

## **The OFT'S role in reviewing NHS mergers**

### **Frequently Asked Questions**

#### **Introduction**

1. The Enterprise Act 2002 (EA02) imposes a duty on the Office of Fair Trading (OFT) to refer completed and anticipated mergers to the Competition Commission (CC) for further investigation if it believes that it is or may be the case that:
  - a. a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and
  - b. the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets for goods or services in the United Kingdom.
  
2. The OFT is of the view that the EA02 applies to mergers between National Health Service (NHS) foundations trusts and between NHS foundation trusts and NHS trusts (together referred to below as NHS providers).<sup>1</sup> The OFT considers that the EA02 does not apply to mergers between NHS trusts only but notes that Monitor has a role in reviewing such mergers.
  
3. The OFT has to date considered two mergers involving NHS foundation trusts<sup>2</sup> one of which it referred to the CC. The OFT is continually building its capability in assessing mergers in this area. This includes improving its understanding of the dynamics of competition in the NHS and the ways in which these can lead to improved outcomes for patients, commissioners and taxpayers.<sup>3</sup> The Co-operation and Competition Panel (CCP) has in the

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<sup>1</sup> The recent Health and Social Care Act 2012 (HSCA) clarified the role of the OFT in examining mergers between NHS foundation trusts as well as between NHS foundation trusts and other enterprises.

<sup>2</sup> Anticipated merger between Poole Hospital NHS foundation trust and Royal Bournemouth and Christchurch Hospitals NHS foundation trust, ME/5351/12, decision dated 8 January 2012 (at the time of issuing these FAQs, the CC had made a final determination); and the acquisition by University College London Hospitals NHS foundation trust of Royal Free London NHS foundation trust's neurosurgery services, ME/5574/12, decision dated 21 February 2013.

<sup>3</sup> In particular, the OFT will continue to work closely with Monitor, the sector regulator of health care in England. To enable it to carry out its duties under the EA02 in relation to NHS mergers, the OFT will also continue to cooperate with the Department of Health and other relevant bodies, such as the NHS Trust Development Authority, the NHS Commissioning Board and

past reviewed a number of mergers involving NHS providers under its Principles and Rules of Cooperation and Competition.<sup>4</sup>

4. The OFT intends in this document to clarify its role in the review of mergers between NHS foundation trusts and between NHS foundation trusts and NHS trusts (both referred to throughout as NHS mergers). This document sets out answers to some of the most frequently asked questions from NHS providers and their advisers regarding the OFT's review of NHS mergers and aims to provide information on the roles of the OFT and the CC. It also provides information on the role of the health care regulator Monitor.
5. The following questions are answered in this document:
  - i. What is the OFT and CC's role in reviewing mergers?
  - ii. What are the OFT's powers?
  - iii. What are the CC's powers?
  - iv. What arrangements can the OFT and CC review?
  - v. What arrangements involving NHS providers can the OFT and CC review?
  - vi. What is the role of Monitor?
  - vii. When should NHS providers approach the OFT?
  - viii. How will the OFT assess NHS mergers?
  - ix. How will the OFT take into account the clinical and financial circumstances affecting merger parties?
  - x. Who should I notify going forward?
  - xi. Where can I get more information and/or guidance?
6. This publication does not constitute guidance under section 106 of the EA02 but summarises general guidance that is already available. It is also only applicable to mergers that fall to be assessed under Part 3 of the EA02.

### **What is the OFT and CC's role in reviewing mergers?**

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relevant third parties (for example local commissioners, patient groups and other representatives).

<sup>4</sup> See [www.ccpnl.org.uk/cases/index.html](http://www.ccpnl.org.uk/cases/index.html).

7. In accordance with Part 3 of the EA02, merger review in the UK is primarily the responsibility of the OFT and the CC. The UK merger control regime is a two phase process, with the OFT responsible for phase one and the CC for phase two.
8. The OFT's phase one process typically lasts 40 working days, but may be extended where necessary. The OFT has a duty under the EA02 to refer a merger to the CC for a phase two review where it believes 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.
9. The CC may only review mergers referred to it by the OFT, or by the Secretary of State in public interest cases (presently specified public interest considerations are national security, media plurality or the stability of the financial system). The CC's phase two process is generally limited to 24 weeks. The CC determines whether the merger has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services.

