COMPETITION COMMISSION

# Optimax Clinics Limited and Ultralase Limited

A report on the completed acquisition by Optimax Clinics Limited of Ultralase Limited

20 November 2013

*Website:* www.competition-commission.org.uk

## Members of the Competition Commission who conducted this inquiry

Alasdair Smith *(Chairman of the Group)*

John Krumins

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Ed Smith

## Chief Executive and Secretary of the Competition Commission

David Saunders

The Competition Commission has excluded from this published version of the report information which the Inquiry Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Non-sensitive wording is indicated in square brackets.

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# Summary

1. On 29 July 2013, the Office of Fair Trading (OFT) referred the completed acquisition by Optimax Clinics Limited (Optimax) of Ultralase Limited (Ultralase) (collectively 'the parties') to the Competition Commission (CC) for investigation and report. The acquisition had completed on 5 November 2012. Optimax is 62.5 per cent owned by Russell Ambrose, the founder of Optimax, who has a controlling interest in and legal control of Optimax. At the time of completion Ultralase was 100 per cent owned by CLVC Group Limited (CLVC), the entire share capital of which was purchased by Mr Ambrose in the transaction.

2. We concluded that the completed acquisition of Ultralase constituted a relevant merger situation and that we had jurisdiction to consider whether the creation of that situation had resulted in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.

3. The parties both supply refractive eye surgery services. Refractive eye surgery is used to decrease or eliminate the dependency of a patient on glasses and/or contact lenses. There are two categories of refractive eye surgery: laser eye surgery and intraocular lens (IOL) surgery.

4. Three large competitors together account for the large majority of the laser eye surgery market—the parties and Optical Express. Optical Express is nearly twice as large as the parties combined. Other competitors appear to be substantially smaller than both the parties and Optical Express.

5. The share of the parties in IOL surgery is much lower than in laser eye surgery. Optical Express is more than six times larger than the parties combined. Some other competitors are either larger or of a similar size to the parties.

6. Laser eye surgery is an expensive discretionary procedure, with demand closely linked to levels of customers' disposable income. Demand for refractive eye surgery is sensitive to the state of the economic cycle and Optimax said that laser eye surgery treatments had reduced by approximately 43 per cent between 2008 and 2012. At present the industry has excess installed capacity partly due to poor demand.

7. We concluded that all laser eye surgery procedures formed part of a single relevant product market. We did not need to take a definitive view on whether laser eye surgery and IOL surgery could be aggregated in a single relevant market or should be treated as separate markets, since this would not change our assessment of the merger effects. We considered the scope of the geographic market and concluded that refractive eye surgery centres typically attract the majority of their customers from within a 45-minute drive-time.

8. We assessed the counterfactual. We found that Ultralase's cash position had deteriorated through 2012 and by end 2012 or early 2013 its funding requirement would have been beyond the limit of its bank facilities. We concluded that, absent additional funding from its shareholders, Ultralase would have failed financially. We noted the evidence from the former CLVC shareholders that CLVC was unlikely to have been willing to invest the cash required to effect a restructuring. We concluded

that Ultralase would not have been able to raise further debt financing from any other source.[1]

9. We considered whether there were other buyers whose acquisition of Ultralase as a going concern, or of its assets, would have produced a better outcome for competition than the merger under consideration. A number of other bidders had expressed initial interest in acquiring Ultralase. We considered, however, that Optimax was the only credible bidder and that the other bidders that had expressed an interest would have been highly unlikely to purchase Ultralase.

10. We assessed what would have happened to the sales of Ultralase. We first assessed what had actually happened to the distribution of sales since the merger, then we assessed what would have happened in the counterfactual where Ultralase had failed financially and there was no alternative purchaser to Optimax.

11. We found that before the merger the parties competed mainly with each other and with Optical Express. Other suppliers provided only a limited constraint. After the merger we found that Optimax has retained only a limited share of the Ultralase sales. On a national scale, Optical Express appears to have gained most of the Ultralase sales, although in some local areas other suppliers may have captured some of the sales that would previously have been supplied by Ultralase.

12. We assessed what would have taken place in the counterfactual by assessing diversions between Ultralase and other suppliers. We found that, had Ultralase exited the market, the large majority of its sales would have gone to Optimax and Optical Express. We found that in a few areas alternative suppliers might have captured more of Ultralase's sales but that alternative suppliers overall would have been unlikely to capture a significantly higher proportion of the Ultralase sales in the counterfactual compared with the post-merger situation.

13. We concluded that since that the distribution of sales in the counterfactual situation would not have differed significantly from that in the post-merger situation we did not expect the completed acquisition of Ultralase by Optimax to result in a less competitive outcome in the market for refractive eye surgery in the UK.

14. We conclude that the merger would not be likely to give rise to an SLC in any market in the UK.

[1] Following the publication of our provisional findings, Ultralase was put into administration on 30 October 2013.

# Findings

## 1. The reference

1.1 On 29 July 2013, the OFT referred the completed acquisition by Optimax of Ultralase to the CC for investigation and report. Optimax is 62.5 per cent owned by Russell Ambrose, the founder of Optimax. Mr Ambrose, with a majority shareholding 62.5 per cent, has a controlling interest in and legal control of Optimax. At the time of completion Ultralase was 100 per cent owned by CLVC, the entire share capital of which was purchased by Mr Ambrose in the transaction which completed on 5 November 2012.[2]

1.2 The CC must decide:[3]

*(a)* whether a relevant merger situation has been created; and

*(b)* if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

1.3 Our terms of reference are in Appendix A.

1.4 This document, together with its appendices, constitutes our findings. Further information, including non-commercially-sensitive versions of the Optimax submission and summaries of evidence from third parties, can be found on our website.[4]

## 2. Background to the industry and the parties

### *Refractive eye surgery*

2.1 The parties both supply refractive eye surgery services. Refractive eye surgery is used to decrease or eliminate the dependency of a patient on glasses and contact lenses. There are two categories of refractive eye surgery: laser eye surgery and intraocular lens surgery.

2.2 Laser eye surgery adjusts the shape of the cornea, which is the transparent front part of the eye, to correct focusing problems. It is used to correct myopia (short-sightedness) and long-sightedness and mild astigmatism. There are two principal treatments available, LASIK[5] and LASEK.[6]

2.3 The second category, IOL surgery, is the use of microsurgery to correct vision through the implantation of IOLs which replace or enhance the eye lens. IOLs may also be used to correct cataracts. IOLs are either inserted in front of the customer's natural lens (phakic IOLs) or in the case of customers with cataracts and certain other conditions, replace the lens entirely (pseudophakic IOLs).

2.4 Customers have an initial consultation to assess whether they are suitable for surgery and which procedure is more appropriate for their specific refractive problem. This may take place either at a consultation clinic or a treatment clinic. The laser eye

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[2] Note in the rest of this document we refer for simplicity to the purchase of Ultralase as being by Optimax.
[3] Under section 35 of the Enterprise Act 2002 (the Act).
[4] www.competition-commission.org.uk/our-work/directory-of-all-inquiries/optimax-ultralase.
[5] Laser Assisted In Situ Keratomileusis.
[6] Laser Assisted Epithelial Keratomileusis.

surgery would take place at a treatment clinic, where the laser equipment would be located. Following the procedure customers need to visit the clinic/centre for the post-operation assessment and for periodic follow-up checks.

### *Laser eye surgery*

2.5 LASIK and LASEK surgery use a laser to ablate (remove by vaporizing) small areas of the cornea. In LASIK a flap is made in the upper layers of the cornea either by femtosecond laser[7] or scalpel. The excimer laser is then used to correct the cornea and the flap is folded back. In LASEK a dilute alcohol solution is used to weaken the cells of the epithelium (the outmost layer of the cornea). The excimer laser then corrects the cornea. The epithelium cells are then smoothed back and the epithelium will rejuvenate and heal itself. Both procedures are performed under local anaesthetic and take similar amounts of time. Their use depends on the characteristics and requirements of the customer.

### *IOL surgery*

2.6 IOLs are typically offered to customers seeking refractive surgery who have strong prescriptions or cataracts. There are a number of different IOL treatments, but all involve the insertion of a synthetic lens to enhance or replace the eye's existing lens.

*(a)* The insertion of a secondary lens is referred to as an implantable contact lens (ICL) or an artificial lens implant (ALI).

*(b)* The removal and replacement of the existing lens is referred to as refractive lens exchange (RLE).

2.7 Customers over the age of 40 and customers with cataracts (a condition where the lens becomes cloudy) are treated with RLEs. Customers under the age of 40 are generally treated with ICLs, which can be removed.

## ***Key competitors***

2.8 The refractive eye surgery market is made up of:

*(a)* large national chains (Optical Express, Ultralase and Optimax);

*(b)* independent clinics and small regional chains (eg Centre for Sight, Accuvision, Optegra);

*(c)* hospital-based providers including private healthcare groups which own or operate hospitals such as Nuffield Health (Nuffield), BMI Healthcare (BMI) and Ramsay Healthcare (Ramsay); NHS hospitals with separate commercial divisions offering facilities for their eye surgeons to treat customers privately such as Moorfields Eye Hospital; and individual or groups of consultant ophthalmologists operating from NHS or private hospitals.

[7] The most common procedure for forming the flap by femtosecond laser is known as Intralase.

*Large national chains*

2.9 Before the merger there were three large national chains providing refractive eye surgery. The market leader is Optical Express. In 2012 it had around [✂] per cent of the national laser eye surgery market and [✂] per cent of the IOL market. The parties together had around [✂] per cent of the national laser eye surgery market in 2012 but only [✂] per cent of the IOL market (see Tables 1 and 2).

*The parties*

- *Optimax*

2.10 Optimax was founded by Mr Russell Ambrose in 1991. Optimax was created with the intention of bringing laser eye surgery to those who needed it at a price significantly lower than traditional refractive eye surgery. Optimax said that between 1992 and 2000 it was the single largest provider of laser eye treatments by volume. It said it performed 70 per cent of treatments over that period.

2.11 Optimax has grown largely through organic expansion. By the time of the acquisition of Ultralase, Optimax had 22 treatment clinics and eight consultation clinics. In the year ending 31 December 2011 turnover was £[✂] and earnings before interest, tax, depreciation and amortization (EBITDA) £[✂].

- *Ultralase*

2.12 Ultralase was founded in 1991 with a single clinic at Clatterbridge, Merseyside. By 2002 Ultralase had 12 clinics. In 2005 it was sold for £[✂] to the Spanish cosmetic group Corporacion Dermoestetica, which claimed to be Europe's largest cosmetic surgery company. In 2008 Corporacion Dermoestetica sold Ultralase to 3i for £[✂]. In 2008 and 2009 Ultralase continued to grow and acquired a number of smaller refractive eye surgery providers.[8]

2.13 The Ultralase financial performance deteriorated. CLVC was incorporated by the banking syndicate[9] to acquire the share capital of the company from 3i in 2010. The financial performance of Ultralase deteriorated after its acquisition by 3i. Royal Bank of Scotland (RBS), one of the major shareholders of CLVC, told us that the 3i investment case for Ultralase was based on achieving incremental growth by rolling out more clinics, without suffering diminishing returns, based on assumptions of market growth in the USA and Spain. It said that over the period from 2008 to 2011 Ultralase had built up a large cost base (in terms of lease obligations, high salaries for surgeons and a large advertising budget). However, the growth did not materialize, partly due to the economic downturn. By 2012 the financial performance had not improved and CLVC decided to appoint financial advisers. This ultimately resulted in the sale of Ultralase to Optimax. For further details see the discussion in paragraph 3.1 and Section 5.

2.14 Ultralase had sought to position itself as a high-quality brand and was achieving substantially higher average revenue per customer than Optimax. The former CEO told us that the Ultralase offer was a premium offering in respect of the types of treatment, the time that people were assessed for, the number of aftercare visits

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[8] In 2008 Ultralase acquired Allclear Clinic Ltd for £[✂]; Allclear Cambridge Limited and Cambridge Eye Laser Clinic Ltd for £[✂]; Quality Healthcare (Waterford Ltd) for £[✂]; and the London Centre for Refractive Surgery for £[✂]. In 2009 Ultralase acquired two clinics in Ireland.
[9] The banking syndicate had provided the finance for the 3i acquisition.

people had, and the level of engagement with the consumer. The business model of Ultralase was similar to Optimax's as its network mainly comprised treatment clinics, however, its cost base was larger. Immediately prior to the transaction Ultralase had 23 treatment clinics and three consultation clinics.

2.15 In the year ending 31 December 2011 turnover was £[✂] and EBITDA £[✂] (EBITDA had reduced from £[✂] in 2010).

*Optical Express*

2.16 The Optical Express Group was founded in 1991. It owns a large chain of retail opticians, three cosmetic surgery clinics, four private dentistry clinics and a private hospital in Manchester. It is the largest competitor to the parties.

2.17 Optical Express entered the refractive eye surgery market in 2002 when it acquired The Health Clinic which offered general ophthalmic procedures across slightly less than 20 locations in the UK. In 2004 it acquired the ophthalmic treatment assets of Boots Group plc from nine sites in the UK. It did not acquire Boots' other optician assets. Optical Express acquired other independent refractive eye surgery providers over time such as Maxivision and had undertaken significant organic growth over a period of years.

2.18 Optical Express operates a 'hub and spoke' business model for refractive eye surgery using optometrists at its retail opticians and consultation clinics to perform initial consultations for corrective procedures. Treatment is performed at a smaller number of treatment centres.[10] This model is different to that of the parties, which have proportionately more treatment clinics.

*Other providers*

2.19 These include:[11]

(a) *Moorfields Private (Moorfields).* Moorfields Eye Hospital NHS Foundation Trust is the largest eye hospital in the world. Moorfields is a separate commercial division of Moorfields Eye Hospital Trust and offers facilities and services through its private patient unit to offer refractive surgery to private customers. Moorfields provides facilities to consultant surgeons who are independent practitioners with practising privileges awarded by the Medical Director of Moorfields Eye Hospital Trust.

(b) *Optegra* operates six hospitals in Birmingham, London, Manchester, Solent, Surrey and Yorkshire. It provides a broad range of eye care procedures with the majority being cataract and refractive lens exchange procedures. Refractive laser eye surgery treatment is not a large part of Optegra's business.

