Anticipated acquisition of Heatherwood and Wexham Park Hospitals NHS Foundation Trust by Frimley Park Hospital NHS Foundation Trust

ME/6432-14

Summary

1. The parties notified the anticipated merger to the Office of Fair Trading (OFT) on 28 March 2014. The merger was investigated under the OFT's administrative timetable[1] by the Competition and Markets Authority (CMA) from 1 April.[2]

2. Frimley Park Hospital NHS Foundation Trust (FPH) and Heatherwood and Wexham Park Hospitals NHS Foundation Trust (HWPH) (together, the 'parties') both supply a range of hospital-based services (including elective and non-elective inpatient services) and diagnostics and outpatient services to patients across a wide area, including Hampshire, Surrey, and Berkshire. They also both provide some specialised services and private (fee-paying) services to patients.

3. The parties signed a memorandum of understanding on 7 May 2013 relating to a possible acquisition of HWPH by FPH (the 'merger'), following which heads of terms were signed on 1 May 2014. The parties engage in activities which constitute 'enterprises' within the meaning of the Enterprise Act 2002 (the 'Act') and which will cease to be distinct as a result of the Merger. In addition, the income of HWPH exceeded £70 million in the UK in 2012/13, thus the turnover test is met. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation. The CMA assessed the merger against the conditions of competition prevailing pre-merger. The CMA has taken HWPH's financial and clinical difficulties into account in its competitive assessment to the extent that such issues are reflected in GP referral data and internal documents.

[1] Regarding the applicability of the OFT's administrative timetable, please refer to paragraphs 6(1) to 6(3) of the Schedule to the Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order, No 416 of 2014.
[2] The CMA was established on 1 October 2013. By virtue of the Enterprise and Regulatory Reform Act 2013 and the Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order, No 416 of 2014, the OFT's functions were transferred to the CMA on 1 April 2014.

4. With respect to product market definition, the CMA followed the framework of analysis of the previous Competition Commission (CC) merger decision in the healthcare sector.[3] The CMA has considered that each specialty constitutes a separate market. Within each specialty, the CMA treated (i) outpatient and inpatient activities as separate markets and (ii) non-elective and elective services as separate markets. The CMA considered that private services are separate markets from NHS services[4] and assessed the merger on the basis of its impact on competition in the market and competition for the market, separately.

5. In relation to competition in the market, the CMA analysed competition for the provision of NHS elective inpatient and outpatient services and private services. In relation to competition for the market, the CMA analysed competition for winning contracts for commissioned NHS elective and non-elective inpatient services and outpatient services, including specialised services. The CMA did not however find it necessary to conclude on the precise scope of the relevant product market.

6. In relation to the geographic market, the CMA identified an overlap between the Parties' catchment areas as a starting point. It then focused primarily on directly analysing the overlap in GP referral patterns rather than defining more precise geographic frames of reference for each specialty. This analysis takes into account how patient preferences are affected by location by focusing directly on the actual choices made by patients and GPs at each individual GP practice. The CMA did not however find it necessary to conclude on the precise scope of the relevant geographic market.

7. The CMA examined whether the merger may be expected to result in a substantial lessening of competition leading to worse outcomes for patients and commissioners.

Competition in the market

8. The CMA analysed overlaps between the parties at specialty level. FPH and HWPH both operate district general hospitals, leading to a significant overlap between their services. Most of the overlap between the services provided by the parties relate to Wexham Park and Frimley Park hospital sites.

[3] CC, A report on the anticipated merger of The Royal Bournemouth and Christchurch Hospital NHS Foundation Trust and Poole Hospital NHS Foundation Trust, 17 October 2013 (the Bournemouth and Poole decision).
[4] Within private services, each specialty constitutes a separate market and within each specialty, markets can be defined along inpatient and outpatient lines (as with NHS services).

Unilateral effects in relation to NHS services

9. With respect to non-elective services, the CMA followed the CC's framework of analysis in the Bournemouth and Poole decision and found that the merger does not raise a realistic prospect of a substantial lessening of competition (SLC) in relation to non-elective services.

10. The CMA assessed whether the merger might lead to unilateral effects in relation to the provision of inpatient elective services and outpatient services. The CMA notes that the analysis of GP referral data showed that a number of other NHS providers were closer competitors to FPH than HWPH for all services. Further, the analysis showed that FPH is HWPH's closest competitor in only (i) five elective inpatient services: dermatology[5], general medicine, general surgery, pain management, and gynaecology and (ii) four outpatient services: gynaecology, respiratory medicine, trauma and orthopaedics, and obstetrics. Notwithstanding this, the CMA found, based on its analysis, that HWPH is not FPH's closest competitor in any specialty and FPH is HWPH's closest competitor for a limited number of specialties for which other NHS providers also compete strongly. In addition, third parties did not raise significant competition concerns.

11. The parties provided the CMA with maps based on GP referral data which identified clusters of GP practices in a local area (which mainly corresponds to NHS Bracknell and Ascot Clinical Commissioning Group (CCG)) for which the two trusts would appear to be important alternatives to one another for the provision of outpatient services. Given that the parties both run local outpatient clinics in the area, the CMA assessed whether the merger might lead to a reduction in the quality offered at one or more of its outpatient sites in the Bracknell and Ascot area.

12. The CMA notes that further investigation revealed that the GP referral data on which the maps were based is not fully reflective of the current local competition. In particular, some of the referrals attributed to FPH and HWPH derive from their main hospital sites rather than their local outpatient clinics.[6] Moreover, Royal Berkshire NHS Foundation Trust (Royal Berkshire) has expanded its offering of local outpatient services from its Brants Bridge site. The CMA notes that the parties have a more limited local competitive offering in Bracknell than that of Royal Berkshire, which appears to be strong and growing.

[5] The parties submitted that there is not a genuine overlap between their activities in elective dermatology as HWPH does not provide these services.
[6] FPH started offering outpatient services from the Royal Berkshire NHS Foundation Trust's ('Royal Berkshire') Brants Bridge clinic in October 2012.

13. Accordingly, the CMA did not consider that the Merger would give rise to a realistic prospect of a SLC in the relevant markets for provision of NHS elective, non-elective inpatient and outpatient services, and private services.

Unilateral effects in private services

14. The CMA has not found a realistic prospect of an SLC in relation to the provision of private services by the parties. In particular, the CMA notes that the parties provide a very small number of private services from their Frimley Park and Wexham Park sites. In addition, there is a significant number of other providers of such services, including private providers. Moreover, no third party raised significant competition concerns in relation to the provision of private services.

Competition for the market

15. The CMA considered whether the merger might lead to reduced competition in relation to NHS (i) elective or non-elective services commissioned by CCGs and (ii) specialised services commissioned by NHS England Specialised Commissioning.

16. The CMA notes that based on third party responses, NHS Bracknell and Ascot CCG is the only CCG where FPH and HWPH are the two leading providers of NHS hospital services. NHS Bracknell and Ascot CCG told the CMA that for the specialties where FPH and HWPH overlap, there are a number of other NHS providers with a similar range of services. These include Royal Berkshire, Ashford and St. Peter's Hospitals NHS Foundation Trust (Ashford and St. Peter's), Buckinghamshire Healthcare NHS Trust (Buckinghamshire Healthcare) and Hillingdon Hospitals NHS Foundation Trust (Hillingdon). It added that it carried out limited tendering for elective and non-elective services in the area and had a choice of NHS providers and private providers, which compete for some diagnostic and elective services. The CMA also notes that no CCGs raised significant concerns that the merger would materially reduce their choice of provider.

