

Anticipated Pathology Services Joint Venture between Basildon and Thurrock University Hospitals NHS Foundation Trust, Southend University Hospital NHS Foundation Trust and Integrated Pathology Partnerships Limited

ME/6252-13

The CMA's decision on reference under section 33(1) given on 28 August 2014. Full text of the decision published on 10 September 2014.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges for reasons of commercial confidentiality.

Summary

1. Basildon and Thurrock University Hospitals NHS Foundation Trust (BTUH) and Southend University Hospital NHS Foundation Trust (SUH) are NHS Acute Trusts in South Essex providing a wide range of acute services and other services. Integrated Pathology Partnerships (iPP) is a UK-based pathology services joint venture (JV) formed to supply outsourced pathology services to the NHS. BTUH, SUH and iPP are together referred to as the '**Parties**'.
2. BTUH, SUH and iPP plan to establish a JV to supply pathology testing and logistics services for BTUH and SUH acute services and for other providers of healthcare services (the **Merger**).
3. For the reasons set out in more detail below, the Competition and Markets Authority (CMA) considers that the Merger has resulted in enterprises ceasing to be distinct, that the share of supply test is met, and accordingly that it is or may be the case that a relevant merger situation has been created.
4. The CMA received submissions from the Parties that, absent the Merger, it was unrealistic that BTUH, SUH and iPP would have competed independently and that there was in any event currently little or no competition between them. However, on a cautious basis, the CMA assessed the case on the basis that, absent the Merger, the Parties would independently compete for the provision of pathology services.

5. The Parties overlap in the supply of pathology services to GPs, community service providers and private hospitals. The main distinction on the demand side between types of pathology tests is the urgency of the timeframe in which the pathology sample must be tested and the requesting clinician requires the pathology report, with some tests being considered hot (ie urgent) and some cold (ie non-urgent). The range of suppliers able to supply cold tests may be different to those able to supply hot tests due to the short turnaround time for hot tests necessitating facilities within a shorter distance of the customer.
6. The CMA found that GPs and community service providers generally only require cold tests, whereas NHS acute trusts and private hospitals require both hot tests and cold tests. The CMA's third party inquiries indicated that often hot and cold tests were procured together by those customers requiring both. The CMA understands that some private hospitals require a smaller volume of hot tests than NHS acute trusts. On this basis, the CMA assessed the Merger with reference to:
 - Routine cold tests within a one hour drive-time.
 - Routine hot tests only or hot and cold tests together, nearby or onsite.
 - Routine hot tests to healthcare providers with lower volumes of tests, such as some private hospitals, either on-site or nearby, up to 20 minutes drive-time.
7. The CMA found that as regards routine cold tests there will remain a sufficient number of competitors who will continue to provide a strong competitive constraint to the Parties post-Merger. The CMA is therefore of the view that the Merger will not give the JV the ability to increase prices or worsen non-price aspects of the competitive offering (such as quality of service provision for example in relation to the reliability of the results from the pathology test and turnaround times). On this basis, the CMA found that the Merger does not give rise to a realistic prospect of a significant lessening of competition (SLC) in this market.
8. The CMA found that the Parties, absent the Merger, would not be close competitors for the supply of hot tests only or hot and cold tests together because they are located too far away from the other's potential customers to meet hot test turnaround times. This is corroborated by third party submissions. The evidence overall also indicates that sufficient competition for these services would remain absent the Merger. In addition, no acute trusts raised any concerns about the Merger. The CMA also found evidence of other third party providers expressing interest in opportunities to provide pathology services to NHS acute trusts. The CMA therefore found that the Merger does not give rise

to a realistic prospect of a SLC in the supply of routine hot tests only or hot and cold tests together.

9. Finally, the evidence suggested that there would be limited competition between the Parties in the provision of routine hot tests to healthcare providers with lower volumes of tests, such as some private hospitals, absent the Merger. The CMA also received no major concerns from private hospitals in this regard. The CMA considers that the Merger does not give rise to a realistic prospect of a SLC in the provision of hot tests to healthcare providers with lower volumes of tests.
10. 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. However it has not been necessary for the CMA to consider whether there are any potential relevant customer benefits, as the Merger does not give rise to a realistic prospect of a SLC.
11. This Merger will not be referred under section 33(1) of the Enterprise Act 2002 (the Act).

Assessment

The Parties

12. BTUH is an NHS Acute Trust in South Essex serving a population of 400,000 covering Basildon and Thurrock together with parts of Brentwood and Castle Point. BTUH provides a wide range of acute services at two hospitals (Basildon and Orsett) as well as other services from locations across South Essex. BTUH had an income of £278.6 million (to 31 March 2013).
13. SUH is an NHS Acute Trust in South Essex covering Southend and Rochford and Castle Point. SUH provides a wide range of acute services and some specialist services at its Westcliffe-on-Sea hospital as well as from several satellite clinics. SUH had revenues of £258 million (to 31 March 2013).
14. BTUH and SUH each provide pathology services which support their own acute services as well as healthcare services supplied by other providers. SUH is located in the South East corner of Essex with the sea to its South and East. Basildon is located in South West Essex, in between Southend and other areas of East England.

