Completed acquisition by General Healthcare Group of control of four Abbey hospitals and de facto control over Transform Holdings Limited, previously part of the Covenant Healthcare Group

ME/4560/10

The OFT's decision on reference under section 22(1) given on 14 September 2010. Full text of decision published 11 October 2010.

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

PARTIES

1. **General Healthcare Group Holding Partnership LLP (GHG)** is a provider of independent healthcare services in the UK. GHG operates two primary businesses: BMI Healthcare Limited (BMI), which operates 60 acute care private hospitals; and Netcare Healthcare (UK) Limited, which provides specialised clinical services to patients under contract to the NHS.

2. **Covenant Healthcare Group (Covenant)** comprised **Transform Holdco Limited (Transform)**, which provides cosmetic surgery, and non- surgical cosmetic treatments across the UK from a network of clinics, and other venues and two Transform owned and operated hospitals; and **Abbey hospitals** which owned and operated five private hospitals in North West England and Scotland as well as the London Churchill Clinic. However both the London Churchill Clinic and Abbey Caldew hospital in Carlisle were sold prior to the GHG transaction. Covenant's turnover (including the London Churchill and Abbey Caldew hospital) in the financial year to 30 September 2009 was approximately £65.8 million.

TRANSACTION

3. GHG, Covenant and the Bank of Scotland plc (the Bank) agreed to a sale and restructuring of certain divisions of Covenant that resulted in GHG

purchasing Abbey Hospitals (Holdings) Ltd and its subsidiaries and shares equivalent to 42.5 per cent of the issued share capital of Transform. The Abbey transaction is structured as an asset purchase while the Transform purchase is structured as a share purchase.

4. Under the terms of the agreement GHG has purchased the business of the Abbey Hospitals for a consideration of [ ], via BMI. Abbey Propco was established, in which the Bank and its joint venture partner, Prestbury, together own 100 per cent of the shares. GHG has entered into long leases with Abbey Propco. Transform Newco was established with the Bank, Cognetas (previous controlling shareholder of Covenant) GHG and the Management holding [ ] per cent, [ ] per cent, [ ] per cent and [ ] per cent of the shares respectively.

5. At the date of the transaction Abbey owned and operated four private hospitals, namely:

   - Abbey Kings Park, Stirling, Scotland
   - Abbey Carrick Glen, Ayr, Scotland
   - Abbey Sefton, Liverpool, England
   - Abbey Gisburne, Clitheroe, England.

   While Transform owned and operated from a network of 19 clinics across the UK, in England its surgical operations were carried out at two Transform-owned and operated hospitals, Pines, in Manchester, and Riverside, in Brentford, both of which are dedicated to the provision of cosmetic surgery, while in Scotland its surgical operations were carried out at Abbey Kings Park and Abbey Carrick Glen hospitals.

6. The transaction completed on 28 May 2010; the parties notified the transaction on 24 June 2010; the extended administrative deadline for a decision is 27 August; and the statutory deadline expires on 27 September 2010.

JURISDICTION

7. As a result of this transaction, GHG, the four Abbey Hospitals and Transform have ceased to be distinct.[1] The parties overlap in the supply of

[1] GHG's shareholding of 42.5 per cent in Transform gives it de facto control over Transform.

private medical services (PMS) through the operation of private acute care hospitals in the UK. By beds, the merger creates a combined share of 27.7 per cent (increment 0.9 per cent); therefore the share of supply test in section 23 of the Act is met. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

MARKET DEFINITION

8. The parties overlap in the provision of cosmetic surgery and the provision of PMS through private acute hospitals. The decision therefore takes the following structure:

- PMS sector market definition, product and geographic scope
- Cosmetic surgery market definition, product and geographic scope
- Competitive assessment – PMS sector, considering:
  - local unilateral effects,
  - regional unilateral effects, and
  - national issues.
- Competitive assessment – cosmetic surgery, considering:
  - unilateral effects, and
  - vertical issues.

Private acute care hospitals

9. GHG and Abbey overlap in the supply of PMS through private acute care hospitals.

10. In a previous case[2] GHG described the patient's route to a PMS provider in detail. In the first instance the majority of patients will approach their general practitioner (GP). Most Private Medical Insurance (PMI) policies treat the GP as the gatekeeper to the plan benefits and a referral by a GP is necessary before a consultant can be seen. The GP will then refer the patient to a consultant, taking into account whether the patient wishes to consider NHS treatment as an option; has PMI and wants to use it and/or is willing to self-pay for private treatment.

[2] Completed acquisition by General Healthcare Group of assets of Nuffield Hospitals, 1 May 2008 – www.oft.gov.uk/OFTwork/mergers/decisions/2008/GHG

11. Should the patient require further treatment, the patient will agree with the consultant where this will take place (which at this stage could still be either as an NHS patient or as a private patient). If the choice is for a private treatment, the hospital in which the treatment is conducted will depend on the hospitals in which the consultant has admitting rights. As such, consultants are usually the primary decision makers in determining where a patient's treatment will take place.

12. The consultant's judgement on which hospital to use will depend not only on geographic proximity, but also issues such as the quality of the nursing team, facilities, patient specific risk issues etc. As consultants are the primary decision maker in deciding where a patient's treatment will take place, the objective of the marketing aimed at consultants by PMS providers is to encourage consultants using other hospitals to switch to their hospitals, new consultants to join and current consultants to use their hospital more. Usually, in making this choice of hospital, the consultant will also take into account those hospitals included in the patient's PMI provider's network. However, if, for whatever reason, a patient attends a hospital not on his PMI provider's 'network' the patient will pay the hospital direct and the PMI provider will reimburse the patient up to the sum usually paid to an equivalent network hospital (usually referred to as 'top up'[i]).

Product scope

13. The OFT has considered whether the market definition for mergers between private healthcare providers as defined in recent merger investigations in this market has changed.[3]

14. In these earlier cases the relevant product market was the supply of PMS, based on privately paid-for hospital services relating to elective treatment of acute medical conditions. NHS PPUs (private patient units) were also considered to lie within the relevant frame of reference where facilities are available to private patients on a full time basis. Private acute hospitals or NHS PPUs were regarded as being effective competitors where they provide a wide range of medical treatments.

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[3] Completed acquisition by General Healthcare Group of assets of Nuffield Hospitals (2008) and Completed acquisition by Spire Healthcare Limited of Classic Hospitals Group (2008).

15. These earlier cases excluded specialised private hospitals/clinics typically dealing with single types of procedure or treatment; and NHS free services and pay-beds from the relevant frame of reference.

