Response of

to

Provisional Decision on Remedies
(Non-Confidential)

7 February 2014

Appendix 3

Appendix 3: Blackheath / Shirley Oaks / Fawkham Manor / Sloane / Chelsfield Park

1. Introduction

1.1 The CC has provisionally found that BMI faces weak competitive constraints in southeast London in the area around its Blackheath, Chelsfield Park, Shirley Oaks, Fawkham Manor and Sloane hospitals. The CC therefore states that divestment of:

'*two hospitals [Chelsfield Park and Sloane] would increase the level of competition for patients within their catchment areas by introducing another one or two competitors, addressing directly the weak competitive constraints that give rise to an AEC in this area*' (para 86, Appendix 2.2 PDR).

2. There is no meaningful cluster that includes Blackheath

2.1 As a starting point, BMI notes that Blackheath is an anomaly both in its treatment in this assessment and in the 'cluster'. The CC has offered no case in respect of Blackheath at any stage in the investigation, nor requested that BMI provide any evidence in relation to it. Blackheath is effectively a central London hospital and has been included in the South East London 'cluster' only on the basis of [✂]. The CC has shown no competitive analysis for Blackheath within the cluster. The prime purpose of including it appears to be to enable the CC conveniently to centre the cluster.

2.2 BMI's response to the PDR in respect of South East London proceeds on the basis that Blackheath is excluded from the analysis. However, BMI notes that the competition position is unaffected either way.

3. There is no meaningful cluster that includes Shirley Oaks

3.1 The CC reasons that Sloane and Shirley Oaks [✂], serve a similar geographic base of patients and that either one of these facilities, independently owned, would give PMIs the ability to exclude at least one operator's hospitals from their networks in the local area and therefore increase competition. In reality, however, this is not the case. [✂].

3.2 As discussed in BMI's main PDR response, the CC's cluster analysis is predicated on the existence of single operator hospitals with overlapping catchment areas. Because the CC has adopted the mistaken approach of using fixed road-distance isochrones, the shape of the catchment is artificially extended and does not reflect where patients actually come from.

3.3 By contrast, BMI's own core catchment analyses, used by the business in the ordinary course, are based on the postcode districts where patients actually come from - i.e. empirical data on actual observed demand. This can have a striking impact on the shape of the catchment. The following map (enlarged at Annex 1) shows how out of kilter the CC's catchment area is in respect of Shirley Oaks.

[✂]

3.4 This has important implications. [✂]:

[✂]

3.5 However, on BMI's demand focussed catchment analysis, it can be seen that the CC's cluster is not meaningful for Shirley Oaks [✂].

[✂]

3.6 On this basis, the CC's catchments do not accurately reflect where Shirley Oaks' patients actually come from. Simply put, they are demonstrably inaccurate and too unreliable to establish and sustain a case for divestment.

3.7 [✂].

3.8 [✂]

3.9 [✂]

3.10 [✂]

3.11 [✂]

[✂]

3.12 [✂]

3.13 [✂]

3.14 [✂]

3.15 [✂]

3.16 [✂]

3.17 [✂]

3.18 [✂]

3.19 Under separate ownership, Shirley Oaks would therefore have no incentive to compete with Sloane or Chelsfield Park for consultants, [✂].

3.20 [✂]. This has always been the case, even prior to the BMI/Amicus merger, when Shirley Oaks was operated by another provider.

3.21 In any event, BMI reiterates that Shirley Oaks is sufficiently constrained in its local environment. The competitive constraint it faces from other private hospitals was discussed at length (15 A3 pages) in BMI's response to the PFs (local assessments). BMI does not repeat those arguments here pending the CC's review of its PF response but reiterates that Shirley Oaks faces very significant competition locally. It is surrounded by competitor hospitals to the west, north and south, including a large number located in the NHS South West London sector. St. Anthony's (larger than Shirley Oaks with broadly the same number of specialties but also ICU level 3 capability, which the CC has largely ignored in its analysis) is located on the other

side of Croydon in Cheam (nine miles away) and Aspen Parkside (again, larger than Shirley Oaks, with broadly the same number of specialties and ICU level 2) is in Wimbledon (12 miles away). HCA's London Bridge Hospital – which, with a new and expanded critical care level 3 unit with 15 beds, is the largest critical care provider between the South bank of the Thames and the South East of England - is a 15 minute train journey from East Croydon station. Two Ramsay hospitals (North Downs and Ashtead) and Spire Gatwick Park hospital are easily accessible from Croydon. This prevalence of competition is corroborated by the fact that Bupa was able to delist Shirley Oaks, essentially diverting all demand to BMI's competitors.

