

PRIVATE HEALTHCARE MARKET INVESTIGATION

Summary of response hearing with Circle Partnership held on 10 February 2014

Introductory remarks

1. Circle Partnership (Circle) believed that the Competition Commission's (CC's) provisional decision on remedies diluted the previously proposed remedies to the point where, as a whole, they would not be effective at fixing the anticompetitive structure and anticompetitive conduct in the market. Circle did not feel that the proposed remedy, as it stood, would encourage new entrants.
2. Circle felt that it had been bullied by incumbents but that as long as the investigation was ongoing, they would be worried that their anticompetitive behaviour would be scrutinized. It expressed concern that this was likely to change following issue of the final report.
3. Circle raised two major issues it wished to focus on: (a) the proposed conditions on equity (consultant incentives); and (b) the remaining proposed remedies which did not adequately address the ability of hospital operators in solus and duopoly areas to exert national pricing power and market dominance. As part of this second point, Circle would like to discuss an oversight role for Monitor to ensure a level playing field for all providers in the future.

Consultant incentives

4. Circle questioned the application of the incentives remedy (ie that it would not apply to consultant-owned businesses and only applied to private hospital operators) as well as the effectiveness and rationality of some of the conditions. It did not see why consultant-owned businesses should be exempt from the remedy. It was also not clear whether joint venture or business equity arrangements between hospital operators and consultants would be exempt.
5. First, Circle stated that the CC had not offered any evidence that there was a connection between the timing of the payment for the equity and the consultant's referral behaviour. It also stated that Circle's scheme was option-based and that there were many reasons why one would want to implement an option-based scheme. Secondly, Circle did not see a connection between the amount that a consultant would pay for the equity and the impact that that would have on their referral behaviour. Thirdly, Circle explained that revenue commitments had been very important to it and that had it not had those revenue commitments from consultants in place, it would not have financed Bath and Reading.
6. Circle flagged that the CC had identified the ability of new market entrants to attract consultants as a significant barrier to entry, and one of the ways that Circle clearly had been able to enter the market was through the use of equity ownership for revenue commitments. In addition, when negotiating with the banks for financing, the banks wanted to know that there was enough certainty in terms of consultant engagement from the opening of that hospital so that their monies were not at risk on that facility from day one. Further, the banks needed a level of support that there was enough revenue to ensure that the hospital would be operationally successful.

7. Circle's proposal would be that equity and revenue together should be permissible in the limited circumstances where it: (a) encouraged a market entrant; (b) was not exclusive; and (c) where it was time-limited. It considered the proposal entirely appropriate as long as those arrangements were transparent in the ways that the CC had proposed—that the patient was aware that the consultant had those financial arrangements with an operator.
8. A number of unintended consequences would arise if new owners could not use equity to incentivize consultants, the main one being that operators would hire consultants directly, which would lead to a situation where the consultant would essentially bring all of their private work to a particular operator and facility. Another consequence would be the rise of arrangements whereby a clinician or a group would get together in a group and negotiate a deal directly with an operator to bring all of their business to that operator.
9. Circle explained that having committed consultants was key for a successful operation and that ownership mattered. Circle had taken active steps to minimize the risk of perverse incentives and stated that it had got more doctors engaged than any other hospital in the UK.
10. [REDACTED]
11. [REDACTED]

The proposed remedies do not adequately address national pricing power and market dominance

12. Circle expressed disappointment about not having had access to the data room. On balance and reflection, Circle believe that the divestiture package proposed for central London would be very effective but it was disappointed that the proposal outside of London was less than 5 per cent of the market so would not change that market power.
13. Circle explained that if the divestiture list did not change, the CC needed to ensure that there was a fair market for new entrants in those other markets. Unless some other element allowed Circle some level of adjudication or fair play in trying to enter markets, the basket of remedies could look somewhat ineffectual.
14. Circle did not agree with the position that divestiture of hospitals in solus areas would be ineffective. It said that it was the volume of solus hospitals that an individual hospital operator had that allowed them a level of market power, which made it very difficult for new operators to enter a market. It proposed that a limit should be placed on the number of solus hospitals that an individual operator was able to have. Circle explained that the link between monopoly power and national market power was important. Circle explained that as it found in Bath, the leverage from the local market power into the national market power prevented recognition. It further stated that private clinics in solus areas might struggle to get recognition because the market power of the big operators was such that the private medical insurer (PMI) would not recognize a new clinic.
15. Circle provided an example of how self-pay rates for MRI scans in Glasgow were double the rate that BMI charged in Bath and suggested that there had to be some level of remedy around the solus hospital not being able to do things to abnormally adjust pricing in local markets because of a new entrant.

16. Circle also considered that there should be some form of remedy which allowed, for example, a new clinic to open up in a solus area, to be recognized by PMIs. Without this sort of remedy, or another remedy in solus areas, there would be a problem.

Tying and bundling remedy

17. Circle was unhappy that the tying and bundling remedy had been dropped. It suggested that some form of open tender could be advisable such that local markets were tendered for in an open market way for pricing in the regional basis and that everyone's tendering for services and pricing was set at, for example, the average of the tendered levels.
18. In relation to volume discounts, Circle did not have an issue with volume discounts in each market but took a different view when volume discounts were linked to the number of hospitals operated on a national basis.
19. Circle considered that a guardian of the market (eg Monitor) to prevent unfair market behaviour was as important as remedies.
20. Circle said that having PMI recognition before or at the time an operator opened a new hospital was important. It further explained the difficult relationship it had with PMIs and also BMI: it stated that BMI did not let AXA PPP recognize Circle and that insurance companies paid Circle less money for the same work.
21. Circle suggested that new entrants could establish themselves if they had recognition and a grace period that PMIs had to give you on a level playing field.
22. When asked what would be the one thing that the CC could do that would help new entrants overcome these type of issues with PMIs, Circle explained that (a), you had to have automatic recognition; and (b) the pricing should then be based on a basket of that economy or within a range of that economy so that you could tender.
23. Circle suggested that a body such as Monitor be responsible for overseeing disputes between PMIs and hospital operators in relation to these issues.