15. iPP is a UK-based pathology services JV between Labco, a European clinical diagnostics company and Sodexo, a global provider of outsourced solutions. It was formed in 2010 to supply outsourced pathology services to the NHS. iPP currently operates Southwest Pathology Services, a JV between iPP, Taunton & Somerset NHS Foundation Trust and Yeovil District Hospital NHS Foundation Trust. iPP had revenues of £13.6 million (to 31 December 2013).

The Merger

16. BTUH and SUH plan to combine major parts of their pathology services and establish a JV with iPP to supply pathology testing and logistics services for their own acute services and for other providers of healthcare services. Responsibility for pathology testing and logistics will transfer to the JV but the interpretation of pathology test results and reporting will remain with each of BTUH and SUH. However, for the purposes of this decision, the CMA refers to pathology testing and logistics as '**pathology services**'.
17. The JV will comprise two Limited Liability Partnership's¹ (LLPs) jointly owned by BTUH, SUH and iPP. BTUH and SUH will each have a [X]% share in the profits earned (when combined a majority share) and iPP will have a [X]% share (a minority share). All pathology staff, other than consultant pathologistsⁱ, will transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to iPP and all assets relating to pathology services will be transferred to iPP. The LLPs will be contracted by BTUH and SUH as their exclusive providers of pathology testing and logistics services for ten years with an option of a five year extension.ⁱⁱ iPP will be sub-contracted by the JV (via the two LLPs) to provide the testing and logistics services that the JV will contract to supply to the two Trusts and their existing customers.ⁱⁱⁱ
18. Once the JV is established, iPP will set up a new laboratory, at an offsite location, to process non-urgent pathology samples. It will initially take over existing laboratory facilities at BTUH and SUH to process urgent tests, subsequently renovating these existing on-site laboratories.

Jurisdiction

19. The Parties formally notified the CMA of the Merger and submitted a satisfactory notification on 2 July 2014. The deadline for the CMA's decision under section 34ZA(1) of the Act is 28 August 2014.
20. The CMA considered whether this case involved two or more enterprises ceasing to be distinct. The CMA assesses, on a case by case basis, whether

¹ Pathology First LLP which will provide testing services and Facilities First LLP providing logistics services (including facilities-related services).

the combination of staff, assets (for example, equipment, patient records), rights and liabilities (for example, NHS contracts) each provider contributes to a transaction is sufficient to form an 'enterprise', taking account of the substance of the transaction and the features of the sector.²

21. As noted above, in this case staff will transfer under TUPE and some pathology services assets will be transferred from two of the Parties to iPP. In addition, contracts will be in place from the inception of the JV so that BTUH and SUH's pathology testing and logistics requirements will be exclusively provided by the JV for remuneration. The CMA therefore considers that the combination of assets, employees and pathology services contributed to the JV are sufficient to constitute an enterprise for the purposes of section 23 of the Act.
22. Enterprises cease to be distinct if they are brought under common ownership or control.³ In this case, each party will have two members on each LLP Board and certain key strategic decisions, such as the JV's participation into any new business, changes to the business plan, the admission of new members to the JV and appointments to the Board, will require unanimous agreement of the JV's members. The CMA considers that this will confer on each of the Parties the ability to at least materially influence policy and business decisions relevant to the behaviour of the JV in the marketplace. The CMA is therefore of the view that the Parties will each have material influence over the JV. As a result the pathology testing and logistics services of BTUH and SUH will cease to be distinct.
23. The Merger will lead to the JV having a share of supply of pathology testing and logistics services to the four Clinical Commissioning Groups (CCGs) in South Essex that will significantly exceed 25%. BTUH and SUH provide all of the GP pathology services to the four CCGs in South Essex⁴ which procure the vast majority of pathology testing and logistics in South Essex.
24. 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.

² See [CMA guidance on the review of NHS mergers, CMA29](#), July 2014, paragraph 5.4 and [Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2](#), January 2014, paragraph 4.6.

³ See Section 26 of the Act which distinguishes three levels of control, one of which is the ability to materially influence the policy of the target (material influence).

⁴ These four CCGs are Southend, Castle Point & Rochford, Basildon & Brentwood, and Thurrock. CCGs generally determine which pathology providers GPs use and as such GPs do not currently exercise individual choice over pathology provision.

Counterfactual

25. The application of the SLC test involves a comparison of the merger scenario against the competitive situation without the merger known as the counterfactual. The CMA considers the effect of the merger compared with the most competitive counterfactual, providing always that it considers that situation to be a realistic prospect.⁵ The counterfactual may therefore be either more or less competitive than the merger scenario. Therefore the selection of the appropriate counterfactual is an important step in determining whether or not there is an SLC.⁶ At phase 1, the CMA generally adopts the prevailing conditions of competition as the counterfactual to an anticipated merger. An alternative counterfactual may be used at phase 1 where there is a realistic prospect of a counterfactual that is more competitive than prevailing conditions.⁷
26. In healthcare services there is often both competition for the market, where service providers compete for the right to provide services across CCGs or other localities, and competition in the market, where decision-makers can choose between competing providers of the same service on an ongoing basis. Both are present to some extent in the provision of pathology services to the NHS.
27. In this case the CMA considered the extent to which there is competition for the supply of pathology services and specifically the extent to which the Parties currently compete. A number of third parties also told the CMA that they expected competition for pathology services in general to increase in the future, with several referring to the findings of the Carter reports⁸ which envisaged higher levels of contestability for pathology services, suggesting that where CCGs and other customers had not previously tendered, they would be increasingly likely to do so in the future. This is consistent with evidence in the Parties' own submission pointing to a general trend towards greater competition as customers increasingly put pathology contracts out to tender.

