

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

Notice under paragraph 2(1) of Schedule 10 to the Enterprise Act 2002 (the Act) – consultation on proposed undertakings in lieu of reference pursuant to section 73 of the Act

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 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that (i) a relevant merger situation has been created; and (iii) the creation of that situation 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**). The text of the SLC Decision is available on the CMA webpages.¹
3. On 17 April 2020, Circle offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 24 April 2020, the CMA gave notice to Circle, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable grounds for

¹ See <https://www.gov.uk/cma-cases/circle-health-bmi-healthcare-merger-inquiry>

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 Circle's offer (the **UIL Provisional Acceptance Decision**).

The undertakings offered

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to the supply of Private Hospital Medical Services (**PHMS**) in Bath and Birmingham.
6. As set out at paragraph 7 of the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, Circle has offered Undertakings consisting in the divestment of the Circle Bath Hospital and Circle Birmingham Hospital.²
7. The text of the Undertakings is available on the CMA webpages (the **Proposed Undertakings**).³

Circle Bath Hospital

8. In relation to Circle Bath Hospital, this includes 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. This leasehold interest expires in 2029 and is renewable at CBHL's option for a further 15-year term;
 - (ii) a leasehold interest in an additional administrative office at Unit 5, Bath Business Park, Peasedown St John, Bath BA2 8SQ. This administrative office is currently used for approximately [X] staff;
 - (iii) the hospital building, infrastructure and fixtures; and
 - (iv) medical equipment, including all operating theatre and ward equipment;

² For the avoidance of doubt, excluding the Circle Rehabilitation Centre.

³ See <https://www.gov.uk/cma-cases/circle-health-bmi-healthcare-merger-inquiry>

- (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.
9. There are [X] staff employed at Circle Bath Hospital, which would transfer to a purchaser. In addition, Circle Bath Hospital has access to [X]"bank" staff. The benefit of the arrangements with these bank staff would transfer to a purchaser.

Circle Birmingham Hospital

10. In relation to the Circle Birmingham hospital, this includes all the issued share capital of Circle Birmingham Limited ('CBL'). Circle Birmingham Hospital was due to open in [X] 2020 but operational commencement has been substantially delayed due to the Coronavirus (COVID-19) outbreak. Circle Birmingham Hospital was planned to open with 20 inpatient beds, 15 day case beds and three operating theatres.
11. Circle Birmingham Hospital will be divested with the following assets owned by CBL:
- (a) the hospital building at 5 Pebble Mill Road, Birmingham, B5 7SA and all applicable buildings regulations approvals following practical completion of the facility;
 - (b) the underlease agreement to be entered into between MPT Circle-Birmingham S.a.r.l.;
 - (c) the following systems and equipment, which Circle shall install and test:
 - (i) heating, ventilation and air conditioning (HVAC);
 - (ii) water;
 - (iii) medical gasses;
 - (iv) LAN cabling into the server room;

- (v) fixed operating theatre equipment and other fixed medical equipment (including MRI and X-Ray equipment); and
 - (vi) catering facilities to provide meals for patients and staff (including for Circle Rehab);
 - (d) subject to necessary consents, an equipment finance lease with ~~3~~ in relation to the installed MRI equipment, X-Ray machine, beds, furniture and certain other assets to be transferred to the Purchaser; and
 - (e) where capable of being transferred, all or substantially all supplier contracts which have been agreed or entered into by CBL.
12. Members of staff employed by CBL would transfer to a purchaser where they are required to commission and maintain the Circle Birmingham facility in accordance with paragraph 4.1 of the Proposed Undertakings and where they constitute Key Staff.
13. The Birmingham Divestment Business shall not include the Circle Rehabilitation facility which is scheduled to open on the same site as Circle Birmingham Hospital but is operated by a different subsidiary (Circle Rehabilitation Services Limited ("**CRSL**")). CRSL has entered into an agreement for sub-underlease with CBL granting it the right to operate a stand-alone rehabilitation facility within a separately demised area within the development. The rehabilitation facility occupies part of the first and third floors of the facility and most of the second floor. In addition, there are shared areas such as lift lobbies and stairways.
14. The purchaser would need to provide some support functions to the Circle Rehabilitation Centre (which is co-located within the larger Circle Birmingham development), to be agreed with Circle. In particular, it would include the following: access to lobby and common reception areas, IT capabilities via LAN & WAN, catering, 50 car parking spaces, utilities and facilities maintenance (including HVAC, water, building exterior, portering and housekeeping).