16. While accepting that the market may be defined as the supply of PMS, the parties submitted that the dynamic between how patients arrived at a PMS hospital, either as PMI, self-pay or NHS, had changed over the last two years. At the time of the GHG/Nuffield case GHG suggested that of 100 patients, approximately [20-30] per cent would be self-pay, [zero-five] per cent would be NHS patients and the balance would be PMI patients. At the current time, while patients with PMI still represent the bulk of patients, the percentage of self-pay patients has reduced by some [50-60] per cent with NHS patients taking up the balance, in effect substituting two NHS patients to one self-pay patient.

17. This increase in NHS patients, GHG submitted, was as a result of two innovations that had occurred since the earlier cases. These are the introduction of Independent Sector Treatment Centres (ISTC)[4] in England and Wales; and the introduction of patient choice of hospital in England through 'Choose and Book'.[5] However, while cognisant of the impact that these developments may have had on the competitive dynamic, the OFT has received no evidence to suggest that it would be appropriate for it to adopt a different approach to market definition in light of these developments, given that services are bought in a different way for NHS patients – services are paid for at standard NHS rates and are free to the patient.

18. Finally, the OFT considered the constraint exerted on GHG by NHS PPUs. In the BUPA/CHG Report[6] the Competition Commission (CC) considered that these were broadly similar to private acute hospitals and therefore

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[4] The ISTC programme was part of a major initiative to create additional capacity within the NHS to reduce waiting times and introduce choice for patients.
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4128686

[5] Choose and Book is a national service that combines electronic booking and a choice of place, date and time for first hospital or clinic appointments. Patients can choose any hospital in England funded by the NHS (this includes NHS hospitals and some independent hospitals).
http://www.chooseandbook.nhs.uk/staff/overview/whatis

[6] *British United Provident Association Limited and Community Hospital Group plc - A report on the proposed merger; and British United Provident Association Limited, Salomon International LLC and Community Hospitals Group plc; and Salomon International LLC and Community hospitals Group plc - A report on existing mergers* - Competition Commission, December 2000 (Cm 5003) (the BUPA/CHG Report).

should be included in the product scope where their facilities were made available to private patients on a full time basis. As well as providing similar services, NHS PPUs are often included on the hospital networks of PMI providers, alongside private acute hospitals.

19. Two-third party PMI providers made comments that suggested that NHS PPUs should not be considered an effective constraint to private hospitals. It was suggested that NHS PPUs were used to 'bulk out' insurers' networks based on the core hospital groups, and that PMI members used NHS PPUs not out of choice and convenience but for reasons of necessity and as a result of limited treatments available elsewhere.

20. In the previous cases,[7] some evidence was provided by third parties that suggested that NHS PPUs may provide a weaker constraint on the parties than another independent hospital. Set against this, PMI providers contract with a large number of NHS PPUs for the provision of PMS, and NHS PPUs may gain some competitive advantage from being located on larger NHS Trust estates.[8] On balance, therefore the OFT considers, on the basis of the overall evidence, that NHS PPUs should continue to be included in the product scope where their facilities are available to private patients on a full-time basis.

21. It has not been considered necessary to narrow the product scope further by considering the provision of specific medical treatments. In the previous cases, third parties had commented that in order to be an effective competitor a hospital would need to offer a wide range of medical treatments. Where the range of medical treatments on offer at a specific hospital is relevant to the competitive assessment, this has been taken into consideration.

22. On the basis of the evidence provided the OFT therefore considers the appropriate product scope with respect to the acquisition of the four Abbey hospitals to be the provision of a wide range of medical treatments either by a private acute hospital or a NHS PPU.

Geographic scope

23. The OFT considers that there may be local, regional and national markets in the provision of PMS.

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[7] See footnote 3.

[8] As a result of having access to the facilities and services, for example intensive care units, available on these NHS estates.

Local PMS markets

24. In the previous case[9] GHG provided a report by Frontier Economics commissioned by GHG to assist it in developing the appropriate methodology for analysing competition in local markets. The report confirmed that on average 80 per cent of episodes[10] across all GHG hospitals are associated with patients who live within a 30-minute drive time of the hospital at which they receive treatment. Most patients do not travel long distances to receive treatment, and, similarly, consultants normally operate out of private acute hospitals that are close to the NHS hospital where they are based. However, in BUPA/CHG the CC considered that in some cases a wider catchment may be appropriate, particularly in rural areas.[11]

25. In this case GHG submitted details on local catchment areas as defined by the drive time and the post code blocks which account for approximately 80 per cent of a hospital's episodes. The OFT considers that this provides a reasonable starting point for considering competition at the local level.

Regional PMS markets

26. Third party comments generally indicated that competition occurs on a local level broadly consistent with the local catchment areas defined above. However, there is some evidence that, for specific treatments offered less widely, some competition may subsequently occur over a wider area.

27. Two third parties pointed to the significant presence of GHG within the central belt of Scotland, creating a four to three in terms of PMS providers, and one third party argued that within the north west of England the merger also creates a four to three in PMS providers. Therefore the OFT has considered the effect of the merger on a regional basis below.

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[9] See footnote 3

[10] An episode is a revenue generating unit of treatment.

[11] The CC also noted that some flexing may be required as the 30-minute isochrone makes no distinction between a hospital in the middle of a catchment area and one close to the boundary, while any hospital just outside the boundary is excluded.

National PMS markets

28. In the BUPA/CHG Report, the CC found that competition in the private hospital market was mainly national (albeit with some local and regional elements). They found that over the previous decade the PMS market had become much more national in structure, with four national providers operating hospitals across the UK and that, for these providers, pricing was largely determined nationally through price negotiations with PMI providers.

29. The parties agreed with this view, submitting that GHG negotiates, wherever possible, national contracts with PMI providers so as to benefit from its buyer power. Two PMI providers also described GHG and Abbey as being national competitors. Therefore, in line with the previous cases, the OFT will also consider competition at a national level.

30. Based on the evidence received, and consistent with the previous decisions, the OFT therefore believes it is appropriate to consider the effect of the merger using national, regional and local geographic scopes.

Cosmetic surgery

31. GHG, through BMI, overlaps with Transform in the provision of cosmetic surgery in the UK. GHG submits that the appropriate market definition should be cosmetic surgical procedures undertaken at private hospitals.

32. Cosmetic surgery services are generally sold in the UK via clinics or 'venues', from which patient co-ordinators, advisors, or consultants themselves offer consultations to discuss objectives, costs, risks and assessments of patient suitability and consultations on surgical options and non-surgical cosmetic procedures to their customers. Cosmetic surgery services may also be advertised by hospitals direct to customers.