⁵ *Merger Assessment Guidelines*, joint publication of the Competition Commission and OFT, September 2010, at section 4.3.5

⁶ See *CMA guidance on the review of NHS mergers*, CMA29, July 2014, paragraphs 6.10 to 6.14; and [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).

⁷ *Merger Assessment Guidelines*, joint publication of the Competition Commission and OFT, September 2010, at section 4.3.5.

⁸ For further information see Department of Health, the Report of the Review of NHS Pathology Services in England, 2006 and the Report of the Second Phase of the Review of NHS Pathology Services in England, 2008, both chaired by Lord Carter of Coles.

Ability of BTUH and SUH to operate independently absent the merger

28. The Parties submitted that, absent the Merger, it would not be realistic to assume that BTUH and SUH would have remained independent pathology providers and that also there had historically been very little, or no, competition between the Parties. They submitted that it is appropriate to assess the Merger against a counterfactual where there is limited competition between the Parties. The Parties submitted that this is evidenced in a number of board papers and reports prepared by both BTUH and SUH surrounding the future provision of pathology services at both Trusts.
29. The Parties stated that the decision to merge BTUH and SUH pathology services was taken at a time when the Parties understood that a separate provider, Consolidated Pathology Services (CPS), was the preferred bidder for the contract to supply GP pathology services to the four CCGs in South Essex. The CPS bid was part of the East of England Transforming Pathology Services (TPS) process, although the South Essex CCGs subsequently withdrew from this process in June 2013. At this time the two Trusts were considering their options given their anticipated loss of GP pathology services, which made up the majority of their external pathology customers. One of the options under consideration by the Boards was each Trust separately outsourcing its pathology services to another organisation. The Parties submitted that the option for each Trust to take no action and to continue to maintain separate and discrete services was ruled out on financial grounds given the potential loss of income if GP pathology services had transferred to CPS.
30. In relation to BTUH, the Parties told the CMA that absent the Merger the next most likely option would have been for BTUH to have market tested independently (ie putting its pathology services out to tender) with the intention of outsourcing to another provider. In the case of SUH, it had considered remaining a standalone provider and competing to provide the pathology services currently provided by BTUH should those be put out to tender. However, the Parties told the CMA that this option was never a serious possibility and such a venture was highly unlikely to have been successful given that SUH would have found it difficult to finance a new laboratory, to offer the same purchasing power advantages as private providers, or to match their expertise in running efficient laboratories. The Parties told the CMA that the scenario in which each Trust separately partnered with different private providers was not realistic and this was illustrated by the example of there being only one private provider having shown interest in providing pathology services for BTUH alone, when BTUH sought to test interest in the market for its pathology services prior to its decision to enter into the Merger. In addition, the Parties said that there would be little reason for a second private provider to partner with SUH and invest in new facilities in Southend, if a competing

provider had already established a new facility in Basildon. The Parties submitted that the remaining option for SUH to have partnered with another NHS provider would have resulted in the same reduction in the number of providers of pathology services as the Merger.

31. The CMA considered the extent to which it was realistic that BTUH and SUH would have competed as independent providers (either on a standalone basis or in partnership with a third party) absent the Merger. The evidence from internal papers demonstrates that there were a number of alternative options for both BTUH and for SUH, which may have been implemented absent the Merger. BTUH had interest from one private provider to form a partnership and offer pathology services to customers independently from SUH. Internal documents also show that SUH had given some consideration to continuing as a stand-alone provider and competing for BTUH pathology services. There is insufficient evidence to support the Parties' submissions that it was not a realistic option for SUH to continue to operate as an independent provider and compete, particularly given that its CCG customers were not ultimately lost to CPS.
32. The Parties also submitted that as only one private provider was interested in partnering with BTUH, it was unlikely that two separate providers could be found in order for BTUH and SUH to operate independently. However, the CMA notes that this was in the context of losing the GP pathology services customers to CPS. As such, the relative lack of interest from private providers at the time may not provide an accurate indication of the level of interest from private providers that might exist following the CCGs decision to withdraw from this procurement process. The CMA has also received evidence from one third party that, absent the Merger, it would have been interested in partnerships or outsourcing arrangements with the Trusts individually.
33. Given the evidence outlined above, the CMA considers that there is a realistic prospect that the two trusts may be competing independently for the provision of pathology services absent the Merger, either on their own, or each in conjunction with a different third party provider. However it has not been necessary to reach a firm conclusion on the relevant counterfactual since in this case no competition concerns have arisen on any realistic counterfactual the CMA could have reasonably assessed the Merger against.

