

Anticipated pathology joint venture between University College London Hospitals NHS Foundation Trust, Royal Free London NHS Foundation Trust and the Doctors Laboratory Limited

ME/6094/13

The OFT's decision on reference under section 33(1) given on 8 November 2013. Full text of decision published 22 November 2013.

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

PARTIES

1. **University College London Hospitals NHS Foundation Trust (UCLH)** was established as a foundation trust in 2004. It provides a range of acute and specialist services from six hospitals, with pathology provided to NHS customers from five sites.¹ UCLH is a member of UCL Partners.² For the financial year ending 31 March 2012, UCLH had a total operating income of approximately £774 million.
2. **Royal Free London NHS Foundation Trust (RFL)** was authorised as a foundation trust on 1 April 2012. It provides acute hospital services together with a number of specialist services. It operates from a main site and several small satellite sites and provides pathology services to NHS customers from the main building at RFL and from a laboratory at []. For the financial year ending 31 March 2012, RFL had turnover of approximately £557 million.

¹ Whitfield Street, Rockefeller building, University College Hospital/EGA (including Mortimer Market and Chenies Mews), Royal National Throat, Nose and Ear Hospital and National Hospital for Neurology and Neurosurgery.

² UCL Partners is an academic health sciences partnership and biomedical research centre with University College London, Moorfields Eye Hospital, The Royal Free Hampstead, Barts Health NHS Trust, Queen Mary University of London and Great Ormond Street Hospital.

3. **The Doctors Laboratory Limited (TDL)** is a UK subsidiary of Sonic Healthcare Limited. TDL provides pathology services to both private and NHS customers from a laboratory in London (close to UCLH) and a laboratory in Manchester. For the financial year ending 30 June 2012, TDL had turnover of approximately £[] million.

TRANSACTION

4. The parties intend to enter into a pathology joint venture (**JV**), which will be formed as a limited liability partnership. TDL will hold a 51 per cent share in the JV, UCLH a 24.5 per cent share and RFL a 24.5 per cent share (**the Transaction**). The parties are each contributing staff (which will transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**)³ and assets to the JV,⁴ as well as all of UCLH and RFL's pathology requirements. In addition, TDL may contribute a contract to the JV. In due course, the JV may take over contracts currently supplied by the parents as the JV may have an option to renew or retender such contracts.
5. The JV will set up a new laboratory in London (and other parts of the country should it win the relevant contracts). It will provide logistics for collecting samples and transporting them to the laboratory, processing of tests, checking and interpreting of results and transmission of these to customers, []. The JV will provide services to RFL, UCLH and TDL as well as North Middlesex University Hospital NHS Trust (**North Middlesex**) with whom the JV will have a 10-year pathology services agreement (with an option to extend to 14 years).
6. The parties' boards have each approved the Transaction and it is in the public domain. The Transaction was notified to the Office of Fair Trading (**OFT**) on 13 September 2013 and the administrative deadline is 8 November 2013.

³ Approximately [] full time equivalent staff will TUPE transfer to the JV from UCLH which includes all laboratory-based staff as well as a small number of service managers. Approximately [] full time equivalent staff will TUPE transfer from RFL to the JV, which represents all laboratory-based staff, some administrative staff associated with the laboratory and laboratory support functions and a small number of service managers. TDL will transfer approximately [] staff.

⁴ Including UCLH and RFL's pathology laboratory equipment, albeit consideration may be given for these.

JURISDICTION

7. The parties submitted that the OFT has jurisdiction to review the Transaction. In order to have jurisdiction, the OFT must consider that it is or may be the case that two or more enterprises have ceased to be distinct and either (i) the turnover threshold is met or (ii) the share of supply test is met.⁵

Enterprises

8. An 'enterprise' is defined in the Act as the activities or part of the activities of a business, and a business includes a professional practice which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge.
9. In this case, as noted above staff will be transferred under TUPE from each of the parties and each of them will contribute laboratory assets to the JV as well as at least all of UCLH and RFL's pathology requirements. OFT guidance indicates that these are likely to be, in combination, sufficient to constitute an enterprise.⁶
10. The OFT believes that the combination of assets, employees and pathology work contributed to the JV are sufficient to constitute 'enterprises' for the purposes of section 23 of the Act.

