



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE NO. 1229/6/12/14

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the “Rules”), the Registrar gives notice of the receipt on 30 May 2014 of an application for review under section 179 of the Enterprise Act 2002 (the “Act”), by HCA International Limited (the “Applicant”) of certain decisions of the Competition and Markets Authority (the “CMA”) contained in a report published on 2 April 2014 entitled “Private healthcare market investigation: Final report” (the “Final Report”). The Applicant is represented by Nabarro LLP, Lacon House, 84 Theobald’s Road, London WC1X 8RW (ref.: Cyrus Mehta / Kabir Garyali).

According to the Notice of Application, the Final Report followed a market investigation by the CMA into private healthcare in the United Kingdom. The CMA decided that the Applicant’s hospitals in central London faced weak competitive constraints and were protected by high barriers to entry and expansion, and that those alleged features have led the Applicant to charge higher prices for treating both insured patients and self-pay patients in central London, thereby giving rise to adverse effects on competition (“AECs”). In order to remedy the AECs, the CMA decided to require the Applicant to divest itself of two of its six central London hospitals - either the London Bridge Hospital together with the Princess Grace Hospital, or else the Wellington Hospital together with the Wellington Hospital Platinum Medical Centre (“PMC”) - which are to be sold under the supervision of the CMA to one or more other health care providers.

The Applicant seeks an order to quash the CMA’s finding of AECs in relation to the Applicant’s hospitals, and its decision to require divestiture (“the Decisions”). The Applicant does not take issue with the other AECs found in the Final Report.

The Applicant advances five grounds of challenge, which are summarised below:

- (i) *Procedural unfairness*: the Applicant contends that the CMA failed to put to it or its advisers key aspects of the case for divestiture so that the Applicant could respond to them. In particular, the Applicant argues that the CMA relied centrally in the Final Report on an analysis of the prices charged by hospital operators to private medical insurers (“PMIs”) for treating insured patients. This analysis differed significantly from a previous analysis of insured pricing in the provisional findings. The CMA should have given the Applicant’s advisers an opportunity to comment on the analysis before making its Decisions, rather than revealing its existence for the first time in the Final Report.
- (ii) *Errors in the CMA’s pricing analysis*: the Applicant contends that the CMA’s analyses of: (a) insured pricing; and (b) price concentration in respect of self-pay prices, are vitiated by errors of assessment. Those errors are sufficiently serious to render the CMA’s reliance on either analysis irrational. In any event, the Applicant argues that it is entitled to challenge the merits of the CMA’s insured pricing analysis, which was never

put to it during the investigation in exercise of its right to a fair hearing in the determination of its civil rights and obligations under Article 6 of the European Convention of Human Rights.

- (iii) *Errors in assessing competitive constraints:* the Applicant contends that the CMA's conclusion that its London hospitals are subject to weak competitive constraints cannot reasonably be relied upon. In particular, the conclusion: rests on an arbitrary definition of the relevant geographic market; fails to have regard to relevant competitive constraints; and relies heavily on the untested opinions of competing hospital operators and the PMIs, which have an obvious economic interest in the outcome of the proceedings.
- (iv) *Errors in assessing barriers to entry and expansion:* the Applicant submits that the CMA's conclusion that there are high barriers to entry and expansion in central London is not rationally sustainable. The CMA's contention that there is any barrier to entry or expansion in London by reason of high sunk costs and limited or static demand is inconsistent with the CMA's own findings that London is an attractive growth market and is unsupported by reasons. Further, the CMA's claim that significant barriers arise by reason of a lack of available sites or planning constraints is contrary to the available evidence. The Applicant also avers that the CMA relied on the views of third parties which have a commercial interest in the outcome of the proceedings.
- (v) *Proportionality:* the Applicant contends that the CMA failed to demonstrate that the remedy of divestiture and the particular divestiture package it designed were proportionate in this case.

By way of final relief, the Applicant asks the Tribunal to:

1. quash the CMA's decisions finding AECs in respect of central London and/or imposing the divestiture remedy on the Applicant;
2. remit the matter to the CMA with appropriate directions;
3. order the CMA to pay the Applicant the costs reasonably incurred in bringing its applications.

In addition, the Applicant applies for: (a) interim or ancillary relief in the form of an order suspending the Decisions pending the outcome of its application; (b) an order for disclosure of certain documents; and (c) permission to adduce an expert report.

Any person who considers that he has sufficient interest in the outcome of proceedings may make a request for permission to intervene in the proceedings in accordance with rule 16 of the Rules. Any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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