3.22 These competitors are competing for patients in Shirley Oaks' catchment area, targeting the same [✂] GP practices as Shirley Oaks. Significant contemporaneous evidence of such competitive action by [✂] has been provided by the management and sales teams at Shirley Oaks hospital and is included at Annex 7 to this Appendix.

3.23 The way in which Shirley Oaks has adjusted its business strategy to competitor interaction was discussed at length in the response to the PFs but has yet to be reflected in the CC's detailed local assessment.

3.24 The description of Shirley Oaks as outside the BMI 'cluster', yet adequately constrained in its local environment, is entirely consistent with [✂] (again, see BMI's response to the Provisional Findings).

3.25 Finally, BMI notes that this description is also entirely consistent with the fact that Shirley Oaks [✂]. The CC – as an evidence-led authority - must trust the evidence, not the intuition. For all these reasons, divestment of Shirley Oaks would be ineffective in promoting patient choice in the area around Chelsfield Park, Shirley Oaks, Sloane and Fawkham Manor hospitals.

4. [✂]

4.1 BMI maintains that the CC has not presented a coherent evidence-based case on which it can rationally conclude that BMI hospitals in South East London operate as a 'cluster'. It reserves its position on this and awaits the CC's final report. However, for the purpose of the PDR, [✂].

4.2 As explained above, the CC's catchment areas do not accurately reflect where a hospital's patients actually come from. Because the CC has adopted the mistaken approach of using fixed road-distance isochrones, the shape of the catchment is not malleable and cannot change to reflect where patients actually come from.

4.3 On the CC's catchments the South East London 'cluster' (excluding Shirley Oaks) looks as follows (enlarged at Annex 8):

[✂]

4.4 On BMI's demand-led core catchment analysis (enlarged at Annex 9) - based on empirical data on where patients *actually* come from - it can be seen that:

(a) [✂]

(b) [✂]

[✂]

5. Divestment of Chelsfield Park would be ineffective

5.1 [✂]

5.2 The CC notes that divestiture would be most effective where it gives insurers the ability to exclude at least one operator's hospitals from their networks (Appendix 2.2, para 106 PDR).

5.3 Divestment of Chelsfield Park would be ineffective for a number of reasons:

5.4 [✂]

5.5 [✂]

5.6 Therefore divestment of Chelsfield Park [✂] would not enable an insurer to exclude [✂] a hospital retained by BMI post-divestment.

5.7 Secondly, Chelsfield Park is already competitively constrained, such that divestment would have no effect on prices to insurers or self-pay patients. BMI does not intend to repeat the competitive assessment contained in its response to the PFs here. However, it does provide further detail on two competitors which in particular the CC has underplayed in its assessment to date, KIMS and HCA London Bridge via the Sevenoaks Medical Clinic.

KIMS

5.8 The Kent Institute of Medicine and Surgery ("KIMS") is a new, state of the art hospital development on the outskirts of Maidstone, Kent, due to open in two months. KIMS (which is 26 miles / 30 minutes' drive time from Chelsfield Park) will have 100 beds (81 inpatient and 20 day case), five high specification operating theatres (including two laminar flow) and level 3 ITU capability with three HDU beds. An information pack showing the KIMS proposition is provided at Annex 10.

5.9 KIMS will be the only tertiary level hospital capable of performing complex procedures in Kent and will obviate the need for patients to travel into Central London for complex surgery. KIMS can be expected to attract a large proportion of the private healthcare demand from Kent and the South East ([✂]) and will change the local private offering dramatically.

5.10 In its own submissions to the CC, KIMS stated that 380 consultants had signed or were in the process of signing practising privileges agreements with it pursuant to which they had agreed to transfer some or all of their existing private patient practices to KIMS.[1] Clearly fierce competition for consultants is already in place.

[1] Provisional Decision on Remedies, paragraph 2.329.

