestment business separately and possibly to different purchasers.
73. The replies of Capiro's competitors and private medical insurers were to a large extent positive and confirmed that the divestiture of the Opco and Propco Divestment Businesses would remove the competition concerns raised by the transaction.
74. Most of the comments focused on the commitment to split Capiro UK's operational business from its property business and the likelihood that both businesses will be sold to different purchasers. [...] the respondents did not oppose the proposed split as such, [...].
75. [...].
76. In view of these concerns the parties submitted on 23 February 2007 modified commitments.
77. The modified commitments take away the concerns which were expressed by the respondents to the market test. [...]

78. [...]

79. On the basis of the market test and taking into account the modifications of the proposed commitments and the existence of suitable potential purchasers, it can be concluded that the commitments proposed by the parties clearly remove the identified serious doubts.

VIII. CONDITIONS AND OBLIGATIONS

80. In order to ensure that the parties comply with these commitments, the Commission attaches conditions and obligations to this decision. The commitments set out in Section B of the text of the commitments and Schedule 1 and 2 of the commitments annexed to the present decision constitute conditions, since only by fulfilling them may the structural change on the relevant markets be achieved so as to eliminate the serious doubts identified by the Commission. The other parts of the commitments constitute obligations, since they concern the implementing steps necessary to achieve the structural change intended to eliminate the serious doubts identified by the Commission.

IX. CONCLUSION

81. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to full compliance with the commitments submitted by the parties. This decision is adopted in application of Articles 6(1)(b) and 6(2) of the Merger Regulation.

For the Commission
signed
Neelie KROES
Member of the Commission

Case M. 4367 - Capio / APW / Nordic Capital / APAX France

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EEC) No. 139/2004 as amended (the "**Merger Regulation**"), Apax Partners Worldwide LLP ("**APW**"), Nordic Capital Fund VI ("**Nordic Capital**") and Apax Partners SA ("**Apax France**" or "**APSA**"; together referred to as the "**Parties**" as further described below) hereby provide the following Commitments (the "**Commitments**") in order to enable the European Commission (the "**Commission**") to declare the acquisition of joint control of Capio AB (publ) ("**Capio**") by APW, Nordic Capital and Apax France compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the "**Decision**").

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under the Merger Regulation.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by APW, Nordic Capital and/or APSA, including Capio, and/or by the ultimate parents of APW, Nordic Capital and/or APSA, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Notice on the concept of concentration under the Merger Regulation.

Assets: all tangible and intangible assets, licences, permits and authorisations, contracts, leases, commitments and credit and other records of the Divestment Businesses listed or referred to in the Schedules.

Closing: the transfer of the legal title of the Divestment Businesses to the Purchasers.

Divestment Businesses: the two businesses which the Parties commit to divest as defined in Section B and the Schedules

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties and who has received from the Parties the exclusive mandate to sell the Divestment Businesses to Purchasers at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of [TEXT DELETED FOR CONFIDENTIALITY] months from the Effective Date.

Hold Separate Managers: the persons appointed by the Parties for the Divestment Businesses to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Businesses, as listed in the Schedules.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties, and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

Parties: APW, a limited liability partnership registered in the UK (England and Wales) with its registered office at 15 Portland Place, London W1B 1PT, UK; Nordic Capital, represented by Nordic Capital VI Limited, incorporated and duly registered under the laws of the Channel Islands, with its registered office at PO Box 87, 22 Grenville Street, St Helier, Jersey JE4 8PX and APSA, incorporated under the laws of France and duly registered in France, with its registered office at 45 Avenue Kléber, 75784 Paris, Cedex 16, France.

Personnel: all personnel currently employed by the Divestment Businesses including Key Personnel, staff seconded to the Divestment Businesses, shared personnel and any additional personnel as listed in the Schedules.

Purchaser(s): the entity/ies approved by the Commission as acquirer(s) of the Divestment Businesses in accordance with the criteria set out in Section D.

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: the period of [**TEXT DELETED FOR CONFIDENTIALITY**] months from the end of the First Divestiture Period within which the Divestiture Trustee shall have the irrevocable and exclusive mandate from the Parties to sell the Divestment Businesses.

