

# OFT clarifies its approach to review of NHS mergers

On 22 March 2013 the OFT published a "Frequently Asked Questions" ("FAQ") document setting out further details on its remit and role in respect of National Health Service ("NHS") mergers.

Notably, the FAQ highlight the OFT's broad remit to review mergers between NHS foundation trusts ("FT") and NHS trusts as well as mergers between NHS FTs, and potentially also reconfigurations such as asset swaps, outsourcing and supply agreements.

## What is the scope of OFT's role?

The Health and Social Care Act 2012 clarified the role of the OFT in examining mergers involving NHS FTs. The FAQ now confirm OFT will also review mergers between:

- NHS FTs and NHS trusts;
- NHS FTs or NHS trusts and other "enterprises";
- But **not** mergers involving only NHS trusts (on the basis that they will remain under the common Government control).

The FAQ highlight that an "enterprise" is defined broadly: it need not cover the whole of a business and may include NHS reconfigurations such as asset swaps, and outsourcing or supply agreements involving the transfer of assets, rights and/or employees.

For example, the OFT concluded that the neurosurgery services of the Royal Free London FT constituted an enterprise when those services were

## Key issues

- OFT will review Foundation Trust / Trust mergers
- Asset swaps / outsourcing / supply agreements may also qualify for review
- OFT has strong preference for structural (i.e. divestments) over behavioural remedies
- Parties must self-assess whether to notify OFT, but are encouraged to engage in pre-notification or seek informal advice

transferred, in phases, to University College London Hospitals NHS FT. By contrast, in HCA International Limited / Guy's and St Thomas' NHS FT, the OFT concluded that a lease of space for use as a private patient unit did not amount to a transfer of an enterprise, as HCA would be investing its own funds to establish private patient facilities, no staff,

customer assets, liabilities, services or patients would be transferred, and Guy's provided only limited private patient cancer services prior to the transaction.

The FAQ highlight that parties must self-assess whether to notify the OFT, and that, in the absence of a notification, the OFT may open an "own-initiative" review where it has competition concerns.

Monitor will continue to review mergers between only NHS trusts.

## How will OFT assess mergers?

In assessing any potential reduction of competition arising from a merger of NHS providers, the OFT will consider the impact on factors such as incentives to maintain access, or to maintain and improve the quality and/or efficiency of their clinical services for patients. Quality of services may be assessed by reference to factors such as clinical quality, waiting times, accessibility, staffing levels and opening times.

In addition, the OFT will assess the impact on competition to win tenders from commissioning bodies.

The types of evidence the OFT will consider include (i) internal documents, (ii) information on the local market such as GP referral patterns, analyses of catchment areas and evidence on patients' willingness to travel, (iii) data on NHS tenders and (iv) views of third parties such as local patient networks, commissioners and local health boards.

### **How does OFT approach remedies and benefits?**

The OFT may decide not to refer a case to the Competition Commission (even though it has identified a risk of a substantial lessening of competition) if: (i) the parties offer clear cut remedies ("undertakings") to resolve the OFT's concerns; or (ii) it concludes the merger would give rise to relevant customer benefits ("RCBs") – such as improved choice, higher quality treatment or better innovation – that will compensate for the identified concerns.

The FAQ state that the OFT has a strong preference for structural undertakings (i.e. divestments) over undertakings regarding future behaviour.

Monitor must advise the OFT on whether it expects the transaction to give rise to RCBs. Monitor intends to publish guidance on this process shortly, as well as a joint memorandum of understanding with the OFT on how the two authorities will interact.

In the two OFT decisions to date – Bournemouth / Poole and UCLH / Royal Free – Monitor concluded that most of the benefits that the parties attributed to their mergers were either

insufficiently substantiated by the evidence, or were likely to have arisen even if the merger had not happened.

### **'Failing firm' scenario - how will the parties' clinical and financial circumstances be taken into account?**

When assessing a merger, the OFT typically compares it with the prevailing (pre-merger) conditions of competition. The FAQ indicate that an alternative "counterfactual" may be appropriate in circumstances where one of the merging NHS providers is failing to meet its duty to provide high quality and safe services to patients within the funding that is available, and as such may be under pressure to reconfigure or close certain or all the services it provided – that is, that the relevant counterfactual is a failing or exiting business.

However, in practice the OFT is reluctant to accept 'failing firm' defences of this kind unless there is very strong evidence. For example, in UCLH / Royal Free, the OFT found that the evidence provided did not support a conclusion that, absent the merger, exit of Royal Free's neurosurgery services was inevitable or that there was no less anti-competitive purchaser who could have credibly acquired the services.

The OFT did, however, take into account certain funding considerations for Royal Free which meant that it would be a weaker competitor going forward.

### **Comment**

The FAQ highlight the broad scope of the OFT's remit, in particular its jurisdiction to review transactions that are less than fully-fledged mergers.

In the absence of a mandatory notification system, this makes self-assessment particularly important.

The document also provides a reminder that the OFT is "generally unlikely" to accept behavioural undertakings; in practice, it has accepted them in only two cases in over ten years (contrast with the Competition and Cooperation Panel which has recommended them in some cases). Arguably the OFT should be more willing to accept behavioural undertakings given the availability of third party monitoring (eg by commissioners or Monitor) and that possible concerns about free market interference do not carry their usual weight given the highly regulated nature of the NHS.

While the OFT encourages early engagement with it and Monitor on RCBs, it is noteworthy that it has never accepted RCBs to clear an otherwise anti-competitive merger, and experience to date suggests that parties have struggled to demonstrate benefits are merger specific or otherwise provide sufficient evidence of RCBs.

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