

Circle/BMI Undertakings Review

Provisional findings report

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The Competition and Markets Authority has excluded from this published version of the provisional findings report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. [Some numbers have been replaced by a range. These are shown in square brackets.] [Non-sensitive wording is also indicated in square brackets.]

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Provisional Findings

1. Background

- 1.1 On 8 January 2020, Circle Health Holdings Limited (**Circle**) acquired all the issued share capital of GHG Healthcare Holdings Limited, the indirect parent company of BMI Healthcare Limited (collectively **BMI**).
- 1.2 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**) as a result of horizontal unilateral effects in relation to the supply of Private Hospital Medical Services (**PHMS**) in Bath and Birmingham (the **SLC Decision**¹).
- 1.3 On 23 June 2020, the CMA accepted undertakings in lieu of a reference under section 73(2) of the Act (**UILs**²), pursuant to which Circle agreed to divest Circle Hospital (Bath) Limited (**Circle Bath**) and Circle Birmingham Limited (**Circle Birmingham Hospital or the acute facility**) (the **Divestiture Businesses**) to a purchaser or purchasers approved by the CMA by the end of the Divestiture Period (as defined in the UILs) (**UIL Acceptance Decision**).
- 1.4 The facility (**Circle Birmingham**) comprises Circle Birmingham Hospital and Circle Rehabilitation Services Limited (**Circle Rehab**). With respect to Circle Birmingham, the UILs specifically provided that Circle could continue to operate the Circle Rehab 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 Hospital.⁴
- 1.5 On 1 June 2021, Circle completed the divestiture of Circle Bath to Royal United Hospitals Bath NHS Foundation Trust.⁵
- 1.6 Despite running a formal divestiture process Circle received no formal offers for Circle Birmingham Hospital. The key issue raised by bidders was the cost of the [X]. The lease is held with a third-party landlord, Medical Properties Trust (**MPT**). On 21 June 2021, Circle requested the CMA varies the UILs insofar as they relate to the divestiture of Circle Birmingham Hospital (**UILs Variation Request**).

¹ Please access the [SLC Decision](#) in the Circle/BMI case page.

² Please access the [UIL Acceptance Decision](#) in the Circle/BMI case page.

- 1.7 This paper sets out the CMA's provisional decision with respect to the UILs Variation Request under the following structure:
- (a) an overview of the SLC Decision;
 - (b) an overview of the Circle UIL;
 - (c) the CMA's assessment of a change of circumstances;
 - (d) the implications of the CMA's provisional decision; and
 - (e) next steps.

The SLC Decision in Birmingham

- 1.8 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. At the time of the SLC Decision, it operated two private hospitals in Bath and Reading, with plans to open a third hospital in Birmingham. BMI currently operates 49 hospitals, two of which are in Birmingham (BMI Edgbaston and BMI Priory) and clinics throughout the UK, providing elective care services to NHS-funded patients and privately-funded patients.
- 1.9 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 faced limited competition in Birmingham and that when Circle was to open its hospital, Circle and BMI would compete closely with each other.
- 1.10 Circle's internal documents showed that Circle was focused on targeting BMI's revenues. Similarly, BMI's internal documents showed that BMI recognised the significant threat posed by Circle. The CMA concluded this competitive constraint would be lost as a result of the Merger. The evidence was consistent across all types of care, sources of funding and overlapping specialties. The CMA therefore believed that the Merger gave 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.³
- 1.11 It is important to note that in the current context, whilst [REDACTED], the Parties' internal documents indicated that Circle Birmingham Hospital's entry was

³ 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 addressed differences in competition for self-pay patients and private medical insurance (**PMI**) patients in the competitive assessment.

expected to have a significant competitive impact on both BMI Priory and Edgbaston.⁴ The SLC Decision noted that [REDACTED] was not inconsistent with the impact on BMI Priory being material. The CMA noted that [REDACTED]. [REDACTED]^{5, 6}

- 1.12 As part of its assessment, the CMA took into account the fact that private hospitals had effectively put their entire hospital capacity temporarily under the control of the NHS to deal with the Coronavirus (COVID-19) outbreak, which in particular might delay the planned opening of Circle's and HCA's hospitals in Birmingham.⁷ The CMA considered that the NHS Agreement⁸ was unlikely to impact the long-term competitive dynamics of the private healthcare industry.⁹

The Circle UIL

Key aspects of the UILs in relation to Birmingham

- 1.13 As set out in the UILs, Circle offered to divest Circle Bath and the Circle Birmingham Hospital.¹⁰
- 1.14 The CMA took into account the impact of the Coronavirus (COVID-19) pandemic and the NHSE Agreement in its assessment of the Proposed Undertakings. In particular, the CMA agreed that:
- (a) the Circle Birmingham Hospital could be sold in 'sale-ready' form. The hospital was not operational and the CMA took into account that during the pandemic it would be hard to operationalise;
 - (b) the divestiture period would be extended; and
 - (c) no up-front buyer would be required.
- 1.15 The CMA accepted these conditions as it had become clear that the impact of the Coronavirus (COVID 19) pandemic was likely to be long-lasting as the NHS continued to deal with the pandemic and addressed the backlog caused by cancelled services since the beginning of the crisis.¹¹

⁴ [Full text decision \(publishing.service.gov.uk\)](#), paragraph 223, page 62.

⁵ See footnote 83 and Annex 10.46, slide 58. See also Annexes 10.39, 10.40 and 4.34 which state: [REDACTED].

⁶ [Full text decision \(publishing.service.gov.uk\)](#), as summarised in paragraph 231-234, page 66.

⁷ [Full text decision \(publishing.service.gov.uk\)](#), as noted in paragraph 9, page 2.

⁸ The NHS Agreement refers to an agreement dated 21 March 2020 between NHS England and private hospital operators (including Circle and BMI) whereby private agreed to effectively put their entire hospital capacity temporarily under the control of the NHS to deal with the COVID-19 outbreak (the **NHS Agreement**).

⁹ [Full text decision \(publishing.service.gov.uk\)](#), as noted in paragraph 57, page 11.

¹⁰ For the avoidance of doubt, excluding the rehabilitation facility.

¹¹ [UIL acceptance decision \(publishing.service.gov.uk\)](#), paragraph 13, page 4.

- 1.16 With respect to making the Circle Birmingham Hospital ‘sale-ready’, the UILs required Circle to:
- (a) complete the construction of the hospital building and receipt of all applicable building regulations approvals;
 - (b) enter into the Underlease¹² and the Sub-underlease;¹³
 - (c) install and test the following building systems: (i) heating, ventilation and air conditioning (HVAC), (ii) water and (iii) medical gasses;
 - (d) install and test the LAN cabling into the server room;
 - (e) install and test the fixed operating theatre equipment and other fixed medical equipment (including MRI and X-Ray equipment); and
 - (f) installation of appropriate catering facilities.¹⁴
- 1.17 On 25 June 2020, the CMA directed Circle to appoint a Monitoring Trustee (**MT**) pursuant to paragraph 13.1 of the UILs. The MT confirmed Circle’s compliance with implementing the above UILs provisions.
- 1.18 Circle was given [~~8~~] [several] months to implement a divestiture of Circle Birmingham Hospital.¹⁵
- 1.19 The UILs provide also for the appointment of a divestiture trustee should Circle not comply with its obligations, however the CMA had not used this power yet (see paragraph 3.37 for further explanation).

The request to review the UILs

- 1.20 On 1 June 2021, Circle completed the divestiture of Circle Bath to Royal United Hospitals Bath NHS Foundation Trust.¹⁶ However, despite extensions to the Divestiture Period, as of the date of this provisional decision, Circle has not yet divested Circle Birmingham Hospital.

¹² means the underlease agreement to be entered into between MPT Circle Birmingham S.a.r.l. (company number. B210919) with registered office at 25 Rue Philippe II, L-2340 Luxembourg City, Luxembourg and Circle Birmingham Limited (company number 07714029) with registered office at 1st Floor, 30 Cannon Street, London, England, EC4m 6XH.

¹³ means the sub-underlease to be entered into between Circle Birmingham Limited (company number 07714029) with registered office at 1st Floor, 30 Cannon Street, London, England, EC4m 6XH and Circle Rehabilitation Services Limited (company number 10527747), 1st Floor, 30 Cannon Street, London, England, EC4m 6XH’.

