

Response of



to

Provisional Decision on Remedies
(Non-Confidential)

Appendix 1

7 February 2014

Response to Provisional Decision on Remedies Bishops Wood/ Clementine Churchill

Divesting either Bishops Wood or Clementine Churchill would be ineffective and disproportionate.

Bishops Wood and Clementine Churchill are complements not substitutes – they have different focuses. Bishops Wood focuses on oncology; Clementine Churchill focuses on high acuity treatments such as neurosurgery and neuro-rehabilitation services. Divestment of either hospital would not result in the increase in competition anticipated by the CC, as Clementine Churchill would not be able to provide the oncology services available at Bishops Wood and Bishops Wood would not be able to match the scope and scale of Clementine Churchill. They are not credible alternatives across much of their respective service provision. [X]. That can merely be a hope rather than an expectation – indeed a hope that is not shared by the main insurer with experience of operating such local tendering exercises based on exclusivity. The CC has not adequately evidenced how the divestiture would be effective and as such has no basis for requiring a divestment.

In any event both hospitals are substantially constrained to the extent that any gain from further contention between them can only be small. This substantially reduces the assumed price benefit, which the evidence suggests is far below that assumed by the CC in any event.

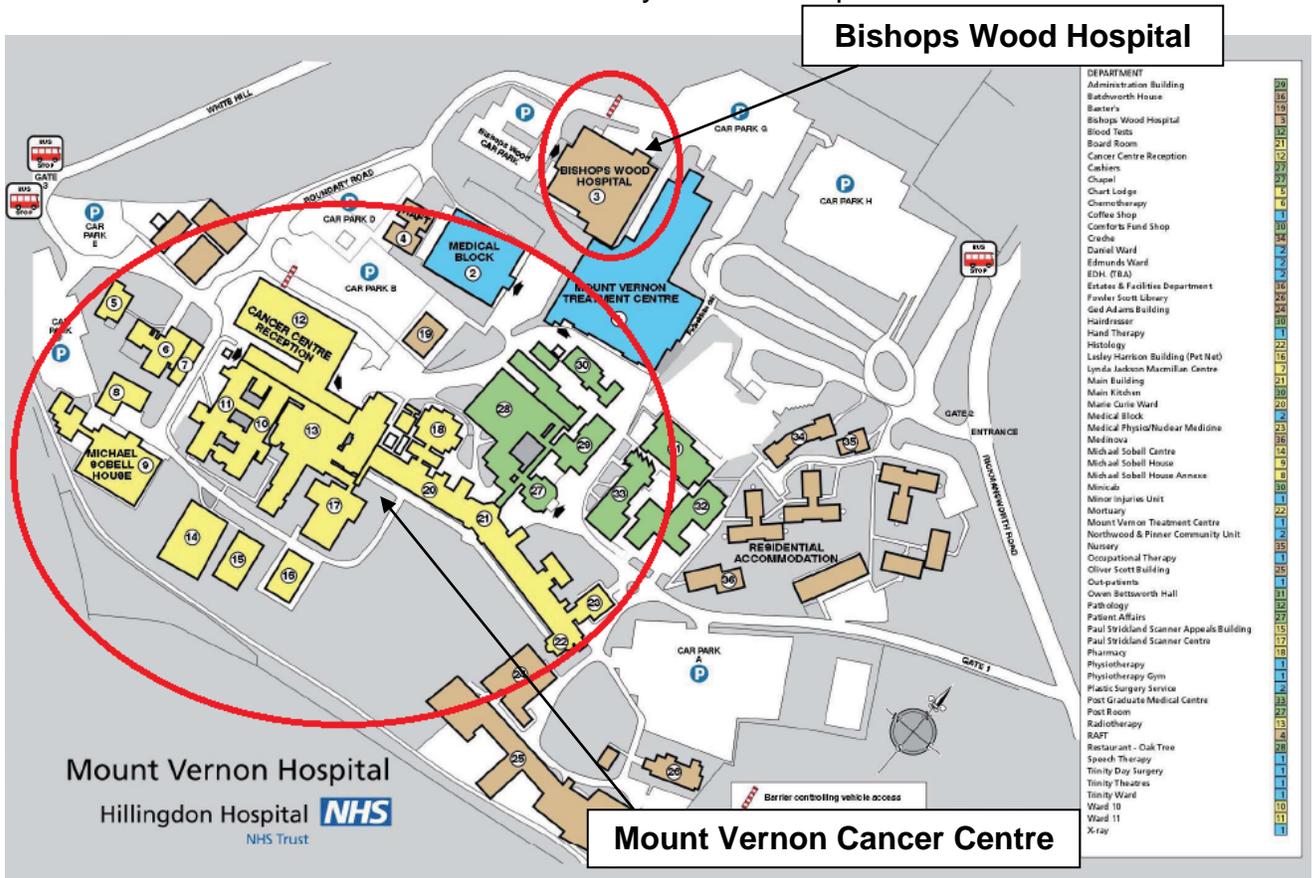
Bishops Wood Oncology Specialisation

- 1.1 Bishops Wood focuses on oncology with [X]% ([X]) of its inpatient and daycase revenue for FY 2013 originating from oncology.¹ In addition to the amounts shown as oncology, a portion of the work included in other categories is also attributable to the oncology work of the hospital.
- 1.2 By contrast only [X]% ([X]) of Clementine Churchill's revenue from daycases and inpatients for FY 2013 is from oncology.
- 1.3 The CC contends that there is an incentive for each hospital within a group to specialise to an extent, rather than to duplicate services, and that this incentive would change following a divestiture of one of the hospitals.² It is wrong to simply assume that is the reason in this case. In fact, Bishops Wood's focus on oncology is primarily the result of the benefit from the NHS facility and commissioners with whom Bishops Wood is co-located. In all likelihood any owner would pursue the same differentiated strategy due to the obvious benefits

¹ [X]

² See PDR, A2(2)-4 para 20

associated with it. Bishops Wood is co-located with Mount Vernon (NHS) Hospital. The NHS has chosen to centralise many of its cancer services in this area at Mount Vernon Hospital and services at Mount Vernon Hospital are operated by two NHS Trusts – the Hillingdon Hospital NHS Trust and the East & North Hertfordshire NHS Trust, the latter operating the cancer services there. The vast majority of Mount Vernon Hospital’s clinical space is given over to the Mount Vernon Cancer Centre - shown in yellow on the plan below.