Section B. The Divestment Businesses

Commitment to divest

1. In order to restore effective competition, the Parties commit to divest, or procure the divestiture of, the Divestment Businesses by the end of the Trustee Divestiture Period as two distinct going concerns to different Purchasers and on terms of sale approved by the Commission in accordance with the procedures described in paragraphs 15 and 15A. To carry out the divestiture, the Parties commit to find Purchasers and to enter into final binding sale and purchase agreements for the sale of the Divestment Businesses within the First Divestiture Period. If the Parties have not entered into such an agreement at the end of the First Divestiture Period, the Parties shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Businesses in accordance with the procedure described in paragraph 24 within the Trustee Divestiture Period.
2. The Parties shall be deemed to have complied with this Commitment if, (i) by the end of the Trustee Divestiture Period, the Parties have entered into final binding sale and purchase agreements, (ii) the Commission approves the Purchasers and the terms in accordance with the procedures described in paragraphs 15 and 15A and (iii) the Closing of the sale of the Divestment Businesses takes place within a period not exceeding [**TEXT DELETED FOR CONFIDENTIALITY**] months after the approval of the Purchasers and the terms of sale by the Commission.
3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Businesses, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Businesses is no longer necessary to render the proposed concentration compatible with the common market.
- 3A. [**TEXT DELETED FOR CONFIDENTIALITY**]

Structure and definition of the Divestment Businesses

4. The Divestment Businesses consist of the following:
 - (a) the entire share capital in **Capio Holdings Plc**, the holding company of the following operational businesses carried out by Capio in the UK: the private acute general hospitals, the NHS Independent Sector Treatment Centres ("**ISTC**"), the Capio Eye Hospital, the two pathology laboratories at the Capio Reading Hospital and the Capio Yorkshire Clinic, the MRI unit at the Capio Rivers Hospital, certain Transfusion Management Services and six mobile radiology units (together referred to as the "**OpCo Divestment Business**"). The legal and functional structure of the OpCo Divestment Business as operated to date is described in Schedule 1; and
 - (b) the entire share capital in **UK Capio Healthcare Properties Ltd**, a distinct property owning group within the Capio group holding Capio's UK freehold properties (referred to as the "**PropCo Divestment Business**"). The legal and functional structure of the PropCo Divestment Business as operated to date is described in Schedule 2.

The OpCo Divestment Business and the PropCo Divestment Business are referred to as the "**Divestment Businesses**".

Section C. Related commitments

Preservation of Viability, Marketability and Competitiveness

5. From the Effective Date until Closing, the Parties shall preserve the economic viability, marketability and competitiveness of the Divestment Businesses, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Businesses. In particular the Parties undertake:
 - (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Businesses or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Businesses;
 - (b) to make available sufficient resources for the development of the Divestment Businesses, on the basis and continuation of the existing business plans; and
 - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Businesses.

Hold-separate obligations of the Parties

6. The Parties commit, from the Effective Date until Closing, to keep the Divestment Businesses separate from any businesses it is retaining and to ensure that Key Personnel of the Divestment Businesses – including the Hold Separate Managers – have no involvement in any businesses retained and vice versa. The Parties shall also ensure that the Personnel do not report to any individual outside the Divestment Businesses.
7. Until Closing, the Parties shall assist the Monitoring Trustee in ensuring that the Divestment Businesses are managed as distinct and saleable entities separate from the businesses retained by the Parties. The Parties shall appoint Hold Separate Managers who shall be responsible for the management of the Divestment Businesses, under the supervision of the Monitoring Trustee. The Hold Separate Managers shall manage the Divestment Businesses independently and in the best interest of the Divestment Businesses with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.
8. To ensure that the Divestment Businesses are held and managed as separate entities and as going concerns in their best interest with a view to its sale, the Monitoring Trustee shall exercise the Parties' rights as shareholder in the Divestment Businesses (except for the right for dividends that are due before Closing), with the aim of acting in the best interest

of the Divestment Businesses, determined on a stand alone basis, as an independent financial investor, and with a view to fulfilling the Parties' obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non executive directors of the board of directors, who have been appointed on behalf of the Parties. Upon the request of the monitoring Trustee, the Parties shall resign as members of the boards or shall cause such members of the boards to resign.