17. With respect to specialised services, the CMA notes that FPH and HWPH each lie in different NHS England Specialised Commissioning Groups, Sussex and Surrey on the one hand and Wessex on the other hand. They told the CMA that the parties overlap in the supply of four of these services (cardiology, chemotherapy, vascular surgery, and neo-natal intensive care) but that these

services are provided by many hospitals.[7] They also told the CMA that there is no current competition between the parties and that there are no current plans to reconfigure specialised services.

Monitor's advice

18. Monitor provided the CMA with its advice pursuant to section 79(5) of the Health and Social Care Act 2012 (HSCA). With respect to Monitor's advice on relevant customer benefits, Monitor submitted that based on the information available to it, it is not able to determine that any relevant customer benefits for the purposes of the Act will arise. With respect to Monitor's advice on 'matters relating to the matter under investigation', Monitor stated that in light of HWPH's sustainability, quality and management issues, the merger appears as the best available solution to the problems at HWPH and the most likely way of achieving the necessary improvements to services for patients.

Conclusion

19. On the basis of the evidence available, the CMA does not consider that there is a realistic prospect that the merger will give rise to a substantial lessening of competition as a result of horizontal effects either in competition in the market or in competition for the market. Therefore, it does not consider that the merger will give the merged entity the ability and/or incentive to decrease quality or patient choice.

Decision

20. This Merger will therefore **not be referred** under section 33(1) of the Act.

Assessment

Parties

1. FPH is an acute general hospital with 725 beds on one site in Frimley. In addition to the main hospital site, the trust runs outpatient and diagnostic services in Aldershot, Farnham, Fleet, and Bracknell. FPH achieved Foundation Trust status in 2005. Frimley Park Hospital also incorporates a Ministry of Defence Hospital Unit, with fully integrated military medics contributing to patient services.

[7] HWPH told the CMA that it does not provide vascular surgery and that its patients are referred to Oxford University Hospitals NHS Trust (Oxford University Hospitals). Oxford University Hospitals told the CMA that is has collaborative links with HWPH, in particular in relation to vascular surgery.

2. HWPH has two acute general hospitals, in Ascot (Heatherwood) and in Slough (Wexham Park). In addition to the main hospital sites, the trust runs outpatient, breast screening and diagnostic services from four other sites: King Edward VII Hospital (Windsor), St Mark's Hospital (Maidenhead), Fitzwilliam House (Bracknell) and Chalfonts Outpatients in Chalfont St Peter. HWPH achieved Foundation Trust status in 2007. Its income in 2012-13 was approximately £232m.

3. FPH and HWPH are together referred to as the 'parties'.

Transaction

4. The parties signed a Memorandum of Understanding on 7 May 2013 on a possible acquisition by FPH of HWPH. Heads of terms were signed on 1 May 2014. The Parties expect that the transaction will be structured as a statutory acquisition under section 56A of the National Health Service Act 2006, as incorporated by section 169 of the HSCA, (the 'merger'). The parties plan to complete the Merger on or around 1 August 2014.

5. The Parties formally notified the OFT by providing a satisfactory submission on 28 March 2014. The Merger was investigated under the OFT's administrative timetable by the CMA from 1 April.[8] The administrative timetable expires on 29 May 2014.

Jurisdiction

6. UK merger control applies to different types of transactions. The term 'merger' includes acquisitions (regardless of whether any financial consideration is payable).

7. FPH and HWPH engage in activities which constitute 'enterprises' for the purposes of section 23 of the Act [9] and which will cease to be distinct as a result of the Merger.

8. In addition, the CMA notes that the UK turnover of HWPH exceeded £70 million and that the turnover test in section 23(1) of the Act is thus satisfied. The merger is anticipated.

[8] Paragraphs 6(1) to 6(3) of the Schedule to the Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order, No 416 of 2014.
[9] The HSCA provides in section 79(1) that where the activities of two or more NHS foundation trusts cease to be distinct activities, this is to be treated as a case in which two or more enterprises cease to be distinct enterprises for the purpose of Part 3 of the Act. The HSCA 2012 confirmed the CMA's role in assessing the competition aspects of mergers involving foundation trusts.

9. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

Role of CMA NHS merger review

10. The CMA's role in reviewing mergers between NHS providers has arisen in the context of the gradual introduction of choice and competition in the NHS.[10] The NHS has evolved from being more centrally organised to a system where providers and commissioners have increased autonomy to drive delivery of high-quality services to patients. These developments have facilitated choice for patients and commissioners. They have also led to a greater focus by providers of healthcare services to improve services to attract patients.

11. Therefore, whilst collaboration and integration remain important to delivering effective healthcare services to patients, competition also plays an important role in incentivising providers to improve quality and efficiency for the benefit of patients.

12. Many mergers will not affect an NHS provider's incentives to improve services for patients. However, some may impact the overall goal of the NHS to improve clinical quality and safety and therefore adversely affect patient interests by reducing incentives for the providers to maintain and improve services for patients, thereby leading to reduced quality or choice for patients or commissioners. Specifically, the aspects of quality which may be impacted by a reduction in incentives to compete include clinical factors such as outcomes, infection rates, mortality rates, ratio of nurses or doctors to patients, equipment, best practice and non-clinical factors such as waiting times, patient experience, cleanliness and parking facilities.

13. The CMA recognises the benefits that the exercise of patient choice and competition can deliver, in continually striving to improve care, but also the benefits a merger can bring, such that it may nevertheless be the best way of delivering certain benefits to patients in a timely manner.

14. In this context, the merger review process is designed to examine the potential (i) adverse effects for patients arising from a loss of competition and, if the CMA

[10] This is the fourth merger between NHS foundations trusts in the healthcare sector examined by the CMA or its predecessors, the OFT and the CC, since the enactment of the HSCA, which confirmed their role in assessing the competition aspects of mergers involving Foundation Trusts. The CMA notes that this is the second full hospital merger it has looked at between NHS Foundation Trusts after the anticipated merger between The Royal Bournemouth and Christchurch Hospitals and Poole Hospital. The two other mergers the OFT considered involved service reconfigurations (acquisition by University College London Hospitals NHS Foundation Trust of Royal Free London NHS Foundation Trust's Neurosurgery Services and Anticipated joint venture between University College London Hospitals NHS Foundation Trust, Royal Free London NHS Foundation Trust and The Doctors Laboratory).

finds that there are any adverse effects, (ii) the potential benefits of a merger for patients and commissioners. When reviewing a merger within the healthcare sector, the CMA will examine whether the merger may be expected to result in a SLC leading to worse outcomes for patients.

Regulation of foundation trusts

15. In this case the parties provide healthcare services in England. Therefore, in assessing the merger, the CMA has taken account of the relevant healthcare regulatory framework in England.

16. Foundation trusts are public benefit corporations which are required to provide NHS services but are afforded a degree of operational autonomy. Their principal purpose is the provision of goods and services for the purposes of the health service in England. They can retain their surpluses and borrow to invest in new and improved services for patients and service users.