(c) *Accuvision* operates five clinics in London, Leeds, Birmingham, Bristol and Newcastle. It provides laser eye surgery and IOL treatments.

(d) *Nuffield* operates 31 hospitals and other facilities across the UK. It provides ophthalmology services with the majority of these being cataract replacements and provides a small amount of laser eye surgery at five locations: Guildford, Exeter, Plymouth, Wolverhampton and Taunton.

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[10] For example, of the 76 Optical Express sites in England offering consultations on laser surgery, only 18 sites offer surgery.
[11] These providers are presented for illustration but they are not necessarily the largest.

(e) *Centre for Sight* is a regional provider of laser eye surgery and IOL treatment based in London, Surrey and Sussex.

### *Market trends*

2.20 Optimax said that laser eye surgery was a relatively expensive discretionary procedure, with demand being closely linked to levels of customers' disposable incomes and other related factors. It said that demand for refractive eye surgery was dependent on the economic cycle and the recent financial crisis was the major reason for the observed reduction in laser eye surgery treatments by approximately 43 per cent between 2008 and 2012. Grant Thornton told us that research it had conducted indicated that laser treatment was an elective procedure and falling consumer demand had had an effect across the market, resulting in a decline in trading since 2008. It found no indication that the market for laser eye surgery was likely to improve over the next two to three years.

2.21 Optimax told us that the industry was characterized by high levels of installed capacity which remained underutilized due to poor demand. It provided us with a measure of capacity utilization which compared the actual versus theoretical maximum days per month that each clinic was open. Optimax's utilization was about [✂] per cent both before and after the merger. Given the similar pre-merger volumes and network, we considered that Ultralase's utilization rate would have likely been similar. Competitors have also consistently told us they either had substantial overcapacity or faced no capacity constraints in practice.[12]

2.22 In addition to the problems that Ultralase experienced, (see paragraph 2.13 and Section 5), in October 2012 it was reported that Optical Express, the market leader, was forced to put a subsidiary into administration and that the owner was required to inject additional capital to pay down debt. Optical Express said it closed almost 100 retail locations in 2012 and in 2013 had replaced them with over 50 consultation or treatment clinics (only a handful of which were treatment clinics).

### *Market shares*

#### *Market shares based on data from larger suppliers*

2.23 We considered the data provided by the merging parties and a number of third parties and calculated market shares for laser eye surgery and IOL treatments. Table 1 shows the volume (in terms of number of customers) of laser eye surgery supplied by each of these providers. We consider that this data accounts for the large majority of treatments but note that the figures provide an upper bound for market shares as they do not account for the volume carried by a number of small providers.

2.24 Optical Express is nearly twice as large as the parties combined. Other competitors appear to be substantially smaller than both the parties and Optical Express.

[12] For example, [✂] confirmed that the capacity was driven by the availability of lasers and facilities and said it operated at below 5 per cent of capacity. Optical Express said that it faced no known capacity restraints and that the company had the ability to expand services to match any significant increase in demand.

TABLE 1 **Annual laser eye surgery volume**

| | Number of customers | | Market share (%) | |
|---|---|---|---|---|
| | *2011* | *2012* | *2011* | *2012* |
| Optical Express | [✂] | [✂] | [✂] | [✂] |
| Optegra | [✂] | [✂] | [✂] | [✂] |
| Optimax | [✂] | [✂] | [✂] | [✂] |
| Ultralase | [✂] | [✂] | [✂] | [✂] |
| Moorfields | [✂] | [✂] | [✂] | [✂] |
| Other | [✂] | [✂] | [✂] | [✂] |
| Total | 60,825 | 51,840 | 100 | 100 |

*Source:* CC analysis of data supplied by each of these suppliers.

*Note*: Other includes BMI, Nuffield and [✂]. Data was not available for a number of smaller providers in the market. For the parties these figures are based on transaction-level data. We had a number of observations for which the treatment type was unknown. To allocate this volume to one of the treatment categories (‘laser’, ‘IOL’ or ‘other’) we used the total volumes with a known treatment type, calculated the proportion of these volumes corresponding to laser, IOL and other treatments, and applied these proportions to the volumes with unknown treatment types. Post-merger some customers of the parties were marked as ‘transferred’ to the other merging party. We allocated them to either Optimax or Ultralase accordingly.

2.25 We have also been provided with IOL volumes by a number of larger providers. Table 2 summarizes the volume information we received. Optical Express was around [✂] times larger than the parties combined. Optegra was also more than [✂] the size of the parties combined in 2012.

TABLE 2 **IOL surgery volume**

| | Number of customers | | Market share (%) | |
|---|---|---|---|---|
| | *2011* | *2012* | *2011* | *2012* |
| Optical Express | [✂] | [✂] | [✂] | [✂] |
| Optegra | [✂] | [✂] | [✂] | [✂] |
| Optimax | [✂] | [✂] | [✂] | [✂] |
| Ultralase | [✂] | [✂] | [✂] | [✂] |
| Moorfields | [✂] | [✂] | [✂] | [✂] |
| Ramsay | [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] | [✂] |
| Total | 5,734 | 9,033 | 100 | 100 |

*Source:* CC analysis of data supplied by each of these suppliers.

*Note:* This data is calculated on the same basis as Table 1 and the notes from there also apply here.

2.26 Table 1 shows that Optimax’s market shares in laser eye surgery in 2011 and 2012 were [✂] and [✂] per cent respectively. The Ultralase shares were [✂] and [✂] per cent. Optical Express’s share was above [✂] per cent. The parties’ combined market share was [✂] per cent in 2011 and [✂] per cent in 2012. The share of the other suppliers was small: 5 per cent in 2011 and 6 per cent in 2012.

2.27 The picture in IOLs is slightly different. Optical Express is still the largest supplier on a national level but the parties are substantially smaller, not only compared with Optical Express but also with Optegra. Optical Express had a share of [✂] per cent in 2011 and [✂] per cent in 2012. Optegra was the second largest with a share of [✂] per cent in 2012. The parties together had a share of [✂] per cent.

### *Market shares based on Abbott Medical Optics data*

2.28 Optimax told us that it used Abbott Medical Optics (AMO) data to estimate the laser eye surgery market size. AMO is a provider of cones (Intralase Patient Interfaces) which are consumables used in the creation of Intralase femtosecond flaps.[13] Intralase is commonly used during LASIK treatment and is one of the most common procedures carried out in the UK.[14] According to the parties' data Intralase accounted for 73 per cent of their total laser procedures undertaken in 2012. AMO told us that it was the sole supplier of cones in the UK and therefore its sales provided a reliable estimate of the market size for Intralase treatments. Optimax, however, said that AMO cones were a generally reliable indicator of market size in respect of national clinics but the figures were unlikely to give a reliable indication for small independents, some of which did not use Intralase equipment, or else used equivalent technology which did not employ cones.

2.29 AMO provided us with a dataset recording sales of cones it made in the UK in the period January 2008 to July 2013. The AMO dataset reported sales to 13 companies including Optimax, Ultralase and Optical Express. While these include the largest suppliers of refractive eye surgery in the UK, a number are not captured by AMO data. As discussed above, AMO data covers only a specific procedure and it may not necessarily reflect closely the distribution of sales related to other types of laser eye surgery. However, we are satisfied that although the AMO data does not include the smaller providers the companies it does include account for the large majority of Intralase Lasik procedures in the UK and the market shares it provided were a reasonable indication of the relative size of the competitors in the market.

2.30 Table 3 below shows the market shares at the national level based on AMO volume data related to the period 2011 to 2012.[15] When available we combined the AMO data with the information provided by suppliers, in particular Optimax, Ultralase, Optical Express and Optegra, to estimate the volume of Intralase procedures. The market shares are consistent with the other evidence that the three main parties are substantially larger than any other provider at a national level.

TABLE 3 **Market share based on AMO data (2011–2012)**

*per cent*

| *Company* | *2011* | *2012* |
|---|---|---|
| Optical Express | [✂] | [✂] |
| Optimax | [✂] | [✂] |
| Ultralase | [✂] | [✂] |
| Optegra | [✂] | [✂] |
| Moorfields | [✂] | [✂] |
| Others | [✂] | [✂] |

*Source:* CC analysis of Optical Express, Optimax, Ultralase, Optegra and AMO data. Others include Advanced Vision Care, Bristol Eye Hospital, Centre for Sight, Centre for Vision, Nuffield, Optilase and Spa Medica.

2.31 Taken together the data provides a strong indication that Optical Express, Optimax and Ultralase comprise most of the laser eye surgery sector. Smaller chains and independents appear to be very small by comparison in the laser eye surgery sector.

[13] One cone is required for each treated eye.
[14] AMO noted that Intralase did not account for the whole laser eye surgery market since *(a)* a number of procedures were performed with a microkeratome; *(b)* a number of procedures were performed direct on the surface without a femtosecond laser or a microkeratome; and *(c)* a number of procedures are also performed on other femtosecond lasers.
[15] We compared the AMO data and the information provided by suppliers and noted that AMO data was broadly reliable from 2011 onwards. For this reason Table 3 shows supply shares only for the period 2011 to 2012.

## 3. The merger and the relevant merger situation

### *Outline of merger situation*

3.1 In late 2011, following several years of financial underperformance and concern over its operating model and the ability of its management to address the underperformance, the owners of Ultralase[16] appointed Grant Thornton, an accounting and financial advisory firm, to review strategic options for Ultralase (see paragraph 2.13). The review included identifying opportunities to reduce costs, the consideration of a proposal to merge with Optimax and assessing administration options. Following the review and the failure of the merger discussions with Optimax the syndicate decided to sell Ultralase and appointed a turnaround specialist as Chairman to seek to improve the financial performance of Ultralase.

3.2 A sales process took place in summer 2012. Grant Thornton spoke with 41 potential buyers which included Optimax and Optical Express.[17] Several companies expressed an interest in purchasing Ultralase. In July 2012 six 'first round' offers were received, including offers from Optimax and [a trade competitor]. However, by August 2012 only two potential purchasers remained and by September 2012 Optimax was identified as the preferred bidder, with a bid of £[✄]. Optimax was the only bidder with funds immediately available for the purchase. By an agreement dated 23 October 2012 the majority owner of Optimax, Russell Ambrose, purchased 100 per cent of shares in CLVC, which owned 100 per cent of the shares in Ultralase Limited and other 100 per cent owned subsidiaries. The transaction completed on 5 November 2012 and was made public on 3 December 2012.

### *The rationale for the merger*

3.3 Optimax told us that the rationale for the merger was to take advantage of what it saw as significant opportunities to achieve cost savings and efficiency gains, while maintaining as far as possible the Ultralase sales level, to create a more profitable, cash-generative group. It intended to cut costs by closing overlapping consultation and treatment clinics and the Ultralase head office and to run the Optimax and Ultralase brands in parallel.[18] Consultation and treatment clinics were to be either white-labelled or dual-branded, and it was hoped that Ultralase's higher pricing could be maintained.[19] Optimax said that it thought there was value in the Ultralase brand as it was perceived by potential customers as a premium brand. It said it thought that Ultralase had a large database of potential customers and an effective marketing machine.

### *Relevant merger situation*

3.4 Under section 35 of the Act, and pursuant to our terms of reference (see Appendix A), we are required to decide first whether a relevant merger situation has been created by the acquisition of Ultralase. Section 23 of the Act provides that a relevant merger situation is created if:

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[16] The former shareholders of CLVC included former Ultralase management and the banks which supplied the original debt financing for the purchase of Ultralase by 3i.
[16] The banks were Lloyds Bank, RBS, Barclays Bank and Bank of Ireland.
[17] Optimax and [a trade competitor] were not approached by Grant Thornton but made their interest known to Grant Thornton.
[18] Shortly after completion of the transaction substantial integration took place. Optimax undertook a review of clinics and assessment centres and as a result it closed 13 Ultralase clinics, three Ultralase consultation centres and two Optimax consultation centres.
[19] Optimax later realized this was not practical if Optimax and Ultralase customers were sharing the same premises.

(a) two or more enterprises have ceased to be distinct within the statutory period for reference; and

(b) either the turnover test or share of supply test is met.

*Enterprises ceasing to be distinct*

3.5 The Act defines an 'enterprise' as 'the activities or part of the activities of a business'. 'Business' is defined as 'including a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied other than free of charge'.[20]

3.6 Both Optimax and Ultralase provide refractive eye surgery services to the public for a fee. We are therefore satisfied that Optimax and Ultralase are businesses for the purposes of the Act and that the activities performed by both businesses (provision of vision corrective surgery services) are enterprises for the purposes of the Act.

3.7 Optimax is 62.5 per cent owned by Russell Ambrose, the founder of Optimax. We are satisfied that Mr Ambrose, with a majority shareholding 62.5 per cent, has a controlling interest in and legal control of Optimax.

3.8 Ultralase is 100 per cent owned by Ultralase Acquisitions Limited, which at the time of completion was in turn 100 per cent owned by CLVC, the entire share capital of which was purchased by Mr Ambrose in the transaction which completed on 5 November 2012, making Mr Ambrose the sole owner of Ultralase. We are satisfied that as a result of the purchase of CLVC the enterprises of Optimax and Ultralase ceased to be distinct enterprises as they came under the common control or ownership of Mr Ambrose.

*Turnover and share of supply tests*

3.9 The Act requires the CC to establish that the transaction has a sufficient nexus with the UK to give us jurisdiction to consider the reference. This will be the case if either the turnover test or the share of supply test is satisfied.[21]

3.10 The turnover test is met where the value of the turnover in the UK of the 'enterprise being taken over' exceeds £70 million. In this case the 'enterprise being taken over' is Ultralase as the operating company within the CLVC group. The turnover of Ultralase for the year ended December 2011 was £38.9 million. The turnover test is therefore not satisfied.

3.11 The share of supply test is satisfied if as a result of enterprises (which supply or acquire goods or services of a particular description) ceasing to be distinct, the merged entity will supply or acquire 25 per cent or more of those goods or services in the UK or a substantial part of the UK, provided the merger results in an increment to that share.[22] The relevant point in time for calculation of the share of supply is immediately before the reference is made.[23]

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[20] Section 129(1) and (3) of the Act.
[21] Section 23 of the Act.
[22] Section 23 of the Act and *CC2*, *Merger Assessment Guidelines*, September 2010 (hereafter, 'the Guidelines'), paragraphs 3.3.3 and 3.3.4.
[23] Section 23 (9) of the Act.