WHAT?: KEY FACTS

- **Independent Identity** - Kent Institute of Medicine & Surgery 'KIMS'
- **Development** - been over five years in planning
- **Patients** - open to both private and NHS patients
- **350 Clinicians** - have agreed to practise privilege agreements
- **Specialities** - basic, intermediate, advanced, complex, reconstruction surgery
- **Location** - Maidstone, Kent, Junction 7, M20
- **Completion date** - admitting patients April 2014

KIMS

WHAT?: KEY FIGURES

90m	£90 million is the total cost invested
1.5m	Serving a catchment of up to 1.5 million patients
350	There are 350 clinicians who will practice at KIMS from 12 different countries
7	Seven acres of space, a footprint of 15,000 sq. m
4	Four outreach clinics planned in Ashford, Canterbury, Kings Hill, Bromley

KIMS

You are here: HOME | DEVELOPMENT & TIMESCALES

Development & Timescales

ABOUT KIMS
OUR MISSION
KIMS SERVICES
HOSPITAL FACILITIES
HEALTHCARE IN KENT
DEVELOPMENT & TIMESCALES
FAQs
PRESS RELEASES

Q. When will Phase 1a open and what medical fields will be performed there?

Phase 1a will open in April 2014 and comprises four linked buildings together with a central car park. Services will include:

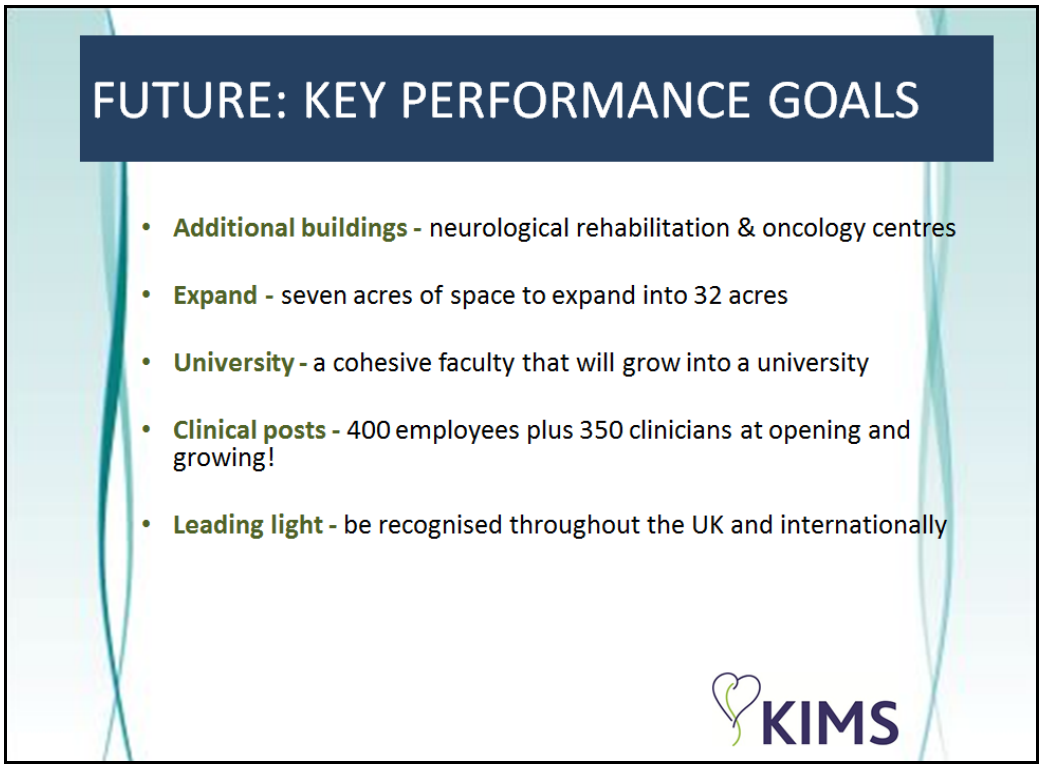
- **The Kent Building**
- General Outpatients
- Cardio Respiratory Department
- Endoscopy Suite
- Imaging Department
- 5 Theatre Suites
- Intensive Treatment Unit
- In-house Sterilisation Unit
- Pathology Laboratory

- **The Maidstone Building**
- 59 single occupancy inpatient suites – including dedicated bariatric and High Dependancy Unit/Corony Care Unit beds

