

Completed acquisition by General Healthcare Group of control of four Abbey hospitals and de facto control over Transform Holdings Limited, previously part of the Covenant Healthcare Group

ME/4560/10

**Undertakings in lieu of reference accepted on 9 November 2010.**

**The OFT's decision on the release of these undertakings under section 73 was given on 3 May 2011. The full text of this Decision was published on 16 May 2011**

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Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

## **THE PARTIES**

1. **General Healthcare Group Holding Partnership LLP (GHG)** is a provider of independent healthcare services in the UK. GHG operates two primary businesses: BMI Healthcare Limited (BMI), which operates 60 acute care private hospitals; and Netcare Healthcare (UK) Limited, which provides specialised clinical services to patients under contract to the NHS.
  
2. **Covenant Healthcare Group (Covenant)** comprised **Transform Holdco Limited (Transform)**, which provides cosmetic surgery, and non-surgical cosmetic treatments across the UK from a network of clinics, and other venues and two Transform owned and operated hospitals; and **Abbey hospitals** which owned and operated five private hospitals in North West England and Scotland as well as the London Churchill Clinic. However both the London Churchill Clinic and Abbey Caldew hospital in Carlisle were sold prior to the GHG transaction. Covenant's turnover (including the London Churchill and

Abbey Caldew hospital) in the financial year to 30 September 2009 was approximately £65.8 million.

## **TRANSACTION**

3. GHG, Covenant and the Bank of Scotland plc (the Bank) agreed to a sale and restructuring of certain divisions of Covenant that resulted in GHG purchasing the businesses of the four remaining Abbey hospitals and Abbey Hospitals (Holdings) Limited and its subsidiaries ('the Abbey transaction') and shares equivalent to 42.5 per cent of the issued share capital of Transform ('the Transform purchase'). The Abbey transaction is structured as an asset purchase while the Transform purchase is structured as a share purchase.
4. Under the terms of the Abbey transaction GHG has purchased the business of the four remaining Abbey hospitals – Abbey Kings Park, Stirling, Abbey Carrick Glen, Ayr, Abbey Sefton, Liverpool, and Abbey Gisburne, Clitheroe - for a consideration of [ ], via BMI. Abbey Propco was established as a joint venture between the Bank and Prestbury. GHG has entered into long leases with Abbey Propco in respect of the four Abbey hospitals. Transform Newco was established with the Bank, Cognetas (previous controlling shareholder of Covenant) GHG and the Management holding [ ] per cent, [ ] per cent, [ ] per cent and [ ] per cent of the shares respectively.
5. The transaction completed on 28 May 2010; the parties notified the transaction on 24 June 2010; the extended administrative deadline for a decision was 27 August 2010; and the statutory deadline expired on 27 September 2010.

## **JURISDICTION**

6. As a result of this transaction, GHG, the four Abbey hospitals and Transform ceased to be distinct.<sup>1</sup> The parties overlapped in the

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<sup>1</sup> GHG's shareholding of 42.5 per cent in Transform gives it de facto control over Transform.

supply of private medical services (PMS) through the operation of private acute care hospitals in the UK. By beds, the merger created a combined share of 27.7 per cent (increment 0.9 per cent); therefore the share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met.

7. The OFT concluded in its decision of 14 September 2010 that it is or may be the case that a relevant merger situation had been created.

## **BACKGROUND**

8. In its decision of 14 September 2010, the OFT stated that it believed that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in respect of the supply of PMS services in the local market around Abbey Carrick Glen.
9. The text of the Decision, published on 11 October 2010, provides details of the OFT's findings.
10. To address the OFT's competition concerns, GHG offered to divest the Abbey Carrick Glen hospital.
11. On 12 October 2010 the OFT published the proposed undertakings in lieu of reference offered by GHG for public consultation. These undertakings were accepted by the OFT on 9 November 2010.
12. The undertakings in lieu of reference required GHG, using its best endeavours and acting in good faith, as soon as reasonably practicable, to effect to the satisfaction of the OFT the divestment of the Abbey Carrick Glen hospital as a going concern by the end of the divestment period to a purchaser approved by the OFT.
13. During the divestment period, GHG – through an independent agent – advertised generally and made direct approaches to a wide range of possible purchasers in an attempt to effect the sale of the Abbey Carrick Glen business, but was unsuccessful in doing so given a lack of interest by third parties in acquiring it. GHG provided written confirmation to the OFT from a range of potential purchasers who

were invited to bid confirming that they had no interest in acquiring the business.