#### **What are the OFT's powers?**

10. In completed mergers, the OFT is likely to seek interim measures, also known as 'initial undertakings' or 'hold separate' undertakings (as it requires the two entities to be held and operated separately), where there are preliminary indications that the merger raises or is likely to raise competition concerns.<sup>5</sup> These hold separate undertakings are intended to ensure that the parties cannot take steps to implement the merger in ways that could not be undone if the OFT or the CC found that the merger raised competition concerns. The OFT will consider the risk of pre-emptive action and the issues of urgency and proportionality in accepting or requesting initial undertakings from merging parties.<sup>6</sup>
11. Following its phase one assessment, the OFT could conclude that:

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<sup>5</sup> See here for initial undertakings template: [www.oft.gov.uk/OFTwork/mergers/publications/](http://www.oft.gov.uk/OFTwork/mergers/publications/)

<sup>6</sup> Further information can be found in paragraphs 4.24 and 6.23 to .45 of OFT 527, Mergers – Jurisdictional and procedural guidance; the Competition Commission also has 'hold separate' powers both in relation to completed mergers and anticipated mergers (see [www.competition-commission.org.uk/our-work/royal-bournemouth-and-christchurch-poole/undertakings-and-order](http://www.competition-commission.org.uk/our-work/royal-bournemouth-and-christchurch-poole/undertakings-and-order)) for undertakings given in the Proposed Merger of the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust.

- (i) a relevant merger situation has not been created (in respect of completed mergers), or arrangements are in progress, which, if carried into effect, will not result in the creation of a relevant merger situation (in respect of anticipated mergers), and therefore it is not reviewable under the provisions of the EA02
- (ii) a relevant merger situation has or will be created but there is not a realistic prospect of a substantial lessening of competition arising from the merger, or
- (iii) a relevant merger situation has or will be created and there is a realistic prospect of a substantial lessening of competition arising from the merger. This triggers the OFT's duty to refer the case to the CC (subject to the exceptions listed below).

12. Where the OFT reaches conclusion (iii) above, the EA02 provides certain limited exceptions to the OFT's statutory duty to refer the transaction to the CC, namely:

- (i) the market(s) concerned are not of sufficient importance to justify the making of a reference to the CC, known as the 'de minimis test',<sup>7</sup> or
- (ii) any relevant customer benefits (RCB) in relation to the creation of a relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects arising, or
- (iii) in the case of anticipated or proposed mergers, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference to the CC.

13. Also, the OFT has the ability to accept undertakings in lieu (UiL) of reference (also known as remedies) if they are offered by the parties and are sufficiently clear cut to resolve the competition concerns raised by the merger. This provision allows for the benign or pro-competitive aspects of the merger to be carried forward, while preventing the substantial lessening of competition aspects from occurring. It is at the merging parties' discretion to offer UiLs to the OFT and show that those UiLs are sufficiently 'clear cut' and meet the other relevant standards required for acceptable UiLs. These undertakings can take the form of divesting assets (structural undertakings) or commitments about future conduct (behavioural undertakings), albeit the OFT is generally unlikely to consider that

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<sup>7</sup> See section 2 here: OFT1122 Mergers—Exceptions to the duty to refer and undertakings in lieu of reference guidance.

behavioural undertakings will be sufficiently clear cut to address the identified competition concerns.<sup>8</sup>

14. As set out below, Monitor will provide the OFT with advice on the effect of an NHS merger on RCBs, for example higher quality services. The OFT will take this advice into consideration when it assesses whether the RCBs outweigh any findings of a substantial lessening of competition arising from the merger.
15. In this regard, the OFT and Monitor would encourage merger parties to engage with both agencies at an early stage, ideally during the pre-notification stage of a merger review, in order to anticipate the types of evidence both agencies will require when assessing whether there are RCBs arising from the merger. Contact details for both agencies are set out at the end of this document.<sup>9</sup>

#### **What are the CC's powers?**

16. Once a merger has been referred to the CC, the CC has power to take any action it considers appropriate for the purpose of preventing pre-emptive action, that is action which might prejudice the reference or impede the taking of action following the reference. If such interim measures are necessary, the CC may adopt any interim measures adopted by the OFT or secure undertakings from the merging parties or make an order. In both anticipated and completed cases the measures might include prevention of further integration (including preventing changes to the nature, description, range and quality of services currently supplied by each merging NHS entity, changes to management responsibilities, pursuing joint bids, discussing or jointly recruiting staff), restrictions on information flows between the parties and the appointment of a monitoring trustee.<sup>10</sup>

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<sup>8</sup> Further information can be found in OFT 1122, Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance, dated December 2010.