Ring-fencing

9. The Parties shall implement all necessary measures to ensure that they do not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Businesses. In particular, the participation of the Divestment Businesses in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Businesses. The Parties may obtain information relating to the Divestment Businesses which is reasonably necessary for the divestiture of the Divestment Businesses or whose disclosure to the Parties is required by law.

Non-solicitation clause

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Personnel transferred with the Divestment Businesses for a period of two years after Closing.

Due Diligence

11. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Businesses, the Parties shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
 - (a) provide to potential purchasers sufficient information as regards the Divestment Businesses; and
 - (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

12. The Parties shall submit written reports in English on potential purchasers of the Divestment Businesses and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date **[TEXT DELETED FOR CONFIDENTIALITY]**.
13. The Parties shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchasers

14. In order to ensure the immediate restoration of effective competition, the Purchasers of each of the Divestment Businesses, in order to be approved by the Commission, must:
 - (a) be independent of and unconnected to the Parties;
 - (b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Businesses as viable and active competitive forces in competition with the Parties and other competitors;
 - (c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the

implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Businesses (the before-mentioned criteria for the Purchasers hereafter the "**Purchaser Requirements**").

15. The final binding sale and purchase agreements shall be conditional on the Commission's approval. When the Parties have reached an agreement with any purchasers, they shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. The Parties must be able to demonstrate to the Commission that the purchasers meet the Purchaser Requirements and that the Divestment Businesses are being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchasers fulfil the Purchaser Requirements and that the Divestment Businesses are being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Businesses without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Businesses after the sale, taking account of the proposed purchasers.
- 15A. **[TEXT DELETED FOR CONFIDENTIALITY]** the PropCo Divestment Business and the OpCo Divestment Business **[TEXT DELETED FOR CONFIDENTIALITY]** divested as two distinct going concerns, **[TEXT DELETED FOR CONFIDENTIALITY]** the Commission, without being bound by but taking into account information from and the specialist advice of the Monitoring Trustee, **[TEXT DELETED FOR CONFIDENTIALITY]** the terms of the lease agreements between the PropCo Divestment Business and the OpCo Divestment Business **[TEXT DELETED FOR CONFIDENTIALITY]** in line with market conditions **[TEXT DELETED FOR CONFIDENTIALITY]**.
- 15B. **[TEXT DELETED FOR CONFIDENTIALITY]**

Section E. Trustee

I. Appointment Procedure

16. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If the Parties have not entered into binding sale and purchase agreements one month before the end of the First Divestiture Period or if the Commission has rejected purchasers proposed by the Parties at that time or thereafter, the Parties shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
17. The Trustee(s) shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Businesses, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

18. No later than one week after the Effective Date, the Parties shall submit a list of one or more persons whom the Parties propose to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, the Parties shall submit a list of one or more persons whom the Parties propose to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 17 and shall include:
- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;

- (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and
- (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

19. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, the Parties shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Parties shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

20. If all the proposed Trustees are rejected, the Parties shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 16 and 19.

Trustee nominated by the Commission

21. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom the Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

22. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or the Parties, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

23. The Monitoring Trustee shall:
- 23.1 propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
 - 23.2 oversee the on-going management of the Divestment Businesses with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by the Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Businesses, and the keeping separate of the Divestment Businesses from the businesses retained by the Parties, in accordance with paragraphs 5 and 6 of the Commitments;
 - (b) supervise the management of the Divestment Businesses as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;
 - (c) (i) in consultation with the Parties, determine all necessary measures to ensure that the Parties do not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Businesses, in particular strive for the severing of the Divestment Businesses' participation in a central information

technology network to the extent possible, without compromising the viability of the Divestment Businesses, and (ii) decide whether such information may be disclosed to the Parties as the disclosure is reasonably necessary to allow the Parties to carry out the divestiture or as the disclosure is required by law; and

