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

Decision on relevant merger situation and substantial lessening of competition

ME/6864/19

SUMMARY

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. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Circle and BMI is an enterprise; that these enterprises have ceased to be distinct as a result of the Merger; and that the turnover test is met. The four-month period for a decision has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

3. In addition, the CMA considers that the increase in Centene Corporation's (**Centene**) shareholding in Circle (and thus the merged entity) to [above 25% but below 50%] may have resulted in Centene being able to exercise material influence over the merged entity, and therefore in the creation of a further relevant merger situation.

4. Circle is a provider of elective care services to patients funded by the National Health Service (**NHS**) (**NHS-funded patients**) and privately-funded patients in the UK. It currently operates two private hospitals in Bath and Reading, with plans to open a third hospital in Birmingham in June 2020. It also operates Circle Integrated Care, which delivers integrated care services in relation to musculoskeletal (**MSK**) conditions and dermatology to NHS-funded patients, and Circle Rehabilitation, which provides rehabilitation services.

5. BMI currently operates 52 hospitals and clinics throughout the UK, providing elective care services to NHS-funded patients and privately-funded patients.

6. Centene has a controlling interest in The Practice Services Limited and a network of companies holding primary care contracts (together '**TPG**'), which provide primary care community services to NHS-funded patients. TPG has a network of eighteen General Practice (**GP**) surgeries and also operates 24 community ophthalmology centres across England, as well as a community dermatology centre in Ramsgate.[i,ii]

7. Consistent with its general approach to the counterfactual at Phase 1, the CMA has considered the effect of the Merger compared with the most competitive counterfactual, providing that it considers that situation to be a realistic prospect. The CMA therefore considered the impact of the Merger against the pre-Merger conditions of competition, taking into account the opening of Circle's hospital in Birmingham.

8. HCA Healthcare UK (**HCA**) is also planning to open a hospital in Birmingham (on the Queen Elizabeth Hospital Birmingham campus) in [✂] 2022. Given the earlier stage of development of this hospital and the uncertainty of its impact on competition in Birmingham, the CMA has on a cautious basis assessed HCA's proposed entry in Birmingham in the competitive assessment, rather than incorporating it into the counterfactual.

9. As part of its assessment, the CMA has taken into account the fact that private hospitals have effectively put their entire hospital capacity temporarily under the control of the NHS to deal with the Coronavirus (COVID-19) outbreak, which in particular may delay the planned opening of Circle's and HCA's hospitals in Birmingham.

Private hospital medical services

10. Healthcare services in the UK can broadly be divided into primary, secondary and tertiary care. Primary care services are usually the first point of contact for patients seeking care, such as a general practitioner. Secondary care services include hospitals, day case units, community care centres, and specialist doctors. Tertiary care refers to further highly specialised treatment services which often utilise specialised equipment, eg neurosurgery.

11. Secondary care includes hospital services or acute care, where a patient receives active but short-term treatment, as opposed to longer term care or chronic care. Private Hospital Medical Services (**PHMS**) form part of these secondary care services.

12. The Parties overlap in the supply of PMHS in Reading and Bath, and will overlap in the supply of these services in Birmingham. In their hospitals, the Parties supply PMHS to inpatients, outpatients and day-case patients (**types of care**) in almost all clinical specialties. The Parties provide PMHS to NHS-funded patients and privately-funded patients (which includes patients who fund the services themselves (**self-pay patients**) and patients funded by private medical insurance (**PMI**) (**PMI patients**)).

13. The CMA has assessed the impact of the Merger on the supply of PHMS with further segmentation between (i) each type of care, (ii) different specialties, and (iii) the source of funding (distinguishing between NHS and privately-funded patients). The CMA has addressed differences in competition for self-pay patients and PMI patients in the competitive assessment.

14. In line with previous CMA decisions and the evidence seen by the CMA in this case, including a catchment area analysis and the Parties' internal documents, the CMA has assessed the effects of the Merger on the supply of PHMS on a local basis. The CMA has also assessed whether the Merger could lead either of the Parties to increase their prices for PMI patients nationally, as a result of a reduction in local competition.

15. The evidence seen by the CMA consistently showed that the location of providers strongly influences the extent to which they compete with each other. This included the analysis of catchment areas from which each hospital's patients are drawn, third party views and internal documents.

16. The various metrics for shares of supply within a given geographic area do not reflect the relative location of providers and hence the level of competitive interaction between hospitals. Given that more direct evidence of the strength of competition (including internal documents) was available, the CMA has not placed significant weight on shares of supply in this case.

Private Hospital Medical Services in Reading

17. The Parties each have one hospital in the Reading area: Circle in Reading and BMI Hampshire Clinic in Basingstoke. While the Parties are the largest hospitals in the area, they are not in the same town and the evidence consistently showed that the Parties are not close competitors, including when assessed by type of care, source of funding, and by specialty. In particular, a number of PHMS providers are nearer to each of the Parties' hospitals than the Parties are to each other. Moreover, the Parties draw a limited number of patients from the same postcode areas and they have many more consultants in common with other competitors than with each other. Third party views and the Parties' internal documents similarly showed that the Parties are not close

competitors to each other and will continue to be constrained post-Merger by other providers.

18. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in relation to the supply of PHMS in the Reading area, including in each segment.

Private Hospital Medical Services in Bath

19. The Parties each have one hospital and are the two largest PHMS providers in Bath. The evidence showed that the Parties compete strongly with each other and that they face a more limited constraint from other providers. This was consistent across all types of care, sources of funding and specialties. In particular, the Parties draw a significant number of patients from the same postcode areas and have many more consultants in common with each other than with other private hospital providers. While there are other sizeable providers outside of Bath (eg in Bristol and to the southwest of Bath), the evidence, including third party views and internal documents, showed that these providers are not strong competitors to the Parties. A significant number of third parties expressed concerns about the Merger in Bath.

20. The CMA therefore believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of PHMS in Bath, including in each segment.

Private Hospital Medical Services in Birmingham

21. BMI currently operates two hospitals in Birmingham: BMI Edgbaston and BMI Priory. Circle was planning to open a hospital and rehabilitation centre in Birmingham in June 2020. Although construction is complete, the opening is likely to be delayed because all private hospital capacity has been temporarily allocated to the NHS to help deal with the Coronavirus (COVID-19) outbreak – see paragraph 9.

22. Based on the evidence (including in particular internal documents and third party views on BMI's competitors in Birmingham and the impact of Circle's entry), the CMA found that BMI currently faces limited competition in Birmingham and that when Circle opens its hospital, Circle and BMI will compete closely with each other. In particular, Circle's internal documents show that Circle was focused on targeting BMI's revenues. Similarly, BMI's internal documents show that BMI recognised the significant threat posed by Circle. This competitive constraint would be lost as a result of the Merger. The evidence is consistent across all types of care, sources of funding and overlapping specialties. The CMA therefore believes that the Merger gives

rise to a realistic prospect of a SLC as a result of horizontal unilateral effects in the supply of PHMS in Birmingham, including in each segment.

23. As noted above, HCA is also planning to open a hospital in Birmingham in [✂] 2022, which is being built on the campus of the NHS Queen Elizabeth Hospital, as a private patient unit (**PPU**). The CMA therefore assessed whether HCA's entry in Birmingham would be sufficiently likely, timely and sufficient to prevent a realistic prospect of an SLC.

24. The CMA found that HCA's entry was likely. However, the hospital is at an early build phase and construction may be delayed as a result of the Coronavirus (COVID-19) outbreak. HCA's entry is therefore several years away and the CMA was unable to conclude that it would be timely enough to prevent the realistic prospect of an SLC. In terms of sufficiency, the evidence shows that HCA is currently planning to open a relatively large hospital with a wide range of healthcare services near the Parties' hospitals. However, HCA's hospital is expected to be considerably smaller than the merged entity and, while there are expected to be overlaps in the planned specialties between HCA and the Parties, HCA's offering will have different areas of focus. The CMA also notes that HCA's plans for the hospital may change in the period prior to opening. In any case, HCA's entry would only increase competition in Birmingham from a modest starting point. Currently, only Spire and Ramsay pose a significant and moderate constraint respectively on the Parties and the Merger is expected to weaken competition that would have developed in the absence of the Merger.

25. In this context, and in light of the evidence discussed above, the CMA does not consider that HCA's entry would be either timely or sufficient to prevent a realistic prospect of an SLC arising from the Merger in Birmingham.

Supply of PHMS nationally

26. PMI prices are agreed between insurers and private hospital operators and common prices are applied across all hospitals in an operator's estate. The CMA has assessed whether Circle would have an incentive to raise its national PMI price post-Merger.

27. The CMA's view is that the Parties' national negotiating position with respect to PMI pricing will not be materially affected by the Merger. The merged entity's portfolio would include 55 hospitals and clinics. However, the Parties' negotiating position would only be strengthened post-Merger with respect to the two areas of overlap where the CMA found a realistic prospect of an SLC (ie Bath and Birmingham), which form only a small proportion of the merged entity's national portfolio. Accordingly, the CMA found that the Merger does

not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of PHMS nationally.

Vertical effects

28. The CMA found that Circle and TPG would not have the ability to foreclose providers competing with the merged entity in the downstream supply of PHMS by referring NHS patients using their primary care community services to the merged entity's hospitals rather than alternative PHMS providers.

Decision

29. For the reasons given above, the CMA believes that it is or may be the case that (i) a relevant merger situation has been created; and (ii) the creation of that situation may be expected to result in an SLC within a market or markets in the United Kingdom.

30. The CMA is therefore considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (**the Act**). Circle has until Friday 17 April 2020 to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 22(1) and 34ZA(2) of the Act.

ASSESSMENT

Parties

31. Circle currently operates two private hospitals providing elective care services to NHS-funded and privately-funded patients in Bath and Reading, and planned to open a third hospital in Birmingham in June 2020. It also operates Circle Integrated Care and Circle Rehabilitation. The turnover of Circle in the financial year ending 31 December 2018 was £155.6 million in the UK.[1]

32. Circle is owned by Penta Capital LLP ([more than 50%] through controlled portfolio companies), Centene (whose shareholding increased to [above 25% but below 50%] on completion of the Merger), and Circle managers ([less than 15%]).[2]

33. Centene is active in the UK in primary care, community ophthalmology, dermatology and community services to Clinical Commissioning Groups

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[1] Circle Health Holdings Limited Annual Report and Financial Statements for the year to 31 December 2018.
[2] Prior to completion of the Merger, Circle was owned by: (i) [more than 50%] by Tosca Penta Healthco Limited partnerships; (ii) [less than 25%] by Centene through its subsidiary MH Services International (UK) Limited; and (iii) [less than 15%] by Circle managers.

(**CCGs**).[3] It also provides mental health integrated care services in Birmingham. None of the funds managed by Penta Capital LLP have any investments in the healthcare sector aside from Circle.

34. As referred to at paragraph 5, BMI currently operates 52 hospitals and clinics throughout the UK, providing elective care services to NHS-funded and privately-funded patients. The turnover of BMI in the financial year ending 31 March 2019 was £868 million in the UK.[4]

35. Circle and BMI are together referred to as the **Parties**.

Transaction

36. On 8 January 2020, Circle acquired all the issued share capital of GHG, the indirect parent company of BMI.

Procedure

37. The Merger was considered at a Case Review Meeting.[5]

Jurisdiction

38. Each of Circle, GHG and Centene constitutes an enterprise.

39. As a result of the Merger, Circle acquired a controlling interest of 100% of GHG. Accordingly, the enterprises of Circle and GHG ceased to be distinct.

40. In addition, the CMA considered whether the increase in Centene's shareholding in the merged entity to [above 25% but below 50%] may have resulted in Centene being able to exercise material influence over the merged entity.

41. The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation.[6] When making its assessment, the CMA focuses on the acquirer's ability to materially influence policy relevant to

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[3] Centene is active in the UK via its wholly owned subsidiaries: Centene UK Limited (now Operose Health Limited), The Practice (Group) Limited (now Operose Health (Group) Limited), The Practice Services Limited and The Practice Properties Limited. Centene also exercises control over a network of companies holding primary care contracts, being The Practice Surgeries Limited, Chilvers and McCrea Limited, The Practice U Surgeries Limited, and The Practice Corporation Management Limited (now, Operose Health Corporate Management Limited). Paragraph 2.11 of the MN.

[4] GHG Opco Bidco Limited turnover for financial year ending 31 March 2019. Paragraph 6.1 of the Merger Notice (**MN**).

[5] See *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, from paragraph 7.34.

[6] *CMA2*, paragraph 4.14.

the behaviour of the target firm in the marketplace. The policy of the target in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives.[7]

42. A finding of material influence may be based on the acquirer's ability to influence the target's policy through exercising votes at shareholders' meetings, together with, in some cases, additional supporting factors. Material influence may also arise as a result of the ability to influence the board of the target, and/or through other arrangements.[8]

43. The Parties submitted that Centene is a minority financial investor and is not involved in the day-to-day operation of Circle.

44. However, based on the Shareholder Agreement and Articles of Association, Centene's [above 25% but below 50%] interest in the merged entity and associated rights enable it to:

    (a) unilaterally block special resolutions at the shareholder level, but not unilaterally pass any ordinary shareholder resolutions;[9]

    (b) appoint [✂] non-executive directors to Circle's board (only [✂] of which will be able to exercise a voting right);[10]

    (c) be consulted on the appointment of the chairman and any additional directors;[11]

    (d) have access to Circle's draft annual budget, monthly management accounts and other management information and monthly financial statements;[12] and

    (e) exercise veto rights over certain decisions of Circle by virtue of the Shareholders' Agreement, including:

        (i) [✂];[13]

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[7] *CMA2*, paragraph 4.14.
[8] *CMA2*, paragraph 4.16.
[9] *CMA2*, paragraph 4.19.
[10] This right is conferred by Clause 8.4.1 of the Revised Shareholder Agreement dated 23rd December 2019 (the **Revised Shareholder Agreement**).
[11] This right is conferred by Clause 8.13 of the Revised Shareholder Agreement; and Article 34 of the Articles of Association adopted on the 23rd of December 2019.
[12] This right is conferred by Clauses 2 and 3 of Schedule 6 of the Revised Shareholder Agreement.
[13] This right is conferred by Clause 6 of Schedule 5D of the Revised Shareholder Agreement.

(ii) [✂];[14] and

(iii) approval of any loans in excess of £[✂] and the creation of any mortgage on any part of the undertaking property or assets of any member of Circle.[15]

45. The CMA believes that it is or may be the case that these rights confer on Centene the ability to influence the commercial strategy and thus the ability to exercise material influence over the merged entity.[16]

46. The UK turnover of BMI exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the **Act**) is satisfied in relation to both Circle's acquisition of a controlling interest in GHG and Centene's ability to exercise material influence over GHG.

47. The CMA therefore believes that it is or may be the case that two relevant merger situations have been created:

(a) The merger between Circle and GHG (ie Circle and GHG have ceased to be distinct), and

(b) The ability of Centene to exercise material influence over the merged entity (ie Centene and GHG have ceased to be distinct).

48. The Merger completed on 8 January 2020 and the CMA was informed of completion on the same day. The four month deadline for a decision under section 24 of the Act is 8 May 2020.[17]

49. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 13 February 2020 and the statutory 40 working day deadline for a decision is therefore 8 April 2020.

Counterfactual

50. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where,

[14] This right is conferred by Clause 20 of Schedule 5B of the Revised Shareholder Agreement.
[15] This right is conferred by Clauses 11 and 12 of Schedule 5B of the Revised Shareholder Agreement.
[16] The CMA notes that Penta Capital LLP will also have the ability to exercise control over the merged entity through its [more than 50%] shareholding and associated rights in Circle. However, this is not discussed further because none of the funds managed by Penta Capital LLP have any investments in the healthcare sector.
[17] This is because 8 May 2020 is a bank holiday.

based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.[18]

Bath, Reading, and vertical effects

51. The Parties submitted that in relation to the overlap in the Parties' PHMS activities in Bath and Reading, the Merger should be assessed against the existing competitive situation.[19]

52. The CMA has not seen any evidence supporting a different counterfactual in relation to (i) the overlap in the Parties' PHMS activities in Bath and Reading, and (ii) vertical effects between Circle's and Centene (TPG)'s activities in primary care and community services and BMI's activities in the supply of PHMS. The CMA therefore considers the pre-Merger conditions of competition to be the relevant counterfactual for the purposes of these theories of harm.

Birmingham

53. In relation to the overlap in the Parties' PHMS activities in Birmingham, the Parties submitted that the assessment should take into account new hospitals that are due to open in the next three years, namely Circle Birmingham and HCA Birmingham.

54. Consistent with its general approach to the counterfactual at Phase 1, the CMA has considered the effect of the Merger compared with the most competitive counterfactual, providing that it considers that situation to be a realistic prospect.[20] In relation to Birmingham, Circle confirmed that it had expected to open a hospital in June 2020,[21] although this may be delayed as a result of the Coronavirus (COVID-19) outbreak.[22] The hospital construction is nearly complete. Therefore, the CMA considers there to be a realistic prospect of Circle opening a hospital in Birmingham in 2020 (or soon thereafter). Accordingly, the CMA included Circle's Birmingham hospital in its counterfactual, which would result in a more competitive counterfactual in Birmingham than the pre-Merger conditions of competition. The CMA has also

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[18] *Merger Assessment Guidelines* (*OFT1254/CC2*), from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *CMA2*), Annex D).
[19] Paragraph 11.1 of the MN.
[20] See footnote 18.
[21] Paragraph 22 of the MN. See Circle's website at https://www.circlehealth.co.uk/birmingham/.
[22] Parties' response to the Issues Letter, slide 21.

taken Circle's entry in Birmingham into account in the counterfactual when assessing the impact of the Merger on the supply of PHMS nationally.

55. HCA is also planning to open a hospital in Birmingham (as a PPU on the NHS Queen Elizabeth Hospital Birmingham campus) in [✂] 2022 (although this may be delayed as a result of the Coronavirus (COVID-19) outbreak). Given the earlier stage of development of this hospital and the uncertainty of its impact on competition in Birmingham, the CMA has on a cautious basis assessed HCA's proposed entry in Birmingham in the competitive assessment, rather than incorporating it into the counterfactual.

NHS Agreement to deal with the Coronavirus (COVID-19) outbreak

56. The CMA notes that the hospital capacity of private hospitals is temporarily being allocated to the NHS pursuant to an agreement entered into between private hospital providers, including the Parties, HCA, Spire, Ramsay, and the NHS to assist the NHS with the Coronavirus (COVID-19) outbreak (the **NHS Agreement**).[23]

57. The CMA considers that the NHS Agreement is unlikely to impact the long-term competitive dynamics of the private healthcare industry.[24] The CMA has nevertheless taken account the potential impact of the NHS Agreement and the Coronavirus (COVID-19) outbreak in its competitive assessment where relevant, in particular insofar as it may delay the planned opening of Circle's and HCA's hospitals in Birmingham.

Frame of reference

58. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA takes these factors into account in its competitive assessment.[25]

59. Healthcare services in the UK can broadly be divided into primary, secondary and tertiary care. Primary care services are usually the first point of contact for patients seeking care, such as a general practitioner. Secondary care

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[23] https://www.england.nhs.uk/2020/03/nhs-strikes-major-deal-to-expand-hospital-capacity-to-battle-coronavirus/
[24] The Parties submitted that the agreement will be in place for an initial 14 week period and then on a rolling basis terminable by NHS England on one month's notice.
[25] *Merger Assessment Guidelines*, paragraph 5.2.2.

services do not typically have initial contact with patients, and include hospitals, day case units, community care centres, and specialist doctors. Tertiary care refers to further highly specialised treatment which often utilise specialised equipment, eg neurosurgery.

60. Secondary care includes hospital services or acute care, where a patient receives active but short-term treatment, as opposed to longer term care or chronic care. Secondary care can typically be either planned (elective), or urgent and emergency care. PHMS form part of these secondary care services.

61. The Parties overlap in the supply of PMHS in the United Kingdom (**UK**). In their hospitals, the Parties supply PMHS to inpatients, outpatients and day-case patients in almost all clinical specialities.[26] The Parties provide PMHS to self-pay patients, PMI patients, and NHS-funded patients.

62. In addition, Circle and Centene provide primary care and community services to NHS-funded patients which give rise to vertical relationships with BMI's PMHS activities in the UK.