33. Transform operates 19 clinics across the UK, and additionally operates monthly from host premises,[12] at over 40 other venues across the UK. In respect of customers of Transform, patient enquiries are received by a contact centre which will assign the patient to his nearest clinic or other venue depending on the location of the home or work postcode as the patient prefers. Transform's clinics and other venues are rarely visited by customers on a drop-in basis and are therefore not typically located in High

Street retail locations. GHG explained that Transform's national competitors also use a similar business model.

34. Transform's Clinics are registered with the Care Quality Commission, as are those of its national competitors, such as The Hospital Group, Harley Medical Group, Make Yourself Amazing, and Sk:n to carry out minor surgical procedures such as botox, dermal fillers, and other non-surgical procedures that involve puncturing the skin with a needle or laser.

35. A difference between Transform's business model and that of hospitals providing PMS for PMI members is that once the patient and surgeon are happy to proceed with a particular treatment, they both sign an agreement consenting to the treatment and the patient co-ordinator will book the treatment at the nearest Transform surgical unit. Payment is made up front and is handled by the clinic.

Product Scope

36. GHG submitted that according to Laing & Buisson,[13] cosmetic surgery is carried out in approximately 351 independent acute medical/surgical inpatient and day surgery hospitals. The cosmetic surgery sector can be divided into the provision of non-surgical cosmetic treatments (including cosmetic dentistry) and the provision of cosmetic surgery. GHG submit that the increment from BMI in the market for the provision of non-surgical cosmetic treatments is very small at less than [zero-five] per cent.

37. Cosmetic surgery clinics and venues operate as retailers of cosmetic surgery services. While they serve some of the same functions as a GP serves in relation to PMS, in that a clinic's advisor/patient co-ordinator will refer a prospective patient to a surgeon to perform the cosmetic surgery, they are different since the clinic's advisors/patient co-ordinator will have a sales function or incentive and therefore is not financially disinterested in the patient's progress.

38. All of BMI's cosmetic consultations take place in its hospitals, and patient contact is direct with consultant surgeons from start to finish. Other providers may have medically qualified client advisors, which are not

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[12] Host Premises are hired venues with no medical facilities. They exist to facilitate initial consultations in areas where the nearest clinic is too far from a patient's home.

[13] Laing & Buisson is an independent publisher of a range of specialist market reports and directories within the healthcare, community care and childcare sectors. — Laing's *Healthcare Market Review 2009—2010*

necessarily the surgeons, while Transform's advisers are non-medically trained and focus on the patient's aesthetic objectives and have an explicit sales function.

39. GHG submitted that cosmetic surgery is only covered by PMI in exceptional circumstances such as following an accident or cancer treatment. However, in these cases the patient would follow the usual PMS patient journey via referral by another specialist or the patient's GP.

40. In the previous cases[14] cosmetic surgery was not considered to form part of the PMS market. This was because it is not funded by PMI providers, but by patients often using consumer credit services provided by or through the cosmetic surgery companies, and it is generally totally elective, in that the patient generally has no clinical need for the procedure.

41. The OFT has noted GHG's view of the market and BMI's low share of non-surgical cosmetic treatments but has not had to conclude on market definition in this case as the decision does not depend on it.

Geographic scope

42. GHG submitted that the market for cosmetic surgery has both national and regional aspects, as well as, in some circumstances, international aspects in that there is international tourism for cosmetic surgery. However, since neither Transform nor BMI offer cosmetic surgery outside the UK the OFT has only considered the effect of the merger in the UK.

43. The OFT has looked at whether the market for cosmetic surgery should be considered on a national or regional basis. It notes that as cosmetic surgery is not reimbursed by PMI providers there is no national price negotiation, unlike as is the case with PMS. However, GHG submits that all cosmetic surgery providers operate national call centres and websites which are the focus of their marketing effort. Transform, for example only advertises in national newspapers and weekly and monthly 'glossy' magazines and on the internet.

44. GHG submitted that competition on a sub national or regional basis is unlikely to be different to that at a national level, since none of the cosmetic surgery providers are regional or local in scope and most have national co-ordination and enquiry centres with non-geographic freephone

numbers. However, the OFT has not had to conclude on the geographic scope of the market for cosmetic surgery as the decision does not turn on it.

COMPETITIVE ASSESSMENT – PRIVATE ACUTE CARE HOSPITALS

Local unilateral effects: introduction

45. GHG provided shares of supply based on the shares of episodes[15] drawn from the relevant catchment area as well as shares by number of beds within the drive time catchment.

46. As there is no publicly available data on the size of local PMS markets in the UK GHG used a statistical model which predicts the total number of patient episodes in each postal district in the UK.[16] The total market size for each catchment is then calculated by totalling the total estimated episodes for each postal district whose centre point falls within the relevant 30-minute drive time. By comparing this market size figure to the actual number of episodes recorded by GHG and the relevant Abbey hospital, GHG derived its estimated market shares.

47. In the previous GHG/Nuffield case it was considered that shares of episodes arising from the catchments around the target hospitals to be a more accurate reflection of the market structure for each local area, rather than shares by the number of beds.

48. However, the market shares presented in this document represent GHG's best estimates, and the OFT recognises that there are inherent difficulties in estimating the size of individual local PMS markets given the lack of publically available information. As a consequence, the OFT has interpreted these market share estimates with a degree of caution, and considered them in the competitive assessment alongside a wide range of other evidence (including internal documents, third party comments etc).

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[14] Completed acquisition by General Healthcare Group of assets of Nuffield Hospitals (2008) See paragraph 22, www.oft.gov.uk/shared_oft/mergers_ea02/2008/GHG.pdf

[15] GHG confirmed that there is no difference between the 'episode' measure they use and the 'discharges' measure used by the CC.

[16] The statistical model, developed for GHG by CACI, uses information on those postal districts where GHG assumed that its hospitals handle 100% of episodes.The model then utilises lifestyle

49. GHG provided maps for each local area showing the drive time catchment centred on the acquired Abbey hospital, and included the overlapping drive time catchments of competing hospitals.[17] GHG also provided maps showing catchment areas as defined by ranked postcodes, that is the top postcodes accounting for 80 per cent of the hospital's output for each of the relevant BMI and Abbey hospital. This evidence has been considered in the analysis of the various local areas listed below.

50. GHG also provided data on the number of consultants with admitting privileges at both a BMI and Abbey hospital that either switched their practices from one to the other or split their practice between the two. The OFT, however, was unable to place much weight on this information as it was ambiguous in terms of what information it provided.[18]

51. The OFT considers below whether unilateral effects arise at a local level by reference to each of the acquired Abbey hospitals.

