

ANNEX 2

RE-WORKING THE CC'S LOCAL MARKET POWER ASSESSMENT

1. INTRODUCTION AND SUMMARY

1.1 The CC's local market analysis has fundamentally failed on a number of different bases for assessing whether Ramsay's hospitals have local market power. In particular:

- (a) as explained in Annex 1, the CC's catchment area analysis has failed to consider the catchment areas in relation to Ramsay's self-pay patients, which is the theory of harm being tested, resulting in some overly narrow catchment areas being defined (referred to throughout this response as "**Core Catchment Areas**"). [X] [CONFIDENTIAL] the CC's patient survey demonstrate that a 45-minute drive-time is a more appropriate approximation for self-pay patients;
- (b) as explained further in Annex 4, the CC has consistently overstated the importance of the [X] [CONFIDENTIAL] Ramsay hospitals in relation to the provision of private treatment in its competitive assessment. As a consequence, this has resulted in the CC inaccurately excluding a number of important competitors to those hospitals, particularly in relation to PPU's and NHS hospitals that provide private treatment, purely on the basis of an inaccurate comparison of the amount of private treatment undertaken; and
- (c) in the PFs the CC has considered hospitals to have local market power if there are less than three fascias in total within the local area. The CC has specifically stated that it does not consider two similar sized competitors to be sufficient. However, not only is this approach illogical, but it is contrary to the comments of the two largest insurers, which suggest that one rival fascia is indeed sufficient to provide a competitive constraint.

1.2 Accordingly, Ramsay has re-worked the CC's local market analysis in relation to the [X] [CONFIDENTIAL] problematic Ramsay hospitals taking account of these failings and using the alternative decision rule suggested by the two largest insurers. This analysis shows that on the basis of a 45 minute drive-time, [X] [CONFIDENTIAL] Ramsay hospitals face at least one other competing fascia, and [X] [CONFIDENTIAL] face at least two competing fascias if the competitive constraints from PPU's and NHS hospitals that provide private treatment are included.

1.3 This re-worked analysis clearly shows that the CC's local market analysis has materially overstated the Ramsay hospitals of concern.

2. THE CC'S DECISION RULE

2.1 In the PFs the CC has concluded that hospitals have local market power if they are either:

- (a) a solus hospital (i.e. face limited competition from any other facility); or
- (b) where they face just one other competing hospital of a similar size (i.e. what the CC previously called a symmetric duopoly). In this regard, the CC states at paragraph 6.113(b) of the PFs that "*we consider two hospitals (or hospital operators in case of common ownership of hospitals nearby) imposing a similar competitive constraint on each other to be insufficiently constrained as they would not be expected to compete effectively against each other*". The CC goes on to express its view that "*we do not regard two similar competitors to be sufficient*".