63. The CMA has first assessed the frame of reference for PHMS and then for primary care and community services.

PHMS

Product scope

64. In *Spire/St Anthony's Hospital*, the CMA considered whether the market for PHMS could be segmented by types of care (ie inpatient, day-case and outpatient), by specialty (eg trauma & orthopaedics, ophthalmology, etc.) and by source of funding (self-pay, PMI and NHS-funded patients). The CMA addresses each of these possible segmentations below.

Type of care

65. Both Parties' sites in Reading, Bath and Birmingham provide (or will provide in the case of Circle Birmingham) inpatient, day-case and outpatient types of care. While differences in revenue shares between different types of care are not particularly high, inpatient care typically generates a higher proportion of

[26] Outpatient treatments are generally defined as those treatments which do not require a patient to be admitted to hospital, whereas inpatient treatments require the patient's admission to hospital and also involve an overnight stay. There is also an 'in-between' case where a patient is admitted but the treatment is completed within the day, referred to as 'day-cases' or 'day patient treatments'. Private Healthcare Market Investigation (**PHMI**), paragraph 32.

revenues than day-case and outpatient care at the Parties' hospitals in the overlap areas.

Table 1: Share of revenue by type of care

Local area	Site	Share of 2018 revenue		
		Day-case	Inpatient	Outpatient
Reading	Circle Reading	[✂]%	[✂]%	[✂]%
	BMI Hampshire	[✂]%	[✂]%	[✂]%
Bath	Circle Bath	[✂]%	[✂]%	[✂]%
	BMI Bath	[✂]%	[✂]%	[✂]%
Birmingham	BMI Edgbaston	[✂]%	[✂]%	[✂]%
	BMI Priory	[✂]%	[✂]%	[✂]%
AVERAGE		[✂]%	[✂]%	[✂]%

Source: Based on data provided by the Parties

66. The Parties submitted that providers with appropriate facilities can switch capacity between inpatient and day-care services at relatively low cost. The Parties also submitted that over the past 10 years there has been a trend towards the increasing importance of outpatient and day-care services. Nevertheless, the Parties focussed their submissions on the supply of inpatient services, which they submitted is consistent with the CMA's approach in the Private Healthcare Market Investigation (**PHMI**) and *Spire/St Anthony's Hospital*.

67. In the PHMI, the CMA found that there appears to be scope for hospitals that provide inpatient care to switch capacity into the provision of day-case and outpatient treatments. However, the ability of day-case and outpatient clinics to switch into the provision of inpatient treatments is very limited due to the scale of the investment and the time required. As a result, asymmetric constraints appear to exist between hospitals providing inpatient care and day-case only and outpatient clinics.[27]

[27] PHMI, paragraphs 5.32-5.40.

68. In *Spire/St Anthony's Hospital*, the CMA concluded that there was a separate frame of reference for providing PHMS by each type of care. In that case, the CMA focussed its assessment on the Parties' inpatient services because:[28]

(a) the constraints on the Parties' day-case and outpatient services were likely to be at least as strong as the constraints on the Parties' inpatient services (by reference to the findings in the PHMI);[29] and

(b) as the CMA did not consider there to be a realistic prospect of an SLC in the provision of inpatient services, then it followed that the same conclusion would apply to day-case and outpatient services. This latter point does not apply in the current case.

69. In this decision, on a cautious basis, the CMA has assessed the effects of the Merger on the basis of each type of care being a separate frame of reference.

Specialty

70. The Parties acknowledged that, from a demand side perspective, there is almost no scope for substitution between specialties and treatments for secondary care. However, the Parties submitted that there is significant supply side substitution both within specialties and between specialties within a private hospital. The Parties submitted that on this basis there is no need to segment the market between specialties, consistent with the product market definitions in previous CMA decisions. As a result, the Parties have primarily focussed their submissions at the hospital level. Nevertheless, the Parties have also considered overlaps at the specialty level in their submissions, where possible.

71. In *Spire/St Anthony's Hospital*, the CMA concluded that there were separate frames of reference for providing PHMS for each specialty. The CMA considered that, from a demand side point of view, individual hospital services are not substitutable for a patient.[30] However, the CMA widened the frame of reference to individual specialties (rather than each hospital service) because while there is a significant degree of supply-side substitution across treatments within the same specialty, there is more limited supply-side substitution across treatments between specialties. This is consistent with the

[28] *Spire Healthcare Limited / St Anthony's Hospital* decision, 24 September 2014, (***Spire/St Anthony's Hospital***), paragraph 58.
[29] The CMA's PHMI found that there was scope for hospitals providing inpatient care to switch capacity into the provision of day-patient and outpatient services. PHMI, paragraph 5.52.
[30] *Spire/St Anthony's Hospital*, paragraph 28.

CMA's finding in previous decisions involving NHS Foundation Trust mergers.[31]

72. In this case, the CMA has not seen compelling evidence to support departing from the frames of reference used in *Spire/St Anthony's Hospital*. For the reasons set out above, the CMA has assessed the effects of the Merger on the basis of each specialty being in a separate frame of reference.

Source of funding

73. The Parties submitted that privately-funded and NHS-funded patients should be considered separately, and within the segment for privately-funded patients, they provided data for self-pay patients and PMI patients where available. The Parties submitted that it is not necessary to conclude on whether the market should be further segmented between self-pay and PMI patients, consistent with the CMA's position in *Spire/St Anthony's Hospital*.

74. In its PHMI, the CMA considered privately funded medical treatments to be in a separate product market from NHS funded medical treatment.[32]

75. In *Spire/St Anthony's Hospital*, the CMA did not find it necessary to further segment the frame of reference by customer group, but considered possible differential effects of the merger on different customers in the competitive assessment as appropriate.[33] In that case, the CMA identified contracts with NHS Organisations as a separate frame of reference.[34]

76. Consistent with previous cases and the evidence in this case, the CMA has assessed the effects of the Merger on the basis of NHS-funded patients being in separate frame of reference from privately-funded patients. Within the privately-funded patients frame of reference, the CMA has addressed differences in competition for self-pay patients and PMI patients in its competitive assessment.[35]

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[31] *Spire/St Anthony's Hospital*, paragraph 30; *Derby Teaching Hospitals NHS Foundation Trust and Burton Hospitals NHS Foundation Trust (2018)* paragraph 56*; University Hospitals Birmingham NHS Foundation Trust and Heart of England NHS Foundation Trust* I (2017), paragraph 56.
[32] PHMI, paragraph 5.52.
[33] *Spire/St Anthony's Hospital*, paragraph 35.
[34] *Spire/St Anthony's Hospital*, paragraph 36.
[35] As discussed below in the competitive assessment, the CMA's conclusions in relation to local competition are unchanged regardless of whether self-pay patients and PMI patients are considered separately in the competitive assessment.

Conclusion on the product scope for PHMS

77. For the reasons set out above, the CMA believes that the relevant product frames of reference are the supply of PHMS with further segmentation between:

    (a) types of care;

    (b) specialty; and

    (c) the source of funding (distinguishing between NHS-funded and privately-funded patients). As regards privately-funded patients, the CMA has addressed differences in competition for self-pay patients and PMI patients in the competitive assessment.

78. However, the CMA notes that much of the evidence it has received is not specific to an individual product frame of reference and applies equally to all product frames of reference.

Geographic scope for PHMS

79. The Parties submitted that location is a key consideration for patients when choosing a hospital, with most patients preferring to visit a hospital closer to where they live, all other things being equal. The Parties submitted that on this basis the CMA has consistently concluded that the geographic market for private hospitals is local in nature.

80. The analysis of the catchment areas from which each hospital draws its patients confirms the local nature of competition.[36] This is also consistent with the Parties' internal documents, which monitor competition in the area local to individual hospitals (as discussed in the competitive assessment below).

81. Consequently, the CMA considers that the geographic frame of reference for the supply of PHMS is local.

[36] For example, see Figure 1, Figure 3 and Figure 5 below.

Primary care and community services

Product scope for primary care and community services

82. Circle and Centene have activities in primary care and community services which give rise to a vertical relationship with BMI's activities in the supply of PHMS in the UK.

    (a) As stated above, Centene has a controlling interest in TPG,[37] which provides primary care community services to NHS-funded patients through a network of eighteen GP surgeries in England, and one small referral management service in Milton Keynes.[38] Some of these GP surgeries are located near BMI hospitals. A vertical relationship exists between TPG and BMI because General Practitioners are responsible for referring patients to consultants and private hospitals.

    (b) TPG also operates 24 community ophthalmology centres across England,[39] as well as a community dermatology centre in Ramsgate. In principle, there may be a vertical relationship with BMI, to the extent that community centres may refer patients to hospitals.

    (c) Circle operates Circle Integrated Care, which manages contracts on behalf of some CCGs to supply integrated care services, in relation to MSK conditions and dermatology[40] to NHS-funded patients. There is a vertical relationship with BMI as the service acts as a single triage point which then refers patients to community centres or hospitals.[41]

83. The product scope frames of reference for GP surgeries, ophthalmology and dermatology community centres, and integrated care services are discussed in turn.

GP surgeries

84. The Parties submitted that the relevant product market for GP surgeries includes NHS and privately funded GP surgeries, as the latter are constrained by NHS-funded GP surgeries. On a cautious basis, the CMA has assessed

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[37] See paragraph 6 above.
[38] Including one walk-in centre. Paragraph 33 of the MN. TPG also has one small referral management service in Milton Keynes. Paragraph 19.42 of the MN.
[39] These centres treat NHS-funded patients presenting with a range of low-risk, non-urgent, routine eye conditions and assess and manage patients whose eye conditions are at a low risk of deterioration. Paragraph 12.5 of the MN.
[40] Circle has been awarded a dermatology integrated care contract by Wolverhampton CCG which is due to start on [✂]. Paragraph 3.13 of the MN.
[41] In particular, regarding Circle's contract with Bedfordshire and Greenwich CCGs, patients are referred by their GP to the service which reviews them and directs them for treatment through appropriate care pathways. The service acts as a single triage point and a single patient hub, subcontracting with all the other providers, and offering patients choice over which provider they go to. CQC Report, dated September 2018.

the impact of the Merger on the market for NHS GP surgeries. However, it is not necessary for the CMA to conclude on the scope of this product frame of reference as concerns do not arise on any plausible basis as a result of vertical effects.

Integrated Care Services

85. The Parties submitted that there is a single market for integrated care services, irrespective of the type of treatment provided (eg MSK or dermatology).[42]

86. The CMA has assessed competition in the supply of MSK and dermatology integrated care service to NHS-funded patients as separate products. However, it is not necessary for the CMA to conclude on the scope of this product frame of reference as competition concerns do not arise on any plausible basis as a result of vertical effects.

Community services for dermatology and ophthalmology

87. The Parties submitted that there is no overlap between:

   (a) TPG's activities in NHS ophthalmology and dermatology community services, and

   (b) the supply of dermatology and ophthalmology by BMI to NHS-funded patients in its hospitals as part of PHMS.

88. The Parties submitted that this is because the care pathway for NHS ophthalmology and dermatology services provides a clear delineation between the types of patients that are treated by community based providers (such as TPG) and patients that are provided with treatment in hospitals (including both NHS and private hospitals that treat NHS-funded patients). Joint guidance issued by The Royal College of Ophthalmologists and College of Optometrists supports the view that they form part of different care pathways.[43] Therefore, the CMA has assessed community services for dermatology and ophthalmology as a separate market from PHMS.

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[42] Paragraph 13.51 of the MN.

[43] Paragraphs 12.9 to 12.15 of the MN refers to the Ophthalmic Services Guidance: Primary Eye Care, Community Ophthalmology and General Ophthalmology, dated February 2019, page 5: '*Community Ophthalmology Services (COS) are commissioned by CCGs. These may involve the assessment and management of patients whose eye conditions are at low-risk of deterioration who are either referred by primary care for further assessment or discharged from secondary care for monitoring*'.

89. However, the Parties submitted that in some circumstances TPG centres could refer patients to hospitals.[44] Therefore, as part of the competitive assessment, the CMA has considered the vertical relationship between these two frames of reference. However, it is not necessary for the CMA to conclude on the scope of these product frames of reference as competition concerns do not arise on any plausible basis as a result of vertical effects.

Geographic scope for the supply of primary care and community services

GP surgeries

90. The Parties submitted that the geographic market for GP surgeries is local in scope as individuals typically register with the GP surgery closest to their home.

91. The Parties also provided information on the distance GPs typically refer patients to private hospitals.[45] This suggests that GPs tend to refer patients to local hospitals.

92. The CMA has assessed competition in relation to GP surgeries on a local basis. However, it is not necessary for the CMA to conclude on the geographic frame of reference as competition concerns do not arise on any plausible basis as a result of vertical effects.

Integrated Care Services

93. The Parties consider the integrated care market to be national in scope on the basis that providers do not need a local presence to be awarded an integrated care contract. For example, Circle has been awarded integrated care contracts in Bedfordshire, Greenwich and Rushcliffe, all areas where Circle does not provide any other services.[46]

94. The CMA notes that CCGs are responsible for commissioning services for the population within a specified boundary. Therefore, the CMA has assessed competition for the supply of integrated care services to NHS-funded patients on a local basis. However, it is not necessary for the CMA to conclude on this

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[44] Where patients have either: (i) been incorrectly referred to TPG or (b) where a patient’s condition has deteriorated so that a hospital setting becomes more appropriate for the patient's care. Paragraph 12.26 of the MN.

[45] The Parties submitted the average (mean) and median 80 percent catchment area for (i) the average 80 percent catchment area based on the drive-distance from the patient's home postcode to the respective BMI hospital for all patients across all BMI sites; and (ii) the average 80 percent catchment area based on the drive-distances from the patient's GP surgery to the respective BMI hospital (rather than from the patient's home postcode to the hospital) for all patients across all BMI sites.

[46] Paragraph 13.52 of the MN.

geographic frame of reference as competition concerns do not arise on any plausible basis as a result of vertical effects.

Community services to NHS-funded patients

95. In relation to community dermatology for NHS-funded patients, the Parties provided information on competition around TPG's Ramsgate centre.

96. The CMA has assessed community services on a local basis, in line with its assessment for PHMS. However, it is not necessary for the CMA to conclude on this geographic frame of reference as competition concerns do not arise on any plausible basis as a result of vertical effects.

Conclusion on frame of reference

97. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:

    (a) the supply of PHMS in Reading

    (b) the supply of PHMS in Bath;

    (c) the supply of PHMS in Birmingham; and

    (d) the supply of PHMS nationally to PMI patients.

98. The CMA has also considered whether conditions of competition differ in the following segments: across types of care, different specialties, and sources of funding.

99. For the reasons set out above, in relation to vertical relationships, the CMA has considered the impact of the Merger in the following frames of reference:

    (a) the supply of MSK integrated care services in (i) Bedfordshire, (ii) Greenwich, (iii) Rushcliffe, and (iv) North Hampshire; and the supply of dermatology integrated care services in Wolverhampton;

    (b) the supply of NHS GP services locally (in BMI hospitals' catchment areas);

    (c) the supply of NHS dermatology services in Ramsgate; and

    (d) the supply of NHS ophthalmology services locally.

100. However, it is not necessary for the CMA to conclude on these frames of reference as competition concerns do not arise on any plausible basis as a result of vertical effects.

101. Where appropriate, the CMA has considered evidence of competitive constraints from outside of these frames of reference in its competitive assessment.

Competitive assessment

Horizontal unilateral effects

102. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices and/or to degrade quality on its own and without needing to coordinate with its rivals.[47] Horizontal unilateral effects are more likely when the merging parties are close competitors.

103. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result in an SLC in relation to horizontal unilateral effects in the following frames of reference:

   (a) the supply of PHMS in Reading;

   (b) the supply of PHMS in Bath;

   (c) the supply of PHMS in Birmingham; and

   (d) the supply of PHMS nationally to PMI patients.

104. The CMA's concern under these frames of reference is that the removal of one of the Parties as a competitor could allow the merged entity to increase prices, lower quality and/or reduce the range of their services. This is because, after a merger, it is less costly for the merged entity to raise prices (or lower quality) as it will recoup the profit on recaptured sales from those patients who would have switched to the offer of the other merging company.

Price setting for self-pay, PMI and NHS-funded patients

Self-pay patients

105. In the *Spire/St Anthony's Hospital* decision[48] and in the PHMI,[49] the CMA found that prices for self-pay patients are set with respect to local competitive conditions. This is consistent with the Parties' submissions in this case.[50]

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[47] *Merger Assessment Guidelines*, from paragraph 5.4.1.
[48] *Spire/St Anthony's Hospital*, paragraph 54(a).
[49] PHMI, paragraph 29. The CMA has taken account of the approach and findings of the PHMI, while noting that the focus and purpose of a market investigation, as well as the legal test, is different to that of a merger assessment under Part 3 of the Act.
[50] Parties' Response to RFI2, Q4. Circle: [✂]. BMI: [✂].

Therefore, the CMA has assessed whether the Merger could lead to local price increases for self-pay patients.

PMI patients

106. The Parties submitted that for PMI patients, private hospital operators will generally engage in bilateral negotiations with insurers, with prices for treatments negotiated at the national level (such that treatment prices are the same across all hospitals within that operator's estate). This is consistent with other submissions from the Parties which suggest that they generally set national prices for PMI patients.

107. In *Spire/St Anthony's Hospital*, the CMA considered that *"negotiations with the merged entity over prices for treatment of insured patients take place at the national level but […] may be impacted by the reduction in local competition. The Merger may lead to an increase in bargaining power by the combined entity, due to the reduction in the PMI providers' outside options at the local level"*.[51]

108. Accordingly, consistent with the evidence in this case, the CMA has assessed whether the Merger could lead either of the Parties to increase their prices for PMI patients nationally, as a result of a reduction in local competition.

NHS-funded patients

109. In *Spire/St Anthony's Hospital*, the CMA assessed competition for NHS-funded patients on a local basis.[52] The Parties submitted that their prices for NHS-funded patients are generally based on the NHS National Tariff,[53] which is set at a national level and adjusted by the Market Forces Factor (**MFF**).[54] They submitted that the MFF estimates the unavoidable cost differences between healthcare providers at the local level.[55] The Parties submitted that neither the NHS National Tariff nor the MFF are affected by local competitive conditions.

110. Consistent with the Parties' submission, NHS Improvement (**NHSI**) told the CMA that the NHS National Tariff and MFF do not take competitive conditions

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[51] *Spire/ St Anthony's Hospital,* paragraph 54(b).
[52] *Spire/ St Anthony's Hospital,* paragraph 48.
[53] The NHS National Tariff is a set of prices and rules used by providers of NHS care and commissioners to deliver the most efficient, cost effective care to patients. Parties' response to RFI2, Q1.
[54] https://improvement.nhs.uk/documents/475/Guide_to_the_market_forces_factor.pdf
[55] The Parties submitted that the MFF accounts for unavoidable costs that providers are unable to influence significantly, eg land, buildings and staff unit costs, that can vary across the country.

between providers into account.[56] Some third party responses also supported the view that the MFF does not take competitive conditions between providers into account.[57] NHSI also told the CMA that in some cases there may be some negotiation in price between the NHS Trust and/or CCG and the private providers.[58] However, any local price variations must be notified to and approved by NHSI.

111. The CMA notes that local price variations are likely to be relevant only for a very small proportion of the Parties' NHS-funded patients. Based on the Parties' submissions, [a significant proportion] of Circle's pricing in Bath and Reading are based on the NHS National Tariff, and over [a significant proportion] of BMI's revenues from NHS-funded patients is based on the NHS National Tariff.[59] Nevertheless, the CMA has assessed on a cautious basis whether the Merger could lead to price increases for CCGs and Hospital trusts regarding NHS-funded patients at the local level.

Other parameters of competition

112. The Parties submitted that, to some extent:[60]

   (a) Circle may flex quality in response to local competition; and

   (b) Both Parties may flex the range of services in response to local competition.