- (d) monitor the splitting of assets and the allocation of Personnel between the Divestment Businesses and the Parties or Affiliated Undertakings;
- 23.3 assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- 23.4 propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Businesses, the holding separate of the Divestment Businesses and the non-disclosure of competitively sensitive information;
- 23.5 review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Businesses and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Personnel;
- 23.6 provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Businesses so that the Commission can assess whether the Divestment Businesses are held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with these Commitments;
- 23.7 within one week after receipt of the documented proposal referred to in paragraph 15, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchasers and the viability of the Divestment Businesses after their sale and as to whether the Divestment Businesses are sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestment Businesses without one or more Assets or not all of the Personnel affects the viability of the Divestment Businesses after the sale, taking account of the proposed purchasers.

Duties and obligations of the Divestiture Trustee

- 24. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Businesses separately or as a single going concern to any purchaser or purchasers, provided that the Commission has approved both the purchaser(s) and the final binding sale and purchase agreement(s) in accordance with the procedures laid down in paragraphs 15 and 15A. The Divestiture Trustee shall include in the sale and purchase agreement(s) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement(s) such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of the Parties, subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
- 25. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

26. The Parties shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties' or the Divestment Businesses' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Parties and the Divestment Businesses shall provide the Trustee upon request with copies of any document. The Parties and the Divestment Businesses shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
27. The Parties shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Businesses. This shall include all administrative support functions relating to the Divestment Businesses which are currently carried out at headquarters level. The Parties shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. The Parties shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.
28. The Parties shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, the Parties shall cause the documents required for effecting the sale and the Closing to be duly executed.
29. The Parties shall indemnify the Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
30. At the expense of the Parties, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Parties' approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 29 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served the Parties during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

31. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
 - (a) the Commission may, after hearing the Trustee, require the Parties to replace the Trustee; or
 - (b) the Parties, with the prior approval of the Commission, may replace the Trustee.
32. If the Trustee is removed according to paragraph 31, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 16-21.

33. Beside the removal according to paragraph 31, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The Review Clause

34. The Commission may, where appropriate, in response to a request from the Parties showing good cause and accompanied by a report from the Monitoring Trustee:

- (a) grant an extension of the time periods foreseen in the Commitments; or
- (b) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where the Parties seek an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall the Parties be entitled to request an extension within the last month of any period.

Section G. Future Co-operation

35. The Parties commit to provide for a period of 10 years after the Effective Date on request of the Commission (or a third party under contract of the Commission, respecting the same confidentiality obligations), to the extent that they are reasonably able and in relation to the period of their ownership of the relevant businesses, information and data pertaining to the operations of the retained businesses as well as on the relevant markets of the Divestment Businesses in a sufficient level of detail to allow the Commission to carry out an ex-post analysis on the effectiveness of the divestiture in resolving the identified competition concern. All business secrets to be conveyed to the Commission will be covered by the obligation of professional secrecy the Commission is bound to by virtue of the EC Treaty and the Merger Regulation.

Signature:**SIGNED AND EXECUTED**.....

Name and position:

Duly authorised for and on behalf of: Apax Partners Worldwide LLP

Signature:**SIGNED AND EXECUTED**.....

Name and position:

Duly authorised for and on behalf of: Nordic Capital Fund VI

Signature:**SIGNED AND EXECUTED**.....

Name and position:

Duly authorised for and on behalf of: Apax Partners SA

SCHEDULE 1

1. **THE OPCO DIVESTMENT BUSINESS**

1.1 The OpCo Divestment Business comprises a number of distinct legal entities that are responsible for the operation of the following:

- (a) all of Capiro's private acute general hospitals in the UK;
- (b) Capiro's one specialist hospital in the UK (an eye hospital in London);
- (c) Capiro's two pathology laboratories (at the Reading Hospital and the Yorkshire Clinic);
- (d) Capiro's current and prospective ISTC NHS outsourcing business.