Abbey Sefton Hospital

52. Abbey Sefton Suite is a 21-bed PPU attached to the Aintree University Hospital NHS Foundation Trust. GHG submits that [80-90] per cent of Sefton's episodes fall with a 30-minute drive time of the hospital. There are a number of other PMS providers within a 30-minute drive time, based on Abbey Sefton, which include Spire Liverpool, Spire Wirral, Fairfield and Ramsay Renacres, all of which are closer than any BMI hospital.

53. GHG has estimated the parties' combined market share at [10-20] per cent (increment [five-10] per cent) within the 30-minute drive time catchment. A third party submitted that following the transaction the number of hospitals with different owners covering multiple specialties would fall from eight to seven.

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variables specific to a postal district, from which the model is able to predict the number of episodes for any postal district in the UK.

[17] For competitor hospitals the parties generally drew a catchment based on a 30-minute drive time.

[18] GHG submitted evidence of the number of consultants that split their practices between hospitals. GHG explained that the numbers of splitters recorded for any one hospital may not mirror the opposing hospitals perspective because a consultant who could split his practice between two hospitals may not be recorded as such by both hospitals if he has not actually admitted any patients to one of them. The result is that the splitting data is not always clear cut in terms of the number of consultants who would consider splitting their practice between hospitals.

54. Given the number of alternative providers, low market shares and the lack of third party concerns, the OFT does not consider the acquisition will give rise to a realistic prospect of a substantial lessening of competition in the Sefton catchment, and therefore does not consider Abbey Sefton further.

Abbey Kings Park

55. Abbey Kings Park is a 21-bed hospital situated in Stirling and [70-80] per cent of its episodes fall within a 30-minute drive time catchment. There is a GHG hospital in Glasgow, BMI Ross Hall. The 30-minute drive time catchment for Abbey Kings Park has a minimal overlap with that for BMI Ross Hall. Where the catchment is calculated on the basis of ranked postcodes, there is no overlap between Kings Park or BMI Ross Hall or BMI Fernbrae in Dundee. While there is only minimal direct overlap between the parties, BMI does provide PMS for [10-20] per cent of the episodes arising from the Kings Park catchment as defined by ranked postcodes.[19] On this basis the parties therefore have a combined share of the episodes arising in the Abbey Kings Park catchment of [70-80] per cent (increment [10-20] per cent).[20] The increment to Kings Park's share is made up of [five-10] per cent of episodes handled by BMI Ross Hall and [zero-five] per cent being handled by BMI Fernbrae.[21]

56. GHG submitted that these market shares overstated any competition between BMI Ross Hall and Kings Park since Kings Park is less able to handle cases with a high complexity, because it only offered care at critical care level 1.[22] It further submitted that all but [zero-five] per cent of episodes from the Kings Park catchment that were handled by BMI Ross Hall were episodes that could not have been handled by Abbey Kings Park in any case. In contrast to Abbey Kings Park, BMI Ross Hall is described as being a major private hospital, offering a comprehensive range of services, offering Intensive Care Unit (ICU) beds (critical care level 3) and a

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[19] By drive time the parties would have a combined share of [60-70] per cent (increment [10-20] per cent).

[20] A third party PMI provider provided local market shares based on the total number of its members discharged from all PMS providers in the relevant catchment area. For Abbey Kings Park this resulted in a combined market share of 75 per cent.

[21] GHG excluded from these market shares certain non contentious episodes handed by BMI Ross Hall that could not be treated at Abbey Kings Park due to a lack of critical care capability.

[22] Level 1 – Critical care, Level 2 – provided in High Dependency Units (HDU) or Intensive Care Units (ICU), and Level 3 Intensive Care Units (ICU) only.

comprehensive number of specialties and the largest number of consultants of neighbouring hospitals. By contrast, a third party commented that Abbey Kings Park is a smaller hospital with a 'cottage hospital' feel, that undertakes a smaller range of lower complexity procedures, and has limited diagnostic capability (no fixed MRI or CT scanners).

57. GHG submitted that of the PMS providers that could compete with Kings Park — Spire Murrayfield, Glasgow Nuffield and BMI Ross Hall — Ross Hall is geographically the most distant competitor, with Spire Murrayfield the closest geographically. Indeed, although the Abbey Kings Park internal documents do not make specific reference to other PMS providers as competitors, evidence supplied indicates that its marketing focus is aimed east towards Edinburgh and away from Glasgow.

58. GHG has suggested that Kings Park is a solus hospital,[23] as there are no other PMS providers located within the 30-minute catchment area. However, the OFT has not had to conclude on this point.

59. The OFT believes that the market shares overstate the extent of competition existing between the parties when due account is taken of the fact that BMI Ross Hall is attracting more complex treatments from the Abbey Kings Park catchment area. The OFT is also conscious of the minimal overlap, the different range of treatments available at Abbey Kings Park compared to BMI Ross Hall, and the geographical distance between BMI Ross Hall and Abbey Kings Park compared to the comparatively closer Spire Murrayfield. As a result of these factors, the OFT believes that the acquisition of Abbey Kings Park does not create a realistic prospect of a substantial lessening of competition, and Abbey Kings Park is therefore not considered further.

[23] Following the BUPA/CHG Report a solus hospital is generally taken to mean a hospital where there are no other PMS hospitals in a 30-minute catchment.

Abbey Gisburne Park Hospital

60. Abbey Gisburne Park is a 34-bed hospital lying within a relatively rural location in Gisburn near Clitheroe, Lancashire. Abbey Gisburne Park's 30-minute drive time area, accounts for [80-90] per cent of its PMS episodes. On the basis of a 30-minute drive time centered on Abbey Gisburne, GHG estimates that the parties have a combined share of episodes of [30-40] per cent (increment [10-20] per cent).[24]

61. A third party PMI provider estimated that Abbey Gisburne had a market share of some 13 per cent in its catchment area, while there were five GHG hospitals that took patients from Abbey Gisburne's catchment that together had a market share of some 52 per cent, giving the parties a combined market share of around 65 per cent.

62. There are a number of other PMS hospitals in the vicinity of Abbey Gisburne Park. Airedale General, a NHS PPU, and BMI Beardwood, are present within the catchment, and three Ramsay hospitals, Ramsay Yorkshire Clinic, Ramsay Fulwood Hall and Ramsay Euxton Hall have catchment areas that overlap with that of Abbey Gisburne Park.