113. The Parties' submission is consistent in this respect with the *Spire/St Anthony's Hospital* decision, in which the CMA considered whether the merger may lead to reduced quality[61] for privately-funded and NHS-funded patients on a local basis.[62]

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[56] The MFF does reflect some local competitive conditions, in local labour and property markets for example. However, it does not reflect the degree of head-to-head competition between hospitals in local health economies.
[57] Third party responses to the CMA's questionnaire. [✂] A third party told the CMA: 'As difference between MFF are generally small within the locality, MFF is not thought to influence competitive conditions to any material extent.'. [✂] Another third party told the CMA that: 'MFF is not intended to recognise competitive conditions but the variable costs of operating in parts of the country.'
[58] At the local level this could arise where individual local NHS trusts and CCGs contract with private healthcare providers to outsource some treatments or procedures that either they do not provide themselves or to provide some additional capacity when required, for example to meet "waiting list initiatives". Other NHS trusts could also compete for such contracts. *Spire/St Anthony's Hospital*, paragraph 36.
[59] BMI estimated that more than [a significant proportion] of revenues received from the NHS are based on national tariff rates, together with the application of an MFF as appropriate. Paragraph 15.214 of the MN.
[60] Parties' response to RFI4, Q1.
[61] Quality indicates how well a given treatment and the overall service are provided. This encompasses various aspects of a competitive offering such as clinical expertise and health outcomes, nursing care (including the nurse to patient ratio), waiting times, comfort and quality of accommodation. Some quality measures are hospital-wide, whilst others are specialty-specific. *Spire/St Anthony's Hospital,* paragraph 51.
[62] *Spire/St Anthony's Hospital,* paragraphs 54(c), 48 and 133.

Conclusion

114. Based on the above, the CMA has assessed whether it is or may be the case that the Merger gives rise to a realistic prospect of an SLC, which could lead to the following adverse effects:

(a) Deterioration of non-price factors of competition (eg quality) for all patients (regardless of the source of funding) at the local level;

(b) Increased prices for self-pay patients and NHS-funded patients at the local level; and

(c) Increased prices for PMI customers at the national level.

115. For each area in which the Parties overlap (ie Reading, Bath, and Birmingham), the CMA has assessed the closeness of competition between the Parties' hospitals, as well as the constraint imposed by competitors' hospitals. It has considered the following evidence:

(a) the location of the Parties and their competitors and shares of supply;[63]

(b) the geographical overlap of the Parties' patients;

(c) the extent to which consultants have practising rights in both of the Parties' hospitals, as compared with their competitors;

(d) third party views; and

(e) internal documents.

Horizontal unilateral effects in the supply of PHMS in Reading

116. The Parties each have one hospital located in or around Reading ('**the wider Reading area'**): (i) Circle Reading and (ii) BMI Hampshire Clinic. BMI Hampshire Clinic is located in Basingstoke, 14.3 miles to the south of Circle Reading.[64]

117. In this section, the CMA first sets out a general assessment of competition in the supply of PHMS in the wider Reading area. The CMA has considered in turn the evidence set out at paragraph 115.

[63] For the reasons set out in paragraphs 119 and 121, the CMA has placed limited weight on shares of supply as evidence of closeness of competition between the Parties.
[64] Paragraph 17 of the MN.

118. The CMA then assesses whether these general conditions of competition differ across (i) types of care, (ii) sources of funding and (iii) by specialty.

Shares of supply and the location of Parties and their competitors

119. The Parties submitted that their combined share of inpatient beds is significantly below 40 percent at the hospital level (which they state has previously been used by the CMA as a filter).[65]

120. The Parties submitted that there is no realistic prospect of an SLC arising in the wider Reading area because the BMI Hampshire Clinic is located on the edge of Circle Reading's catchment area; and there are a number of competing providers in closer proximity to the Parties' sites, including:[66]

   (a) two other private hospitals in Reading (Spire Dunedin and Ramsay Berkshire);

   (b) two PPUs (including one, Candover Clinic,[67] which is just 3 miles from BMI Hampshire Clinic in Basingstoke); and

   (c) Spire Clare Park, which is closer to BMI Hampshire Clinic than Circle Reading.

121. The evidence suggests that the relative location of different providers is likely to strongly influence the extent to which they compete. Patients tend to travel a shorter distance to hospital (assuming all other factors are equal). This is reflected in the fact that hospitals tend to draw more patients from nearby postcodes than from further away postcodes (see for example Figure 2 below). Furthermore, the Parties' internal documents monitor competition in the area local to individual hospitals (see for example paragraph 133 below). The CMA's view is consistent with both the Parties' submissions on the frame of reference and the CMA's approach in previous cases (see paragraph 79).

122. Table 2 and Table 3 present shares of supply for the Parties and the competitors they identified in the wider Reading area based on (i) total revenues, (ii) inpatients (total revenues, admissions and number of beds) and (iii) number of operating theatres.[68] The shares of supply indicate that Circle Reading and BMI Hampshire Clinic are the largest hospitals in the area and

[65] Paragraph 18 (c) of the MN.
[66] Paragraph 18(a) of the MN.
[67] Candover Clinic is owned and operated by the NHS Hampshire Hospitals Foundation Trust. See http://www.candoverclinic.com/supporting-the-nhs/.
[68] For completeness, the CMA notes that Frimley Park PPU was not included. However, the evidence available to the CMA (consultant overlaps, third-party evidence and internal documents) shows that Frimley Park PPU appears to place no or very weak constraint on the Parties.

combined shares of supply are high ([✂] % for inpatients by revenue and [✂] % for all patients by revenue).

123. However, the shares of supply in Table 2 and Table 3 do not account for the relative location of different suppliers or differentiation more generally (including across different specialties) and so are unlikely to accurately reflect the competitive interactions between them.[69] Given that more direct evidence of the strength of competition was available (including information on patient location, overlapping consultants and internal documents, as discussed further below), the CMA has not placed significant weight on shares of supply in this case.

Table 2: Shares of supply in the wider Reading area – total revenues

Hospital	Revenue (GBP)	Revenue share (%)
Circle	[✂]	[20-30%]
BMI	[✂]	[20-30%]
Combined	**[✂]**	**[40-50%]**
Spire Dunedin	[✂]	[10-20%]
Spire Claire Park	[✂]	[10-20%]
Ramsay Berkshire	[✂]	[5%-10%]
Candover Clinic	[✂]	[5%-10%]
Royal Berkshire (private only)	[✂]	[0%-5%]

Source: Parties' and third-party sales data

Table 3: Shares of supply in the wider Reading area – inpatient (revenues, admissions and share of beds) and operating theatres

Hospital	Revenue (GBP)	Revenue share (%)	Admissions	Admission share (%)	Beds	Share of beds (%)	Operating theatres	Share of OTs
Circle	[✂]	[20%-30%]	[✂]	[20%-30%]	15	9%	5	26%
BMI	[✂]	[20%-30%]	[✂]	[20%-30%]	35	20%	4	21%
Combined	**[✂]**	**[50%-60%]**	**[✂]**	**[40%-50%]**	**50**	**29%**	**9**	**47%**
Spire Claire Park	[✂]	[10%-20%]	[✂]	[10%-20%]	34	20%	3	16%
Spire Dunedin	[✂]	[5%-10%]	[✂]	[5%-10%]	24	14%	2	11%
Ramsay Berkshire	[✂]	[5%-10%]	[✂]	[5%-10%]	43	25%	3	16%
Candover Clinic	[✂]	[5%-10%]	[✂]	[10%-20%]	22	13%	2	11%
Royal Berkshire (private only)	[✂]	[0%-5%]	[✂]	[0%-5%]	NA	NA	NA	NA

Source: Revenue and admission shares based on Parties' and third-party sales data. Numbers of beds and operating theatres

[69] This case can therefore be distinguished from *Spire/St Anthony's Hospital*, where the CMA used shares of supply by specialty to filter out specialties unlikely to present competition concerns.

were provided by the Parties.

124. Figure 1 indicates that the Parties are located in different areas. In particular, Circle Reading is located in Reading, very close to the Spire Dunedin, Ramsay Berkshire and Royal Berkshire hospitals.[70] In contrast, BMI is located in Basingstoke, very close to Candover Clinic (and Spire Clare Park to some extent).

Figure 1: Location of the Parties and their competitors in the wider Reading area

Source: Parties' submission.

125. As set out above at paragraph 121, the evidence suggests that the relative location of different providers is likely to strongly influence the extent to which they compete, which may suggest that the Parties compete less closely with each other than with hospitals located more closely to each of Circle Reading (ie Spire Dunedin, Ramsay Berkshire and Royal Berkshire hospitals) and BMI Hampshire Clinic (ie Candover Clinic and Spire Clare Park). The CMA has considered the extent to which this is reflected in the other evidence it has received (see below).

Geographical overlap of the Parties' customers

126. Figure 2 below presents volumes of inpatients for Circle Reading and BMI Hampshire Clinic by postcode area.[71] The darker the postcode area, the more inpatients a given hospital sources from that postcode area. In the CMA's view, Figure 2 shows that:

(a) Circle Reading attracts inpatients primarily from the Reading area and many inpatients are drawn from north of Reading, a considerable distance from BMI Hampshire Clinic. As referred to above, BMI Hampshire Clinic is located in Basingstoke, 14.3 miles to the south of Circle Reading, and is located comparatively further from Circle Reading than competitors' hospitals. Many of BMI Hampshire Clinic's inpatients are drawn from the area south of Reading, with many located south of BMI Hampshire itself. Therefore, the Parties overlap in a relatively limited number of postcode areas, which are additionally typically shaded lightly (ie have a low number of that Parties inpatients), at least for one of the Parties;

[70] While this cannot be seen on the map, Royal Berkshire is very close to Spire Dunedin and Berkshire Independent Hospital.
[71] The pattern for other types of care is similar.

(b) Circle Reading is located close to Spire Dunedin, Ramsay Berkshire Independent Hospital and Royal Berkshire and is likely to predominantly overlap with these hospitals given their location;[72] and

(c) BMI Hampshire Clinic is likely to predominantly overlap with Candover Clinic (and possibly Spire Clare Park to some extent), given the location of these hospitals.

[72] While this cannot be seen on the map, Royal Berkshire is very close to Spire Dunedin and Ramsay Berkshire Independent Hospital.

Figure 1: Circle Reading and BMI Hampshire density of patients' activity – all inpatients

[ ]

Source: Parties' submission.

CMA Competition & Markets Authority

Share of overlapping consultants between the Parties and their competitors

127. In *Spire/St Anthony's Hospital*, the CMA noted that consultants are often the driver of a patient's choice of hospital.[73,74] This was confirmed by evidence received from third parties.[75] In addition, the Parties submitted that, 'given the importance of consultants as a driver for patient choice', their analysis of consultants' practising privileges show that Circle Reading and BMI Hampshire Clinic are likely to impose only a minimal constraint on each other if at all.[76] The CMA believes that a low degree of overlap in consultants between the Parties supports the view that the Parties do not compete closely with one another.

128. Within the top three overlapping specialties at Circle Reading (Trauma and Orthopaedics, General Surgery and Ophthalmology),[77] only one consultant at BMI Hampshire Clinic also has practising privileges at Circle Reading. This compares with 27 consultants that also practise at the Candover Clinic.[iii]

129. Within the top three overlapping specialties at BMI Hampshire Clinic (Trauma and Orthopaedics, General Surgery and Urology),[78] only one consultant at BMI Hampshire Clinic also has practising privileges at Circle Reading. This compares with 27 consultants that also practise at the Candover Clinic.

130. This indicates that the Parties' hospitals have a very limited overlap in consultants and have many more consultants in common with other nearby competitors than with each other. This is further evidence that they are competing less closely with one another than with other competitors.

Third-party views

131. Third-party views are consistent with the Parties not competing particularly closely with each other in the wider Reading area. In particular:

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[73] *Spire/St Anthony's Hospital*, paragraph 69.
[74] Paragraph 15.3 of the MN.
[75] For example, one third party told the CMA that: 'Often patients tend to go wherever the consultant with whom the patients have a pre-existing relationship works'. Note of call with third party [✂].
[76] Paragraph 15.122 of the MN.
[77] Accounting for [a significant proportion] percent of turnover. Paragraphs 15.114-15 and Table 15.6 of the MN.
[78] Accounting for [a significant proportion] percent of turnover. Paragraphs 15.117-18 and Table 15.7 of the MN.

(a) Third-party responses indicated that Ramsay Berkshire and Spire Dunedin are much closer competitors to Circle Reading than BMI Hampshire Clinic;[79] and

(b) Rival PHMS provider responses indicated that Candover Clinic is a much closer competitor to BMI Hampshire Clinic than any other providers (including Circle Reading).[80] While PMI providers considered Circle Reading to be a close competitor, they also indicated other competitors are similarly close (ie Spire Clare Park, Spire Dunedin and Candover Clinic).[81] A relevant CCG also indicated Spire to be a much closer competitor to BMI Hampshire Clinic than Circle.[82]

132. The CMA notes that one third party raised concerns about the horizontal effects of the Merger regarding the supply of PHMS in the wider Reading area, stating that the Merger 'poses a risk to reducing the overall quality in the services'.[83] The CMA has taken these concerns into account. However, the evidence in the wider Reading area consistently shows that the Parties are not competing closely with each other.

Internal documents

133. The Parties' internal documents indicate that the Parties do not compete closely with each other in the wider Reading area. In particular:

(a) Circle regularly monitors the [✂] market shares of Circle Reading, [✂], [✂] and [✂], but not BMI Hampshire Clinic.[84]

(b) A third-party report prepared by Mansfield Advisors for the purpose of BMI's *"[✂]"*[85] only monitors shares of supply of BMI Hampshire Clinic and [✂]. It mentions [✂] as the [✂] private competitor of BMI Hampshire Clinic [✂]. [✂].

Summary of evidence regarding general competition in Reading

134. For the reasons set out above, the CMA found that the Parties do not compete closely with each other in the wider Reading area. This is supported

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[79] Based on responses to CMA third-party questionnaires [✂].
[80] Based on responses to CMA third-party questionnaires [✂].
[81] Based on responses to CMA third-party questionnaires [✂].
[82] [✂]. Third party response to the CMA's questionnaire.
[83] [✂]. Third party response to the CMA's questionnaire.
[84] Circle's Monthly Bath Site Performance Reviews and Circle's Monthly Executive Management Presentations from January 2018 to November 2019.
[85] Parties' response to RFI1, Q2. BMI was transferred into new ownership at the end of 2018. Under the new ownership, an initiative was put in place to ensure that each hospital had its own strategic plan to guide its operational and capital expenditure priorities over a five-year period.

by the evidence reviewed by the CMA – including the hospitals' location, the fact that the Parties draw a limited number of patients from the same postcode areas, the analysis of overlapping consultants, third party views and internal documents – which consistently shows that the Parties are not close competitors in the wider Reading area.

135. The evidence discussed above also indicates that the merged entity will continue to be constrained by a number of third party PHMS providers in the wider Reading area.

136. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of PHMS in the wider Reading area.

Competition by type of care

137. All hospitals in the Reading area supply all three types of care (inpatients, day-case patients, and outpatients).

138. As discussed at footnote 71, day-case, inpatient and outpatient maps show similar patterns in terms of the geographical distribution of the Parties' patients. Further, the Parties' internal documents discussed in paragraph 139 and third party responses[86] did not indicate that competition varies materially across types of care.

139. Therefore, the CMA believes that competition does not differ materially from the general assessment set out above in relation to each type of care.

Competition by source of funding

140. The CMA has also assessed whether competition differs when considering each source of funding. It has assessed privately-funded patients and NHS-funded patients, separately.

Third party views

141. Third party responses did not indicate any significant differences in the effects of the Merger across sources of funding.

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[86] Based on responses to CMA third-party questionnaires [✂].

Privately-funded patients

142. All hospitals in the Reading area provide services to both self-pay and PMI patients. Therefore, the CMA considers that competition for private patients is unlikely to differ significantly from the general assessment set out above.

NHS-funded patients (NHS Trusts and CCGs)

143. All private hospitals in the wider Reading area listed in Table 2 and Table 3 above provide services to NHS-funded patients.

144. Consistent with the position in relation to privately-funded patients, the evidence from third parties with NHS activities indicates that the Parties do not compete particularly closely with each other for NHS-funded patients in the wider Reading area and they face competitive constraints from other providers (see paragraph 131).

145. Therefore, on this basis, the CMA believes that competition for NHS-funded patients does not differ materially from the general assessment set out above.

Competition by specialty

146. The CMA has also assessed whether competition differs in the wider Reading area when looking across specialties.

147. Table 4 below presents overlapping specialties provided by the Parties in the wider Reading area, and which of those specialties are provided by other hospitals in the area.

Table 4: **Provision of overlapping specialties by other hospitals in the wider Reading area**

	Competitors near Circle			Competitors near BMI	
Specialty	**Spire Dunedin**	**Ramsay Berkshire**	**Royal Berkshire**	**Candover Clinic**	**Spire Clare Park**
Dermatology	x	x		x	x
ENT	x	x	x	x	x
Gastroenterology	x	x	x	x	x
General Medical Practice / General Medicine	x	x		x	x
General Surgery	x	x	x	x	x
Gynaecology	x	x	x	x	x
Neurology	x	x		x	x
Ophthalmology	x	x	x	x	x
Plastic Surgery	x	x		x	x
Radiology	x	x	x	x	x
Trauma & Orthopaedics	x	x	x	x	x
Urology	x	x	x	x	x
Vascular Surgery	x	x		x	

Source: Third Parties' submission.

148. This evidence shows that the most relevant competitors to the Parties (Spire Dunedin, Ramsay Berkshire, Candover Clinic and Spire Clare Park) are present in all or almost all overlapping specialties.

149. Moreover, the only specialty discussed to a material extent in the Parties' internal documents is orthopaedics (specifically orthopaedics shares of supply). In particular, Circle only appears to regularly monitor [✂] shares of supply of Circle Reading, [✂], [✂] and [✂], but not BMI Hampshire Clinic (see paragraph 133(a)). This indicates that the Parties are not close competitors in the wider Reading area, as orthopaedics is an important specialty for Circle accounting for a significant amount of its revenue. [87]

150. Additionally, as discussed in paragraphs on 128 and 129, only one consultant works at both of the Parties' hospitals for the top three specialties of each of the Parties.

151. Third parties did not indicate any material difference in competition across specialty in the wider Reading area.[88]

[87] Trauma & Orthopaedics accounted for [a significant proportion] percent of revenues at Circle Reading in the last two years. See paragraph 13.21 of the MN.
[88] Based on responses to CMA third-party questionnaires [✂].

152. Therefore, the CMA believes that the effects of the Merger in relation to the supply of PHMS in the wider Reading area do not differ materially when looking at competition at specialty level.

Conclusion for the supply of PHMS in Reading

153. For the reasons set out above, the CMA found that the Parties do not compete closely with each other in the wider Reading area. In particular, the available evidence – including on the hospitals' location,[89] the fact that the Parties draw a limited number of patients from the same postcode areas, the analysis of overlapping consultants, third party views and the Parties' internal documents – consistently shows that the Parties do not compete closely with each other in the wider Reading area. This is also consistent with the evidence on competition by type of care, source of funding, and by specialty.

154. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of PHMS in the wider Reading area (including across types of care, sources of funding, and different specialties).

Horizontal unilateral effects in supply of PHMS in Bath

155. The Parties each have one hospital located in Bath: (i) Circle Bath and (ii) BMI Bath Clinic. Below the CMA first sets out a general assessment of competition in the supply of PHMS in Bath. The CMA then assesses whether these general conditions of competition differ (i) across types of care, (ii) across sources of funding and (iii) by specialty.

General assessment of competition in Bath

156. The CMA has considered in turn the evidence set out at paragraph 115.

The location of the Parties and their competitors and shares of supply

157. The Parties submitted that their combined share of beds is less than 40 percent at the hospital level, and that this is likely to be an overestimate because it does not take into account the competitive constraint imposed by Royal United Hospital Bath (**RUH**) and Southmead Bristol PPU.

158. The Parties submitted that the merged entity will continue to face significant competition from other hospitals providing private treatment in the area,

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[89] Circle Reading is located in Reading, very closely to both Spire Dunedin, Ramsay Berkshire and Royal Berkshire hospitals. In contrast, BMI is located in Basingstoke, very closely to Candover Clinic (and Spire Clare Park to some extent). See paragraph 134.

including Spire Bristol, Nuffield Bristol, Emersons Green Treatment Centre, the Shepton Mallet Treatment Centre, RUH, and Southmead Bristol PPU.