<sup>9</sup> Further information in relation to Monitor's approach to its advice on RCBs will be published on Monitor's website ([www.monitor-nhsft.gov.uk](http://www.monitor-nhsft.gov.uk)).

<sup>10</sup> See [www.competition-commission.org.uk/our-work/royal-bournemouth-and-christchurch-poole/undertakings-and-order](http://www.competition-commission.org.uk/our-work/royal-bournemouth-and-christchurch-poole/undertakings-and-order) for undertakings given in the Proposed Merger of the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust. See [www.competition-commission.org.uk/assets/competitioncommission/docs/2012/publications/cc18.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/publications/cc18.pdf) for more information about the CC's powers in respect of interim measures.

17. Following its assessment, the CC could conclude:

- (i) a relevant merger situation has not been created (in respect of completed mergers), or arrangements are in progress, which, if carried into effect, will not result in the creation of a relevant merger situation (in respect of anticipated mergers) and therefore it is not reviewable under the provisions of the EA02
- (ii) a relevant merger situation has or will be created but does not give rise to a substantial lessening of competition, or
- (iii) a relevant merger situation has or will be created and it may be expected to result in a substantial lessening of competition.

18. Where the CC finds that the transaction is expected to result in a substantial lessening of competition (outcome (iii) above), it must consider whether remedies are appropriate to resolve the substantial lessening of competition and any resulting detrimental effects. When determining what remedies are appropriate, it may take account of the RCBs identified in its assessment and the impact remedies might have on these. The CC has extensive remedy powers which include the power to divest and to prohibit the merger in full or partially. The remedies may be secured by undertakings or by the CC making an Order.<sup>11</sup>

#### **What arrangements can the OFT and CC review?**

19. The OFT and CC have the jurisdiction to examine relevant merger situations. Relevant merger situations can include any arrangements (whether anticipated or completed) which includes, for example, mergers, acquisitions, certain types of joint ventures, asset swaps or management agreements,<sup>12</sup> and will arise where:

- Two or more enterprises cease to be distinct,  
and

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<sup>11</sup> Further information can be found in CC8, Merger Remedies: Competition Commission Guidelines.

<sup>12</sup> Where these do not constitute mergers, the OFT notes that such arrangements will still be subject to competition law as both the OFT (see OFT1389 Public bodies and competition law – a guide to the application of the Competition Act 1998) and Monitor will have the power to apply the provisions of the Competition Act 1998 to providers of healthcare services; and Monitor's licences under section 75 of the HSCA will contain rules prohibiting agreements that restrict competition where that is against patient's interests.

- either the UK turnover of the acquired enterprise exceeds £70 million, or
  - the two enterprises supply or acquire at least 25 per cent of the same goods or services supplied in the UK (or a substantial part of it) and the merger increases that share of supply.
20. The term 'enterprise' includes the whole or part of a business and two enterprises will cease to be distinct when they are brought under common ownership or control. This does not mean that the enterprise in question need be a separate legal entity: it simply means that the activities in question should be carried on for gain or reward.<sup>13</sup>
21. An 'enterprise' may comprise any number of components, most commonly including the employees working in the business and the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill.
22. Commercial arrangements/NHS reconfigurations such as an outsourcing or supply agreement where they involve a transfer of assets, rights and/or employees, or where parties transfer or swap assets, for example, may create a relevant merger situation. In making a judgement as to whether such an arrangement results in a relevant merger situation, the OFT will look at the substance of the arrangement rather than merely its legal form.<sup>14</sup>

### **What arrangements involving NHS providers can the OFT and CC review?**

23. The enactment of the HSCA clarified the role of the OFT in reviewing mergers between two or more NHS foundation trusts and between NHS foundation trusts and other 'enterprises' (as defined by section 129 of the EA02).<sup>15</sup>
24. In addition to its role in reviewing mergers involving NHS foundation trusts, the OFT considers that NHS trusts (which may include, for example,

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<sup>13</sup> See paragraph 3.8: OFT527 Mergers—Jurisdictional and procedural guidance.

