

Briefing note on the application of merger control rules to pathology service reconfigurations

3 June 2013

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Background

1. On 22 March 2013, the Office of Fair Trading (OFT) published a set of frequently asked questions (the OFT FAQs) setting out its approach to jurisdiction for its review of mergers involving NHS organisations.¹ Monitor separately published a briefing note on the respective roles of Monitor, the OFT and the Competition Commission (CC) in relation to mergers involving NHS trusts and NHS foundation trusts.
2. Monitor is also aware that a number of transactions are planned or in progress in respect of pathology services, in many cases triggered by the recommendations of the Carter Review.² Many of these transactions appear to take the form of joint ventures (JVs) that consolidate the pathology services of two or more providers under a single management structure. These JVs are intended to provide services on behalf of their parent organisations and in some cases also to other organisations.³
3. While service reconfiguration may improve the efficiency, effectiveness and quality of pathology services, it is important to ensure that any reconfiguration complies with merger control rules. Moreover, in a merger assessment of pathology services, the benefits arising from any service reconfiguration may be taken into account.⁴
4. Although not all pathology service reconfigurations will give rise to competition concerns, the purpose of this briefing note is to clarify that some of these transactions involving pathology services potentially amount to mergers of relevant businesses and may therefore be subject to review under the relevant merger control rules (merger review). Depending on the types of organisation involved merger review would be carried out either by the OFT⁵ or by Monitor. As explained below, providers should therefore consider at an early stage, before proceeding with implementation of a pathology reconfiguration, whether it would be appropriate to notify the OFT of their arrangements or Monitor accordingly.
5. In this briefing note we identify the tests that establish whether the OFT or Monitor has jurisdiction to review a pathology reconfiguration as a merger. We set out how

¹ See document entitled 'The OFT's role in reviewing NHS mergers – frequently asked questions' the OFT's website: <http://www.offt.gov.uk/OFTwork/mergers/publications/>

² Report of the Second Phase of the Review of NHS Pathology Services in England, Department of Health 2008. See http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_091984.pdf.

³ A key recommendation of the Carter Review was the development of consolidated pathology networks characterised by "end-to-end management of the service...and the concentration of non-urgent and specialist work in one or more centralised and accredited core laboratories".

⁴ For example, the OFT may decide not to make a reference if it believes that any relevant customer benefits in relation to the creation of the relevant merger situation outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.

⁵ Under the Enterprise Act 2002, the OFT has a statutory duty to make a reference to the CC where the OFT believes that it is or may be the case that a relevant merger situation has resulted or may be expected to result in a substantial lessening of competition.

and to whom the parties to such a transaction should consider notifying their reconfiguration plans. We also outline the choice and competition rules and laws that apply to reconfigurations that are not reviewable as mergers.

Mergers of pathology services

6. The OFT has jurisdiction to review transactions between NHS foundation trusts, between NHS foundation trusts and private businesses, and between NHS foundation trusts and NHS trusts (provided its jurisdictional thresholds are met). In these cases Monitor has a statutory duty to provide advice to the OFT on whether such a merger will lead to benefits for people who use health care services provided for the purposes of the NHS, and on such other matters relating to the matter under investigation as Monitor considers appropriate.⁶
7. Until 1 April 2013 the Co-operation and Competition Panel (CCP) reviewed mergers involving NHS providers under the Principles and Rules of Cooperation and Competition (Principles and Rules)⁷. The CCP has now become the Competition Directorate of Monitor. Monitor is now responsible for advising the NHS Trust Development Agency (NHS TDA) on the competition aspects of mergers between NHS trusts only. Monitor's approach to the review of transactions between NHS trusts only is likely to be similar to the CCP's current remit under the Principles and Rules, including in relation to the applicable jurisdictional thresholds set out at paragraph 11 below.
8. A pathology service reconfiguration may amount to a merger for the purposes of the OFT or Monitor depending on the nature of the transaction and whether it meets certain jurisdictional thresholds. Transactions that may require notification are those that meet the criteria of the OFT or Monitor, as set out in paragraph 11 below.
9. Transactions which fall within the scope of a merger review are generally those which result in activities from two or more organisations which were previously conducted separately ceasing to be distinct. Factors that might indicate that a particular transaction amounts to a merger for the purposes of the OFT or Monitor include the transfer of a combination of customer contracts, assets, records, the application of TUPE⁸ to the transfer of staff and the introduction of a joint or single management structure. So, for example, a merger is likely to take place when:
 - one provider of pathology services transfers a combination of staff, assets, records and contracts to another provider; or
 - two or more providers set up a jointly-controlled organisation (JV) for pathology services and contribute their former pathology services into the new organisation.