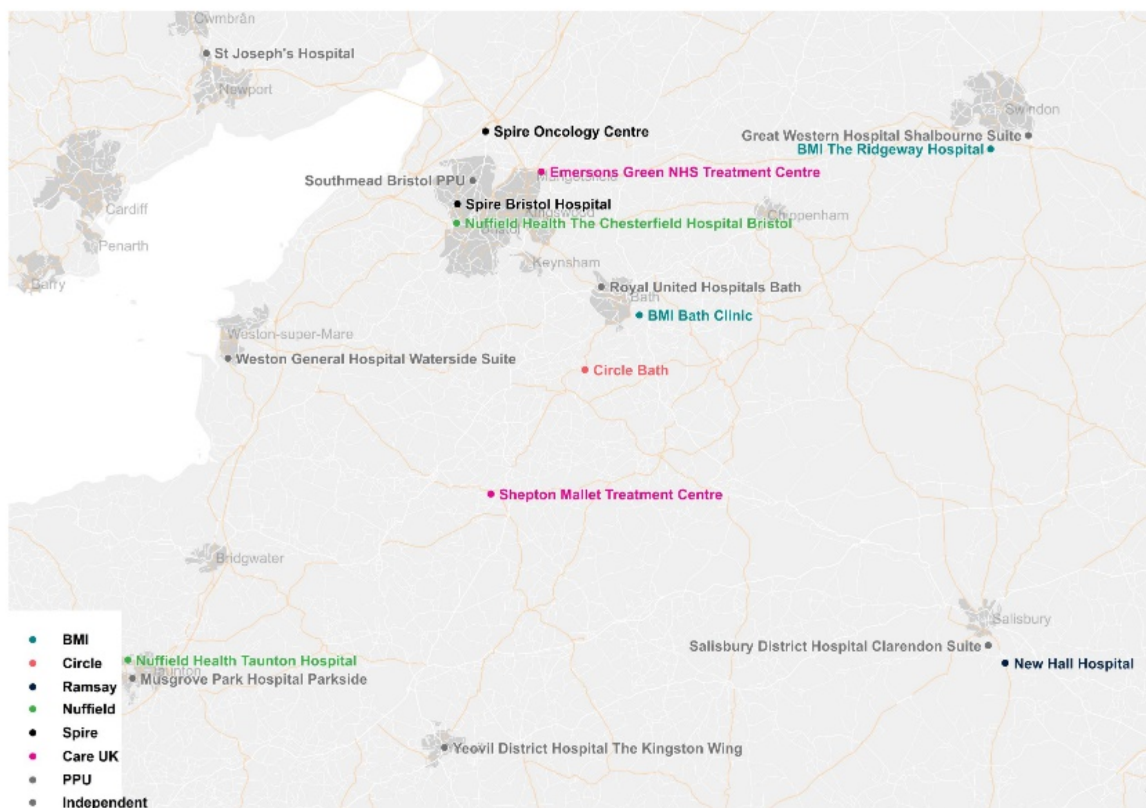
159. In addition, the Parties submitted that at a specialty level there remains a large number of competing hospitals providing the same range of specialties as those provided by the Parties.[90]

160. The Parties also submitted that in the PHMI final report, the Competition Commission found that Spire Bristol competes for patients in the Bath area (although the reverse is not true, as BMI Bath does not attract insured inpatients from Bristol).[91]

161. Figure 3 below presents the location of the Parties and the competitors named by the Parties (as listed in paragraph 158). This shows that in the immediate Bath area there are three private hospital providers: BMI Bath Clinic, Circle Bath, and RUH. There are also a number of private hospital providers located in Bristol and a number of other providers located outside of Bath and Bristol (and which are further away from the Parties than the Parties are to each other), including Shepton Mallet Treatment Centre located to the southwest.

[90] Paragraph 21(c) of MN.
[91] Parties' response to the Issues Letter, paragraph 6.2(a).

Figure 3: Location of Parties and their competitors in the wider Bath area



Source: Parties' submission.

Note: the Parties have calculated roughly circular areas around each hospital that they refer to as "catchment areas" (see blue and red circles on the map above).[92] *However these do not directly correspond to the areas from which each hospital draws its patients (see eg Figure 4).*

162. Table 5 and Table 6 below present shares of supply for the Parties and the competitors they identified in the wider Bath area based on (i) total revenues, (ii) inpatients (total revenues, admissions, and number of beds) and (iii) operating theatres.[93] These shares of supply show that:

(a) In the wider Bath area, the Parties have a significant combined share of [✂] by revenue.

[92] The Parties have estimated catchment areas around each hospital by calculating what road distance between patients' home postcodes and hospital postcodes would encompass 80% of PMI inpatients. The catchment area includes every postcode up to that distance, meaning that it is inevitably roughly circular. Paragraph 12 of the MN.

[93] For completeness, the CMA notes that Southmead Bristol PPU and Spire Oncology Centre were not included. However, the evidence available to the CMA (including consultant overlaps, third-party evidence and internal documents) shows that they appear to place no or very weak constraint on the Parties. Further, Spire Oncology Centre is present in only one specialty (Oncology) where there is no overlap between the Parties' activities in Bath.

(b) Of the three hospitals in the immediate Bath area, Circle is the largest supplier by revenue and RUH is very small.

(c) The hospitals located in Bristol (eg Spire Bristol), c.15-20 miles to the northwest, are sizeable.

(d) The Shepton Mallet Treatment Centre, c.15-20 miles to the southwest, is [✂] larger by revenue than BMI.

Table 5: Shares of supply in the wider Bath area – total revenues

Hospital	Revenue (GBP)	Revenue share (%)
Circle	[✂]	[10%-20%]
BMI	[✂]	[10%-20%]
Combined	**[✂]**	**[20%-30%]**
Spire Bristol	[✂]	[30%-40%]
Emersons Green TC	[✂]	[10%-20%]
Shepton Mallet TC	[✂]	[10%-20%]
Nuffield Bristol	[✂]	[10%-20%]
RUH (private patients only)	[✂]	[0%-5%]

Source: Parties and third-party sales data

Table 6: Shares of supply in the wider Bath area – inpatients (revenues, admissions and share of beds) and operating theatres

Hospital	Revenue (GBP)	Revenue share (%)	Admissions	Admission share (%)	Beds	Share of beds (%)	Operating theatres	Share of OTs
Circle	[✂]	[10%-20%]	[✂]	[10%-20%]	28	12%	4	17%
BMI	[✂]	[5%-10%]	[✂]	[5%-10%]	35	15%	3	13%
Combined	**[✂]**	**[20%-30%]**	**[✂]**	**[20%-30%]**	**63**	**27%**	**7**	**29%**
Spire Bristol	[✂]	[30%-40%]	[✂]	[30%-40%]	74	32%	5	21%
Nuffield Bristol	[✂]	[10%-20%]	[✂]	[20%-30%]	30	13%	3	13%
Shepton Mallet TC	[✂]	[10%-20%]	[✂]	[10%-20%]	34	15%	5	21%
Emersons Green TC	[✂]	[10%-20%]	[✂]	[10%-20%]	33	14%	4	17%
RUH (private patients only)	[✂]	[0%-5%]	[✂]	[0%-5%]	N/A	N/A	N/A	N/A

Source: Revenue and admission shares based on parties and third-party sales data. Numbers of beds and operating theatres were provided by the Parties.

163. The shares of supply in Table 5 and Table 6 do not account for the relative location of different suppliers or differentiation more generally (including across different specialties) and so are unlikely to accurately reflect the

competitive interactions between them (see paragraph 123).[94] In line with its approach in relation to Reading, given that more direct evidence of the strength of competition was available (including information on patient location, overlapping consultants and internal documents, as discussed further below), the CMA has not placed significant weight on shares of supply in this case.

164. Subject to these caveats, the CMA considers that the relative location of these suppliers and the accompanying shares of supply indicate that the Parties are both large providers which are located close to each other in the immediate Bath area. There are sizeable providers located in Bristol to the northwest and the Shepton Mallet Treatment Centre to the southwest. While these providers have high market shares, for the reasons set out in paragraph 163 the CMA considers market shares to be a weak indicator of competitive constraints. Moreover, these providers are located outside of Bath and are significantly further away from the Parties than the Parties are to each other. The CMA has considered the extent to which the other evidence it has received shows that these alternative providers are competing with the Parties in the wider Bath area (see below). RUH is unlikely to be a significant competitive constraint on the Parties given its minimal PHMS revenues and low share of admissions (the Parties' estimates of RUH's shares do not distinguish between RUH's PHMS and NHS activities). [95]

Geographical overlap of the Parties' patients

165. Figure 4 below presents volumes of inpatients for Circle Bath and BMI Bath Clinic by each postcode area.[96] The darker the postcode area, the more inpatients a given hospital sources from that postcode area. Figure 4 shows that:

    (a) there is a significant overlap between the Parties' activities as they generally source inpatients from similar postcode areas;

    (b) the Parties' activities may also significantly overlap with RUH's given its proximity to both hospitals;

[94] This case can therefore be distinguished from *Spire/St Anthony's Hospital*, where the CMA used shares of supply by specialty to filter out specialties unlikely to present competition concerns.
[95] See Table 5 and Table 6.
[96] The pattern for other types of care is similar.

(c) the Shepton Mallet Treatment Centre may have a sizeable overlap with Circle Bath, in particular given that Circle Bath sources high volumes of inpatients from postcode areas between the two hospitals; and

(d) hospitals in Bristol (Spire Bristol, Nuffield Bristol, Emersons Green Treatment Centre)[97] have some overlap with the Parties' activities, as they may compete for inpatients located between the Parties' hospitals and Bristol. However, for the Parties' patients who are not located between Bath and Bristol, hospitals located in Bristol may not be a good alternative, for example for those patients located east and south of Bath.

[97] For the reasons set out in footnote 93, Southmead Bristol PPU and Spire Oncology Centre are not discussed in this sub-section.

Figure 4: Circle Bath and BMI Bath Clinic density of patients' activity – all inpatients

[ ]

Source: Parties' submission.

Share of overlapping consultants between the Parties and their competitors

166. For the reasons set out above in paragraph 127, the CMA considers that a high degree of overlap in consultants between the Parties indicates that the Parties compete closely with one another.[98]

167. Within overlapping specialties, 71% of Circle Bath consultants also practise at BMI Bath Clinic. This compares with only 26% and 11% of Circle Bath consultants also practising at RUH and Spire Bristol, respectively.[99]

168. Within overlapping specialties, 63% of BMI Bath Clinic's consultants practise at Circle Bath, compared to 31%, 9% and 7% at RUH, Spire Bristol and Nuffield Bristol, respectively.[100]

169. This indicates that the Parties' hospitals have many more common consultants with each other than with other private hospital providers in the local area. This is further evidence that they are competing more closely with one another than with third parties.

Third party views

170. Competitors, PMI providers and a CCG[101] indicated that the Parties are very close competitors to each other and, overall, are much closer competitors to each other than to any other providers (including the Bristol hospitals and the Shepton Mallet Treatment Centre).

171. The CMA notes that the majority of competitors and several PMI providers expressed concerns about the Merger in the Bath area.[102] In addition, the CMA received a complaint from a consultant working in the Bath area.[103]

Internal documents

172. The CMA has also considered the extent to which the Parties view each other as close competitors based on their internal documents.

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[98] *Spire/St Anthony's Hospital*, paragraph 71.
[99] Hospitals that share three or fewer consultants with Circle Bath have been excluded from the analysis.
[100] Hospitals that share three or fewer consultants with BMI Bath Clinic have been excluded from the analysis.
[101] Based on responses to CMA third-party questionnaires [✂].
[102] [✂]. Third-party responses to the CMA's questionnaire.
[103] [✂]. Third party complaint from consultant in the Bath area dated 4 December 2019.

173. The Parties' internal documents indicate that they compete closely with each other and that they face effective competition from at most two competitors in the area:

   (a) Circle's Monthly Bath Site Performance Reviews from January 2018 to December 2019 and Circle's Monthly Executive Management Presentations from January 2018 to November 2019 show that Circle regularly monitored the orthopaedics market shares of Circle Bath and BMI Bath Clinic, together with a limited number of other competitors ([✂] and in some, mostly recent, documents [✂]).[104]

   (b) [✂][105] [✂].[106] [✂].

   (c) [✂].[107]

   (d) [✂].[108] [✂].

174. In relation to competitors, these documents suggest that:

   (a) RUH competes with Circle and may also compete with BMI for NHS-funded patients. [✂], and [✂] (see paragraphs 173(a) and 173(b)).

   (b) The Shepton Mallet Treatment Centre may be a competitor to Circle. [✂] (see paragraph 173(a)).

   (c) Hospitals located in Bristol are weak competitors [✂].[109]

175. The Parties submitted that these documents show that both RUH and the Shepton Mallet Treatment Centre are strong competitors in the area, and in particular have a much higher market share than BMI in relation to orthopaedics.[110] The CMA notes that while RUH is the only other competitor located in the immediate Bath area, its PHMS activity is small;[111] and Shepton Mallet Treatment Centre [✂] and [✂].[112] Therefore, the CMA considers that

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[104] [✂] market shares were monitored by Circle in its [✂], and in Annexes 10.10 and 4.10 of the MN.

[105] Parties' Response to RFI1, Q2. BMI was transferred into new ownership at the end of 2018. Under the new ownership, an initiative was put in place to ensure that each hospital had its own strategic plan to guide its operational and capital expenditure priorities over a five-year period.

[106] Annex 10.21 of the MN.

[107] Annex 09.06 of the MN- Circle Board minutes - 07.19, paragraph 6.2.

[108] [✂] Annex 10.33 of the MN.

[109] Circle rarely appears to monitor competitors other than BMI, [✂] and [✂] (Annexes 10.07, 10.08 of the MN 4.12 and 4.13, of Parties' response to RFI 1).

[110] Parties' response to the Issues Letter, paragraph 6.2(b).The CMA refers to paragraphs 162 to 164 above regarding its assessment of market shares.

[111] Paragraph 164

[112] While the Mansfield Advisors document discussed in paragraph 173(b) mentioned that [✂].

these documents are consistent with the Parties competing closely with each other and other competitors not imposing a strong competitive constraint.

176. The Parties submitted that Circle Bath considers additional providers, including [✂] and [✂], as being competitors in its Monthly Performance Review documents.[113] However, the CMA notes that these additional competitors were discussed in Circle's documents [✂] [114] [✂]. Further, [✂].[115]

177. In relation to the Mansfield Advisors report referred to at paragraph 173(b) the Parties submitted that the document [✂]. The Parties submitted that Care UK, Spire and Nuffield Bristol fall within the 80 percent catchment area of the Parties' hospital as calculated in accordance with the CMA's past decisions. The CMA has taken the Parties' submission regarding this document into account but found that this document provides evidence that Care UK, Spire and Nuffield Bristol are weak competitors to the Parties for the following reasons:

(a) As noted at paragraph 173(b), [✂].

(b) The CMA believes that [✂];[116]

(c) [✂].

178. The Parties also submitted that BMI's September 2019 Bath Monthly Performance Report shows that it monitors developments at [✂], stating [✂].[117] The CMA notes that [✂] appears to be monitored only in [✂] by BMI and the internal documents show that BMI monitors Circle much more extensively than other competitors.

179. The Parties submitted that Care UK compares the Shepton Mallet Treatment Centre to other hospitals on its website including the Parties and therefore, the Shepton Mallet Treatment Centre and the Parties compete.[118] The CMA considers that, while Care UK's website lists the Shepton Mallet Treatment Centre, this does not provide any indication of the extent of constraint imposed by the Shepton Mallet Treatment Centre on the Parties and thus does not contradict the CMA's view that the Shepton Mallet Treatment Centre is a modest constraint on the Parties.

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[113] Parties' response to the Issues Letter, paragraph 6.5.
[114] Annexes 10.7, 10.8 of the MN dated January/February 2018 and 4.12, 4.13 of RFI1 response dated June/July 2019.
[115] [✂].
[116] [✂].
[117] Parties' response to the Issues Letter, paragraph 6.3(a).
[118] Parties' response to the Issues Letter, slide 16.

Summary of evidence regarding general competition in Bath

180. The CMA found that the Parties are very close competitors in Bath, and that they face limited competitive constraint from other providers. This is supported by the evidence reviewed by the CMA – including the hospitals' location, the significant geographical overlap of the Parties' patients, third party views, the analysis of overlapping consultants and internal documents – which consistently shows that the Parties are very close competitors.

181. With respect to competing providers:

   (a) While the CMA would expect a significant geographical overlap in patients between the Parties and RUH given its proximity to both hospitals, as RUH is the only other competitor located in the immediate Bath area, its PHMS activity is small (particularly when compared to the Parties).

   (b) The Shepton Mallet Treatment Centre [✄]. There is also no overlap between the Parties' consultants and consultants at the Shepton Mallet Treatment Centre. In addition, it is located further away from the Parties than the Parties are from each other and, overall, third parties did not view it as a close competitor of the Parties. The CMA would expect Shepton Mallet to have a sizeable geographical overlap in patients with Circle Bath in particular given that Circle Bath sources high volumes of inpatients in areas between the two hospitals, but not to the same extent with BMI. Therefore, the CMA's current view is that it is at most a modest competitor to the Parties.

   (c) Providers located in Bristol were only discussed to a limited extent in Circle's internal documents. There is also limited overlap between the Parties' consultants and consultants at Bristol hospitals. In addition, they are located further away from the Parties than the Parties are from each other and, overall, they were not identified by third parties as being particularly close competitors to the Parties. In terms of geographical overlap in patients, the CMA would expect hospitals in Bristol to have some overlap with the Parties as they might compete for inpatients located between the Parties' hospitals and Bristol. However, for the remaining patients (eg east/south of Bath) Bristol hospitals would likely be a poor alternative. Therefore, the CMA's current view is that they are weak competitors to the Parties.

182. On this basis, the CMA believes that the Merger raises significant competition concerns as a result of horizontal unilateral effects in the supply of PHMS in Bath.

Competition by type of care

183. All hospitals in the Bath area mentioned above (ie the Parties, the Shepton Mallet Treatment Centre and RUH) supply all three types of care (inpatients, day-case patients and outpatients).

184. As discussed in footnote 96, day-case, inpatient and outpatient maps show similar patterns in terms of the geographical distribution of the Parties' patients. Further, the Parties' internal documents and third party responses did not indicate that competition varies materially across types of care.[119]

185. Therefore, the CMA believes that competition does not differ materially from the general assessment set out above in relation to each type of care.

Competition by source of funding

186. The CMA has also assessed whether competition differs when considering each source of funding. It has separately assessed privately-funded patients and NHS-funded patients.

Third party views

187. Third party responses did not indicate any significant differences in the effects of the Merger across sources of funding. As discussed in paragraph 170, third parties (including PMI providers and a CCG) indicated that the Parties are very close competitors to each other and, overall, are much closer competitors to each other than to any other providers.[120] Several PMI providers raised concerns about the Merger in Bath.[121]

Privately-funded patients

188. All hospitals in the wider Bath area listed in Table 5 provide services to self-pay patients. Therefore, the CMA believes that competition for self-pay

[119] The Parties submitted that day-case and outpatient-only clinics should also be included in shares of supply for outpatients and day-case patients, implying that these clinics compete with the Parties for these patients (see paragraph 15.211 of the MN). The CMA notes that third parties rarely indicated day-case/outpatient-only clinics to be competitors to the Parties, and those clinics were only mentioned as a weak constraint if they were mentioned at all. Third party responses to the CMA's questionnaires [✂].

[120] The Parties submitted that Care UK self-pay prices are typically more than [✂]% cheaper than the market rate (Parties' response to Issues Letter, slide 16). The Parties also submitted that on its website Care UK compares the Shepton Mallet Treatment Centre to other hospitals, including the Parties and therefore that it competes with the Parties (Parties' response to the Issues Letter). However, third party views and the Parties' internal documents indicated that the Parties compete closely with each other and that other competitors do not impose a strong competitive constraint (see paragraphs 170 and 173).

[121] [✂].Third-party responses to the CMA's questionnaire.

patients does not differ significantly from the general assessment set out above.

189. All hospitals in the wider Bath area listed in Table 5 above also provide services to PMI patients. However, in relation to PMI patients, competitive constraints on the Parties appear to be even weaker, given that the Shepton Mallet Treatment Centre was not mentioned by PMI providers as being a competitor of the Parties.

190. The implications for the supply of PHMS nationally to PMI customers is discussed from paragraph 317 below.

NHS-funded patients (NHS Trusts and CCGs)

191. All private hospitals in the wider Bath area listed in Table 5 above provide services to NHS-funded patients. However, the Parties accounted for a significant proportion of one local CCG's PHMS purchases in 2018.