<sup>14</sup> Further information can be found in chapter 3 of OFT 527, Mergers – Jurisdictional and procedural guidance.

<sup>15</sup> See footnote 2 for details of the mergers the OFT has assessed to date.

community and ambulance services) fall within the definition of an 'enterprise' and as such may be considered enterprises for the purpose of UK merger review. While NHS services are 'free for the patient at the point of delivery', the primary care trusts (and/or commissioning organisations) procure and pay a consideration for the provision of such services.

25. Consequently, the OFT will review mergers between NHS foundation trusts, between NHS foundation trusts and NHS trusts and between NHS foundation trusts or NHS trusts and other enterprises and this may lead to any of the outcomes previously mentioned (see paragraphs 11 to 13). However, the OFT's view is that mergers involving only NHS trusts would not result in a merger reviewable under the EA02 as NHS trusts will remain under the common control of the Secretary of State for Health.<sup>16</sup>
26. Monitor will continue to assess mergers between NHS trusts only and will advise the NHS Trust Development Authority on the competition aspects of such transactions. Such mergers are currently assessed by the CCP. From 1 April 2013, the CCP will become part of Monitor and its Co-operation and Competition Directorate. Monitor will take a similar approach to the assessment of NHS trust mergers as the CCP has done to date.<sup>17</sup>

### **What is the role of Monitor?**

27. The OFT must notify Monitor where it decides to carry out an investigation of an NHS merger. Once notified, Monitor is under a duty to provide advice to the OFT on:<sup>18</sup>
  - i. the effect of the matter under investigation on benefits<sup>19</sup> (RCBs) arising from the merger (for people who use health care services provided for the purposes of the NHS), and
  - ii. such other matters relating to the matter under investigation as Monitor considers appropriate.

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<sup>16</sup> Section 26 of the EA02 states that for the purposes of UK merger control, 'any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control'. To the extent that enterprises are already under common ownership or common control, a merger between them would therefore not satisfy this criterion such that they would not 'cease to be distinct'.

<sup>17</sup> Further information will be available on see Monitor's website: [www.monitor-nhsft.gov.uk](http://www.monitor-nhsft.gov.uk).

<sup>18</sup> As per section 79 of the HSCA.

<sup>19</sup> See section 30(1)(a) of the EA02.



28. As is anticipated by the HSCA, the OFT and Monitor will work closely together on the practical application of this co-operation. The OFT and Monitor intend to publish jointly a memorandum of understanding shortly, that will provide further information on the interaction relevant to this cooperation. Monitor will also publish guidance on its approach to assessing RCBs on its website in due course.

### **When should NHS providers approach the OFT?**

29. Merger parties are expected to self-assess, that is determine for themselves, with their advisers whether they should notify the OFT. The contents of this document, and the published guidance referred to throughout, which is further detailed at the end, will assist prospective merger parties with the assessment.

30. Parties should engage openly and early with the OFT. Once parties have decided to notify the OFT, they are encouraged to engage in detailed pre-notification discussions with the OFT mergers group. The benefits of pre-notification, especially in the context of NHS mergers, are as follows:

- it allows the OFT to develop its understanding of the relevant local health economy (such as services provided by the merging NHS providers and their competitors in the area)
- the OFT can provide advice on the type of evidence which it will require during the course of its investigation
- merger parties will be able to engage in early discussions with the OFT on areas that may raise competition concerns (such as particular services where the merging NHS providers are particularly close competitors)
- the OFT may identify specific evidence to assess the merging NHS providers' claims. These can include submissions that one of the merging NHS providers was likely to exit certain or all service areas it provides, absent the merger (the exiting firm counterfactual) or that the pre-merger competitive conditions were not likely to endure and as such the OFT should assess the impact of the merger against an alternative scenario<sup>20</sup>

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<sup>20</sup> See section below on the clinical and financial circumstances affecting the merger parties.