- 2.2 This means that the CC has applied a decision rule for assessing whether a hospital has local market power in terms of whether that hospital faces at least two rival fascias, and only if it faces two rival fascias can it be considered to be effectively constrained. However, this approach is fundamentally flawed both as a matter of logic and basic economics.
- 2.3 First, as the CC is aware, irrespective of the precise scope of the relevant market definition, the key factor in assessing the competitive constraints on a hospital operator is whether a sufficient number of sales would be lost in aggregate (including those private patients that drop out of the market altogether) to render a hypothetical price increase unprofitable. As set out further in Annex 5, the fixed cost nature of the industry means that hospitals only need to lose a relatively small number of patients to be fully constrained from increasing prices (i.e. between [X] [CONFIDENTIAL] for the [X] [CONFIDENTIAL] problematic Ramsay hospitals).
- 2.4 In these circumstances, it is implausible for the CC to suggest that a hospital needs to face at least two other competing fascias in order to be fully constrained (i.e. in order to exceed the critical loss value in response to a hypothetical price increase). Given the relatively small number of patients that need to be lost in order to render a hypothetical price increase unprofitable, the option of switching to just one competing fascia will usually be more than sufficient to exceed these critical loss values.
- 2.5 In this regard, the duopoly concern of the CC is implausible, particularly in the context of a market where negotiations take place at a national level with insurers, and the insurers themselves have stated that one other fascia is sufficient. Accordingly, the CC's concern that a "symmetric" duopoly could in some way unilaterally increase prices and not impose a sufficient constraint on each other is simply implausible. This is particularly relevant in relation to the [X] [CONFIDENTIAL] Ramsay hospitals of concern as they are [X] [CONFIDENTIAL] in an area. It is simply wrong to suggest that these hospitals are not fully constrained by [X] [CONFIDENTIAL].
- 2.6 Secondly, the only potential theory of harm in relation to how symmetric duopolies may give rise to higher prices is in relation to some form of tacit coordination between the two hospitals. However, this is not the theory of harm being tested by the CC. Moreover, the characteristics of the local markets being tested render such a notion completely implausible. In particular, the lack of price transparency and inability of hospital managers to effectively monitor rivals, clearly shows that the PH market is not susceptible to such a tacit coordination outcome.
- 2.7 The CC has attempted to justify its decision rule (in paragraph 6.114 of the PFs) on the basis that it *"is supported by the evidence that links local concentration with price outcomes, including the results of our PCA presented in paragraphs 6.190 to 6.202, and our interpretation of what the parties told us and a review of the qualitative evidence"*. However, this reasoning appears to be flawed:
- (a) first, the qualitative evidence and comments from the parties do not appear to support the CC's decision rule. In particular, as discussed further below, both Bupa and AXA PPP, the two largest insurers, have explicitly commented that one other competing fascia is generally sufficient to give them an "outside option". This is not surprising given that [X] [CONFIDENTIAL]; and
 - (b) second, the CC has not presented any evidence from its price concentration analysis to show that prices to self-pay patients are in some way lower when there are three or more competing fascias in an area compared to when there are just two competing fascias. Clearly, this result would be of fundamental importance to support a decision rule that more than two competing fascias are required.

2.8 Accordingly, the main area of concern that arises from this (arbitrary) decision rule is that it bears no resemblance to the facts of the case. Moreover, the CC's imposition of a decision rule that shows a complete disregard for the nature of the market and the comments of the two biggest insurers, shows that it represents an untenable position to take. This is also particularly important to Ramsay given that [X] [CONFIDENTIAL] hospitals that have been adjudged to have market power are considered to be duopolies (i.e. they face competition from just one rival fascia).

2.9 The following section therefore focuses on the comments of the two largest insurers in relation to the decision rule as to which hospitals have local power. In addition, we have also re-worked the CC's local market analysis in relation to the [X] [CONFIDENTIAL] problematic Ramsay hospitals in order to reflect the comments of the two main insurers, and to demonstrate the sensitivity of the CC's local market power findings to this arbitrary decision rule.

3. PMI STATEMENTS

3.1 As mentioned above, the CC's decision rule for assessing which hospitals have local market power appears to be inconsistent with the views expressed by the two largest insurers, namely Bupa and AXA PPP. The views of these two insurers are summarised below:

(a) AXA PPP

3.2 In paragraph 6.115(e) of the PFs, the CC reports the comments of AXA PPP on the issue of whether two hospitals are sufficient. Of note, AXA PPP commented that "[t]o the extent that there are two major hospitals in a moderately sized city, in a broadly symmetric duopoly, it will not always necessarily be the case that the PMI provider has to "stock" both hospitals. As such, the hospitals may (if offered individually) compete to be listed."

3.3 It is clear from these comments that AXA PPP also accepts that sufficient competitive constraints exist where a hospital faces just one other rival fascia (and AXA PPP specifically refers to symmetric duopolies in this regard). Moreover, these comments also demonstrate that AXA PPP has the power to list just one hospital on its network, which clearly shows its potential to delist hospitals locally and overcome the CC's notion of a "local duopoly" using its national bargaining power.

3.4 Accordingly, the comments from AXA PPP also suggest that the CC's decision rule is fundamentally at odds with commercial reality, and in many situations just one rival facility will be sufficient to constrain the hospital in question.

(b) Bupa

3.5 Moreover, the CC's decision rule has adopted a more extreme position than even Bupa. In paragraph 12 of Annex 6(11), Bupa commented on what it considered to constitute as a hospital with local market power, which it referred to as a "must have" hospital.