Enterprises ceasing to be distinct

11. Enterprises cease to be distinct if they are brought under common ownership or control.⁷ Control includes situations falling short of outright voting control. Section 26 of the Act distinguishes three levels of control, namely the ability materially to influence the policy of the target (known as material influence), the ability to control the policy of the target (known as de facto control) or acquire a controlling interest in the target (known as de jure or legal control).
12. The parties submitted parts of their activities will cease to be distinct as they will each acquire at least material influence over the JV. The OFT

⁵ Section 23 of the Enterprise Act 2002 (the **Act**).

⁶ Mergers – Jurisdictional and Procedural Guidance at paragraph 3.10.

⁷ Section 26 of the Act.

notes that the board will be composed of members from each of the JV partners. Further, certain matters such as the approval of the business plan, appointment of future CEOs, approving entry into a development agreement for lease in respect of any laboratory facility, will require a unanimous decision of the board. The OFT is therefore of the view that the parties will each have at least material influence over the JV. Further, the OFT is of the view that TDL will have a controlling interest by virtue of its 51 per cent shareholding in the JV, its ability to appoint four out of eight directors to the board and its casting vote for non unanimous decisions.⁸

13. As a result of this Transaction the pathology services of UCLH, RFL and TDL will cease to be distinct.

Turnover test

14. The UK turnover of the business contributed to the JV of UCLH, RFL and TDL exceeds £70 million.⁹ Therefore, the turnover test in section 23(1)(b) of the Act is satisfied.

Conclusion on jurisdiction

15. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.¹⁰

COUNTERFACTUAL

Parallel transactions

16. The OFT may be required to consider a merger at a time when there is the prospect of another merger in the same market (a parallel transaction). For the OFT, the question is, whether the transaction under review creates the realistic prospect of a substantial lessening of competition (**SLC**), and it is likely to consider whether the statutory test would be met whether or not

⁸ 'A 'controlling interest' generally means a shareholding giving more than 50 per cent of the voting rights in a company'. Para. 3.32 of the Mergers – Jurisdictional and Procedural Guidance.

⁹ The parties submitted that for the 2012/2013 financial year, the total UK turnover of the businesses contributed to the JV was £[] million for UCLH, £[] million for RFL and £[] million for TDL. Mergers – Jurisdictional and Procedural Guidance at paragraph 3.49.

¹⁰ The merger does not qualify for review under the European Union Merger Regulation (Council Regulation 139/2004/EC, OJ L24, 29/1/2004) as it does not meet the thresholds.

the parallel transaction proceeds (unless the parallel transaction can clearly be ruled out as too speculative).¹¹

17. At the time of this decision, the OFT is aware of a proposed merger between RFL and Barnet & Chase Farm Hospitals NHS Trust (**Barnet & Chase Farm**). It was cleared on 13 August 2013 by the Cooperation and Competition Panel, which became Monitor's Cooperation and Competition Directorate in April 2013. RFL submitted that there are still a number of regulatory hurdles to overcome before the transaction completes and that its board has yet to approve the merger.
18. The parties also submitted that a pathology JV entitled Transforming Pathology Partnerships is being formed in proximity to London.¹² In addition, they noted the formation of South West London Pathology Service consortium.¹³ Third party responses also highlighted a possible JV entitled Consolidated Pathology Services also in proximity to London.¹⁴
19. The OFT is also aware of merger discussions between other trust providers but these did not affect the analysis.
20. However, the OFT does not need to conclude whether or not any of these transactions is likely to succeed or is too speculative, given that under any scenario, the OFT would have no competition concerns with this Transaction. Out of caution, the OFT therefore considers whether or not the Transaction creates a realistic prospect of a SLC, irrespective of whether the RFL/Barnet & Chase Farm merger, the Transforming Pathology Partnerships and/or Consolidated Pathology Services JVs or the South West London consortium go ahead.

¹¹ Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 5.3.25.

¹² This involves Cambridge University Hospitals NHS Foundation Trust, Colchester Hospital University NHS Foundation Trust, West Suffolk NHS Foundation Trust, the East & North Hertfordshire NHS Trust, Hinchingsbrooke Health Care NHS Trust, Ipswich Hospital NHS Trust and Mid Essex Hospital Services NHS Trusts.

¹³ This joint pathology service involves Croydon Health Services NHS Trust, Epsom and St Helier NHS Trust, Kingston Hospital NHS Trust and St George's Healthcare NHS Trust as well as possibly Royal Marsden Hospital as a strategic partner. Press statement 18 May 2012 by the parties. It is unclear what legal form this takes.