- encourages the merger parties to engage with the OFT and Monitor on any RCBs from an early stage,<sup>21</sup> and
- it should lessen pressures on the administrative timelines and reduce the need for information requests during the OFT's assessment process.

31. As noted above at paragraph 10, in completed mergers, the OFT is likely to seek interim measures, also known as 'initial undertakings' or 'hold separate' undertakings (as it requires the two entities to be held and operated separately), where there are preliminary indications that the merger raises or is likely to raise competition concerns.<sup>22</sup> The OFT will consider the risk of pre-emptive action and the issues of urgency and proportionality in accepting or requesting initial undertakings from merging parties.<sup>23</sup>

32. Parties are therefore encouraged to make use of the pre-notification process, and approach the OFT's mergers group early, to discuss completed mergers that will be subsequently notified.<sup>24</sup>

#### **How will the OFT assess NHS mergers?**

33. The OFT and CC have jointly published guidance on how they generally assess mergers to determine whether there may be a risk of harm to competition and choice. These guidelines are useful for those contemplating NHS mergers.<sup>25</sup>

34. The OFT is required to refer completed and anticipated mergers to the CC for further investigation if it believes that it is or may be the case that the

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<sup>21</sup> See section above on the role of Monitor, particularly on the RCBs.

<sup>22</sup> See here for initial undertakings template: [www.oft.gov.uk/OFTwork/mergers/publications/](http://www.oft.gov.uk/OFTwork/mergers/publications/)

<sup>23</sup> Further information can be found in paragraphs 4.24 and 6.23 to .45 of OFT 527, Mergers – Jurisdictional and procedural guidance; the Competition Commission also has 'hold separate' powers both in relation to completed mergers and anticipated mergers (see [www.competition-commission.org.uk/our-work/royal-bournemouth-and-christchurch-poole/undertakings-and-order](http://www.competition-commission.org.uk/our-work/royal-bournemouth-and-christchurch-poole/undertakings-and-order)) for undertakings given in the Proposed Merger of the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust.

<sup>24</sup> Further information on the OFT's pre-notification process can be found in OFT 527, Merger – Jurisdictional and procedural guidelines, dated June 2009, at paragraphs 4.42 to 4.48.

<sup>25</sup> Further information is available in OFT 1254, Mergers Assessment Guidelines, a joint publication of the CC and the OFT, dated September 2010, and OFT1313, A quick guide to UK merger assessment, a joint publication of the CC and the OFT, dated March 2011.

creation of a relevant merger situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets for goods or services in the United Kingdom. When considering whether the duty has arisen the OFT applies a 'realistic prospect' threshold.<sup>26</sup>

35. In relation to the services provided by NHS providers, the OFT assesses whether an NHS merger between such providers is likely to reduce competition between providers of these services. For example, the OFT may consider whether the merger is likely to lead to a reduction in the merged organisation's incentives to maintain access, and maintain and improve the quality and/or efficiency of their clinical services for patients (together substantial lessening of competition). Quality of services may be assessed through various factors, including but not limited to clinical quality, waiting times, accessibility, staffing levels and opening times.
36. The OFT is likely to review wide-ranging evidence which it collects during the course of its investigation. This evidence may include (but is not limited to) documents provided by the merging parties, such as internal documents, reports, studies, surveys, pre-merger business plans, recent annual reports and accounts and catchment area analysis. Within the first few days of the investigation, the OFT announces that it is investigating by issuing a public invitation to comment. It will also seek contact details from the parties for important customers, competitors and suppliers of the merger parties.
37. In assessing whether the duty to refer an NHS merger is met, the types of evidence the OFT will consider include (but is not limited to):
  - a. internal documents to the merging NHS providers such as board papers or reports analysing local competitive conditions
  - b. GP referral patterns, analyses of catchment areas and evidence on patients' willingness to travel
  - c. information on tenders which the merging NHS providers have participated in
  - d. views of local patient networks, relevant commissioners, and local health boards, and

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<sup>26</sup> For further information see paragraph 2.2 of OFT 1254, Merger Assessment Guidelines.

