

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

Decision on whether to conduct a review of undertakings in lieu of a reference

ME/6864/19

The CMA's decision to conduct a review of undertakings in lieu of reference under section 92(2)(b) of the Enterprise Act 2002 given on 2 August 2021. Full text of the decision published on 20 October 2021.

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

Summary

1. On 21 June 2021, Circle Health Holdings Limited (**Circle**) wrote to the Competition and Markets Authority (**CMA**) requesting that the CMA varies undertakings in lieu of a reference (**UILs**) that were accepted on 23 June 2020 in connection with Circle's acquisition of all the issued share capital of GHG Healthcare Holdings Limited, the indirect parent company of BMI Healthcare Limited (collectively **BMI**) (the **Merger**).¹ Circle is seeking a variation of the UILs in light of a change of circumstances.
2. The evidence the CMA has received from Circle indicates that there is a realistic prospect of a review of the UILs finding a change in circumstances and that a review would be in line with the CMA's published prioritisation principles. The CMA has therefore decided to conduct a review of the UILs.
3. The CMA is not, at this stage, required to decide on the statutory question under section 92(2)(b) of the Enterprise Act 2002 (the **Act**) of whether there has been a change of circumstances, such that the UILs are no longer

¹ The final UILs are available on the CMA's website, at <https://www.gov.uk/cma-cases/circle-health-bmi-healthcare-merger-inquiry>

appropriate and need to be varied or superseded by a new enforcement undertaking. This decision is limited to whether to conduct a review of the UILs and is independent of, and without prejudice to, the future outcome of the CMA's assessment and review of the UILs.²

Background

4. On 8 January 2020, Circle Health Holdings Limited acquired all the issued share capital of GHG Healthcare Holdings Limited, the indirect parent company of BMI Healthcare Limited.
5. On 8 April 2020, the CMA decided under section 22(1) of the Act that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
6. On 23 June 2020, the CMA accepted UILs under section 73(2) of the Act, pursuant to which Circle agreed to divest Circle Hospital (Bath) Limited (**Circle Bath**) and Circle Birmingham Limited (**Circle Birmingham**) to a purchaser or purchasers approved by the CMA by the end of the Divestment Period (as defined in the UILs) (**UIL Acceptance Decision**).³ The divestment businesses owned by these subsidiaries comprise the Circle Bath Hospital and the Circle Birmingham Hospital (as defined in the UILs). With respect to the Circle Birmingham Hospital, the UILs specifically provided that Circle could continue to operate a stand-alone rehabilitation facility within a separately demised area of the development, by entering into a sub-underlease with the ultimate purchaser of Circle Birmingham.⁴
7. On 25 June 2020, the CMA directed Circle to appoint a monitoring trustee (**MT**) pursuant to paragraph 13.1 of the UILs.
8. On 1 June 2021, Circle completed the divestment of Circle Bath to Royal United Hospitals Bath NHS Foundation Trust.⁵ However, despite extensions to the Divestment Period, as of the date of this decision Circle has not yet divested Circle Birmingham.

² See also [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders](#) (CMA11), section 3.

³ The SLC Decision, the UIL Acceptance Decision and the final UILs are available on the CMA's website at <https://www.gov.uk/cma-cases/circle-health-bmi-healthcare-merger-inquiry>.

⁴ UILs, Annex 2

⁵ https://www.ruh.nhs.uk/media/media_releases/2021_06_01_RUH_buys_Circle_hospital.asp.