3.12 In this case, the services which both Optimax and Ultralase supply are refractive eye surgery services. We have information on the volume of patients treated from the providers and information on consumables used in the most common form of refractive eye surgery by the major providers. Table 4 sets out market shares for laser eye surgery for the period July 2012 to June 2013. The first column reports market shares based on patient volume. The second column shows the market shares based on consumables. We chose the July 2012 to June 2013 period for assessment of share of supply because we had concerns that a shorter period ending on the date of reference[24] would not be reflective of the seasonal nature of the industry and because it would give undue weight to the effects of decisions made after the merger which might distort the significance of the shares of supply brought together in the merger.

3.13 The table shows that on both measures Ultralase had a [✂] per cent share and Optimax a [✂] and [✂] per cent share of patient and consumables respectively. The combined share is [✂] per cent from July 2012 to June 2013.[25] Based on this information we are satisfied that the share of supply of the merged entity exceeds 25 per cent and the increase is attributable to the merger.

TABLE 4 **Laser eye surgery (volume) shares July 2012 to June 2013**

*per cent*

| | *Data supplied by providers** | *AMO data†* |
|---|---|---|
| Optical Express | [✂] | [✂] |
| Optegra | [✂] | [✂] |
| Optimax | [✂] | [✂] |
| Ultralase | [✂] | [✂] |
| *Combined market share of the parties* | [✂] | [✂] |
| [✂] | [✂] | [✂] |
| Moorfields | [✂] | [✂] |
| Others | [✂] | [✂] |
| **Total** | **100** | **100** |

*Source:* AMO, Optimax, Ultralase, Optical Express, Optegra, Moorfields, BMI, Nuffield and [✂].

*This data is calculated on the same basis as Table 1 and the notes from there also apply here.
†This data is calculated on the same basis as Table 3 and the notes from there also apply here.

3.14 Section 24 of the Act requires that a reference of a completed merger may be made if two or more enterprises have ceased to be distinct no more than four months before the date of the reference. The four-month period starts to run from the date on which the enterprises cease to be distinct or the date on which notice of material facts about the completion of the transaction have been given to the OFT or made public. In this case, the transaction completed on 5 November 2012 but was made public on 3 December 2012. In January 2013 the statutory clock was suspended under section 25(2) of the Act and at the time of the reference, the OFT's administrative timetable had not been started. We are therefore satisfied that the reference was made within the statutory time frame specified by section 24.

3.15 In applying the share of supply test we considered whether it is satisfied on a national basis or in a substantial part of the UK. We note that the merger parties provide refractive eye surgery nationally in the UK and the test is therefore satisfied on a national basis.

[24] 29 July 2013 (paragraph 1.1).
[25] After rounding.

*Conclusion on the relevant merger situation*

3.16 For the reasons set out above we are therefore satisfied that the completed acquisition of Ultralase constitutes a relevant merger situation and we have jurisdiction to consider whether the creation of that situation has resulted in an SLC within any market or markets in the UK for goods or services.

## 4. Market definition

4.1 The Guidelines[26] state that the purpose of market definition in a merger inquiry is to provide a framework for the analysis of the competitive effects of the merger. The Guidelines go on to state that the CC will identify the market within which the merger may give rise to an SLC, and that this will include the most relevant constraints on the behaviour of the merged firms.

4.2 The Guidelines also note that in practice, the analysis leading to the identification of the market or markets and assessment of competitive effects will overlap, with many of the factors affecting market definition being relevant to the assessment of competitive effects and vice versa.[27] The relevant market contains the most significant competitive alternatives available to the customers of the merger firms. It includes the most relevant constraints on the behaviour of the merger firms.[28]

4.3 In this section, we set out the relevant market in which we have assessed the effects of the merger. We first assess the product market. Then we discuss the appropriate scope of the geographic market.

### *Product market*

4.4 Optimax and Ultralase provide a range of refractive eye surgeries in two broad categories: laser-based surgeries (LASIK and LASEK) and microsurgical procedures which entail the implantation of IOLs (paragraphs 2.2 and 2.3). We first considered the extent to which the different types of procedures are substitutable on the demand side. We found that there is typically only one treatment that is appropriate for a specific refractive problem. The patient's suitability and need are key factors in determining the type of treatment which would be appropriate. The appropriate treatment is determined by the consultant based on the individual characteristics of each patient (eg age, prescription, physiology and expectations (whether they expect to use glasses at all)).

4.5 Customer choice is restricted to the set of suitable treatments identified by the consultant, the customization necessary in the treatment, and supplementary services (such as lifetime guarantees). This suggests that there is likely to be limited demand-side substitutability between the different types of refractive surgery.

4.6 We considered whether, despite the lack of demand-side substitution, different services may be aggregated into broader markets on the basis of supply-side factors.[29] Our view is that all LASIK and LASEK treatments can be aggregated in a

[26] The Guidelines, paragraph 5.2.1.
[27] ibid, paragraph 5.1.1.
[28] ibid, paragraph 5.2.1.
[29] ibid, paragraph 5.2.17.

single market since the vast majority of laser eye surgery providers in the UK offer both LASIK and LASEK treatments.[30]

4.7 We next considered the scope for supply-side substitution between laser-based procedures and IOLs. Optimax submitted that LASIK, LASEK or IOL treatments should be aggregated in the same market.[31] We noted, however, that the investment required for a provider of IOLs to offer laser eye surgery can be significant.[32,33] Despite the availability of leased and second-hand lasers and the possibility of renting the laser on a per-procedure basis, there are concerns about the reliability of leased/second-hand equipment.[34] We also were concerned that renting lasers on a payment-per-procedure basis[35] would not be price competitive against the three large national chains. Overall, the extent to which IOLs suppliers can switch easily and in a timely fashion (typically within one year) to provide laser eye surgery is unclear.

4.8 We conclude that all laser eye surgery formed part of a single relevant product market. We did not need to take a definitive view on whether laser eye surgery and IOL surgery could be aggregated into a single relevant product market since this would not change our assessment of the competitive effects of the merger.

4.9 We also considered whether glasses and contact lenses exerted a competitive constraint on refractive eye surgery. We asked some third parties how customers would likely respond if the price of refractive surgery increased by 5 or 10 per cent, as normally used in the context of the hypothetical monopolist test.[36] [✂] said that under the current economic climate customers would consider remaining with glasses or contact lenses in response to a price increase. However, Moorfields said that that it did not consider that glasses and contact lenses posed a competitive constraint on its refractive eye surgery business as they were different things and were choices; Nuffield told us that at 5 per cent the market was relatively inelastic; and Optegra said that if pricing was a little higher in the laser market it did not believe it would make any difference to the numbers of customers.

4.10 We noted that according to the results of our customer survey (the customer survey)[37] the main factor affecting customers' decision to undergo refractive surgery was the inconvenience of using contact lenses or glasses.[38] While costs/savings over the long run were also mentioned as a reason, this evidence suggests that

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[30] Accuvision does not offer LASEK, but offers Trans-Epithelial Laser Eye correction instead which, it claims, is a substitute for LASEK and delivers better outcome than LASEK.

[31] Optimax said that customers did not set out to buy a specific treatment and therefore 'the key stage of attracting customers to attend consultations is common; virtually all providers offer all three procedures; and there are very limited technical barriers to a provider of one procedure providing others' (paragraphs 3.12 and 3.13 of the parties' initial submission to the CC).

[32] Estimates of the cost of lasers to provide LASIK and LASEK in one clinic range from £350,000 to £500,000 (estimates provided by Optimax and Optegra).

[33] Optical Express noted that whilst a large number of surgeons may have IOL experience through their National Health Service consultancy providing cataracts and they may provide IOL procedures by renting space in hospitals or theatres, they have not invested in laser eye surgery equipment and technology.

[34] Nuffield said that second-hand equipment could be used but had drawbacks. It said that it was difficult to assess the extent of prior usage and how often the equipment had been serviced. Nuffield said it had used leased lasers but said they could be subject to similar concerns, which was why it used nominated suppliers and maintained robust records.

[35] Nuffield told us that it hired lasers on a payment-per-procedure basis. It said that it did not have an annual contract for the lasers because they would be sat dormant for most of the time and it would not be a viable financial model.

[36] The Guidelines, paragraphs 5.2.9–5.2.16. The Guidelines, paragraph 5.2.10, state:

> A set of substitute products (a 'candidate market') will satisfy the hypothetical monopolist test if a hypothetical firm that was the only present and future seller of the products in the candidate market would find it profitable to raise prices. Under this framework, a candidate market will fail the hypothetical monopolist test, and will be too narrow to comprise the relevant market, if customers would respond to the price rise by switching to products outside the set to such an extent that the price increase by the hypothetical monopolist would not be profitable.

[37] Customer survey conducted by GfK for the CC, published 14 October 2013.

[38] 76 per cent of all Optimax and Ultralase customers surveyed.

customers' choice is mostly driven by non-price factors and thus it seems unlikely that customers would be sensitive to price variations in the order of 5 to 10 per cent.

4.11 We did not consider that glasses/contact lenses and refractive eye surgery can be aggregated on the basis of supply-side factors. The set of competitors differs between the two markets. Optical Express is the only supplier of refractive eye surgery which also provides glasses and contact lenses. Specsavers, a major optician retail chain in the UK, said that the refractive eye surgery was a 'hospital/ clinic' type of service which was radically different from the day-to-day business of high-street opticians and [✂].[39]

4.12 Our view is that glasses and contact lenses, although they may provide some constraint, do not form part of a single relevant market with refractive eye surgery.

*Conclusion on the product market*

4.13 We conclude that all laser-based procedures form part of a single relevant market. We did not need to take a definitive view on whether laser eye surgery and IOL surgery could be aggregated into a single relevant product market since this would not change our assessment of the competitive effects of the merger. We conclude that glasses and contact lenses are not part of a single relevant market with refractive eye surgery.

### *Geographic market*

4.14 In our assessment of the competitive effects of the merger we found that competition takes place locally, as customers choose between the available alternatives in their area, although we recognized that the three large national chains mostly set their competitive variables centrally (paragraph 6.18). We assessed the extent of the local market to identify the area over which the parties competed locally.

4.15 Optimax submitted data that used an 80 per cent catchment area around each of the treatment and consultation clinics to identify overlaps. The size of the catchment area was based on a straight line distance, rather than drive-times and was specific to each overlap. These catchment areas were based only on the location of Optimax customers. The Ultralase catchment areas were assumed to be equal to the catchment area of the nearest Optimax location.

4.16 We calculated the driving times of all Ultralase and Optimax customers between 2008 and 2012. We found that on average 80 per cent of customers lived within about 45 minutes of the clinic in which they received a consultation.

4.17 Our 45-minute isochrones are also broadly consistent with the information provided by third parties. Optegra said that the closest 80 per cent of its customers came from a 30- to 60-minute drive-time, depending on the procedure. It said that laser eye surgery customers would be more likely to be within a 30-minute radius. Optical Express said that based on historical data over 80 per cent of its customers lived within a 20-minute drive-time of its consultation clinics and 40 minutes of its treatment clinics but this depended on the population spread and the vicinity of the next nearest clinic. [✂] told us that the majority of customers came from within 30 to 40 minutes depending on the clinic. Nuffield said that customers were within 30 minutes on average.

[39] It also said that in the past three years it had an agreement in place to refer customers to Ultralase clinics in the UK and the Republic of Ireland and it was currently in negotiations with [✂] and [✂] to conclude a similar agreement.

4.18 The results obtained from the customer survey support our findings on the average catchment areas. The customer survey indicated that customers travelled an average of about 37 minutes to receive a consultation and about 41 minutes to receive surgery. The average journey is slightly shorter in London.[40] We noted that in some areas (eg Bristol, Exeter, Edinburgh or Newton Abbot), driving times are significantly higher than 45 minutes. We also noted that travel patterns in London may differ from those in other areas as customers rely more on public transport and therefore drive-time isochrones may be less appropriate.[41]

4.19 The outcome of our price-concentration analysis is also consistent with the evidence above (see Appendix D for further details). We found a negative, albeit weak, relationship[42] between price and concentration within a 45-minute catchment area but no evidence that competitors located more than 45 minutes away from the parties' clinics exerted a competitive constraint.[43]

*Conclusion on the geographic market*

4.20 The evidence indicates that refractive eye surgery providers typically attract most of their customers from within a drive-time of 45 minutes.

4.21 The use of catchment areas is pragmatic. The Guidelines note[44] that catchment areas will typically be narrower than the geographic market identified using the hypothetical monopolist test. In light of this we used isochrones based on our catchment area analysis as the starting point for our competitive assessment, but we also considered the constraint posed on the parties by rivals located further away than implied by the isochrones.

### *Conclusion on market definition*

4.22 We conclude that all laser-based procedures formed part of a single relevant product market. We did not need to take a definitive view on whether laser eye surgery and IOL surgery could be aggregated into a single relevant product market since this would not change our assessment of the competitive effects of the merger. We conclude that glasses and contact lenses are not part of a single relevant market with refractive eye surgery. We found that refractive eye surgery centres typically attract the majority of their customers from within a 45-minute drive-time.

## 5. Counterfactual

5.1 Consideration of whether the merger may give rise to an SLC involves a comparison of the prospects of competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'.[45] The Guidelines explain[46] that we may examine several possible counterfactual scenarios based on evidence

[40] The average journey time to consultation clinics is 35 minutes in London and 37 minutes in other areas. The average journey time to treatment centres is 41 minutes in London and 42 minutes in other areas.
[41] Our customer survey shows that 78 per cent of Optimax's laser customers and 87 per cent of Ultralase's laser customers in London travelled to their first consultation by rail, tube, cycle or walked. In areas other than London, 91 per cent of Optimax's laser customers and 74 per cent of Ultralase's laser customers travelled by car.
[42] This is mostly based on the regressions performed on Optimax's prices.
[43] Although this result is statistically significant, its significance is sensitive to the inclusion of a particular clinic. However, the result is robust and not sensitive to outliers when only the most popular type of treatment is evaluated. We also noted that there are factors that may have limited our ability to capture the effects of competition at local level through the price-concentration analysis (see Appendix D for further details).
[44] The Guidelines, paragraph 5.2.25.
[45] ibid, paragraph 4.3.1.
[46] ibid, paragraphs 4.3.1 & 4.3.7.

obtained during the course of our inquiry. The CC must select the most likely scenario absent the merger (which may or may not be the continuation of the pre-merger situation). The Guidelines note that 'the CC will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments'.[47]

5.2 We assessed whether Ultralase should be considered an exiting firm. We took account of the views of firms and individuals involved in the evaluation of the financial position of Ultralase preceding the sales process, and in the sales process. We also noted that on 28 December 2012 Optimax placed the Ultralase business into a company voluntary arrangement (CVA) with creditors and that consideration of a CVA had begun shortly after completion of the purchase of Ultralase.