Parallel transactions

34. The parties also referred to a number of other pathology mergers in the NHS that would affect the competitive landscape for pathology services, including the East of England procurement referred to above and a number of other possible pathology mergers and questioned whether the appropriate

counterfactual should assume that all of these transactions will proceed. The CMA notes that at least two of these partnerships have been created⁹ but there are a number of other potential transactions in relation to which the CMA is unable to determine the extent to which they are likely to proceed. The CMA has not received any information on other transactions taking place in the area other than those raised by the Parties. Several providers confirmed to the CMA that they intend to operate independently post-merger.

35. In this case the CMA does not need to conclude on whether or not any of these (or any other) transactions are likely to proceed, given that under any scenario, the CMA would have no competition concerns with the Merger. The CMA has examined whether the Merger creates a realistic prospect of an SLC, irrespective of whether any other transactions proceed.

Frame of reference

36. The purpose of market definition is to provide a framework for the CMA's analysis of the competitive effects of the merger. Market definition is a useful tool, but not an end in itself, and identifying the relevant market involves an element of judgement. The boundaries of the market do not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way as the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.¹⁰
37. Pathology is concerned with the study of the cause of disease and the ways in which diseases affect human bodies. It involves examining changes in the tissues and in blood and other body fluids to show the potential for disease to develop, to detect its presence, cause or severity, or to monitor its progress or the effects of treatment.
38. BTUH and SUH supply pathology services to a number of customers, including CCGs (who purchase on behalf of GPs), community service providers and private hospitals. Both also self-supply pathology services for their own trusts and are customers for some tests from other acute trusts. The Parties therefore overlap in the supply of pathology services to GPs, community service providers and private hospitals.
39. As well as routine pathology tests carried out by almost all pathology labs, there are some pathology tests that can be considered specialist due to the low volume of tests required and the fact that only a few providers carry them out.

⁹ Transforming Pathology Partnerships (TPP) was formed on 1 May 2014 for the provision of pathology services for five CCGs in the geography served by the six owner trusts and acute pathology services for those trusts. The Eastern Pathology Alliance (EPA) is providing community pathology services to Norfolk.

¹⁰ [Merger Assessment Guidelines](#), paragraph 5.2.2

BTUH and SUH confirmed that they do not overlap in the provision of such specialist tests to other acute trusts or in other specialist tests. No third party raised any issues regarding the impact of the Merger in relation to specialist tests and therefore specialist tests are not considered further.

Product frame of reference

40. The parties submitted that pathology services can be segmented into two categories, namely the market for cold (ie non-urgent) pathology services and the market for hot (ie urgent) and cold pathology services together.

Types of pathology tests

41. Pathology customers have little or no ability to substitute between alternative pathology tests, with the choice of test being clinically-led. The narrowest product frame of reference, on the basis of demand-side factors, could therefore be individual tests, for a particular customer type, with a particular urgency.
42. Third parties told the CMA that pathology services can be broadly grouped by discipline. These include, but are not limited to:
- Biochemistry
 - Haematology
 - Microbiology
 - Immunology
 - Histology
43. The Parties submitted that the pattern of self-supply by NHS acute trusts indicates that supply-side substitution is relatively easy between many types of pathology tests. There was some evidence that supply-side substitution was possible, as trusts could switch capacity between tests relatively easily, but for some tests, investment in specialist equipment would be needed for a provider that did not currently supply that type of test to start doing so. Some providers told the CMA that they were in the process of bringing some tests back in-house after having previously outsourced them.
44. The vast majority of third parties that the CMA contacted indicated that, although there were differences between the types of tests, almost all acute trusts supplied the full range of routine tests. Given that almost all suppliers

supply the vast majority of all routine tests, the CMA has assessed the Merger for routine tests without segmenting by different test types.

Hot versus cold tests

45. The main distinction on the demand side between types of pathology tests is the urgency of the results, with some tests being considered hot (ie urgent) and some cold (ie non-urgent). Third parties told the CMA that, in general, hot tests are tests where a result is required within at most a one-hour turnaround, with cold tests allowing a substantially longer period of time, sometimes over several days.
46. On the supply side, the range of suppliers able to supply cold tests may be different to those able to supply hot tests. As cold tests allow a longer turnaround time suppliers may be located some distance from the customer. On the other hand, to supply hot tests a pathology provider would either have to have existing facilities a very short distance from the customer or be willing and able to set up nearby facilities or take over use of on-site facilities.
47. CCGs (on behalf of GPs) and community service providers¹¹ generally only require routine cold tests and typically purchase a bundle of pathology services from a single provider. Responses from third parties confirmed that most tests for GPs and community service providers are not urgent 'hot' tests but are routine cold tests.
48. Unlike GPs and community service providers, NHS acute trusts require both hot tests and cold tests. The vast majority of acute trusts that the CMA contacted procured their routine hot and cold tests together.¹²
49. Both BTUH and SUH each supply pathology tests to two different private hospitals, meaning that they supply four private hospitals in total. The Parties submitted that SUH supplies a mix of hot and cold tests to private hospitals, whilst BTUH only supplies cold tests. However, one private hospital supplied by SUH told the CMA that their test results were not urgent, and the turnaround times it required were more consistent with cold tests. The CMA also received evidence from one private hospital that they are supplied a small number of hot tests by BTUH.

