

Anticipated lease by HCA International Limited of premises from
Guy's and St Thomas' NHS Foundation Trust

ME/5641/12

The OFT's decision on reference under section 23 given on 30 October 2012.
Full text of decision published 7 November 2012.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

The Parties

- HCA International Limited (HCA)** owns six private acute medical hospitals in London. It also has a number of outpatient and diagnostics centres and various partnerships with NHS Trusts in London and elsewhere in the United Kingdom (**UK**) to operate private patient services. HCA generated turnover in the UK for the year ended 2010 of approximately £512 million. HCA's parent company is HCA Holdings Inc, a healthcare provider headquartered in Nashville, Tennessee in the United States (**US**) that owns and operates 163 hospitals and over 100 surgery centres and clinical facilities in the US and the UK.
- Guy's and St. Thomas' NHS Foundation Trust (the Trust)** comprises Guy's hospital and St. Thomas' hospital located on two separate sites in London. The Trust is also part of King's Health Partners, one of five accredited UK academic health sciences centres. The Trust has two private patient facilities at the Westminster Bridge Consulting Rooms and the Howard Ward at St. Thomas'.¹ The Trust's total private patient activity across all of its sites was worth £21 million per year,ⁱ based on Monitor's classification of private work for the private patient cap.

¹ The Trust had provided private patient services from Nuffield House at Guy's Hospital until April 2012. It also has the Lansdell Suite, a six-bed private maternity unit on the St. Thomas' Hospital site and a number of 'pay beds' within the NHS hospital.

The Transaction

3. The Trust intends to develop a new NHS cancer treatment centre (**CTC**) on the Guy's Hospital site, to be opened in January 2016. The Trust and HCA will enter into a lease agreement for 25 years whereby HCA will operate and manage a private patient unit (**PPU**) on four floors within the CTC to provide inpatient and day care medical and surgical cancer patient services.
4. On 8 August 2012, HCA and the Trust entered into a Collaboration Agreement whereby the parties agreed to enter into the lease agreements discussed in further detail below. This agreement also provides that the Trust will not set up a competing PPU but may continue to carry out its existing private patient work.
5. Under the terms of the lease, HCA will acquire the premises as a shell and will at its own cost (estimated at approximately £[]) complete the interior works.
6. The Trust and HCA will also enter into another agreement whereby HCA will lease space in the Borough Wing of Guy's Hospital in London Bridge from where HCA will provide outpatient radiotherapy planning and treatment services. The lease of this space will occur in two phases, the initial phase now, with further space leased upon completion of the CTC (anticipated for January 2016). The lease of space in the Borough Wing will be for 10 years and may increase to 25-30 years when the CTC is completed.
7. It is provided for in the lease agreements that the Trust will provide services of a limited nature to HCA when the CTC is constructed and operational. Such services may include building services such as waste removal and other such necessary services required from the Trust as landlord.
8. The above arrangements are collectively referred to as the '**transaction**'.

Jurisdiction – enterprises ceasing to be distinct

9. Under section 23(1) of the Enterprise Act 2002 (the **Act**), a relevant merger situation is created if two or more enterprise cease to be distinct and either the turnover threshold is met or the share of supply test is satisfied.

10. In relation to whether a particular transaction constitutes the transfer from the vendor to the acquirer of an 'enterprise', the OFT's guidance states that:

'An 'enterprise' may comprise any number of components, most commonly including the employees working in the business and the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill. In some cases, the transfer of physical assets alone may be sufficient to constitute an enterprise: for example, where the facilities or site transferred enables a particular business activity to be continued. Intangible assets such as intellectual property rights are unlikely, on their own, to constitute an 'enterprise' unless it is possible to identify turnover directly related to the transferred intangible assets that will also transfer to the buyer. In interpreting these principles, the OFT will have regard to the following specific considerations.

- The transfer of 'customer records' is likely to be important in assessing whether an enterprise has been transferred.
- The application of the TUPE regulations would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise.
- The OFT would normally (although not inevitably) expect a transfer of an enterprise to be accompanied by some payment for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of the land and assets being transferred would be indicative of goodwill being transferred.'²

² OFT Mergers – Jurisdictional and Procedural Guidance, OFT527, paragraph 3.10. See also the Joint publication of the OFT and Competition Commission, Merger Assessment Guidelines, OFT 1254, dated September 2010.