192. Consistent with the position in relation to privately-funded patients, the evidence from third parties with NHS activities indicates that the Parties are very close competitors for NHS-funded patients in the immediate Bath area and that they face a limited competitive constraint from other providers.[122]

193. On this basis the CMA believes that competition for NHS-funded patients does not differ materially from the general assessment set out above.

Competition by specialty

194. The CMA has also assessed whether competition differs in Bath when looking across specialties.

195. Table 7 below presents the overlapping specialties of the Parties in Bath, and which of those specialties are provided by other hospitals in the wider Bath area. This evidence, when combined with the evidence discussed above, shows that:

   (a) RUH Bath overlaps in many specialities but, as noted above, its PHMS activities are minimal.

   (b) The Shepton Mallet Treatment Centre is not active in nine out of the 17 overlapping specialties. Therefore, to the extent that the Shepton Mallet Treatment Centre is currently a competitive constraint on the Parties, it

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[122] [✂].

does not constrain the Parties in relation to a significant number of specialties.

(c) The Bristol-based competitors offer all or most of the specialties offered by the Parties. However, the wider evidence discussed above indicates that the location of these competitors means that the Parties are each other's closest competitors (with Bristol-based competitors imposing a weak constraint on the Parties).

Table 7: Provision of overlapping specialties by other hospitals in the wider Bath area

Specialty	RUH	Shepton Mallet TC	Emersons Green TC	Spire Bristol	Nuffield Bristol
Audiology				x	x
Cardiology	x			x	
Dermatology	x			x	x
ENT	x	x	x	x	x
Gastroenterology	x	x	x	x	x
General Medical Practice / General Medicine				x	x
General Surgery	x	x	x	x	x
Gynaecology	x	x	x	x	x
Maxillofacial/oral	x		x	x	x
Neurology	x			x	x
Ophthalmology	x	x	x	x	x
Physiotherapy	x			x	x
Plastic Surgery				x	x
Radiology	x	x	x	x	x
Trauma & Orthopaedics	x	x	x	x	x
Urology	x	x	x	x	x
Vascular Surgery				x	x

Source: Parties' and third-party submissions

196. Additionally, as discussed in paragraphs 166 to 169, Circle consultants typically also work at BMI Bath Clinic and vice versa. This compares to a very limited number of the Parties' consultants that also work at the Bristol hospitals. The same is generally true at the specialty level.[123]

197. The only specialty discussed to a material extent in the Parties' internal documents is orthopaedics (specifically shares of supply in orthopaedics). In

[123] The exceptions are Plastic Surgery and Ophthalmology, where the number of consultants concerned is very low.

particular, [✂].[124] The CMA considers that these documents suggest that the Parties compete closely and that they face competition from at most two competitors in the area.

198. Third party views did not indicate any material difference in competition across specialty.[125]

199. Therefore, the CMA believes that the effects of the Merger in relation to the supply of PHMS in Bath do not differ materially when looking at competition at specialty level.

Overall conclusion for the supply of PHMS in Bath

200. Based on the available evidence (in particular, on the hospitals' location, the fact that the Parties generally source inpatients from similar postcode areas, third party views, the analysis of overlapping consultants and the Parties' internal documents), the CMA found that the Parties are very close competitors in Bath and that they face a more limited competitive constraint from other providers. This is also consistent the available evidence on competition by type of care, source of funding and specialty.

201. Therefore, the CMA believes that the loss of competition between the Parties resulting from the Merger would give rise to an incentive for the merged entity to increase the price of its services to self-funded patients and/or to lower the quality of its services to NHS-funded and privately-funded patients, resulting in the realistic prospect of an SLC in the supply of PHMS in Bath.

Horizontal unilateral effects in supply of PHMS in Birmingham

202. BMI currently operates two hospitals in Birmingham: BMI Edgbaston and BMI Priory. As explained in paragraph 54, Circle planned to open a hospital (together with a rehabilitation centre) in Birmingham in June 2020. The opening is likely to be delayed because the capacity at Circle's hospital and rehabilitation centre is temporarily being allocated to the NHS, as part of the NHS Agreement (see paragraph 56). [iv] In addition, the Parties submitted that [✂].

203. In order to assess whether there is a realistic prospect of the Merger resulting in horizontal unilateral effects in the supply of PHMS in Birmingham, the CMA has considered evidence regarding:

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[124] See paragraph 173(a).
[125] See responses to CMA third-party questionnaires [✂].

(a) The current competitive constraints faced by BMI in Birmingham and the expected impact of Circle's entry in Birmingham; and

(b) The potential impact of HCA's entry in Birmingham (planned in [✂] 2022) and whether this would be likely, timely and sufficient to prevent any loss of competition.[126]

The current competitive constraints faced by BMI in Birmingham and the expected impact of Circle's entry on BMI

204. To assess the current competitive constraints faced by BMI in Birmingham and the expected impact of Circle's entry on BMI, the CMA has considered:

(a) evidence regarding general competition in Birmingham (taking into account Circle's entry); and

(b) any specific evidence regarding competition by type of care, source of funding and specialty.

General competition in Birmingham

205. In the assessment of general competition in Birmingham, the CMA has considered the following evidence:

(a) The closeness in the service offering between the Parties' hospitals;

(b) Location of the Parties and their competitors and shares of supply;

(c) The location of BMI's patients' in Birmingham;

(d) Internal documents; and

(e) Third party views.

Closeness in the service offering between the Parties' hospitals

206. As discussed in paragraph 202:

(a) BMI currently operates two hospitals in Birmingham: BMI Edgbaston and BMI Priory.

(b) Circle planned to open a hospital (**Circle Birmingham**), together with a rehabilitation centre (**Circle Rehab**) in Birmingham in 2020.

[126] *Merger Assessment Guidelines*, paragraph 5.8.3.

207. The CMA first considered the closeness in the service offering between BMI hospitals in Birmingham and Circle Birmingham. The CMA then considered the closeness in the service offering between BMI hospitals in Birmingham and Circle Rehab.

- *Closeness in the service offering between BMI hospitals and Circle Birmingham*

208. The Parties submitted that BMI Priory is a large hospital that primarily treats high acuity patients requiring specialised and complex treatment. They submit that this contrasts with Circle Birmingham and BMI Edgbaston, which are smaller hospitals that provide lower acuity elective procedures with a focus on trauma and orthopaedics, and do not treat complex patients.[127] They submit that BMI Priory's overlap with Circle Birmingham is limited to a small range of specialties, which account for approximately [a significant proportion] percent of BMI Priory's revenues.[128]

209. The CMA acknowledges that there may be some differentiation in BMI Priory and Circle Birmingham's offering. However, the CMA considers that competing in specialities that account for approximately half of BMI Priory's revenues represents a material overlap between these hospitals.[129] Moreover, BMI Priory's specialties account for [a significant proportion] of Circle Birmingham's forecast revenues.[130] The other evidence the CMA has received on the strength of competition between these hospitals is set out in the remainder of this section.

210. The Parties submitted that BMI Edgbaston will be a closer competitor to Circle Birmingham than BMI Priory.[131] As discussed in paragraph 208, the Parties submitted that both Circle Birmingham and BMI Edgbaston are smaller hospitals that provide lower acuity elective procedures with a focus on trauma and orthopaedics, and do not treat complex patients. The CMA notes that the planned specialties at Circle Birmingham accounted for a very high share ([✂]%) of BMI Edgbaston's 2018 revenues, indicating a significant overlap between these hospitals. The other evidence the CMA has received on the strength of competition between these hospitals is set out in the remainder of this section.

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[127] Parties' response to the Issues Letter, slide 25.
[128] Paragraph 24 of the MN.
[129] This is supported by the Parties' internal documents, which are consistent with Circle's impact on BMI Priory being significant (see paragraph 224).
[130] Circle Birmingham revenues based on latest 3rd year pre-Merger forecasts.
[131] "ME/6864/19 Circle/BMI – [✂]", page 4

- *Differentiation in the service offering between BMI hospitals and Circle Rehab*

211. The Parties submitted that there is no direct overlap between Circle Rehab and BMI's hospitals,[132] as Circle Rehab will focus on specialist inpatient rehabilitation services and BMI's hospitals do not offer inpatient rehabilitation services in Birmingham at all (BMI's hospitals only offers outpatient rehabilitation services).[133] The Parties also submitted that, while both Circle Rehab and BMI's hospitals offer outpatient rehabilitation, there would be limited competition for these patients between Circle Rehab and BMI's hospitals.[134] In particular, they submitted that:

    (a) standalone outpatient referrals would form a very small part of Circle Rehab's offering; and

    (b) the Parties' services would be differentiated with respect to post-operative outpatient rehabilitation.

212. This is consistent with one of Circle's internal documents [✂][135]. Notably, [✂]. In other words, for Circle Rehab a different set of competitors is being monitored compared to documents that discuss Circle Birmingham and BMI Priory/Edgbaston's competitors (see paragraphs 224 to 239).

213. Accordingly, the CMA's view is that the Merger will not result in the loss of material competition between Circle Rehab and BMI's hospitals. Therefore, Circle Rehab is not discussed further in this decision.

Location of Parties and their competitors and shares of supply

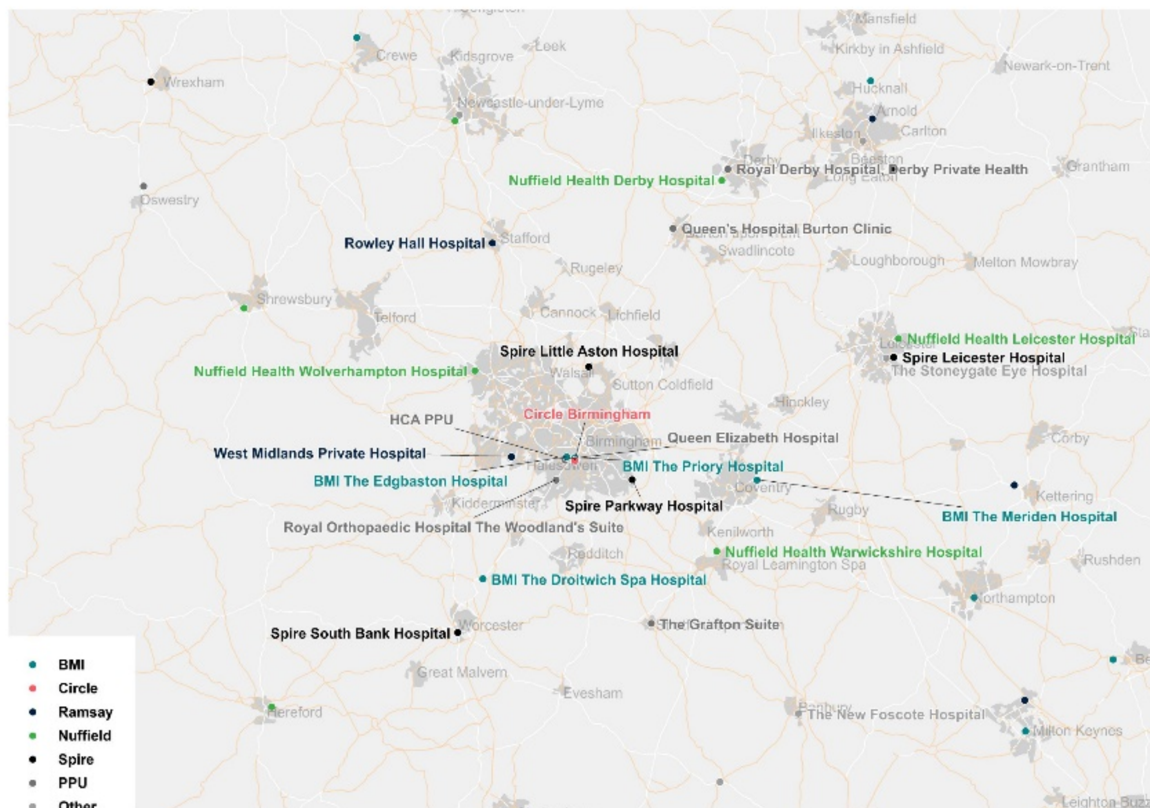
214. The Parties submit that there are six other competing hospitals within the catchment area of Circle Birmingham and a number of other sites in the catchment area of the overlapping BMI hospitals. These include two Spire hospitals, one Nuffield hospital and one Ramsay hospital.[136]

[132] Parties' response to the Issues Letter, slide 26.
[133] Paragraph 15.57 of the MN.
[134] Paragraph 18.98 of the MN.
[135] Annex 18.8 slide 8
[136] Paragraph 24 of the MN.

215. Figure 5 below presents the location of the Parties and their competitors in Birmingham, together with the 80% catchment areas estimated by the Parties for PMI inpatients.[137]

216. Figure 5 shows that Circle (and HCA, which is being built on the Queen Elizabeth Hospital campus, as a private patient unit (**PPU**)[138]) will open right next to BMI's Priory and Edgbaston hospitals, and will be located much more closely to BMI than other competitors in the area.

Figure 5: Location of Parties' and competitors' hospitals in Birmingham



Source: Parties' submission.

217. The Parties submit that combined shares of supply at both the hospital and specialty level in the Birmingham area will be modest and are likely to

[137] The limitations of these "catchment areas" are discussed in the notes to Figure 3. Given that Circle Birmingham does not currently have any patients, the Parties used Circle Reading's catchment area for Circle Birmingham.
[138] A PPU is a facility within the NHS providing medical care to private patients. Such units may be separate units dedicated to private patients or be facilities within the main NHS site which are made available to private patients either on a dedicated or non-dedicated basis.

overstate the competitive constraint between the Parties due to the highly differentiated service provided at BMI Priory.[139]

218. Table 8 provides shares of supply of PHMS to all patients in Birmingham for competitors referred to by the Parties in their documents. These shares include Circle's entry but exclude the entry of HCA, which is discussed from paragraph 266 below.[140]

219. Table 9 provides shares of supply for inpatients only.

Table 8: Shares of supply in the wider Birmingham area – total revenues

Hospital	Revenue	Revenue share (%)
Circle Birmingham	**[✂]**	**[10%-20%]**
BMI Priory	[✂]	[10%-20%]
BMI Edgbaston	[✂]	[5%-10%]
BMI combined	**[✂]**	**[20%-30%]**
Parties combined	**[✂]**	**[40%-51%]**
Spire Parkway	[✂]	[10%-20%]
Spire Little Aston	[✂]	[10%-20%]
Spire combined	**[✂]**	**[20%-30%]**
Ramsay West Midlands	**[✂]**	**[5%-10%]**
Nuffield Warwickshire	[✂]	[10%-20%]
Nuffield Wolverhampton	[✂]	[5%-10%]
Nuffield combined	**[✂]**	**[10%-20%]**
Queen Elizabeth Hospital PPU	**[✂]**	**[0%-5%]**
ROH PPU	**[✂]**	**[0%-5%]**

Source: Parties and third-party sales data

Notes: Circle Birmingham revenues based on latest 3rd year pre-Merger forecasts.[141,142] 2018 revenues are used for the remaining hospitals; those revenues were not adjusted to reflect any revenue that may be lost to Circle.

[139] Paragraph 24 of the MN.
[140] These shares exclude Circle Rehab for the reasons set out in paragraphs 211 and 213 above. These also exclude Aspen Midlands, which was mentioned as a main competitor by only one out of 14 third parties and rarely appears in the Parties' internal documents.
[141] The CMA has used the third year revenue forecast for Circle Birmingham in its assessment, to reflect Circle Birmingham's scale at full capacity.
[142] The Parties submitted that these revenues are overstated, as they were based on [✂] and provided a revised set of revenues. However, the CMA notes that the revised estimates provided by the Parties were prepared after the Merger was in contemplation, and therefore may have been affected by it. Further, the CMA notes that the estimate which the CMA has used in Table 8 appears to have been considered by Circle to be appropriate until very recently. Indeed, the revenues which the CMA used in its assessment were *"based on* [✂]*"* (Parties' response to RFI5) and these revenues were very similar to estimates provided in February 2020 (Parties' response to RFI4).

Table 9: Shares of supply in the wider Birmingham area – inpatients

Hospital	Revenue	Revenue share (%)	Admissions	Admission share (%)	Beds	Bed share (%)	Operating theatres ("OTs")	Share of OTs
Circle Birmingham	**[✂]**	**[10%-20%]**	**[✂]**	**[10%-20%]**	**20**	**6%**	**3**	**12%**
BMI Priory	[✂]	**[10%-20%]**	[✂]	**[10%-20%]**	67	21%	5	20%
BMI Edgbaston	[✂]	[5%-10%]	[✂]	[5%-10%]	31	10%	3	12%
BMI combined	**[✂]**	**[20%-30%]**	**[✂]**	**[20%-30%]**	**98**	**30%**	**8**	**32%**
Spire Parkway	[✂]	**[10%-20%]**	[✂]	**[10%-20%]**	51	16%	4	16%
Spire Little Aston	[✂]	**[10%-20%]**	[✂]	**[10%-20%]**	24	7%	3	12%
Spire combined	**[✂]**	**[30%-40%]**	**[✂]**	**[30%-40%]**	**75**	**23%**	**7**	**28%**
Ramsay West Midlands	**[✂]**	[5%-10%]	**[✂]**	[5%-10%]	**34**	**11%**	**2**	**8%**
Nuffield Warwickshire	[✂]	**[10%-20%]**	[✂]	**[10%-20%]**	42	13%	3	12%
Nuffield Wolverhampton	[✂]	[5%-10%]	[✂]	[5%-10%]	29	9%	2	8%
Nuffield combined	**[✂]**	**[10%-20%]**	**[✂]**	**[10%-20%]**	**71**	**22%**	**5**	**20%**
ROH PPU	**[✂]**	**[0%-5%]**	**[✂]**	**[0%-5%]**	**7**	**2%**	**NA**	**NA**
Queen Elizabeth PPU	**[✂]**	**[0%-5%]**	**[✂]**	**[0%-5%]**	**17**	**5%**	**NA**	**NA**

Source: Revenue and admission shares based on parties and third-party sales data. Numbers of beds and operating theatres sourced from MN.

Notes: Circle Birmingham revenues and admissions based on 3rd year pre-merger forecasts. 2018 revenues/admissions are used for the remaining hospitals; those revenues/admissions were not adjusted to reflect any revenue/admissions that may be lost to Circle. Beds and OTs for all hospitals sourced from the MN.

220. As discussed in paragraphs 121, 123 and 163 in relation to Reading and Bath, the shares of supply in Table 8 and Table 9 do not account for the relative location of different suppliers (or closeness of competition more generally) and so are unlikely to accurately reflect the competitive interactions between them. Moreover, the revenue and admissions based shares of supply are less likely to be robust than actual revenue and admission based estimates as they have been constructed using a mixture of past data and forecasts.[143] Given that more direct evidence of the strength of competition (including internal documents – see below) was available, the CMA has not placed significant weight on shares of supply in this case.

221. Subject to these caveats, the CMA's considers that these shares of supply and the relative locations of the different suppliers indicate that:[144]

[143] For example, it might be expected that some of the additional revenue that Circle Birmingham expects to earn and the patients that it attracts are at the expense of other hospitals. This means that those other hospitals' revenue and admissions (and associated shares of supply) might be overstated.
[144] The CMA notes that the orthopaedics shares of supply provided by the Parties in page 38 of Response to the CMA's Issues Letter are consistent with the above. Specifically, they similarly indicate that a) Circle Birmingham

(a) Circle and BMI would be two large private hospital providers located close to each other and the merged entity is forecast to be the largest private hospital provider in the wider Birmingham area. This is consistent with Circle's entry being likely to have a significant competitive effect on BMI. The CMA has considered the extent to which the wider evidence indicates that this is the case.

(b) Spire and Nuffield are also substantial providers, while Ramsay West Midlands is much smaller, except on an inpatient bed basis. The CMA has considered the extent to which the wider evidence indicates that these suppliers effectively currently constrain BMI.

(c) The Royal Orthopaedic Hospital (**ROH**) and Queen Elizabeth PPU do not provide a significant level of PHMS currently and are much smaller than the other PHMS providers in the area.