¹¹ Community service providers typically require the same tests, or a subset of, the routine cold tests procured by CCGs.

¹² Although it is noted that in the OFT's UCLH/RF/TDL decision there were indications this may differ in the future.

50. Private hospitals gave mixed evidence on whether they split their pathology needs between different suppliers of hot and cold services. One private hospital told the CMA that it uses a mix of suppliers for different tests.
51. Pathology providers that the CMA spoke to indicated that suppliers to GPs and community service providers were also able to supply cold tests to private hospitals. However, there may be different suppliers who could provide urgent hot tests from those who provide cold tests, given that these require a much shorter turnaround time. One private hospital told the CMA that there is a considerable difference in the turnaround time required for urgent and non-urgent tests.
52. The CMA also understands that some private hospitals require a smaller volume of pathology tests than NHS acute trusts. This may limit supply-side substitution due to the minimum levels of investment required to supply hot tests. Third party providers also confirmed to the CMA that the volume of tests is a key consideration in any decision to tender for pathology services. On a cautious basis, the CMA considers that this supports a separate assessment of the supply of hot tests for providers with lower volumes of tests such as some private hospitals.
53. Based on the evidence above the CMA considers that, as cold tests allow a substantially longer period of turnaround time, there is likely to be a different range of suppliers available to carry out cold tests compared to hot tests and so there may be a different geographic frame of reference. The CMA notes that in the majority of cases where customers require hot tests, these are purchased together with cold tests.

Logistics and testing services

54. The JV comprises two LLPs; one providing logistics services and one providing testing services. The Parties submitted that it is possible in the future that these two services could be offered separately to customers and, therefore, could form separate product markets.
55. The CMA considered whether these separate services could form distinct markets, and in particular, whether the competitive conditions might differ between them. The vast majority of the customers who responded purchase an end-to-end pathology service involving logistics and testing, although one smaller customer told the CMA that it delivered samples to the relevant lab. In general, the CMA considers that most customers will require both logistics and testing. This was also supported by evidence from suppliers, who all offered an end-to-end service.

56. In any case, the CMA notes that the same set of providers are active in both markets, and therefore assesses them together for the purposes of this investigation, although there is no need to conclude on this point given that no competition concerns arise on any conceivable basis.

Conclusion

57. It is not necessary for the CMA to come to a firm conclusion on the product frame of reference given that no competition concerns arise under any possible segmentation. However, for the purposes of this assessment, the CMA considers the impact of the Merger on the basis of the following product frames of reference¹³:

- Routine cold tests only.
- Routine hot tests only or hot and cold tests together.
- Routine hot tests to healthcare providers with lower volumes of tests, such as some private hospitals.

Geographic frame of reference

58. In publicly funded healthcare services the relevant geographic market may be based on the location of providers and will be guided by the needs and behaviour of those who make choices about the service (ie in this case GPs and healthcare providers).¹⁴ In the OFT's UCLH/Royal Free/TDL decision, it defined geographic markets for pathology services on the basis of drive-times from customer location using a proxy for customer location¹⁵, while noting that the conditions of competition are similar across the particular customers in question. The CMA has adopted a similar approach in this case but used the locations of the Parties as a proxy for customer location due to the nature of the geographic location of the Parties and their customers.¹⁶

¹³ This is consistent with the product frame of reference used in UCLH/Royal Free/TDL.

¹⁴ [CMA Guidance on the review of NHS Mergers](#), July 2014, paragraph 6.40 and 6.41

¹⁵ Since GPs included in CCG contracts were spread across the boroughs of the CCGs, the OFT proxied customer location by the location of the providers they currently used thereby checking there are sufficient competitors within a drive time of the parties' locations and the locations of other providers currently used by the parties' customers.

¹⁶ In addition to assessing drive-times from BTUH and SUH we also took the location of the furthest and most remote GP sample collection point in Southend as the basis for a sensitivity check as this would be likely to represent the worst case scenario for a potential provider of pathology services. Other sample collection points (eg. those to the West of SUH) will be a similar distance or even closer to other competitors than SUH.

