FAIR MARKET VALUE

Introduction

1. In assessing the proportionality of a divestiture remedy, the CC is required to consider whether the divestiture assets can be sold at fair market value. The Tribunal has stated that a divestiture remedy is only capable of being proportionate if "*the company has an appropriate opportunity to realise a fair market price for that business*"[1] and that "*there is a fair opportunity to test the market to get the most competitive offers for the business in question*"[2].

2. The PDR makes no reference to whether HCA could achieve a fair market value in being forced to dispose of the London Bridge and Princess Grace. The CC does not appear to have given this any consideration or carried out any analysis as part of its consultation process, nor it seems has the CC obtained professional advice from specialist advisers on these issues, without which it cannot make a reasonable and informed decision as to how to design its divestiture remedy in a way that provides fair market value for affected parties.

Divestiture period

3. The divestiture period is a critical factor in ensuring that the vendor is able to secure fair market value. The Tribunal has noted: "*… it is obvious that in the context of a compulsory sale the shorter the period allowed for the disposal the less freedom the vendor has to refuse a prospective purchaser's first offer or generally to attract suitable buyers into the market, and that this can clearly have an impact on the proceeds realised.*"[3]
4. The CC proposes a period of [✂]. As HCA has previously submitted[4], this period is too compressed a timescale to allow for the marketing of the facilities, a fair and transparent bidding process, negotiations with potential bidders, purchaser due diligence, the negotiation of transitional service level agreements and the purchaser's ability to secure relevant regulatory approvals.
5. The CC refers to the fact that Nuffield sold nine hospitals to BMI within a period of six months. However, the CC has failed to have regard to the very different nature of HCA's facilities, the significantly higher net asset value of HCA's hospitals and the complexities which arise from trying to split out two hospitals from a closely-integrated group, which would make this a far more intricate and complex transaction than Nuffield's sale of nine regional hospitals to BMI.
6. The CC's proposal for [✂] is arbitrary and it has not given proper consideration to the length of time which would be required, not merely to <u>dispose</u> of the assets, but to dispose

[1] *BAA v CC*, CAT (2011), para 76
[2] *BAA v CC*, CAT (2011), para 77
[3] *BAA v CC*, CAT (2009), para 249
[4] Response to PDR, paragraphs 7.36-7.38

of them in a way which would allow HCA to achieve a fair market value. HCA submits that a divestiture period of [✂] would be the minimum period required to allow it to go through the steps set out above and increase the chances of HCA being able to obtain fair market value for these businesses.

Purchaser criteria

7. HCA has also raised concerns about the CC's proposed conditions which prospective purchasers must meet and how this will adversely impact HCA's ability to achieve fair market value for its hospitals:

   (i) The requirement for the purchaser to have expertise and experience in the same type of high-acuity clinical specialisms as HCA is extremely restrictive and would exclude a wide range of potential bidders, thus significantly reducing the marketability of the two hospitals and adversely affecting their market value. The CC states that in HCA's case "*we would consider carefully the expertise of the purchaser in operating high-acuity facilities in particular.*" [5] This will greatly narrow down the pool of prospective purchasers.

   (ii) The CC's exclusion of existing hospital operators "*with facilities in close proximity to the divestiture facilities*"[6] appears to rule out any other central London provider – the only area in which there are any UK operators which run high-acuity facilities.

   (iii) The CC also states that its "*preference would be for the facilities to be sold to different purchasers*"[7]. This condition will further restrict HCA's ability to negotiate with a purchaser to acquire both divested hospitals and to achieve value by combining these assets.

   The application of these highly restrictive conditions would make it impossible for HCA to achieve a fair market value for its assets and could even rule out any prospect of carrying out a fair tender process.

8. The CC has also failed to conduct any assessment of whether there is in fact genuine and credible interest in the specific hospitals subject to potential divestment. The CC simply makes a vague and unsubstantiated reference to some third parties expressing an interest in acquiring a central London hospital.[8] In addition, the CC has not considered or properly tested how many of these potential acquirers would be able to meet the CC's proposed purchaser criteria. Without such an assessment, particularly given the CC's extremely restrictive purchaser conditions, the CC cannot reasonably conclude that there would be credible and sufficient purchaser interest so as to ensure fair market value for HCA's hospitals.