63. BMI Beardwood is a smaller hospital than Abbey Gisburne Park or the Ramsay hospitals, with 18 beds (plus seven for day care) and a one-bed high dependency unit. Both Ramsay Fullwood Hall and Ramsay Euxton Hall, with 29 and 32 beds respectively also have a one-bed high dependency unit. Ramsay Yorkshire Clinic is a 73-bed hospital with a four-bed intensive care/high dependency unit.

64. Abbey Gisburne Park offers only a limited range of specialties, has no critical care level 2 or 3 capability, and has no CT scanning capability. MRI scanning is via a mobile facility only, and the hospital has no ability to offer dental or clinically necessary breast surgery, and is not in a number of PMI networks for various specialist treatments.

65. GHG submitted that Abbey Gisburne Park's position as a PMS provider was weak, with NHS funded work accounting for some [80-90] per cent of its episodes. Despite joining BUPA's list of PMS providers in 2008 it was still

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[24] On the basis of a ranked postcodes catchment the parties have a combined share of [40-50] per cent (increment [10-20] per cent)

only the choice of some [10-20] per cent of the PMS patients within its catchment area.

66. One third party indicated that the transaction results in a reduction from seven to six of the number of PMS hospitals, including NHS PPU's and other 'insignificant units' with different owners in the area. However, this third party also considered that NHS PPUs should not be included in any fascia count since they were not appropriate units for comparison with private hospitals, and in that case the merger would create a '3 to 2'.

67. Although BMI Beardwood is Abbey Gisburne Park's closest competitor, geographically, GHG considers that the Ramsay Fulwood, and Ramsay Euxton Hall provide greater competition to BMI Beardwood than Abbey Gisburne Park and are expected to continue to provide a strong constraint on the activities of BMI after the merger. GHG also submitted that Airedale PPU, an 11-bed unit that lies on the edge of the Abbey Gisburne catchment area, was capable of posing a constraint given that is not significantly smaller than BMI Beardwood (in terms of beds) and asserts that since it has access to NHS HDU/ICU can offer the usual range of PMS specialties and capacity, and can undertake the full range of procedures within its specialties. The OFT is also aware that the majority of PMI providers include Airedale NHS PPU within their schemes, and that it considers itself in competition with the other PMS groups in the area. Following the earlier cases[25] the OFT considers that NHS PPUs should be included where their facilities are available to private patients on a full-time basis, as is the case with Airedale NHS PPU.

68. Several third parties considered that the parties were likely to be in competition in the local catchment area, including for NHS contract work.[26] Third party comments included that the hospitals are each other's geographically closest competitor; and that BMI and Abbey are potentially the most significant local providers of PMS within the catchment area.

69. Only one internal Abbey document, a Business Review document in November 2009 suggests that Abbey did regard BMI Beardwood as a 'major' competitor in PMS provision, stating that they 'need to target the

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[25] See footnote 3.

[26] Any NHS work would be at agreed NHS tariff rates and therefore not affected by any potential price rises post merger.

private activity currently undertaken by BMI Beardwood'. In comparison, other PMS providers within the area besides BMI Beardwood are described as 'peripheral competitors' in the Abbey Gisburne 2009 Budget.

70. On the basis of the significant market shares of the parties within the catchment and these internal documents, the OFT considered that BMI may represent the largest single constraint on the limited PMS activity undertaken at Abbey Gisburne.

71. However, GHG has argued that the effect of the extremely low level of PMS work carried out by Abbey Gisburne Park, approximately [zero-five] PMS episodes a day, is that its service offering is focused on the NHS work that comprises the greater part of its business. According to the evidence supplied by GHG, Abbey Gisburne had operated at this low level of activity for PMS work both before BUPA added the hospital to its network in 2008 and since. GHG submitted that the hospital could not operate without the tariff priced NHS work, adding that the level of revenue attributable to PMS, some [ ], is too small to have any substantive bearing on decisions to invest in or to improve the Hospital. The competitive constraint on Abbey Gisburne Park is therefore, in its view, driven by its need to attract NHS business.

72. Abbey's internal documents show no evidence of recent significant investment or of its marketing specifically targeting BMI Beardwood's catchment area. Abbey was targeting a wide area in its marketing campaign, of which the area around BMI Beardwood was only a very small part and could not in any way be said to be the focus.

73. Abbey Gisburne Park's limited range of specialties, and low level of critical care (level 1) indicates that it was a relatively weak local competitor and that therefore it is likely that any constraint that the parties exerted on one another may have been asymmetric (that is, that, for the most part, BMI Beardwood constrained Abbey Gisburne Park).

74. The OFT therefore considers, given the potential constraint from competitors, including the three significant Ramsay hospitals and NHS Airedale PPU, Abbey Gisburne Park's reliance on NHS work, the limited evidence of investment in PMS, and a lack of third party concerns that the acquisition of Gisburne Park does not create a realistic prospect of a

substantial lessening of competition, and Abbey Gisburne Park is therefore not considered further.

Abbey Carrick Glen

75. Abbey Carrick Glen is an 18-bed hospital in Ayr. There are no other PMS hospitals located within its catchment area whether calculated by drive time or ranked post code. However, the catchment areas of both BMI Ross Hall and Glasgow Nuffield overlap with those of Abbey Carrick Glen, particularly in respect to post code KA3, Kilmarnock, East Aryshire.[27]

76. On the basis of a 30-minute drive time centered on Abbey Carrick Glen, GHG estimates that the parties have a combined share of episodes of [40-50] per cent (increment [10-20] per cent). For a catchment defined by ranked postcodes the estimated market shares are similar at [40-50] per cent, increment [10-20] per cent.[28] One PMI provider provided evidence that over 98 per cent of its customers within the Abbey Carrick Glen catchment area use either Abbey Carrick Glen or BMI Ross Hall.

77. As with Abbey Kings Park, GHG provided information on the differentiation of the hospitals services and submitted that these market shares may overstate the competitive dynamic between them, since BMI Ross Hall is a major private hospital, offering the most comprehensive facilities of all PMS hospitals in the region, and is the only PMS provider in Scotland offering critical care level 3; while Carrick Glen is the smallest PMS hospital in Scotland, offering only a limited range of specialties, with few regularly referring consultants and no critical level 2 or 3 capability. GHG has submitted that its facilities are at or close to the minimum required to operate in the PMS market. Almost 40 per cent of revenue earned by Abbey Carrick Glen is derived from either cosmetic surgery (that is via Transform) and from NHS work.