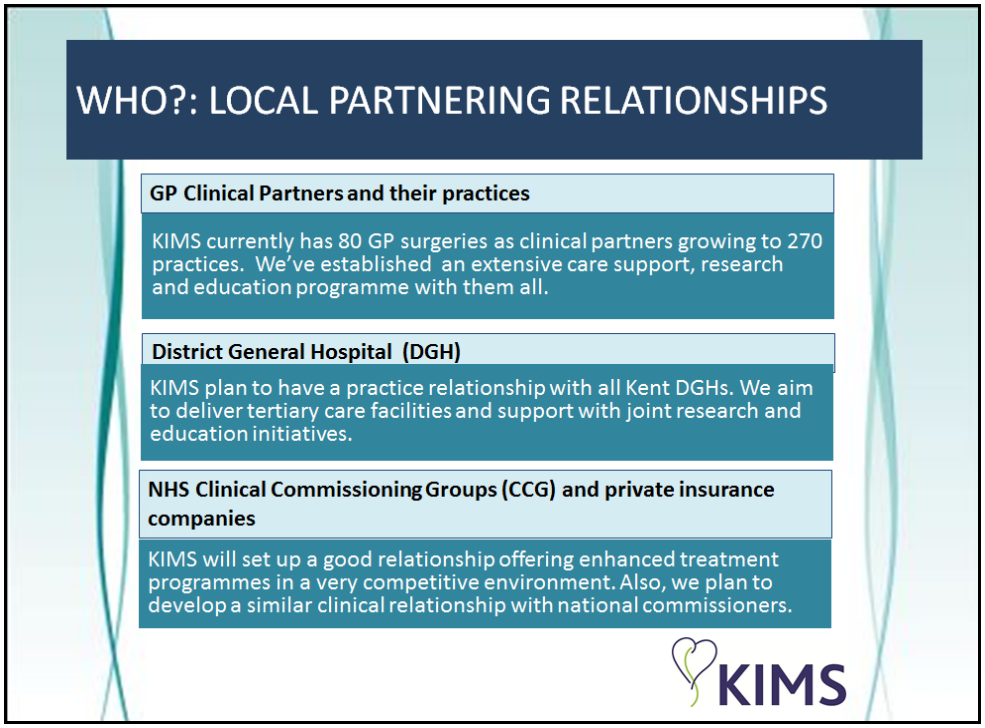
- **The Canterbury Building**
- Physiotherapy Department – in and outpatient physio', chiropody and podiatry
- Hospitality – hospital catering and dining area
- Inpatient Ward – 18 single occupancy suites
- Day Case Ward – 20 single occupancy day care bays
- Interventional Fluoroscopy Suite
- Angiography Suite

- **The Clydesdale Building**
- Dermatology Suite – outpatient and day care minor treatments and procedures
- Administration offices for KIMS and clinicians
- Education Centre – including Seminar and Meeting Rooms
- Medical Records Storage

5.11 It is expected that tertiary work will also 'drag' secondary work to KIMS, which offers onsite consultation and research grade diagnostic testing/ imaging facilities (MRI, CT and nuclear medicine).



5.12 KIMS has marketed itself aggressively in West Kent, i.e. to patients attending, inter alia, Chelsfield Park. There are plans for outreach centres in Ashford, Canterbury, Kings Hill and Bromley [✂].



WHO?: CLINICAL PARTNERS

Clinical support to provide high-quality care

Company	KIMS Partnership	Purpose / Service
BERKA Healthcare Ltd	Clinical partnership	Develop further reach out clinics, subsidised nursing accommodation, further tertiary centres and the development of subsidised day care nurseries
Canterbury Christ Church University	Clinical partnership	Provide training for nurses and all medical technical specialities
Crown Diagnostic Ltd	NHS partnership	NHS Health Checks, assessing risk, helping prevent diseases
CTC Ltd	Clinical partnership	Reach out clinic providing wrap-around clinical support
Diabetes Kent Ltd	Clinical partnership	Medtronic Diabetes, providing optimal diabetes care