1.2 **[TEXT DELETED FOR CONFIDENTIALITY]**

1.3 Subject to paragraph 1.5 below, the Commitment takes the form of an undertaking to dispose of the shares in Capiro Holdings Plc including all subsidiaries shown above to a single Purchaser under an approved sale and purchase agreement.

1.4 The OpCo Divestment Business includes, but is not limited to:

(a) **the following main tangible assets:**

all equipment and tools used in relation to or by the OpCo Divestment Business (including, without limitation, beds, furniture, fittings, medical, surgical and other instruments).

See **Appendix 1** for information about the main tangible assets.

(b) **the following main intangible assets:**

The OpCo Divestment Business includes all the intangible assets owned by the OpCo Divestment Business including the following:

- (i) all rights in the UK to the trade names/ logos/ marks used in connection with the OpCo Divestment Business save for the right in and to the use of the name "Capiro"; and
- (ii) all copyrights/ patents/ know-how/ confidential information and other intellectual property used in connection with the OpCo Divestment Business.

See **Appendix 2** for information about the main intangible assets.

(c) **the following main licences, permits and authorisations:**

- (i) all licences, approvals, permits, consents and authorisations necessary to operate the OpCo Divestment Business;
- (ii) all concessions to/with the OpCo Divestment Business from the NHS to operate ISTCs; and
- (iii) all software and other licences used in the OpCo Divestment Business.

See **Appendix 3** for information about the main licenses, permits and authorisations.

(d) **the following main contracts, agreements, leases, commitments and understandings:**

- (i) 32 leaseholds (21 general hospitals, 1 specialised hospital and 10 ISTCs) in relation to the properties used by Capiro in relation to/for the purposes of the OpCo Divestment Business;
- (ii) all agreements for the supply of goods and services to the OpCo Divestment Business;
- (iii) all employment agreements relating to the operation of the OpCo Divestment Business; and
- (iv) all agreements with PMI providers.

See **Appendix 4** for information about the main contracts, agreements, leases, commitments and understandings.

(e) **the following patient and other records:**

all records of the OpCo Divestment Business including all records of patients.

(f) **the following Personnel and Key Personnel:**

all personnel employed by the OpCo Divestment Business (at present some 1,022 employees).

See **Appendix 5** for a list of the key administrative and clinical personnel.

(g) **the arrangements for the supply with the following products or services by the Parties or Affiliated Undertakings for a transitional period of up to ● after Closing:**

There are no supply arrangements between the Parties and the OpCo Divestment Business.

[TEXT DELETED FOR CONFIDENTIALITY]

1.5 The OpCo Divestment Business will **not** include the following:

- (a) Capiro's three private psychiatric hospitals operated by Florence Nightingale Hospitals Limited (company number 01431836);
- (b) Capiro's pathology services currently operated by Independent Histopathology Services Ltd (company number 04115820) and Capiro Diagnostics Ltd (company number 04464225): Capiro's two pathology laboratories which serve only third party (non-Capiro) customers and Capiro's Point-of-Care Testing (POCT), a start-up venture;³⁷ and
- (c) the rights in and to the use of the name "Capiro".

37 **[TEXT DELETED FOR CONFIDENTIALITY].**

SCHEDULE 2

2. **THE PROPCO DIVESTITURE BUSINESS**

2.1 The PropCo Divestment Business comprises UK Healthcare Properties Ltd and all its subsidiaries shown at 2.2 below, the distinct property owning group within the Capio group.

2.2 **[TEXT DELETED FOR CONFIDENTIALITY]**

2.3 Subject to 2.5 below, the Commitment takes the form of an undertaking to dispose of the shares in UK Healthcare Properties Ltd to a single purchaser under a sale and purchase agreement approved by the Commission.

2.4 The PropCo Divestment Business includes, but is not limited to:

(a) **the following main tangible assets:**

All properties as listed in **Appendix 1**.

(b) **the following main intangible assets:**

The PropCo Divestment Business does not include any intangible assets.

(c) **the following main licences, permits and authorisations:**

(i) all licences, approvals, permits, consents and authorisations necessary to operate the PropCo Divestment Business; and

(ii) the benefit of any insurance policies currently in place in relation to the properties.