¹⁴ [Final undertakings \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), section 4, page 4.

¹⁵ [Final undertakings \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), page 13.

¹⁶ https://www.ruh.nhs.uk/media/media_releases/2021_06_01_RUH_buys_Circle_hospital.asp.

- 1.21 On 21 June 2021, Circle requested the CMA to vary the UILs insofar as they relate to the divestiture of Circle Birmingham Hospital, so that BMI's hospital in Edgbaston (**BMI Edgbaston**) may be sold to a purchaser approved by the CMA, instead of Circle Birmingham (**UILs Variation Request**).
- 1.22 The UILs Variation Request stated that the circumstances underlying the UILs have materially changed since the UILs came into force, on the basis of:¹⁷
- (a) Circle Birmingham Hospital being a high cost asset;
 - (b) the impact of the Coronavirus (COVID-19) pandemic; and
 - (c) the entry of HCA.
- 1.23 Circle submitted that the divestiture process, which had been conducted over a period of [REDACTED] [several] months¹⁸ by an investment bank and supervised by the MT, did not ultimately yield any binding offers despite Circle Birmingham Hospital [REDACTED].
- 1.24 Circle also stated that the Coronavirus (COVID-19) pandemic has had a significant operational impact on both the NHS and the private hospital sector in the UK,¹⁹ and that HCA is on track to open a new hospital in Birmingham in mid-2022 and that a recruitment drive is in progress.²⁰

Decision to launch a review of the UILs

- 1.25 On 2 August 2021 the CMA decided to launch a review of the UILs to consider whether there has been any change of circumstances such that the current undertakings are no longer appropriate and should be varied or superseded.²¹
- 1.26 As set out in the decision to conduct a review of the undertakings in lieu of a reference (**Decision to conduct a review of the UILs**), the CMA found that, since the acceptance of the UILs, there had been a [REDACTED] [change] in costs for the Circle Birmingham Hospital as a result [REDACTED] which the CMA considered to be material.²²

¹⁷ UIL Variation Request, section 4.

¹⁸ [REDACTED] were appointed in [REDACTED] 2020 with active marketing of the business commencing [REDACTED] 2020 (see second and fifth MT reports).

¹⁹ UIL Variation Request, paragraph 4.7

²⁰ UIL Variation Request, paragraph 4.15

²¹ See [Circle Health / BMI Healthcare: Review of undertakings - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/circle-health-bmi-healthcare-review-of-undertakings)

²² [Decision on whether to conduct a review of the undertakings in lieu \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/news/cma-decision-on-whether-to-conduct-a-review-of-the-undertakings-in-lieu)

- 1.27 Further to a marketing process for Circle Birmingham Hospital conducted by a third party [REDACTED], the commercial significance of the [REDACTED] [change] was supported by evidence from prospective purchasers, [REDACTED], and indicated that, [REDACTED], Circle Birmingham Hospital was not sufficiently commercially attractive to be attractive to potential purchasers [REDACTED].
- 1.28 The CMA therefore believed that there was a realistic prospect of finding a change of circumstances in relation to Circle Birmingham Hospital. The CMA decided that it would be appropriate to conduct a review of the UILs.
- 1.29 When launching a review of the UILs, the CMA had not, at that stage, decided 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 Hospital are no longer appropriate and need to be varied or superseded by a new enforcement undertaking. This document sets out the CMA's provisional decision on that question.

CMA's legal powers

Powers to accept undertakings in lieu of a reference

- 1.30 Section 73(1) of the Act gives the CMA the power to accept undertakings in lieu of a reference only where the CMA has concluded that the duty to refer is met and the CMA has decided not to apply any available exceptions to the duty to refer.²³ Any undertakings in lieu of a reference accepted by the CMA must be for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effects identified. In deciding to accept undertakings in lieu of a reference, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.²⁴
- 1.31 Any remedy accepted by the CMA at Phase 1 must meet the clear cut standard set out in its Remedies Guidance and must be capable of ready implementation.²⁵ This means that in order to accept undertakings in lieu of a reference, the CMA must be confident that all of the potential competition concerns that have been identified at Phase 1 would be resolved by means of the undertakings without the need for further investigation. The need for

²³ The CMA's approach to applying the exceptions from the duty to refer is set out in the [Mergers: Exceptions to the duty to refer \(CMA64\)](#), 13 December 2018.

²⁴ Section 73(3) of the Act.

²⁵ [Merger remedies \(publishing.service.gov.uk\)](#) paragraph 3.27.

confidence reflects the fact that, once undertakings in lieu of a reference have been accepted, section 74(1) of the Act precludes a reference after that point.

- 1.32 It is always at the parties' discretion whether to offer undertakings in lieu of a reference. However, in choosing to offer undertakings in lieu of a reference, the merger parties avoid the burden of a phase 2 investigation but also forego the possibility of the phase 2 investigation leading to a different outcome. The CMA cannot impose a remedy via an Order at Phase 1 unless the CMA has previously accepted undertakings in lieu of a reference and those undertakings are not being or will not be fulfilled, in which case the CMA has Order-making powers under section 75 of the Act.
- 1.33 Where the CMA decides that undertakings in lieu of a reference will be accepted only where the merger parties have identified an upfront buyer, the CMA will not accept the undertakings unless a divestiture agreement, generally conditional from the buyer's perspective only on acceptance of the UILs by the CMA (and the completion of the main transaction if it remains anticipated), has been agreed with a buyer for the divestiture business and the CMA considers that the buyer would be acceptable.
- 1.34 The CMA will assess on a case-by-case basis whether a monitoring trustee should be appointed to oversee and report on the divestiture process.²⁶
- 1.35 In other cases, where no upfront buyer provision is required, the CMA will continue to have an active role to play after it has formally accepted the undertakings from the parties. Thus, where the undertakings are structural in nature, they will provide for a divestiture period within which the merger parties must identify a suitable purchaser for the divestiture business and conclude a divestiture agreement with that buyer. And if the merger parties are unable to find a suitable purchaser capable of being approved by the CMA within the time period specified within the undertakings, the undertakings will typically provide for the CMA to be able to appoint a divestiture trustee to sell the divestiture business on behalf of the merger parties at no minimum price, or for the CMA to direct the parties to sell at no minimum price.
- 1.36 Once undertakings in lieu of a reference have been accepted, the CMA is released from its duty to refer by section 74(1) of the Act and indeed is prohibited from making a reference. The undertakings therefore become the definitive solution to any SLC found at Phase 1. Section 74(1) of the Act precludes a reference to Phase 2²⁷ even where undertakings in lieu of a

²⁶ Monitoring Trustees are appointed to ensure that Undertakings are complied with.

²⁷ Unless material facts about the relevant arrangements or transactions in consequence of which the enterprises subject to the merger have or will cease to be distinct (or relevant proposed arrangements or transactions) were not notified to the CMA, or made public before the UILs were accepted (sections 74(2) to (4) of the Act).

reference are not fulfilled. In that situation, the CMA can rely on its order-making power under section 75 of the Act and, if necessary, bring civil proceedings, under section 94 of the Act, to enforce the undertakings and/or the section 75 order.

- 1.37 Section 75 of the Act gives the CMA the power to issue an order against the merger parties to ensure fulfilment of the undertakings in lieu of a reference. Such orders may be made for the purposes listed in section 73(2) of the Act (namely to remedy, mitigate or prevent the SLC and any adverse effects resulting from it)²⁸ and may contain provision which is different from the provision contained in the undertaking concerned.^{29,30}

Varying undertakings in lieu of a reference³¹

- 1.38 Under section 73(5)(b) of the Act, an undertaking accepted in lieu of a reference, '*may be varied or superseded by another undertaking*'. Alternatively, it may be entirely released by the CMA under section 73(5)(c).
- 1.39 Under section 92(2)(b) of the Act, the CMA has a duty to keep undertakings under review and consider, from time to time, whether '*by reason of any change of circumstances, an enforcement undertaking is no longer appropriate*'³² and if it needs to be "varied or superseded by a new enforcement undertaking". This is the legal standard of proof that needs to be met before the CMA's consent to any variation is granted.
- 1.40 What constitutes a change of circumstances will vary case by case. However, the change of circumstances must be such that undertaking is no longer appropriate in dealing with the competition problems and/or adverse effects which it was designed to remedy. Examples of such circumstances include where the undertaking has become clearly obsolete, changes in legislation or changes in market conditions.³³

²⁸ Section 75(3) of the Act

²⁹ Section 75(5)(b).