5.3 Our Guidelines note[48] that in forming a view on an exiting firm scenario we will consider:

*(a)* whether the firm would have exited (through failure or otherwise);

*(b)* whether there would have been an alternative purchaser for the firm or its assets to the acquirer under consideration; and

*(c)* what would have happened to the sales of the firm in the event of its exit.

### *Would Ultralase have exited?*

*Views of Optimax*

5.4 In its initial submission, Optimax said that absent the merger Ultralase would have exited the market. Optimax said Ultralase would have been highly unlikely to have been able to meet all the obligations due by the end of 2012 using its existing funds, and it would have been unlikely to secure additional funds.

5.5 Optimax said that Ultralase's revenues declined between 2010 and 2012, mainly due to a fall in the number of treatments. As its cost base was largely fixed, operating profitability dropped very significantly and, by late 2012, cash flow was negative. It said that Ultralase's borrowing facility was fully utilized and internal documents showed that additional funding would be required by end December 2012. Optimax said that, given the presence of a fully utilized borrowing facility and an adverse balance sheet position, it was highly likely that Ultralase would have defaulted on its financial obligations by end 2012 and it was unlikely to have been able to secure additional funds.

5.6 Optimax said that Ultralase would have been unable to restructure itself, including during a period of administration. It said that Ultralase had developed a number of initiatives to improve operating profitability which were estimated to boost 2012 EBITDA by approximately £[✂] (and £[✂] a year thereafter) with minimum capital outlay, and a further £[✂] a year if implemented fully. However, full implementation would have required an investment of approximately £[✂].[49] Optimax thought it was unlikely that Ultralase would have been able to secure this additional funding and would have entered administration and, ultimately, liquidation.

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[47] ibid, paragraph 4.3.6.
[48] ibid, paragraph 4.3.8.
[49] Plus a further £2.4 million if, in addition, new business opportunities were to be developed.

### *Views of Grant Thornton*

5.7 Grant Thornton, the accounting firm, was retained in November 2011 by the former shareholders of CLVC to report on the condition of Ultralase and if necessary, manage a sales process or, failing that, an administration (paragraph 3.1).

5.8 Grant Thornton found that profitability had fallen, resulting in Ultralase being unable to service its debt. In its report, Grant Thornton said that a key concern was that one of the two providers of interest-free credit to Ultralase customers[50] had given six months' notice of termination in April 2012 as a result of concerns over the creditworthiness of Ultralase. It said if the other provider of interest-free credit had followed suit Ultralase would most likely not have been able to continue to trade because the majority of customers used the interest-free credit facility.

5.9 Grant Thornton found that, although the business was able to generate a profit before overheads and debt servicing costs, it was balance sheet insolvent, with net liabilities of £[✂] as at 31 May 2012, largely as a result of the business being insufficiently profitable to service the debt structure. It said that cash flow forecasts showed that there was a high likelihood that Ultralase would have run out of money by end 2012 or January 2013. It also said that the realizable value of Ultralase's laser equipment and other assets on a liquidation basis would have been minimal, and the administration (which would cost about £[✂]) might have realized insufficient cash to cover the costs—the net deficit was estimated at £[✂].

5.10 As noted in paragraph 2.20 Grant Thornton had found no indication that the market for laser eye surgery was likely to improve over the next two to three years. In light of this Ultralase, under its new chairman, produced a cost-saving plan which was reviewed by Grant Thornton, full implementation of which would have required a cash injection of £[✂]. There would have been significant execution risk and a wholesale change [✂] would have been required for the project to have any chance of success. Grant Thornton said that [✂] would have limited the owners' options, as any subsequent M&A process, had the plan failed, might have been seen as distressed.

5.11 Grant Thornton told us that if the sale to Optimax had not proceeded, the two other options open to CLVC were to put the business into administration (which would most likely have led to the liquidation of the business) or to explore the possibility of bringing in a new investor (such as a private equity house specializing in distressed situations) alongside existing investors to provide restructuring funds, but there was no great appetite on the part of CLVC for either option and no investor had been identified.

### *Views of the former shareholders of CLVC*

5.12 As noted in paragraph 2.13 Ultralase was owned by CLVC. The former shareholders of CLVC included former Ultralase management and the banks which supplied the original debt financing for the purchase of Ultralase by 3i. The banks were Lloyds Bank, RBS, Barclays Bank and Bank of Ireland (collectively referred to as the 'bank syndicate').

5.13 The members of the bank syndicate we spoke to[51] told us that the issues facing Ultralase were: the drop in volumes after 2008 which led to a reduced revenue stream; the fixed cost structure which was too high for the revenue stream to support;

[50] Approximately 65 per cent of Ultralase's revenues came from customers taking advantage of interest-free credit agreements.
[51] RBS and Lloyds Bank.

anticipated growth in the demand for laser eye surgery did not materialize; the management team's inability to restructure Ultralase in line with falling demand; and the dependence of the business on interest-free credit. They said the effect of the reduced revenue stream coupled with a high fixed cost base meant that Ultralase was unable to generate sufficient cash to service its high debt burden.

5.14 The owners of CLVC said that, in light of the Grant Thornton report, they looked to reduce costs as an immediate step and appointed a new chairman with restructuring experience to do that. The restructuring plan developed by the new chairman and reviewed by Grant Thornton was not preferred over the sale of Ultralase because, to obtain the full potential benefits, it required an additional investment of up to £[✂]. The bank syndicate was unwilling to provide this cash, as it thought the returns were too uncertain given the execution risks involved. The decision was therefore taken in March 2012 to implement those aspects of the plan that did not require additional investment and put the business up for sale, with the aim of closing the sale before Ultralase used up its cash and providing a window within which Ultralase could be sold.

*RBS views*

5.15 RBS told us that Ultralase's cost base was too high. As noted in paragraph 2.13 it said that over the period 2008 to 2011 Ultralase, in common with the rest of the industry, had built up a large cost base in anticipation of an ever-growing revenue stream. It said that 3i believed that incremental growth could be obtained by rolling out more clinics, without suffering any diminishing returns, basing its assumptions on market penetration levels in the USA and Spain. After CLVC took control of Ultralase in 2010, RBS said the lenders still believed in the underlying growth of the market but they were no longer willing to fund further increases in clinic numbers. Ultralase's EBITDA had declined from around £10.2 million for the 2007 financial year when the business was bought by 3i to about £5.3 million by the 2010 financial year when CLVC took ownership. CLVC still thought that, as a cyclical business, revenues would rebound and the banks would recover their money.

5.16 However, RBS said that by early 2012 it was clear to it that the anticipated revenue stream was never going to materialize. It said a report prepared by Grant Thornton told the bank syndicate that the UK market had peaked in 2007 in terms of the percentage of the population who were willing to undergo laser eye surgery and penetration would not reach the levels seen in the USA and Spain. It told us that, in light of the fact that the underlying growth story was no longer valid and that the market was cyclical, the operational leverage and fixed cost base of the business were unsustainably high.

5.17 RBS told us [✂]. It said that CLVC had considered investing more money and had asked the management team in 2011 to put together an investment case. It said that the case produced by the management team was unsatisfactory. RBS said that management did not address the overheads of the business and how to maintain a cost base that would allow the business to survive a downturn as well as an upturn. RBS thought that the subsequent restructuring plan developed under the new chairman was better, but would have needed further detail to make it a fully executable recovery plan. As presented RBS did not believe that the plan would attract third party financing. RBS said that CLVC would have needed to invest about £[✂] and the owners of CLVC felt this was too much. [✂] if CLVC were to invest more money. Given the perception that the market was likely to take some years to recover, the decision was taken to sell Ultralase.

*Lloyds Bank views*

5.18 Lloyds Bank said Ultralase had approached the banks in September 2011 to inform them that it anticipated breaching the financial covenants in its loan facilities at year end. It had also told the banks that it would require additional funding in early 2012. Lloyds Bank said that the initial review of Ultralase carried out by Grant Thornton in late 2011 had projected that Ultralase would run out of cash during the first half of 2012. As a result, the bank syndicate had installed a new executive chairman and restructuring manager to cut costs and conserve cash, which had successfully enabled the business to continue until the point where it could be sold.

5.19 Lloyds Bank also told us that Ultralase's management was not as flexible as it should have been and should have acted much earlier to reduce fixed costs. It said that if the investment had been made in restructuring Ultralase, the net present value would not have been sufficient to justify the investment, given the risks involved.

5.20 Lloyds Bank told us that, had it not been possible to sell Ultralase, it was very difficult to know for certain whether the bank owners of CLVC would have injected further funds into the business or allowed it to go into liquidation. It said that a liquidation would have resulted in zero or a negative recovery for the lenders (to cover the Grant Thornton liquidation costs). A decision to inject further funds would have required a positive credit decision from all four bank owners of CLVC (or a decision by some lenders to buy out the interest of others) and it was very difficult to envisage this being achieved, especially as some of the lenders (including Lloyds Bank) had already raised provisions against their exposure to Ultralase.

*Other views*

5.21 The former CEO of Ultralase told us that although the business was profitable at the operating level, servicing the debt and paying for the independent business reviews required by CLVC had put the company into a loss-making situation. He told us that the bank syndicate felt that the market turnaround was taking too long, they would have had to wait before seeing returns on any additional investment, and a 'degree of fatigue' had set in. He said for these reasons the banks preferred to sell Ultralase to a willing buyer rather than extend further credit to facilitate a restructuring.

### *Our assessment*

5.22 In assessing whether Ultralase would have exited the market for reasons of financial failure, we considered whether the firm would have been unable to meet its financial obligations in the near future and whether it would have been unable to restructure itself successfully. We examined:

*(a)* Ultralase's audited accounts;[52]

*(b)* Ultralase's management accounts[53] and cashflow forecasts;

*(c)* Grant Thornton's January 2012 report on the business plan and cost restructuring for Ultralase;

*(d)* Grant Thornton's contingency planning review conducted in July 2012;

[52] Note that audited accounts for 2012 are not yet available.
[53] Note that the most recent management accounts that appear to be available are for July 2013.

(e) Ultralase's board minutes and other relevant internal documents; and

(f) evidence from the former shareholders of CLVC.

5.23 We found that although the business continued to generate positive operating profits (before head office and debt service costs) during 2012, the company's cash position deteriorated through the year. In a board report dated 22 August 2012, Ultralase was forecasting that both at the end of September and at the end of December, its funding requirement would be beyond the limit of its bank facilities. The company managed to conserve cash and trade through September, but by mid-November, shortly after it was purchased by Optimax, Ultralase was forecasting that its available cash by year end (excluding customer deposits and an allowance for 'cash in transit') would fall to £38,000 and would be negative (ie there would be a funding need) by the end of the first week in January. The CFO of Ultralase at the time emailed Optimax stating that Ultralase's funding requirements ([✂] depending on trading sensitivities) would commence towards the end of December 2012 and continue through the first quarter of 2013, dropping off in April 2013 but increasing again in June.

5.24 We noted the evidence from the former CLVC shareholders that the bank syndicate was unwilling to invest the cash required to effect a restructuring. Given Ultralase's already very high leverage (net debt/EBITDA was forecast to be [✂] times by end 2012) and the fact that the existing bank syndicate had security over substantially all Ultralase's assets, we conclude that Ultralase would not have been able to raise further debt financing from any other source.

*View on exit*

5.25 We therefore conclude that the Ultralase business would have failed financially and exited. On 30 October 2013, after the publication of our provisional findings, Ultralase Limited was put into administration. We do not consider that this event changed our conclusions on the assessment of the counterfactual that Ultralase would have failed financially and exited absent further funding.

### *Were there alternative purchasers for Ultralase?*

5.26 We considered whether there were other buyers whose acquisition of the firm as a going concern, or of its assets, would have produced a better outcome for competition than the merger under consideration. This may include buyers interested in acquiring the firm or its assets as a means of entering the market.[54]

5.27 The Guidelines state that, when considering the prospects for alternative purchasers:

(a) the CC will assess the evidence supporting the claims that there was only one possible purchaser for the firm or its assets; and

(b) the unwillingness of alternative purchasers to pay the vendor the asking purchase price would not rule out a counterfactual involving a sale to an alternative purchaser.[55]

[54] We note there may also have been buyers that may have been interested in acquiring a small number of specific assets (particularly in a liquidation situation) but did not consider this would have substantially affected competition.
[55] The Guidelines, paragraph 4.3.17.

*Views of the former shareholders of CLVC*

5.28 Lloyds Bank told us that:

*(a)* It understood that in February 2012 Russell Ambrose held discussions with the Ultralase CEO about a potential merger between Ultralase and Optimax. However, these discussions were unsuccessful due to a lack of agreement over relative valuation and the management structure of the merged body.

*(b)* 38 potential bidders for Ultralase were identified but there were only four indicative offers received.[56]

*(c)* Grant Thornton identified Optimax and [Bidder A] as likely purchasers. The other potential bidders either failed to maintain their interest or were not seen as credible. [Bidder A] was not a preferred purchaser as it was an unknown organization, did not have committed funding in place and had yet to do detailed due diligence. Optimax was preferable to [Bidder A] as it had funds available, did not wish to do detailed due diligence and could proceed immediately.

5.29 RBS told us that:

*(a)* CLVC decided in March 2012 to sell Ultralase as the merger discussions with Optimax were unsuccessful.

*(b)* From the six first round indicative offers received, Optimax, [Bidder A] and Bidder B (a joint venture between [a trade competitor] and a European private equity firm) were identified as potential bidders. RBS said that Bidder B did not demonstrate that it was a viable purchaser, as it was unlikely to be able to complete the purchase on time.

*(c)* The [Bidder A] bid was not accepted as it did not have committed funding in place, and its preferred acquisition route was via a pre-pack administration process[57] which would have added further costs to the sale process (meaning that [Bidder A]'s bid would have been worth less to the vendors, on a net basis, than Optimax's).