(d) **the following main contracts, agreements, leases, commitments and understandings:**

[TEXT DELETED FOR CONFIDENTIALITY]

(e) **the following customer, credit and other records:**

The PropCo Divestment Business includes all records relating to the PropCo Divestment Business.

(f) **the following Personnel:**

No personnel is included in the PropCo Divestment Business.

(g) **the arrangements for the supply with the following products or services by the Parties or Affiliated Undertakings for a transitional period of up to ● after Closing:**

There are no supply arrangements between the Parties and the PropCo Divestment Business.

- 2.5 The PropCo Divestment Business will **not** include any of the properties used in connection with the operation of Capiro's private psychiatric hospitals, namely:

Name and address	Title number(s)
Capiro Nightingale Hospitals – Lisson Grove Bendall Mews, Enford Street and Bell Street 11-19 Lisson Grove London NW1 6SH	NGL669122 NGL255448
Capiro Nightingale Hospitals – Liverpool Park Road Waterloo Liverpool L22 3XE	MS403828 MS394289

APPENDIX 1

MAIN TANGIBLE ASSETS

OpCo Divestment Business

- Beds, furniture, fittings, medical, surgical, other instruments located in hospitals/ISTC's.
- six mobile diagnostic (radiology) units;
- one MRI unit at Capio Rivers Hospital.

PropCo Divestment Business

Freeholds

Capio Ashtead , The Warren, Ashtead, Surrey KT21 2SB
Capio Duchy Hospital , Penventinnie Lane, Truro TR1 3UP
Capio Euxton Hall Hospital , Wigan Road, Euxton, Chorley, Lancashire PR7 6DY
Capio Fitzwilliam Hospital , Milton Way, South Bretton, Peterborough PE3 9AQ
Capio Fulwood Hospital , Midgery Lane, Fulwood, Preston PR2 9SZ
Capio Mount Stuart Hospital , St Vincent's Road, Torquay, Devon TQ1 4UP
Capio North Downs Hospital , 46 Tupwood Lane, Caterham, Surrey CR3 6DP
Capio Oaklands Hospital , 19 Lancaster Road, Salford M6 8AQ
Capio Oaks Hospital , Oaks Place, Mile End Road, Colchester CO4 5XR
Capio Pinehill Hospital , Benslow Lane, Hitchin, Hertfordshire SG4 9QZ
Capio Renacres Hospital , Renacres Lane, Halsall, Nr Ormskirk, Lancashire L39 8SE
Capio Rivers Hospital (including Orchard Lea, Jacobs & Gardens) High Wych Road, Sawbridgeworth, Hertfordshire CM21 0HH
Capio Rowley Hospital , Rowley Park, Stafford ST17 9AQ
Capio Springfield Hospital , Lawn Lane, Chelmsford CM1 7GU
Capio West Midlands Hospital , Coleman Hill, Halesowen, West Midlands B63 2AH
Capio Winfield , Tewkesbury Road, Longford, Gloucester GL2 9WH
Capio Woodland Hospital , Rothwell Road, Kettering, Northhamptonshire NN16 8XF
Capio Diagnostics, Yorkshire Laboratory , Bradford Road, Bingley, West Yorkshire BD16 1TW
Capio New Hall Hospital (inc. Salisbury ISTC) , Bodenham, Salisbury, Wiltshire SP5 4EY
Capio Reading Hospital Wensley Road, Coley Park, Reading, Berkshire RG1 6UZ

APPENDIX 2

MAIN INTANGIBLE ASSETS

OpCo Divestment Business

[TEXT DELETED FOR CONFIDENTIALITY]

PropCo Divestment Business

None

APPENDIX 3

MAIN LICENCES, PERMITS AND AUTHORISATIONS

OpCo Divestment Business

Acute hospital services – an accreditation from the Healthcare Commission.
ISTC – a licence awarded by the Healthcare Commission.