17. This gives them an incentive to maximise their income by taking steps to attract patients. The regulatory framework, which includes the payment by results (PbR) regime and the commissioning of services by CCGs, is designed to incentivise providers of acute services to attract additional patients, as this leads to additional income (that is, money follows the patient). The incentive to attract patients will be stronger for more profitable specialties and may lead to hospitals competing to offer the best quality service in their area. However, the CMA understands that tariffs do not always accurately reflect costs of provision and this may affect these incentives.

Competition in the provision of NHS healthcare services

18. In line with the analysis of competition in the provision of NHS healthcare services by the CC[11], there are two different models of competition in the provision of NHS healthcare services:

    a. Competition in the market (that is, competition for patients), which occurs where patients have a choice between providers of the same service. Payments for these services are commonly made according to the PbR tariffs that are set centrally. The initiatives related to patient choice are relevant to competition in the market, which occurs mainly in respect of routine elective (planned) services as well as maternity services. Hospitals are motivated to compete on quality in order to attract patient referrals and hence income. The CMA will assess the extent and nature of current (or pre-merger) competition.

[11] CC's Bournemouth and Poole decision.

In relation to competition to attract patients of NHS services, competition is almost always on quality,[12] rather than on price,[13] as the majority of services are covered by national prices and the PbR regime. The same applies to elective, non-elective, specialised, and community services.[14]

b. *Competition for the market* refers to competition to attract contracts from the commissioning entity to provide services. It occurs where providers are (or may be) competing to be one of a limited number of providers of a service (for instance for specialised services).[15] Providers may compete on quality and, in some cases, price.[16] The CMA will assess whether the merger will have any impact on:

    i. a possible competitive tender, where the merger could lead to worse outcomes because there would be fewer bidders[17]; and

    ii. providers on existing contracts might provide lower quality services, knowing that commissioners have fewer options to replace them post-merger than absent the merger.

Where there is competition to attract contracts to provide services, the CMA's assessment will consider whether the merging providers would be close competitors to supply these services and what other providers would constrain them.

19. The CMA notes that the parties' internal documents suggest that the parties take into account competition from other providers when considering new activities or when reviewing their own performance. References to competition from other providers and possible expansion of the parties (for instance, in terms of market share or catchment area) are present in business cases for investment in equipment or in the provision of new services, but also in annual plans, strategy documents and board minutes. Such references relate to competition in and for the market.

[12] See the CC's Bournemouth and Poole decision, at paragraphs 6.72-77.
[13] However, it is possible for there to be variations from the national tariff.
[14] Different types of tariffs apply to different services. For example, national prices do not apply to some community services.
[15] This is often the case for specialised services, where there is an expectation of a small number of providers of services that are often costly to provide.
[16] Any Qualified Provider services do not typically restrict the number of providers, so these will not generally feature in an assessment of the effect of the merger on competition to attract contracts to provide services.
[17] This may be reflected in commissioners receiving reduced value for money, including lower quality services or higher prices where services are not subject to a national price.

Financial and clinical issues at HWPH

20. The parties told the CMA that HWPH is a struggling trust and that the quality of its service has deteriorated over time. They stated that HWPH has been in deficit since the financial year 2009/2010 and is [✂]. They also told the CMA about the Care Quality Commission's (CQC) recent inspections and that HWPH is subject to regulatory intervention by Monitor due to not complying with some of its licence conditions.

21. The NHS provider licence is Monitor's main tool for regulating providers of NHS services, including foundation trusts. Monitor told the CMA that HWPH has been in significant breach of its Terms of Authorisation[18] since July 2009.[19] Throughout the period of breach, HWPH has been subject to numerous regulatory interventions by Monitor.

22. The CQC carried out inspections in May and October 2013 and identified serious quality concerns at HWPH (in particular at the Wexham site) and issued several warning notices to the trust. Following an announced inspection visit on 12 and 13 February 2014, it recommended that HWPH be placed into 'special measures', which Monitor announced on 1 May 2014.[20]

23. The CMA notes that several services have been closed at Heatherwood since 1990. These include closures of some of the wards, the maternity unit (which was relocated to Frimley Park), and the minor injury unit, which was relocated to the Royal Berkshire's Brants Bridge clinic. The minor injury unit is now operated by a private provider, One Medicare, following a tender process organised by several CCGs.[21]

24. The CMA notes that it took into account HWPH's financial and clinical issues in its assessment of the counterfactual and in its competitive assessment to the extent that such issues are reflected in GP referral data, internal documents, and third party evidence.

Counterfactual

25. The application of the SLC test involves a comparison of the merger scenario against the competitive situation without the merger. The competitive situation that would likely exist if the merger did not take place is referred to as 'the

[18] On 1 April 2013, HWPH's terms of authorisation were replaced by the NHS provider licence. HWPH continues to be in breach of licence conditions CoS 3(1), FT4(5)(a), (c), (f), (d) and (h) and FT4(6).
[19] Apart from Mid Staffordshire NHS Foundation Trust, this is the longest period of breach of any foundation trust.
[20] 'Special measures' describes a package of tools which NHS regulators put in place in July 2013 after persistent failings were identified in the quality of care at 11 NHS trusts and foundation trusts. The purpose of the regime is to give intensive support to trusts so they address their care problems effectively and put them right as quickly as possible. The main features of the special measures regime are set out in the guide: http://www.monitor.gov.uk/sites/default/files/publications/Special%20measures%20guide.pdf
[21] http://www.onemedicare.co.uk/view-news.php?n=73

counterfactual'. Since the counterfactual may be either more or less competitive than the prevailing conditions of competition, the selection of an appropriate counterfactual may increase or reduce the prospects of a SLC finding by the CMA.[22]

26. At phase 1, the CMA generally adopts the pre-merger situation as the counterfactual. An alternative counterfactual to the prevailing (pre-merger) conditions may be used at phase 1 where there is compelling evidence that the prospect of prevailing conditions continuing is not realistic.

27. The parties submitted that HWPH [✂]. They referred to HWPH's past and forecast performance which they consider shows that it [✂]. They stated that absent a merger with another organisation, Monitor could place HWPH in special administration although they added that it was not certain.

28. The CMA assessed whether HWPH would have exited the supply of NHS services. In forming a view on the applicability of the exiting provider scenario, the CMA considers the following three limbs:[23]

    - whether the provider would have exited (through failure or otherwise); and if so
    - whether there would have been an alternative acquirer for the provider's assets to the acquirer under consideration; and
    - what would have happened to the patients and to the commissioner contracts of the provider in the event of its exit.

29. For the CMA to accept at phase 1 an exiting provider argument, it would need (on the basis of compelling evidence) to believe that it was inevitable that HWPH would exit and be confident that there was no substantially less anti-competitive acquirer for HWPH.

30. In this case, the CMA notes that the parties and Monitor told the CMA that HWPH has faced financial and clinical issues (see previous section).

31. However, the CMA notes that the parties did not submit compelling evidence to show that HWPH would have inevitably exited absent the Merger. Therefore, the CMA has not had to consider whether there would have been an alternative purchaser or what would have happened to the patients and to the commissioner contracts in the event of its exit.

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[22] See *Merger Assessment Guidelines,* joint publication of the Competition Commission and OFT, September 2010, at section 4.3. The Merger Assessment Guidelines have been adopted by the CMA. See Annex D to CMA2 *Mergers: Guidance on the CMA's Jurisdiction and Procedure*, January 2014 (Merger Assessment Guidelines).
[23] Merger Assessment Guidelines, at paragraph 4.3.8.