¹⁴ It would bring together Luton & Dunstable University Hospital NHS Foundation Trust, Bedford Hospital NHS Trust, Princess Alexandra Hospital NHS Trust and West Hertfordshire Hospital NHS Trust.

Level of competition (present and future)

21. The OFT considers the effect of the merger against the most competitive counterfactual, provided that situation is realistic.¹⁵
22. In general, there are two models of competition in healthcare services. First, there is competition for the market, where service providers compete for the right to provide services across a clinical commissioning group (**CCG**) or other locality, with prices agreed between the commissioner or NHS Foundation Trust or NHS Trust (together referred to as NHS acute trusts below), and the provider. Secondly, there is competition in the market, where decision-makers can choose between competing providers of the same service on an ongoing basis. The OFT understands that both models are present to some extent in the provision of pathology services to the NHS: competition can occur for the market where a customer (for example, a CCG or NHS acute trust or even a private provider) can tender to select a supplier to provide a service; and competition can occur in the market where the customer has selected more than one supplier to provide services and then chooses between those suppliers based on any number of factors such as price or quality.¹⁶
23. However, the OFT also understands that historically there has been limited, if any, competition for the supply of pathology services, either for the market or in the market. The parties provided a list of Official Journal of the European Union (**OJEU**) tenders, which suggested that only a small number of CCGs and trusts across the UK have tendered for pathology services (with 19 instances of competitive tendering since 2011).
24. This has been supported by third party responses from CCGs in this case, where they have historically tended by default to use the NHS acute trusts in their area for the provision of their services and only one indicated that it had conducted a tender. Third party responses suggested that in cases where CCGs have not tendered, they conduct only limited negotiations over price in line with inflation each year. NHS acute trusts themselves

¹⁵ Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 4.3.5.

¹⁶ Competition in the market can also take other forms. For example, with specialist pathology tests, the OFT understands that most of these are made on a 'spot' basis without an ongoing contract. Although there exists guidance on provider-to-provider pricing within the NHS, this is not binding. The parties therefore compete in this respect.

have historically self-supplied although some have recently tendered for their pathology services to be provided by third parties.

25. The OFT notes that the parties have never bid for tenders against each other, albeit each has bid for some of the contracts they hold. Further, UCLH already had an existing cost-sharing arrangement for pathology services with TDL. The shared laboratory covered most of UCLH's pathology needs with the exception of histopathology and cytology screening. UCLH and TDL also provide pathology services to a third party together.
26. In relation to competition in the market, the OFT notes that where there are two providers for a given CCG, one third party noted that it benchmarked and re-directed more pathology to the cheapest provider.¹⁷ Two of the parties overlap in providing pathology services to [], [], [], [], [] and [] CCGs in that they both have simultaneous contracts with the CCGs to provide services and within those contracts the CCG could, in principle, choose between them. The OFT also noted that specialist tests are purchased on a spot basis suggesting that there is competition in the market for the supply of specialist tests.
27. The extent of competition between the parties, as outlined above, is currently limited. This reflects an absence of significant competition at the present time in the supply of pathology services generally, albeit competition may be stronger for specialist tests.
28. Merger review involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The description of the counterfactual is affected by the extent to which events or circumstances are foreseeable, enabling the OFT to predict with some confidence. Future changes in market conditions are often addressed as part of the competitive assessment. The OFT therefore considers that it is appropriate to look at the loss of rivalry between the parties that would have developed and been foreseeable, absent the merger.¹⁸
29. In this context, the parties submitted that in future there is likely to be a significant increase in the use of competitive tendering by CCGs and that

¹⁷ The OFT understands that the CCG determines which pathology providers GPs will use and, as such, GPs do not currently exercise choice as to which provider they use.

¹⁸ Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 4.3.1. and 4.3.2.

some NHS acute trusts, which had previously been self-supplying, will find it more cost effective to tender their services to another provider. Third party evidence suggested that CCGs, where they had not previously tendered, would be increasingly likely to do so in the future (confirming the parties' submission of a general trend towards greater competition between providers for this work) and would consider doing so in response to a price rise from their current provider. A small minority of NHS acute trusts who responded to the OFT indicated that they would consider outsourcing their pathology services.