PropCo Divestment Business

None

APPENDIX 4

MAIN CONTRACTS, AGREEMENTS, LEASES, COMMITMENTS AND UNDERSTANDINGS

OpCo Divestment Business

Leaseholds with UK Healthcare Properties Ltd

Capio Ashtead , The Warren, Ashtead, Surrey KT21 2SB
Capio Duchy Hospital , Penventinnie Lane, Truro TR1 3UP
Capio Euxton Hall Hospital , Wigan Road, Euxton, Chorley, Lancashire PR7 6DY
Capio Fitzwilliam Hospital , Milton Way, South Bretton, Peterborough PE3 9AQ
Capio Fulwood Hospital , Midgery Lane, Fulwood, Preston PR2 9SZ
Capio Mount Stuart Hospital , St Vincent's Road, Torquay, Devon TQ1 4UP
Capio North Downs Hospital , 46 Tupwood Lane, Caterham, Surrey CR3 6DP
Capio Oaklands Hospital , 19 Lancaster Road, Salford M6 8AQ
Capio Oaks Hospital , Oaks Place, Mile End Road, Colchester CO4 5XR
Capio Pinehill Hospital , Benslow Lane, Hitchin, Hertfordshire SG4 9QZ
Capio Renacres Hospital , Renacres Lane, Halsall, Nr Ormskirk, Lancashire L39 8SE
Capio Rivers Hospital (including Orchard Lea, Jacobs & Gardens) High Wych Road, Sawbridgeworth, Hertfordshire CM21 0HH
Capio Rowley Hospital , Rowley Park, Stafford ST17 9AQ
Capio Springfield Hospital , Lawn Lane, Chelmsford CM1 7GU
Capio West Midlands Hospital , Coleman Hill, Halesowen, West Midlands B63 2AH
Capio Winfield , Tewkesbury Road, Longford, Gloucester GL2 9WH
Capio Woodland Hospital , Rothwell Road, Kettering, Northhamptonshire NN16 8XF
Capio Diagnostics, Yorkshire Laboratory , Bradford Road, Bingley, West Yorkshire BD16 1TW
Capio New Hall Hospital (inc. Salisbury ISTC) , Bodenham, Salisbury, Wiltshire SP5 4EY
Capio Reading Hospital , Wensley Road, Coley Park, Reading, Berkshire RG1 6UZ

Leaseholds with third parties

Hospitals

Capio Eye Hospital , 114a Harley Street, London, W1G 7EL
Capio Park Hill Hospital , Thorne Road, Doncaster, South Yorkshire, DN2 5TH

ISTC's*

Cobalt NHS TC , Cobalt Business Park, Silverlink North, Silver Fox Way, North Tyneside NE27 0BY
Boston NHS TC , Boston West Business Park, Sleaford Road, Boston PE21 8EG
Gainsbororough NHS TC , John Coupland Hospital, Ropery Road, Gainsborough, Lincolnshire DN21 2TJ
Capio New Hall TC , Capio New Hall, Bodenham, Salisbury, Wiltshire SP5 4EY
Capio Reading TC , Capio Reading, Wensley Road, Coley Park, Reading, Berkshire RG1 6UZ

Bodmin NHS TC , Boundary Road, Bodmin, Cornwall PL31 2QT
Clifton Park NHS TC , Blue Beck Drive, Shipton Road, York YO30 5RA
Horton NHS TC , Horton Hospital, Oxford Road, Banbury, Oxon OX16 9FG
Blakelands NHS TC , Smeaton Close, Blakelands, Milton Keynes, Bucks MK14 5HR
Linthorpe Hall , Middlesbrough, (opening May 07)

* Boston, Clifton Park, Horton and Bodmin are operating leases; Blakeland and Cobalt are Finance Leases and Gainsborough is a Licence.

PMI contracts

[TEXT DELETED FOR CONFIDENTIALITY]

Key IT contracts

[TEXT DELETED FOR CONFIDENTIALITY]

Key medical supply agreements

[TEXT DELETED FOR CONFIDENTIALITY]

PropCo Divestment Business

None

APPENDIX 5

PERSONNEL AND KEY PERSONNEL

OpCo Divestment Business

[TEXT DELETED FOR CONFIDENTIALITY]

PropCo Divestment Business

None