1.4 There has been a concerted effort by the East and North Hertfordshire NHS Trust to expand Mount Vernon Cancer Centre. It has been for several years an explicit strategic objective of the East and North Hertfordshire NHS Trust to “maintain the pre-eminence of Mount Vernon as a tertiary Cancer Centre, and to provide more cancer care locally.”³ At Mount Vernon Cancer Centre there are currently over 500 members of staff. Mount Vernon Cancer Centre has a catchment of almost 2 million people and over 5,000 new patients registering

³ See East and North Hertfordshire NHS Trust Annual Report and Accounts 2010/2011, pp. 8, 13; East and North Hertfordshire NHS Trust Business Plans 2012/2013 p. 6, <http://www.enherts-tr.nhs.uk/files/2010/03/trust-Annual-report-2012-13-no-cover.pdf> East and North Hertfordshire NHS Trust Business Plans 2013/2014 slide 21 <http://www.enherts-tr.nhs.uk/files/2013/04/item-9-Trust-Operating-Plan-2013-14.pdf>

with it each year.⁴ Since 2005 there has been approximately £35 million invested in developing its services,⁵ including a new £2.25 million brachytherapy unit, a £21.82 million radiotherapy wing, and a £1.43 million redevelopment of the chemotherapy unit. Mount Vernon Cancer Centre now has the first CyberKnife in the NHS, costing £2.7 million.⁶ There are plans in place for the further development of the Mount Vernon Cancer Centre site⁷ and for its strategic and commercial development.⁸

- 1.5 The obvious strategy for anyone owning Bishops Wood Hospital therefore is to seek to provide a private service that complements and builds on the advantage it gains from its affiliation with and proximity to Mount Vernon Cancer Centre, as a NHS Centre of Excellence for Oncology. Bishops Wood shares over [redacted] oncology consultants with Mount Vernon and has arrangements in place with the East and North Hertfordshire NHS Trust for patients of Bishops Wood to make use of the CyberKnife facility where appropriate. Such facility is not available at or in the immediate vicinity of Clementine Churchill. There is no reason to believe that any owner of Clementine Churchill would invest to create this capability as Clementine Churchill is positioned between the central London CyberKnife facilities (at TLC Cancer Centre and HCA Harley Street Clinic) and the Mount Vernon Cancer Centre.
- 1.6 Additional patient benefits and efficiencies arising from Bishops Wood's links to Mount Vernon include access to eight radiotherapy facilities at the Mount Vernon site. Due to radiation risk these facilities are located in bunkers, and thus require significant investment and specially adapted buildings. [redacted] any business case for such investment would have to consider the existing competition from Cancer Partners UK's new radiotherapy facilities at Elstree.
- 1.7 Bishops Wood also seeks to differentiate its cancer care by offering a joined up patient cancer service involving specialist support services (Macmillan nurses, hospices and end of life care, alternative and complementary therapy centres etc.) which are all located close to Mount Vernon Cancer Centre. These services are independent of both the NHS and BMI, but Bishops Wood has developed long-standing relationships with them – so BMI's patients benefit from the cancer