Location of BMI's customers

222. The Parties submit that, due to Birmingham's size, number of commuters and transport links, patients are more likely to travel longer distances for private hospital procedures compared to other parts of the country and thus the precise location of a hospital within central Birmingham is unlikely to be a significant factor in the choice of hospital for patients. They submit that BMI sources patients from a wide geographic area. They therefore submit that hospitals in Birmingham compete with other hospitals on the outskirts of Birmingham and in the surrounding towns and cities. They submit that this is consistent with the PHMI, which stated that *"BMI Edgbaston attracts insured inpatients from a wide area with no clear centre of patient activity"*.[145]

223. The CMA has considered the Parties' submissions by reference to Figure 6 and 7, which present volumes of inpatients for BMI Priory and Edgbaston by each postcode area. The darker the postcode area, the more patients BMI Priory/Edgbaston sources from that area. The figures indicate that:[146]

(a) These hospitals tend to draw more patients from nearby postcodes than more distant postcodes. This indicates that, while some patients may be willing to travel longer distances for private hospital procedures / treatment, location appears to be an important factor for patients, and thus

and BMI would be two large hospital providers located next to each other, b) Spire and Nuffield would also be substantial providers and c) Ramsay West Midlands would be much smaller. As regards ROH and Queen Elizabeth PPUs, the CMA is unable to comment given that the Parties were not able to attribute shares of supply specifically to these PPUs.

[145] Parties' response to the Issues Letter, pages 28-29.

[146] These observations above are consistent across different types of care.

the relative location of different providers is likely to influence the extent to which they compete.

(b) Both BMI hospitals source substantial volumes of inpatients from areas near [✂]. This is consistent with Circle Birmingham potentially having a significant competitive impact on BMI.

(c) BMI also sources material volumes of inpatients from areas around [✂]. However, as noted above, [✂] is a relatively small provider of PHMS.

(d) BMI also sources substantial volumes of patients from areas near [✂]. However, [✂] currently has limited scale – see paragraph 221(c).

(e) BMI Priory in particular sources some inpatients from areas near [✂]. However, the maps indicate that in absolute terms the total number of BMI inpatients around those rival hospitals is smaller compared to the number of BMI inpatients near Circle Birmingham.

(f) BMI Priory and Edgbaston draw [✂] fewer inpatients from areas around other hospitals than those discussed above. This is consistent with these hospitals only providing a limited competitive constraint to the Parties (see also paragraph 244).[147]

Figure 6: BMI Priory density of patient activity – all inpatients

[✂]

Source: Parties' submission.

Figure 7: BMI Edgbaston density of patient activity – all inpatients

[✂]

Source: Parties' submission

Internal documents

- *Impact of Circle Birmingham's entry on BMI*

224. The Parties' internal documents indicate that Circle Birmingham's entry is expected to have a significant competitive impact on BMI Priory and Edgbaston.

[147] The CMA notes that BMI also sources patients from some postcode areas outside of the maps presented in Figure 6 and 7 below. However, the number of these patients appears to be limited (i.e. all of these areas appear to be very lightly shaded).

225. One Circle document from November 2016 discusses targeting [✂]% of BMI Priory [✂] (which appears to refer to [✂]) revenues from privately-funded patients and [✂]% of BMI Edgbaston [✂] revenues from privately-funded patients, [✂] more than from other PHMS providers (see Figure 8). Based on this document and the Parties' submissions, the CMA estimates that this would comprise [✂]% of Circle's [✂] revenues from privately-funded patients.[148,149] This same document also discusses targeting [✂]% of BMI Edgbaston revenues [✂].

226. The Parties submitted that the CMA has placed too much reliance on this document, given that (i) the document is marked as a draft, (ii) the cited targets were *expressly* stated as being "up for discussion", and (iii) the document was created in November 2016, [✂].

227. While recognising the submissions from the Parties the CMA considers that it is appropriate to assign weight to the evidence contained in this document for the following reasons. The Parties did not provide any updated (or final) versions of this document or any evidence demonstrating that the contents was "corrected" following subsequent discussions even though they were requested to do so.[150] Furthermore, the CMA notes that the Parties have referred to other sections of this document multiple times themselves in their submissions (see for example paragraphs 18.31 and 18.83 of the MN), indicating that, despite it being marked as draft and not as recent as other internal documents available to the Parties, it contained robust and useful evidence for the CMA's assessment. Finally, the CMA considers that this evidence is corroborated by other sources of evidence as discussed further in this section.

Figure 8: Extracts from Circle internal document discussing targeting MSK revenues/market shares from BMI Edgbaston and Priory

[✂]

Source: Annex 18.2

228. Another Circle document indicates that Circle Birmingham would take [✂]% and [✂]% market share from BMI in [✂] and [✂] respectively, [✂]. That

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148 The Parties submitted that this document contained an error: the figure for BMI Priory's MSK revenues should have been £[✂] instead of £[✂] (Parties' response to the Issues Letter, page 53). [✂].
149 The Parties appeared to suggest that this proportion (i.e. [a significant proportion]%) should be even lower, given that BMI's PMI orthopaedics revenues [✂]. However, the CMA notes that this proportion seems to concern all BMI's private patients (i.e. PMI and self-pay patients) rather than PMI patients only, and BMI's private patient orthopaedics revenues did not appear to [✂]. Indeed, BMI Priory and Edgbaston 2018 revenues for orthopaedic private patients were greater than £[✂] and £[✂] referred to in Figure 8([✂]).
150 Email from case team to the Parties [✂] on Thursday 19/03/2020 21:22.

document also indicates that Circle would gain share of BMI (and [✂]) [✂].[151] [✂].[152]

229. BMI documents are consistent with Circle Birmingham's entry having a significant impact on BMI. These documents indicate that [✂],[153] [✂], [✂][154], [✂][155] and [✂].[156] One of these documents indicates that [✂].[157] One document refers to [✂][158]. [✂].[159] [✂].[160] This is consistent with the evidence gathered in the PHMI which stated that: *"BMI responded to Circle's entry in Birmingham by refurbishments and the establishment of a dedicated eye centre at its Priory Hospital."*[161]

230. The Parties submitted that BMI expected only [a small proportion] of Circle revenues to come from BMI sites. They submitted that BMI's budget for FY19/20 estimated a £[✂] revenue impact from the opening of Circle Birmingham across both BMI hospitals. They submitted that this compares to total forecast revenues at Circle Birmingham in year 1 of approximately £[✂].[162] However, the CMA notes that the Parties' comparison does not appear to be made on a "like-for-like" basis. In particular, a BMI's [✂] document[163] refers to Circle's entry in [✂] and the impact of Circle's entry on [✂]. The Parties appear to compare this to a whole year of Circle's forecast revenues. Further, Circle's revenues were forecast to [✂] over time.[164]

231. The Parties submitted that BMI Priory provides a highly specialised and differentiated service compared with the proposed services of Circle Birmingham.[165] They submitted that BMI Edgbaston will be a closer competitor to Circle Birmingham than BMI Priory.[166]

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[151] Annex 18.6 dated May 2019, slides 5, 7 and 8.
[152] [✂] Annex 18.1, dated April 2018, slide 2.
[153] Annex 10.22 dated July 2019, states: [✂]. Annex 10.23 from July 2019 states: [✂]. Annex 10.28 dated June 2019 states: [✂].
[154] Annex 10.46 dated March 2019 slides 58 and 59.
[155] Annex 10.45 dated September 2018, slide 12.
[156] Annex 10.28 dated June 2019, states: [✂] Annex 10.49 dated September 2018, indicates that [✂].
[157] BMI estimated its 2019 EBITDA would be £[✂]. This takes into account the [✂], which is said to improve the forecast EBITDA position by £[✂] (Annex 10.28 dated June 2019). This suggests [✂].
[158] Annex 10.46 dated March 2019 mentions [✂] as one of [✂]. [✂].
[159] See Annex 10.29 dated May 2018. See also third-party report by Mansfield Advisors prepared for the purpose of BMI's [✂] which states: [✂] (Annex 10.31 dated September 2019).
[160] Annexes 10.39, 10.40 and 4.34 dated September to October 2019.
[161]PHMI, paragraph 6.434.
[162] Parties' response to the Issues Letter, paragraph 2.8
[163] Annex 10.46 titled "Central and South West Region FY19-20 Budget Presentation" dated March 2019, slides 58, 59 and 62.
[164] For example, Circle's projected revenues almost [✂] between year [✂] and year [✂] (Parties' response to RFI5, Annex 6.1).
[165] Paragraph 24 of the MN. Parties' response to the Issues Letter, page 25.
[166] "ME/6864/19 Circle/BMI – "[✂]", page 4.

232. Consistent with the Parties' submission, Circle appeared [✂] (see paragraph 225). However, the CMA notes that this is not inconsistent with the impact on BMI Priory being material. Circle targeted [✂] of revenue from BMI Priory than it did from each of [✂] and [✂] with respect to private patients (see Figure 8). Further, certain BMI documents [✂],[167] and are consistent with this impact being material.

233. Overall the documents discussed above indicate that:

(a) Circle Birmingham is expected to be a strong competitor to BMI in the Birmingham area; and

(b) BMI has already started to respond to Circle's anticipated entry (see paragraph 229).

- *Circle's internal documents on the competitive constraint from BMI*

234. The Parties submit that Circle's internal documents describe the [✂].[168] They also submit that BMI Priory and Edgbaston have lower CQC ratings[169] than other competitors in Birmingham and therefore impose a more limited competitive constraint compared to other competitors in the area.[170]

235. As discussed in paragraph 233, the CMA considers that the Parties' documents indicate that Circle Birmingham will be a strong competitor to BMI's hospitals in the Birmingham area. However, the Parties' documents indicate that the constraint BMI hospitals would exert on Circle Birmingham [✂]. [✂].[171] [✂].

236. However, Circle documents are also consistent with BMI being at least a moderate competitive constraint on Circle Birmingham [✂].[172,173] [✂],[174] [✂].[175]

[167] See footnotes 153, 158 and Annex 10.46, slide 58. See also Annexes 10.39, 10.40 and 4.34 which state: [✂]
[168] Paragraph 24 of the MN.
[169] The Care Quality Commission (CQC) is the independent regulator of health and social care in England. CQC inspection reports include ratings, which can help patients in comparing services and making choice about care.
[170] Parties' response to the Issues Letter, page 37.
[171] Annex 18.2 dated November 2016, slide 4.
[172] Annex 18.1 dated April 2018, slide 5.
[173] The Parties submit that the fact that the Parties' facilities are the closest in terms of location is a statement of fact, and does not translate into an assessment of BMI's competitive constraint. However, as explained in paragraph 244, the relative location of different providers is likely to strongly influence the extent to which they compete. [✂]. Therefore, the CMA's view is that BMI hospitals being by far the closest to Circle's facility in terms of location is consistent with BMI being at least a moderate competitor to Circle.
[174] BMI, Spire and Ramsay. Annex 18.2 dated November 2016.
[175] Based on revenues provided in Annex 18.2, slide 4 and Annex 18.1 slide 5.

- *Existing competition from other providers*

237. The Parties submit that BMI's internal documents point to a large number of competitors in the area, and refer to competitive pressure from [✂], [✂], [✂] and the [✂]. As discussed in paragraph 234 they also submit that internal Circle planning documents describe [✂] and [✂] as the most significant competitive risks to Circle Birmingham.[176]

238. The CMA considers that BMI's internal documents indicate that BMI currently faces limited competition in Birmingham. This evidence is consistent with other evidence discussed in paragraph 244.

    (a) One BMI document stated: [✂].[177]

    (b) Another BMI document stated that [✂].[178]

    (c) This is consistent with a Circle document which stated that [✂]. [179]

239. In terms of the evidence in the Parties' internal documents on the constraint imposed by competitors that are currently present in the wider Birmingham area, and consistent with the evidence discussed in paragraph 244:

    (a) BMI documents indicate that Spire [✂].[180] This is consistent with a Circle document, [✂] (see paragraph 235).

    (b) The Parties' internal documents suggest that Ramsay West Midlands is likely to be a moderate competitor. A Circle document [✂] (see paragraph 235). However, one BMI document described Ramsay West Midlands [✂].[181] Further, while a Mansfield Advisors[182] document describes [✂].[183]

    (c) The Parties' internal documents indicate that other competitors exercise a more limited constraint on the Parties. These other competitors are either

[176] Paragraph 24 of the MN.
[177] Annex 10.29 dated May 2018
[178] Annex 10.28 dated June 2019.
[179] Annex 18.1 dated April 2018.
[180] Annex 10.28 dated June 2019 [✂]. Further, the document states that: [✂] and [✂]. One Mansfield Advisors document describes [✂] as [✂] competitors (Annex 10.22 dated July 2019).
[181] Annex 10.28 dated June 2019.
[182] Further information on the role of Mansfield Advisors is available in the MN, paragraph 10.6.
[183] Annex 10.22 dated July 2019.

referred to as a relatively weak constraint or are not referred to at all.[184,185,186,187]

Third party views

240. The majority of competitors indicated that Circle's entry would have a significant impact on BMI Priory/Edgbaston.[188]

241. This is consistent with competitors' views on BMI's rivals in Birmingham, which suggest that BMI currently faces limited competition in Birmingham. Overall, these views indicated that Spire (i.e. Spire Parkway and Spire Little Aston) is currently BMI's only strong competitor and Ramsay West Midlands is currently BMI's only moderate competitor.[189] Other competitors were generally not identified as good alternatives to BMI in Birmingham. One competitor stated that "*The Circle/BMI merger would risk entrenching the position of an already weakly constrained incumbent*".[190]

242. As discussed in paragraph 250(a), PMI providers' views on the impact of Circle's entry are consistent with competitor views discussed in paragraph 240. Specifically, feedback from some PMI providers suggested that the impact of Circle Birmingham's entry on BMI Priory/Edgbaston would be material. Moreover, as discussed in paragraphs 250(b) and 253, CCG and PMI provider views on BMI's competitors in Birmingham indicated that BMI currently faces limited competition in Birmingham.

243. Finally, the CMA notes that a number of third parties raised concerns about the Merger in Birmingham.[191]

Summary of evidence regarding general competition in Birmingham

244. The CMA's view is that, absent the Merger, Circle Birmingham would impose a significant competitive constraint on BMI's hospitals in Birmingham. This competitive pressure will be lost as a result of the Merger. This is supported by the Parties' internal documents (see paragraph 233) and third-party views (see paragraphs 240 and 242). This is also consistent with the following evidence:

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[184] ROH was indicated to be a [✂] competitor by Circle. [✂] (Annex 18.2, slide 3). BMI indicated ROH to be a [✂] competitor (Annex 10.28). [✂] (Annex 10.22, slide 14 and Annex 10.23, slide 14).
[185] Nuffield Wolverhampton is [✂].
[186] Nuffield Warwickshire [✂].
[187] Queen Elizabeth [✂] (Annex 10.28). [✂].
[188] [✂]. Third-party responses to the CMA's questionnaire.
[189] Based on competitor responses to CMA third-party questionnaires [✂].
[190] [✂]. Third-party response to the CMA's questionnaire.
[191] [✂]. Third-party responses to the CMA's questionnaire.

(a) Circle will open right next to BMI Priory/Edgbaston and is of a significant size (see paragraph 221(a)).

(b) Competition in the Birmingham area is currently relatively limited. As discussed in paragraphs 238, 239 and 241, the Parties' internal documents and competitor views indicate that BMI currently faces limited competition in Birmingham, with only Spire and Ramsay currently posing a strong and moderate constraint, respectively. This is consistent with the CMA's view in the PHMI which stated that BMI Priory was *"insufficiently constrained"*.[192,193]

(c) BMI has also already started to respond to Circle's anticipated entry (see paragraph 229).

245. There is some evidence that the constraint BMI hospitals would exert on Circle Birmingham is less strong (see paragraph 235). However, given the close proximity of these hospitals, their scale, and the overlap in their services, there is likely to be at least a moderate degree of competitive constraint imposed by BMI on Circle, particularly if BMI continues to respond to the competitive pressure from Circle.

Specific evidence regarding competition by type of care, source of funding and specialty level

Competition by type of care

246. Table 10 below summarises the types of care offered by the Parties (or to be offered in the case of Circle) and other hospitals in Birmingham.

[192] Paragraph 470 of Appendix 6(7).
[193] The Parties submitted that [a significant proportion] of BMI Edgbaston and [a significant proportion] of BMI Priory patients will have at least five competing fascia post-Transaction, and more than [a significant proportion] of patients will have at least seven competing fascia available post Transaction (i.e. patients will have plenty of options remaining post-merger). Parties' responses to the Issues Letter, page 20. However, as discussed in this paragraph, the evidence indicates that, other than Spire and Ramsay, these providers are not effective competitors to the Parties.

Table 10: type of care by hospital in Birmingham

Hospital/Party	Type of care		
	Inpatient	Day-case	Outpatient
Circle	✓	✓	✓
BMI	✓	✓	✓
Ramsay West Midlands	✓	✓	✓
Spire Parkway	✓	✓	✓
Spire Little Aston	✓	✓	✓
Nuffield Wolverhampton	✓	✓	✓
Nuffield Warwickshire	✓	✓	✓
Queen Elizabeth (PPU)	✓	✓	✓
ROH (PPU)	✓	✓	

Source: Parties and third parties' submissions.

247. The Parties, as well as competitors that the CMA considers to be strong or moderate competitive constraints to the Parties (i.e. Spire and Ramsay West Midlands respectively – see paragraph 244) provide all types of care. Further, the CMA notes similar patterns in terms of the geographical distribution of the Parties' patients across different types of care (see footnote 146). Finally, the Parties submitted that a number of day-case and outpatient clinics (including Ramsay Stourbridge and Ramsay Westbourne) compete or will compete with the Parties.[194] However third-party responses rarely indicated that day-case/outpatient-only clinics compete with BMI in Birmingham. This is consistent with the Parties' internal documents, which either rarely refer to these clinics, or do not refer to at all, or indicate that they are present in non-overlapping specialties.[195,196,197]

248. On the basis of this evidence, the CMA considers that competition in Birmingham is broadly similar across different types of care.

Competition by source of funding

- *Private customers*

249. Table 11 below summarises which hospitals offer self-pay and PMI services in Birmingham. The Parties, as well as competitors that the CMA considers to be strong or moderate competitive constraints to the Parties (i.e. Spire and

[194] Parties' responses to the Issues Letter, page 34 and paragraph 15.211 of the MN.
[195] [✂] (Annex 10.31) suggests that [✂]. Further, [✂] (Annex 10.22 and 10.23) [✂]. However, [✂] (Annex 10.22, slide 14 and Annex 10.23, slide 14). Further, [✂] (i.e. Annexes 10.28 and 18.2 discussed for example in paragraph 268(a)).
[196] Birmingham Prostate Clinic [✂] (Annex 18.6, slide 4 [✂]"). [✂].
[197] [✂] Midland Eye Clinic. [✂] Genesis Care's entry into Birmingham. [✂].

Ramsay West Midlands respectively – see paragraph 244) provide PHMS to both self-pay and PMI customers.

Table 11: Self-pay and PMI funding by hospital in Birmingham

Hospital/Party	Self-pay	PMI
Circle	✓	✓
BMI	✓	✓
Spire Parkway	✓	✓
Spire Little Aston	✓	✓
Ramsay West Midlands	✓	✓
Ramsay Westbourne	✓	
Nuffield Wolverhampton	✓	✓
Nuffield Warwickshire	✓	✓
Queen Elizabeth (PPU)	✓	✓
ROH (PPU)	✓	✓

Source: Parties and third parties' submissions.

250. Consistent with the evidence discussed in paragraphs 240 and 241:

(a) Feedback from some PMI providers suggested that the impact of Circle Birmingham's entry on BMI Priory/Edgbaston would be material.[198] Further, one additional PMI provider stated that Circle's entry would likely have some impact on BMI "due to their proximity".[199]

(b) PMI provider views on BMI's competitors in Birmingham indicated that BMI currently faces limited competition in Birmingham. Overall, PMI providers indicated that Spire hospitals (Parkway and Little Aston) are currently BMI's only strong competitors, Ramsay West Midlands is a weak to moderate competitor to BMI, and other competitors are weak constraints.[200]

251. Therefore, on this basis, the CMA believes that competition for privately-funded patients does not differ materially from the general assessment set out above.

- *NHS-funded patients*

252. All PHMS providers in the Birmingham area offer services to NHS-funded patients.

[198] [✂]. Third-party responses to the CMA's questionnaire
[199] [✂]. Third-party response to the CMA's questionnaire
[200] Based on PMI provider responses to CMA third-party questionnaires [✂].