32. Therefore, on the basis of the evidence available, the CMA does not consider that a counterfactual other than the prevailing conditions of competition would be appropriate to assess this Merger. The CMA has nevertheless taken HWPH's financial and clinical difficulties into account in its competitive assessment to the extent that such issues are reflected in GP referral data, internal documents, and third party evidence.

Market definition

33. The parties both provide elective and non-elective secondary inpatient care, specialised clinical services, and outpatient services. In addition, the parties provide a very small amount of private (fee-paying) services to patients.

Product scope

34. The CMA considers that market definition is a useful tool, but not an end in itself. Market definition provides a framework for assessing the competitive effects of the merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of a merger in a mechanistic way, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.[24]

35. In their submission, the parties followed the same approach as the CC in its Bournemouth and Poole decision in relation to product market definition.

36. In that decision, the CC considered that each medical specialty (for example, obstetrics, paediatrics, and neurology) constitutes a separate market.[25] Within each specialty, the CC treated outpatient and inpatient activities[26] as separate markets and noted that there is an asymmetric constraint between inpatient and outpatient, with inpatient providers being readily capable of providing outpatient services but not vice versa. The CC considered day cases as part of the relevant inpatient market. With regard to outpatient (and to a lesser extent inpatient) services, the CC decided that services should not be further separated according to whether or not the services can be provided in community settings. However, some services are provided only in the community and they should be viewed as being in separate markets. The CC also found non-elective and elective services to be separate markets.

[24] Merger Assessment Guidelines, at paragraph 5.2.2.
[25] CC's Bournemouth and Poole decision, at paragraphs 5.1 ff.
[26] Outpatient services are generally defined as those services which do not require a patient to be admitted to hospital, whereas inpatient services do require patients' admission to hospital (and also involve an overnight stay).

37. The CC also considered that private services are separate markets from NHS services. Within private services, each specialty constitutes a separate market and within each specialty, markets can be defined along inpatient and outpatient lines (as with NHS services).

38. In this case, the CMA notes that the responses that it received from the parties and third parties during its market investigation do not suggest that departing from the product markets as defined above would be appropriate. The CMA has therefore considered the market on the basis of:

    a. each specialty as a separate product market;

    b. outpatient and inpatient services as separate product markets (outpatient services not being further separated according to whether or not the services can be provided in community settings);

    c. elective and non-elective services[27] as separate product markets; and

    d. NHS services and private services as separate product markets.

39. In terms of how the CMA has applied these product markets in its analysis, and in line with the analysis of competition in the provision of NHS healthcare services by the CC, the CMA assessed the merger on the basis of competition in the market and competition for the market, separately.

    a. In relation to competition in the market, the CMA analysed competition for the provision of NHS elective inpatient services and outpatient services. The CMA also assessed private services, separately.

    b. In relation to competition for the market, the CMA analysed competition for winning commissioned elective and non-elective services and outpatient services, including specialised services. Specialised services as designated in the HSCA 2012 are commissioned by NHS England. Specialised services are those that either treat rare conditions or that require a specialised team working together at a centre.

40. The CMA did not find it necessary to conclude on product market definition in this case.

[27] Routine elective clinical care is planned and typically requires a referral from a GP or another consultant. By contrast, non-elective care is provided in unplanned and urgent circumstances (such as A&E, emergency surgery, maternity) and it does not usually require a referral (though in some circumstances patients may go urgently to an A&E department following the recommendation of a GP).

Geographic scope

41. When competing to attract patients (whether by specialty, outpatient services or inpatient services), and as set out by the CC in the Bournemouth and Poole decision, location is important to patients/GPs when they choose a hospital, and hospitals providing the same services in different locations are not perfect substitutes for one another. Hospitals that are near one another may be expected to exert a stronger competitive constraint than hospitals located further away.[28]

42. For NHS services, the CMA identified an overlap between the parties' catchment areas as a starting point. The CMA notes that a catchment area is typically narrower than a geographic market identified using the hypothetical monopolist test.[29]

43. The parties calculated drive-times from which they draw 80% of their patients, split by specialty. The parties concluded 80% of patients come from within a 20-minute drive time of each site, and 90% from within 30 minutes of each site. The CMA notes that the parties' main hospital sites of Frimley Park Hospital and Wexham Park Hospital are 21 miles apart by road, with a drive time between 35 and 40 minutes. HWPH's Heatherwood site is located 17 miles from Frimley Park. There is thus an overlap between the parties' catchment areas.

44. Notwithstanding this, given the data available in this case the CMA focused directly on data on patient flows (GP referral patterns) for each specialty rather than defining a precise geographic frame of reference with respect to competition in the market for elective inpatient and outpatient services. Therefore, it did not find it necessary to conclude on a precise geographic market for each specialty as GP referral patterns produce measures that provide an indication of the closeness of competition between the parties. At the CMA's request, the parties provided Dr Foster data at specialty level.

45. The CMA notes that maps based on Dr Foster GP referral data showed a cluster of GP practices in an area where the parties would appear to be important alternatives to one another for the provision of outpatient services (which mostly falls within the NHS Bracknell & Ascot CCG area). The CMA has therefore assessed the merger's impact in this area by way of a sensitivity check but has not found it necessary to conclude on the geographic market.

46. With regard to competition for the market for inpatient (elective and non-elective) and outpatient services, including specialised services, the CMA

[28] CC's Bournemouth and Poole decision, at paragraph 5.56.
[29] Merger Assessment Guidelines at section 5.2, and in particular paragraphs 5.2.2 and 5.2.25.

reviewed the information provided by CCGs and NHS England (specialised services) on tenders to assess closeness of competition between the parties and other providers for these services. This information also showed that catchment areas are wider for specialised services than other services. The CMA did not find it necessary to conclude on a precise geographic market in this case.

47. For private services, the CMA did not find it necessary to conclude on the precise scope of the geographic market given that on any possible geographic market, there are other providers of private services that compete with the Parties.

Horizontal issues

48. Unilateral effects are effects which may arise in horizontal mergers where the merger involves two competing entities and removes the rivalry between them. In this case, the CMA considered whether the merger might result in a removal of rivalry which would allow the merged trust to reduce quality, as for the most part FPH and HWPH do not compete on price.

49. With respect to non-elective services, the CMA followed the CC's framework of analysis in the Bournemouth and Poole decision and found that the merger is not expected to result in an SLC in relation to non-elective services.[30]

50. The CMA considered whether the merger would lead to a realistic prospect of an SLC in relation to (i) competition in the market for NHS elective inpatient and outpatient services, as well as private services and/or (ii) competition for the market for NHS elective and non-elective services and outpatient services, including specialised services.

Competition in the market

Extent of the overlap between the Parties and with third parties

51. FPH and HWPH both operate district general hospitals, leading to a significant overlap between their services. In summary, the CMA notes that there is an overlap[31] between the parties' activities in the following specialities.

    a. Elective inpatient: Trauma & Orthopaedics, General Surgery, Urology, Cardiology, Gynaecology, ENT, Plastic Surgery, Pain Management,

[30] CC's Bournemouth and Poole decision, at paragraphs 6.239 ff and paragraphs 6.273 ff.
[31] For the purpose of this analysis and overlap has been defined as where both trusts derive more than ten spells from a speciality.