*(d)* Optimax's offer was nominally lower than the [Bidder A] bid but would have avoided any pre-pack administration costs as it wanted to purchase Ultralase as a going concern.

*(e)* An alternative option available should the sale have not gone ahead was a sale to a private equity firm specializing in distressed situations, possibly for between £2 million and £5 million. RBS said that it did not pursue this option earlier in the sale process as it was concerned that the value of the business could fall if it was made public that a distressed private equity firm was being considered.

*Other views*

5.30 Grant Thornton told us:

*(a)* Ultralase was presented to purchasers as an opportunity to enter the market through a premium provider of reasonable size at a competitive price.

[56] In fact, according to contemporaneous documents prepared by Grant Thornton, six indicative first round offers were received.
[57] [Bidder A] was also prepared to make an offer on a share purchase basis.

(b) Various parties who expressed an initial interest failed to progress through the sales process. Two high-net-worth individuals required exclusivity before they were willing to carry out due diligence, while overseas parties were only interested in acquiring certain sites.

(c) Three possible bidders were identified—Optimax; [Bidder A] (a private equity firm) and [Bidder B]. Bidder B was not considered a credible bidder because there was a perceived lack of agreement between the two parties to the joint venture and it would not have been able to close the transaction before January 2013, by which time Ultralase would have required additional funding. [Bidder A] did not have committed funding in place (as its own fund was already closed, it would have had to raise cash from other funds). There was also a significant risk that if [Bidder A] had carried out full due diligence, it would have concluded that the underlying trends were negative, the forward-looking pipeline was looking challenging and a more substantial turnaround of the business involving greater risk and greater funding would have been necessary. Grant Thornton thought that once the potential funders had appreciated this, there was a substantial risk that they would not have wished to invest at all or would have materially reduced the price they were willing to pay.

(d) Optimax was considered the most credible bidder because the previous merger discussions with Ultralase had indicated strong interest in Ultralase. In view of the impending funding requirement, the bank syndicate looked for a quick sale and the availability of funds for Optimax made it less of an execution risk.

(e) [Bidder A] preferred to acquire Ultralase through a pre-pack administration arrangement.[58] Grant Thornton said the bank syndicate looked favourably on bidders offering to buy the business as a straight share sale because it led to a cleaner exit for the owners of CLVC.

(f) In September 2012 CLVC decided to sell Ultralase to Optimax, as it had funds ready to proceed with the purchase, while continuing discussions with [Bidder A] in case the sale to Optimax fell through.

5.31 Grant Thornton allowed Optimax only limited data room access as it was a competitor to Ultralase. In order to move quickly, Optimax was willing to carry out limited due diligence. BDO advised Optimax on the purchase with a limited due diligence scope.[59]

5.32 [Bidder A] told us that:

(a) It made two offers to acquire Ultralase. The first was in July 2012 and the second, revised offer was in September 2012. During this period it had carried out some limited due diligence into Ultralase. Prior to these offers it had previously had exploratory conversations with banks about the possibility of buying Ultralase and was aware that Ultralase was experiencing financial difficulties.

(b) It was not intending to fund the investment from its own in-house investment fund, as that fund's investment period had already closed.[60] Rather, it had intended to secure financing commitments for investment in Ultralase from other

[58] Although a pre-pack administration was [Bidder A]'s preferred route, it had been willing to consider a straight share sale instead provided that it could agree certain warranties with the sellers.
[59] BDO told us that its involvement was limited to advising on restructuring the Ultralase Group if Russell Ambrose required it, and that it did not perform financial due diligence on behalf of Russell Ambrose.
[60] Private equity investment funds are typically structured with a limited period—say, five years—in which the funds raised must be invested in various projects.

funds. Funds were only likely to be interested in Ultralase if they thought that the laser eye surgery market had already or nearly bottomed out and that sales were likely to improve. A growing market, combined with [Bidder A] 's plans to control costs by closing some Ultralase clinics, turning some others into consultation clinics (a 'hub-and-spoke' principle), driving growth into IOLs and providing ophthalmic surgery under contract to the NHS, could have made Ultralase an attractive business proposition. If full due diligence had not substantiated this growth story, but rather had uncovered more bad news, then the funds would have been unlikely to invest. [Bidder A] said that it was 'quite possible this business had no value'. It said that funds would typically expect a return of around 300 per cent over a three- to five-year time horizon[61] and they would look to exit after this time. Any indications that a turnaround in the market was likely to be significantly delayed would have meant that these expectations would not have been met. It said that investors would not have been willing to 'take a huge leap of faith'. It recognized that its bid for Ultralase involved a 'very high degree of execution risk' and that the risk increased as time went on.

*(c)* At the time of its second bid, in September 2012, it had secured expressions of interest from two funds: [✂]. However, it said that delays in the sales process increased the risk that the funds could lose interest and, subsequent to the September bid, [✂] had indeed told [Bidder A] that it was no longer interested. It said that raising financing in this way from other funds was less certain than doing so from an in-house, committed investment fund.

*(d)* The six- to eight-week timetable for closure of the purchase (set out in its September offer) could 'conceivably' have been met, but it could also have taken longer.[62] It said that decision-making by the vendors appeared to be slow and this could have further delayed the process. It also said that it understood that one of the bank syndicate had, a short time previously, sold down its stake to two other institutions, which could have had the potential to further slow the vendor group's ability to make decisions and so delay the process.[63]

5.33 Optimax told us that, by November 2012, Ultralase's financial position was precarious and that [Bidder A] could not have completed a purchase in time given that, although it had conducted some financial assessments, it had not started its formal due diligence process. Optimax suggested that a sale to [Bidder A] would likely not have materialized until December 2012 at the earliest, even with a very fast due diligence process, which would have had to be started straight away. It pointed out that no other bidder had started a due diligence process by the time of the acquisition by Optimax. It said that, if a sale to [Bidder A] were to have taken place, it would have been necessary to complete the full due diligence by the time the first financing need arose, ie in approximately three weeks, which it thought would have been highly unlikely. Therefore, in its view, absent the purchase by Optimax, it would have been highly likely that Ultralase would have entered into administration and liquidation.

5.34 Optimax also said that, even if there had been sufficient time to carry out legal and financial due diligence before Ultralase failed, it did not believe that a non-trade buyer would have been likely to make an offer above the liquidation value. It said there was evidence that Grant Thornton had had concerns over whether [Bidder A] would

[61] Equivalent to approximately 25 per cent a year if a five-year time horizon is assumed.
[62] Grant Thornton told us that it thought ten weeks would be a more realistic estimate of the time [Bidder A] would likely have needed once they were granted exclusivity.
[63] Lloyds Bank had signed a sale and purchase agreement with a consortium of Goldman Sachs and Texas Pacific Group covering a portfolio of distressed assets, including Lloyds Bank's share of the loans to Ultralase and shares in CLVC.

reduce or withdraw its offer during the due diligence process. It also said that, according to its modelling (carried out on its behalf by Oxera), a non-trade buyer such as [Bidder A] would not have been able to achieve the return required by a private equity investor.

*Our assessment*

5.35 We assessed the documents produced by Grant Thornton at the time of the sale. The sales process commenced in May 2012. Absent Optimax, [Bidder A] would have been considered the most likely purchaser.[64] We first consider the timeline of [Bidder A]'s involvement in the process and whether, absent Optimax, it would have been likely to be able to carry out full legal and financial due diligence, reach agreement on structure with the vendors, obtain committed funding and complete the purchase before Ultralase's funding shortfall arose in late December/early January. We then go on to consider whether, if [Bidder A] had been willing to make an offer, it would have been likely to be in excess of Ultralase's liquidation value.

5.36 We examined the Grant Thornton papers concerning the progress of the sale and questioned Grant Thornton and [Bidder A], in order to establish the timeline. [Bidder A] approached Grant Thornton to express an interest in Ultralase in late June 2012. It was granted access to the data room on 2 July and attended a management meeting on 11 July. An initial bid was received from [Bidder A] on 13 July. At that stage, [Bidder A] had provided no formal proof of the availability of funds to complete the transaction. Its bid was subject to full due diligence and discussions with the vendors on restructuring the capital structure.[65]

5.37 By mid-August, [Bidder A] had commenced some due diligence and was believed to require 8 to 10 weeks to complete the transaction, so completion was estimated to be possible by the middle or end of October. Although [Bidder A] had held some discussions with potential funders, it did not have committed funding in place. At this stage, Grant Thornton assessed the execution risk as 'mid – high', while the risks involved in Optimax's bid were lower.

5.38 By mid-September, [Bidder A] had [✂] as a result of negative trends in Ultralase's business and perceived risks to consultant relationships if the restructuring measures were fully implemented. This offer was still subject to due diligence, negotiation and completion of legal agreements and fund investment committee approval for the financing. The time to completion was estimated by [Bidder A] in its second bid document at six to eight weeks (unless the transaction was structured as a pre-pack administration,[66] in which case timing would be determined by the administrator). However, [Bidder A] would only be prepared to progress with due diligence if it were granted exclusivity for the six- to eight-week period. The vendors were unwilling to do this, as they had decided by 12 September that Optimax was the preferred buyer.

5.39 If Optimax had not been the preferred bidder, but rather the vendors had decided on 12 September to proceed with [Bidder A], the timing estimates above suggest that it might have been possible to achieve completion by mid-November, provided that agreement could have been reached between the vendors and [Bidder A] on

[64] By September, when the vendors were deciding on who should be the preferred bidder, Grant Thornton's status updates listed four other bidders aside from Optimax and [Bidder A]: [Bidder E], [Bidder B], [Bidder C] and [Bidder D]. [Bidder E] were only interested in buying six to eight clinics. [Bidder B] said it was unable to make any acquisition prior to January. [Bidder C] and [Bidder D] were 'on hold'.
[65] One of the options included in [Bidder A]'s offer—its preferred option—involved a 'structured cash and debt roll through', ie the existing lenders would have maintained at least a portion of their debt funding to, and equity stake in, Ultralase.
[66] If the transaction was not structured as a pre-pack administration, [Bidder A] would have required a degree of warranty protection from the vendors.

warranties. If it could not, and a pre-pack administration became the chosen route, then it is likely that completion would have taken longer.[67] In both cases, successful completion would also have been conditional on [Bidder A] obtaining committed financing.

5.40 [Bidder A] told us that if, following full due diligence, conditions had been a little worse than anticipated at the time of their September bid, there might have been a willingness on the part of the funds to contemplate a revised bid at a slightly lower price (though there could be no certainty that it would have made a bid in such circumstances). It said that if conditions turned out to be much worse, the funds would not have been interested, even if the price was significantly lower.

5.41 In our view, had [Bidder A] conducted full due diligence, seen sales continuing to decline in September and October 2012 and seen the financial projections it is likely that the funds would have lost interest in the transaction regardless of price. We conclude that [Bidder A] would have been highly unlikely to obtain sufficient funding from outside investors for the purchase of Ultralase. We conclude that [Bidder A] was unlikely to have completed a purchase of Ultralase.

5.42 The only other potential bidders left in the process were [Bidder B], [Bidder E], [Bidder C] and [Bidder D]. Grant Thornton confirmed that [Bidder B] would not have been able to complete a purchase of Ultralase before January, and that [Bidder E] was no longer interested in buying the business as a whole but was only interested in a small number of clinics. We thought it likely that an asset sale of this nature would only have taken place after Ultralase had been put in administration. Grant Thornton also said that it did not consider [Bidders C and D] to be credible buyers. Neither had carried out any due diligence and Grant Thornton said if they had done so they would have been highly unlikely to purchase Ultralase. Lloyds Bank confirmed that Optimax was the only credible bidder.

5.43 Had CLVC (in the absence of a sale to Optimax) attempted to sell Ultralase to a private equity house specializing in distressed situations, we thought it likely that landlords, suppliers and potential customers would then have realized that Ultralase was in financial difficulty and this, of itself, would have had a detrimental effect on the business[68] and compromised the new owner's ability to turn the business around.

### *View on alternative purchasers*

5.44 We conclude that there was no credible alternative purchaser that would have acquired the firm as a going concern, or its assets.

## ***View on whether Ultralase was failing financially and whether there would have been an alternative purchaser***

5.45 We conclude that Ultralase would have failed financially (paragraph 5.25) and there was no credible alternative purchaser (paragraph 5.44).

[67] Grant Thornton told us that a pre-pack administration would have added a few extra weeks to the process, and also increased the risk of not achieving a successful outcome (given the possible negative perception of the company by potential customers, landlords and equipment lessors that an administration might cause).
[68] For example, if potential customers knew that Ultralase was in a turnaround situation they might be reluctant to rely on it for protracted aftercare.

5.46 In our assessment of the competitive effects of the merger we assess what would have happened to the sales of Ultralase in the event of its exit, which is the third aspect we consider in forming a view on an exiting firm scenario.

## 6. Assessment of the competitive effects of the merger

6.1 In this section, we assess the competitive effects of the acquisition and how they relate to the third aspect we consider when forming a view on an exiting firm scenario: what would have happened to the sales of the firm in the event of its exit. Given that the parties' business in IOLs is small (paragraph 2.31) the merger appears unlikely to create any competitive concern in IOLs and we have focused our competitive assessment of the merger on the laser eye surgery market.

6.2 We first consider the nature of the purchasing decision and discuss key aspects of competition in the laser eye surgery market. We then analyse what would have happened to the sales of Ultralase in the event of its exit, compared with its acquisition by Optimax.

### *Competition in the laser eye surgery market*

6.3 We analysed the way providers of refractive eye surgery compete as a guide to assessing how competition may develop after the merger, including considering the competitive constraint imposed by different types of providers on the parties and assessing the extent to which national providers flex their strategy in response to local competitive conditions.

6.4 We have been told that refractive eye surgery is a discretionary purchase and the recession and the financial crises started in 2008 have had a material impact on the industry as a whole (see paragraphs 2.20 and 2.21). We considered it important, therefore, to investigate the recent trends in the market (in particular, in terms of volume and prices) so as to gain a better understanding of how competition has responded to the current challenges and whether this may inform our assessment of the merger effects (further details are provided in Appendix C).

