

COMPETITION COMMISSION PRIVATE HEALTHCARE MARKET INVESTIGATION

RESPONSE TO ANNOTATED ISSUES STATEMENT

1. Introduction

1.1 The London Clinic ("The Clinic") welcomes this opportunity to comment on and provide further evidence in relation to the Competition Commission's Annotated issues statement (the "Annotated IS").

1.2 We focus in this response on the following features of the Central London market:

1.2.1 Market power of HCA in Central London;

1.2.2 Exclusionary practices of HCA.

1.3 HCA has significant market power in the Central London market, indeed is super-dominant in relation to certain key specialties such as oncology. This market power together with HCA's conduct – from providing loyalty inducing financial incentives to leading consultants, to vertical integration with GPs, Leaders in Oncology Care (the "LOC") and other diagnostic centres – are features of the market that restrict competition.

1.4 Ultimately, the impact of HCA's conduct is felt by patients, PMIs and subscribers to private medical insurance. First, HCA is able to charge above the competitive level; this will only get worse if HCA is allowed to pursue an exclusionary strategy to strengthen its position across a range of specialties. Secondly, by tying consultants to its six elite hospitals, HCA puts them in a very difficult position, potentially with adverse consequences for patients, PMIs and subscribers to private medical insurance.

2. Market power of HCA in Central London market

2.1 HCA has significant market power in the Central London market. The CC has already received ample evidence of the degree of market power enjoyed by HCA, including the following:

2.1.1 HCA owns six of the seven elite private hospitals in Central London.¹

¹

According to the AXA PPP submission dated 20 July 2012, HCA owns six of the seven elite private hospitals, with The Clinic being the other.

Aviva in its submissions refers to HCA owning six of the nine private hospitals in Central London.

In our initial submission, we had taken a conservative view that there are 11 private hospitals competing in Central London. However, the view of the PMIs, which are the principal customers of the hospitals, is instructive here and indicates that the other Central London private hospitals may not be effective competitors.

- 2.1.2 HCA's share of revenues from provision of private healthcare in Central London is in excess of the level at which dominance would normally be found. This dominance is particularly evident in relation to certain key specialties of cardiology, gastroenterology, oncology (including radiotherapy), and radiology.²
 - 2.1.3 In relation to cancer services, with its ownership of six hospitals and a majority share in the LOC³, we would estimate that HCA has a market share of over 80%.
 - 2.1.4 Not only does this give HCA a super-dominant position in relation to cancer services, it allows HCA to strengthen its market position in relation to other services to the detriment of other providers. It is essential for an elite hospital to offer tertiary care services, particularly cancer services.
 - 2.1.5 HCA has *de facto* exclusive or preferential arrangements with many of the leading consultants, which are described further in section 3 below. Access to leading consultants is essential for a private hospital to be able to compete effectively on the Central London market.
 - 2.1.6 Through its vertical integration with GPs, the LOC and diagnostic centres, HCA is able to secure referrals thereby further strengthening its market power.
 - 2.1.7 HCA is able to charge significantly higher prices for its services than its competitors, as evidenced by the submissions of PMIs (see paragraph 2.2), which is of itself evidence of HCA's market power. Major PMIs have little alternative but to agree to these higher prices, since HCA has such a strong market position – and in particular has such a large share of Central London market capacity – that it is a must-deal hospital which the major PMIs cannot delist. [CONFIDENTIAL]
- 2.2 Many of the PMIs have expressed specific and significant concerns about the market power of HCA in the Central London market.
- 2.2.1 AXA PPP has made a 39 page submission specifically in response to HCA's response to the CC issues statements. AXA PPP highlights a broad range of concerns about HCA's conduct and its impact on

² Revenues is the best basis for measuring market shares because it reflects capacity, utilisation and mix of procedures and services. See the 2000 Competition Commission report into the BUPA/CHG merger – British United Provident Association Ltd and Community Hospitals Group Plc: a report on the proposed merger; and British United Provident Association Ltd, Salomon International LLC and Community Hospitals Group Plc; and Salomon International LLC and Community Hospitals Group Plc; a report on the existing mergers.

³ As noted in our initial submission and in information provided subsequently, HCA acquired a majority share in LOC, which is a specialist provider of oncology services comprising over 35 oncologists with a wide range of specialist expertise in oncology related treatments, and which allows HCA to secure referrals for a range of oncology treatments.

competition in the Central London market. AXA PPP's submissions of particular note include (though these are by no means a summary of all the key points):

Ultimately we consider that HCA's market position is of such strength that it operates with little regard to its competitors or customers. This is borne out by excessive levels of profit for some treatments to the detriment of patients. We believe therefore that HCA's market position in Central London, which is being further strengthened via the acquisition of primary care facilities and PPUs, results in an adverse effect on competition via higher prices which is detrimental to patients. (paragraph 9)

The fact that HCA's prices are significantly higher than its competitors, and that the costs we pay continue to increase relative to HCA's competitors (see further below in Sections 3 and 4 – B), provide no indication that HCA is acting to improve cost efficiency through investment, which in turn we believe is due to a failure in price competition; (paragraph 39(a))