⁶ Section 79 (5) of the Health and Social Care Act 2012.

⁷ Available from Monitor's website, www.monitor.gov.uk.

⁸ The Transfer of Undertakings (Protection of Employment) Regulations 2006

10. These arrangements might either be the result of an initiative by providers, or a response to commissioner activity: for example, where a tender specification for pathology services is such that no current single provider is able to meet the specification independently (or able to invest to do so), or where providers decide to bid jointly for tendered services. Provided there is a change of management or control as described in paragraph 9 above, and the relevant jurisdictional thresholds are met, the arrangements are likely in either case to constitute a merger. More detail can be found in the OFT's jurisdictional and procedural guidance for mergers⁹ and OFT FAQs.
11. Arrangements that constitute mergers for the purpose of merger control in the UK must meet certain thresholds (turnover or share of supply) to be reviewable by the OFT. The OFT thresholds are set out in the OFT FAQs under the question "*What mergers can the OFT and the CC review?*" Monitor's approach is likely to be similar to the CCP's remit under the Principles and Rules, including in relation to applicable jurisdictional thresholds. The OFT may review anticipated or completed mergers. In the case of a completed merger, the merger must have taken place not more than four months before the reference is made, unless the merger took place without having been made public and without the OFT being informed of it (in which case the four month period starts from the earlier of the time the merger was made public or the time the OFT was told about it).¹⁰
12. For the purposes both of assessing whether organisations or parts of organisations are ceasing to be distinct, and whether the jurisdictional thresholds are met, it will be necessary in each case to determine exactly which services are affected by the transaction. The scope of the consolidation of pathology services might vary from case to case. For example, a JV organisation might be providing centralised laboratory (analytical) services, with the participating hospital trusts or other members each retaining their own clinical interpretation (post-analytical) services. Other arrangements might consolidate both of these steps. Pre-analytical services such as phlebotomy might also be included.

OFT process for notification of pathology transactions

13. The following further guidance on the OFT process is available:

- OFT FAQs;
- *Mergers – jurisdictional and procedural guidance*, Office of Fair Trading (OFT527);
- *Merger assessment guidelines*, Office of Fair Trading and Competition Commission (OFT1254); and

⁹ See OFT 527, *Mergers – Jurisdictional and procedural guidance*, June 2009, available at http://www.of.gov.uk/shared_of/mergers_ea02/oft527.pdf and the OFT FAQs.

¹⁰ See OFT 527, *Mergers – Jurisdictional and procedural guidance*, June 2009, available at http://www.of.gov.uk/shared_of/mergers_ea02/oft527.pdf

- *Mergers - Exceptions to the duty to refer and undertakings in lieu of reference guidance*, Office of Fair Trading (OFT1122).¹¹

14. Prior notification to the OFT is not compulsory, it is up to merging parties to determine whether or not they should notify the OFT. If parties are unsure whether or not to notify, we would encourage them to engage early with the OFT.¹² We note that in the event that the CC finds a completed merger to result in a substantial lessening of competition, it can ultimately require it to be unwound or amended. Organisations whose planned pathology reconfigurations potentially fall within the OFT's jurisdiction are therefore advised to consider carefully at an early stage whether or not to notify their arrangements before proceeding with implementation of any reconfiguration and if appropriate to make early contact with the OFT to seek informal advice. Where parties do wish to notify the OFT, we encourage parties to engage early in pre-notification with both the OFT and Monitor.