⁴ See <http://www.enherts-tr.nhs.uk/our-hospitals/mount-vernon-cancer-centre/>

⁵ See Annex 2- Press Statement - First NHS CyberKnife® begins treating cancer patients East and North Hertfordshire NHS Trust 2012/13 annual report and accounts p. 15 <http://www.enherts-tr.nhs.uk/files/2010/03/trust-Annual-report-2012-13-no-cover.pdf>

⁶ See Annex 2 - Press Statement - First NHS CyberKnife® begins treating cancer patients

⁷ See East and North Hertfordshire NHS Trust Business Plans 2013/2014 slide 24 <http://www.enherts-tr.nhs.uk/files/2013/04/item-9-Trust-Operating-Plan-2013-14.pdf>

⁸ See East and North Hertfordshire NHS Trust Annual Plan 2012/2013, p. 18 <http://www.enherts-tr.nhs.uk/files/2010/03/trust-Annual-report-2012-13-no-cover.pdf>

care ecosystem that has developed around Mount Vernon. As independent, onsite services, these cannot simply be transferred to other hospitals located further away and in any event, require time to develop. [X].

- 1.8 BMI has chosen to mirror the NHS strategy with respect to concentrating cancer expertise in specialist centres. This allows BMI to offer improved end-to-end capability for cancer care and design improved and more integrated patient care pathways that meet patient need, consultant demand and best clinical practice. Recognising the advantages that location and links with Mount Vernon give, BMI has [X].
- 1.9 By contrast, [X].
- 1.10 [X]. The difference between Bishops Wood and Clementine Churchill is not a function of investment incentives in BMI's ownership as the CC claims. The focus by BMI at Bishops Wood on oncology – and cancer services more generally - is an inevitable by-product of NHS strategy to develop cancer services and oncology at Mount Vernon Cancer Centre, and would persist after any divestment regardless of who bought the facility.
- 1.11 [X].

Clementine Churchill's focus on high acuity treatments

- 1.12 Clementine Churchill has focused on high acuity treatments - including neurosurgery and neuro-rehabilitation services and particularly complex back surgery – as a body of consultants from the nearby Royal National Orthopedic Hospital NHS Trust (RNOH) have this clinical capability. [X].
- 1.13 Clementine Churchill has a six bed ICU level 3 facility which underpins a significant portion of the high acuity work that it attracts and which is identified by both AXA PPP and Bupa as a major distinguishing feature of Clementine Churchill.

Bishops Wood would not be in a position to compete effectively with Clementine Churchill after any divestment by BMI

- 1.14 [X]
- 1.15 In terms of reconfiguring its current operations, clearly no owner of Bishops Wood is going to take action that would cause it to reduce its oncology offering, given this is its major competitive advantage. [X].
- 1.16 [X]
- 1.17 Bishops Wood does not have an ICU level 3 facility. [X].