11. The parties stated that the nature of the transaction does not create a relevant merger situation in accordance with the OFT's guidance as none of the factors set out in the guidance are present in this case. In particular, the parties stated that the arrangements do not involve the transfer of assets, rights or employees. Specifically, the parties stated that:

- HCA will acquire limited rights to use the 'Guy's' name in relation to the PPU but will not acquire any assets, equipment, stock, staff, existing contracts, goodwill or any liabilities
- the transaction is intended to create a new facility, providing dedicated private patient cancer services that the Trust does not currently provide. They stated that it is not the intention of the transaction to restrict the Trust from enabling consultants in other specialisms from carrying out cancer related work that would be considered minimal and incidental to that specialism
- it is not intended that any part of the Trust's existing private patient business transfers to HCA, and
- although the Trust has in the past carried out a small level of radiotherapy for private patients³ and offered limited private patient clinical cancer services at St. Thomas' Hospital,⁴ the terms of the Collaboration Agreement specifically allow for the Trust to continue to carry out its existing private patient cancer services up to a financial cap that significantly exceeds the value of this existing work.

12. The OFT received a number of third party comments in response to its invitation to comment, published on 23 August 2012. These third parties raised concerns regarding the impact of the transaction on competition, particularly given the existing position that HCA enjoys in relation to the provision of private patient services in London. However, with specific reference to whether the transaction will result in a relevant merger

³ The parties stated that the revenue generated from these services was approximately £[] in 2011 and occurred mainly at St. Thomas' Hospital site. Also, for the year 2011-2012, such work related to [30-40] patients.

⁴ The parties stated that this amounted to approximately £[] of private clinical oncology work conducted at the St. Thomas' site.

situation, third parties stated that there was a substantial level of private patient cancer services provided by the Trust and that this would now transfer to HCA. They argued that the transaction involves the transfer of intangible matters such as a network of consultants, the reputation for cancer services and access to the broader Guy's clinical infrastructure. It was put to the OFT that the level of private patient cancer services provided by the Trust exceeded the minimal levels stated by the parties.

13. The parties were asked to clarify the factual position pertaining to the current levels of private cancer treatment carried out at the Trust. The parties confirmed that the Trust does not currently carry out at the Guy's Hospital site private patient services that would normally be described as medical or clinical oncology (cancer services).⁵ The parties further stated that oncology was not a specialism that was carried out at Nuffield House, although the specialisms carried out there may have included cancer related work that the parties consider minimal and incidental to the specialism. The parties informed the OFT that the Trust carried out some private patient clinical haematology or bone marrow transplant services at Nuffield House but this service provision was centralised at King's College Hospital in 2012. The parties stated that the Trust no longer provides this service for either private or NHS patients.
14. The OFT considers that the difference between the parties' submission and those of third parties as to the level of current or recent (that is, including those services previously conducted at Nuffield House) private patient cancer services relates to the classification of the patient and service provided by each of the parties and third parties. It is understood by the OFT that in some cases, all services provided to a patient diagnosed with cancer will be considered oncology services. The parties have confirmed that a consultant in a specialism other than oncology may treat a patient with cancer on a one-off basis but this would be recorded under that specialism and not oncology. The OFT also notes that, until 2012, the Trust did provide clinical haematology services to private patients as discussed above. In this respect, the OFT considers that it is important for the purposes of the present analysis to note that:
 - HCA will provide dedicated private patient cancer services at the new facility. This differs from the private patient cancer services provided by the Trust in that the latter was generated by its consultants engaging in

⁵ Medical oncology being the diagnosis and treatment of cancer, and clinical oncology including biopsies and the surgical removal of tumours and other cancer surgical procedures.

the provision of ad-hoc cancer services to private patients as opposed to the Trust actively (through advertising and promotion) providing such private patient cancer services. In this respect, the OFT notes that the anticipated revenues of the HCA facility are significantly greater than the current level of revenues for private patient cancer services provided by the Trust.