³⁰ The OFT/CMA has made an order under section 75 to give effect to an undertaking only once, in Completed acquisition by Greene King plc of Laurel Pub Holdings Limited. On 6 October 2004, the OFT accepted UILs from Greene King to divest 13 pubs to a buyer/ buyers approved by the OFT by 5 April 2005. By this deadline, Greene King had disposed of all but one of these pubs, with the remaining pub being in the PSD of Oxford. The OFT extended its deadline, but Greene King was still unable to comply. As a result, the OFT ordered Greene King to reduce its share of full publican on-licenses in the Oxford PSD to 25% or less within a three month period or to the level held by Greene King or Laurel immediately prior to the acquisition.

³¹ The CMA's approach to the review of remedies is set out in [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#), 13 December 2018.

³² Section 89(2) of the Act clarifies that the term "enforcement undertaking" includes an undertaking in lieu of a reference accepted under section 73 of the Act.

³³ Paragraphs 2.4 to 2.6 of the CMA11.

- 1.41 In this case, the CMA will therefore need to be satisfied that first, there has been a change of circumstances in relation to Circle Birmingham Hospital (eg, by reason of Coronavirus (COVID-19) pandemic related changes in market conditions, the imminent entry of a new competitor (HCA) and/or the commercial attractiveness borne out by a failure, despite best endeavours, to find a purchaser for the site); and second, that as a result of these changes, the divestiture of Circle Birmingham Hospital in the manner provided for in the UILs is no longer appropriate in dealing with the SLC in the supply of private hospital medical services in Birmingham. The CMA would typically apply these provisions where market conditions have changed in such a way that the problem the UILs were designed to resolve no longer applies. The CMA has not to date sought to rely on this provision where the underlying concern remains the same, but there has proved to be an issue with the effectiveness of the remedy.
- 1.42 Whilst section 73(5) envisages undertakings in lieu of a reference being varied, released or superseded by a new enforcement undertaking, section 92(4) makes clear that the CMA shall take such action as it considers appropriate in relation to any enforcement undertaking accepted by it and this includes any possible enforcement order to be made by it instead of an enforcement undertaking (section 92(4)(d) of the Act). In the context of undertakings in lieu of a reference this would apply to the use of the CMA's order making power under section 75 of the Act in circumstances where the undertakings have not been fulfilled.
- 1.43 For completeness, the CMA has also had regard to its published guidance, 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.

2. Consideration of a change of circumstance

Introduction

- 2.1 In this section, the CMA considers whether there has been a change of circumstances such that the current UILs are no longer appropriate. In this instance, Circle has told the CMA that the Circle Birmingham Hospital being a high cost asset; the impact of the Coronavirus (COVID-19) pandemic; and the entry of HCA are material changes and that the current UILs are no longer appropriate.

Nature of the change of circumstances

- 2.2 Circle submitted that the divestiture process, which was conducted over a period of [REDACTED] [several] months³⁴ by an investment bank and supervised by the MT, did not ultimately yield any binding offers despite Circle Birmingham Hospital [REDACTED]. Specifically:
- (a) Circle received [REDACTED] initial non-binding offers from [REDACTED]. Circle then progressed to a detailed due diligence process with [REDACTED].³⁵
 - (b) [details of negotiations with prospective purchases] [REDACTED].³⁶
- 2.3 Circle submitted that despite being a new, state of the art facility, the divestiture process, including the engagement with [REDACTED], has demonstrated Circle Birmingham Hospital to be a high cost and [REDACTED], which constituted a material change in circumstances meriting a review of the UILs.³⁷
- 2.4 Circle also stated that the Coronavirus (COVID-19) pandemic has had a significant operational impact on both the NHS and the private hospital sector in the UK, including Birmingham, resulting in longer delays and a growing number of patients on waiting lists.³⁸ Circle submitted that the number of patients waiting for treatment has increased by 67% compared to the pre-Covid position. Pre-Covid there were no patients waiting more than a year for surgery, whereas that number is now almost 18,000.³⁹
- 2.5 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 and thus Circle consider that HCA entry is now timely and sufficient.⁴⁰

Third party evidence

- 2.6 See paragraph 2.28 for comments received by purchasers during the sales process.

³⁴ [REDACTED] were appointed in [REDACTED] 2020 with active marketing of the business [REDACTED] 2020 (see second and fifth MT reports).

³⁵ UIL Variation Request, paragraph 4.1, 4.2, 4.5

³⁶ [REDACTED] [details of negotiations with prospective purchasers]. UIL Variation Request, paragraph 4.3-4.4.

³⁷ UIL Variation Request, paragraph 4.6

³⁸ UIL Variation Request, paragraph 4.7

³⁹ [Summary of the variation request \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁴⁰ UIL Variation Request, paragraph 4.15

2.7 As already noted, the lease is held with a third-party landlord, MPT. The CMA was provided a letter from [REDACTED] stating [REDACTED].⁴¹

The CMA's assessment of whether circumstances have changed

2.8 In this section the CMA assesses the evidence as to whether there has been a change of circumstance such that the UILs are no longer appropriate.

Assessment of potential change of circumstances related to market conditions

2.9 In assessing whether there has been a relevant change of circumstances for the purposes of section 92, the CMA assesses whether the circumstances that led to the SLC finding no longer apply and/or whether the circumstances that led to the acceptance of the UILs as being as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it no longer apply. The review of the UILs is focused on whether there have been changes since the CMA's SLC Decision and acceptance of the UILs that were not factored into the CMA's analysis or thinking at the time.

2.10 It is important to note that the SLC that the CMA found was not time limited. As such the SLC and the need for a remedy does not fall away simply due to a passage of time unless this is specifically provided for in the relevant remedy, nor would it be appropriate that a delay in implementing a remedy could lead to it no longer being required unless new evidence suggests the Undertaking is no longer appropriate.

The entry of HCA

2.11 Circle contends that the more certain and closer entry of HCA in Birmingham is a material change in circumstance.

2.12 According to HCA's website, The Harborne Hospital, part of HCA is planning to open in Birmingham during 2022. The hospital will be a new £100m hospital. It will be located on the Queen Elizabeth Hospital Birmingham's campus and will provide a full range of healthcare services, including acute and complex care for private patients in the West Midlands, as well as extra capacity and access to specialist facilities for NHS patients.⁴²

⁴¹ 23 March 2021 letter from [REDACTED].

⁴² [The Harborne Hospital Birmingham coming 2022 | HCA UK \(hcahealthcare.co.uk\)](https://www.hcahealthcare.co.uk)

- 2.13 Circle submitted that during the Coronavirus (COVID-19) pandemic BMI Priory [REDACTED].⁴³ Circle submitted that HCA will focus on the same complex/high acuity treatments that are currently offered by the BMI Priory, and will impose a significant competitive constraint on BMI Priory.
- 2.14 In response to the decision to conduct the review HCA told us its expectations are that the opening date of the PPU will now occur in [REDACTED], later than originally expected and HCA has only recruited 3 members of staff to date for this facility and no formal offers of practising privileges or employment have yet been made to medical consultants to carry out their medical practice.⁴⁴
- 2.15 In its SLC Decision, the CMA considered whether the 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.⁴⁵ The CMA concluded that HCA's entry was likely but was unable to conclude that it would be timely or sufficient to prevent a realistic prospect of an SLC arising from the merger in Birmingham. The CMA concluded that HCA's hospital was expected to be considerably smaller than the merged entity and, while there were expected to be overlaps in the planned specialties between HCA and the Parties, HCA's offering would have different areas of focus.
- 2.16 The CMA also noted that HCA's plans for the hospital might change in the period prior to opening. Furthermore, the CMA concluded that HCA's entry would only increase competition in Birmingham from a modest starting point. As of the SLC Decision, only Spire and Ramsay posed a significant and moderate constraint respectively on the Parties and the Merger was expected to weaken competition that would have developed in the absence of the Merger.⁴⁶
- 2.17 In summary, Circle has submitted that HCA's entry is now more certain and imminent, and that when it enters it will provide a constraint to the Parties, although this latter point appears to be based on a temporary change in functions at BMI Priory when it was providing services to the NHS.
- 2.18 The SLC decision took into account HCA's entry on a similar timescale and concluded it was likely. It did not conclude on timeliness, but did find that notwithstanding this, entry was not sufficient to prevent the SLC from arising. The CMA noted there may still be a material period of time prior to entry (or

⁴³ UILs Variation Request, paragraph 4.12: "during the course of the NHSE contract, [REDACTED] of admitted patient revenue under the General Surgery speciality for BMI Priory was highly complex, which BMI Edgbaston and CBH would be unable to carry out".