#### *The purchasing decision*

6.5 Refractive eye surgery is a one-off, high-value purchase. Unlike many other goods or services it is not possible to try out the purchase and assess its quality before purchase. Therefore the ability to access information about refractive eye surgery is important to reassure a potential purchaser and to increase awareness of the procedure (which has an impact on market size). In this regard information from friends and family that have had the treatment is a particularly important source of information to increase a customer's trust in the procedure. 47 per cent of the respondents to the customer survey had surgery following a recommendation, mostly from colleagues, friends or family members. Recommendation from friends/colleagues/family was mentioned by 52 per cent of the respondents as a factor influencing their decision as to which provider to use. The customer survey results suggest that customers undertake relatively little research before selecting a provider. The majority of Optimax and Ultralase customers had not considered any other providers at the time of purchase[69] and few had a consultation[70] or received a

[69] The survey indicated that 55 per cent of Optimax customers and 61 per cent of Ultralase customers had not considered any other provider at the time of purchase.
[70] According to the results of our survey, 22 per cent of Optimax customers and 21 per cent of Ultralase customers had a consultation with another provider.

quote[71] from more than one provider. There may be an effect whereby a recommendation based on a procedure carried out by a large national chain in one location would benefit its clinics elsewhere.

6.6 Large national providers need to maintain a high level of marketing to increase customer awareness of its existence and to establish the provider as a quality brand. Third parties consistently indicated that considerable investments in marketing activities are required in order to attract a significant volume of customers. We noted that some suppliers suggested that there were important spill over effects in that marketing spend by any one firm benefits other firms in the industry.[72]

6.7 As discussed in Section 4 on market definition, the market is local, with 80 per cent of customers having treatment at a centre within 45 minutes of where they live. Third parties told us that location of the clinics and brand awareness played a key role in a customer's decision regarding the selection of a refractive eye surgery supplier. For example, Optegra told us that the major factors in a customer's decision were: *(a)* the convenience of the clinic location; *(b)* that a provider was a national chain with multiple clinics that buyers had heard of and had seen the advertising; and *(c)* price.

*Competition between national players and smaller/local providers*

6.8 In paragraph 2.8 we identified three broad categories of refractive eye surgery suppliers: large national chains, independent clinics and small regional chains, and hospital-based providers. In this section we consider the competitive constraint imposed by the independent clinics, small chains, and other providers (hereinafter small suppliers) on the three large national chains.

6.9 Several third parties told us that small suppliers provided a weak constraint on the three large chains.

*(a)* Optical Express said that in reality it did not consider itself to be in competition nationally with anyone apart from Optimax and Ultralase. It also said that independent surgeons who had a strong clinical reputation in the community were able to compete with national corporate providers of refractive eye surgery within that locality. However, it said the prices charged by such providers were generally much higher.

*(b)* The former CEO of Ultralase said that in the laser eye surgery market in the UK, there were three main players: Ultralase, Optimax and Optical Express. He said that there might be local competition in local markets where a particularly strong individual surgeon practice was present but, in the main, Ultralase viewed Optical Express and Optimax as its major competitors.

*(c)* When asked about its ability to attract customers who would have gone to Ultralase, Optegra said that it would not be able to target customers that Ultralase would typically have had in the past because it was young and unknown. It said that many people would not consider it as an option and it would be expensive to raise its profile to make customers aware that it was an option.

*(d)* Nuffield told us that it did not see high street chains as its competitors because refractive eye surgery was a small part of its business.

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[71] According to the results of our survey, 31 per cent of Optimax customers and 24 per cent of Ultralase customers received a quotation from another provider.
[72] Optical Express said that marketing of laser eye surgery would raise awareness, particularly if it had celebrity endorsement, and others would benefit.

6.10 The parties' internal documents indicate that they mainly monitored the competitive behaviour of the other party and Optical Express. For example, in 2012 Optimax commissioned a one-off mystery shopping comparison exercise on Optical Express and Ultralase. An Ultralase document concerning pricing strategy considered the prices charged for LASIK treatments only by the three large providers.

6.11 The responses to the customer survey suggest that Optimax and Ultralase customers have low levels of awareness of providers other than Optical Express, Optimax and Ultralase. Only 13 per cent of Optimax customers and 12 per cent of Ultralase customers mentioned providers other than the three largest providers when asked which other surgery provider they were aware of at the time they made a decision to have the treatment.

6.12 The price-concentration analysis provides some evidence that small providers do not constrain the large national chains significantly. The analysis suggests some, albeit weak, competitive constraint between the three large chains, but we found no evidence that the presence of other competitors has an effect on the parties' prices[73] (see Appendix D).

6.13 A number of third parties also pointed out that there were differences in the channels through which providers won customers. Small suppliers tended to rely on professional referrals (by opticians and doctors) while customers of the large national chains were largely self-referred (on the recommendation of family, friends or colleagues):

*(a)* Moorfields told us that it provided services to independent practitioners and they used its facilities to see customers who were referred to them via a range of different means; some came through to the Moorfields direct helpline and some came directly through recommendation and referral from other sources.

*(b)* Nuffield said that it did not market laser eye surgery as a stand-alone product. It said what ordinarily happened was that local GPs would refer customers with an ophthalmic problem to one of its specialist consultants. It said that laser might be discussed as an option for that patient. Alternatively it might receive customers that a high street provider refused to treat.

*(c)* Ramsay said that the Optimax and Ultralase route of referral was different from its own. Customers referred to Ramsay were either referred by clinical commissioning groups (CCGs), or they were self-pay customers who had elected to visit a Ramsay hospital. It said that the large national chains operated a self-referral model.

*(d)* Optical Express said that while there were some customers who might go to a national provider or an independent, most would go to the three national providers because they were the ones who were publicizing that they provided laser vision correction and excellent service.

6.14 We also considered suppliers' positioning in price and quality. Optimax told us that Optimax had been traditionally perceived by consumers as occupying the lower end of the market, and regarded as the volume-oriented, relatively inexpensive mass market option. By contrast, Ultralase has marketed itself as a 'premium option' and this was reflected in its prices which tended to be substantially higher than the other

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[73] See also footnotes to paragraph 4.19.

large national chains (see Appendix C).[74] Some third parties (Optegra and [✂]) told us that they also tended to position themselves at the higher end of the market, focusing more on quality than on price, but it is unclear whether this strategy is common to all small suppliers.

6.15 The evidence suggests that in general small suppliers exert only a limited constraint on the parties and on Optical Express. We recognize that in some local areas independent clinics or small chains may have a strong reputation and may be capable of winning customers who otherwise might go to one of the large chains. We also noted that Ultralase sought to differentiate itself as a premium provider compared with Optimax and Optical Express. However, Optimax and Optical Express were nonetheless the closest competitors to Ultralase.

*Local vs national competitive strategies*

6.16 Optimax said that competition was primarily local, as only a few providers operate nationally, a large number of competitors run a single or small number of clinics, and discounts are set on a local basis to reflect individual competitive conditions.

6.17 We noted in paragraph 4.20 that customers do not travel far to go to a clinic and they choose between providers that are located nearby. The customer survey shows that 25 per cent of Optimax customers and 16 per cent of Ultralase customers mentioned convenience of location as one of the reasons for choosing their provider. Evidence submitted by the parties supports the view that network coverage is an important competitive dimension as customers' proximity to clinics is a key element in a provider's ability to attract customers.[75]

6.18 The available evidence indicates that the most important tools used to win customers in the market are: price, marketing, and quality. Although competition takes place locally, as customers ultimately choose among the alternatives available in their area, we have been told that the large national chains mostly set their competitive variables centrally. We assess below the extent to which the parties flex their strategy to account for local competitive factors.

6.19 Optimax said that Optimax and Ultralase set their list prices nationally, although occasionally, Ultralase would set different prices in Northern Ireland. However, most customers did not pay the list price. Optimax told us that only [✂] per cent of its customers paid the list price and all other customers paid less. It said that the discount received varied widely between customers. Our analysis of the parties' transaction database confirmed that the large majority of customers received a discount.

6.20 Optimax said that discount/promotion policies were mainly set at a national level. However, local managers were allowed some discretion over the application of the

[74] This view was shared by third parties. Optegra told us that Optimax and Optical Express had a production line approach, while Ultralase was always positioned more upmarket. [✂] told us that Ultralase had higher prices than Optimax but offered better quality. Similarly, Optical Express said that until the merger Optimax's marketing strategy was very price-driven whilst Ultralase's (and Optical Express's) marketing approach was less focused on price. This is somewhat supported by the results of our survey. The survey indicated that Optimax customers were more likely to cite the low cost of treatment and the convenience of location as reasons for the choice of provider whereas Ultralase customers were more likely to mention a recommendation from someone else, the qualification and expertise of surgeons and the quality of aftercare.
[75] Optimax told us that it has 'has opened consultation clinics and treatment clinics with the overall aim of providing convenient access to treatment/consultations' and that its intention was 'to ensure a maximum drive-time of 60 minutes to attend an Optimax consultation'. Proximity to clinics was also mentioned by third parties (for example, Optegra) as an important driver of customer choice.

policy.[76] We noted that Optimax has a 'price beat' guarantee[77] as an example of discount at local level. Optimax also submitted emails containing examples of Optimax clinics lowering their prices to capture customers who had received quotations from other suppliers with a local presence.

6.21 Our price-concentration analysis also found some (albeit weak) evidence of Optimax setting lower prices in areas where it faced more competition from Optical Express and Ultralase[78] (Appendix D). Optical Express told us that price negotiation with customers was important where the customer had consulted with more than one large national chain, consistent with local competition taking place but mostly between the parties and Optical Express.

6.22 As discussed in paragraph 6.5, marketing is a primary driver of the demand in the market. Optimax said that its advertising strategies were largely set centrally and national advertising was critical to generate enquiries. However, it said that local marketing was also important. It said that local papers, local radio and direct mail might provide a targeted service.

6.23 Optimax said that it monitored local competitors' offerings, including brand and advertising. It submitted evidence of responses Ultralase had had to specific clinic openings and closures. In discussing the poor enquiries-to-consultation conversion ratio in Aberdeen, Ultralase mentioned Optical Express's strong 'local (Scottish) marketing presence and brand image' among the reasons. In assessing the opportunity to open a new consultation clinic in Sheffield Ultralase noted that the area had a poor enquiries-to-consultation conversion ratio and that this might have been in part due to the lack of local marketing.[79]

6.24 We gathered third party views on the extent to which their marketing strategy was set at local level. Optical Express said that it used both local and national advertising and typically, local marketing activities would take place to launch new clinics and tactical campaigns would be launched at key periods to increase brand awareness in a particular area. Optegra said that it sometimes advertised in local glossy magazines but it was on a relatively small scale. It said the vast majority of its effort and spend were devoted to national campaigns for refractive lens exchange—mostly television and press. [✂] told us that most advertising campaigns were national.

6.25 We found little evidence that quality varies across local areas. Optical Express said that large and small chains set quality standards that applied equally to all its clinics and in general there were no appreciable differences in quality across local clinics (assuming the same form of technology was available). We considered whether the choice of the equipment is driven by the local competitive conditions. Although sometimes the parties used different laser equipment in different locations, we did not see evidence that this was the case. Optegra, for example, told us that the equipment (type of laser) may differ by clinic but this was because of the preferences of individual surgeons.[80]

6.26 In conclusion we found that while competitive variables, such as list prices and quality, are mainly set centrally, local managers have some discretion in setting aspects of the provider's offer, such as discounts and local marketing activity, in

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[76] The parties told us that local managers had some flexibility to grant discounts, [✂].
[77] Under this guarantee if any customer is offered the same laser eye treatment for less by another provider, [✂]. Following the acquisition Ultralase has also started offering this guarantee.
[78] See also footnotes to paragraph 4.19.
[79] Optimax also provided, as an example of monitoring of local competitors, [✂].
[80] Optegra told us that it tried to get the right equipment into the consultant's hands in a specific hospital so that he felt comfortable that he could achieve the best outcomes for customers.

response to local competitive conditions. In most cases we found that local competition takes place predominantly between the parties and Optical Express.

*Volume and revenue over time*

6.27 As noted in paragraph 2.20 Optimax said that there had been an observed reduction in laser eye surgery treatments of approximately 43 per cent between 2008 and 2012.

6.28 We noted that the parties' laser eye surgery volumes[81] were relatively stable in the period 2009 to 2011. A considerable drop-off in sales occurred in 2012. Optimax lost [✂] per cent of sales and Ultralase lost [✂] per cent of sales. Similarly, Optical Express experienced a considerable contraction in its sales (losing [✂] per cent) in 2012.

6.29 Optimax told us that the significant decrease in sales that occurred in 2012 was probably due to the lack of industry advertising, especially on television, which had resulted in a contraction of new enquiries (see Appendix C for our analysis of the marketing spend evolution in recent years), and that the existing database of enquiries was getting older and smaller [✂].

6.30 The parties' combined sales volume fell further, by an additional [✂] per cent in 2013, mainly due to a large fall in Ultralase sales. Some of the fall in sales may have been due to the reduction in marketing spend and the closure of Ultralase treatment and consultation clinics and Optimax consultation clinics soon after the acquisition.[82] However, Optical Express sales also dropped significantly ([✂]). In terms of revenues, the parties' combined revenue dropped by [✂] per cent in 2013 while Optical Express's revenue fell by [✂] per cent.

*Prices over time*

6.31 In the pre-merger period Optimax's average revenue per customer[83] fell in 2010 by [✂] per cent, increased in 2011 by [✂] per cent and did not change in 2012. Ultralase figures show the opposite pattern. They increased significantly from 2008 to 2010 by a total of [✂] per cent but have declined from 2010 to 2012 by [✂] per cent (but were still significantly higher than those of Optimax and Optical Express in 2012). Optical Express revenue per customer [✂].

6.32 Following the merger the Ultralase average revenue per customer decreased by approximately [✂] per cent compared with the same period in 2012 while the Optimax average revenue per customer increased by [✂] per cent. This was mainly as a result of it not being possible to maintain different Ultralase and Optimax prices, with both brands operating mainly from the same clinics, so the companies' prices were aligned. The Optical Express average revenue per customer also increased in 2013, by [✂] per cent.[84]

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[81] See Appendix C, Table 1. These figures refer to the January to June period only.
[82] Thirteen Ultralase clinics, three Ultralase consultation centres and two Optimax consultation centres were closed (paragraph 3.3).
[83] That is, the weighted average price across all treatments carried out by the company.
[84] This data is presented in Appendix C, Figure 1.