- Although the Collaboration Agreement contains certain non-compete clauses⁶ which limit the private patient services that the Trust may carry out post-transaction, the OFT also notes the parties' submission that there are carve-outs from the provisions that permit the Trust to continue to carry on a certain volume of existing private patient cancer services (with reference to radiotherapy services) post-transaction.⁷

15. Some third parties also put to the OFT that the HCA PPU would not be limited to cancer services, and that the arrangement would extend to other private patient services in the future. In this respect, the parties stated to the OFT that the transactions under review pertained only to a cancer treatment facility and that the parties had not committed to HCA providing further private patient treatment in the context of the current arrangements. The parties also confirmed that there was no restriction in the Collaboration Agreement on the Trust's ability to carry out private patient healthcare services (outside cancer services) that it currently carries on. It is further accepted by the parties that if, at a future date, the Trust agreed to transfer any activities to the new PPU and/or HCA exercised its option to buy out other such services, the application of the Act would need to be considered as to whether such a transfer gave rise to a relevant merger situation.

⁶ The OFT has only examined these provisions in order to ascertain whether there will be a transfer of activities between the Trust and HCA and does not make any comment on whether such provisions are considered directly related and necessary to the transaction. The OFT notes that these provisions exclude private patient services currently provided at [].

⁷ It should be noted that the carve-out limit for the Trust's continuing private patient cancer services exceeded the cumulative amounts of spend that third parties stated were currently being spent on cancer treatment at the Trust. As such, even having regard to the higher figures quoted by third parties, the Trust would continue to be able to provide this level of treatment such that a transfer of this 'business' is not necessarily occasioned by the transaction.

OFT assessment on jurisdiction

16. As per the Jurisdictional and Procedural Guidance,⁸ in making a judgement as to whether or not a transaction involves the transfer of a business or part of a business, the OFT will have regard to the substance of the agreement and not just its legal form. Consequently, it may not be that a single factor is determinative. The transfer of a physical asset alone may be sufficient, but intangible assets are unlikely in the absence of other factors to be sufficient.
17. The OFT notes that HCA may be entitled to use the name 'Guy's' in its branding and promotion of the facilities. However, the OFT does not consider this factor on its own is sufficient to conclude that a relevant merger situation has been created.
18. Taking all of the information provided by the parties and third parties into account, the OFT considers that the transaction does not involve two or more enterprises ceasing to be distinct as per section 23(1) of the Act for the following reasons:
 - The transaction concerns the lease of space by the Trust to HCA for use as a PPU, and HCA will be investing its own funds to establish its private patient services facilities. In the absence of additional factors, the leasing of space in itself would not be expected to provide the basis for a finding that an 'enterprise' had been transferred.
 - No staff, customer assets or liabilities will be transferred from the Trust to HCA. Consultant practising privileges will not be transferred to HCA and consultants practising at the Trust will have to apply for privileges to practice at the HCA facilities.
 - The Trust did not provide dedicated private patient cancer services prior to the Transaction, except for a very limited amount of radiotherapy services at St. Guy's Hospital and cancer services at St. Thomas' Hospital. This includes provision of services from the Nuffield House facility that, from April 2012, has been active in the provision of NHS patient services only but previously provided private patient services. The value of these private patient cancer services is less than that set out in the carve-out provisions discussed above in paragraph 14.

⁸ OFT527, dated June 2009, paragraph 3.9.

- No services or patients will transfer to HCA and the Trust is contractually permitted to continue to provide the level of services post-transaction up to an amount specified in the Collaboration Agreement (which is greatly above the very limited level that the Trust states it currently provides).
19. Whilst no transfer of activities occurs at this time or is envisaged by the transaction, the parties accept that should a situation arise whereby the Trust transfers any activities to HCA, those arrangements may fall to be assessed as per the provisions of the Act, to ascertain whether a relevant merger situation arises.

Conclusion

20. On the basis of the information available to it, and taking the effect of the arrangements in the round, the OFT has decided that the anticipated lease by HCA International Limited of premises from Guy's and St. Thomas' NHS Foundation Hospital Trust does not qualify for investigation under the mergers provision of the Act because the arrangements in progress or in contemplation will not, if carried into effect, result in the creation of a relevant merger situation under section 23 of the Act.

ⁱ The Trust has clarified that this should read, 'The Trust's total private patient activity across all of its sites was worth £21 million for the year ended 2011...'.