30. The parties submitted that absent the Transaction, the status quo is the most likely counterfactual in the short term, albeit the long term strategies of the parties are unclear. More specifically, they noted that absent the joint venture, in future, UCLH would []¹⁹ []; []. In the absence of an agreement between them, TDL would have []. RFL would []. However, RFL []. The OFT considers this suggests that RFL might have competed more strongly against UCLH and TDL in future.
31. The OFT recognises that there is limited, if any, competition between the parties currently. However, on a cautious basis the OFT has considered the extent to which such rivalry may be expected to emerge between the parties, given the changes taking place in the supply of pathology services, and that the merger will remove. In doing so, the OFT is also mindful, however, of the evidentiary standards that should apply to such a forward looking theory of harm. In this case, it has not been necessary to conclude on the exact conditions of competition that would have prevailed between the parties, absent the JV, since no competition concerns have been found even on the cautious basis of significant rivalry developing between the parties. The OFT has assessed the case using the counterfactual that absent the merger the parties would compete for pathology work for CCGs, NHS acute trusts, and for community service providers, as well as for the provision of specialist tests.

FRAME OF REFERENCE

32. The OFT considers that market definition is a useful tool, but not an end in itself. Market definition provides a framework for assessing the competitive effects of the merger and involves an element of judgement. The

¹⁹ This is supported by an internal [] document provided to the OFT [].

boundaries of the market do not determine the outcome of the analysis of the competitive effects of a merger in a mechanistic way, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.²⁰

33. Pathology is the medical specialty concerned with the study of the cause of disease and the ways in which diseases affect our bodies. It involves examining changes in the tissues and in blood and other body fluids to show the potential for disease to develop, to detect its presence, cause or severity, or to monitor its progress or the effects of treatment. The parties suggested that pathology tests can be broadly categorised as follows:
- blood sciences – the examination of blood and urine (including haematology, transfusion and biochemistry)
 - infection – the examination of disease, detection of viruses and problems of the immune system (including microbiology, virology and immunology), and
 - cellular pathology – the examination of tissues and organs (including hispathology and cytology).
34. The parties overlap in the provision of pathology services to NHS customers and in particular, GPs, community service providers and NHS acute trusts.
35. TDL also provides pathology services to private GPs and hospitals.²¹ However, neither UCLH nor RFL currently have pathology services contracts with private hospitals.²² They have further submitted that []. As such, given there is no material overlap and the OFT did not receive any third party private customer concerns, it does not consider the provision of pathology services to private providers further.²³

²⁰ Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 5.2.2.

²¹ This work will be undertaken by but not transferred to the JV and UCLH and RFL have a non-compete with TDL in respect of this private work.

²² However, UCLH does provide pathology services as part of a wider contract to two private hospitals as part of a cancer care and neurology work.

²³ The OFT did receive concerns from private competitors noting that the size of the JV will make it difficult for other providers to compete and that, in turn, would reduce choice for customers. However one of the respondents also noted there were other providers with similar strength. Whilst it was unclear whether the competitors compete for private work, the OFT is of the view that a number of other providers will remain post-merger and act as a constraint on the JV.

Product scope

36. The parties submitted that pathology services can be segmented into five categories, namely:

- routine cold (that is non urgent) tests to GPs (represented in commissioning decisions by CCGs)
- routine cold tests to community service providers (sometimes represented by CCGs and sometimes independent)
- routine cold tests to NHS acute trusts
- routine hot (that is, urgent tests requiring a turnaround time of less than two hours) tests to NHS acute trusts
- specialist cold tests to NHS acute trusts.²⁴

These distinctions are examined in more detail below.

37. The OFT's starting point in identifying an appropriate frame of reference is generally to consider whether narrow candidate markets can be widened through substitution on the demand-side. If appropriate, the OFT then considers if substitution on the supply-side allows several products that are not demand-side substitutes, to be aggregated into one wider market.²⁵

38. Pathology customers have little or no ability to substitute between alternative pathology tests, with the choice of test being clinically-led. The narrowest product scope, on the basis of demand-side factors, could therefore be individual tests, for a particular customer type, with a particular urgency.

39. The procurement of pathology services differs between NHS acute trusts, GPs and community service providers. The OFT has therefore considered each of these separately below.

GPs

40. CCGs procure pathology services on behalf of GPs in their area. The parties submitted that pathology services are not in general contracted for on a test by test basis. CCGs, which will generally require only routine cold

²⁴ The parties submitted that no speciality tests are hot and GPs and community service providers, due to the nature of their work, rarely commission hot or specialist tests. The OFT did not receive any evidence suggesting otherwise.

