

Completed acquisition by Circle Health Holdings Limited of GHG Healthcare Holdings Limited, a parent of BMI Healthcare Limited

Decision that undertakings might be accepted

The CMA's decision to accept undertakings in lieu of reference under section 73(2) of the Enterprise Act 2002 given on 24 April 2020. Full text of the decision published on 29 April 2020.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

ME/6864/19

Introduction

1. On 8 January 2020, Circle Health Holdings Limited (**Circle**) acquired all the issued share capital of GHG Healthcare Holdings Limited (**GHG**), the indirect parent company of BMI Healthcare Limited (collectively '**BMI**'), (the **Merger**). Circle and BMI are together referred to as the **Parties**.
2. On 8 April 2020, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to Circle of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 22(1) on the date of the SLC Decision in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act.
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. Accordingly, on

17 April 2020, Circle offered undertakings to the CMA for the purposes of section 73(2) of the Act.

5. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to Circle that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

The undertakings offered

6. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
7. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of Private Hospital Medical Services (**PHMS**) in Bath and Birmingham. To address this SLC, Circle has offered to give undertakings in lieu of a reference to divest Circle Bath Hospital and Circle Birmingham Hospital¹ (the **Proposed Undertakings**).

Impact of the Coronavirus (COVID-19) outbreak on Circle's hospitals

8. On 21 March 2020, the Parties reached an agreement with NHS England (**NHSE**) to assist the NHS with the Coronavirus (COVID-19) outbreak (the **NHSE Agreement**).²
9. The Parties submitted that in order to provide the support required by the NHS in responding to Coronavirus (COVID-19), the Parties are no longer providing private medical health services at their sites for the duration of the Coronavirus (COVID-19) crisis (other than time-critical treatment in limited areas such as cancer treatment). This will continue until the sites are returned to the Parties and reinstated following the end of the pandemic and the termination of the NHSE Agreement. Accordingly, the normal services and business operations of the Parties' hospitals have been suspended, including

¹ For the avoidance of doubt, excluding the Circle Rehabilitation Centre.

² See the press release describing the agreement issued by NHS England:

<https://www.england.nhs.uk/2020/03/nhs-strikes-major-deal-to-expand-hospital-capacity-to-battle-coronavirus/>

at Circle Bath Hospital. Circle Birmingham Hospital is a new facility which, prior to the pandemic, had not yet started offering any services to patients.

10. The CMA has taken into account the impact of the Coronavirus (COVID-19) outbreak and the NHSE Agreement in its assessment of the Proposed Undertakings, particularly in relation to the duration of the Divestment Period and when assessing the requirement for an upfront buyer.

Divestment of Circle Bath Hospital

11. The divestment of Circle Bath Hospital will be by way of sale of all of the issued share capital of Circle Hospital (Bath) Limited (**CHBL**). Circle Bath Hospital will therefore be divested with all assets owned by CHBL which are currently utilised by and necessary for the operation of the hospital, including:

(a) all or substantially all tangible and intangible assets which contribute to the current operation or are necessary to ensure the viability or competitiveness of the business, including:

(i) the leasehold interest in Bath Business Park, Peasedown St John, Bath BA2 8SQ. [X];

(ii) a leasehold interest in an additional administrative office at Unit 5, Bath Business Park, Peasedown St John, Bath BA2 8SQ. [X];

(iii) the hospital building, infrastructure and fixtures; and

(iv) medical equipment, including all operating theatre and ward equipment;

(b) where capable of being transferred, all or substantially all licences, permits, consents and authorisations issued by any governmental or regulatory organisation for the benefit of the business;

(c) where capable of being transferred, all or substantially all contracts, leases, commitments and customer orders of or associated with the business, including any relevant contracts with NHSE; and

(d) all customer, credit and other records related to or associated with the business.

Divestment of Circle Birmingham Hospital

12. Circle submitted that Circle Birmingham Hospital was due to open in June 2020, but operational commencement has been substantially delayed due to the Coronavirus (COVID-19) outbreak. It is expected that the practical

completion of the development will occur in [REDACTED]. Circle stated that, under normal market conditions, the commissioning of the hospital would take [REDACTED] from practical completion.

13. As Circle Birmingham Hospital is not currently operational, Circle proposes to commission the facility in order to make it sale-ready. By the time of sale, Circle will ensure that the facility has appropriate utilities, infrastructure and certain newly installed operationally ready assets, including MRI and x-ray equipment. Full details of the infrastructure and assets to be installed will be consulted on at a later date once agreed.
14. Circle does not believe it would be able to fully operationalise the hospital under the present conditions (including, for example, attracting and retaining a full complement of staff). Furthermore, Circle considers that a potential purchaser will likely wish to make its own staffing decisions and other decisions on the hospital's full operationalisation (eg selecting the IT system configurations).
15. A suitable purchaser will acquire all of the share capital in Circle Birmingham Limited (**CBL**), including its interest in the completed hospital under the [REDACTED] lease with the Medical Properties Trust (with the lease taking effect from practical completion [REDACTED]) and the installed MRI and X-ray machines (financed through a facility transferrable to the purchaser subject to third party consent).