- 1.18 Oncology and whole pathway cancer care is not the only point of service differentiation between the hospitals. Clementine Churchill generates [REDACTED] from neurosurgery and neuro-rehabilitation services and Bishops Wood generates [REDACTED]. In order to threaten to compete with Clementine Churchill and take this work away from the latter, Bishops Wood would need to develop a new specialty, attracting consultants for the first time, investing in related equipment and attracting specialist nurses. As noted above, it is not clear consultants would be willing to make the move [REDACTED].
- 1.19 The CC’s reasoning in rejecting the divestment of either Edgbaston or Priory – summarised below - applies even more so to Bishops Wood and Clementine Churchill.
- 1.20 The CC argues that as Priory provides differentiated service offerings (including critical care level 3 facilities), and as there are no other BMI facilities in that area offering the same level of critical care services, divestiture of one or more BMI facilities in the area would not appreciably increase the competitive constraint on Priory, and that therefore neither Priory nor Edgbaston should be divested. The CC considers AXA PPP’s statement that Edgbaston would be able to compete effectively with Priory only if there was a very significant level of investment, as supportive of its decision not to require a divestment in that case.⁹
- 1.21 Similarly to its analysis of Priory, the CC acknowledges that Clementine Churchill provides specialist services, including ICU level 3, not offered by other hospitals in the area.¹⁰ Whereas the CC acknowledged AXA PPP’s argument that Edgbaston would need a very significant level of investment to compete effectively with Priory as supporting its conclusion against divestiture¹¹, regarding Bishops Wood, AXA PPP goes even further to state that “*even with significant investment [it] thought it unlikely that Bishops Wood would be able to compete with the BMI CCH...*”¹². It follows *a fortiori* therefore that the CC should conclude against divestment for both Bishops Wood and Clementine Churchill, thereby applying its reasoning regarding Edgbaston and Priory consistently.
- 1.22 [REDACTED]
- 1.23 [REDACTED]
- 1.24 [REDACTED]

⁹ PDR, A2(2)-49 para 135

¹⁰ PDR, A2(2)-10 para 22

¹¹ PDR, A2(2)-49 para 135

¹² PDR, A2(2)-7 para 17.

- 1.25 The CC has been told by the PMIs that its concept of a narrow exclusive tender exercise over the overlap procedures is unworkable, that Bishops Wood has a smaller presence than Clementine Churchill in the majority of key specialisms and that it would need to expand significantly in a number of specialisms in order to be a credible alternative for insurers.¹³ [§<].
- 1.26 AXA PPP also acknowledges the constraints on Bishops Wood stating that it thinks it is unlikely, even with significant investment, that Bishops Wood would be able to compete with Clementine Churchill or Spire Bushey for private patients to the extent that AXA PPP could remove or realistically threaten to remove either Bishops Wood or Clementine Churchill.¹⁴ Bupa also acknowledges Bishops Wood's limitations to act as such a threat to its competitors.¹⁵ There is no reason to suppose that the CC is better able to make these judgments for these experienced PMIs and put its view in place of theirs. Bupa and AXA PPP have not been shy of taking the opportunities the CC has created for them in this inquiry. There is every reason to believe that they would push aggressively for divestiture if they felt it enhanced their negotiating position. They haven't because it won't. That is the only conclusion open to a rational decision maker.

Bishops Wood is heavily constrained by competition

- 2.1 There is compelling and extensive evidence that Bishops Wood is already effectively constrained by its competitors. These competitors include:
- (a) Spire Bushey which is 7.2 miles from Bishops Wood, has 70 beds, five theatres, ICU level 2, and operates chemotherapy services alongside Cancer Partners UK's radiotherapy services at the Elstree Cancer Centre, 8.4 miles from Bishops Wood. Critically this is competition for cancer care.
 - (b) Spire Harpenden is a further competitive constraint, with 72 beds, four theatres, providing among other services private chemotherapy, diagnostic imaging, and ICU level 2 and is 20.9 miles from Bishops Wood.
 - (c) Spire Thames Valley Hospital, with 50 beds, 2 theatres ITU level 3 is a further competitor, located 10.3 miles from Bishops Wood.
 - (d) The Royal National Orthopaedic Hospital (which has 220 beds, ICU level 2 and ICU level 3 as well as a specialist Orthopaedics Unit and is located