²⁵ Merger Assessment Guidelines, A Joint publication of the Competition Commission and Office of Fair Trading, OFT 1254, September 2010, paragraphs 5.2.6 to 5.2.19.

tests, have traditionally purchased a bundle of pathology services from a single provider. The parties expect this model of purchasing to continue, because of the benefits it provides, including:

- no requirement for GPs to separate out their requests and samples for collection by multiple providers
- no requirement to make separate requests for different tests on the same sample or for the same patient
- a more holistic overview of the patient's condition when tests across more than one discipline are carried out, and
- a single IT system for receiving results, and a single point of contact for queries.

41. The majority of third parties have confirmed that pathology tests for GPs are not urgent 'hot' tests and are routine. In addition, the OFT has not received any evidence to suggest that CCGs, on behalf of GPs, procure individual tests separately. As a result, the relevant product being demanded by CCGs could be considered to be a bundle of complementary routine tests. As such, the OFT has assessed the Transaction on the basis of routine cold test to GPs.

Community service providers

42. The parties submitted that, as with tests for GPs, community service providers generally procure bundles of pathology services, for similar reasons. The tests procured by or on behalf of community service providers (such as sexual health clinics) are likely to constitute the same tests as, or a subset of, those routine cold tests procured by CCGs on behalf of GPs.

43. The conditions of competition in the supply of pathology could therefore differ between GPs and community service providers, if certain providers chose to specialise in the smaller set of tests demanded by particular types of community service provider - although the OFT has not received any evidence to suggest that this is the case. In any event, such practice would lead to no narrower a set of potential providers, relative to those available to GPs requiring a larger variety of tests. On a cautious basis, the OFT therefore considers it appropriate to assess together the competitive effects of the Transaction on pathology for community service providers together with that for GPs.

NHS acute trusts

44. NHS acute trusts require the following types of pathology services: routine (hot and cold tests), and specialist cold tests.

Routine tests

45. The parties submitted that supply side substitutability of pathology equipment suggests the product scope is at least as wide as the three pathology disciplines (blood sciences, infection and cellular pathology) and that providers of pathology services tend to provide all three disciplines and the great majority of pathology tests, on the basis that most customers demand a bundle of tests.
46. While there is little or no demand-side substitution between tests and some NHS acute trusts may choose to procure certain disciplines of testing separately, third party responses confirmed that the majority of routine tests are provided by all pathology providers suggesting that they may be supply-side substitutes. The OFT's assessment takes into account constraints from providers that offer all routine tests. Given that no competition concerns arose, it is not necessary to conclude on whether the separate disciplines may constitute separate markets in which there are additional different constraints.
47. Unlike with GPs and community service providers, routine tests for NHS acute trusts can also be differentiated between hot tests and cold tests. Hot tests require a very short turnaround times (for example, to provide results during an operation) whereas cold routine tests for NHS acute trusts have a longer turnaround time.²⁶ The OFT has found that at present NHS acute trusts generally do not procure hot and cold tests separately, the OFT has therefore assessed them together. However, the OFT notes that the parties have indicated that this may differ in future, with the possibility of different providers for hot and cold routine tests. If this were the case, given that the set of competitors, and conditions of competition may vary between hot and cold routine tests for NHS acute trusts, they may in future be in a separate product scope.

²⁶ Turnaround times are considered in more detail later, within the section on geographic scope.

Self-supply

48. The majority of NHS acute trusts currently provide in-house pathology services to meet their routine requirements. The OFT therefore also considered whether the relevant product scope should include both in-house provision by NHS acute trusts, and outsourced provision (whether conducted on-site or elsewhere).²⁷
49. Although many NHS acute trusts currently self-supply, it is not clear the extent to which those that self-supply are likely to exert a constraint by bidding for contracts to supply other NHS acute trusts. Moreover, the OFT received comments from some third parties, suggesting that it would be difficult for NHS acute trusts that currently out-source to move their pathology back in-house. On a cautious basis, the OFT has not therefore considered self-supply as part of the relevant product scope, although within the competitive assessment it has taken into account the constraint that the option of retaining services in-house will exert on potential providers, when an NHS acute trust that currently self-supplies tenders its contract.
50. The OFT has therefore assessed the Transaction on the basis of routine hot and cold tests for NHS acute trusts.