Routine cold tests

59. In UCLH/Royal Free/TDL, the OFT considered that, on a cautious basis, the supply of routine cold tests should be considered on the basis of a one hour drive-time.¹⁷
60. The Parties submitted that for cold services all suppliers within at least a two hour drive-time should be considered within the same geographic market. They based this on turnaround times for pathology reports, potential deterioration of pathology samples, scope for improvements in pathology logistics, and the cost of transporting pathology samples.
61. Pathology samples are collected from sample collection points; for a CCG these will be spread across the area and will typically be located at GP surgeries, although other locations can also be used.
62. The CMA received mixed views from third parties on the maximum distance that a pathology provider for cold tests could be located from a test site. Most customers were unsure about the maximum journey time that would allow a provider to remain competitive, instead emphasising the need to meet the turnaround times and maintain sample quality. Some third parties suggested drive-times of one hour or less, whilst others suggested it could potentially be longer, with one stating it could be up to four hours.
63. Evidence from NHS acute trusts shows that a number of trusts serve customers between 40 to 55 minutes away and a small number were more than one hour drive away. Of the providers who indicated to the CMA that they would be either likely or very likely to bid for cold pathology contracts, a number were approximately one hour away and the furthest trust was approximately two hours' drive-time away.
64. One third party also told the CMA that in other countries samples are sent away over considerably longer distances to be tested and that such a model should be possible for the UK, although this had historically not been the case.
65. The Parties submitted an analysis of the transport costs involved in the provision of pathology services to customers (ie not self-supply to the trust) and the extent to which this provides a constraint on the geographic area they can be provided within. This review found that transport and logistics costs were likely to be a very small proportion of the overall cost of pathology services (well

¹⁷ UCLH/RF/TDL decision, paragraph 60. Monitor performed a comparable assessment in recent pathology cases, see [Proposed merger of Southport and Ormskirk Hospital NHS Trust and St Helens and Knowsley Teaching Hospitals NHS Trust's pathology](#) (July 2014); [Proposed merger of Brighton and Sussex University Hospitals NHS Trust and Surrey and Sussex Healthcare NHS Trust's pathology services](#) (March 2014)

below 5%) and that the incremental costs of adding customers were also very small (assuming that variable costs per mile are constant), suggesting that the geographic market could be at least four hours or even wider. While the CMA considers that low transport costs suggest that suppliers may be able to compete for contracts outside of their historical areas of supply, and may be able to do so over considerable distance, this evidence is unlikely to enable us to define precisely the exact geographic market.

66. The Parties also submitted a review of the literature on the rate of sample deterioration for pathology samples. This review, which was conducted by pathologists at BTUH and SUH, showed that the vast majority of samples would not suffer significant deterioration within four hours of being produced.
67. The large-scale East of England procurement process had stringent criteria for award, including turnaround times, and as part of this for the area of South Essex a provider based 90 to 120 minutes away was selected. This could support a geographic frame of reference of two hours. However the CMA also notes that the process collapsed in South Essex, which the CMA understands was partly due to concerns over logistics and the desire to have a laboratory hub in the local area.
68. In any event, it has not been necessary for the CMA to conclude on this point in this case given that no competition concerns arise even on the narrowest plausible frame of reference for the geographic market, namely, on the basis of a one hour drive-time for cold tests.

Routine hot and cold tests or hot tests only

69. In UCLH/RF/TDL, the OFT considered that the providers of urgent pathology services available to NHS acute trusts will be limited to those who have existing facilities within a very short distance from the NHS acute trust, or those who are willing and able to set up nearby facilities or take over use of on-site facilities. These could include providers not currently active in London or in the UK.
70. The parties submitted that a similar approach should be taken in this case. No third party suggested to the CMA that a wider frame of reference should apply for the supply of hot and cold tests to NHS acute trusts or to larger private hospitals. The CMA also notes that where NHS acute trusts have outsourced their hot pathology testing this has resulted either in the outsourced provider taking over existing on-site facilities or setting up a new laboratory very close-by. This is also the case in the Parties' proposed plans for the JV.
71. Therefore, on a cautious basis, the CMA has limited the geographic frame of reference for the supply of routine hot and cold tests together or hot tests only to nearby or on-site.

Routine hot tests to healthcare providers with lower volumes of tests, such as some private hospitals

72. The CMA received a small number of responses from healthcare providers who required a lower volume of hot tests, such as private hospitals.
73. One private hospital told the CMA that a maximum drive-time of 20 minutes would be required for hot tests. The CMA considers that the provision of hot tests to private hospitals is likely to have requirements similar to those of hot tests for NHS acute trusts, in other words, provision must be on-site or nearby.
74. Compared to NHS acute trusts, some private hospitals require a smaller volume of hot tests and therefore it may be the case that providers are less willing to invest in setting up a laboratory near or on their premises. Therefore, on a cautious basis, the CMA has assessed routine hot tests for private hospitals on the basis of suppliers located up to 20 minutes drive-time away.

Conclusion on frame of reference

75. The CMA has assessed the Merger against the following frames of reference:
 - Routine cold tests within at least one hour drive-time.
 - Routine hot tests only or hot and cold tests together nearby or on-site.
 - Routine hot tests to healthcare providers with lower volumes of tests, such as some private hospitals, either on-site or nearby, up to 20 minutes drive-time.