9. On 21 June 2021, Circle requested the CMA varies the UILs⁶ insofar as they relate to the divestment of Circle Birmingham, so that ~~[X]~~ **(UIL Variation Request)**.⁷ A summary of this request is available on the CMA's case page.⁸ The statutory framework for considering Circle's request
10. Under clause 19.1 of the UILs, the UILs shall remain in force until such a time as they are varied, released or superseded under the Act. Under the Act, an undertaking in lieu of a reference accepted under section 73(2) of the Act may be varied or superseded by another undertaking⁹ or released by the CMA.¹⁰
11. The CMA has a statutory duty to keep enforcement undertakings under review.¹¹ In considering Circle's request to vary the UILs the CMA must examine whether, by reason of any change of circumstances the UILs relating to Circle Birmingham are no longer appropriate and need to be varied or superseded by a new enforcement undertaking, or if Circle can be released from the UILs.¹²
12. The CMA has also had regard to its published guidance, *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* (CMA 11)¹³ which sets out that the process for reviews of undertakings consists of two stages: (i) an initial screening, where the CMA decides whether to conduct a review; and (ii) the review itself.¹⁴ The scope of this decision is limited to whether to conduct a review of the UILs (ie the initial screening only).
13. In deciding whether to conduct a review, the CMA will consider its published prioritisation principles and whether there is a realistic prospect of finding a change of circumstances.¹⁵ The precise nature of the CMA's consideration of any change of circumstances depends entirely on the individual circumstances affecting a particular undertaking.¹⁶
14. The CMA is not required to conclude, at this stage, on the statutory question of whether there has been a change of circumstances since the UILs came

⁶ Prior to submitting the UIL Variation Request, Circle also provided the CMA with a submission containing an update on the Birmingham divestment process dated 30 April 2021.

⁷ ~~[X]~~

⁸ [See summary of Circle's UIL variation request.](#)

⁹ Section 73(5)(b) of the Act.

¹⁰ Section 73(5)(c) of the Act.

¹¹ Section 92(1)(a) of the Act. Section 89(2) of the Act sets out that the term "enforcement undertaking" includes an undertaking in lieu of a reference accepted under section 73(2) of the Act.

¹² Section 92(2)(b) of the Act.

¹³ [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#), revised August 2015

¹⁴ See CMA 11, part 3.

¹⁵ CMA 11, paragraph 3.10

¹⁶ CMA 11, paragraph 2.5.

into force, such that the UILs are no longer appropriate and should be varied or superseded by a new undertaking.¹⁷ The CMA will issue a final decision addressing the statutory question after its review of the UILs is complete.

15. The CMA has decided, in this case, to proceed directly to carrying out its review of the UILs without issuing an invitation to comment on whether to carry out a review. Consistent with its published guidance, the CMA considers that the change of circumstances claimed by Circle and evidence advanced in support (in particular, evidence relating to changes [REDACTED] and commercial negotiations with prospective purchasers of Circle Birmingham) in and of itself constitutes specified information which needs to be excluded from disclosure under Part 9 of the Act.¹⁸

Circle's request to vary the UILs

16. The UIL Variation Request states that the circumstances underlying the UILs have materially changed since the UILs came into force, on the basis of:¹⁹
- (a) The sales process to date demonstrating that a divestment is unlikely to be achieved due to Circle Birmingham being [REDACTED];
 - (b) The impact of the COVID-19 pandemic; and
 - (c) The entry of HCA Healthcare UK (**HCA**).
17. Circle submitted that the sales process, which was conducted over a period of [REDACTED] [several] months²⁰ by an investment bank and supervised by the MT, did not ultimately yield any binding offers despite Circle Birmingham [REDACTED]. Specifically:
- (a) Circle received [REDACTED] initial non-binding offers from [REDACTED] [a number of potential purchasers]. Circle then progressed to a detailed due diligence process with [REDACTED] [a subset of potential purchasers].²¹
 - (b) [REDACTED] [details of negotiations with prospective purchasers].^{22, 23}

¹⁷ Section 92(2)(b) of the Act.

¹⁸ CMA 11, paragraph 3.6.

¹⁹ UIL Variation Request, section 4.

²⁰ [REDACTED] bank were appointed in [REDACTED] 2020 with active marketing of the business commencing [REDACTED] 2020 (see second and fifth MT reports).

²¹ UIL Variation Request, paragraph 4.1, 4.2, 4.5

²² [details of negotiations with prospective purchasers] [REDACTED]. UIL Variation Request, paragraph 4.3-4.4.