*Summary of findings on competition in the laser eye surgery market*

6.33 We conclude that in general small suppliers exert only a limited constraint on the parties and on Optical Express and that Optimax and Optical Express were by far the closest competitors to Ultralase. In most cases local competition takes place predominantly between the parties and Optical Express. We noted that the parties' laser eye surgery volumes were relatively stable in the period 2009 to 2011 but fell sharply in 2012 in common with Optical Express. The parties' combined sales volume fell substantially further in 2013. Optical Express's sales also dropped substantially, but by less than the parties.

### *What would have happened to the sales of Ultralase in the event of its exit*

6.34 We next tested what would have happened to the sales of Ultralase in the event of its exit. The Guidelines[85] state that if the majority of the sales of the firm in the event of its exit were expected to have switched to the acquiring firm, the merger may have little effect on competition. By contrast, if the sales were likely to have been dispersed across several firms, the merger, by transferring most or all of the sales to the acquirer, may have a significant impact on competition.

6.35 The assessment of what would have happened to the sales of Ultralase in the event of its exit entails two steps:

*(a)* assessing whether the distribution of sales might be expected to differ between the merger and the counterfactual scenario of exit; and

*(b)* when it is likely to differ, assessing whether the sales distribution in the counter-factual of exit can be expected to result in a more competitive outcome.

6.36 The starting point of our assessment was to compare the market structure in the post-merger situation with that which would have likely resulted in the counterfactual situation. If we found that the distribution of sales differed in the two situations, we would have considered whether alternative suppliers, especially smaller/local players, faced barriers to expansion and whether the transaction had strengthened the position of the large national chains compared with the counterfactual. In particular, if there were important economies of scale, an increase in sales could enable alternative suppliers to lower their unit costs (by spreading fixed costs over larger volumes) and, therefore, enhance their ability to market competitive offers. In paragraph 6.15 we found that small suppliers exerted only a limited constraint on the large national chains. Therefore we would have concerns about the merger if the counterfactual assessment showed that a large national chain would have emerged that would have been able to compete effectively with Optimax and Optical Express.

6.37 In paragraph 4.21 we concluded that providers typically attract most of their customers from within a drive-time of 45 minutes. This means we would need to assess the market structure in each local area where the parties overlap. Appendix C, Table 5, sets out the list of overlaps identified on the basis of 45-minute catchment areas[86] and shows the number and the identity of the competitors' clinics located within a distance of 45 minutes from the parties' centres.

[85] The Guidelines, paragraph 4.3.18.
[86] We recognized that patients were more widely distributed in some areas. Therefore, in addition to drive-times between stores, we also considered the extent to which the distribution of Optimax and Ultralase customers overlapped in these areas. Based on this analysis we identified a number of overlaps where an Ultralase store overlapped with more than one Optimax store and vice versa (see Appendix C).

6.38 We noted, however, that the parties compete mainly with each other and with Optical Express. Other suppliers appear to provide only a limited constraint on high street suppliers (see paragraph 6.15). As Optical Express is present in all the local areas where the parties overlap, either with a consultation clinic or treatment clinic (see Appendix C, Table 5), our assessment would be similar in all the local areas.[87] Therefore we assessed the aggregated impact of the merger across all areas as the figures aggregated at national level provide a good proxy of the local effects. We considered that in some areas there might be alternative suppliers who might constrain the three national players and therefore assessed how the distribution of sales had evolved following the merger in certain local areas (see paragraphs 6.52 and 6.53).

*Market structure in the post-merger situation*

6.39 Optimax told us that given the 'one-off' nature of the purchase Ultralase did not have any captive customers or long-term contracts, and therefore the purchase by Optimax of Ultralase made little difference to this outcome since all future customers were available for other competitors to win. It said there was no sense in which Optimax had 'bought' Ultralase's market share, since market share was highly transitory in the laser eye surgery industry.

6.40 We consider this to be an oversimplification. While we agree that suppliers of refractive eye surgery do not have captive customers or long-term contracts, there are several possible reasons as to why a firm acquiring a competitor in an industry which features one-off purchases may be able to retain the supply share of the target company post-merger.

*(a)* As noted in paragraph 6.7 we were told by third parties that location of clinics and brand awareness play a key role in the customers' decision regarding the selection of refractive eye surgery supplier.

*(b)* The acquisition of Ultralase's database of possible customer leads might have enabled Optimax to capture future Ultralase sales. We noted that Optimax mentioned the acquisition of all Ultralase marketing channels, including its database of possible leads, as part of the rationale for the merger (paragraph 3.3). The value of this in practice appears to have been limited, however.

*(c)* For a service such as refractive eye surgery, quality is difficult to observe in advance and past customer experience is likely to be an effective driver to attract future customers. Therefore, given the usual high rate of success of refractive eye surgery the existence of a large base of satisfied past Ultralase customers is likely to result in a benefit to Optimax in attracting additional customers that would previously have gone to Ultralase.[88]

6.41 In its initial submission to the CC Optimax acknowledged that reputation and brand were important in a medical industry (paragraph 5.5) and it perceived the Ultralase brand as being of value. We noted that at the time of the merger the strategy to retain

[87] Optimax, as well as other suppliers (Optegra and Nuffield), told us that customers were mostly concerned with the location of the clinic where they received pre-operation consultations and aftercare, and that they were willing to travel longer for treatment. We also noted that eye surgery providers' decisions on the coverage of their network are typically based on the driving time to consultation centres. Therefore we considered local competition to be more important between the locations where customers had their consultation, whether it was a consultation or treatment clinic.

[88] Although Optimax told us the database had proved to be of limited value.

Ultralase's sales was extensively discussed.[89,90] Optimax told us that it expected to retain Ultralase sales thanks to the acquisition of the Ultralase 'marketing machine.' Optimax also told us that its initial plan had been to have a two-brand merged clinic approach and it anticipated retaining 50 per cent of Ultralase sales.[91]

6.42 Against this background we noted that since the merger, Ultralase's and Optimax's pricing strategy has been aligned by matching the list prices of the two companies and undertaking similar promotional campaigns (for example, the Optimax price match guarantee). We also noted that following the transaction the investment in marketing activities for the Ultralase brand has been considerably reduced. For the seven months to July 2013 the marketing spend for Ultralase amounted to £[✂]. Compared with 2012, when Ultralase spent £[✂] million in the first seven months, this implies a reduction of almost [✂] per cent in the marketing spend.[92] We note that marketing spend as a proportion of revenue remained broadly constant but we also note the importance of total marketing spend to attracting customers. Optimax has also cut its marketing expenditure in 2013 but to a lesser extent (from £[✂] in 2012 to £[✂] in 2013,[93] a reduction of [✂] per cent).

6.43 Optimax said that following the acquisition it realized that the Ultralase marketing channels [✂]. It also said that the awareness of the Ultralase brand declined rapidly after Ultralase ceased television advertising in July 2012. In light of this [✂] as Optimax leads were cheaper to generate from a marketing perspective.

6.44 Third party comments suggested that Optimax had not been successful in gaining Ultralase customers:

*(a)* Optical Express told us that since the merger there had been a major reduction in the profile of Ultralase in the market.

*(b)* [✂] told us that although Optimax had taken over Ultralase, it did not believe that Optimax had benefited. It said that Optimax had inherited the existing customers but did not think that Optimax had gained new customers. It said it did not believe that Optimax had done a good job of disguising the fact that Optimax was running the operation and so the customers had gone to other companies such as [✂].

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[89] An internal document of Ultralase dated 5 November 2012 suggested to 'capitalise on the UL "heritage credential" as a premium brand' and market Optimax as a value brand. The document also discussed various options in relation to the way brands could be managed from marketing activities. In considering the options regarding the website, it is recommended to 'retain separate websites to not give away market share'. In relation to customers willing to consult both Ultralase and Optimax the document indicated the importance of seeking 'to avoid twin journeys happening concurrently (2 pre-Ops at same time/clinic)' in order to maintain a perceived distinction/separation between the brands. In addition, the document contained a recommendation to maintain 'separate telesales and clinic advisers who are advocates of the respective brands'. It went on to discuss how the merger can be implemented at clinic level while preserving the two brands and indicated that that where the clinics will be merged, they could be either white-labelled or dual-branded facilities.

[90] Along a similar line, Grant Thornton discussed the possible post-merger operating models. It considered three different scenarios: *(a)* two brands with separate clinics, *(b)* two brands with merged (white labelled) clinics, and *(c)* one brand customer interface with a rationalized clinic portfolio. Grant Thornton noted that the management of Ultralase favoured a two-brand strategy 'to minimise leakage post-merger and in order to cover both the budget and the premium end of the market'. Grant Thornton suggested that a single brand customer 'front-end' with a two brand service offering (ie 'a differentiated range of discount treatment options possibly even branded as the standard Optimax treatment or the premium Ultralase treatment') could achieve savings in marketing costs up to £[✂] a year while retaining a significant proportion of the current customer base. However, Ultralase's management disagreed with this option and believed that 'a single customer "front-end" brand would drive treatments to competitors, most notably Optical Express'. To estimate the illustrative post-merger EBITDA in the various scenarios Grant Thornton assumed a 25 per cent loss of customers in Optimax should it adopt a one-brand customer interface business model.

[91] A marketing report of 26 March 2013 said that 'one of the motivations of acquisition was to [✂]. Therefore two brands will remain where we either generate enquiries or convert them to bookings.'

[92] The 2013 marketing spend as a percentage of turnover for Ultralase was comparable to 2012 (approximately [✂] per cent) but this is explained by the significant loss in sales that Ultralase experienced also as a result of the cut in the marketing spend.

[93] These figures refer to the marketing spend in the first seven months of 2012 and 2013.

6.45 Optimax told us that the initial strategy of marketing both brands had not worked because of the difficulties in maintaining a differentiation in brands when offered from the same premises.[94]

6.46 To investigate further how the merger had affected the sales distribution among the suppliers of refractive eye surgery we considered the following evidence:

(a) the total combined sales of the parties pre and post-merger; and

(b) an estimate of the market shares before and after the merger based on the AMO data.

*Combined sales of the parties pre and post-merger*

6.47 Table 5 shows the combined volume of treatments carried out by the parties in the years before the merger and in 2013. In relation to the post-merger period we had data up to June 2013. To look at trends post-merger we compared the volume of treatments in the first six months of each year.

6.48 If the merged parties had managed to retain most of the pre-merger sales, we would have expected the combined volume of the parties to be broadly similar pre- and post-merger. Post-merger the combined volume of Optimax and Ultralase decreased by [✂] per cent in 2013 (from [✂] to [✂] treatments).

6.49 A straight comparison between 2012 and 2013, however, may not be meaningful as the overall demand has been declining in the recent years and therefore a contraction in sales could have been expected anyway. Clinic closures and the reduction in marketing spend would have also impacted on sales. We noted that the volume reduction from 2012 to 2013 for the parties was considerably higher than Optical Express (which lost [✂] per cent of sales). This may suggest that the parties lost more sales than might have been expected in the absence of the merger.

TABLE 5 **Volume (number of customers) for January–June (2011–2013)**

| *Volume* | *Optimax* | *Ultralase* | *Optimax + Ultralase* | *% change in the parties' combined volume* |
|---|---|---|---|---|
| 2011 | [✂] | [✂] | [✂] | [✂] |
| 2012 | [✂] | [✂] | [✂] | [✂] |
| 2013 | [✂] | [✂] | [✂] | [✂] |

*Source:* Optimax.

*Note:* This data is calculated on the same basis as Table 1 and the notes from there also apply here.

*Market shares before and after the merger based on AMO data*

6.50 In Section 2 we used the AMO data to estimate the market shares of suppliers. Table 6 below shows the market shares at the national level based on AMO volume data related to the first six months of each year from 2011 to 2013.

[94] Optimax submitted that Ultralase customers coming into Optimax premises would be told of the merger at the time of booking. This represented about two-thirds of all group attendees. The remainder would attend a mixed clinic and would come into contact with Optimax customers in the waiting room. It said it was not desirable to have different prices for the two brands and customers were not now willing to pay a premium price for Ultralase.

TABLE 6 **Market shares based on AMO data—January–June (2011–2013)**

*per cent*

| | *2011* | *2012* | *2013* |
|---|---|---|---|
| Optimax | [✂] | [✂] | [✂] |
| Ultralase | [✂] | [✂] | [✂] |
| Optical Express | [✂] | [✂] | [✂] |
| Optegra | [✂] | [✂] | [✂] |
| Moorfields | [✂] | [✂] | [✂] |
| Others | [✂] | [✂] | [✂] |

*Source*: AMO, Optimax, Ultralase, Optical Express and Optegra.

6.51 In 2011, the year before the merger, Optical Express had a share of [✂] per cent with Optimax ([✂] per cent) and Ultralase ([✂] per cent) being, respectively, the second and third largest suppliers in the market. Together the three major players represented 93 per cent of the supply. In 2013 the Ultralase share fell by [✂] per cent to [✂] per cent. Optical Express appears to have benefited most from Ultralase's reduction in sales with an [✂] percentage point increase in its market share. Optimax increased its share by [✂] percentage points, suggesting that it had captured some of Ultralase's sales but to a significantly lesser extent than Optical Express. We saw no evidence that any supplier other than Optical Express and Optimax had gained significantly at a national level as a result of Ultralase's loss of market share.[95]

6.52 With the exception of Optimax, Ultralase and Optical Express, all other suppliers have only a local or regional presence. The national shares may therefore understate the growth of smaller suppliers at the local level. For this reason, we analysed how the market shares had evolved over time in some local areas. We selected five areas, namely Bristol, Newcastle, Manchester, Liverpool and Belfast. In Bristol, Newcastle and Manchester the Ultralase clinic was closed post-merger, whilst in Liverpool and Belfast both parties still had a clinic.[96]

6.53 Figures 6 to 10 in Appendix C show the shares of suppliers before and after the merger in these five local areas. In all of the areas, including Belfast and Liverpool where the Ultralase facility has remained open, the Ultralase sales have fallen substantially. In general, Optimax does not appear to have gained substantial sales from Ultralase as its market share has remained stable or has slightly increased as in Belfast and Manchester. In most areas the main beneficiary appears to have been Optical Express.[97] In some areas other providers have also benefited to some extent, in particular Centre for Vision in Manchester and Optilase in Belfast.[98]

*Summary of post-merger sales*

6.54 The evidence we discussed above suggests that Optimax has retained only a limited share of Ultralase's pre-merger sales. On a national scale, Optical Express appears to have captured the majority of the lost Ultralase sales, although in some local areas other suppliers (for example, Optilase in Northern Ireland) may have captured some of the supply previously served by Ultralase.