78. However, the OFT considers that that the parties' combined market share may underestimate their competitive strength in the Abbey Carrick Glen catchment area. First, the OFT notes the absence of any other PMS

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[27] GHG internal documents also noted the prospective entry of Sheehan Medical Centre to Glasgow, with completion of this facility due by 2012. This facility would not be in the 30-minute drive time catchment of Abbey Carrick Glen.

[28] Episodes that could only feasibly have been carried out at Ross Hall are excluded from these market shares.

hospitals within a reasonable driving distance aside from Nuffield Glasgow. The merger effectively creates a three to two in terms of PMS providers.

79. Secondly, there is evidence that Nuffield Glasgow may not be a particularly strong competitive force on Abbey Carrick Glen. Third parties have suggested that Carrick Glen customers are less likely to travel to Glasgow Nuffield given the greater distance compared to BMI Ross Hall. An Abbey Carrick Glen internal document states that 'Glasgow Nuffield has never been demonstrated as a competitor to Carrick Glen with no overlap of surgeons'.

80. Further, while the OFT accepts that the Abbey Carrick Glen's 80 per cent catchment area covers a wide area to the south in which it is unlikely to face strong competition from BMI Ross Hall, it is also the case that the north of its catchment has a higher proportion of PMI members, which would suggest that a larger proportion of Abbey Carrick Glen's episodes are drawn from the north of the catchment.[29]

81. Abbey Carrick Glen achieved a turnover of some [ ] in total, of which the OFT estimates, based on internal documents, that approximately [ ] is derived from PMS provision. GHG submitted that BMI Ross Hall generates approximately [ ] in PMS revenue from episodes in the Abbey Carrick Glen catchment area. This represents some [30-40] per cent of Abbey Carrick Glen's PMS turnover which suggests that BMI Ross Hall is a significant player in Abbey Carrick Glen's catchment.

82. Internal documents from Abbey Carrick Glen, whilst recognising Glasgow Nuffield, clearly demonstrated that it considered BMI Ross Hall to be its main competitor in the north of its catchment area, and that it was aiming to target BMI Ross Hall's customers. Specifically, internal documents (including budgets and advertising schedules) demonstrated a pattern of Abbey Carrick Glen targeting marketing and publicity events in and around Glasgow with a view to capturing share in the north of its catchment area from BMI Ross Hall.[30]

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[29] GHG provided a map that showed the number of adults with PMI by postal district. Within Carrick Glen's catchment area, postal districts KA3 (1,500 to 2,500), KA11 and KA1 (1,000 to 1,500) are in the north of the catchment.

[30] Internal documents refer to a local marketing media company producing a GP newsletter to formulate marketing strategy to capture potential business in the north of the county that may be going to Glasgow.

83. Third parties were concerned by BMI's acquisition of Abbey Carrick Glen, since the transaction would effectively reduce choice for patients within an extended Glasgow area from three providers to two, and would similarly reduce the choice available to the PMI providers as to which hospitals could be included in their networks. Third parties were also concerned that the acquisition would increase GHG's negotiating position and ensure 'artificially' high prices due to a lack of local competition.

84. Therefore, taking into account the significant role that BMI Ross Hall plays in Abbey Carrick Glen's catchment area, the fact that this merger is properly characterised as a '3 to 2' with Glasgow Nuffield a more limited competitor to Abbey Carrick Glen and the internal evidence that shows that Abbey Carrick Glen was targeting potential patients, consultants and GPs in the north of its catchment area and therefore in active competition with BMI Ross Hall, the OFT has concluded that the loss of competition from BMI Ross Hall on Abbey Carrick Glen creates a realistic prospect of a substantial lessening of competition.

Regional unilateral effects

85. Although 80 per cent of PMS episodes will occur within an approximate 30-minute drive time, third parties indicated that competition for some specific treatments may occur on a regional basis, and hence the OFT has examined whether the transaction could give rise to unilateral effects concerns at a regional level.

86. There are two Abbey hospitals in north west England and two in the central belt of Scotland.

87. GHG submitted Laing & Buisson figures for predicted episodes on a regional basis, which show that within the north west the combined market share will be [30-40] per cent (an increment of [zero-five] per cent). One-third party considered that the area around Lancashire, Cheshire and Merseyside was 'dominated' by GHG (with the merged entity having over 50 per cent of the market) and as a result of the merger the number of national players in the region would reduce from four to three.

88. Since Laing & Buisson do not split out figures for Scotland, GHG was unable to submit shares based on its data. However, a third party

estimated that the merged entity may have a share of some 70 per cent based on its own business.

89. Despite these high regional market shares, only one third party complaint about a lessening of competition on a regional basis was received.

90. Nevertheless, as outlined above in the local market analysis, there is little evidence to suggest that any of the Abbey hospitals played a particularly important role in supplying PMS outside of their immediate local catchment areas. Nor is there any indication that the Abbey hospitals collectively constituted a particularly competitive force at a regional level. This is particularly the case given the range of treatments and level of critical care offered, which was more limited than other regional PMS hospitals.

91. Therefore the OFT considers that despite the nominal increase in GHG's share of supply at a regional level this will not in real terms significantly affect the ability of PMI providers to negotiate. As a result the OFT does not consider that the transaction gives rise to a realistic prospect of a substantial lessening of competition at a regional level.

National issues

92. GHG submitted that the acquisition by GHG of the four Abbey hospitals does not significantly alter the market structure at the national level, since post-transaction there will still be four national players: GHG, Nuffield, Spire, and Ramsay, with 64, 30, 36 and 24 hospitals respectively.

93. GHG provided market shares on several bases: available beds, available hospitals, estimated share of revenue and available episodes.[31] Regardless of how the market shares are calculated the increment arising from the merger is less than [zero-five] per cent. These increments to market share are difficult to square with the views of two third parties, which included the Abbey hospitals as national competitors.

94. Third party estimates suggested that the market share of the parties may be higher with respect to services to PMI funded patients, and higher still if the four major national hospital groups were considered to be a distinct segment of the market. One competitor was concerned that GHG may have reached a critical mass in terms of market share in PMS, which may allow

the enlarged group to distort the behaviour of PMI providers. It was stated that as GHG has grown through recent acquisitions it has been able to exert significant and disproportionate influence on PMI providers.

95. GHG argued that this concern was unfounded, submitting that the PMI providers remained powerful negotiators, who had defended their position over a number of years. GHG argued that PMI providers use their negotiating power to restructure networks, payment terms and prices. It pointed to a 2008, Laing & Buisson report[32] that found that the two leading PMI providers, BUPA and PPP AXA had some 65 per cent of PMI sales, while post transaction, the top two PMS providers by revenue, GHG and Spire, will have a combined share of some 41 per cent.