- e. views from other NHS organisations which provide similar services to the local area.
38. As noted above, the OFT has published two NHS merger decisions, which should provide merging NHS providers and their advisers with additional information on both how the OFT assesses NHS mergers and what type of information was provided to the OFT for it to conduct its assessment.<sup>27</sup> In addition, CCP has also provided advice to Monitor and the Secretary of State on a number of mergers, under the Principles and Rules of Cooperation and Competition, which will provide useful context and material for NHS providers and advisers notifying NHS mergers to the OFT.<sup>28</sup>
39. Merger parties may notify the OFT by way of an informal submission or statutory merger notice.<sup>29</sup>

**How will the OFT take into account the clinical and financial circumstances affecting the merger parties?**

40. The application of the substantial lessening of competition test at phase one by the OFT involves a comparison of the prospects for competition with the merger against the competitive situation without the merger (the latter is called the 'counterfactual'). The OFT considers the effect of the merger compared with the most competitive counterfactual providing always that it considers the situation to be a reasonable prospect. The OFT typically adopts the prevailing competitive conditions (or the pre-merger situation in the case of completed mergers) as the counterfactual. However, there may be reason for the OFT to use a different

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<sup>27</sup> Anticipated merger between Poole Hospital NHS foundation trust and Royal Bournemouth and Christchurch Hospitals NHS foundation trust, ME/5351/12, decision dated 8 January 2012; and the acquisition by University College London Hospitals NHS foundation trust of Royal Free London NHS foundation trust's neurosurgery services, ME/5574/12, decision dated 21 February 2013.

<sup>28</sup> See <http://www.ccpanel.org.uk/cases/index.html>.

<sup>29</sup> The difference between these types of submissions and the information that they are expected to contain is set out in further detail in chapter 5 of OFT527, Mergers – Jurisdictional and procedural guidance, June 2009.

counterfactual, for example, taking account of clinical and financial circumstances of any of the merging trusts.<sup>30</sup>

41. The OFT may receive submissions by merging parties stating that one or other of the parties is failing and likely to exit the market (that is, that the relevant counterfactual is a failing or exiting firm (business)). The OFT will consider whether all three criteria of the exiting firm (business) scenario are satisfied. These are:
  - (i) whether the business would have exited (through failure or otherwise), and if so
  - (ii) whether there would have been an alternative purchaser for the business or its assets to the acquirer under consideration, and
  - (iii) what would have happened to the sales of the business in the event of its exit (in the case of NHS mergers, what would have happened to the revenue of the NHS entity in the event of its exit).
  
42. In its assessment of NHS mergers, the NHS providers may wish to submit that an alternative counterfactual should be used to assess the impact of the merger. This may include 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 as set out under the NHS constitution, and as such may be under pressure to reconfigure or close certain or all the services it provided.
  
43. The OFT will consider the evidence available in assessing such submissions and will typically review (amongst other evidence) internal documents that discuss the options available to the organisation that claims it would have failed or exited absent the merger. For example, in its assessment of the merger between Bournemouth Foundation Trust and Poole Foundation Trust, the OFT considered evidence of service reconfiguration or exit in the form of submissions by the relevant commissioner.<sup>31</sup>

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<sup>30</sup> Further information on the OFT's approach to the appropriate counterfactual is outlined in OFT1254, Merger Assessment Guidelines, joint publication of OFT and CC, dated September 2010, at paragraphs 4.31 to 4.3.24.

<sup>31</sup> ME/5351/12: Anticipated merger between the Royal Bournemouth and Christchurch hospitals NHS foundation trust and Poole hospital NHS foundation trust.

44. As each case will be dealt with on its own merits and factual presentation, the OFT would encourage NHS providers to enter into early pre-notification discussions with the OFT in relation to the relevant situation against which the NHS merger should be assessed where the merger parties consider that it is not the prevailing conditions of competition (for example, if one of the NHS providers was going to close its services).