²³ [details of negotiations with prospective purchasers] [REDACTED] (Annex 1 to Circle's submission containing an update on the Birmingham divestment process, dated 30 April 2021).

18. Circle submitted that despite being a new, state of the art facility, the sales process, including the engagement with [X] [potential purchasers], has demonstrated Circle Birmingham [X] [as currently comprised is unlikely to be divested], which constitutes a material change in circumstances meriting a review of the UILs.²⁴
19. Circle also stated that COVID-19 has had a significant operational impact on both the NHS and the private hospital sector in the UK, resulting in longer delays and a growing number of patients on waiting lists.²⁵
20. With regards to the entry of HCA, Circle submitted that HCA is on track to open a new hospital in Birmingham in mid-2022 and that a recruitment drive is in progress.²⁶

Background to the CMA's acceptance of the divestment of Circle Birmingham

21. The Circle Birmingham Hospital is a new build hospital that, at the time the CMA accepted the UILs, was nearing completion. At the time the CMA accepted the UILs, the Circle Birmingham Hospital was Circle's only site in Birmingham. A sale of Circle Birmingham to a suitable purchaser would address the entire overlap, thereby providing a comprehensive solution to remedy the SLC identified by the CMA in Birmingham.
22. The CMA considered that a new build hospital, that was not subject to the NHSE Agreement and not used by the NHS during the COVID-19 pandemic,²⁷ was likely to be an attractive asset the disposal of which would be capable of ready implementation, and would be available for the provision of private hospital medical services following final steps being taken to make it sale ready.²⁸
23. Under the UILs, Circle was allowed to retain and operate a rehabilitation facility (**Circle Rehab**), for which Circle had set up a separate subsidiary, Circle Rehabilitation Services Limited after entering into a joint venture with Vamed Management und Service GMBH, a third party rehabilitation provider. Circle Rehabilitation Services Limited entered into an agreement for a sub-underlease with Circle Birmingham, granting it the rights to operate the Circle Rehab within a separately demised area within the development, on the first

²⁴ UIL Variation Request, paragraph 4.6

²⁵ UIL Variation Request, paragraph 4.7

²⁶ UIL Variation Request, paragraph 4.15

²⁷ UIL Acceptance Decision, paragraph 14

²⁸ UIL Acceptance Decision, paragraph 48

and third floor of the facility and on most of the second floor.²⁹ Rehabilitation services did not form part of the market where the CMA found a realistic prospect of an SLC and Circle Rehab was excluded from the scope of divestment business in Birmingham under the UILs.

24. The proposed UILs were subject to a public consultation pursuant to paragraph 2(1) of Schedule 10 to the Act, which commenced on 14 May 2020, however the consultation did not specifically consider the [X] of the Circle Birmingham Hospital.³⁰ Five of the six respondents to the CMA's consultation either supported the proposed UILs or stated they had no comment on the proposals. The sixth respondent was [X], whose key concern was that Circle Birmingham should be made operational as swiftly as possible so that it can help ease capacity constraint in the Birmingham area. These third party submissions did not cause the CMA to change its preliminary view that the UILs offered by Circle in principle would be acceptable.³¹

Change of circumstances

25. Based on the evidence currently available, the CMA does not consider that either the impact of the COVID-19 pandemic, or the entry of HCA give rise to a realistic prospect of a change in circumstances that would merit conducting a review of the UILs. This is on the basis that:
- (a) The UILs were accepted in June 2020, at a time when the nature of the burdens of the COVID-19 pandemic on the NHS and private hospital sector were either known or reasonably foreseeable.
 - (b) The impact of the COVID-19 pandemic was already taken into account by the CMA in its assessment of both the Merger and the UILs. In the SLC Decision, the CMA took the view that COVID-19 would not alter the competitive dynamics in the long term. In assessing the proposed duration of the Divestment Period and the need for an upfront buyer, the CMA expressly took into account the impact of COVID-19³² and the resulting NHSE agreement.³³ Moreover, other than the impact on [X]

²⁹ UIL Acceptance Decision, paragraph 42

³⁰ The full consultation text is available on the CMA's website, at <https://www.gov.uk/cma-cases/circle-health-bmi-healthcare-merger-inquiry>

³¹ UIL Acceptance Decision, paragraph 26.