¹³ PDR, A2(2)-4 para 16

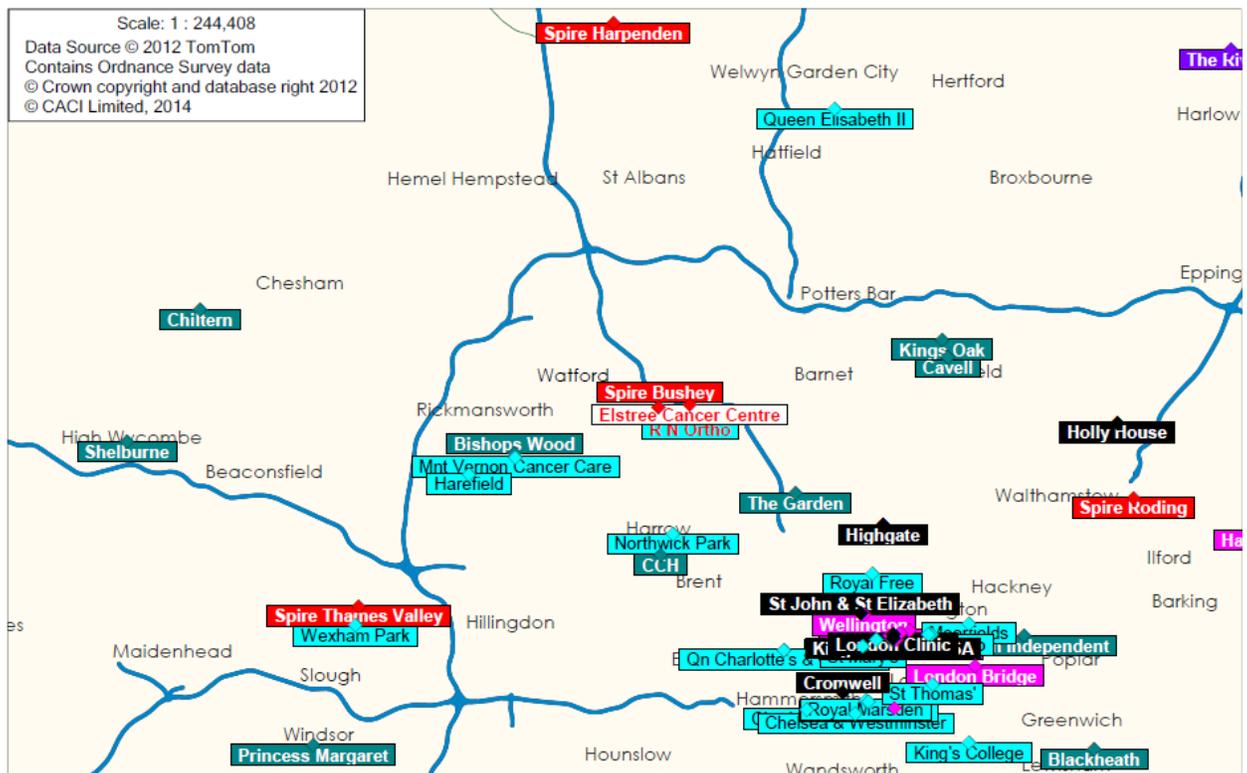
¹⁴ PDR, A2(2)-4 para 17

¹⁵ PDR, A2(2)-4 para 16

6 miles from Bishops Wood) with a private patient turnover from its PPU of approximately £5 million pa.

- (e) Harefield PPU, (with just over £29 million turnover in year ended 31 March 2012)¹⁶ acts as a further competitive constraint. It is located approximately 2.4 miles from BMI Bishops Wood. Harefield PPU has 37 inpatient beds¹⁷ available to private patients. It offers access to consultants specialising in cardiothoracic procedures.¹⁸ Due to Harefield Hospital's international reputation for heart and lung transplants, Harefield PPU receives patients from all over the world.

2.2 See the map below of Bishops Wood's and Clementine Churchill's surrounding competitors:



¹⁶ Accounts of Royal Brompton & Harefield NHS Foundation Trust for the Year ended 31 March 2012, p. 15.
<http://www.rbht.nhs.uk/about/our-work/publications/>

¹⁷ http://finder.bupa.co.uk/Hospital/view/52441/harefield_hospital

¹⁸ http://www.rbhh-specialistcare.co.uk/wp-content/uploads/2013/08/consultant-directory_web.pdf

- 2.3 Bishops Wood notes the highly competitive landscape and sets out the various ways in which Spire Bushey and other hospitals compete with Bishops Wood for patients, consultants and GPs:

[REDACTED]¹⁹

The fact that not all competitors are full service does not detract from the cumulative impact they have: together they are sufficient in number and diversity to challenge Bishops Wood across the board – including in oncology, its core specialty.