General Medicine, Clinical Haematology, Paediatrics, Respiratory Medicine, Rheumatology, Oral Surgery, and Neurology

b. Outpatient: Trauma & Orthopaedics, Cardiology, General Surgery, Paediatrics, Urology, Obstetrics, Gynaecology, Neurology, ENT, Dermatology, Clinical Haematology, General Medicine, Respiratory Medicine, Rheumatology, Plastic Surgery, Clinical Oncology (Previously Radiotherapy), Pain Management, Midwife Episode, Geriatric Medicine, Nephrology, Medical Oncology, and Clinical Neurophysiology

52. Out of its two hospital sites, Wexham Park (in Slough) represents HWPH's main hospital site as it accounts for around [✂] % of the elective inpatient income and around [✂] % of the outpatient income.[32] Although the parties' sites at Heatherwood and Frimley Park are geographically closer, most of the overlap between the services provided by the Parties relate to Wexham Park and Frimley Park hospital sites.

53. Given the overlap between the parties' catchment areas and the services that they offer, the CMA has assessed closeness of competition between the parties. The CMA has thus analysed GP referral data, reviewed internal documents, and sought evidence from third parties.

GP referral analysis

54. In line with previous OFT and CC previous decisions, the CMA has carried out a ranking analysis of GP referral patterns.[33] GP referral patterns reflect the aggregated choices made by different pairs of GPs and patients within each GP practice. They provide an insight into the relative importance of the alternative providers of elective and outpatient services at each GP practice.[34]

55. The parties provided data on referral patterns for each speciality where both of the parties are active, but only for the areas covered by the five former PCTs in which they derived the majority of their business. Although the CMA considers that this approach was appropriate in this case, it notes that this risks omitting areas near the edge of catchment areas where the parties may compete strongly with another provider.

[32] Based on CMA calculations using internal data submitted by the Parties.
[33] CC's Bournemouth and Poole decision, at paragraphs 6.195 ff.
[34] In this case the CMA did not have access to the HES data from the Department for Health. It relied upon Dr. Foster data provided by the Parties. HES (Hospital Episode Statistics) is a data warehouse containing details of all admissions, outpatient appointments, and A&E attendances at NHS hospitals in England. This data is collected during a patient's time at a hospital and is submitted to allow hospitals to be paid for the care they deliver. Dr. Foster data is derived from the HES data, see http://drfosterintelligence.co.uk/solutions/nhs-hospitals/hospital-marketing-manager-hmm/

56. Within each GP practice the CMA ranked providers by the number of referrals that they received for a given specialty. It then used two different methods to produce measures that provide an indication of the closeness of competition between the parties in each specialty:

    a. *Ordinal measure*:

        i. Using the rankings for each GP, the CMA made the assumption that the first ranked provider (that is, the provider a GP practice referred to the most often for the set of services reviewed during the period of analysis) is the favoured provider for that GP practice (for the specified services), and that the second provider (that is, the provider a GP practice referred to the second most often for the set of services reviewed during in the period of analysis) was, for that GP practice, the best alternative provider;

        ii. Next, the CMA assumed that, following a change in the quality of service at its favoured provider (and assuming that all else remains equal), a GP practice would instead refer patients to its best alternative provider. In other words, if a GP practice were to decide against referring some patients to its favoured provider, it would instead refer to the second ranked provider.

        iii. To provide a measure of how close a competitor HWPH is to FPH, the CMA aggregated the number of FPH referrals for all GP practices where HWPH was the best alternative provider. By dividing this by the total number of referrals made to FPH, the CMA was able to produce a measure that provides an indication of closeness of competition. Following this approach the CMA also produced measures that provide an indication of the closeness of competition of FPH to HWPH and of other competitors to both of the parties.

    b. *Proportional measure*:

        i. Rather than assuming that all referrals would move to the best alternative provider at a GP (ordinal measure), the CMA instead assumed that referrals would be reallocated to all providers currently receiving referrals at that GP in proportion to the quantity of referrals that they currently received from that GP practice;

        ii. To provide a measure of how close a competitor HWPH is to FPH, the CMA aggregated the number of referrals that would be

reallocated to HWPH. By dividing this by the total number of referrals made to FPH, the CMA was able to produce measures that provide an indication of closeness of competition. Following this approach the CMA also produced measures that provide an indication of the closeness of competition of FPH to HWPH and of other competitors to both of the Parties.

57. In line with the CC's Bournemouth and Poole decision, the CMA considered it reasonable to assume that GPs would switch to hospitals to which they already refer for two reasons. First, both GPs and patients learn about the quality of a hospital when they have had experience with it. It seemed likely that GPs would switch to hospitals to which they have previously referred and for which they have gained some experience (as long as that experience has not been negative). Second, we expected that past choices of patients/GPs are likely to reflect (although imperfectly) their preferences over the best alternatives available.

58. The CMA notes that there are a number of different approaches which could be used to produce measures that provide an indication of closeness of competition. In this case for the ordinal method only, it has chosen to focus its analysis on competition between the top two providers. It notes that the evidence in this case suggests that most referrals are made to a limited number of hospitals, with a long tail receiving a limited number of referrals. In instances where there are a number of hospitals receiving a similar proportion of referrals from a GP, it may be appropriate for the CMA to look at lower ranked providers as well.

Frimley Park Hospital NHS Foundation Trust

59. The analysis of GP referral data indicates that HWPH is not FP's closest competitor in any specialty that they both provide. This analysis shows that FPH's closest competitor across most specialties is Royal Surrey County Hospital NHS Foundation Trust (Royal Surrey). On average, across all specialties, HWPH was the fourth closest competitor to FPH, which indicates that after the merger sufficient competitive constraints will remain on FPH. The other closer competitors of FPH after Royal Surrey are Hampshire Hospitals NHS Foundation Trust (Hampshire Hospitals) and Ashford and St Peters.

Heatherwood and Wexham Park Hospitals NHS Foundation Trust

60. The referral analysis indicates that FPH is HWPH's closest competitor in five elective services (Dermatology, General Medicine, General Surgery, Gynaecology, and Pain Management). HWPH is not a close competitor to FPH

in these specialties indicating that the competitive constraint between the parties may be asymmetric.

61. The parties submitted that there is not a genuine overlap between their activities in elective dermatology as HWPH does not provide these services. They submitted that based on HWPH's internal data, this refers to only six spells.[35] The CMA notes that based on the referral analysis, Buckinghamshire competes to the same extent as FPH in elective dermatology.

62. Table 1 below shows the results of the referral analysis for the four remaining specialties. The CMA interprets the percentages in the table as measures that provide an indication of closeness of competition: the higher the number, the closer the competitor.

63. The CMA notes that for these four specialties, FPH was HWPH's closest competitor at GP practices accounting for no more than [20-30]% of HWPH's referrals. The data shows that there are a number of other competitors to HWPH and that some of these competitors provide a similar constraint to HWPH as FPH.