Monitor process for notification of pathology transactions between NHS trusts

15. Monitor's approach to reviewing mergers between NHS trusts is likely to be similar to the CCP's approach to reviewing mergers involving NHS providers under the Principles and Rules. For further guidance on Monitor's approach to reviewing mergers between NHS trusts, including pathology transactions, please refer to the CCP's Merger Guidelines.¹³

16. Monitor encourages parties to have discussions with it at an early stage in the transaction planning so that the timing of Monitor's review can be coordinated with other processes (contact details are available at paragraph 22 below). The point at which parties to a merger should ask Monitor to start its review will vary from transaction to transaction. In general, there needs to be sufficient certainty about the nature of the transaction and the main terms of agreement.

Reconfigurations that do not qualify as mergers

17. Some pathology reconfigurations might take the form of agreements to cooperate or to coordinate business strategy, without the transfers of contracts, assets and staff that often indicate a change of control/businesses ceasing to be distinct. This looser type of JV might not be reviewable as a merger by Monitor or the OFT because the services concerned are not subject to a change of control or do not constitute enterprises ceasing to be distinct. In other cases, the turnover (or share of supply) thresholds might not be met.

18. These transactions could nevertheless be of interest to Monitor if they reduce choice and competition in a way that adversely affects the interests of patients. For example, an agreement by which two providers agree to specialise in different areas of pathology and to cease providing certain services offered by the other has the effect of reducing the choices available to commissioners and/or patients. This

¹¹ Available from the OFT's website, <http://www.offt.gov.uk/OFTwork/mergers/publications/>

¹² See the OFT FAQs.

¹³ Available from Monitor's website www.monitor.gov.uk.

might not be in patients' interests unless there are significant benefits that outweigh the material adverse effects for health care users. Agreements of this kind may also give rise to concerns under the Competition Act 1998 (CA98).

19. Both the OFT and Monitor have the power to apply the provisions of the CA98 to providers of health care services.¹⁴ Monitor has published draft guidance on the application of CA98 to the health care sector.¹⁵ Advice from the OFT on the provisions of CA98 and its enforcement is available from the OFT's website.¹⁶
20. In addition, Monitor's licences for providers of NHS health care services and the regulations for commissioners of NHS health care services under section 75 of the Health and Social Care Act (the National Health Service (Procurement, Patient Choice and Competition (No. 2) Regulations 2013), contain rules prohibiting agreements that restrict competition where that is against patients' interests.¹⁷ Monitor has published draft guidance on the choice and competition licence conditions.¹⁸

Contact details

21. For further information about the content of this note, or any related issue, please contact cooperationandcompetition@monitor.gov.uk. Questions for the OFT in relation to mergers should be addressed to healthcare.mergers@oft.gsi.gov.uk

¹⁴ The Health and Social Care Act 2012 gives Monitor concurrent, or shared, powers with the OFT to enforce provisions of the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union (the EC Treaty) in relation to the provision of health care services in England.¹⁵ <http://www.monitor.gov.uk/regulating-health-care-providers-commissioners/cooperation-and-competition/our-cooperation-and-compe>.

¹⁵ <http://www.monitor.gov.uk/regulating-health-care-providers-commissioners/cooperation-and-competition/our-cooperation-and-compe>.

¹⁶ <http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/>

¹⁷ Monitor will not be able to apply its new powers to NHS trusts. However, it expects that it will be providing advice to the NHS TDA on compliance by NHS trusts with the principles set out in the licence conditions on choice and competition.

¹⁸ <http://www.monitor.gov.uk/regulating-health-care-providers-commissioners/cooperation-and-competition/our-cooperation-and-compe>.

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