Specialist tests

51. Although specialist tests may be included in headline contracts with pathology providers alongside routine tests, they are – by their very nature - frequently subcontracted to specialist providers, and in the main are paid for on a 'spot' basis. This suggests that the conditions of competition differ between routine and specialist tests. In addition, the OFT is aware of some specialist providers that do not intend to begin providing routine pathology tests.

²⁷ The OFT will generally follow the principle that self-supply 'will be included in the relevant market only if it can be demonstrated that it would be profitable for the supplier to forgo its use and sell into the merchant market in response to a SSNIP. The Authorities will also consider whether self-supply by potential customers of the merger firms should be included in the relevant market. The Authorities will generally include self-supply if the ability of customers to choose this option affects the profitability of a price rise by the hypothetical monopolist.' Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 5.2.20.

52. For specialist tests, as with other tests, there is little or no demand side substitution. The parties submitted that there is some supply-side substitution, with a great deal of substitutability of equipment between routine and specialist tests within each pathology discipline (blood sciences, infection and cellular pathology).
53. Bearing in mind the requirement that providers must have both the ability and incentive to shift resources between tests in order for them to be considered part of the same market on the basis of supply-side factors,²⁸ the OFT considers that the extent of such supply-side substitution is lower between specialist and other tests than between different routine tests. This is likely both because specialist tests require specialist staff and/or equipment, and because the low volumes of these tests carried out may provide insufficient incentive for new providers to quickly begin providing them in response to a price rise or lowering of quality.

Conclusion

54. It is not necessary for the OFT to come to a firm conclusion given that no competition concerns arise under any possible segmentation. Therefore, for the purposes of this assessment, the OFT considers the impact of the Transaction on the supply of:
- routine cold tests to GPs (represented in commissioning decisions by CCGs) and community service providers (commissioning independently or through CCGs)
 - routine hot and cold tests to NHS acute trusts, and
 - specialist cold tests to NHS acute trusts.

Geographic scope

55. The parties submitted that the geographic scope is driven by clinical turnaround times (how quickly results are needed), as well as the length of time for which samples can travel safely. They submitted that the geographic scope differs across routine cold tests, routine hot tests and specialist cold tests.
56. When prices are negotiated individually and suppliers can price discriminate on the basis of customer location, the geographic scope of the relevant

²⁸ Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 5.2.17.

market may be one aspect of the definition of any relevant customer market and the OFT may define separate markets on the basis of customer location.²⁹ These conditions are likely to be met in the case of tests supplied to GPs, community service providers and NHS acute trusts, and so the OFT has defined geographic markets on the basis of drive times from each customer's location, while noting that the conditions of competition are similar across the particular customers in question in this case.

Routine cold tests for GPs and community service providers

57. The parties submitted that the appropriate geographic scope for routine cold tests is a two-hour drive time from the customer. This is on the basis that clinical turnaround times are typically one working day or longer, and that once a test result is determined it can be transmitted almost instantly electronically or by phone. The parties also submitted that there are limits on the time that samples can be kept before they degrade, that these vary by discipline and test type (and by the temperature of storage), but that the shortest time limit is for potassium, PTH and insulin blood tests. For these, samples should be centrifuged within around two hours. The parties also noted that pathology providers have logistics in place to meet the requirements of their customers by, for example, collecting samples from GPs to coincide with the timing of their phlebotomy clinics, or collecting from hospitals multiple times a day, including on request.
58. They further submitted that it is possible to meet this requirement through a small laboratory within the two-hour drive time, for processing time-sensitive samples, along with a larger 'hub' laboratory further away (but within the one day turnaround catchment area). In addition, the parties submitted that providers without a current presence within the two-hour drive time can easily set up a laboratory after winning a local contract.
59. Third party evidence indicated that the key requirement is having a supplier able to meet the required turnaround times and the majority did not require a provider to be currently located within a particular drive time, as long as they could meet these or were willing to set up locally. Third party evidence supported that GPs generally require a 24-hour turnaround on their pathology tests, and that the resulting necessary proximity will

²⁹ Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 5.2.27.

depend on the logistics used. One provider noted that they intend to bid within 90 miles of their facilities.