⁴⁴ Email from HCA Healthcare, 23 November 2021.

⁴⁵ SLC Decision paragraphs 24-25 and 278 – 279.

⁴⁶ [Full text decision \(publishing.service.gov.uk\)](#), as summarised in paragraph 24, page 5.

before it reaches full capacity) during which HCA would not impose a material constraint.⁴⁷ [✂]. Therefore, based on the evidence it has received, the CMA's provisional view is that neither uncertainty about the timing of HCA's opening nor the temporary changes made to BMI's service provision arising from the Coronavirus (COVID-19) pandemic are not changes of circumstance that would alter its findings on the sufficiency of HCA's entry that would lead to the CMA conclude that the UILs are no longer appropriate.

The impact of the Coronavirus (COVID-19) pandemic

- 2.19 Circle submitted that the impact of the Coronavirus (COVID-19) pandemic has had a very significant operational impact on both the NHS and the private hospital sector in the UK. Circle submitted that this was due to the pressure of treating large numbers of COVID-19 patients which has led to much longer delays for the growing number of patients on waiting lists.⁴⁸
- 2.20 Circle submitted that data on clinical pathways showed that four million fewer people completed elective treatment in 2020 compared with 2019. As well as fewer patients being treated, 2020 saw six million fewer people referred into consultant-led elective care than in 2019.⁴⁹
- 2.21 With regards to Birmingham, Circle submitted that data from NHS Digital showed that the number of patients waiting for treatment had increased by 67% compared to the pre-Coronavirus (COVID-19) pandemic position. Pre-Coronavirus (COVID-19) pandemic there were no patients waiting more than a year for surgery, whereas that number is now almost 18,000. Pre-Coronavirus (COVID-19) pandemic, 88% of orthopaedic patients were treated within the target wait time but is currently as low as 53%.⁵⁰
- 2.22 The Coronavirus (COVID-19) pandemic has had and continues to have a profound impact on the health care sector in the UK. Waiting lists have increased significantly and the NHS requires support from private providers to tackle the back log.
- 2.23 The Coronavirus (COVID-19) pandemic was in existence and the UK was in a national lockdown at the time of the SLC Decision. It was therefore a known quantity and factored into the CMA's assessment in the SLC Decision and its assessment of UILs. As noted in paragraph 1.15 it was as a result of the

⁴⁷ [Full text decision \(publishing.service.gov.uk\)](#), as summarised in paragraph 276, page 70.

⁴⁸ Circle - Submission re Edgbaston(386761688.1) (2).pdf, paragraph 4.7, page 6.

⁴⁹ Circle - Submission re Edgbaston(386761688.1) (2).pdf, paragraph 4.8, page 6.

⁵⁰ Circle - Submission re Edgbaston(386761688.1) (2).pdf, paragraph 4.10, page 6.

Coronavirus (COVID-19) pandemic that the CMA departed from its standard UILs implementation approach.

- 2.24 While the future impacts of the Coronavirus (COVID-19) pandemic are uncertain, competition amongst PHMS providers is as important today as it was when the CMA made its SLC Decision. Moreover, the CMA factored the Coronavirus (COVID-19) pandemic into its SLC Decision and in its consideration of the UILs. Accordingly, the CMA does not consider the Coronavirus (COVID-19) pandemic as being a change or circumstance that would lead to the CMA conclude that the UILs are no longer appropriate.

Change of circumstance in relation to the UILs

- 2.25 Despite Circle appointing [X] to run a divestiture process, no binding offers for Circle Birmingham Hospital were forthcoming. This was not the case for Circle Bath that was sold to Bath Royal United Hospitals NHS Foundation Trust.
- 2.26 As noted above, Circle Birmingham Hospital received initial interest from [X] purchasers. Of these, [X] ([potential purchasers]) pursued the prospect but ultimately could not reach an agreement with Circle. No binding offers were made for the site.

Market testing

- 2.27 In the cases where the CMA requires an upfront buyer, the CMA is allowed to defer the acceptance of the UILs until a purchaser has committed to acquire the site and third parties have had an opportunity to comment on both the remedy and the purchaser. However, in this case, in light of the Coronavirus (COVID-19) pandemic, the CMA agreed it would be impractical to require an upfront buyer. It was not known at the time the CMA accepted the UILs whether the [X] costs of Circle Birmingham Hospital [X] to potential purchasers or how it compared to other hospitals as the CMA had not required an upfront buyer on this occasion.
- 2.28 Circle did not raise concerns regarding the [X] of the proposed divestiture of Circle Birmingham Hospital at the time of the UIL Acceptance Decision. It has been the subsequent market testing, carried out in the context of the divestiture process, that has identified the [X] costs [X] that does not appear to be acceptable for prospective purchasers. In particular:
- (a) [prospective purchaser] confirmed that [X]. [prospective purchaser] [X]' [prospective purchaser] considered this to be [X].

(b) Similarly, [prospective purchaser] [redacted] also cited [redacted].

2.29 Circle submitted to the CMA that [redacted].⁵¹

Change in [redacted] costs

2.30 The overall [redacted] cost of Circle Birmingham [redacted].⁵²

2.31 There have been a number of changes [redacted] [to the costs] of Circle Birmingham and these [redacted] over the life of the project. In summary, the relevant changes are:

(a) in [redacted], the expected [redacted] for the Circle Birmingham Hospital was [redacted].

(b) In [redacted] of April 2020 (the [redacted] prior to the CMA's Decision to accept UILs in Principle⁵³), which was reflected in the Remedies Form submitted to the CMA,⁵⁴ [redacted]. This [redacted] was the expected [redacted] [costs] at the time the CMA accepted the UILs.

(c) As of 22 June 2021, a revised estimate [redacted], with the Circle Birmingham Hospital [redacted].⁵⁵

2.32 The CMA therefore understands that [redacted] as of April 2020 (prior to the CMA's acceptance of the UILs) was £[redacted]. Since then, the estimate [redacted].⁵⁶

2.33 Circle explained that the main reason for the [redacted] [changes] in costs [redacted].⁵⁷ [redacted]. The Coronavirus (COVID-19) pandemic was an additional factor [redacted].⁵⁸

Summary view of a change of circumstance with regards to the UILS

2.34 The evidence above leads to the CMA to conclude that there has been a change in circumstance in relation to the UILs on two fronts. Firstly, the [redacted] costs at Circle Birmingham have [redacted] [changed] by a material amount since the CMA accepted the UILs. In addition, at the time of the UILs Acceptance Decision, the CMA was not aware of how the [redacted] costs of the site compared to the market, it is subsequent market testing that has brought this to light.

⁵¹ Circle's response the CMA's requested for information dated 30 June 2021, paragraph 6.2

⁵² Circle's response the CMA's requested for information dated 30 June 2021, paragraph 2.4.

⁵³ 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>

⁵⁴ Remedies Form, Annex 4.

⁵⁵ [redacted] [details of the changes] Circle's response the CMA's requested for information dated 30 June 2021, paragraphs 2.1-2.8.

⁵⁶ [Decision on whether to conduct a review](#).

⁵⁷ There were a number of [redacted]. The total [redacted] known to the CMA at the time of the UIL acceptance [redacted] [changed] after the CMA's UIL acceptance decision. See [Decision on whether to conduct a review](#).

⁵⁸ Circle's response the CMA's requested for information dated 30 June 2021, paragraph 2.2 and 3.1.

This combination of factors reflects a relevant change of circumstances as it affects the CMA's assessment of what constitutes as comprehensive a remedy as is reasonable and practicable to the SLC and any adverse effects resulting from it for the purposes of section 73 of the Act.