253. Consistent with competitor and PMI responses in paragraphs 240 and 250(b), CCG feedback on BMI's competitors in Birmingham indicated that BMI currently faces limited competition in Birmingham. Some CCGs mentioned Spire and ROH (which supplies orthopaedics only) as a strong competitor to BMI. Overall, CCG responses indicated that UHB (which includes Queen Elizabeth Hospital) is a medium constraint for NHS-funded patients, and that other hospitals than those mentioned above imposed a relatively weak constraint (they were either only mentioned once or, like Ramsay West Midlands, not mentioned at all).[201]

254. Evidence from the Parties' internal documents supports the view that the impact of Circle Birmingham's entry on BMI's supply to NHS-funded patients would be material. For example, [✄].

255. Therefore, on this basis, the CMA believes that Circle Birmingham's entry would act as a competitive constraint on BMI for NHS-funded patients.

Competition by specialty

256. Table 12 below presents the overlapping specialties of the Parties in Birmingham, and which of those specialties other hospitals in the area provide.

257. The table shows that the Parties, as well as competitors that the CMA considers to impose strong or moderate competitive constraints on the Parties for private customers in particular (ie Spire and Ramsay West Midlands respectively – see paragraph 247) are active in all overlapping specialties.

258. The table shows that neither ROH nor Queen Elizabeth PPU is present in gynaecology, and ROH is only active in orthopaedics.

[201] Based on CCG responses to CMA third-party questionnaires [✄].

Table 12: Provision of overlapping specialties by other hospitals in Birmingham

Specialty	Spire Little Aston	Spire Parkway	Ramsay West Midlands	ROH	Queen Elizabeth PPU	Nuffield Wolver-hampton	Nuffield Warwick
ENT[202]	x	x	x		x	x	x
General Surgery	x	x	x		x	x	x
Gynaecology	x	x	x			x	x
Trauma & Orthopaedics	x	x	x	x	x	x	x
Urology	x	x	x		x	x	x

Source: Parties' and third party submissions

259. As discussed in footnote 144, orthopaedics shares of supply provided by the Parties are consistent with shares of supply across all specialties discussed in paragraphs 218 to 221. As discussed in paragraphs 225 and 228, [✂].

260. Therefore, on this basis, the CMA believes that competition at specialty level does not differ materially from the general assessment set out above.

Conclusion on horizontal unilateral effects in Birmingham

261. The CMA believes that BMI's Priory and Edgbaston hospitals currently face limited competition in Birmingham from other providers, with only two effective competitors active in the area: Spire, which the CMA considers imposes a strong competitive constraint on BMI, and Ramsay, which imposes a moderate constraint on BMI. This is supported by the evidence reviewed by the CMA, including third party views and internal documents in particular.

262. Evidence regarding the impact of Circle Birmingham's entry, including from the Parties' internal documents as well as from third parties, indicates that:

(a) Circle Birmingham and the BMI hospitals are located closely to one another (where location is an important parameter of competition for customers);

(b) Circle Birmingham and BMI will overlap to a material extent in relation to the specialties they offer;

[202] The CMA notes that the Parties' submissions regarding whether Circle Birmingham would supply ENT absent the Merger, and therefore whether the Parties would overlap in ENT absent the Merger, are inconsistent. The Parties submitted in the Response to the CMA's Issues Letter that Circle Birmingham would not provide ENT, based on email correspondence dated July 2019 (Parties' response to the Issues Letter, annex 4.1). However, paragraphs 18.8 and 18.78 of the MN, and Parties' response to RFI5, Annex 5.1 (dated February 2020 ie *after* the email correspondence mentioned above), indicate that Circle Birmingham would provide ENT. Nevertheless, whether there is an overlap in ENT or not does not affect the CMA's conclusions in the remainder of the decision.

(c) Circle Birmingham is targeting patients from BMI to a disproportionate extent in comparison to other hospitals; and

(d) BMI was particularly concerned by, and had begun to react to, Circle's entry.

263. On this basis, the CMA considers that Circle Birmingham's entry would act as a competitive constraint on BMI (both at its Priory and Edgbaston hospitals) across all types of care, sources of funding and overlapping specialties.

264. The CMA believes that the loss of competition between the Parties that would result from the Merger would give rise to an incentive to increase the price of the merged entity's services to privately-funded and NHS patients and/or to lower the quality of its services to self-funded, PMI and NHS-funded patients, resulting in significant competition concerns.

265. The CMA therefore believes that the Merger gives rise to a realistic prospect of an SLC within a market or markets in the UK as a result of horizontal unilateral effects in relation to the supply of PHMS in Birmingham.

Impact of HCA's entry in Birmingham

266. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.[203]

267. HCA is planning to open a new private hospital in Birmingham. The Parties submitted that HCA represents a significant competitor whose entry would prevent any possible SLC from arising in Birmingham.[204]

268. The CMA has assessed whether HCA's entry would be timely, likely and sufficient to prevent a realistic prospect of an SLC in the supply of PHMS in Birmingham.

Likelihood of HCA's entry

269. In July 2017, University Hospitals Birmingham NHS Foundation Trust (**UHB**) and HCA announced plans to build a new private hospital on the NHS Queen

[203] *Merger Assessment Guidelines*, from para. 5.8.1.
[204] Paragraph 24 of the MN.

Elizabeth Hospital Birmingham campus.[205] Construction on the new hospital started in April 2019.[206] HCA has set up a webpage providing information on the planned hospital.[207]

270. Both HCA and UHB also confirmed in their submissions to the CMA that the hospital will likely enter in the future.[208]

271. The CMA therefore considers that HCA's entry in Birmingham is likely.

Timeliness of HCA's entry

272. Before the onset of the Coronavirus (COVID-19) outbreak, HCA Birmingham had been expected to open in [✂] 2022 although this date was subject to potential delay (as the project is at an early build phase and has already experienced delays).[209] However, HCA submitted that the outbreak is likely to impact the opening date.[210]

273. The CMA's Merger Assessment Guidelines state that the CMA "*may consider entry or expansion within less than two years as timely, but this is assessed on a case-by-case basis, depending on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants*".[211]

274. The CMA notes that HCA's entry would not have happened within two years even under HCA and UHB's original plans. Although the precise impact of the Coronavirus (COVID-19) outbreak remains unclear at this stage, the CMA considers that the construction and opening of the HCA hospital may be delayed even further beyond this timeframe.[212]

275. The CMA also considered the dynamics and characteristics of this market. A competitive reaction from the Parties in anticipation of HCA's entry (such as service improvements) would have the effect of bringing forward the point at which patients would feel would the benefits of that entry. However, the evidence seen by the CMA indicates that while the Parties had begun monitoring HCA and BMI was considering how to respond to the threat of

[205] See https://www.hcahealthcare.co.uk/news/press-releases/new-65-million-pound-specialist-hospital-facility-planned-for-birmingham.
[206] See https://www.vinciconstruction.co.uk/media-centre/press-archive/news-article.asp?articleid=266.
[207] See https://www.hcahealthcare.co.uk/facilities/hca-uk-birmingham.
[208] HCA's and UHB's responses to CMA's questionnaire.
[209] [✂].
[210] HCA submission to the CMA [✂].
[211] Merger Assessment Guidelines, para 5.8.11.
[212] The CMA notes that the Coronavirus (COVID-19) outbreak will also affect Circle's opening. However, the plans for entry of Circle Birmingham are far more advanced and, as such, the CMA is satisfied that it will enter the market in a timely manner.

entry more widely, the Parties had not adjusted their plans or taken steps specifically to respond to HCA's entry (see paragraphs 301 to 306).

276. This indicates that the expected timing of the opening of the HCA hospital was still too far off for a competitive response (even before taking account of any delays resulting from the complexity of the project or the Coronavirus (COVID-19) outbreak). Even if HCA's entry were ultimately sufficient to constrain the merged entity (which, as discussed below, the CMA considers not to be the case), there may still be a material period of time prior to entry (or before it reaches full capacity) during which HCA would not impose a material constraint.

277. In these circumstances, the CMA thus considers that it is unable to conclude that HCA's entry would be timely enough to prevent the realistic prospect of an SLC in the supply of PHMS in Birmingham.

Sufficiency of HCA's entry

278. As a preliminary point, the CMA notes that pre-Merger competition for PHMS is currently relatively limited in Birmingham, with only Spire and Ramsay currently posing a significant and moderate constraint respectively on the Parties (see paragraph 261). The CMA found that Circle would compete closely with BMI in the counterfactual, but that this constraint would be lost as a result of the Merger (see paragraph 263). The CMA also notes that HCA's plans to enter are not merger-specific – i.e. they are not an example of a merger leading to consequential changes that may offset any harm to competition. In this context, HCA Birmingham's entry would need to have a particularly significant impact to remove the competitive concerns that the CMA has identified as arising from the Merger.

279. With this in mind, the CMA has considered the following evidence to assess whether HCA's entry, even if it were timely enough, would be sufficient to prevent a realistic prospect of an SLC as a result of horizontal unilateral effects in Birmingham:

(a) Location and scale of HCA's entry;

(b) HCA's plans for services;

(c) Parties' internal documents; and

(d) Third-party views.

Location and scale of entry

280. The Parties submitted that:[213]

   (a) HCA is one of the leading providers of private hospitals in the world and the second largest in the UK;

   (b) the HCA site will receive investment of £100 million. By way of comparison, the cost of the Circle Birmingham hospital is £[✂] and the cost of Circle Rehab is £[✂];[214]

   (c) HCA will be the third largest private hospital in Birmingham (by inpatient beds), just behind Spire Parkway. By inpatient beds, HCA will be two and a half times larger than Circle Birmingham, providing a much greater competitive threat. By inpatient beds, the Parties will have a combined market share of just [30-40]%, with an increment of [5-10]%, so other competitors in the area (including HCA) will be more than sufficient to constrain the Parties post-Merger;

   (d) Shares of inpatient beds are likely to understate the competitive constraint from HCA for private patients, given that its 50 beds apply specifically to private patients and a significant proportion of the treatment at the Parties' hospitals is for NHS-funded patients;

   (e) HCA as a PPU will benefit from opening next to an NHS hospital;[215] and

   (f) HCA will be located just 1.7 miles from Circle Birmingham.[216]

281. The CMA has assessed the estimated shares of supply of HCA Birmingham.

282. Table 13 provides estimated shares of supply of PHMS to all patients in Birmingham. Table 14 provides estimated shares of supply for inpatients only.[217] Both tables include Circle's and HCA's entry.

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[213] Parties' response to the Issues Letter, pages 42, 43 and 46.
[214] Parties' response to the Issues Letter.
[215] Parties' response to the Issues Letter, page 44.
[216] Paragraph 18.25 of MN.
[217] Inpatient shares have been provided using inpatient beds and operating theatres only (i.e. excluding revenues and admissions) due to data limitations.

Table 13: Estimated shares of supply in the wider Birmingham area including HCA – total revenues

Hospital	Revenue	Revenue share (%)
Circle Birmingham	**[✂]**	**[10%-20%]**
BMI Priory	[✂]	[10%-20%]
BMI Edgbaston	[✂]	[5%-10%]
BMI combined	**[✂]**	**[20%-30%]**
HCA	**[✂]**	**[10%-20%]**
Spire Parkway	[✂]	[10%-20%]
Spire Little Aston	[✂]	[10%-20%]
Spire combined	**[✂]**	**[20%-30%]**
Ramsay West Midlands	**[✂]**	**[5%-10%]**
Nuffield Warwickshire	[✂]	[10%-20%]
Nuffield Wolverhampton	[✂]	[5%-10%]
Nuffield combined	**[✂]**	**[10%-20%]**
ROH PPU	**[✂]**	**[0%-5%]**

Source: Parties and third-party sales data.

Notes: Circle Birmingham revenues based on latest 3rd year pre-merger forecasts. 5th year forecast used for HCA.[218,219] 2018 revenues are used for the remaining hospitals; those revenues were not adjusted to reflect any revenue that may be lost to Circle or HCA

[218] The Parties submit that HCA Birmingham will ramp up to operating at full capacity much more quickly than other private hospitals (including Circle Birmingham) (Parties' response to the Issues Letter, page 44). The CMA has used long-term revenue forecasts for both HCA and Circle Birmingham in its assessment, to reflect the estimated scale of both hospitals at full capacity.

[219] HCA forecast [✂].

Table 14: Estimated shares of supply in the wider Birmingham area including HCA – inpatients

Hospital	Beds	Bed share (%)	OTs	Share of OTs
Circle Birmingham	**20**	**6%**	**3**	**10%**
BMI Priory	67	19%	5	17%
BMI Edgbaston	31	9%	3	10%
BMI combined	**98**	**28%**	**8**	**28%**
HCA	**50**	**14%**	**4**	**14%**
Spire Parkway	51	14%	4	14%
Spire Little Aston	24	7%	3	10%
Spire combined	**75**	**21%**	**7**	**24%**
Ramsay West Midlands	**34**	**10%**	**2**	**7%**
Nuffield Warwickshire	42	12%	3	10%
Nuffield Wolverhampton	29	8%	2	7%
Nuffield combined	**71**	**20%**	**5**	**17%**
ROH PPU	**7**	**2%**	**NA**	**NA**

Source: Parties and third-party sales data.

Notes: Beds for all hospitals sourced from Response to the CMA's Issues Letter. OTs for all hospitals sourced from the MN.

283. The estimated shares of supply set out in Table 13 and Table 14 suggest that HCA's entry is expected to be relatively large in size. However, HCA's estimated share is expected to be less than half that of the merged entity on the basis of revenue, operating theatres and number of beds.

284. As explained at paragraph 220, there are limitations to using shares of supply to assess the strength of competition in this case. These limitations are even more acute when estimating the potential share of supply of HCA Birmingham, given that the hospital will not be operational for more than two years at least. The HCA revenue estimates are based on [✂] forecasts, which are more than [✂] years away and thus have a high degree of uncertainty. The CMA has therefore not placed significant weight on these estimated shares of supply.

285. Nevertheless, the CMA recognises that HCA is an established, experienced and well-funded competitor in the UK and HCA Birmingham is planned to be of a relatively large scale (albeit significantly smaller than the merged entity). However, the CMA is concerned not only with the scale of HCA's entry but how much of a constraint it will impose on the Parties, which will depend on how closely it will compete with them. As a result, the CMA has considered (i)

the location of HCA[220] and (ii) the closeness in the services it is expected to provide.

286. In relation to location, HCA Birmingham will be located near to the Parties' hospitals (see Figure 5). This would suggest that, all else being equal, HCA Birmingham may be expected to exercise a relatively greater constraint on the Parties than other hospitals located further away.

287. The CMA has seen mixed evidence on whether patients and consultants would perceive HCA Birmingham as being more or less attractive as a result of being a PPU. The Parties argued that links with a large NHS hospital provide certain clinical and operational advantages.[221] An internal HCA document provides support for this view, noting that [✄].[222] However, survey evidence collected in the PHMI found that most patients have a preference for being treated at a private hospital compared with a PPU.[223] It is therefore unclear whether HCA's proximity to an NHS hospital makes it a stronger or weaker competitor for private patients – in particular for the overlapping services with the Parties hospitals. Intuitively, the CMA considers that it may be more of an advantage for certain types of services, for example acute care, than for others, for example routine orthopaedic surgery.

288. In relation to the services that will be offered by HCA Birmingham, the CMA has considered the available evidence, including HCA's plans. This topic is discussed below.

HCA's plans for services

289. The CMA has assessed the extent to which HCA Birmingham will compete closely with the Parties by looking at the services that it plans to offer and its projected scale by specialty.

290. In its submission to the CMA, HCA submitted [✄].[224]

291. HCA stated that [✄].[225] HCA also submitted that [✄].

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[220] See paragraphs 221 and 223 for discussion of importance of location for the CMA's competitive assessment.
[221] Parties' response to the Issues Letter, page 44.
[222] [✄]. Third party response.
[223] PHMI, paragraph 6.193. [✄].
[224] [✄]. Third party response to the CMA's questionnaire.
[225] [✄]. Third party response to the CMA's questionnaire.

292. [✄]. HCA's website describes HCA Birmingham as a "*specialist hospital*" and indicates that its intention is to "*treat a wide range of medical conditions and … specialise in acute and complex care*".[226]

293. By contrast, the Parties submitted that whilst BMI Priory primarily treats high acuity patients requiring specialised and complex treatment, Circle Birmingham and BMI Edgbaston provide lower acuity elective procedures with a focus on trauma and orthopaedics, and do not treat complex patients.[227] This suggests that the focus of HCA's services will be differentiated from the Parties' overlapping services.

294. As set out in Table 12, the Parties overlap in the provision of general surgery, gynaecology, trauma & orthopaedics and urology and possibly in ENT. [✄].[228] The CMA also notes that HCA's internal documents indicate that HCA sees [✄] as its main competitors.[229]

295. However, the documents HCA submitted to the CMA indicate that there will be a material level of differentiation between the services offered by HCA and the services in which the Parties overlap. While HCA plans to provide most of the specialties in which the Parties overlap, its focus will be on complex/high acuity treatments.

296. In particular, in its [✄] tender submission, in relation [✄][230], [✄].[231]

297. Further, an HCA document dating from May 2019 [✄].[232] [✄].

298. With regard to the scale of HCA's entry in these specialties, HCA's [✄] tender submission includes projections by activity (see table below).[233] [✄][234] [✄]. By comparison, Circle is forecast to [✄] inpatient admissions in Orthopaedics, General Surgery, Gynaecology and Urology and BMI has [✄] inpatient admissions in those specialties.[235] This suggests that HCA's entry may not exert a significant constraint on the Parties in respect of the specialties in which the Parties overlap.

[✄]

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[226] See https://www.hcahealthcare.co.uk/facilities/hca-uk-birmingham.
[227] Parties' response to the Issues Letter, slide 25.
[228] The Parties considered that it would be surprising if HCA Birmingham did not provide ENT. Parties' response to the Issues Letter, page 46.
[229] [✄]. Third party response to the CMA's questionnaire.
[230] [✄]. Third party response to the CMA's questionnaire.
[231] [✄]. Third party response to the CMA's questionnaire.
[232] [✄]. Third party response to the CMA's questionnaire.
[233] [✄]. Third party response to the CMA's questionnaire.
[234] [✄]. Third party response to the CMA's questionnaire.
[235] Latest 3rd year pre-merger forecasts used for Circle (Parties' response to RFI5, Annex 6.1). 2018 admissions used for BMI (Parties response to RFI4, Annex 8.1).

299. In addition, given that HCA's entry is more than two years away at least, HCA's plans and projections may change and the actual services offered (and HCA's relative focus on the different specialties) may differ from those currently planned.

300. In conclusion, the CMA considers that while there are some overlaps in the planned specialties between HCA and the Parties, HCA's offering will be differentiated from the Parties. In particular, HCA's focus appears to be on complex/high acuity treatments (where the overlaps between the Parties and limited) and the projected scale of HCA's entry in the Parties' overlapping specialties appears modest and subject to change given the expected length of time prior to HCA's entry.

Parties' internal documents

301. HCA's entry is monitored by the Parties' internal documents.[236] Some of BMI's internal documents refer to BMI reacting to a broader group of entrants, including HCA.[237] Some of BMI's internal documents recognise that HCA's entry [✂][238] and [✂].[239,240]

302. However, the strength of the competitive threat posed by HCA is not clear from these documents.[241] This is in contrast to the Parties internal documents seen by the CMA regarding Circle's entry.

303. In particular, the Parties' documents include specific estimates of the expected impact of Circle's entry. For example, one Circle document discusses targeting [✂]% of BMI Priory [✂] revenues from privately-funded patients and [✂]% of BMI Edgbaston [✂] revenues from privately-funded patients, and one BMI document indicates that [✂] (see paragraphs 225, 228 and 229). [✂].