Horizontal issues

76. BTUH and SUH both have pathology contracts with 13 CCGs¹⁸ as part of a wider NHS Acute Services Contract meaning that they can provide pathology services to GPs in any of these CCGs. However, in practice BTUH provides pathology services primarily to two South West Essex CCGs and SUH provides services to two South East Essex CCGs. BTUH and SUH also supply pathology services to a number of smaller customers such as NHS community healthcare providers, mental health providers, sexual health services and private hospitals in South Essex.
77. The CMA notes that iPP currently has no customers in the East of England, but does supply pathology services in the South West to acute trusts, CCGs and

¹⁸ The 13 CCGs are: Basildon & Brentwood CCG, Thurrock CCG, Southend CCG, Castle Point & Rochford CCG, West Essex CCG, Mid Essex CCG, North East Essex CCG, Barking & Dagenham CCG, Newham CCG, Havering CCG, Redbridge CCG, Waltham Forest CCG, and East & North Hertfordshire CCG.

others as part of a joint venture with Yeovil District Hospital NHS Foundation Trust and Taunton & Somerset NHS Foundation Trust.

78. The Parties have not provided shares of supply in the relevant product and geographic scope. As noted above, BTUH and SUH supply the vast majority of pathology services in South Essex. The Parties have estimated that the expenditure on pathology logistics and testing (the components transferring into the JV) is approximately £12.2 million at BTUH and £12.7 million at SUH.

Routine cold tests

79. The Parties submitted that there were 28 separate providers within a two hour drive-time from the SUH site and ten providers within 60 minutes who were capable of providing routine cold-testing services. The Parties further submitted that these estimates are conservative given that they assume a number of planned joint ventures go ahead and that, in their view, the geographic frame of reference should be much wider.
80. The CMA placed greater weight on the constraints provided by those NHS acute trusts and other pathology providers that explicitly indicated their intention to bid for contracts in the relevant catchment area, have already done so, or have been identified by third parties as capable of doing so.
81. On a cautious basis the CMA found that there were eight providers which had a hub laboratory within a one hour drive-time of SUH.¹⁹ This differs from the Parties estimate that there were ten providers within 60 minutes as their estimate includes two providers who only had 'spoke' laboratories. However on a cautious basis the CMA has only considered the providers who had 'hub' laboratories as these may provide a stronger constraint. The CMA received evidence from three third party providers within a one hour drive-time from SUH suggesting they would compete against the JV, or expressing interest in bidding for contracts with CCGs, community service providers and private hospitals in the relevant area.²⁰ Despite Southend's isolated geographic position, three parties outside of the 60 minute drive-time also stated that they would be likely to bid for contracts within Southend for CCGs, community providers and private hospitals. A number of potential providers within one hour drive-time told the CMA that they had no plans to bid in the area, however there do not appear to be significant barriers to their doing so in future.

¹⁹ As previously mentioned the CMA assessed drive-times from BTUH as well as SUH, using these locations as a proxy for customer location and also considered the impact on the number of providers of taking the furthest GP sample collection point in Southend as the basis for a sensitivity check. Even using this sensitivity, there remained three suppliers within a 60 minute drive-time, and many only slightly over 60 minutes away that had confirmed an interest in bidding for Southend-based contracts.

²⁰ These were [REDACTED].

82. In addition there is at least one other provider which, although not within the catchment area, expressed interest in bidding for pathology contracts. This provider had also expressed interest in the market testing previously carried out by BTUH and had bid for other CCG contracts in other parts of the UK, although it has not yet been successful and therefore the CMA did not attach significant weight to this constraint.
83. The CMA also notes the evidence from the East of England TPS pathology tender, which shows that two other providers bid for the South Essex contract and that one of these, CPS, was awarded the preferred bidder status despite being around 100 minutes away from SUH.
84. None of the CCGs who responded to the CMA, including the four CCGs who are currently major customers of BTUH and SUH, raised any competition concerns about the Merger, indicating that they believed there would be other options if they needed to switch provider post-merger.
85. The CMA received no evidence of switching between the Parties before the Merger. However, one third party, [redacted], told the CMA that they had considered switching to BTUH from SUH in the past in response to a proposed price rise, and that, as a result of considering this alternative, ultimately the price rise had not gone ahead. However, this third party acknowledged that there were other options which would be available to it post-Merger and the CMA confirmed with several third parties that they would be interested and able to supply such a customer.
86. A majority of community service providers and private hospitals who responded also did not raise any concerns about the Merger, highlighting that other options existed for their pathology requirements. One private hospital raised some concerns that the Merger would remove the option of [redacted] for future negotiations. However, the hospital confirmed that there were a number of other options available to them and several pathology providers indicated an interest in supplying private hospitals. The CMA also notes that the Parties have not in the past competed for this customer, and that the private hospital never had discussions with [redacted] at the point it had negotiated its pathology requirements with [redacted] when the hospital opened.
87. Given that there are a sufficient number of competitors who will continue to provide a strong competitive constraint to the Parties post-merger, the CMA is of the view that the Merger will not give the JV the ability to increase prices or worsen non-price aspects of the competitive offering (such as service quality including reliability of results and turnaround times). The CMA therefore believes that the Merger does not give rise to a realistic prospect of an SLC in the supply of routine cold tests within a one hour drive-time.