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5 PDR, para 2.85(b)
6 PDR, para 2.85(d)
7 Ibid
8 PDR, paragraph 2.80

Network synergies

9. HCA has described[9] how its hospitals benefit from economies of scope and scale and how divestiture would reduce these economies, both for HCA and for the divested hospitals, and increase costs. This creates two issues:

   (i) Divestiture will have a detrimental, ongoing impact on the efficiency and value of HCA's remaining business – HCA has quantified the loss of value which would arise. A fair market value for the divested assets will not compensate HCA for this.

   (ii) The prospective purchaser would be purchasing these assets without the network benefits which currently arise, i.e. the removal of network benefits impacts on the value of the assets to a purchaser. In other words, a proportion of the value which HCA currently derives from running these hospitals as part of an integrated network would be lost on a sale.

Asset risks

10. As part of the financial due diligence associated with a sale, a purchaser would look at the reliance of the hospital on consultants and the risk to revenue streams of any moving their practise. HCA has warned the CC[10] that a divestiture remedy is likely to be extremely unsettling for consultants based at the London Bridge and Princess Grace and that this would impact on the ability of the hospitals to retain key consultants, and indeed recruit new ones. The CC has received letters from numerous consultants at these hospitals indicating their concerns about a change of ownership. This would also significantly affect the value of the businesses and would prevent HCA from achieving a fair market value that could be achieved in a "normal", voluntary sale process.

Combined effects

11. The CC has failed to consider the *combined* impact of all the CC's proposed divestitures on HCA's ability to secure a fair market price. The CC is proposing the sale of a package of seven BMI hospitals and two HCA hospitals within a short timeframe. This means that a substantial and unprecedented number of hospital businesses would be put on the market at the same time. This is very likely to impact on the level of interest for, and the value of, HCA's hospitals at that point in time. Furthermore, these transactions would be occurring alongside other significant market opportunities, including in particular the recently announced sale of St. Anthony's Hospital in Cheam and the proposed sale of Spire's hospitals.

12. These 46 hospitals represent more than **20% of the entire private hospital market**. Now that the CC's market investigation is concluding, a backlog of PPU capacity is also likely to come into the market alongside new capacity such as the KIMS hospital in April 2014,

[9] Response to PDR, paragraphs 6.46-6.64
[10] Response to Remedies Notice, paragraphs 6.57-6.66

which means that the CC would be requiring HCA to sell London Bridge Hospital and The Princess Grace Hospital during highly unfavourable market conditions – seriously jeopardising HCA's prospects of achieving fair market value.

13. There is a clear risk that the value of HCA's hospitals would be significantly impacted by these other transactions. This is a further factor which supports a longer or staggered divestment period and which must be considered as part of the CC's proportionality assessment.

PMI contracts

14. HCA repeats its concern, set out in previous submissions[11], that even though it is proposing an 18-month holdover period for PMI contracts, the uncertainty over future PMI contracts will also negatively impact the value of these hospitals. A prospective purchaser will only have secured 18 months of continuity under the existing contracts. PMI recognition is critical to the viability of these businesses, and a purchaser has no assurances that PMIs will agree reasonable terms with the new owners of these hospitals.

Conclusion

15. A compulsory divestiture in and of itself restricts the vendor's freedom as to whether and how to sell the business and thereby impacts on the market value of the assets. It is therefore incumbent on the CC to take account of the divestiture of assets at below market value in its proportionality assessment and, further, to minimise the impact of a forced sale by providing a sufficient opportunity for the vendor to market the business and achieve as close to a fair market value as is possible in these circumstances. The manner in which the CC is requiring HCA to divest these hospitals, and the restrictive conditions it is imposing, will not allow for a fair market value and are further reasons why the divestiture remedy is disproportionate.

[11] Response to PDR, paragraphs 7.29-7.32