60. Given no competition concerns arise under any possible segmentation, it has not been necessary to conclude on whether the geographic scope includes providers within two hours' drive time. Out of caution, the OFT has reviewed the transaction on the basis of a one-hour drive time of customers for routine cold tests for GPs and community service providers.³⁰ However, the OFT did consider what providers outside of the relevant catchment area could enter by setting up a laboratory within it.

Routine hot and cold tests for NHS acute trusts

61. The parties submitted that NHS acute trusts would generally expect hot tests to be carried out on their premises or very close by.³¹ The parties submitted that in practice, NHS acute trusts tendering this service would offer their existing equipment and space on their premises to external bidders, or would expect the bidder to set up a new, rapid response laboratory on its premises. The parties argued that the geographic market therefore encompasses any provider willing to bid to provide this service from the NHS acute trust's premises.
62. Third party evidence supported this, with some NHS acute trusts saying that facilities are needed on-site or very close by for urgent tests. Estimates of the maximum distance ranged from 15-20 minutes' drive time to 10 miles.³²
63. The OFT therefore considers that the providers available to NHS acute trusts, for the provision of their urgent pathology, will be limited to those who have existing facilities within a very short distance from the NHS acute trust, or those who are willing and able to set up nearby facilities or take over use of on-site facilities. These could include providers not

³⁰ This takes account of a small number of third party responses which indicated that the relevant drive time may be less than two hours.

³¹ For example, TDL's Whitfield Street laboratory is not on the UCLH site but is connected to it by a pneumatic tube system, while RFL carries out pathology for [].

³² NHS acute trusts noted that non-urgent tests could travel further, although estimates of how far ranged from roughly 45 minutes' drive, to 1.5 hours, to 'outside London'. NHS acute trusts also noted that samples could travel much further or even internationally for some tests, if stabilised properly. However, as noted above, hot and cold tests are generally procured together and therefore considered to be in the same product scope such that the geographic scope will be determined by the requirements of the hot tests.

currently active in London or in the UK. On a cautious basis the OFT has considered only those competitors for which there is evidence to suggest that they are likely to bid for NHS acute trust contracts in North West London (whether or not currently in London).

Specialist cold tests for NHS acute trusts

64. The parties submitted that specialist tests can travel quite extensive distances before processing is required and that the geographic scope for most specialist tests is at least national, if not global.
65. The parties provided the OFT with the information on where the specialist tests they outsource are sent. This showed that specialist tests can travel long distances (TDL outsources the majority of its test to other countries). However, the two NHS acute trusts (the main customer type for specialist tests), UCLH and RFL, send 80 per cent of their specialist send away tests to London or the south of England.
66. Third parties supported the parties' view that specialist tests can generally travel long distances. One provider noted that samples could be received overnight from anywhere in the UK, and that the majority of results can then be communicated the same day that the samples arrive.
67. The OFT is aware (as outlined in the discussion of tests for GPs) that for some tests, the stability of the sample may affect the distance it can travel. However, the OFT asked specialist pathology providers to comment on the distances that could be travelled by samples for the particular specialist tests in which the parties overlap. It received no evidence that in any case this factor limits the geographic scope to anything narrower than the UK.
68. The OFT notes that a number of London customers use London providers. However, one customer noted that these choices were driven by factors other than location, and while another customer noted a preference for using nearby providers they also indicated a willingness to look outside London in response to a price rise.
69. The OFT therefore considers that for those specialist tests in which the parties overlap, the geographic scope is no narrower than the UK.

Conclusion on frame of reference

70. For the purposes of this assessment, the OFT considers the impact of the Transaction on the supply of:

- routine cold tests to GPs and community service providers within a one- hour drive time of the parties' customers
- routine hot and cold tests to NHS acute trusts, on-site or nearby, and
- specialist cold tests to NHS acute trusts in the UK.

HORIZONTAL ISSUES

71. UCLH has three contracts with CCGs [] for GP direct access arrangements as well as for [a Foundation Trust] and two community contracts for [].

72. RFL has nine contracts with CCGs [] for GP direct access pathology services. RFL also has a contract to supply pathology services to [an NHS trust].

73. TDL has two pathology contracts with [] CCGs, which are part of contracts to provide testing for three NHS acute trusts. In addition TDL has contracts for community work with [].

74. UCLH and TDL also jointly provide pathology services to [an NHS Trust]. All three parties provide specialist tests to a number of customers.

