

## THE LONDON CLINIC

### COMPETITION AND MARKETS AUTHORITY PRIVATE HEALTHCARE REMITTAL

#### RESPONSE TO NOTICE OF PROVISIONAL FINDINGS AND NOTICE OF POSSIBLE REMEDIES

##### Introduction and General Comments

The London Clinic ("the Clinic") welcomes this opportunity to comment on the Provisional Findings ("PF") and notice of possible remedies (the "Notice") published by the Competition and Markets Authority (the "CMA") on 10 November 2015.

In relation to the PF, the Clinic welcomes the findings of the CMA and generally agrees with the conclusions reached. Accordingly, the Clinic does not propose to comment further specifically on the PF in this Response except in the context of the comments made below in relation to specific remedies.

The Clinic has sought to respond to the CMA's questions in the Notice and has set out its main comments below. The Clinic very much welcomes the opportunity to discuss its views in more detail with the CMA in the hearing on 15 December 2015.

##### ***Remedy 1: Divestiture of one or more hospitals and/or other assets owned by HCA in Central London***

In light of the CMA's provisional finding that "HCA's large market share, combined with high barriers to entry and expansion in Central London, result in HCA facing weak competitive constraints, and this leads to HCA charging higher prices to private medical insurers than would be expected in a well- functioning market" ("AEC"), the Clinic considers that divestment of hospitals (and other assets) by HCA would in principle be a practical, effective and proportionate remedy.

However, the Clinic remains concerned that the specific divestiture package identified by the CMA will not effectively and comprehensively address the AEC or constrain HCA as it does not deal with HCA's super-dominant position in relation to certain sub-specialities.

As the Clinic has previously described, in the field of oncology, HCA's market power is entrenched by its super-dominant position in relation to certain sub-specialities: chemotherapy and radiotherapy. HCA's ownership interest in Leaders in Oncology Care ("LOC") through its concentration of leading oncology consultants, in practice gives HCA a share of 80-90% of chemotherapy treatment in Central London. In relation to radiotherapy, HCA also enjoys a super-dominant position through referral from LOC consultants to the Harley Street Clinic.

Therefore, and as set out in the Clinic's Statement of Intervention dated 18 July 2014<sup>1</sup>, HCA's substantial market power in oncology in Central London arises not only out of the HCA's ownership of 6 hospitals, but critically through its ownership of LOC. This is because LOC performs a crucial role as a gateway for oncology referrals. This enables HCA to divert the Clinic's patients away from the Clinic in favour of HCA facilities for oncology and other healthcare services. As a consequence, HCA's ownership of the LOC gateway has given rise to a serious exclusionary effect in relation to the Clinic. Where a consultant surgeon based at the Clinic refers a patient onto a consultant oncologist, even if that oncologist is based at the Clinic, he/she will usually have practising privileges at LOC as well. Those oncologists who hold equity rights in LOC have a financial interest in treating the patient at LOC. This is likely to result in the patient being diverted away from the Clinic, often for *all* subsequent treatment. Thus, if the patient requires radiotherapy, he/she will

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<sup>1</sup> Case nos. 1228/6/12/14, 1229/6/12/14 and 1230/6/12/14, AXA PPP v CMA, Statement of Intervention by the London Clinic, paragraphs 16-21

usually be directed to an HCA facility such as the Harley St Clinic<sup>2</sup>. It also has a detrimental impact on the Clinic's surgical offering, as well as its oncology business, since once a patient is 'lost' to HCA, he/she is unlikely to return to the Clinic.

Therefore the Clinic repeats its view that in order to effectively and comprehensively remedy the AEC in respect of oncology in Central London, the divestment package must include LOC.

The Clinic notes that the CMA's predecessor, the Competition Commission, rejected the inclusion of LOC in the divestment package on the basis that "concerns as to referral patterns arising from HCA's ownership of LOC would be addressed by our remedy 4 [a cap on equity participation] in respect of clinician incentives and a more intrusive remedy such as divestment would therefore be disproportionate"<sup>3</sup>.

However, as set out in paragraph 25 of the Clinic's Statement of Intervention, the Clinic considers that a 5% cap on equity participation by clinicians in equity sharing arrangements with private hospital operators does not address the LOC problem given that even a low percentage shareholding can still be of significant value. The Clinic's understanding is that the four founding LOC clinician shareholders hold a significant equity stake in LOC.