96. A PMI provider complained that prices at the Abbey Hospitals would increase post merger, without any improvement in the Abbey facilities. GHG submitted that it chose to operate flat pricing across all of the BMI Hospitals nationally, as it was cheaper than trying to work out costs per treatment,[ii] and enabled consultants to take a patient to any hospital in the group as required. GHG submitted that it would only increase prices once GHG had clinical governance[33] over the four Abbey Hospitals since the presence of GHG clinical governance was a consultant's guarantee of quality standards at the hospital. GHG submitted that it had followed a similar process with the seven Nuffield hospitals it had acquired in 2008, making significant investments since the acquisition which has resulted in improved clinical care, service provision and patient satisfaction at the former Nuffield hospitals.

97. One third party raised concerns specific to the acquisition of a further two hospitals, that it considered to be 'solus' Abbey Kings Park and Abbey

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[31] These were all based on GHG estimates and Laing & Buisson's Laing's Healthcare Market Review 2009-2010.

[32] *Health & Care Cover – UK Market Report 2008.* Laing & Buisson

[33] In 1998 the Department of Health published *A First Class Service - Quality in the NHS*, which defines clinical governance as:

'A framework through which NHS organisations are accountable for continuously improving the quality of their services and safeguarding high standards of care by creating an environment in which excellence in clinical care will flourish.'

On its website GHG states that it follows the same fundamental approach. www.ghg.co.uk/quality-commitment-new/quality-assurance-strategies

Carrick Glen. It was considered that the acquisition of two additional solus hospitals would result in a significant increase to GHG's negotiating power at a national level. The concern is that national hospital groups are able to use the PMIs dependency on solus hospitals as leverage in negotiations.

98. The OFT has considered all the points made by third parties about the impact of the transaction on the national market for PMS provision, but is not persuaded by the arguments. In light of the small increment resulting from the merger, less than [zero-five] per cent on any basis, the OFT considers that unilateral effects are unlikely to arise as a result of the transaction at the national level.

99. The OFT does not consider that any increase in price — as a result of GHG implementing its national pricing strategy in the Abbey hospitals — can be considered as a price increase resulting from loss of competition. It notes GHG's argument that, in any event, any price increase would correspond to an increase in quality given the introduction of GHG's clinical governance standard.

100. The OFT has not had to conclude on whether the two Abbey Hospitals in Scotland, Kings Park and Carrick Glen are truly solus hospitals. However, it notes that whether or not these hospitals are solus in nature, both are in fairly rural areas where PMI take up is low, have no special facilities, and therefore may not be considered to be 'must have' hospitals for PMI providers. Further the two hospitals together only account for an increment of around [zero-five] per cent to GHG's national market share, by episodes or estimated share of revenue. Given these factors, the OFT does not believe that there will be any material strengthening of GHG's position such as to significantly change its ability to negotiate nationally.

VERTICAL ISSUES

101. There were no pre merger vertical links between GHG and the Abbey Hospitals.

COMPETITIVE ASSESSMENT — COSMETIC SURGERY

Unilateral effects

102. GHG estimated, based on a Healthcare Commission survey for 2003/2004, that the numbers of cosmetic surgery procedures in the UK in 2008 were around 75,000. It also submitted that Mintel recently estimated a higher figure of 577,000 for total cosmetic (surgical and non- surgical) procedures in 2007, with 105,000 surgical and 472,000 non-surgical. Based on these estimated figures the parties' combined market share in the provision of cosmetic surgery procedures will be between [10-20] and [20-30] per cent with an increment of between [five-10] and [10-20] per cent. This figure is too small to generate unilateral effect concerns and the OFT has received no complaints from third parties on this point. The OFT has therefore not considered this issue further.

Vertical issues

103. Third parties raised concerns in respect of the Transform acquisition with regard to the potential foreclosure from any or all of the facilities within the enlarged GHG of competing cosmetic surgery providers. GHG submitted that neither BMI nor Transform would have the incentive to refuse to undertake third party cosmetic surgery work that currently equates to some [zero-five] per cent of the total number of all estimated cosmetic surgery episodes, since the parties do not have a sufficiently high market share in their own right to make such an action profitable. The estimated combined market share of [20-30] per cent includes episodes undertaken for third parties.

104. The OFT has considered these third party concerns and the parties rebuttal to them. It considers that any strategy on the part of GHG to exclude competing cosmetic surgery providers' customers from its hospitals could be easily undermined by BMI's competitors, as cosmetic patients typically travel further than PMS patients and would have greater number of options than any equivalent PMS patient. Therefore the OFT does not consider that vertical competition concerns arise in relation to the provision of cosmetic surgery treatment.

THIRD PARTY VIEWS

105. Where relevant third party comments have been included above.

ASSESSMENT

Cosmetic Surgery

106. GHG overlaps with the Transform business in the provision of cosmetic surgery in the UK.

107. The parties combined share of supply for cosmetic surgery is between [10-20] and [20-30] per cent with an increment of between [five-10] and [10-20] per cent. The only third party concerns were related to foreclosure on the part of the merged entity of its hospitals to competing providers of cosmetic surgery. GHG submitted that neither BMI nor Transform would have the incentive to refuse to undertake third party cosmetic surgery work that currently equates to some [zero-five] per cent of total estimated cosmetic surgery episodes, since the parties do not have a sufficiently high market share in their own right to make such an action profitable. The OFT has considered these third party concerns and the parties rebuttal, and has concluded that the acquisition of de facto control over the Transform business does not create a realistic prospect of a substantial lessening of competition.

Private acute care hospitals

108. GHG and Abbey overlap in the supply of PMS through private acute care hospitals.

109. The effect of the transaction on the four local markets where GHG acquired an Abbey hospital has also been considered. As a result of the analysis outlined above, it has been concluded that only in respect of the local market around Abbey Carrick Glen would the acquisition give rise to a substantial lessening of competition. In this area, the merger is properly characterised as a '3 to 2', with more limited competition from the other provider. BMI Ross Hall generates significant revenue, comparatively, in Abbey Carrick Glen's catchment area. There is clear internal documentary evidence demonstrating the constraint that BMI Ross Hall exerted on Abbey Carrick Glen, which will be lost post merger.

110. Looking at the market at a regional level, the OFT considers that the low increment (less than [zero-five] per cent) to GHG's regional market share in the north west does not give rise to any competition concerns at the regional level. In Scotland there is little evidence to suggest that the Abbey hospitals – individually or collectively – played a particularly important role in supplying PMS outside of their immediate local catchment. Nor is there any indication that the Abbey hospitals collectively constituted a particularly significant competitive force at a regional level.

