



THEATRE GROUP

PRIVATE HEALTHCARE MARKET INVESTIGATION

FURTHER SUBMISSION FOLLOWING ORAL HEARING OF 18 FEBRUARY 2014

27 FEBRUARY 2014

Competition Commission - Private Healthcare Market Investigation

Further submission by the Theatre Group on remedies

1. Introduction

- 1.1 The Theatre Group (“**TG**”) is making this further submission to the Competition Commission (“**CC**”) at the invitation of the members of the CC’s Group at the oral hearing held on 18 February 2014. The purpose of this submission is to set out TG’s thoughts on how the CC might structure an alternative to Remedy 1, which requires the disposal by BMI OpCo of a number of hospitals, in a way which achieves the objectives identified at that hearing.
- 1.2 This submission has been shown to and discussed with TG’s lenders.
- 1.3 The CC’s Remedy 1 will require BMI OpCo to sell its interests in seven hospitals in six different areas. In five of those areas BMI has the option of which hospitals to sell. The total list of hospitals from which the sales will be selected runs to 12 BMI OpCo operated hospitals, seven of which are owned by TG. Of those 12, the CC has identified four TG owned hospitals where it considered a freehold sale to be necessary in order to ensure the “success of the remedy”.
- 1.4 Under the structure of the remedy set out in the CC’s Provisional Decision on Remedies, the number of such hospitals where sale of a TG owned freehold will be required will be between two and four, at BMI OpCo’s discretion without reference to TG.
- 1.5 At the oral hearing, the Group repeatedly told TG that the CC wanted to “*keep TG whole*” and that any loss of value as a result of the proposed remedies in the private healthcare market investigation should be borne by BMI OpCo, rather than by TG. The Group invited TG to set out alternative proposals to achieve the sale of the BMI OpCo business in these hospitals on a basis which will achieve the CC’s objectives and without involving any freehold disposals by TG (the “**Revised Remedy**”).
- 1.6 TG is making this submission without prejudice to any of its arguments in its submission of 6 February 2014. For the avoidance of doubt, nothing in this submission should be construed by the CC as TG’s acceptance of those of the CC’s arguments with which it has disagreed in its submission of 6 February 2014 or at the oral hearing of 18 February 2014.

2. Objectives

- 2.1 TG understands the CC’s objectives in structuring the Revised Remedy to be as follows:

- to achieve the sale of each hospital operating business to a purchaser which meets the CC's criteria;
- to keep the Theatre Group whole, in particular by minimising the adverse impact of the remedy on TG by effecting the sale by BMI OpCo without requiring TG to sell its freehold interest;
- to follow a market based approach wherever possible;
- to ensure the process is conducted in a manner to minimise time taken, and maximise value; and
- to align the incentives and property rights to drive a successful remedy.

2.2 TG considers that the CC's objectives can be met through a remedies package structured in three stages, as explained further below. TG considers that this will deliver the CC's objectives, in a market focussed manner and without the need for freehold sales.

3. **Step 1**

3.1 BMI OpCo will be required to offer the hospitals for sale¹ with the existing lease terms in place, subject to the usual supervision of a Monitoring Trustee. Where the remedies package includes optionality in a particular area, it will be for BMI OpCo to decide how to exercise that optionality and to select the hospitals to be sold.

3.2 BMI OpCo will appoint an M&A adviser to run this process. BMI OpCo and its adviser will provide appropriate and prompt disclosure to TG concerning the sale process in order to provide full transparency on matters relating to the leases, keep TG up to date with progress, discussions with interested parties, proposals and any offers, and will consult TG in advance of being requested to consent to a new tenant in accordance with existing lease terms.

3.3 BMI OpCo should make it clear that offers may be for either positive or negative consideration (payable to or by BMI OpCo respectively).

3.4 Once BMI OpCo has identified purchasers for those hospitals to be sold, the CC will be asked to approve potential acquirers according to their financial and operational criteria.