- 2.2.2 Aviva, in its response to the Annotated IS, states (section 2.1): Aviva Health is particularly concerned about the market power of HCA hospitals in London. HCA accounts for over 70% of Aviva Health's spend in central London and owns 6 out of 9 private London hospitals. We are charged significantly higher prices for treatments at HCA compared with other private London facilities (see Appendix A). We have little alternative but to pay these higher prices.
- 2.2.3 BUPA, in its initial submissions and response to issues statement, refers to the lack of effective competition and the need for remedies in Central London, where only one hospital group has a significant presence, and the "particular issue" caused by HCA's scale in Central London.
- 2.3 On any reasonable assessment of the above evidence, HCA has significant market power in Central London with particular strength in key specialties.
- 2.4 HCA's market power in Central London in relation to certain key specialties, together with its preferential or exclusive access to leading consultants, and vertical integration are, together and individually, features of the market that restrict competition. These features restrict competition in these key specialties from existing private hospital operators and act as barriers to new entry; they also restrict competition in related markets.
- 2.5 We note the CC's comments at paragraph 66 of the Annotated SI that your analysis to date may not have fully captured the market power of HCA. The use

of market concentration measures based on fascia counts and LOCI do not fully capture the special features of the Central London market and do not give an accurate measure of the level of competition. We reserve our position to comment further on the CC's analysis having attended the CC's data room.

- 2.6 We explained in our initial submission that there are features of the Central London market that distinguish it from private healthcare in other parts of the country. In summary: there is a focus on acute care and complex and tertiary surgery; Central London has world renowned consultants and facilities; there are a higher proportion of self-paying patients, including many overseas patients and a patient population drawn from outside the local area; the presence of HCA as a powerful local competitor; high capital and operating costs and limited opportunities for expansion in the immediate area. Additionally, it is clear from the submissions of the PMIs, as principal purchasers of private hospital services, that they regard the Central London market as distinct and facing unique problems.
- 2.7 Accordingly, we welcome your indication that you will undertake further investigation as to the extent of competitive constraints on HCA, which should expand upon the analysis referred to in paragraph 67 of the Annotated IS, but which should focus on competitive constraints from other private hospitals in Central London:

(a) Our analysis of shares of capacity (theatres), admissions and revenue held by private hospitals/PPUs located in central/Greater London shows that HCA is by far the largest private hospital operator operating in the London area.

(b) HCA appears to be particularly strong in a number of specialties, including, for example, cardiology, gastroenterology, oncology and radiology.

3. **HCA exclusionary conduct**

- 3.1 HCA's conduct on the Central London market, in particular with regard to agreements with consultants and other clinicians, is a feature of the market that restricts competition, by raising barriers to entry and strengthening HCA's market position against existing competition.

HCA agreements with consultants

3.2 We note that you consider there are mechanisms by which an incumbent hospital operator could deter new entry by using its relationships with consultants. We agree with this finding and consider that HCA uses such mechanisms. In fact, the mechanisms used by HCA serve not only as barriers to new entry, they also amount to features of the market that restrict competition from existing providers such as The Clinic.

3.3 We note also your findings (in paragraph 61 of Appendix E to the Annotated IS) with regard to agreements with consultants, that:

Increasingly, and coincident with OFT/CC intervention, hospital groups are:

(a) withdrawing less sophisticated schemes which might attract criticism on ethical (or regulatory) grounds, for example volume-related incentive schemes; and/or

(b) caveating the obligations which they place on clinicians with an overriding obligation to serve the best clinical interests of the patient; and/or

(c) extending caveats in agreements still further to the effect that clinicians should feel under no obligation whatsoever to refer patients to the hospital group concerned on the basis of either the terms or the existence of agreements entered into.

3.4 Even if it is the case that express restrictions are being removed from agreements, in practice, our experience is that HCA is entering into agreements with consultants which have the same exclusionary effect. Furthermore, we are seeing HCA entering into such agreements on a more frequent basis.

3.5 Therefore we consider that further CC investigation is required as to the arrangements between HCA and consultants.

3.6 [CONFIDENTIAL] Our experience is that regardless of the express terms of HCA's agreements with consultants, HCA's dealings with consultants are intended to ensure that the consultant in practice refers work to the HCA hospitals in preference to other hospitals. Given HCA's market power, they therefore have the effect of foreclosing these rival hospitals.⁴

3.7 [CONFIDENTIAL]:

⁴

Even if consultants are required by HCA's Code of Conduct to comply with GMC requirements (see HCA's reply dated 22 February 2013 to AXA PPP'S response to HCA's submission), the financial incentives offered by HCA nonetheless have a loyalty inducing effect and therefore are a feature of the market that restricts competition.