Intense competition for patients

- 3.1 As noted throughout Bishops Wood’s internal documentation, [REDACTED].²⁰
- 3.2 In order to compete, Bishops Wood is also [REDACTED]. Bishops Wood is also growing its oncology services through [REDACTED].²¹ Bishops Wood’s internal documents demonstrate [REDACTED].²²
- 3.3 Spire Bushey is also expanding its capacity and service offerings through its £7 million investment programme announced in 2009.²³ In 2010 alone Spire Bushey developed a new day care suite, providing additional beds and accommodation, a fifth state-of-the-art theatre, extended parking, a 128 dual source CT scanner (the first in the UK private healthcare market and the third of its kind in the UK), an upgraded imaging department, a new ophthalmic suite and other revamped facilities.²⁴ In addition Spire Bushey in 2012 expanded its physiotherapy department, providing sports medicine and rehabilitation services.²⁵ In 2011 Spire Bushey won a three year contract to run the Royal National Orthopaedic Hospital PPU in Stanmore until spring 2014, and has

¹⁹ [REDACTED]

²⁰ [REDACTED]

²¹ [REDACTED]

²² [REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ [REDACTED]

expanded its private orthopedic offering there via the Stanmore Orthopaedic Centre.²⁶

- 3.4 [REDACTED]. Spire Bushey (unlike Clementine Churchill) focusses on oncology and has a joint venture with Cancer Partners UK at the Elstree Cancer Centre established in 2010.²⁷ [REDACTED].
- 3.5 In reaction to Spire Bushey's expansion into oncology, Bishops Wood has been [REDACTED]²⁸ as [REDACTED].

Competition for Consultants

- 4.1 Bishops Wood competes with Spire Bushey and other hospitals for consultants across all specialisms. Moreover, Bishops Wood's main focus is on oncology, a specialism which the CC itself acknowledges is subject to intense competition for consultants.²⁹ A large proportion of Bishop Wood's consultants split their time with one or more of the three Spire hospitals in the area: Spire Bushey, Spire Thames Valley and Spire Harpenden. This is also the case in oncology where Bishops Wood is specialised and has a competitive advantage, and where [REDACTED] of Bishops Wood's [REDACTED] consultants already split their time with one or more of Spire Bushey, Spire Thames Valley and Spire Harpenden.³⁰
- 4.2 In order to attract consultants, hospitals, including Bishops Wood³¹ and Spire Bushey³², hold numerous educational and social events as well as regular information updates.³³ Indicative of the intense competition for consultants, [REDACTED].³⁴ The slide below demonstrates that Bishops Wood is in a competitive market for consultants and that it is aiming to promote and develop its consultants and thereby grow its market share:

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

29 Annotated Issues Statement, para. 131

30 [REDACTED]

31 [REDACTED]

32 See Annex 17 - The Prostate Practice - Launch Invitation at Sopwell House 14 November 2013

33 See Annex 18 - Spire Bushey Consultant Newsletter May 2010, see Annex 19 Spire Bushey Consultant Newsletter June 2011

34 [REDACTED]

[REDACTED]³⁵

- 4.3 Bishops Wood is in intense competition with other hospitals to attract GP referrals to its facilities. As with consultants, Bishops Wood and its competitors engage with GPs through educational and social events and by other means. The efforts of its competitors to attract GP referrals are followed carefully by Bishops Wood. [REDACTED].
- 4.4 There is also competition against Bishops Wood from as far away as Central London for referrals from GPs in Bishops Wood's vicinity. For example the Wellington Hospital, run by HCA and located 17.7 miles away in Central London, is targeting GPs in the area around Bishops Wood for cancer referrals. In addition, the Northwick Park Hospital PPU, run by Trustplus and located 7.2 miles from Bishops Wood, is targeting GPs in the vicinity of Bishops Wood.

Bupa

6.1 [REDACTED]

[REDACTED]

- 6.2 Bupa's delisting of Bishops Wood, [REDACTED].³⁶ Moreover BUPA Healthcare at Home, is reported to be winning Bupa oncology referrals which would previously have gone to Bishops Wood.³⁷
- 6.3 For the CC to hold to the position that Bishops Wood is not constrained it needs to explain [REDACTED].

Clementine Churchill is heavily constrained

- 7.1 Clementine Churchill's internal documents demonstrate that it is in competition with numerous hospitals and conducts itself accordingly, in a vigorously competitive manner. This is consistent with insurer evidence³⁸ [REDACTED].

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ See AXA PPP's comments, PDR, A2(2)-para 17, Aviva Health UK Response to PFs and Possible remedies p. 4 "*Outside of London, divestiture remedies are less likely to be effective ... Aviva does not believe that there is likely to be an immediate effect on prices as a result of the changed competitive dynamic...*". PruHealth Response to PFs p.4 "*PruHealth did not express concerns about the structure and functioning of*

7.2 [REDACTED]

7.3 Unsurprisingly - given [REDACTED], Clementine Churchill displays significant evidence of competition, tracking its various competitors, monitoring their developments and strategies:

[REDACTED]³⁹

7.4 Moreover, Clementine Churchill lists these competitors as threats and plans its strategy accordingly:

[REDACTED]⁴⁰

7.5 [REDACTED]

7.6 Clementine Churchill regards possible expansion into new geographic markets via, for example, [REDACTED], as an opportunity. If Clementine Churchill were insufficiently constrained it would not be incentivised to expand into new services and geographic areas, instead exploiting its strong position in the local market.