3.6 Of note, the PFs state that "*Bupa argued that where a hospital was located in an area with no, or a very limited number of, rival hospitals located nearby (or where the rivals lacked sufficient capacity or key specialisms) the hospital was 'must have' in order to serve policyholders in that area. It stated that its analysis, which identified hospitals that either dominated treatments in an area (with over 80 per cent of Bupa's claims activity) or did not have a rival within a 30 minute drive time, showed that [%] of BMI's hospitals were 'must have'*" [emphasis added].

3.7 It is plainly not the case that [X] [CONFIDENTIAL] Ramsay hospitals meet these criteria. This suggests that the threshold that Bupa sets internally to classify whether hospitals are to be regarded as "must have" facilities and have local market power is less restrictive than the measure used by the CC. In particular, Bupa's own analysis only considers

whether there is one rival facility within a 30 minute drive-time, and not two rival facilities as considered by the CC. It stands to reason, therefore, that for the principal complainant to apply a different (lower) measure than the CC indicates that the CC has materially overstated the local market concerns.

4. RE-WORKED ANALYSIS

4.1 In light of the comments of both Bupa and AXA PPP that one rival fascia is sufficient to provide a competitive constraint to the hospital in question, Ramsay has re-worked the CC's local market analysis in relation to the [X] [CONFIDENTIAL] Ramsay hospitals that have been considered to have local market power.

4.2 Set out in the Appendix to this Annex, is a table and maps that shows all the competing fascias to the [X] [CONFIDENTIAL] problematic Ramsay hospitals on the basis of:

- (a) a 30 minute drive-time which reflects Bupa's own internal analysis, albeit that (as demonstrated in Annex 1) this will understate the catchment areas for Ramsay's self-pay patients, which is the relevant theory of harm being tested; and
- (b) a 45 minute drive-time, [X] [CONFIDENTIAL], which is more consistent with:
 - (i) [X] [CONFIDENTIAL]; and
 - (ii) the CC's own patient survey which shows that the average travel time for self-pay patients is just under 45 minutes (see page 48 of the survey results).

4.3 The results of this analysis clearly show that:

- (a) on the basis of a 45 minute drive-time:
 - (i) [X] [CONFIDENTIAL] Ramsay hospitals face at least one other competing fascia, and [X] [CONFIDENTIAL] face at least two competing fascias if the competitive constraints from PPU's and NHS hospitals that provide private treatment are included;
 - (ii) if the analysis incorrectly excludes the competitive constraints from PPU's and NHS hospitals that provide private treatment, [X] [CONFIDENTIAL] of the Ramsay hospitals still face at least one other competing fascia, and [X] [CONFIDENTIAL] face at least two competing fascias; and
- (b) even on the basis of an overly narrow 30 minute drive-time (based on Bupa's own internal analysis):
 - (i) [X] [CONFIDENTIAL] Ramsay hospitals face at least one other competing fascia, and [X] [CONFIDENTIAL] face at least two competing fascias if PPU's and NHS hospitals that provide private treatment are included; and
 - (ii) if the analysis incorrectly excludes the competitive constraints from PPU's and NHS hospitals that provide private treatment, [X] [CONFIDENTIAL] of the Ramsay hospitals still face at least one other competing fascia, and [X] [CONFIDENTIAL] faces at least two competing fascias.

4.4 Accordingly, this re-worked analysis, which is based on comments by the two largest insurers (and indicates that just one rival fascia is sufficient to provide a competitive constraint on the hospital in question), clearly shows that the CC's local market analysis has materially overstated the Ramsay hospitals of concern.

- 4.5 As there appears to be absolutely no supporting evidence whatsoever to justify the decision rule applied by the CC (i.e. to require at least three competing fascias in an area), Ramsay would urge the CC to review its local market analysis as a matter of urgency.

APPENDIX

COMPETING FASCIAS WITHIN 30 AND 45 MINUTE DRIVE-TIMES FOR THE [X] [CONFIDENTIAL] IDENTIFIED RAMSAY HOSPITALS

Ramsay Hospital	Hospitals within 30 Minute Drive-time	Hospitals within 45 Minute Drive-time	Comments
[X] [CONFIDENTIAL]	[X] [CONFIDENTIAL]	[X] [CONFIDENTIAL]	[X] [CONFIDENTIAL]