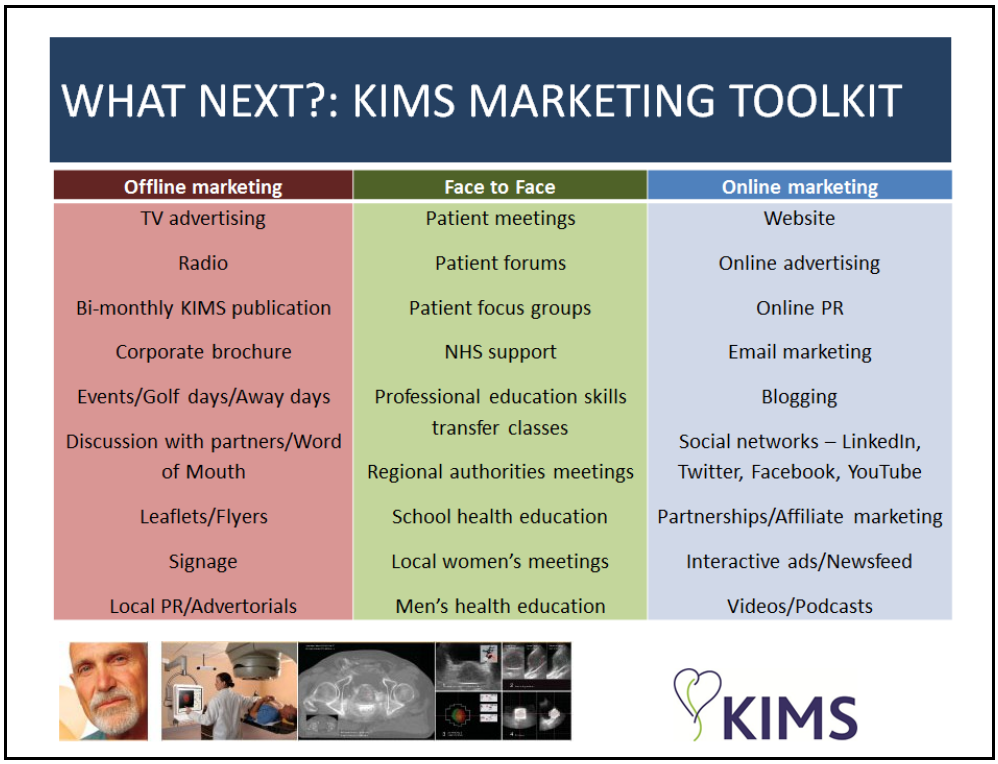
KIMS

WHO?: SUBSIDIARY CLINICAL COMPANIES

Collaborating to create a healthy community

Company	KIMS Partnership	Purpose / Service
Dermatology Kent Ltd	NHS partnership	Comprehensive dermatology treatment service
Kent Neuroscience Ltd	Stoke Mandeville clinical partnership	Development of neuro village
Kent Pathology Services Ltd	Clinical partnership	High quality, responsive pathology services
KIMS Therapy Services Ltd	Clinical partnership	Specialised programmes of therapy
Lauriem Limited Liability Partnerships	Clinical partnership	Homecare services improving quality of life for patients
University links	Joint research and education partnership	Associated with 15 national and international universities

KIMS



5.13 KIMS has been recruiting consultants from a wider range of areas – from Pembury, Darent Valley and Medway to central London, as well as from a wide range of medical specialties (spinal, cardiac and cranial etc.). [✂]:

[✂][2]

[✂][3]

[✂][4]

5.14 It is well established in competition assessment that potential competition as well as actual competition can act as a constraint.[5] The CC cannot ignore the impact that the arrival of KIMS will have on private hospitals in the South East. That the CC has chosen to ignore this facility in its supposed detailed market assessment underlines the lack of rigour in the work. This facility, which is obviously no pipe dream, is transformational in the market in which Chelsfield Park operates. How can the CC justify ignoring it?