14. The undertakings in lieu provided for the potential appointment of a Trustee in the event that the GHG did not satisfy the divestment obligation.
15. The OFT was conscious that in this case that GHG had provided a considerable amount of documentary evidence to demonstrate to the OFT that it had, in good faith, sought to divest the Abbey Carrick Glen business. The steps taken by GHG, in attempting to effect a sale, seemed to the OFT to be substantially those which a Trustee would have taken. The fact that these efforts were ultimately unsuccessful were, GHG explained, due to the saleability of the Carrick Glen business, rather than any lack of commitment on the part of GHG.
16. The OFT then considered whether it was appropriate to engage the Trustee provisions of the GHG undertakings, that is, to request GHG to appoint a Divestment Trustee for the purposes of selling Carrick Glen. In the light of the specific circumstances surrounding the saleability of Carrick Glen, the OFT did not move automatically to the appointment of a Trustee and instead required that a different, independent agent review, on behalf of the OFT, the sale process carried out for GHG.
17. That independent review concluded that the sale process undertaken on behalf of GHG had been carried out to 'suitable standards and in a manner consistent with industry norms'. Further, the review also concluded that there was no realistic prospect of a Trustee being able to sell the Abbey Carrick Glen business as a going concern.
18. In light of the above, the OFT considered that, given the particular facts and circumstances of this case the appointment of a Trustee was not an appropriate course of action. In particular, the OFT considered that there would be no prospect, in this particular case, of a Trustee achieving a sale if appointed.
19. Following GHG's formal request to be released from the undertakings in lieu, the OFT consulted on the proposed release of GHG from the

obligation, under the undertaking in lieu, to divest the Abbey Carrick Glen hospital.

## **CONSULTATION**

20. On 24 March 2011 the OFT published a consultation on the proposed release of GHG's undertakings inviting interested parties to give their views by 8 April 2011 pursuant to Paragraph 7(1) Schedule 10 of the Act. In the consultation, the OFT noted that it was minded to release the undertakings.
21. The OFT received comments from two interested parties during the consultation period: one in favour of the release, and one not. A summary of the response from the latter respondent is discussed below.
22. The second respondent was of the view that, even if there were a case for releasing GHG from its obligation to divest the Abbey Carrick Glen hospital, GHG should not be released from its obligation in paragraph 9 of the undertakings in lieu to hold separate the business of the hospital from the remainder of the BMI Group and that GHG should be required to continue to operate the hospital as a standalone entity.
23. The OFT has carefully considered this representation. However it notes that the obligation to hold Carrick Glen separate from the BMI Group has resulted in significant costs for the Carrick Glen hospital. These costs have included the employment of a hold separate manager and the inability of the Carrick Glen business to be able to take full advantage of BMI's group services and purchasing power with suppliers. It is expected that such costs will increase as Carrick Glen currently uses legacy Abbey policies, practices and IT which will progressively need to be updated. [ ].
24. At the time of the original decision the OFT considered whether, in the circumstances of this case, it should require that the Abbey Carrick Glen hospital be sold to an upfront buyer. It decided that an upfront buyer remedy was disproportionate, in part given the scale

of the SLC.<sup>2</sup> The OFT considers that this factor, which informed the structure of the remedy at the time of the original decision, is still relevant. Therefore, for the same reasons that it was disproportionate to impose the costs of an upfront buyer requirement, the OFT considers it would be disproportionate to impose significant additional costs on the Carrick Glen business via indefinite hold separate undertakings, since such costs would harm its ongoing viability.

25. In addition, the OFT is mindful of the monitoring costs of such a behavioural obligation, both on GHG and the OFT - which would ultimately be borne by customers and the public purse respectively.
26. The OFT has, therefore, concluded that a requirement to maintain ongoing 'hold separates' would be unworkable in the long term, and would impose an ongoing burden on the Abbey Carrick Glen business that would have an increasingly negative impact on the viability of the business going forward.
27. For this reason, the OFT has rejected the proposal that that hold separate undertakings remain in place following the release from the obligation to divest the Abbey Carrick Glen business.

## **DECISION**

28. The OFT concluded that the divestment of Abbey Carrick Glen hospital was necessary to remedy, mitigate or prevent the identified substantial lessening of competition and any adverse effects resulting from it. However, following GHG's unsuccessful initial sales process, an independent review has concluded that the sale process undertaken on behalf of GHG had been carried out to 'suitable standards and in a manner consistent with industry norms', and that further, there was no realistic prospect of a Trustee being able to sell the Abbey Carrick Glen hospital as a going concern.

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<sup>2</sup> Paragraph 125 of the OFT Decision of 14 September 2010  
[www.oft.gov.uk/shared\\_oft/mergers\\_ea02/2010/GHG-Abbey.pdf](http://www.oft.gov.uk/shared_oft/mergers_ea02/2010/GHG-Abbey.pdf)

29. On the basis of the evidence provided to the OFT, both by GHG as a result of its initial sales process, and by the review of that sales process carried out by an independent third party, the OFT believes that appointment of a Trustee would serve no useful purpose in this case.
30. The OFT has considered representations from an interested third party that proposed that, should GHG be released from its obligation to divest the Carrick Glen business, it should be required to continue to operate the business on a standalone basis. The OFT has rejected this proposal as unworkable and liable to have a negative impact on the viability of the business going forward.
31. Therefore in the light of these findings, the OFT has concluded that the appropriate action is to release GHG from the undertakings in lieu of reference accepted on 9 November 2010 in their entirety with effect from today (3 May 2011).