³² UIL Acceptance Decision, paragraph 46

³³ The NHS agreement refers to an agreement dated 21 March 2020 between NHS England and private hospital operators (including Circle and BMI), whereby private hospitals agreed to effectively put their entire hospital capacity temporarily under the control of the NHS to deal with the COVID-19 outbreak. See also SLC Decision, paragraph 9.

(which we consider below) there is no clear locus between the passage of the COVID-19 pandemic, relative to potential scenarios at the time of the CMA's original decision accepting the UILs, and the difficulties experienced in implementing the divestiture.

- (c) The entry of HCA by mid-2022 was expressly recognised by the CMA in the SLC Decision, with the CMA concluding that it would be neither timely nor sufficient to prevent a realistic prospect of an SLC arising in Birmingham.³⁴ Circle has not provided any new evidence indicating that there has been a change to that timeline since the UILs were accepted. The only development has been the passage of time, in that over 12 months have lapsed since the SLC Decision was issued.
26. For the reasons set out above, the impact of the COVID-19 pandemic and the entry of HCA are therefore not considered further in this decision (save to the extent this was a factor taken into account by the CMA when accepting the UILs, and as an additional factor in [REDACTED] [changes relating to] Circle Birmingham Hospital which are considered further below).
27. In considering whether there is a realistic prospect of finding a change of circumstances, the CMA has assessed the evidence gathered from Circle and the MT with respect to [REDACTED] of the Circle Birmingham Hospital. The CMA considered in particular:
- (a) the provisions of the UILs with respect to [REDACTED];
 - (b) the [REDACTED] as between Circle Rehab and the remainder of the site;
 - (c) changes to [REDACTED]; and
 - (d) market testing and views of prospective purchasers.

UIL provisions on [REDACTED]

28. The UILs themselves are silent on [REDACTED] but do make a reference to the [REDACTED]. It was also clear to the CMA from discussions with Circle and through the Remedies Form that the rehabilitation facility retained by Circle would [REDACTED].³⁵ At the time the UILs were accepted, the CMA considered that the [REDACTED] would be subject to [REDACTED].

³⁴ SLC Decision, paragraphs 23-25

³⁵ Remedies Form, paragraph 4.13.

[REDACTED] [Details of lease arrangements]

29. The [REDACTED] is derived from Circle's agreements with [REDACTED] that predate the UILs: (i) an agreement [REDACTED]; and (ii) a deed of variation [REDACTED].
30. In terms of how the [REDACTED] Circle Rehab and the remainder of the facility, Circle submitted that [REDACTED] [details of lease arrangements].³⁶ The [REDACTED] took account of the [REDACTED]. Circle submitted that the reason for this approach was that [REDACTED]. Circle stated that it agreed with [REDACTED] that the [REDACTED] method was the most appropriate means for [REDACTED], at the time of signing the deed of variation.³⁷
31. Circle has submitted that adopting a different [REDACTED] from the one above, that would result in [REDACTED] would lead to the.³⁸
32. The overall [REDACTED] of the entire site (comprising both Circle Rehab and the acute facility) is broadly calculated at [REDACTED]% [REDACTED].³⁹

Changes to [REDACTED]

33. Figure 1 sets out how the estimated [REDACTED] (including [REDACTED])⁴⁰ and [REDACTED] of the acute facility at the Circle Birmingham Hospital (excluding Circle Rehab) have changed over time.