Provisional conclusion on the change of circumstances

2.35 Based on the above assessment, the CMA believes that the entry of HCA and the Coronavirus (COVID-19) pandemic were already factored into the CMA's prior decisions.

2.36 As stated in the SLC Decision, the CMA considered that the HCA's entry was likely, but that even if it were timely enough, it would not be sufficient to prevent a realistic prospect of an SLC as a result of horizontal unilateral effects in Birmingham.⁵⁹ The information provided to the CMA does not indicate any change of circumstances that would alter that finding such that the UILs are no longer appropriate.

2.37 However, based on the above the CMA does consider that there has been a change of circumstances with regards to whether the UILs are an effective remedy to the SLC. Both the [X] cost of the site and how this compared to market [X] were not known to the CMA at the time of the UILs Acceptance Decision and those costs have subsequently [X] [changed].

3. Action proposed in light of change of circumstance

3.1 Having provisionally found that there has not been a change of circumstances in relation to the market conditions that lead to the SLC decision, it would consequentially be inappropriate to release Circle from the UILs on that basis. However, having provisionally found that there has been a change of circumstance with regards to whether the UILs are an effective remedy to the SLC and therefore remain appropriate, in this section we outline the potential options available.

⁵⁹ SLC Decision paragraphs 278 – 279.

Assessment of the UIL Variation Request

Circle's proposal

- 3.2 On 21 June 2021 Circle submitted a written request⁶⁰ accompanied by a Remedies Form, seeking to vary the UILs accepted on 23 June 2020 to divest BMI Edgbaston instead of Circle Birmingham Hospital.
- 3.3 Circle submitted that the divestiture of BMI Edgbaston would remedy the SLC identified by the CMA in relation to Birmingham; in particular it would remove the increment resulting from the merger in terms of both bed numbers and operating theatres. Circle further submitted that the divestiture of BMI Edgbaston is the most comprehensive solution that is both reasonable and practicable to remedy the SLC identified in Birmingham.⁶¹
- 3.4 Circle submitted that it would also be willing to enter into appropriate transitional services agreements (**TSA**) with a purchaser of BMI Edgbaston at the purchaser's request.⁶²
- 3.5 The proposal is for divestiture of BMI Edgbaston to be a disposal of assets as it sits within BMI as a corporate entity and is not itself incorporated.

Overview of BMI Edgbaston

- 3.6 BMI Edgbaston is located in Birmingham, near to Circle Birmingham Hospital. The premises are leased⁶³ from [REDACTED].⁶⁴
- 3.7 Circle submitted that BMI Edgbaston has three operating theatres and 31 registered beds in use. However, Circle also noted (as it did in the Merger Notice), that Edgbaston has one additional ward (with 11 available beds) that is currently used as a suite of offices.⁶⁵
- 3.8 Circle submitted that BMI Edgbaston is [REDACTED], characterised [REDACTED]. From the start of the period of the Independent Sector contract with the NHS in England aimed at responding to the Coronavirus (COVID-19) pandemic, [REDACTED] changed dependent upon activity requirements at each of BMI Edgbaston and BMI Priory.⁶⁶

⁶⁰ UILs Variation Request

⁶¹ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 2.1, page 1.

⁶² Circle - Remedies Form - Edgbaston (2).pdf, paragraph 1.4 page 1.

⁶³ BMI's [REDACTED].

⁶⁴ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 4.4, page 2.

⁶⁵ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 4.5, page 2.

⁶⁶ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 4.6 – 4.7, pages 2 - 3.

- 3.9 Circle submitted that BMI Edgbaston has access to both clinical and non-clinical bank and agency staff, who are not employed directly by BMI but whose services can be drawn on to cover vacancies and shortfalls.⁶⁷
- 3.10 Circle submitted that BMI Edgbaston, together with all other BMI sites, [REDACTED].⁶⁸
- 3.11 Circle submitted that it would expect that the divestiture of BMI Edgbaston assets would include the leasehold interest in the hospital, all the equipment, furniture, beds, and related movable goods located at the hospital, the benefit of certain contracts relating exclusively to the maintenance of, or provision of clinical services, at the hospital. [REDACTED]⁶⁹ [REDACTED].⁷⁰

Services at BMI Edgbaston

- 3.12 Consistent with the CMA's understanding set out in the SLC Decision, Circle submitted that the BMI Edgbaston hospital provides independent secondary care to NHS, Insured and Self Pay patients across the Birmingham area. It covers specialties including General Surgery, Orthopaedics, Urology, Gynaecology, Plastic Surgery, Gastroenterology and Ear, Nose and Throat medicine amongst others.⁷¹

Assessment of BMI Edgbaston

The clear-cut standard

- 3.13 In order to accept undertakings in lieu of a reference, the CMA must be confident that all of the potential competition concerns that have been identified in the SLC Decision would be resolved by means of the undertakings without the need for further investigation. The need for confidence reflects the fact that, once undertakings in lieu of a reference have been accepted, section 74(1) of the Act precludes a reference after that point. Such undertakings are therefore appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear cut. Furthermore, those remedies must be capable of ready implementation.⁷²
- 3.14 The clear-cut requirement has two separate dimensions:

⁶⁷ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 4.8, pages 3.

⁶⁸ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 4.9, pages 3.

⁶⁹ Transfer of Undertakings (Protection of Employment) Regulations

⁷⁰ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 4.10, pages 3.

⁷¹ Circle - Remedies Form - Edgbaston (2).pdf, paragraph 5.1, pages 3.

⁷² Merger remedies (publishing.service.gov.uk) paragraph 3.27, pages 11.

(a) in relation to the substantive competition assessment, it means that there must not be material doubts about the overall effectiveness of the remedy. The more extensive the competition concerns, in terms of magnitude of potential customer harm, the more significant the error costs of an ineffective remedy, and hence the greater the belief must be that the undertakings in lieu of a reference will comprehensively resolve those concerns. Whilst the CMA will require that the clear-cut standard is applied to any remedy where the test for reference has been met, in those cases where the potential magnitude of harm is especially large, the CMA will be particularly cautious in its approach to accepting undertakings in lieu of a reference.

(b) In practical terms, it means that undertakings in lieu of a reference of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be acceptable. This practical requirement, in terms of assessment and implementation, may impact on the specifications of a divestiture package, in order to ensure it remains practicable.

3.15 The same clear-cut standard applies to this UIL Variation Request. As outlined in paragraph 2.10, the original SLC was not time limited.

3.16 On 14 May 2021 the CMA emailed Circle noting that: '[i]n relation to the possible divestiture of BMI Edgbaston, this was briefly discussed between the CMA and Circle prior to accepting the current UILs. The initial feedback from the CMA at that time was that we would not consider a divestiture of the Edgbaston hospital alone to be a clear-cut remedy to our SLC. This was primarily on that basis that the overlap included both BMI Edgbaston and BMI Priory. As such, with regards to Birmingham, the only remedies the CMA considered would be 'clear cut' solutions to the SLC at the time of accepting the UILs were: (i) a divestiture of Circle Birmingham or (ii) a combined divestiture of both BMI Edgbaston and BMI Priory.'⁷³

3.17 With regards to this, Circle submitted that the CMA's 'recent decisional practice' in connection with undertakings in lieu of a reference relating to inpatient care supports an approach which seeks to remove or very substantially reduce the increment in terms of bed numbers, as well as one (in

⁷³ Email.

light of Muller/Dairy Crest⁷⁴) which 'takes a realistic view of the need to replace the competitive constraint in the counterfactual'.⁷⁵