7.7 [REDACTED]

7.8 It is telling that the key takeaways for Clementine Churchill listed in BMI's internal document below relate to growing its services and competing with other hospitals, which is not consistent with an ineffectively constrained hospital. An explicit purpose of launching Clementine Churchill's Neurosciences and Spinal units is [REDACTED]. The launch of Clementine Churchill's Spinal Unit, in conjunction with its recent acquisition of the O-Arm facility, indicates that Clementine Churchill is investing in its facilities (the O-Arm is estimated at [REDACTED] including non-recoverable VAT) in order to compete with [REDACTED] other hospitals, particularly in orthopaedic services. The O-Arm facility was purchased in order to [REDACTED]⁴¹ At the time of purchase of the O-Arm, Clementine Churchill was the only site to have this equipment in the UK, allowing it to provide a service to unique "gold standard". There are currently only two other sites in the UK with this facility, including the Royal National Orthopedic Hospital in Stanmore. If Clementine Churchill was insufficiently constrained, in a market characterised by large numbers of effectively constrained competitors across the UK (Ramsay, Nuffield

the market outside of London. It seems that the change in structure is at the behest and design of the two largest insurers, and we do not believe this to be equitable or in the market's best interest."

³⁹ [REDACTED]

⁴⁰ [REDACTED]

and Spire hospitals in particular) why would it have been first in the UK to invest in this state-of-the-art facility? Similarly, [REDACTED].⁴²

7.9 The award of the three year Royal National Hospital PPU contract to Spire Bushey enabled Spire Bushey to expand further into orthopaedics services [REDACTED].

[REDACTED]⁴³

7.10 Clementine Churchill also competes [REDACTED], for key staff. [REDACTED].⁴⁴

7.11 Clementine Churchill generates [REDACTED] international revenue business for BMI, accounting for [REDACTED] of BMI's overall international revenue for FY 2013, or approximately [REDACTED], and competing directly with Central London hospitals for this. Its largest customer is [REDACTED].⁴⁵ This constitutes approximately [REDACTED] of Clementine Churchill's revenue. In this regard Clementine Churchill's primary competitor is HCA which is dominating the London market and whose market share is limiting BMI's growth.⁴⁶ Bupa Cromwell is also an important competitor in this regard.⁴⁷ It is BMI's objective to increase its participation in this market, and with it Clementine Churchill's.

7.12 Bishops Wood does not [REDACTED] participate to any significant degree in the international market. Clementine Churchill has the requisite scale and scope of services to attract international business. By contrast, Bishops Wood, as a far smaller and more specialised hospital, [REDACTED].

Conclusion

8.1 The asymmetry between Bishops Wood's and Clementine Churchill's capability and Bishops Wood's capacity constraints mean that the idea of an insurer being able to remove or credibly threaten to remove either of these hospitals to engender increased competition between them is unrealistic. This is consistent with AXA PPP and Bupa submissions. The CC has no basis on which to

41 [REDACTED]

42 [REDACTED]

43 [REDACTED]

44 [REDACTED]

45 [REDACTED]

46 [REDACTED]

47 [REDACTED]

disbelieve these insurers when they are providing evidence about their own purchasing intentions and have strong incentives to support the CC's chosen direction of travel if they considered it would be to their advantage. In respect of self-pay, the effect of divestment would be felt by a tiny number of patients.

- 8.2 Moreover, Clementine Churchill at least is already adequately constrained for episodes that are or could be contestable with Bishops Wood. An insurer can already delist Clementine Churchill for these contestable episodes. This is consistent with AXA PPP comments and past Bupa practice.
- 8.3 Competition would not be enhanced as Bishops Wood would continue to compete particularly against Spire when owned by another private healthcare provider just as it does now. Any further constraint from Clementine Churchill can at best procure a small improvement to competition, which would be insufficient to allow an insurer to delist one of the two hospitals. That benefit is insufficient to outweigh the costs.