Figure 1: Per annum [REDACTED] of the Circle Birmingham Hospital (acute facility only, excluding Circle Rehab)

	Project start (agreement [REDACTED] signed)	Deed of variation [REDACTED]	UIL offer and CMA provisional acceptance	Current position*
	[REDACTED]	[REDACTED]	Apr-20 ⁴¹	Jun-21
[REDACTED] (incl. [REDACTED])	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

34. As set out in Figure 1, there have been a number of changes to the [REDACTED] Circle Birmingham Hospital and [REDACTED] over the life of the project.

(a) In [REDACTED], the expected [REDACTED] for the acute facility was [REDACTED], [REDACTED].

³⁶ [REDACTED] The CMA understands that [REDACTED]. Circle's response to the CMA's request for information dated 30 June 2021, paragraph 2.2

³⁷ Circle's response to the CMA's request for information dated 30 June 2021, paragraph 4.1 and 1.1.

³⁸ Parties' submission containing an update on the Birmingham divestment process, dated 30 April 2021, paragraph 2.10-2.13

³⁹ Circle's response the CMA's requested for information dated 30 June 2021, paragraph 2.4.

⁴⁰ [REDACTED]. Circle's response to the CMA's request for information dated 30 June 2021, Schedule.

⁴¹ Following the SLC Decision, Circle had until 17 April 2020 to offer UILs.

- (b) In [REDACTED] April 2020 ([REDACTED] prior to the CMA's decision to accept UILs in principle⁴²), which was reflected in the Remedies Form submitted to the CMA,⁴³ Circle had [REDACTED]. This [REDACTED] was the expected [REDACTED] at the time the CMA accepted the UILs.
- (c) As of 22 June 2021, [REDACTED] has shared a revised estimate of the [REDACTED] with Circle, showing that total [REDACTED] have changed [REDACTED]. [REDACTED] for the acute facility.⁴⁴
35. The CMA therefore understands that the [REDACTED] for the acute facility as of April 2020 (prior to the CMA's acceptance of the UILs) was [REDACTED]. Since then, the estimate of the [REDACTED] has [REDACTED] [changed].⁴⁵
36. Circle explained that the main reason for the [REDACTED] [changes] [REDACTED]. The COVID-19 pandemic was an additional factor in [REDACTED].⁴⁶

Market testing and views of prospective purchasers

37. Alongside the [REDACTED] [changes], it was also not known at the time the CMA accepted the UILs whether [REDACTED] from the perspective of potential purchasers or [REDACTED]. Circle did not [REDACTED] with the proposed divestment of Circle Birmingham at the time of the UILs, as [REDACTED].⁴⁷
38. In recent submissions to the CMA, Circle stated that [REDACTED].⁴⁸
39. Where the CMA is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package (arising from a combination of composition and purchaser risk), it may require the merger parties to offer an upfront buyer, that is contractually committed to the transaction, before the CMA approves the UILs.⁴⁹ The potential for [REDACTED] is an example of such a risk.
40. In this case, requiring an upfront buyer might have identified the problem with the [REDACTED], or alternatively, if the problem could not be satisfactorily resolved within the statutory timescale for accepting UILs, the case may have potentially resulted in a phase 2 investigation. However, in light of the impacts of COVID-19 and the existence of the NHSE Agreement that required private

⁴² CMA's decision that undertakings might be accepted, dated 24 April 2020, available on the CMA's website at <https://www.gov.uk/cma-cases/circle-health-bmi-healthcare-merger-inquiry>

⁴³ Remedies Form, Annex 4.

⁴⁴ [REDACTED] [details of the changes]. Circle's response to the CMA's request for information dated 30 June 2021, paragraphs 2.1-2.8.

⁴⁵ [REDACTED] [details of changes].

⁴⁶ Circle's response to the CMA's request for information dated 30 June 2021, paragraph 2.2 and 3.1.