Table 1: Referral analysis for the elective inpatient services where FPH is HWPH's closest competitor (top providers %)[36]

Specialty	General Medicine		General Surgery		Pain Management		Gynaecology	
Method	Ord.	Prop.	Ord.	Prop.	Ord.	Prop.	Ord.	Prop.
Number of spells	[ ]		[ ]		[ ]		[ ]	
FPH	[20-30]	[20-30]	[20-30]	[10-20]	[10-20]	[10-20]	[20-30]	[10-20]
Oxford Univ.	[0-10]	[0-10]	[20-30]	[10-20]	[0-10]	[0-10]	[20-30]	[0-10]
Ashford St Peter's	[10-20]	[10-20]	[10-20]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
Royal Berkshire	[0-10]	[0-10]	[10-20]	[10-20]	[0-10]	[0-10]	[0-10]	[10-20]
Buckinghamshire	[0-10]	[0-10]	[10-20]	[10-20]	[10-20]	[0-10]	[0-10]	[0-10]
Hillingdon	[0-10]	[0-10]	[0-10]	[0-10]	[10-20]	[0-10]	[10-20]	[0-10]
Royal Surrey	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
BMI	[0-10]	[0-10]	[0-10]	[0-10]	[10-20]	[20-30]	[0-10]	[0-10]
Spire	[0-10]	[0-10]	[10-20]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
Only refer to HWPH	[30-40]	[30-40]	[0-10]	[0-10]	[10-20]	[10-20]	[0-10]	[0-10]
All Other hospitals	[0-10]	[10-20]	[20-30]	[10-20]	[20-30]	[10-20]	[30-40]	[20-30]

Source: CMA analysis of Dr Foster data provided by the Parties (April 2012-April 2013)

64. The referral analysis indicates that FPH is HWPH's closest competitor in four outpatient services (Gynaecology, Respiratory Medicine, Trauma and Orthopaedics, Obstetrics). Table 2 below shows the results of the referral analysis for these four specialties, the percentages in the table should be

[35] A spell relates to the whole hospital stay of a patient, from admission to discharge.
[36] The data in the table does not sum to 100 per cent as some providers with a low share are not reported.

interpreted as measures that provide an indication of closeness of competition: the higher the number, the closer the competitor.

65. FPH was HWPH's closest competitor at GP practices accounting for no more than [20-30] % of HWPH's referrals. Similarly to the analysis for inpatient specialties, the data shows that there are a number of other competitors to HWPH and that some of these competitors provide a similar constraint to HWPH as FPH.

Table 2: Referral analysis for the outpatient services where FPH is HWPH's closest competitor (top providers %)[37]

Specialty	Gynaecology		Obstetrics		Respiratory Medicine		Trauma and Orthopaedics	
Method	Ord.	Prop.	Ord.	Prop.	Ord.	Prop.	Ord.	Prop.
Number of spells	[ ]		[ ]		[ ]		[ ]	
FPH	[10-20]	[10-20]	[20-30]	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]
Oxford Univ.	[0-10]	[0-10]	[0-10]	[10-20]	[0-10]	[0-10]	[0-10]	[10-20]
Ashford St Peters	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
Royal Berkshire	[10-20]	[10-20]	[10-20]	[10-20]	[0-10]	[10-20]	[0-10]	[10-20]
Buckinghamshire	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[10-20]
Hillingdon	[0-10]	[0-10]	[10-20]	[10-20]	[0-10]	[0-10]	[0-10]	[0-10]
Royal Surrey	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
BMI	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
Spire	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
Only refer to HWPH	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]	[0-10]
All Other hospitals	[50-60]	[30-40]	[30-40]	[20-30]	[60-70]	[40-50]	[30-40]	[20-30]

Source: CMA analysis of Dr Foster data provided by the Parties (April 2012-April 2013)

66. In addition to its analysis of GP referral data, the CMA also takes into account third party responses and internal documents provided by the Parties.

Third party responses

67. The CMA notes that third party responses to its market investigation corroborated its analysis of GP referral data. Third party responses suggested that both FPH and HWPH compete with other NHS competitors. Only one CCG stated that the Parties were the top two competitors for patients in their local area, followed by Royal Berkshire. Royal Surrey, St George's Healthcare NHS Trust's (St George's) and Hampshire Hospitals noted that they compete for some services with FPH (but not with HWPH). Buckinghamshire noted competition for some specialties with HWPH (but not FPH). Two other providers (Royal Berkshire and Ashford and St Peter's) told the CMA that they compete to some extent with both parties.

[37] The data in the table does not sum to 100 per cent as some providers with a low share are not reported.

Internal documents

68. The CMA notes that its review of the parties' internal documents corroborated its analysis of GP referral data.

69. The CMA reviewed a wide range of internal documents provided by the parties, including board minutes, annual plans, business plans, and development materials (materials discussing training events at GP practices).

70. The CMA notes that some of these documents refer to competition with other NHS providers and to a lesser extent with private providers. Overall, while some of these documents suggest that the Parties compete to some degree, FPH's internal documents mainly refer to competition with Royal Surrey and Ashford and St Peters. HWPH's documents mainly refer to competition with Royal Berkshire and Buckinghamshire Healthcare.

71. The parties' internal documents refer to competition between each other as occurring mainly in the Bracknell area, which is further described below.

Local assessment in Bracknell and Ascot

72. By way of sensitivity analysis, the CMA requested that the parties provide maps of referral data to identify local areas where they may have a high share of GP referrals. The CMA notes that these maps, which are based on Dr Foster GP referral data, show that there is a cluster of GP practices in an area (which mostly falls within the NHS Bracknell & Ascot CCG area) where the parties together account for a significant proportion of referrals in four outpatient specialties (gynaecology, trauma & orthopaedics, paediatrics, and respiratory medicine).

73. The CMA notes that in this area GPs are located between the Frimley Park, Heatherwood, and Wexham Park hospitals. The CMA notes that this is therefore a geographic area which might see strong competition between the parties. In addition to their main hospital sites, the parties also operate outpatient clinics in the Bracknell and Ascot area. FPH operates an outpatient clinic from Royal Berkshire's premises in Brants Bridge (since October 2012). HWPH also has an outpatient clinic at Fitzwilliam House.

74. The CMA notes that patients located in the Bracknell and Ascot area represent a small proportion of the parties' revenues at the trust level. The CMA's analysis of the impact of the merger on individual specialties at trust level (which took into account patients located in the Bracknell and Ascot area) did not suggest that the merger would lead to a realistic prospect of an SLC.

75. The CMA also considered there to be a possibility that quality of local service provision, waiting times and training and marketing could be determined locally, and thus could be affected by competition between the parties in this local area.[38] In this case, as both parties have outpatient clinics in Bracknell, the CMA has focused in particular on local outpatient service provision, and has assessed whether the merged entity may be incentivised to reduce the quality offered at one or more of its outpatient sites as a result of the merger.

Competition between the parties in Bracknell and Ascot

76. The parties note that some of their internal documents discuss competition between them in this local area. They however submit that they are more likely to be reflective of HWPH's past competitive position. The parties stated that their analysis of GP referral patterns in Bracknell did not suggest that strong competition is still taking place. The parties also argued that it is a highly competitive area where Royal Berkshire recently opened a clinic. The parties also stated that FPH's move to Bracknell was influenced by GPs approaching FPH with concerns around HWPH no longer offering the services to patients that they require.

77. The CMA considers that the parties have a more limited local competitive offering in Bracknell than that of Royal Berkshire. The CMA notes that Royal Berkshire is operating outpatient services from its Brants Bridge site in Bracknell and is in the process of offering more services. Both FPH's clinic at Royal Berkshire's Brants Bridge site and HWPH's clinic at Fitzwilliam House are small and offer a more limited number of services than Royal Berkshire's offering from its Brants Bridge site.