111. Therefore the OFT considers that despite the nominal increase in GHG's share of supply at a regional level this will not in real terms significantly affect the ability of PMI providers to negotiate. As a result the OFT does not consider that the transaction gives rise to a realistic prospect of a substantial lessening of competition at a regional level

112. The OFT has considered carefully the complaints raised by third parties about the effect of local market strength impacting on GHG's national negotiating strength. Based on the available evidence, the OFT has concluded that the addition of the Abbey hospitals to the GHG network is unlikely to have a material adverse effect on the national negotiating power of the PMI providers. There continues to be four national hospital groups and the OFT considers that the low increment (less than [zero-five] per cent) to GHG's national market share does not give rise to any competition concerns at the national level.

113. Consequently, the OFT believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

EXCEPTIONS TO THE DUTY TO REFER

114. The OFT's duty to refer under section 22(1) of the Act is subject to the application of certain discretionary exceptions, including the markets of insufficient importance, or 'de minimis', exception under section 22(2)(a).[34]

115. The OFT has found a realistic prospect of a substantial lessening of competition in relation to the supply of PMS services in the catchment area

[34] OFT516b, November 2007.

around the Abbey Carrick Glen hospital. The OFT has calculated that the size of the affected market is less than £4 million.[35] On the basis that the annual UK revenue of the market affected by the merger is significantly below £10 million, the OFT has considered whether it should apply the 'de minimis' exception to the duty to refer.

'De minimis' and availability of undertakings in lieu

116. As stated in the *Dunfermline/BRN* case,[36] the OFT believes that it would be proportionate to refer a problematic merger (that is, not to apply the 'de minimis' exception) where it is 'in principle' clearly open to the parties to offer a clear-cut undertaking in lieu of reference. This is because the recurring benefits of avoiding consumer harm by means of undertakings in lieu in a given case, and all future like cases, outweighs the one-off costs of a reference.

117. In this case, the OFT believes that there is 'in principle' a clear cut undertaking in lieu available, namely divestment of the Abbey Carrick Glen hospital.[37]

118. The OFT is aware that Abbey Carrick Glen hospital provides cosmetic surgery services to Transform, but notes that there is no reason in principle why this should prevent the divestment of Abbey Carrick Glen hospital. The OFT also notes that the parties made some reference during the investigation to the fact that there had been some difficulty in achieving a sale of the four Abbey hospitals together with the Transform business. However, the OFT notes that Abbey Carrick Glen hospital, individually, was profitable and that there is no reason to believe that other PMS providers not present in the local area might not be interested in acquiring it.[38]

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[35] Comprising the provision of PMS to all customers of the Abbey Carrick Glen hospital and to customers of other hospitals (principally BMI Ross Hall and Nuffield Glasgow) that are within the catchment area of Abbey Carrick Glen hospital.

[36] Completed acquisition by Dunfermline Press Limited of the Berkshire Regional Newspapers business from Trinity Mirror plc 4 February 2008.

[37] The divestment of BMI Ross Hall would potentially also be an effective remedy, but including this as an 'in principle' undertaking in lieu in the context of the 'de minimis' analysis would raise questions about the proportionality of the remedy relative to the competition concerns identified.

[38] Indeed, the OFT notes that GHG has itself remedied local competition concerns through on-sales of individual hospitals: see paragraphs 5 to 7 of Completed acquisition by GHG of assets of Nuffield Hospitals, 1 May 2008.

119. On the basis that the OFT believes that a clear-cut and proportionate remedy is in principle available the OFT has declined to consider its 'de minimis exception in this case.

UNDERTAKINGS IN LIEU OF REFERENCE

120. Where the duty to make a reference under section 22(1) of the Act is met, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, accept from such of the parties concerned undertakings as it considers appropriate for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may result from it.

121. The OFT's guidance states that in order to accept undertakings in lieu of reference '[ ] the OFT must be confident that the competition concerns identified can be resolved by means of undertakings without the need for further investigation. Undertakings in lieu of reference are therefore appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation [ ]'.[39]

122. By way of proposed undertaking in lieu, GHG offered to divest the Abbey Carrick Glen hospital.[40] [ ].

123. The proposed undertaking is a structural remedy to remove the increment resulting from the merger in relation to the Abbey Carrick Glen/BMI Ross Hall overlap. Thus, the OFT believes it constitutes a clear-cut remedy, rendering it appropriate for the OFT to suspend its duty to refer.

124. The OFT has considered whether, in the circumstances of this case, it should require that the Abbey Carrick Glen hospital be sold to an upfront buyer. The OFT has stated previously that it will seek an up-front buyer where the risk profile of the remedy requires it, for example where the OFT has reasonable doubts with regard to the ongoing viability of the divestment package and/or there exists only a small number of candidate suitable purchasers.[41] In this case, the OFT notes that the Abbey Carrick

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[39] See paragraph 8.3 of OFT Mergers Substantive Assessment Guidance.
[40] [ ].
[41] See for example Anticipated acquisition by SRCL Limited of Cliniserve Holdings Limited, 21 November 2008, paragraph 133.

Glen hospital was profitable, that GHG has successfully on-sold individual hospitals previously[42] and that there are a number of potential purchasers for Abbey Carrick Glen given the range of private medical service providers.

125. In addition, when considering the risk profile of a merger remedy, the OFT is mindful of the burden that imposition of an upfront buyer requirement places on the parties and the need for proportionality in the use of the upfront buyer mechanism. The OFT is conscious that in cases, such as this, where the size of the affected market is small and the scale of customer harm which may flow from the merger is also small (but nonetheless an SLC) then such factors may prove relevant for the OFT in determining whether it is proportionate to require an upfront buyer in a given case.

126. Taking all the circumstances into account, the OFT therefore does not believe that it is proportionate in this case to require that divestment of the Abbey Carrick Glen hospital be made to an upfront buyer.

127. By way of conclusion, as the parties have offered undertakings in lieu that the OFT considers are clear-cut and capable of restoring pre-merger levels of competition, the OFT considers it appropriate to suspend its duty to refer this case while it considers further whether to accept these in lieu of a reference under section 73 of the Act.

DECISION

128. The OFT's duty to refer the completed acquisition of the four Abbey Hospitals and Transform by GHG to the Competition Commission pursuant to section 22(1) of the Act is suspended because the OFT is considering whether to accept from GHG undertakings in lieu of reference under section 73 of the Act.

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[i] GHG clarified that this was now usually referred to as 'out of band'
[ii] GHG clarified that this should read hospital, rather than treatment.

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[42] See footnote 38 above.