- 3.7.1 [CONFIDENTIAL] a non-compete provision [CONFIDENTIAL] in combination with the other factors listed below deters consultants from treating patients in non-HCA hospitals.
 - 3.7.2 [CONFIDENTIAL] what we consider to be a loyalty payment. [CONFIDENTIAL] In our interpretation, [CONFIDENTIAL] comprise only those activities that any consultant would expect to carry out as a matter of course, without any additional remuneration over and above their consultancy fees. The payment is therefore disproportionate to the services being provided under the agreement.
 - 3.7.3 HCA provides some consultants with free of charge access to consulting rooms, providing a financial benefit of many thousands of pounds a year.
 - 3.7.4 HCA also provides consultants with secretarial/admin support and/or takes the consultant's existing secretaries onto its payroll, amounting to a financial benefit of c. £30,000 a year. This facility provides HCA with access to all practice information of the consultant, including where referrals originate and where care is then received (which would identify if consultations or treatment are being provided at a non-HCA hospital), which is extremely useful to HCA. Control of this practice information also makes it very difficult for a consultant to break away in order to move to another private hospital.
 - 3.7.5 [CONFIDENTIAL] terminable on three months' notice. We understand that [CONFIDENTIAL], HCA conducts quarterly reviews attended by the consultant and the CEO of the relevant HCA hospital to assess levels of business referred by the consultant. Our belief [CONFIDENTIAL] is that the reviews are used to encourage consultants to achieve certain levels of referrals to HCA hospitals against the threat of termination of the agreement. The availability of detailed practice information as outlined above enables discussion regarding leakage of referrals.
- 3.8 We also believe that HCA uses the following mechanisms to punish or discourage consultants who also work for another private hospital:
- 3.8.1 HCA can elect not to refer HCA generated referrals to the consultant (where the referral is initially made to the HCA hospital itself rather than to a named consultant).
 - 3.8.2 HCA can elect not to award a regular theatre or out-patient session, making it difficult for the consultant to expand his practice.
 - 3.8.3 HCA can elect not to promote the consultant to Embassies, PMIs and GPs, on which the consultant is dependent for referrals.

3.8.4 HCA can withhold or suspend payment of the services fee mentioned above.

HCA selective targeting of consultants

3.9 Our experience is that HCA targets leading specialists (or particular specialties such as oncology) and targets its financial incentives at these consultants. If a hospital is able to attract a pre-eminent specialist, it is likely that other associated consultants will follow this lead.

3.10 A prime example of this is LOC [CONFIDENTIAL].

3.11 Other key instances include:

[CONFIDENTIAL]

3.12 HCA is targeting consultants engaged with The Clinic with increasing frequency, and The Clinic has seen a marked increase in 2012 and 2013 of consultants moving to or being approached by HCA.

3.13 We have sought to engage [CONFIDENTIAL], who are or were practising at HCA hospitals but who informed us that they could not be engaged by The Clinic until their contracts with HCA had ended.

Effect of the HCA Agreements with Consultants

3.14 The HCA agreements with consultants, coupled with HCA's market power in Central London leads to the following adverse consequences for patients, PMIs and subscribers to PMI.

3.14.1 Decision making is not transparent. The decision on patient care is taken by the consultant (or on his/her advice) without disclosure of the HCA loyalty payment to the patient or PMI.

3.14.2 A potential risk of conflict of interest arises for the consultant as between financial incentives and the patient's interests.
[CONFIDENTIAL]

3.14.3 Patients and subscribers to PMI pay more than they would otherwise given that business is directed to HCA hospitals which charge higher prices than rivals (according to the evidence collated by the PMIs).

3.15 Even if smaller rivals attempted to match the level of the HCA loyalty payments, the adverse consequences above would persist given HCA's market dominance and track record of paying more than rivals are able to in order to entrench its market position. Given its market power, HCA is able to price up a key input,

knowing that it can pass on this input cost to its customers, whereas competitors such as The Clinic are not in a position to do the same.

3.16 [CONFIDENTIAL]

4. **Other barriers to entry in Central London**

4.1 We consider that the CC has understated the barriers to entry in Central London. You state that your case studies do not suggest that either capital requirements or planning issues constitute a significant barrier. However, such a view significantly understates the difficulty we had in obtaining planning permission for the Cancer Centre and misrepresents the barriers to entry or expansion in London.


4.2 Our experience in the construction of the Cancer Centre was actually that barriers to entry were significant. The key barriers were access to land and planning issues. [CONFIDENTIAL] The process was facilitated by the Clinic's existing presence in the Harley Street vicinity, reputation and relationships with landlords, advantages which a new entrant would not have.

4.3 More generally, as we explained at our Hearing, the scale and scope of services required to compete in Central London is much greater than in other local markets. The investment required to acquire land is much higher and, crucially, the nature of the tertiary services we provide, such as oncology, requires huge investment in facilities and equipment.

5. **Conclusion**

5.1 For the reasons given in this submission, we consider it is essential that the CC carries out further investigation into HCA's market power on the Central London market, and in particular in relation to specialties such as oncology. The CC should also investigate further HCA's practices with regard to clinicians, particularly the loyalty inducing financial incentives offered to consultants and the acquisition of GPs and other practices. HCA's significant market power, combined with the exclusionary measures described, are features of the market that restrict competition and raise barriers to entry.

5.2 If the CC wishes to discuss any issue raised in this submission, we would be happy to meet further with the CC and/or provide further assistance.


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CHIEF FINANCIAL OFFICER

[CONFIDENTIAL]