78. Further, the CMA notes that Fitzwilliam House has seen outpatient activity drop by around 25% over the past five years. The parties submitted that part of this decline is attributable to a cessation of trauma & orthopaedics services at Fitzwilliam House (in 2013), and a decline (over 40%) in gynaecology referrals. According to NHS Bracknell & Ascot CCG, the decline in referrals to HWPH has been commensurate with increased patient flows to both Royal Berkshire and FPH.

79. The CMA notes that further investigation revealed that the Dr Foster data on which the maps were based (suggesting that the parties may be close competitors for outpatient services in this area) is not fully reflective of the current local competition. In relation to the Dr Foster data provided to it, the CMA notes that:

[38] The CMA also notes that waiting times are highly divergent between the Parties, with those at HWPH's Fitzwilliam House site considerably higher than at FPH's Bracknell clinic.

a. Some of the referrals attributed to FPH and HWPH derive from their main hospital sites rather than their local outpatient clinics and the Dr Foster data available to it does not make the distinction between the sites.[39] This may therefore overestimate the number of referrals made at each parties' local outpatient clinic;

b. The data does not make the distinction between first and follow-up appointments (for which no choice of hospitals is provided to patients). This may overestimate the proportion of referrals for which a choice is made by the patient/GP and for which competition in the market takes place between providers; and

c. The data only captures referrals made between April 2012 and April 2013. It does not take into account changes to local competition occurring afterwards, such as Royal Berkshire expanding its offering of local outpatient services from its Brants Bridge clinic.

Conclusion on the local assessment

80. Overall, on the basis of the available evidence, in particular that the parties have a more limited local competitive offering in Bracknell than that of Royal Berkshire, which appears to be strong and growing, the CMA considers that the merger will not give the merged entity the ability or incentive to decrease the quality or patient choice offered at one or more of its outpatient sites after the merger. Therefore, it does not consider that there is a realistic prospect that the merger will give rise to a substantial lessening of competition as a result of horizontal effects in competition in the Bracknell and Ascot area.

Private services

81. The parties submit that they do not overlap in the provision of any outpatient services to private patients, but overlap in the provision of eight inpatient services. These services are provided from the Wexham Park and Frimley Park sites, respectively. The parties argue that they have a different focus in their private work, with FPH operating a 38 bed facility in competition with private providers, whereas HWPH's 16 bed facility [✂].[40] The parties listed a number of competing providers that provide private care in addition to the main NHS hospitals. Other NHS hospitals include Royal Surrey, Ashford & St Peter's, and Royal Berkshire. Private providers include BMI, which has several sites,

[39] Although FPH only started offering services from Royal Berkshire's Brants Bridge clinic from October 2012, the CMA's investigation revealed that FPH attracted patient referrals to Frimley Park before then.
[40] HWPH indicated that [ ].

including one between the parties' sites, Spire, which is located next to Wexham Park, and Berkshire Independent Hospital.

82. Third parties who replied to the CMA's market investigation did not express any concerns about the impact of the merger on the provision of private services by the parties.

83. The CMA notes that it has not found that the merger would lead to a realistic prospect of a substantial lessening of competition in relation to the provision of private services by the parties.

Conclusion on competition in the market

84. Overall, on the basis of the evidence available, including the fact that based on GP referral analysis, HWPH is not FPH's closest competitor in any specialty and FPH is HWPH's closest competitor for a limited number of specialties for which other NHS providers also compete strongly, the absence of significant third party competition concerns and the support from a large number of third parties (including CCGs, patient groups and other NHS providers), the CMA does not consider that there is a realistic prospect that the merger will give rise to a substantial lessening of competition as a result of horizontal effects in relation to competition in the market. Therefore, the CMA does not consider that the Merger will give the merged entity the ability and/or incentive to decrease quality or patient choice.

Competition for the market

85. In order to assess the effect of the merger on competition for the market, the CMA considered whether or not potential reconfiguration of services by commissioners (including by tender) was likely to occur and, if so, whether the merger was likely to create a loss of competition in relation to such reconfiguration.

Competition for the market for services commissioned by CCGs

86. The CMA considered whether the merger might lead to reduced competition in relation to acute elective or non-elective services (including maternity services) and outpatient services which commissioners may change or reconfigure, because they have less choice of possible providers for these services.

87. The parties told the CMA that they do not hold comprehensive information about tenders with FPH only starting to report and analyse this activity in the current financial year (FY 2013/14). Based on this limited data, the parties note that out of the [✂] external tenders that FPH took part in, HWPH only

participated in [✂]. They submitted that the first tender was to establish the Bracknell Urgent Care Centre (total value of approximately £5 million) where HWPH was not even shortlisted. FPH was shortlisted but lost the bid to One Medicare, a Yorkshire-based provider. According to the parties, this would suggest that HWPH is a weak competitor and that the relevant geographic market is wide. The second tender was to provide muscular skeletal services in a community setting. Both HWPH and FPH were shortlisted and the remaining three competitors were all private providers. However, the parties note that these services are community-based and therefore not the core activity of the parties and that they are subject to strong competition from private providers. [✂].

88. As part of its market investigation, the CMA contacted CCGs that commission healthcare services from the parties. Most of these CCGs commission services from only one of the parties as for most services the parties are located within different CCG areas. NHS Bracknell and Ascot CCG was the only CCG that commissions services from both parties. NHS Bracknell and Ascot CCG told the CMA that for the specialties where FPH and HWPH overlap, there are a number of other NHS providers with a similar range of services. These include Royal Berkshire, Asford and St. Peter's, Buckinghamshire Healthcare and Hillingdon. It told the CMA that it is not intending to reconfigure any of the services provided by the parties. It also stated that they undertook three tender processes for which it received a variety of responses, including from private providers. [✂] This confirms the parties' submission that they face strong competition from other providers, including from private providers for some services.

89. The CMA notes that none of the CCGs raised concerns that the Merger would reduce their choice of provider for services.

Competition for the market for specialised services commissioned by NHS England

90. Specialised services as designated in the HSCA are commissioned by NHS England. Specialised services are those that either treat rare conditions or that require a specialised team working together at a centre. Some specialised services may be provided in relatively few specialist centres while other specialised services will be provided by most acute hospitals. Specialised services can be expensive to provide. On 1 April 2013, NHS England took over responsibility for commissioning specialised services.

91. The funding model differs between specialised and non-specialised services: whilst non-specialised services are funded by the CCG in which the patient lives, specialised services are commissioned and funded by the NHS England

area in which the patient is treated. Each NHS England area team only commissions from providers located in their allocated area. FPH is within the Sussex and Surrey NHS England Specialised Commissioning team and HWPH is within the Wessex NHS England Specialised Commissioning team.[41]

92. NHS England Specialised Commissioning teams told the CMA that the parties are both active in four specialised services: neo-natal intensive care, chemotherapy, vascular surgery, and cardiology. NHS England Surrey and Sussex have indicated that although classified as specialised services, the services provided by the parties will be provided by many hospitals (with the capability to provide these services), in particular for neo-natal intensive care and chemotherapy.

93. HWPH told the CMA that it does not provide vascular surgery but that they have an agreement with Oxford University Hospitals.[42] HWPH only provides outpatient vascular services.