[95] Only [✂] and [✂], counted as part of 'Others', appeared to have grown their share nationally, though only marginally (less than one percentage point each).
[96] Following the merger, the Ultralase clinic in Liverpool has been converted to an IOL-only centre and has not carried out any laser surgery in 2013.
[97] We also considered London and we noted that the evolution of the share is broadly similar to other areas with Optical Express being the main beneficiary of the fall in Ultralase sales, followed by Optimax and Moorfields.
[98] Optilase was a new entrant that entered the Belfast market in 2010.

*Market structure in the counterfactual (exit) scenario*

6.55 To assess the distribution of sales in the counterfactual we analysed the diversion between Ultralase and other suppliers, ie the proportion of Ultralase's customers[99] that would have switched to alternative suppliers in the event of Ultralase's exit. We considered three sets of evidence:

*(a)* the results of the customer survey commissioned by the CC;[100]

*(b)* the pre-merger market shares for the major providers; and

*(c)* third parties' views on the likely diversion from Ultralase to other suppliers.

*Customer survey*

6.56 As part of the customer survey, customers were asked what they would have done if they had known beforehand that all Ultralase clinics would be closed down. Those that said that they would have had the surgery with another supplier were then asked which other provider they would have used instead. The responses provided a direct indication of the possible impact of Ultralase's exit on the competitors' sales, ie the diversion ratio from Ultralase to other suppliers.

6.57 However, we had concerns about the reliability of the customer survey results regarding diversion due to the nature of the purchase and the fact that the merger has been already completed:

*(a)* We excluded customers who purchased services after the merger but some existing Ultralase customers were likely to have diverted to Optimax for aftercare when their clinic was shut (many Ultralase clinics were closed following the merger). This would have increased their awareness of Optimax's brand and therefore may have biased their response to the diversion question.

*(b)* Many respondents (almost 50 per cent) said that they would have gone to another supplier but did not know which one. This makes reliable diversion ratios difficult to calculate.[101]

*(c)* The surveyed sample covered customers who received treatment before the merger (November 2012). Given the time since the treatment and the hypothetical nature of the question, responses may not reliably reflect customers' views at the time the decision over the supplier was made.

*(d)* Suppliers' names in this industry are often similar one to another (eg Ultralase, Optilase, Visualase) and this may create confusion among customers, especially when they are asked to remember which alternative suppliers they considered, (but ultimately did not use) several months before.

Although we tried to address these issues through careful design of the customer survey we recognize the diversions calculated from the survey are still problematic.

[99] By 'Ultralase's customers' we mean the customers who would have gone to Ultralase, had it not exited the market.
[100] www.competition-commission.org.uk/our-work/directory-of-all-inquiries/optimax-ultralase/evidence/cc-commissioned-research-and-surveys.
[101] The diversion ratios in Table 7 are calculated based on the assumption that customers who did not know to which alternative supplier they would have gone would distribute across other suppliers according to the same distribution observed for the respondents who did mention an alternative provider.

6.58 Table 7 shows the diversion ratio estimates based on the results of our customer survey.

TABLE 7 **Diversion from Ultralase based on the customer survey**

*per cent*

| | *Total* | *London* | *Other areas* |
|---|---|---|---|
| Accuvision | *1* | *3* | *1* |
| Focus Clinic | <1 | 3 | 0 |
| London Vision Clinic | <1 | 3 | 1 |
| Moorfields Eye Hospital | 3 | 14 | 1 |
| Nuffield | <1 | 0 | 1 |
| Optical Express | 15 | 17 | 15 |
| Optimax | 65 | 52 | 68 |
| Vision Express | 1 | 0 | 2 |
| Others | 2 | 3 | 2 |
| No surgery | 10 | 6 | 11 |
| *Number of respondents* | *554* | *97* | *457* |

*Source:* GfK customer survey.

*Note:* 'No surgery' relates to the customers who responded that they would not have had any surgery if they had known beforehand that all Ultralase clinics would be closed down (ie the outside option).

6.59 The customer survey suggests a high diversion ratio at a national level between Ultralase and Optimax (65 per cent) whilst the diversion from Ultralase to Optical Express is significantly lower, at 15 per cent.[102] The diversion to other suppliers is 9 per cent and is spread across a number of alternative suppliers, including Accuvision, Focus Clinic, London Vision Clinic, Moorfields, Nuffield and Vision Express (among which Moorfields has the highest diversion, at 3.2 per cent, followed by Accuvision and Vision Express with a diversion of 1.4 and 1.3 per cent respectively).

6.60 The diversion ratio between the parties is lower in London (52 per cent)[103] where alternative suppliers appear to play a greater role compared with other areas of the UK (the diversion ratio to others is 25 per cent in London and 6 per cent elsewhere).

6.61 To address some of the concerns described in paragraph 6.57, we considered the subsample of customers that had a consultation with another provider before receiving treatment at Ultralase. Customers who actively searched for alternatives and had a consultation with a supplier other than the one they ultimately selected can be expected to be better informed on the available alternatives and consequently be more likely to provide a reliable response to the diversion question.

6.62 Around 20 per cent of Ultralase's customers (125 respondents) had a consultation with another provider. We considered the response of this subset of customers to the question of which other provider they would have used if they had known beforehand that all Ultralase clinics would be closed down (ie the same question as described in paragraph 6.56). Of these customers 53 per cent said they would have used Optimax, 26 per cent Optical Express and 7 per cent other suppliers.[104] Although the diversion to Optimax is smaller than that of the entire sample of respondents (53 per

[102] We note that these figures differ significantly from what we may expect if diversion ratios were proportional to the market shares (see Table 8). See paragraphs 6.65 to 6.69 for further discussion on this point.
[103] The diversion ratio from Ultralase to Optimax in areas other than London is 68 per cent.
[104] 15 per cent of the respondents said that they would not have had any surgery.

cent vs 65 per cent), the majority of Ultralase customers still indicated that Optimax would have been their alternative choice if Ultralase had not been available.[105]

6.63 Optimax submitted the results of its own survey carried out with customers who had had a consultation with either of the parties, but did not then go ahead with the treatment (ie either they received the treatment elsewhere or did not have treatment). This survey gave a diversion ratio from Ultralase to Optimax of 22 per cent, 52 per cent to Optical Express and 26 per cent to other providers.

6.64 We noted that their diversion estimates for Optimax's survey are based on a very limited sample of people (23) who mentioned that after their consultation with Optimax or Ultralase they had had treatment elsewhere. Given the size of the sample, we could not attach any weight to this evidence.

*Distribution according to pre-merger market shares*

6.65 As an alternative measure of the diversion ratios, we considered what the diversion would be if we had assumed that Ultralase's customers were distributed among the remaining suppliers in proportion to their pre-merger market shares. We note that market shares do not necessarily reflect the extent to which the parties are close competitors, in particular in industries with differentiated products. However, given our concerns over the reliability of the customer survey we considered whether our views on diversions would change significantly if diversions were in proportion to the pre-merger market shares.

6.66 We considered two distinct sets of market shares (see paragraphs 2.23 to 2.31 for further details of how market shares were estimated). The first set is based on the data provided by a number of suppliers (Set A). The second set is based on the AMO data (see Table 3) and uses the information on the Intralase procedures as a proxy for the entire market (Set B). As noted in paragraph 2.29 the data includes companies that account for the large majority of laser procedures in the UK.

6.67 Table 8 shows the annual pre-merger shares in the two sets described above and the implied diversion ratios. As the 2012 volumes were partially affected by the merger (which occurred in November 2012), we considered the 2011 market shares.

TABLE 8 **Diversion ratios from Ultralase based on market shares—Set A and Set B**

*per cent*

| | *Market shares (2011)* | | *Implied diversion ratios from Ultralase* | |
|---|---|---|---|---|
| | *Set A* | *Set B* | *Set A* | *Set B* |
| Ultralase | [✂] | [✂] | [✂] | [✂] |
| Optical Express | [✂] | [✂] | [✂] | [✂] |
| Optimax | [✂] | [✂] | [✂] | [✂] |
| Moorfields | [✂] | [✂] | [✂] | [✂] |
| Optegra | [✂] | [✂] | [✂] | [✂] |
| Others | [✂] | [✂] | [✂] | [✂] |

*Source*: AMO, Optimax, Ultralase, Optical Express, Optegra, Moorfields, BMI, Nuffield and [✂].

*Note:* The underlying data is calculated on the same basis as Table 1 and Table 3 and the notes from there also apply here.

105 We note that this subset of customers did not always indicate the provider that they had had a second consultation with as their next best alternative in the absence of Ultralase. Of these customers, around 45 per cent had a consultation with Optimax and a similar proportion with Optical Express while the remaining customers had a consultation with either Accuvision, Moorfields, Vision Express or others.

6.68 The diversion from Ultralase is highest to Optical Express ([✄] to [✄] per cent), followed by the diversion to Optimax ([✄] to [✄] per cent). The combined diversion to other parties is limited, 6 per cent in Set A and 9 per cent in Set B.

6.69 The estimates based on the pre-merger market shares suggest a significantly higher diversion to Optical Express than to Optimax than that implied by the results of the customer survey. We noted in paragraph 6.65 that market shares do not necessarily reflect the way that Ultralase customers would divert to competitors. However, we did not receive any evidence suggesting that, before the merger, Ultralase was closer to Optimax than to Optical Express, in the way implied by the customer survey.

6.70 We note that pre-merger Ultralase marketed itself as a premium service supplier and differentiated itself from the predominantly price-driven offerings of Optical Express and Optimax. Third parties we spoke to supported the view that Ultralase was positioned differently to Optimax and Optical Express.[106] However, although the diversion ratios based on the customer survey and on market shares both suffered from some issues, both pointed to a relatively limited diversion from Ultralase to suppliers other than Optimax and Optical Express. In our view this supports the view that Optimax and Optical Express were the closest competitors to Ultralase.

*Third parties' views on the likely diversion from Ultralase to other suppliers*

6.71 As an additional element in the assessment of the diversion between Ultralase and other suppliers we considered the views of third parties.

*(a)* Optical Express told us that smaller suppliers, in particular independents, would not have been capable of attracting a high volume of Ultralase customers because independents did not have an active marketing strategy. It said that independents did not have call centres or websites and attracted business through professional referrals and by reputation in much the same way as had always happened.

*(b)* Optegra said that it would not be able to target customers that Ultralase would typically have had in the past because it was young and unknown and it would be expensive to raise its profile to make customers aware that it was an option.

*(c)* [✄] expressed a different view and said that the customers who would have gone to Ultralase would probably have done some research and would have gone to somewhere like itself, a consultant-led organization. It thought the Ultralase customers would have gone to higher-end providers and thought that less than a third would have gone to Optimax and Optical Express.

6.72 We also considered that the evidence we discussed in paragraphs 6.9 to 6.15 indicated that, in general, small suppliers exert only a limited constraint on the parties and on Optical Express. This provides further support that the diversion from Ultralase to small suppliers would have likely been limited. We noted that the evidence from [✄] ran counter to this view but otherwise the evidence pointed consistently to small suppliers generally not imposing a significant competitive constraint on the large national chains.

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[106] Optegra told us that the Ultralase's positioning was deliberately slightly different to the other two high street chains and that Optimax and Optical Express tended to adopt a 'production-line' approach. Similarly, [✄] said that Ultralase had been the better group and customers went to Ultralase knowing that it was the higher-priced option but considering that they were getting something better than that provided by Optical Express and Optimax.

*Summary of counterfactual sales*

6.73 Overall it seems to us that, had Ultralase exited the market, the large majority of its sales would have gone to Optimax and Optical Express. It is difficult to assess whether Optimax or Optical Express would have benefited more but the common denominator of the evidence we collected is that alternative suppliers would have been unlikely to capture a materially higher proportion of the Ultralase sales in the counterfactual situation compared with that in the post-merger situation.

6.74 In some areas, in particular London, some alternative suppliers might have been better placed to capture more of Ultralase's sales if Ultralase had exited than elsewhere. However, as we noted above (see paragraphs 6.52 and 6.53), in some areas local providers have increased their share of sales following the merger, as Optimax had not been particularly successful in retaining Ultralase sales.

### *Conclusion on what would have happened to the sales of Ultralase in the event of its exit*

6.75 We conclude that the distribution of sales in the counterfactual situation would not have differed significantly from that in the post-merger situation. In the counterfactual situation, most of the Ultralase sales would be likely to have gone to Optimax and Optical Express. The degree of competition in the market would have changed substantially if Ultralase's loss of market share had enabled a large national chain to emerge and compete effectively with Optical Express and Optimax (see paragraph 6.36), but we saw no evidence that any supplier other than Optical Express and Optimax would have gained significantly. We note that post-merger Optimax has largely been unsuccessful in retaining the Ultralase sales, which have been captured mostly by Optical Express.

6.76 The difference between the merger and the counterfactual would be in the way the Ultralase sales are redistributed between Optimax and Optical Express. Before the merger Optical Express was already bigger than Optimax with a larger market share. If Optimax had gained more sales in the merger we do not consider that this would be a less competitive outcome compared with the counterfactual. Optical Express would still provide considerably more treatments than the merged entity.

6.77 Given the large amount of spare capacity available in the industry (see paragraph 2.21) and the overall declining demand, we would expect a downward pressure on prices in the absence of any significant increase in the underlying costs of provision. We observed, instead, some price increases following the merger (see paragraphs 6.31 and 6.32) which may suggest that the removal of Ultralase might have eliminated a competitive constraint on Optimax and Optical Express. However, even if this were the case a similar outcome would have resulted in the counterfactual situation.

6.78 Therefore we do not expect the completed acquisition of Ultralase by Optimax to result in a less competitive outcome in the market for refractive eye surgery in the UK compared with the counterfactual situation.

## 7. Findings

7.1 We conclude that the merger would not be likely to give rise to a substantial lessening of competition in any market in the UK.