OFT REVIEWS PROPOSED MERGER OF TWO NHS FOUNDATION TRUST HOSPITALS

The OFT has today announced that it is reviewing the proposed merger between Poole Hospital NHS Foundation Trust and Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust, and invited comments from interested parties.

This is the first time the OFT has undertaken a review of a merger involving NHS Foundation Trusts since the enactment of the Health and Social Care Act 2012 (HSCA). The HSCA confirmed the OFT’s function in assessing the competition aspects of mergers between NHS Foundation Trusts, as well as mergers between NHS Foundation Trusts and one or more other businesses.

Each time the OFT conducts such a review of a qualifying merger it will take non-binding advice from Monitor, the independent regulator of NHS Foundation Trusts. Monitor will advise on whether the merger gives rise to relevant customer benefits for patients that the OFT should take into account, and can also provide advice on other matters relating to the merger.

The OFT’s function is to examine whether the proposed merger could substantially lessen competition, which could reduce choice or quality of care for patients or increase the cost of delivering services.
as a result of its investigation, the OFT concludes that there is a realistic prospect that the merger would result in a substantial lessening of competition, it has a duty to refer the case to the Competition Commission for an in-depth review unless the OFT considers it appropriate to apply one of the exceptions to the duty to refer. One such exception would be the OFT believes that any relevant customer benefits brought about by the merger outweigh the effects of the loss of competition.

The OFT has substantial experience of considering mergers in the healthcare sector, such as those involving private hospitals or dental practices with a substantial proportion of NHS patients.

As the first stage in its investigation, the OFT today issued an ‘Invitation to Comment’ which seeks views from third parties on competition issues arising from the proposed merger. The deadline for comments to be received is 2 November 2012. Comments can be sent to Poole.Bournemouth@oft.gsi.gov.uk.

Sheldon Mills, Director of Mergers, said:

‘Choice and competition can lead to better quality care for patients, as well as supporting value for money for the taxpayer. It is therefore important that the OFT examines whether this merger may
lead to a substantial lessening in competition and takes appropriate action.

‘We expect this to be the first of a number of mergers involving NHS Foundation Trusts. Alongside working closely with Monitor, which will advise on patient interests, we will draw on the experience we have gained through examining other healthcare mergers. We also encourage interested parties to share their views with us.’

The OFT’s current administrative target for reaching a decision in this case is 14 December 2012.

NOTES

1. Section 79 of the Health and Social Care Act 2012 refers to mergers involving NHS foundation trusts. It provides that:

   (1) For the purposes of Part 3 of the Enterprise Act 2002 (completed and anticipated mergers), each of the following cases is to be treated as being (in so far as it would not otherwise be) a case in which two or more enterprises cease to be distinct enterprises.

   (2) The first case is where the activities of two or more NHS foundation trusts cease to be distinct activities.

   (3) The second case is where the activities of one or more NHS foundation trusts and the activities of one or more businesses cease to be distinct activities.

   (4) Where the Office of Fair Trading decides to carry out an investigation under Part 3 of the Enterprise Act 2002 of a matter involving an NHS foundation trust, it must as soon as reasonably practicable notify Monitor.
(5) As soon as reasonably practicable after receiving a notification under subsection (4), Monitor must provide the Office of Fair Trading with advice on-

(a) the effect of the matter under investigation on benefits (in the form of those within section 30(1)(a) of the Enterprise Act 2002 (relevant customer benefits) for people who use health care services provided for the purposes of the NHS, and

(b) such other matters relating to the matter under investigation as Monitor considers appropriate.

(6) In subsections (2) and (3), a reference to the activities of an NHS foundation trust or a business includes a reference to part of its activities.

(7) In this section, ‘enterprise’ and ‘business’ each have the same meaning as in Part 3 of the Enterprise Act 2002.

2. Part 3 of the Enterprise Act 2002 applies to qualifying mergers, also known as ‘relevant merger’ situations. These include several types of transactions and arrangements, including joint ventures, that meet one of the relevant jurisdictional thresholds. See further Part 3 of the Merger Assessment Guidelines, a joint publication of the Competition Commission and the Office of Fair Trading, September 2010, (OFT1254); and Chapter 3 of the OFT’s Mergers - Jurisdictional and procedural guidance, June 2009. Both available here.

3. Under the Enterprise Act 2002 a relevant merger situation is or will be created if two or more enterprises have ceased or will cease to be distinct enterprises; and the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £70 million; or as a result of the transaction, in relation to the supply of goods or services of any description, a 25 per cent share of supply in the United Kingdom (or a substantial part of it) is created or enhanced.

4. The Reference Test — The OFT has a duty to make a reference to the Competition Commission if the OFT believes that it is or may be the case that a relevant merger situation has been or will be created; and as applicable, the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

5. Undertakings in lieu of reference – Section 73 of the Enterprise Act 2002 provides for the option of accepting undertakings, instead of making a reference, for the purpose ofremedying,
mitigating or preventing the substantial lessening of competition concerned, or any adverse effect which has or may have resulted from it or may be expected to result from it. The Act provides that for such a purpose, the OFT may accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate. In doing so, the OFT will have regard in particular to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it. It may, in particular, also have regard to the effect of any action on any relevant customer benefits (including in the present case, patient benefits).

6. Any interested party or individual can submit its comments on the competition aspects of this transaction by 2 November 2012 by email to Poole.Bournemouth@oft.gsi.gov.uk or by post to Poole/Bournemouth and Christchurch NHS Foundation trusts merger, 9th Floor, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8JX. Further information on the OFT’s merger assessment is available on its website here.

7. The administrative target is the OFT case team’s best estimate of the date by when the decision will be announced. If any change occurs, the information is refreshed on the OFT’s website as soon as practicable. However, the OFT cannot guarantee that it will be announced on or before this estimated date as the timetable of a given case may change during the merger assessment process due to different reasons. Updated timetables are available here.

8. More information on Monitor and its role can be found here.

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