Circle's submission on the ability of BMI Edgbaston to address the SLC

- 3.18 Circle submitted that the divestiture of BMI Edgbaston will ensure that the market for PHMS in the Birmingham area is as competitive as the pre-merger situation. It said that this reflected the fact that BMI Edgbaston is of a comparable size to Circle Birmingham Hospital, is larger in terms of number of beds, and is focussed on the same specialities.⁷⁶
- 3.19 Circle also submitted that, if it sold BMI Edgbaston, it would have a lower share of beds than BMI had pre-merger, the same market share in terms of operating theatres as BMI had pre-merger and a lower market share post-merger.⁷⁷ Therefore, Circle submitted that BMI Edgbaston is the most comprehensive solution that is both reasonable and practicable to remedy the SLC identified in Birmingham.
- 3.20 Circle also submitted that BMI Edgbaston has a [redacted] than Circle Birmingham Hospital [redacted], which makes it a much more attractive acquisition. As it has [redacted], an operator of BMI Edgbaston will exert a stronger competitive constraint than an operator of Circle Birmingham Hospital, as it will be able to set lower prices and have the ability to spend more on marketing, staffing and attracting consultants, as well as investing more in the site.⁷⁸
- 3.21 Circle submitted that [redacted], has expressed a firm interest in acquiring the BMI Edgbaston, and is currently engaged in the negotiation of terms and due diligence. Circle considers [redacted] a highly credible purchaser and has already been approved as a purchaser of Circle Birmingham Hospital by the CMA. Accordingly, Circle believes the divestiture of BMI Edgbaston to [redacted] could likely be achieved within [redacted] months.⁷⁹

CMA views on divestiture of BMI Edgbaston

- 3.22 The CMA agrees with Circle that in terms of bed and theatre capacity Circle Birmingham Hospital and BMI Edgbaston are broadly equivalent. However,

⁷⁴ [Muller UK & Ireland Group / Dairy Crest Group](#). In this case Müller agreed Undertakings with the CMA to sell to Medina Dairy Limited (Medina Dairy) with the option to require Müller to process up to 100 million litres of milk each year in Dairy Crest's Severnside dairy for supply to national grocery retailers. The option was for a period of at least 5 - and up to 8 - years.

⁷⁵ Circle - Submission re Edgbaston(386761688.1) (1).pdf, paragraph 2.9, page 3.

⁷⁶ Circle - Submission re Edgbaston(386761688.1) (1).pdf, paragraph 5.1, page 9.

⁷⁷ Circle - Submission re Edgbaston(386761688.1) (1).pdf, paragraph 5.2, page 9.

⁷⁸ Circle - Submission re Edgbaston(386761688.1) (1).pdf, paragraph 6.5, page 10.

⁷⁹ Circle - Submission re Edgbaston(386761688.1) (1).pdf, paragraph 6.9, page 10.

bed and theatre numbers are not the only parameters along which competition occurs and even if it could be shown to remedy the SLC there remain considerable concerns in relation to the practicalities of divesting Edgbaston alone.

- 3.23 The SLC Decision makes clear that the entry of Circle Birmingham Hospital was expected to materially impact both BMI Edgbaston and BMI Priory. For example, the CMA found that the Parties' internal documents indicated that Circle Birmingham Hospital's entry was expected to have a significant competitive impact on BMI Priory and Edgbaston.⁸⁰
- 3.24 As noted in paragraph 1.11, whilst Circle appeared to target a [X] of BMI Priory revenues compared to BMI Edgbaston's this is not inconsistent with the impact on BMI Priory being material. Circle targeted [X] the share of revenue from BMI Priory than it did from each of the [X] and [X] hospitals with respect to private patients. Further, certain BMI documents explicitly discussed the impact of Circle Birmingham Hospital's entry on BMI Priory, and are consistent with this impact being material. The majority of competitors indicated that Circle Birmingham Hospital's entry would have a significant impact on BMI Priory and Edgbaston.⁸¹
- 3.25 Given the above, the reduction in rivalry leading to the SLC relates to competition between Circle Birmingham and both BMI Edgbaston and BMI Priory.
- 3.26 In terms of the parties' submissions that BMI Edgbaston's is competitively equivalent to Circle Birmingham Hospital, the CMA observed, as set out in Table 13 of the SLC Decision, the estimated shares of supply in the wider Birmingham area including HCA. The total revenues included in the SLC Decision showed that Circle Birmingham Hospital was expected to have [X] the revenues of BMI Edgbaston.⁸²
- 3.27 Whilst the CMA accepted future revenues are always uncertain and the figures in the SLC Decision may have changed subsequently, the CMA considers this to be a strong indicator that BMI Edgbaston is not a close substitute to Circle Birmingham Hospital. The evidence suggests the BMI Edgbaston would be a weak competitive constraint on the Parties' combined offering of Circle Birmingham Hospital and BMI Priory if divested to a third party. This was relayed to the Parties during the Phase 1 discussions on potential undertakings in lieu of a reference.

⁸⁰ [Full text decision \(publishing.service.gov.uk\)](#). paragraph 223, page 62.

⁸¹ [Full text decision \(publishing.service.gov.uk\)](#). paragraph 239, page 69.

⁸² [Full text decision \(publishing.service.gov.uk\)](#). table 13, page 79.

- 3.28 The CMA notes that the [REDACTED] cost of the Circle Birmingham Hospital has [REDACTED] [changed] both since Circle originally commissioned the site and further since the CMA accepted the UILs. The overall [REDACTED] cost appears to have made the site [REDACTED] to potential purchasers. The CMA does not consider that this alters its view of the competitive strength of the site. The CMA notes that Circle still considers that the site would be profitable under its ownership, 'Circle still expects the facility to generate a profit once it is fully operationalised'.⁸³
- 3.29 Circle submitted that in relation to revenues 'the BMI operational model in Birmingham has been based on generating efficiencies across both sites, which has led to historically [REDACTED]'.⁸⁴
- 3.30 The CMA notes Circle's explanation that BMI Edgbaston is an [REDACTED] asset that in the hands of an independent owner may be capable of competing more strongly. However the differences [REDACTED] between BMI Edgbaston and Circle Birmingham Hospital are significant and further illustrate the [REDACTED]. The CMA notes that Circle's revised revenues for Circle Birmingham Hospital, [REDACTED], are [REDACTED] than the [REDACTED] BMI Edgbaston revenues outlined in the SLC Decision. It is not clear cut that [REDACTED] by an independent owner of BMI Edgbaston.
- 3.31 The CMA has found a number of other concerns with the BMI Edgbaston site that call into question the 'clear-cut' nature of the proposed alternative remedy. These are:
- (a) BMI Edgbaston relies on [REDACTED]. Whilst a purchaser may be able to cover some of these [REDACTED], this presents a challenge. The CMA is sceptical that these challenges can easily and quickly be overcome with [REDACTED] as Circle has suggested, and presents a material challenge. In addition, a purchaser would have to identify the [REDACTED] it needs to operate BMI Edgbaston and [REDACTED].⁸⁵
 - (b) BMI Edgbaston relies on centralised shared service centre that need to be separated and increase the complexity of the remedy.
 - (c) BMI Edgbaston is a much older facility than Circle Birmingham Hospital (which is new) and Circle submitted that [REDACTED].⁸⁶ On further probing of this, Circle clarified that it '[..] does not consider that BMI Edgbaston will definitively require [REDACTED] in order to be an effective competitor. The new

⁸³ Circle_BMI - Response to CMA questions of 30 June - Further responses [15.07.2021] (1).pdf. paragraph 6.2, page 3.

⁸⁴ Case ME 6864.19 - Circle_BMI - Response to CMA questions of 11 August - 26.08.2021.pdf. paragraph 3.2, page 3.

⁸⁵ [REDACTED].

⁸⁶ Remedies Form para 6.6.

owner may, at its option, wish [REDACTED], reflecting its own strategic objectives'⁸⁷

- (d) BMI Edgbaston [REDACTED]. The CMA understands that BMI Edgbaston [REDACTED]. Circle Birmingham Hospital would certainly acquire these capabilities. A purchaser would [REDACTED] according to Circle.

Provisional conclusion on BMI Edgbaston

- 3.32 The above together indicate that a divestiture of BMI Edgbaston would be complex and present risks to effective implementation.
- 3.33 The CMA has considered carefully whether it can be confident that the divestiture of BMI Edgbaston would remedy the competition concerns that it has found in the SLC Decision. Of the three sites in Birmingham, BMI Edgbaston would be expected to provide the least effective constraint on the Parties post-merger and would require the most time and effort in order to establish itself as an effective competitor. Consequently, the CMA does not consider it to be a clear-cut remedy that would meet the requirements of section 73 of the Act in addressing the SLC identified in the CMA's SCL Decision. Even if it were in principle capable of addressing the SLC, it has material practical implementation issues that would mean that the CMA could not be confident that it would be an effective remedy.