### **Who should I notify going forward?**

45. Where no merger filing has been made to CCP/Monitor in relation to NHS mergers, merger parties are expected to self-assess, that is determine for themselves, with their advisers whether they should notify the OFT.
46. Where no notification is made to the OFT and the OFT has concerns that an NHS merger may raise competition concerns, it may open an assessment on its own initiative by sending an enquiry letter to the merger parties.<sup>32</sup> These NHS mergers would be assessed in the same way as those notified directly to the OFT.
47. As noted above, Monitor will continue to review mergers between only NHS trusts and will advise the NHS Trust Development Agency on the competition aspects of such transactions.<sup>33</sup>
48. The OFT is also working closely with the Department of Health and the NHS Trust Development Authority in order to provide assistance and guidance to both of these entities on the OFT's role in assessing NHS mergers.

### **Where can I get more information and/or guidance?**

#### Published Guidance

49. As mentioned throughout this document, the OFT and CC have published guidance documents relevant to the UK merger regime. These documents

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<sup>32</sup> However, the NHS merger must have taken place not more than four months before the reference is made, unless the NHS 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 NHS merger was made public or the time the OFT was told about it).

<sup>33</sup> Further information will be available on Monitor's website: [www.monitor-nhsft.gov.uk](http://www.monitor-nhsft.gov.uk).

will assist merger parties in understanding the OFT and CC's role in assessing NHS mergers. The primary sources of guidance are:

### **Joint OFT/CC publication**

- OFT1254/CC2 Merger assessment guidelines

### **Other OFT publications**

- OFT508 Overview of the Enterprise Act
- OFT527 Mergers—Jurisdictional and procedural guidance
- OFT1122 Mergers—Exceptions to the duty to refer and undertakings in lieu of reference guidance

All available on the OFT's website at:

[www.oft.gov.uk/OFTwork/mergers/publications/](http://www.oft.gov.uk/OFTwork/mergers/publications/)

### **Other CC publications**

- CC18 Merger Procedural Guidelines
- CC1 Rules of Procedure
- CC7 Disclosure Guidance
- CC8 Merger Remedies: Competition Commission Guidelines

All available on the CC's website at: [www.competition-commission.org.uk/publications/cc-rules-and-guidance](http://www.competition-commission.org.uk/publications/cc-rules-and-guidance)

### **Contact with the OFT's mergers group**

50. The OFT offers a range of points of contact to the mergers group to discuss process, procedure or anticipated transactions. There are two main types of discussions that parties should be aware of: pre-notification discussions and informal advice. Informal advice is used to obtain information about the OFT's views of likely competition issues in a future transaction, but does not trigger an actual investigation leading to a public decision. Pre-notification discussions are a preliminary stage for cases where the parties wish to proceed to notify the merger.

## Pre-notification discussions

51. The OFT's pre-notification process is discussed briefly above at paragraph 30. To reiterate, the OFT would encourage merger parties to use the pre-notification process to seek further assistance with regard to NHS mergers by contacting the OFT as set out at the end of these FAQs.
52. The pre-notification process is applicable where there is a good faith intention on behalf of the parties to enter into a merger situation. It will assist this process if the merger parties could provide a draft informal submission in advance. The OFT will keep the existence of such discussions confidential.<sup>34</sup>

## Informal advice

53. The OFT also has an informal advice procedure for merger parties and their advisers in relation to prospective mergers that have not yet been made public, that is, remain confidential. The OFT will provide informal advice where there is a good faith intention to enter into a merger arrangement but it is not yet in the public domain, where it is useful and appropriate and only when its duty to refer is a genuine issue. An application for informal advice will normally seek the OFT's substantive view as to the likelihood of the case being referred to the CC. However, the OFT will also provide advice on jurisdictional issues in cases that raise a genuine issue of a duty to refer.<sup>35</sup>

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<sup>34</sup> Further information can be found in OFT 527, Mergers – Jurisdictional and procedural guidance, paragraphs 4.42 to 4.48.

<sup>35</sup> Further information can be found in OFT 527, Mergers Jurisdictional and procedural guidelines, dated June 2009, paragraphs 4.28 to 4.41.



## Contact details

You may contact the OFT mergers group:

### **By post**

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### **By Telephone**

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### **By email:**

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You may contact Monitor

### **By post**

The Co-operation and Competition Directorate  
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