¹ In this submission it is assumed that BMI OpCo will sell hospitals as an asset sale. An alternative could be, subject to any relevant finance consents, for BMI OpCo to hive down each hospital to be sold into a newly incorporated subsidiary and then to sell that subsidiary. The process set out in this submission can easily be adopted for such a share sale, if appropriate.

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3.5 At the same time as the CC is being asked to approve potential purchasers, TG will run its process, based on existing contractual rights in the existing leases, to approve or reject the proposed new tenant².

4. **Step 2**

4.1 If, within the period specified for Step 1 an acceptable bidder cannot be found for one or more hospitals, BMI OpCo (through its M&A adviser) will request best bids for those hospitals on revised lease terms, whereby bidders will propose revised lease terms.

4.2 In the event that an offer is received from a bidder acceptable to both the CC and TG on the basis of amended lease terms, BMI OpCo will agree to surrender the existing lease to TG. The surrender shall take effect at a date to be agreed by all parties so as to allow an orderly handover of the hospital operations to the new tenant. Alternatively, at TG's option for example if required to be tax efficient, the existing lease will be modified and assigned to the approved new tenant.

4.3 BMI OpCo will fully compensate TG for any loss suffered and costs incurred as a consequence of changes to the leases or tenants under this process by paying a make whole payment to TG ("**Make whole amount**"). BMI OpCo and TG would have an opportunity, within a pre defined period, to negotiate the Make whole amount. If no settlement is reached, DTZ, or another suitably qualified property expert agreed by TG and BMI OpCo, would conduct the calculation. If TG and BMI OpCo cannot agree on an expert within (say) seven days, a party nominated by the Royal Institution of Chartered Surveyors (RICS) will conduct the calculation.

4.4 On formal acceptance of a new tenant by CC and TG, BMI will become liable to pay the Make whole amount. The payment will be, at TG's option, either an upfront payment when the new tenant takes occupation of the hospital or payments made each quarter spread over the remaining term of the lease, or a combination of the two.

4.5 If BMI and TG cannot reach a negotiated settlement within the specified period of time on the 'Make whole amount', the appointed expert will calculate it by reference to (without limitation):

(A) the value of the difference between the rent payable to the TG under the existing lease and the rent payable by the new tenant;

(B) TG's transaction costs;

² The details of these rights are set out in Simmons & Simmons LLP's letter to the Commission of 31 October 2013.

- (C) dilapidations;
- (D) other costs and losses to TG (if and as identified); and
- (E) if TG considers appropriate, other impacts on capital value.

5. **Step 3**

If the above steps fail to produce an acceptable purchaser for one or more hospitals, the CC's Monitoring Trustee will step in and dispose of those hospitals which have not successfully been disposed of in Steps 1 or 2. Should the Monitoring Trustee consider it essential to amend the terms of the lease as required, it will be able to do so, on condition that BMI OpCo makes payment to TG of the calculated 'Make whole amount'.

6. **Indicative Timing**

- 6.1 TG considers that the process set out above is an efficient one which should not give rise to any undue delay. Under this proposal, which does not involve any freehold disposals, the precise period to be allowed for Steps 1 and 2 is a matter for BMI OpCo.
- 6.2 The existing leases contain rights for TG to consent to leasehold assignment in certain circumstances. TG has carefully structured these proposals so as to ensure that its interests are protected. Whilst its criteria for approving a leasehold assignment are not exactly those used by the CC in approving a proposed purchaser, TG believes that there is no reason why its approval of the assignment should be a significant obstacle or cause of significant delay, subject to the need for appropriate lenders' consents.

7. **Conclusion**

- 7.1 This paper sets out TG's initial proposals for a process by which the CC can achieve Revised Remedy in a timely manner. It has the merit of relying to the maximum extent on the market to determine the outcome.
- 7.2 TG and its directors are keen to engage further with the Commission to develop the thinking in this document and will make themselves available for meetings with the Group and staff if required.
- 7.3 Finally, it should be stressed again that nothing in this submission is intended to change the position of TG as set out in its submission of 6 February 2014.

Theatre Group

27 February 2014