Overview of other remedy options

- 3.34 In this section we outline other potential remedial options.

Divestiture of Circle Birmingham

Background and Circle's view

- 3.35 One potential remedy would be to continue to pursue a divestiture of Circle Birmingham Hospital.
- 3.36 Circle submitted that the divestiture of Circle Birmingham Hospital has proven to be impracticable and it was unable to attract a purchaser [REDACTED]. Circle further submitted that the reasons for this, namely the [REDACTED] [cost] of Circle Birmingham Hospital, cannot reasonably be resolved by Circle.⁸⁸

⁸⁷ Case ME 6864.19 - Circle_BMI - Response to CMA questions of 11 August - 26.08.2021.pdf, paragraph 3.7, page 4

⁸⁸ Circle - Submission re Edgbaston(386761688.1) (2).pdf, paragraph 6.4, page 10.

3.37 Circle was willing to sell the site for [REDACTED], [REDACTED] received no binding offer. The UILs provide for the CMA to be able to appoint a Divestiture Trustee to sell the Divestiture Business on behalf of the Parties at no minimum price, or for the CMA to direct the Parties to sell at no minimum price. However, as there was [REDACTED],⁸⁹ the CMA has provisionally concluded that it would be unlikely that the appointment of a Divestiture Trustee would have any success in divesting the Circle Birmingham Hospital as currently configured and the Trustee's powers and remit would not extend to altering the Divestiture Business.

3.38 On 30 April 2021, Circle wrote to the CMA to provide an update on the Birmingham divestiture process, noting that it was highly unlikely that [potential purchaser] ([REDACTED]) and Circle would reach an agreement. [REDACTED]:⁹⁰

(a) [REDACTED]:

(i) [REDACTED];

(ii) [REDACTED];

(iii) [REDACTED]

(iv) [REDACTED]; and

(v) [REDACTED].

(b) [REDACTED]:

(i) [REDACTED];

(ii) [REDACTED]; and

(iii) [REDACTED].

3.39 Circle informed the CMA that [REDACTED].⁹¹ [REDACTED].⁹²

3.40 For its part in the negotiation, Circle submitted that it agreed to [REDACTED].⁹³

⁸⁹ Paragraph 8.5 of the UILs relating to the role of the Divestiture Trustee limits the terms which the Divestiture Trustee can require Circle to accept in the context of a divestiture.

⁹⁰ ME686419 Circle_BMI - Update on Birmingham Divestment Process - 30.04.2021 (1).pdf, paragraph 2.3, page 1.

⁹¹ ME686419 Circle_BMI - Update on Birmingham Divestment Process - 30.04.2021 (1).pdf, paragraph 2.4, page 2.

⁹² Circle Health/GHG 50837 - Annex 1 - Letter from [REDACTED].pdf - Documents (sharepoint.com).

⁹³ ME686419 Circle_BMI - Update on Birmingham Divestment Process - 30.04.2021 (1).pdf, paragraph 2.7, page 2.

- 3.41 Circle also submitted that it tried to ascertain whether there were other ways to make the divestiture of Circle Birmingham Hospital viable for [REDACTED] [potential purchaser]. This offer has been declined by [REDACTED] [potential purchaser].⁹⁴
- 3.42 Circle contended that any further concessions could not be reasonably accommodated and in Circle's view would lead to [REDACTED]. For example, Circle submitted that the [REDACTED] that [REDACTED] [potential purchaser] requested would be expected to [REDACTED].
- 3.43 In addition to [REDACTED], [REDACTED] [potential purchaser] requested that Circle [REDACTED]. Circle submitted that this would [REDACTED].⁹⁵ Circle submitted that this would [REDACTED].⁹⁶
- 3.44 Circle submitted that Circle Rehab was from the outset planned as a standalone business, independent of Circle Birmingham Hospital. Circle Rehab was established in 2017 through a joint venture with Vamed Management und Service GMBH, one of Europe's leading rehabilitation providers.⁹⁷ Circle submitted that [REDACTED].

CMA's view on continuing to require a divestiture of Circle Birmingham

- 3.45 As outlined above, [REDACTED] in order to reach an agreement with [REDACTED] [potential purchaser] and Circle. Circle for its part has made some concessions too. However, this has not yielded a divestiture. The key question as to whether a divestiture of Circle Birmingham Hospital is still possible is whether it is possible for Circle [REDACTED].
- 3.46 The CMA considers that the Circle Birmingham Hospital is an attractive and viable site but for one thing, [REDACTED] cost. Whilst Circle has made some concessions – ie [REDACTED]- the CMA considers that these have been [REDACTED].
- 3.47 With respect of the financial impact on Circle Rehab, it may be the case that [REDACTED] could materially harm the prospects of the business. However, [REDACTED].
- 3.48 With regards to [REDACTED] to [REDACTED] [REDACTED] [potential purchaser] would be materially adverse to Circle Rehab, and potentially unreasonable, however it is not clear what Circle has offered in compromise to this position. It is also not clear that

⁹⁴ ME686419 Circle_BMI - Update on Birmingham Divestment Process - 30.04.2021 (1).pdf, paragraph 2.8, page 2.

⁹⁵ ME686419 Circle_BMI - Update on Birmingham Divestment Process - 30.04.2021 (1).pdf, paragraph 2.10, page 3.

⁹⁶ ME686419 Circle_BMI - Update on Birmingham Divestment Process - 30.04.2021 (1).pdf, paragraph 2.11, page 3.

⁹⁷ ME686419 Circle_BMI - Update on Birmingham Divestment Process - 30.04.2021 (1).pdf, paragraph 2.12, page 3.

if Circle compromised in other areas that this request would continue to be sought.

- 3.49 On balance, the CMA considers that a divestiture of Circle Birmingham Hospital might be achievable if Circle (not necessarily Circle Rehab) showed greater flexibility than hitherto and [redacted] in terms of [redacted]. Circle has not carried out [redacted] but it is clear from the divestiture process to date, that [redacted] which has deterred any potential purchaser. Circle could [redacted] [show more flexibility] [redacted]. For example, this could take the form of Circle Rehab [redacted]. This may require a variation of the UILs to make clear that Circle will [redacted].
- 3.50 The CMA also notes that Circle provided the UILs whilst aware that there was a risk that the [redacted] of the Circle Birmingham Hospital might increase. In the CMA's view it is therefore reasonable that Circle should bear the consequences of this risk.

Divestiture of BMI Priory

Background and Circle's views

- 3.51 Circle has offered BMI Edgbaston as an alternative remedy to the CMA's SLC. As noted in paragraph 3.32 the CMA considers that this site is not a clear-cut solution to the SLC.
- 3.52 One alternative solution to the SLC would be the divestiture of BMI Priory. Priory is larger in terms of capacity, types of procedures and [redacted] than Circle Birmingham Hospital. In this regard it more clearly addresses the SLC where BMI Edgbaston does not.
- 3.53 However, Circle submitted there are a number of practical problems in relation to a potential divestiture of BMI Priory, including:⁹⁸
- (a) BMI Priory is a specialist site, focusing on high-acuity work. In Circle's view this makes it a more challenging facility for a private operator to run. Circle noted that, an operator such as [redacted].
 - (b) The lease for BMI Priory estate [redacted]. Circle submitted that [redacted] would represent a much more complex and time-consuming process than a divestiture of BMI Edgbaston ([redacted]).

⁹⁸ Circle - Submission re Edgbaston(386761688.1) (2).pdf, paragraph 6.11, pages 10 – 11.

- (c) The [redacted] at BMI Priory is £[redacted]. Although BMI Priory is a larger hospital, in Circle's view the [redacted]. Moreover, as BMI Priory is part of a [redacted], in addition to being more complex to carve out, it would likely be [redacted].
- (d) Circle submitted that the market for specialist independent hospitals, such as BMI Priory, is even more constrained than the general independent hospital market. Few providers have either the experience or the desire to operate a hospital conducting high acuity and specialist work which carries significantly increased clinical risk.