Upfront buyer

16. The Parties submitted that it would not be suitable to require an upfront buyer in this case owing to the significant impact of Coronavirus (COVID-19) outbreak on the Parties and the private healthcare sector more generally.
17. In particular, the Parties submitted that there are currently a number of impediments to running a sales process for the two hospitals. The Parties face operational and practical issues in running a due diligence process (including site visits) at a time when their focus is on the Coronavirus (COVID-19) outbreak and the hospitals are being used by the NHS under the NHSE Agreement. The Parties also anticipate that potential purchasers would face a number of financial and practical obstacles to engage with a sales process at this time.
18. The Parties would therefore commit to agree final UILs with the CMA within the 50-working day period (subject to any extension the CMA might consider to be necessary). This would include agreement on a timetable within which the divestments will take place following acceptance of the final UILs (**the Divestment Period**).

19. Circle has undertaken its own preliminary analysis to identify potential purchasers for both hospitals. Circle has identified a number of potential purchasers who could be approached in relation to one or both hospitals.³
20. The Parties proposed that the Divestment Period should run for a period of [X] following the cessation of the NHSE Agreement and the resumption of private healthcare services at each relevant hospital. It is anticipated that the NHSE Agreement will be terminated in relation to specific sites at different times, dependent on when the site is no longer required to support the NHS response to the Coronavirus (COVID-19) outbreak. The Parties therefore proposed that the trigger for the Divestment Period for each of the proposed divestment sites should be defined by reference to the date on which the particular site is released from the obligations under the NHSE Agreement (the **Specified Date**).
21. Given that there will be a period of time following the end of the NHSE Agreement during which providers will need to reinstate and reconfigure their hospitals in order to resume commercial operations, the Parties propose that the trigger date for the Divestment Period shall be the date falling [X] after the Specified Date.

The CMA's provisional views

22. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that restores competition to the level that would have prevailed absent the merger.⁴

Clear-cut undertakings

23. The CMA believes that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA in Bath and Birmingham, given that the divestment of Circle Bath Hospital and Circle Birmingham Hospital will fully remove the overlaps between the Parties that gave rise to the finding of a realistic prospect of an SLC in these areas. As such, the Proposed Undertakings may result in replacing the competitive constraint provided by Circle that would otherwise be lost following the Merger.

³ These include [X] operators.

⁴ *Mergers remedies (CMA87)*, December 2018, Chapter 3 (in particular paragraphs 3.27, 3.28 and 3.30).

24. The CMA therefore currently believes that the Proposed Undertakings are capable of amounting to a sufficiently clear-cut and effective resolution of the competition concerns identified by the CMA in the SLC Decision.

Undertakings capable of ready implementation

25. In assessing whether the Proposed Undertakings are capable of ready implementation, the CMA has taken into account the impact of the Coronavirus (COVID-19) outbreak and in particular the NHSE Agreement on the Parties and the private healthcare sector more generally.
26. The CMA believes at this stage that the Proposed Undertakings include valuable assets and, after the Specified Date, may be capable of ready implementation. Circle Bath, which is already a fully operational hospital, will have been released from the NHSE Agreement and will be available for PHMS. Circle Birmingham, a new hospital, will also have been released from the NHSE Agreement and will be available for PHMS following final steps being taken to make it sale-ready (and, once sold, operational in accordance with the purchaser's specifications). While Circle Birmingham will not be fully operational, it will be made sale-ready with key infrastructure, facilities and equipment. The purchaser will be able to configure the hospital to its own specifications, which the CMA understands is likely to be an advantage for potential purchasers.
27. The CMA therefore considers that both Circle Bath and Circle Birmingham should be capable of being sold.
28. In addition, the CMA considers that an upfront buyer is neither necessary nor practicable in this case. The CMA is satisfied that an upfront buyer is not necessary because the CMA believes that the NHSE Agreement is unlikely to impact the long-term competitive dynamics of the private healthcare industry⁵ and the hospitals comprising the Proposed Undertakings are valuable assets which are likely to generate significant purchaser interest. The CMA also understands that it would not be feasible while the NHSE Agreement is in force to identify an upfront buyer and to achieve a sale during the 50 working day period for the reasons set out in paragraphs 16 and 17 above.
29. Finally, while the Divestment Period is longer than the CMA is usually willing to accept (and will only start ~~at~~ following the release of each of the relevant

⁵ As set out in paragraph 57 of the SLC Decision.

hospitals from the NHSE Agreement), the CMA is satisfied that such a period is justified in the specific circumstances of this case.

30. The CMA understands, as discussed in paragraph 28 above, that it will be difficult to effect a sale of the Proposed Undertakings while the NHSE Agreement is in place and that any such sale may take more time during the Coronavirus (COVID-19) outbreak given the particular impact on the Parties and potential purchasers operating in the private healthcare sector. Even after Circle Bath and Circle Birmingham are released from the NHSE Agreement, the Parties and potential purchasers may still be subject to this agreement (as individual hospitals may be released at different times) and there remains a possibility that private healthcare providers, including the Parties and potential purchasers, may be asked to provide further support to the NHS to tackle the outbreak.
31. Additionally, the CMA notes that any risk posed by the length of the overall divestment period is mitigated by (i) the nature of the divestment assets and the market the Parties operate in, and (ii) the Parties' commitment to appoint a Monitoring Trustee for the duration of the Divestment Period to ensure ongoing compliance with any UILs approved by the CMA.
32. For these reasons, the CMA currently thinks that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.
33. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA.

Consultation process

34. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.⁶

Decision

35. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by the Parties, or a modified version

⁶ [CMA2](#), paragraph 8.29.

of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 23 June 2020 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 18 August 2020 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 22(1) and 34ZA(2) of the Act.

Joel Bamford
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Competition and Markets Authority
24 April 2020