94. The CMA notes that both NHS England Surrey and Sussex and NHS England Wessex Specialised Commissioning teams have indicated that since the parties lie in different areas and the services they provide are commissioned at the regional rather than national level, there is no competition between them for specialised services.

95. For other services in which the parties do not currently overlap, the CMA notes that NHS England Specialised Commissioning teams told the CMA that they have no current plans to reconfigure services. In addition, there are other NHS providers in each of the parties' areas who could bid for specialised services. The CMA notes that no concerns were raised by NHS England Specialised Commissioning teams.

96. The CMA notes the lack of competition between the parties for the provision of specialised services is in line with internal documents provided by the parties. For instance, in relation to competition for the market in cardiology, FPH's internal documents refer to competition with St George's, Ashford and St. Peter's and Royal Surrey. In relation to competition for the market in vascular surgery, one of FPH's internal documents refers to competition with Ashford St Peters. FPH's internal documents do not refer to HWPH for such services.

97. One NHS provider told the CMA in response to its market investigation that they compete strongly with FPH for certain tertiary services but that there is no

[41] NHS Specialised Commissioning teams told the CMA that for some specialised services which are only provided in few specialist centres, there will be a mapping exercise undertaken at the national level, which has not been done yet.
[42] Oxford University Hospitals indicated that they have collaborative links with HWPH, in particular in relation to vascular surgery.

competition with HWPH. The CMA notes that NHS providers have collaborative links in place for the provision of specialised services to reach the sufficient number of patients to be awarded the contract. Some concerns were raised by NHS providers in relation to the impact the merger could have on collaborative links as set out in the third party comments section below.

98. Overall, on the basis of the evidence, including the absence of material competition between the parties, the presence of other credible NHS providers (and to a lesser degree of private providers for some services), and the absence of substantial third party concerns, the CMA does not consider that there is a realistic prospect that the merger will give rise to a substantial lessening of competition as a result of horizontal effects in competition for the market. Therefore, the CMA does not consider that the merger will give the merged entity the ability and/or incentive to decrease quality or choice for services commissioned by CCGs and NHS England Specialised Commissioning teams.

Barriers to entry and expansion

99. The parties told the CMA that the cost of entry into the provision of elective inpatient services is not negligible as any provider is likely to require trained staff (both medical and nursing), specialist equipment and commissioner support for expansion. A new entrant is therefore likely to be an existing elective inpatient care provider.

100. They stated that outpatient services are subject to lesser requirements in terms of medical expertise and equipment and the cost of entry is correspondingly lower. Moreover, some outpatient services can be provided by GPs with special interests (for example, pain management, cardiology, dermatology, respiratory care). A likely entrant could be an existing secondary care provider (eg a district general hospital, like the parties) but also a community provider and in some cases GPs with special interests. However, the identified cost of entry does not mean that barriers to entry themselves are high as there are providers able and willing to expand their service into new inpatient and outpatient services areas. They argued that some of the parties' strongest competitors are already expanding their services in direct competition with the parties.

101. The CMA notes that in the Bournemouth and Poole decision, the CC found that entry into inpatient services by any provider other than an existing acute hospital was unlikely. Many outpatient services are linked to inpatient services through the care pathway, which would prevent another provider from offering a comparable constraint into this part of the pathway.

102. In any event, on the basis that no competition concerns arise as a result of the merger, the CMA does not consider it necessary to conclude on barriers to entry and expansion.

Monitor's advice

103. Under section 79(5) of the Health and Social Care Act, as soon as reasonably practicable after receiving a notification under section 79(4), Monitor is required to provide the CMA with advice on the following matters:

    a. the effect of the matter under investigation on benefits (in the form of those within section 30(1)(a) of the Act (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.

104. Monitor provided the CMA with its advice pursuant to section 79(5) of the HSCA on 2 May 2014.

105. With respect to Monitor's advice on relevant customer benefits, Monitor submitted that based on the information available to it, it is not able to determine that any relevant customer benefits for the purposes of the Act will arise.

106. With respect to Monitor's advice on matters relating to the proposed acquisition, Monitor stated that in light of HWPH's sustainability, quality and management issues, the merger appears as the best available solution to the problems at HWPH and the most likely way of achieving the necessary improvements to services for patients.

Third party views

107. As part of its market investigation, the CMA received comments from CCGs which commission services from the Parties, NHS England Specialised Commissioning teams for Wessex and Surrey and Sussex, other NHS providers, a private provider, patients, patient groups, local representatives, Monitor, and the CQC.

108. Overall, the merger is supported by the majority of third parties (including Monitor, relevant CCGs, some competing NHS providers, patients, and local representatives). They referred for instance to FPH's ability to deal with management issues at HWPH and wider clinical and financial issues faced by

the trust, the opportunity for FPH to increase scale and thus be better able to deal with the increasing pressure faced by NHS foundation trusts, and the provision of better services (and better quality outcomes) for patients locally.

109. The majority of the CCGs who replied to the CMA's market investigation, including those in the main catchment area overlap, noted the existence and strength of other competing NHS providers and had no concerns about the impact of the merger on local competition. Some competing NHS providers also felt that there would be no negative impact on competition and patient choice, in part because there would still be strong competition from other providers, while the majority of other providers raised no significant concerns (except for the comments in relation to network arrangements) below.

110. The CMA notes that third party NHS providers raised concerns in relation to network agreements for specialised services. They argued that the merger may lead to a detriment to patient choice and/or a disruption of the treatment networks that each party is a member of. The CMA notes that the concerns expressed are primarily that for the services that neither party provides, the merged trust would use a different trust network and that this could lead to some patients having to travel further distances to receive specialised care. NHS England has however informed the CMA that the parties could not unilaterally decide to alter pre-existing networks, since any reconfiguration would need to be approved by a number of stakeholders, including strategic clinical networks, itself, and relevant CCGs. The CMA also notes that the merged entity would not earn a margin from diverting patients to another network (for services that they do not provide). The CMA therefore considers that none of these concerns would arise due to an SLC as a result of the Merger.

111. The CMA took Monitor's and CQC's comments and documents in relation to HWPH's financial and clinical difficulties into account in its assessment of the counterfactual.

112. The CMA notes that concerns were raised by third parties in relation to:

    a. the financial sustainability of the merger. In particular, they stated that the Merger may not be financially sustainable in terms of the economies of scale the combined trust must deliver. Other third parties also stated that any gains will be realised by the trust itself and not the wider health community;

    b. levels of transparency around the merger, as well as consultation and engagement with patients and the public on plans for specific services being offered on the current hospital sites in future. Some third parties

raised issues in relation to the scope for rationalisation of services at the parties' sites as a result of the merger;

c. the difficulty for patients to travel, including the lack of parking space at Frimley Park or Wexham Park and travel difficulties between sites, in particular for elderly people. Some of these third parties raised concerns around patients having to travel between sites if some services were only provided from one site post-Merger; and

d. the possibility that quality may decrease at FPH as resources may be diverted towards integration and raising standards at HWPH. A third party was also concerned that the money attributed to FPH would be diverted for services at HWPH.

113. The CMA refers to its competitive assessment of the Merger and notes that none of these concerns would arise due to an SLC as a result of the merger.

114. Third party comments have been included where relevant in the decision.

Decision

This merger will therefore **not be referred** under section 33(1) of the Act.