CMA's provisional view on a divestiture of BMI Priory

- 3.54 The CMA considers that a divestiture of BMI Priory would address its competition concerns. BMI Priory is a larger facility than Circle Birmingham Hospital that among other services provides acute services. The other services are not part of the competitive overlap but may make the site more attractive to potential purchasers.
- 3.55 The CMA acknowledges that the greater number of specialty services at BMI Priory may reduce the available pool of potential purchasers but does not consider the uncertainty around this automatically rules out the divestiture of BMI Priory as an effective remedy. Indeed, Circle submitted that BMI Priory has [redacted] as it has been [redacted] therefore the site is [redacted].
- 3.56 With regards to the [redacted] as noted above, the CMA would not consider this to be insurmountable challenge. Creating a [redacted] BMI Priory should be within Circle's ability, as notwithstanding the [redacted], one was created for the Circle Birmingham site which has been split between Circle Birmingham Hospital and Birmingham Rehab. In addition, [redacted].
- 3.57 The [redacted] requires market testing. If Circle decided to pursue this option the UILs would have to be varied by means of a new undertaking. In order for such an undertaking to be acceptable to the CMA, it would have to include an upfront purchaser requirement to ensure no repeat of the issues outlined in this paper. In addition, the CMA notes that the SLC Decision shows that BMI Priory has [redacted] that of BMI Edgbaston.⁹⁹
- 3.58 The CMA's view is a divestiture of BMI Priory would be an effective remedy to the SLC Decision and the identified SLC in Birmingham.

⁹⁹ Phase one Decision, Table 8: shares of supply in the wider Birmingham area, page 57.

Provisional assessment of remedy options

- 3.59 We have found the [redacted] [changed] costs of the Circle Birmingham Hospital to be a change in circumstance, and the resulting inability of the Parties to fulfil their UIL commitment to sell it has meant that, in the CMA's view, the UILs are no longer appropriate.
- 3.60 The CMA considers that a divestiture of BMI Edgbaston would not address the its competition concerns effectively. The SLC Decision shows that the competitive constraint from Circle Birmingham Hospital affects both BMI Priory and BMI Edgbaston. Additionally, BMI Edgbaston alone is a [redacted] than Circle Birmingham Hospital is expected to be, as shown by [redacted]. BMI Priory has been [redacted] BMI Edgbaston in terms of [redacted]. A divestiture of BMI Edgbaston raises further practical concerns as set out in paragraph 3.31.
- 3.61 The CMA considers that there are two remedies that are likely to be effective in addressing the SLC. These are:
- (a) continuing to pursue a divestiture of Circle Birmingham with greater flexibility on the part of Circle (for example, through [redacted] to a potential purchaser); and
 - (b) a variation of the UILs to incorporate a divestiture of BMI Priory instead of Circle Birmingham Hospital.
- 3.62 The CMA accepts that a divestiture of Circle Birmingham Hospital can only be achieved via [redacted]. However, the CMA believes that Circle could offer [redacted] to attract a potential purchaser. The CMA notes that Circle has not [redacted] that was willing to offer some concessions.
- 3.63 A divestiture of BMI Priory could also be a clear-cut solution to the SLC. BMI Priory is a large facility offering a wide array of services including those that Circle Birmingham Hospital planned to offer. Whilst there may be some challenges to selling the site with regards to separation and identifying potential purchasers, the CMA considers these to be achievable and in any event it would appear less complex than the challenges that would arise on the divestiture of BMI Edgbaston.
- 3.64 In summary, the CMA's provisional conclusion is that either a divestiture of Circle Birmingham Hospital with greater flexibility on the part of Circle or a divestiture of BMI Priory would be effective remedies to SLC identified in the SLC Decision.

Proportionality

3.65 Consistent with the CMA's Guidance¹⁰⁰ and relevant case law,¹⁰¹ to find that a remedy is proportionate, that remedy:

- (a) must be effective to achieve the legitimate aim in question (appropriate);
- (b) must be no more onerous than is required to achieve that aim (necessary);
- (c) must be the least onerous, if there is a choice of equally effective measures; and
- (d) in any event must not be disproportionate in relation to the SLC and its adverse effects.

3.66 Therefore, to reach a view on the proportionality of the effective remedies we have identified we have assessed these remedies against the four principles set out above.

Effective to achieve the legitimate aim in question

3.67 We have identified the following remedies to be effective:

- (a) the divestiture of Circle Birmingham Hospital on more flexible terms; and
- (b) the divestiture of BMI Priory

3.68 For the reasons set out in this paper (see paragraphs 3.34 to 3.64) for the CMA's assessment of effective remedies), the CMA considers that these remedies are the only ones that would be effective in achieving the legitimate aim of effectively addressing the SLC and its resulting adverse effects.

No more onerous than is required to achieve that aim

3.69 The CMA acknowledges that both remedies are intrusive remedies insofar as they require the divestiture of valuable assets.

3.70 However, the CMA carefully assessed the effectiveness of the available remedy options including all the proposals put forward by Circle and found

¹⁰⁰ Merger remedies guidance CMA87, paragraph 3.6.

¹⁰¹ See *Tesco plc v Competition Commission* [2009] CAT 6, paragraph 137, drawing on the formulation by the European Court of Justice in *Case C-331/88 R v Ministry of Agriculture, Fisheries and Food, ex p. Fedesa*, ECLI:EU:C:1990:391, paragraph 13.

only the two remedies set out above to be effective in comprehensively addressing the SLC and the resulting adverse effects that the CMA found.

- 3.71 The CMA has therefore concluded that requiring either a divestiture of Circle Birmingham Hospital (with ~~the~~) or a divestiture of BMI Priory would be no more onerous a course of action than is required to achieve the legitimate aim of effectively addressing the SLC and its resulting adverse effects.

Identification of the least onerous equally effective measure

- 3.72 Having identified two effective remedies, the CMA needs to assess the relevant costs and level of intrusiveness associated with each remedy. However, it is not clear at this stage which of the two would be the least onerous, which would depend to an extent on the negotiations between Circle and a prospective purchaser.
- 3.73 As a result, the CMA's provisional view is that neither remedy is clearly more onerous than the other. The CMA invites views and further evidence from Circle and other parties on the relevant costs and proportionality of each effective option. The CMA will take these representations into account in determining a preferred remedy option, should this be required (see paragraph 3.81).

Proportionality with respect to the SLC and its adverse effects

- 3.74 The CMA now assesses whether either remedy would produce costs which would be disproportionate to the scale of the SLC and its adverse effects.
- 3.75 The CMA's guidance says that because the merger parties have the choice of whether or not to proceed with the merger, it will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the CMA and other monitoring agencies.¹⁰²
- 3.76 Both of the effective remedy options will solve the adverse effects arising from the SLC. Proportionality needs to be weighed against the serious harm the merger has caused or is expected to cause in the Birmingham area. As set out in paragraphs 2.19 to 2.21, a competitive market in PHMS in Birmingham is important in providing good outcomes to consumers, especially given the increased waiting lists arising from the Coronavirus (COVID-19) pandemic. The CMA has not identified material relevant costs arising from either remedy.

¹⁰² [Merger remedies \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), paragraph 3.8

3.77 As a result, the CMA's provisional view is that neither remedy is disproportionate to the SLC and its adverse effects.

Conclusion on proportionality

3.78 As outlined above, the CMA considers that the divestiture of Circle Birmingham Hospital (with Circle showing more flexibility [X]) or the divestiture of BMI Priory are both effective to achieve a legitimate aim, are no more onerous than is required and do not produce adverse effects which are disproportionate to the SLC.

Provisional decision on UILs Variation Request and remedies

3.79 The CMA has provisionally concluded that there has been a change of circumstance allowing the CMA to vary the UILs.

3.80 The CMA has also provisionally concluded that the UILs should be varied to give effect to either of the following remedies:

(a) a divestiture of Circle Birmingham Hospital, with [X] [on more flexible terms]; or

(b) a divestiture of BMI Priory.

3.81 Implementation of this remedy would occur by Circle submitting a variation request to the CMA for approval. If Circle does not agree to either of the above proposed courses of action, in light of the fact that the UILs are not being fulfilled, Section 75 of the Act gives the CMA the power to issue an order against the merger parties for the purposes of remedying the SLC. Such an Order could include a requirement to provide [X] to a purchaser of Circle Birmingham Hospital or include the divestiture of BMI Priory.

3.82 This decision is provisional and the CMA will consider further representations and evidence from Circle and other relevant third parties.