304. Further, some documents point towards BMI's competitive responses being driven specifically by Circle's entry. For example, a number of documents stated that [✂].[242] This is consistent with the evidence gathered in the PHMI which stated that: *"BMI responded to Circle's entry in Birmingham by refurbishments and the establishment of a dedicated eye centre at its Priory*

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[236] HCA's entry is monitored in Annexes 10.22, 10.23 and 18.3 to the MN, Annexes 1.1 to 1.7 to Parties' response to the Issues Letter, as well as other documents referred to in this paragraph.
[237] Annex 10.39 states: [✂]. Annex 10.39 states: [✂]. Annex 10.40 and 4.34 contain similar statements.
[238] Annex 10.28 [✂].
[239] Annex 10.28 refers to [✂]. Another document refers to Circle and HCA's entry into [✂] (Annex 10.29).
[240] Third-party report by Mansfield Advisors prepared for the purpose of BMI's [✂] states: [✂]. Annex 10.31.
[241] [✂]. While these emails monitored HCA's entry, these documents did not provide any view on the magnitude of the impact of HCA's entry.
[242] Annexes 10.39, 10.40 and 4.34 dated September to October 2019.

Hospital."[243] In contrast to these specific references to Circle, while some documents suggest that BMI is responding to entry more generally, [✂].[244]

305. Some of the other documents of the Parties are also more explicit about Circle's [✂]. [✂][245] [✂].[246] [✂].[247]

306. Finally, internal BMI email correspondence refers to HCA being a [✂][248] and the Parties do not overlap in [✂].

Third-party views

307. The CMA has also sought views from third parties regarding HCA's entry, although it has placed more weight on the factual evidence discussed above.

308. Third parties gave a mixed view on whether HCA's entry would have a material impact on BMI, or the market as a whole.[249]

309. On the one hand, some third parties suggested that HCA's entry would have a material impact on BMI Priory/Edgbaston. Two competitors indicated that the impact of HCA's entry would be "high" and "material" respectively.[250] One competitor indicated that the market is *"already crowded"* and the entry of HCA will keep it competitive.[251] One PMI provider stated that HCA's entry would be *"fairly significant"* as HCA *"will have a full offering of acute and complex services and a distinct advantage of being in partnership with the NHS"* as well as *"an enviable reputation for delivering high quality care"*.[252] Another provider suggested that HCA's entry *"may boost the self-pay market."*[253]

310. On the other hand, other third parties did not anticipate HCA's entry having a significant impact on the Parties. Several third-party responses indicated that,

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[243] PHMI, paragraph 6.434.
[244] Annex 10.39 and Annex 10.40, as referred to in footnote 242.
[245] Parties' response to RFI1, Q2. BMI was transferred into new ownership at the end of 2018. Under the new ownership, an initiative was put in place to ensure that each hospital had its own strategic plan to guide its operational and capital expenditure priorities over a five-year period.
[246] Annex 10.22 states: *"A brand-new,10-level NHS hospital is being developed in West Birmingham where HCA plans to open a PPU"*. Annex 10.23 *states "HCA is building a specialist cancer and cardiology hospital with the local NHS trust set to open 2020; HCA will operate a 66-bed PPU within the 138-bed hospital"*.
[247] The Parties submitted that HCA had just as many references as Circle Birmingham in these two documents. However, a simple count of the number of times a competitor is mentioned is not a good guide to the strength of the constraint that they exert.
[248] Annex 1.2
[249] The Parties submitted that the CMA should be wary of relying on the views of some competitors who may see an opportunity by trying to 'game the system' (Response to CMA's Issues Letter, page 49). In this respect, the CMA notes that proportionately fewer PMIs and CCGs expected the impact of HCA's entry to be significant.
[250] [✂]. Third-party responses to the CMA's questionnaire
[251] [✂]. Third-party responses to the CMA's questionnaire.
[252] [✂]. Third-party responses to the CMA's questionnaire.
[253] [✂]. Third-party responses to the CMA's questionnaire.

consistent with the evidence discussed in paragraph 300, HCA's and the Parties' offerings would be differentiated.[254] One competitor also stated that, consistent with the evidence discussed in paragraph 283, "*HCA Birmingham would have a significantly lower capacity than the combined Circle / BMI sites so it is not clear how significant the constraint will be*".[255] One PMI provider did not expect HCA's entry to have a material impact on BMI, although no further evidence was provided.[256]

311. Finally, a number of third parties raised concerns about the Merger in Birmingham.[257]

Conclusion on the impact HCA's entry

312. The evidence indicates that HCA is currently planning to open a relatively large hospital in close proximity to the Parties in Birmingham. However, HCA's hospital is expected to be considerably smaller than the merged entity, with less than half of the merged entity's share of supply by [✂], operating theatres and number of beds.

313. While there are expected to be overlaps in the specialties between HCA and the Parties, HCA's services will be differentiated from the services in which the Parties overlap with one another. In particular, HCA's focus appears to be on complex/high acuity treatments (where the overlaps between the Parties and limited) and the projected scale of HCA's entry in the Parties' overlapping specialties appears modest.

314. Furthermore, HCA's entry is at least two years away and may be further delayed as a result of the Coronavirus (COVID-19) outbreak. HCA's plans and the actual services offered (and HCA's relative focus on the different specialties) may change in the intervening period.

315. In any case, HCA's entry would only increase competition in Birmingham from a modest starting point. Currently, only Spire and Ramsay pose a significant and moderate constraint respectively on the Parties (see paragraph 261) and the Merger is expected to weaken competition that would have developed in the absence of the Merger (see paragraph 264).

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[254] One CCG stated that *"HCA Birmingham will be targeting a different patient group to existing BMI Priory/Edgbaston and proposed Circle hospitals"*. One PMI provider stated that HCA would have a limited impact on competition due to its understanding that *"HCA would focus on high complexity services and Oncology and will not be focussing on the wider range of services offered by BMI Priory and BMI Edgbaston that account for the significant proportion of their activity"*. Another PMI provider expected a "low impact" due to its expectation that *"HCA Birmingham would operate on a higher tariff"*. [✂]. Third party responses to the CMA's questionnaire.
[255] [✂]. Third party response to the CMA's questionnaire
[256] [✂]. Third party response to the CMA's questionnaire
[257] [✂]. Third party responses to the CMA's questionnaire.

316. In this context, and in light of the evidence discussed above, the CMA does not consider that HCA's entry would be either timely or sufficient to prevent a realistic prospect of an SLC arising from the Merger in Birmingham.

Horizontal unilateral effects in supply of PHMS nationally to PMI customers

317. As discussed in paragraphs 106 to 108, PMI prices are set centrally and applied across all local areas. Therefore, the CMA has considered the impact of the Merger on PMI prices at the national level and thereby in every local market in which either Party operates.

318. The CMA's view is that the merged entity's national negotiating position with respect to PMI pricing will not be materially affected by the Merger. The merged entity's portfolio would include 55 hospitals and clinics.[258] In contrast, the Parties' negotiating position would only be strengthened post-Merger with respect to two areas of overlap where the CMA found a realistic prospect of an SLC,[259] i.e. a small part of the merged entity's national portfolio. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of PHMS nationally.

319. The Parties submitted that PMIs have significant buyer power in negotiating prices with PHMS providers.[260] However, the CMA did not have to conclude on this, as the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of PHMS nationally for the reasons set out in paragraph 318.

Vertical effects

320. Vertical effects may arise when a merger involves firms at different levels of the supply chain, for example a merger between an upstream supplier and a downstream customer or a downstream competitor of the supplier's customers.

321. Vertical mergers may be competitively benign or even efficiency-enhancing, but in certain circumstances can weaken rivalry, for example when they result in foreclosure of the merged firm's competitors. The CMA only regards such

[258] See paragraphs 31, 34 and 54.
[259] Bath and Birmingham, which would cover only 5 of the Parties' hospitals: BMI Bath Clinic, Circle Bath, BMI Priory, BMI Edgbaston and Circle Birmingham.
[260] Parties' response to the Issues Letter, page 58.

foreclosure to be anticompetitive where it results in an SLC in the foreclosed market(s), not merely where it disadvantages one or more competitors.[261]

322. The CMA's approach to assessing vertical theories of harm is to analyse (a) the ability of the merged entity to foreclose competitors, (b) the incentive of it to do so, and (c) the overall effect of the strategy on competition.[262]

323. In the present case, the CMA has considered whether Circle Integrated Care and TPG could foreclose competing PHMS providers by referring patients to the merged entity's hospitals rather than alternative PHMS providers.

324. As stated at paragraph 82, Circle and TPG have activities in primary care and community services which give rise to a vertical relationship with BMI's activities in the supply of PHMS in the UK:

(a) TPG provides primary care community services to NHS-funded patients through a network of eighteen GP surgeries in England, and one small referral management service in Milton Keynes.[263] Some of these GP surgeries are located near BMI hospitals. A vertical relationship exists between TPG and BMI because General Practitioners are responsible for referring patients to consultants and private hospitals.

(b) TPG also operates 24 community ophthalmology centres across England, as well as a community dermatology centre in Ramsgate. In principle, there may be a vertical relationship with BMI, to the extent that community centres may refer patients to hospitals.

(c) Circle operates Circle Integrated Care, which manages contracts on behalf of some CCGs to supply integrated care services, in relation to MSK conditions and dermatology to NHS-funded patients. There is a vertical relationship with BMI as the service acts as a single triage point which then refers patients to community centres or hospitals.

325. These are discussed in turn below.

TPG GP surgeries and downstream supply of PHMS

326. TPG operates 18 GP surgeries in England (including one walk-in centre and one small referral management service in Milton Keynes). These GP surgeries only provide NHS services. The CMA considered whether TPG

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[261] In relation to this theory of harm 'foreclosure' means either foreclosure of a rival or to substantially competitively weaken a rival.
[262] *Merger Assessment Guidelines,* paragraph 5.6.6. In practice, the analysis of these questions may overlap and many of the factors may affect more than one question,
[263] See footnote 38.

could limit the access of hospitals competing with the merged entity to patients referred from TPG's GP surgeries, thereby limiting those hospitals' ability to compete in the supply of PHMS.

327. The Parties' submitted that TPG would not have the ability to foreclose in this manner.[264] This is because under relevant legislation and NHS 'choice policy', the patients referred by TPG must be offered a choice as to where they are treated and Centene (which controls TPG) has no ability to influence where TPG's GPs refer patients. The Parties also submitted that TPG's share of registered patients is less than [0-5] percent in any BMI catchment area, and therefore any action by Centene to seek to influence TPG to refer additional patients to BMI hospitals would have no material effect on the downstream market.[265]

328. The CMA believes TPG is unlikely to have market power in providing referral services to hospitals because there are more than 6,500 GP practices in England. Therefore, at a national level Centene accounts for a very small proportion of GPs (less than [0-5] percent). Moreover, at the local level, in the 16 areas where a TPG GP practice falls within the catchment area of a BMI hospital, TPG GP practices have a very low share of the total patients registered with any GP (less than [0-5] percent).[266]

329. Accordingly, the CMA believes that the merged entity will not have the ability to use its supply of GP services to foreclose rival PHMS suppliers.

TPG's community ophthalmology centres and downstream supply of PHMS

330. TPG operates 24 community ophthalmology centres across England. These centres treat NHS patients presenting with a range of low-risk, non-urgent, routine eye conditions or the assessment and management of patients whose eye conditions are at a low risk of deterioration.[267]

331. The CMA considered whether, post-Merger, TPG could limit the access of hospitals competing with the merged entity to its community ophthalmology referrals, thereby worsening those competing hospitals' ability to compete in the supply of PHMS.

332. The Parties submitted that these centres provide primary ophthalmology care which differs from the secondary (ie hospital) care provided by BMI.[268] The

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[264] Paragraph 34 of the MN.
[265] Paragraph 34(b) of the MN
[266] See also paragraphs 19.57 and 19.58 of the MN.
[267] Paragraph 12.7 of the MN.
[268] Paragraph 12.8(a) of the MN.

Parties submitted that it is unusual for TPG centres to refer a patient to a hospital (ie they will usually only need to be referred to a hospital if the triage process has mis-diagnosed a patient or if the patient's condition deteriorates). The Parties submitted that where a patient does need to be referred to a hospital, in the vast majority of cases they will be referred to an NHS hospital and that it is very rare for TPG ophthalmology centres to refer patients to a private hospital. The Parties estimated that only [a very small proportion] of patients were referred to private hospitals for one of its community ophthalmology contracts in the third quarter of 2019.[269]

333. The CMA has reviewed data submitted by the Parties. The CMA estimates that only [✂] community ophthalmology patients were referred to private hospitals in 2019 (on average [✂] per TPG centre).[270] In comparison, there were over [✂] ophthalmology appointments across all of the Parties' hospitals in 2018, and an average of [✂] Ophthalmology appointments at BMI hospitals and [✂] appointments at Circle hospitals.[271]

334. Accordingly, the CMA believes that the merged entity will not have the ability to use its supply of community ophthalmology services to foreclose rival PHMS suppliers.

TPG's dermatology community centre and PHMS provision

335. TPG's dermatology community centre in Ramsgate is located more than 50 miles from the closest BMI hospital that provides NHS dermatology services (with three NHS hospitals providing dermatology services within a 20 mile catchment area of TPG's dermatology centre), and the total annual value of TPG's contract to provide dermatology services at Ramsgate is low, at around £[✂].[272]

336. Therefore, the CMA believes that TPG companies would not have the ability to foreclose competing PHMS providers by referring patients to the merged entity's hospitals rather than alternative PHMS providers.

[269] Parties' response to RFI3, Q7. The Parties submit that [✂]. They submit that [✂].
[270] The Parties estimated that, for [✂] of its community ophthalmology contracts, only [a very small proportion] of patients seen in the third quarter of 2019 were referred to private hospitals. TPG had [✂] community ophthalmology appointments in 2019 (see RFI3 Annex 7.1). If [a very small proportion] of these patients were referred to private hospitals, this would imply that only [✂] of these patients were ultimately referred to private hospitals.
[271] Parties' response to RFI3, Annex 8.1.
[272] Paragraphs 12.37 to 12.39 of the MN.

The supply of Integrated Care services

337. The Parties submitted that

(a) With respect to the provision of MSK integrated diagnosis and care services for NHS patients, Circle is the primary contractor for the following CCGs (and therefore the area covered by each of these CCGs): Greenwich, Bedfordshire, Rushcliffe and North Hampshire.

(b) With respect to the provision of dermatology integrated care services for NHS patients, Circle is the primary contractor for Wolverhampton CCG.[273]

338. The CMA notes that the provision of integrated care services may involve referrals to hospitals. Therefore, there is a vertical overlap between Circle's integrated care supply upstream and the supply of PHMS by the Parties downstream. In principle, Circle could limit rival hospitals' access to MSK and dermatology referrals, thereby worsening those hospitals' ability to compete in supplying PHMS.

Ability

339. The Parties submitted that Circle would have limited ability to refer additional MSK patients in these regions to BMI hospitals, with the aim of foreclosing competitors in the downstream market for the provision of PHMS (ie input foreclosure) for the following reasons:[274]

(a) NHS patients have the choice as to which hospitals to use; and

(b) NHS guidelines prevent Circle favouring certain hospitals.

340. The Parties' submission is consistent with evidence from CCGs.[275] This suggests that Circle's ability to influence patients' choice might be limited.

341. All CCGs contacted by the CMA said that they monitor referral patterns and would be able to detect shifts in those patterns.[276,277] These CCGs also told the CMA that they could take action in the event that they detected a pattern

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[273] Paragraph 31 of the MN.
[274] Paragraph 32 of the MN.
[275] In particular, one CCG told the CMA that patients play an important role in the choice of treatment location. [✂]. Another CCG told the CMA that it has an interest in ensuring that other acute hospitals are part of patients' choice [✂]. Third party call notes.
[276] [✂], [✂], [✂], [✂]. Four CCGs indicated that they would be able to detect a foreclosure strategy of the Parties. [✂], a fifth CCG stated that it monitors what happens to patients on a regular basis to ensure that there are a number of providers that patients can choose from. Third party call notes.
[277] Third party call note. [✂].

of onward referrals (reviewing or terminating the contract).[278] None of the CCGs raised concerns about the Merger. One hospital raised a concern relating to Circle's provision of MSK integrated care services, although stating that they would expect the merged entity to offer patients a choice of hospitals for onward referrals.[279] This suggests that Circle would not have the ability to limit rival hospitals' access to its referrals.

Conclusion in relation to foreclosure using the supply of Integrated Care services

342. In the light of the evidence set out above, the CMA believes that the merged entity is unlikely to have the ability to use its supply of Integrated Care services to foreclose rival PHMS suppliers.

Conclusion on vertical effects

343. For the reasons set out above the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of vertical effects in relation to the merged entity's activities in PHMS downstream and the supply to NHS patients of MSK and dermatology integrated care services by Circle, GP services by TPG, or community ophthalmology and dermatology services by TPG.

Barriers to entry and expansion

344. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In relation to Bath and the Reading area, the CMA is not aware of any plans for entry by new PHMS providers. In relation to Birmingham, the CMA has already considered the planned entry of HCA as part of the competitive assessment above.

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[278] In particular, one CCG told the CMA that while termination of a contract would be the last resort if a CCG noticed a pattern of referrals, it stated that: "If there was an unsatisfactory response from a provider [to [✂] inquiry about shift in referral patterns], the CCG would look to review the contract". [✂] Similarly, a different CCG told the CMA that it would question Circle and possibly ultimately terminate the contract if Circle engaged in a foreclosure strategy. [✂] Another CCG also told the CMA that any foreclosure strategy by Circle would affect its choice of a future provider. [✂] Finally, another CCG told that CMA that: 'It would not be acceptable to [✂] if Circle decided to refer patients covered by the contract only to Circle and BMI hospitals. Wolverhampton CCG can challenge the provider if they do not act in line with the contract, and offer patient choice. […] If CCG found patients weren't being offered a choice it would enact the levers in the NHS standard contract'. [✂] Third party call notes.

[279] [✂]. Third party response to the CMA's questionnaire.

Third party views

345. The CMA contacted customers and competitors of the Parties. Third party comments and concerns have been taken into account where appropriate in the competitive assessment above.

Conclusion on substantial lessening of competition

346. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in relation to the supply of PHMS in Bath and Birmingham.

Decision

347. Consequently, the CMA believes 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 an SLC within a market or markets in the United Kingdom.

348. The CMA therefore believes that it is under a duty to refer under section 22(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.[280] Circle has until 17 April 2020[281] to offer an undertaking to the CMA.[282] The CMA will refer the Merger for a phase 2 investigation[283] if Circle does not offer an undertaking by this date; if Circle indicates before this date that it does not wish to offer an undertaking; or if the CMA decides[284] by 24 April 2020 that there are no reasonable grounds for believing that it might accept the undertaking offered by Circle, or a modified version of it.

349. The statutory four-month period mentioned in section 24 of the Act in which the CMA must reach a decision on reference in this case expires on 8 May 2020. For the avoidance of doubt, the CMA hereby gives Circle notice pursuant to section 25(4) of the Act that it is extending the four-month period mentioned in section 24 of the Act. This extension comes into force on the date of receipt of this notice by Circle and will end with the earliest of the following events: the giving of the undertakings concerned; the expiry of the period of 10 working days beginning with the first day after the receipt by the

[280] Section 22(3)(b) of the Act.
[281] Section 73A(1) of the Act.
[282] Section 73(2) of the Act.
[283] Sections 22(1) and 34ZA(2) of the Act.
[284] Section 73A(2) of the Act.

CMA of a notice from Circle stating that it does not intend to give the undertakings; or the cancellation by the CMA of the extension.

Joel Bamford
Senior Director, Mergers
Competition and Markets Authority
8 April 2020

End notes:

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[i] Centene has informed the CMA that the name of The Practice Services Limited has been changed to Operose Health (Group) UK Limited. The references to 'The Practice Services Limited' should be replaced with 'Operose Health (Group) UK Limited' in paragraph 6 and footnote 3.

[ii] Centene has informed the CMA that the name of The Practice Services Limited has been changed to Operose Health (Group) UK Limited (and that the UK operations are now known as Operose rather than TPG). Therefore, the references to 'TPG' should be replaced with 'Operose' in paragraphs 6, 28, 52, 84(a), 84(b), 87(a), 88, 89,95, 323, 324(a), 324(b), 326, 327, 328, 330,331, 332, 333, 335, 336, 343 and at footnotes: 38, 44, 269 and 270.

[iii] The consultant overlap figures referred to in paragraphs 128,129,167 and 168 are sourced from Bupa consultant finder, rather than the Parties' data.

[iv] At paragraph 202, in relation to the temporary allocation of Circle Birmingham Hospital and rehabilitation centre to the NHS, for the avoidance of doubt, the NHS is not yet utilising these facilities but may well do so following their completion.