Routine hot tests only and hot and cold tests together

88. The CMA considered whether competition to supply hot tests only or hot and cold tests together would be substantially lessened by the Merger. Hot tests need to be delivered on-site or nearby and therefore providers that are willing to set up on-site or nearby can be considered potential suppliers for these services. The CMA considered whether, absent the Merger, the Parties would have been likely to have been close competitors to supply hot tests only or hot and cold tests together and whether sufficient competition for these services would remain if the Merger went ahead.
89. The Parties do not currently supply routine hot and cold services to other NHS acute trusts, and they submitted that they do not compete with each other to supply hot services in their current locations due to the fact that each is located too far away from the other's potential customers to meet any hot test turnaround times. Further, the Parties argued that neither BTUH nor SUH had been competing by bidding for contracts with acute trusts and large private hospitals to take over their on-site facilities. The CMA found no evidence that the Parties would compete to supply hot tests to other organisations absent the Merger.
90. No acute trusts raised any concerns about the Merger, and none indicated that either BTUH or SUH would have been particularly likely to supply services to them post-Merger. The CMA considers that this indicates that they would not be close competitors absent the Merger.
91. Two third party providers who currently supply hot and cold services elsewhere in the UK told the CMA that they would be interested in bidding for opportunities with NHS acute trusts, including forming partnerships that included taking over work from their onsite laboratories. A number of other providers expressed broad interest in bidding for opportunities of this sort.
92. The CMA considers that the Parties would not be close competitors to supply hot tests only or hot and cold tests together absent the Merger, and that nonetheless there would be sufficient competition for these services from other alternative suppliers if the Merger went ahead. The CMA therefore believes that the Merger will not give the JV the ability to increase prices or worsen non-price aspects of the competitive offering. Based on the evidence available to the CMA overall, it believes that the Merger does not give rise to a realistic prospect of an SLC in the supply of routine cold and hot pathology services or hot pathology services only.

Routine hot tests to healthcare providers with lower volumes of tests, such as some private hospitals

93. In this case, the CMA considers that the relevant smaller providers requiring hot tests are likely to be smaller private hospitals in the South Essex area.
94. The Parties submitted that they do not compete with each other to supply hot tests to private hospitals since the private hospitals served by SUH are located too far away from BTUH to meet the urgent turnaround times for these tests. The two private hospitals supplied by SUH are 24 and 27 minutes away from BTUH. In addition, the Parties argued that BTUH does not supply hot services to any third party customer.
95. The CMA received no major concerns from private hospitals relating to urgent tests supplied to them. The CMA notes that, on the basis of a 20 minute drive-time, the Parties do not overlap in the potential supply of hot tests to private hospitals. The CMA did not receive any evidence that the Parties had previously competed closely with each other to supply urgent tests to private hospitals or would be close competitors absent the Merger.
96. One private hospital with hot tests supplied by [redacted] raised some concerns about the Merger, although it also felt that its tests were not urgent. This hospital stated that [redacted] could have been an alternative option for them although it also noted that they had never held discussions with [redacted]. However, on further consideration, this private hospital told us that it would have been difficult to switch to [redacted]. It also suggested that there were other options for them to choose and that their tests were not that urgent. This suggests that, for at least some of their tests, these would not be classified as hot tests.
97. On the basis of the overall evidence the CMA found that, absent the Merger, the Parties would not be competing closely for the supply of hot tests to healthcare providers with lower volumes of tests, given the geographic distance between the Parties and these providers. The CMA therefore considers that the Merger does not give rise to a realistic prospect of an SLC in the provision of routine hot tests to healthcare providers with lower volumes of tests, such as some private hospitals.

Barriers to entry and countervailing buyer power

98. In cases where competition concerns arise, the CMA will consider the presence of barriers to entry or countervailing buyer power. In this case, the CMA considers that the Merger does not give rise to a realistic prospect of an SLC, and was therefore not required to consider the barriers to entry or countervailing buyer power.

Third party views

99. The CMA received a number of responses from CCGs, other NHS commissioning bodies, private hospitals, NHS acute trusts, private pathology providers and former members of the Strategic Health Authority.
100. The vast majority of responses raised no concerns about the Merger. Two customers raised potential concerns about the Merger. These have been reflected in the competition assessment above.
101. A number of third parties, including customers and pathology providers, were supportive of the JV and considered that it would allow BTUH and SUH to achieve cost efficiencies and compete more effectively against other pathology providers.
102. Third party comments have been included where relevant in the decision.

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:
 - 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.
 - 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 31 July 2014. 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. However it has not been necessary for the CMA to consider whether there are any potential relevant customer benefits, as the Merger does not give rise to a realistic prospect of a SLC.

Decision

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

Nelson Jung
Director
Competition and Markets Authority
28 August 2014

END NOTES

I. With regards to paragraph 17, the Parties wish to clarify that:

- In addition to consultant pathologists (required to provide pathology reporting services), pathologist support staff, mortuary staff and the infection control team, will also not be transferred to iPP.
- One LLP will provide testing services and the other will provide facilities and logistics services, but for the purposes of this report the services provided by these LLPs are referred to as 'testing and logistics services'.
- iPP has wholly owned specialist company entities that will sub-contract to the JV the facilities, testing and logistics services and for the purposes of this report are together referred to as iPP.