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

15. As set out in the UIL Provisional Acceptance Decision, on 21 March 2020, the Parties reached an agreement with NHS England (**NSHE**) to assist the NHS with the Coronavirus (COVID-19) outbreak (the **NHSE Agreement**).⁴

⁴ [Decision that undertakings might be accepted](#), paragraphs 8 to 10.

16. As part of the NHSE Agreement, the Parties are no longer providing private medical health services at their sites for the duration of the Coronavirus (COVID-19) outbreak (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 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.
17. 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.

CMA assessment

18. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie the CMA currently does not have material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.⁵ This is because the Proposed Undertakings will⁶:
 - (a) remove the overlaps between the Parties that gave rise to the finding of a realistic prospect of an SLC in Bath and Birmingham; and
 - (b) replace the competitive constraint imposed by each of the Parties on the other that would otherwise be lost following the Merger.
19. 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. The CMA considers that the Proposed Undertakings would be capable of ready implementation⁷:

⁵ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

⁶ *Decision that undertakings might be accepted*, paragraph 23.

⁷ *Decision that undertakings might be accepted*, paragraph 26.

- (a) Circle Bath, which is a fully operational hospital, will have been released from the NHSE Agreement and will be available for PHMS; and
 - (b) Circle Birmingham, which is a new hospital, will have been released from the NHSE Agreement and will be available for PHMS following final steps being taken to make it sale-ready.
- 20. In addition, the CMA considers that an upfront buyer is neither necessary nor practicable in this case because the NHSE Agreement is unlikely to impact the long-term competitive dynamics of the private healthcare industry 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.⁸
- 21. Finally, while the Divestment Period is longer than the CMA is usually willing to accept (and will only start ~~following~~ following the release of each of the relevant hospitals from the NHSE Agreement), the CMA is satisfied that such period is justified in the specific circumstances of this case:
 - (a) it will be difficult to effect a sale of the Proposed Undertakings while the NHSE Agreement is in place;
 - (b) 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; and
 - (c) even after being released from the NHSE Agreement, the Parties and potential purchasers may still be subject to the agreement (as individual hospitals may be released at different times) and there remains a possibility that they may be asked to provide further support to the NHS to tackle the outbreak.⁹
- 22. Additionally, the CMA notes that any risk posed by the length of the divestment period is mitigated by the following factors:
 - (a) the nature of the divestment assets and the market the Parties operate in, and

⁸ [Decision that undertakings might be accepted](#), paragraph 28.

⁹ [Decision that undertakings might be accepted](#), paragraphs 29 to 30.

- (b) 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.¹⁰

Proposed decision and next steps

23. For the reasons set out above, the CMA currently considers that the Proposed Undertakings are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.
24. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation. The text of the Proposed Undertakings is available on the CMA web pages.¹¹
25. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.¹²
26. Representations should be made in writing, by email¹³ to the CMA and be addressed to:

Nadia Muhammad

Email: nadia.muhammad@cma.gov.uk

Telephone: 020 3738 6467

Deadline for comments: 28 May 2020.

¹⁰ [Decision that undertakings might be accepted](#), paragraph 31.

¹¹ See <https://www.gov.uk/cma-cases/circle-health-bmi-healthcare-merger-inquiry>

¹² Under paragraph 2(4) of Schedule 10 to the Act.

¹³ Due to the ongoing Coronavirus (COVID-19) outbreak, the CMA's offices across the UK are closed until further notice. We are no longer able to accept delivery of any documents or correspondence by post or courier to any of our offices.