2 [✂]

3 [✂]

4 [✂]

5 Competition Commission Market Investigation Guidelines, paragraph 175(b).

HCA

5.15 In addition to KIMS, Chelsfield Park is constrained by HCA London Bridge Hospital through acute and ever-increasing competition intensified by Sevenoaks Medical Centre ("SMC"), HCA's referral centre in Sevenoaks.[6] This opened in June 2011. Although an outpatient centre, consultants wishing to practice at SMC are required as a means of HCA attracting new flows to London Bridge, an easy train journey away, to apply for consultation rights at HCA London Bridge Hospital. Consultants are strongly encouraged to direct all resulting surgery to London Bridge Hospital.[7] Indeed, SMC's website states: 'if onward referral is required, Sevenoaks Medical Centre, [SMC] offers rapid access to the facilities at London Bridge Hospital, including access to consultants from a wide range of other specialties if further investigations or treatments are needed.'[8]

5.16 HCA London Bridge has opened a new and expanded critical care unit level 3, with 15 beds making it the largest private critical care provider between the South bank of the Thames and the South East of England. The CC has recognised that patients are willing to travel to London for treatment, or often are already in London for work.[9]

5.17 Competition from HCA SMC is especially relevant to Chelsfield Park [✂].

5.18 Sevenoaks is an area with high PMI penetration. [✂] HCA has localised its promotion of consultants to Bromley GPs, using one of BMI's regular venues in Beckenham for West Kent GP events. Its Sevenoaks-specific strategy includes setting up Sevenoaks GP forums; monthly Sevenoaks GP Group educational meetings; patient-facing activity; carrying out data analysis for the Sevenoaks area to establish whether there has been a change in referral patterns over time.[10]

5.19 [✂]

5.20 [✂]

[✂]

5.21 [✂]

5.22 For completeness, BMI notes that Chelsfield Park competes with a number of other competitors, [✂]. Further evidence (additional to that provided in the PFs)

---

6 Which itself offers 21 specialties in Sevenoaks.

7 [✂]

8 http://blog.londonbridgehospital.com/entry/3660. Specialties offered in Sevenoaks include: acupuncture, Aesthetics, Cardiology, Counselling, Dermatology, ENT Surgery, Gastroenterology, General Surgery, Gynaecology, Hearing Aid Specialist, Neurology, Ophthalmology, Oral & Maxillo Facial Surgery, Orthopaedics, Osteopathy, Physiotherapy, Plastic Surgery, Podiatry/Chiropody, Psychiatry, Rheumatology and Urology.

9 PFs, paragraph 6.112(d). See also paragraph 43 of the CC's London Working Paper for further analysis of the asymmetric constraints between hospitals in Central London and Greater/Outer London.

10 [✂]

illustrating the way in which Chelsfield Park monitors and reacts to competitors' activities in its key target catchments and specialties are included at Annex 13.[11]

5.23 For the reasons outlined in this section 5, Chelsfield Park [✂] is already being sufficiently competitively constrained by competitors. It is clear that the divestment of Chelsfield Park would be ineffective in increasing competition in the area of South East London.

5.24 As with KIMS, it is beyond comprehension how the CC has failed to identify and analyse the impact of HCA in the 'detailed' assessment it claims to have done for the PDR.

6. [✂]

[✂]

7. [✂]

[✂]

8. **Proportionality**

8.1 Any remedy imposed by the CC must be proportionate. Forced divestments are an extremely intrusive and draconian remedy and the CC relies solely on its assessment of overlapping catchments as justification. The obvious shortcomings in the CC's catchment area analysis are highlighted by the discrepancies that arise when compared with BMI's evidently more accurate core catchment areas, which also reflect the reality of the competitive environment as experienced by BMI over many years and guide the strategic thinking of the business. Basing a divestment on such an evidently flawed assessment would not only fall far short of the double proportionality approach articulated in *Tesco v Competition Commission* but would be contrary to the evidence. The CC states "*[i]n considering the reasonableness of different remedy options the CC will have regard to their proportionality*."[12] The CC simply cannot order the divestment of Chelsfield Park when:

(i) Chelsfield Park is already competitively constrained, [✂];

(ii) [✂];

(iii) [✂]

(iv) [✂]

8.2 [✂]

[11] [✂]

[12] CC Guidelines for market investigations: Their role, procedures, assessment and remedies (April 2013), paragraph 342.

9. Conclusion

9.1 BMI maintains that the CC has not presented a coherent, evidence-based case on which it can rationally conclude that Blackheath, Shirley Oaks, Fawkham Manor, Sloane and Chelsfield Park operate as a 'cluster'. Further, the CC's cluster simply does not stack up – Blackheath and Shirley Oaks cannot form part of it.

9.2 [✂]

9.3 [✂]

9.4 [✂]