⁴⁷ Remedies Form, Annex 4, paragraph 3.1

⁴⁸ Circle's response to the CMA's request for information dated 30 June 2021, paragraph 6.2

⁴⁹ [Merger remedies](#) (CMA 87), 13 December 2018, paragraph 5.28.

hospitals to support the NHS in responding to the pandemic, the CMA agreed with Circle's submissions in the Remedies Form that it would not have been feasible while the NHSE Agreement was in force to identify an upfront buyer and to achieve a sale within the applicable statutory timetable.⁵⁰

41. It has been the subsequent market testing, carried out by [X] [Circle's financial advisers] in the context of the sale process, that has identified [X] [that there is currently no prospective purchaser for Circle Birmingham] for prospective purchasers. In particular:
- (a) [X] [prospective purchaser] confirmed that its concern in relation to the site was [X] [costs], stating that it [X]. [X] [prospective purchaser] was also [X], and that [X]. [X] [Prospective purchaser] considered this to be [X]⁵¹
- (b) Similarly, [X] [prospective purchaser] also cited the [X].⁵²

The CMA's assessment

42. The evidence set out in paragraphs 29-36 above indicates that since the acceptance of the UILs, there has been a [X] [change in] costs Circle Birmingham Hospital as a result of [X] which the CMA considers to be material. Further to a marketing process for Circle Birmingham conducted by a third party [X], the commercial significance of the [X] [change] is supported by evidence from prospective purchasers, [X], and indicates that [X], Circle Birmingham is not [X].
43. The CMA therefore believes that there is a realistic prospect of finding a change of circumstances in relation to Circle Birmingham. The CMA has therefore decided that it would be appropriate to conduct a review of the UILs.
44. This decision is limited to whether to conduct a review of the UILs. The CMA is not, at this stage, required to decide on the statutory question under section 92(2)(b) of the Act of whether there has been a change of circumstances, such that the UILs relating to Circle Birmingham are no longer appropriate and need to be varied or superseded by a new enforcement undertaking.

⁵⁰ Remedies Form, paragraph 16; UIL Acceptance Decision, paragraph 49.

⁵¹ [X] 12 March 2021.

⁵² UIL Variation Request, paragraph 4.5; Monitoring Trustee, eighteenth report, page 23.

Prioritisation Principles

45. With regard to the CMA's [prioritisation principles](#), the CMA considers that a review of the UILs should be considered a priority for the CMA for the following reasons:
- (a) **Strategic significance:** The review of the UILs is a good fit with the CMA's objectives and strategy and it reflects the CMA's statutory duties to achieve an effective and clear cut solution to phase 1 mergers that give rise to a realistic prospect of an SLC and to keep enforcement undertakings under review. Further, in the context of this case, Circle's variation request relates to undertakings which have not yet been implemented.
 - (b) **Impact:** Pending the sale of Circle Birmingham, the SLC identified by the CMA in Birmingham has not been effectively remedied and the acute facility at the Circle Birmingham Hospital is not yet operational, to the detriment of patient choice and capacity for private hospital medical services in the Birmingham area.
 - (c) **Risk:** Conducting a review will give market participants a thorough opportunity to comment and submit further evidence on alternative divestiture options [X], , in line with the CMA's published guidance and the public consultation requirements of Schedule 10 of the Act, maximising the likelihood of a successful outcome.
 - (d) **Resources:** The CMA considers, in the light of the evidence provided, that there is a realistic prospect of finding a change of circumstances which justifies CMA action and that this project can be delivered with proportionate resources.

Decision to conduct a review

46. For the reasons set out above, the CMA considers that there is a realistic prospect of finding a change in circumstances relating to Circle Birmingham. Moreover, the CMA has assessed the need to launch the review of the UILs against its published prioritisation principles and found its launch to be consistent with these principles. The CMA has therefore decided to conduct a review of the UILs, pursuant to section 92(2)(b) of the Act.
47. As the UILs have not yet been implemented by Circle at the date of this decision, the CMA considers it appropriate for the review of the UILs to be

undertaken by Joel Bamford, Senior Director of Mergers.⁵³

Adam Land

Senior Director of Remedies Business and Financial Analysis

Competition and Markets Authority

2 August 2021

⁵³ CMA 11, paragraph 3.12 and footnote 14.