The equity participation remedy and consultant incentive remedy set out in the CMA's Private Healthcare Market Investigation Order 2014 (the "Order") has not been sufficient to constrain HCA since the date of the Order, in particular in the oncology segment. Indeed, HCA's market position in oncology in Central London has in fact strengthened.

Therefore the Clinic considers that in order to be an effective remedy to the adverse effect on competition in respect of oncology in Central London, the divestment package must include LOC and the NHS PPUs operated by HCA in Central London in addition to the Wellington Hospital or London Bridge and Princess Grace. Failure to include LOC in any divestiture package would mean that the remedy was ineffective in relation to a critical specialty in which HCA has probably its strongest market position and faces the weakest competitive constraints. Given the failure of the Order to constrain HCA, it would not be disproportionate to extend the divestiture remedy to include LOC.

If the CMA is not minded to include LOC in the divestiture remedy, then the Clinic considers that the CMA should revise the equity participation remedy to prohibit equity participation by clinicians above a level set by reference to an absolute monetary value. The CMA should also require clinicians to declare the value and size of their equity participation and any other incentives they receive from hospital operators on their annual returns to the General Medical Council.

*Purchaser risks:* The Clinic considers that a suitably composed divestiture package would attract interest from independent, capable and committed prospective purchasers. We believe that a number of hospital groups which are not currently present in Central London would be interested and there would also be interest from abroad.

*Asset risks:* Sales of private hospitals are comparatively common and present no particular obstacles. Indeed HCA's current portfolio of hospitals was built through a series of acquisitions. Accordingly, the Clinic considers that a divestiture period of 6 months would suffice. This would avoid any risk of deterioration of the relevant assets or defection of key consultants in the interim. This would also allow sufficient time for HCA to put in place any transitional agreements to effect a smooth separation.

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<sup>2</sup> See also Transcript of Oral Hearing on 31 October 2013 at p 9 lines 8-21 and p 12 lines 17-22

<sup>3</sup> CC provisional decision on Remedies Appendix 2.1 paragraph 95

### ***Remedy 2: Require HCA to give competitors access to its hospital facilities to compete***

The Clinic considers that this remedy would not be practicable or effective in remedying the insured and self-pay AECs.

The Clinic believes that the success of any Central London hospital depends on developing long term relationships with consultants and it would simply not be credible to enter the market or expand on a time-limited basis.

Any short or medium term rental would not correspond with hospital investment cycles and the operator would have no incentive to re-invest in the rented hospital facilities and complex clinical equipment so as to keep them updated and attractive.

The Clinic believes that the minimum period that would be required in order to make this remedy in any way practical would be 25 years. In that context, the Clinic considers the divestment remedy to be a significantly more practical, effective and comprehensive remedy to change the competitive conditions in the Central London market.

Furthermore, The Clinic does not consider that a rental agreement would somehow act as a stepping stone to entry by a competitor seeking to develop a new hospital on a different site as it would not be attractive to enter on a leased site, for a limited period of time, invest in that site and in growing goodwill associated with that site, and then re-locate.

### ***Remedy 3: Restrictions on HCA's further expansion in Central London***

The Clinic is broadly supportive of this remedy and considers that it would in principle be effective in facilitating new entry and/or expansion by non HCA operators in Central London. The Clinic would welcome the opportunity to discuss this remedy in more detail at the hearing. The Clinic would be concerned to ensure that acquisition should not be limited to the mere purchase of sites or hospital facilities but also to the acquisition of parts of the referral process.

This is in part because, in the Clinic's view, the consultant incentives remedy (as well as the equity participation remedy, as noted above) set out in the CMA's Private Healthcare Market Investigation Order 2014 has not been effective in constraining HCA. The Clinic would welcome further discussion on this point in the hearing.

### ***Remedy 4: Light touch price control***

The Clinic would not support a price control and agrees that the CMA should not take this remedy forward.

### ***Remedy 5: preventing tying and bundling***

The Clinic agrees that the CMA should not take this remedy forward.

### ***Remedy 6: Facilitate site availability in Central London***

The Clinic agrees that the CMA should not take this remedy forward.

### ***Relevant customer benefits***

The Clinic does not consider that there are any relevant customer benefits arising from the market features that have resulted in the AEC. The Clinic agrees with the CMA that the remedy package should not be varied to preserve any RCBs.

**The London Clinic, 3 December 2015**