75. The parties have not provided shares of supply in the relevant product and geographic scope. However, by way of context, an internal document suggested that London pathology (comprising hot, cold and specialist tests) services account for spending of around £[400-750] million.³³ As noted above, the total UK turnover attributed to the business contributed to the joint venture is £[] million.

Routine cold tests to GPs and community service providers

76. The parties submitted that there were 29 pathology laboratories within a two-hour drive time. They further noted that the JV will face strong competition from a large number of providers to supply routine cold test to GPs. These included GSTS Pathology LLP, Imperial College Health Partners,

³³ [].

South West London Consortium, Barts Health NHS Trust, Oxford Laboratory Medicine and Transforming Pathology Partnerships. They also noted that two providers which are not within the catchment area, IPP and Synlab, could enter and set up a laboratory within the relevant catchment area. Further, the parties noted that these providers had bid for contracts in the UK in the past. They also noted that there are a large number of current pathology providers within a one-hour catchment area.

77. On a cautious basis, the OFT has placed more importance on the constraints provided by those NHS acute trusts and other providers that have explicitly indicated their intention to bid for contracts in the relevant catchment area, have already done so or have been identified by third parties as capable of doing so.
78. The OFT received evidence from three third parties within the one-hour drive time³⁴ to suggest that they would compete against the JV for contracts with CCGs and community service providers, each of whom was considered a credible option by a number of CCGs who indicated they would be willing to source from them.³⁵ Third parties have also highlighted Imperial College Healthcare NHS Trust (**Imperial**) as a competitor within the relevant catchment area. Imperial currently provides pathology for several of the CCGs served by the parties.
79. Whilst Synlab and IPP are not within the catchment area, as noted above, the parties have suggested that they are actively bidding and []. They have previously bid for other CCG contracts in partnership with NHS providers in other parts of the UK.³⁶ However, the OFT notes that in the case of Synlab it has not yet bid successfully in the UK and was therefore not able to add much weight to the constraint it provides. Finally, one pathology provider to private healthcare organisations, based in London, indicated it intended to expand its provision of pathology services. However, the OFT did not place as great a weight on this given the provider does not yet serve NHS customers and the OFT is not aware that it has bid to do so.

³⁴ Since the GPs included in CCG contracts are spread across the boroughs in question, the OFT has proxied customer location by the location of the providers they currently used. This means checking that sufficient competitors remain within one hour both of the parties' locations, and the locations of other providers currently used by the parties' customers.

³⁵ These were [], GSTS Pathology LLP (providing services to other CCGs) and Barts Health NHS Trust (providing services to other CCGs).

³⁶ Abbott Diagnostics has also bid for CCG contracts with NHS providers but [].

80. The majority of third party CCGs did not raise competition concerns and identified a number of other providers, which would be able to meet their pathology needs. Most CCGs also use other providers in addition to the parties.
81. Overall third party responses suggested that TDL on the one hand and UCLH and RFL on the other are not currently close competitors. Of the third party CCGs and competitors who responded, the majority noted that TDL was a strong current competitor; views were mixed with respect to UCLH and RFL. However, the OFT notes that the parties' CCG customers are geographically close to one another (in North West London) and, in several cases, the parties serve the same CCG. The OFT understands that in cases where CCGs use more than one provider, it is because GPs in different geographies within the CCGs send their tests to different providers, but there may be greater competition in future both within and for the market.
82. Given the limited current competition between the parties and the fact that a sufficient number of competitors will continue to provide a strong competitive constraint in any event, the OFT is of the view that the Transaction will not give the JV the ability to increase price or worsen non-price aspects of the competitive offering (such as quality of results and turnaround times). The OFT therefore believes that the Transaction does not give rise to a realistic prospect of a SLC in the supply of routine cold pathology services to GPs or community service providers within a one-hour drive time of the parties to the JV or their customers.

Routine cold and hot tests to NHS acute trusts

83. As noted above, NHS acute trusts do not currently procure their cold and hot tests separately.³⁷ The OFT has therefore considered the narrowest set of possible providers, that is those that could provide hot tests, given providers need to be on site or very nearby. However, in so far as NHS acute trusts would be willing to split the procurement of routine hot and

³⁷ The OFT notes that one customer noted that NHS acute trusts have the option of outsourcing a specific type of pathology, for example, immunology and providing the rest in house. However, if there are sufficient providers for all tests, there would also be sufficient providers able to provide one specific discipline of pathology. The customer also noted that it would be cumbersome, ineffective and costly to manage multiple suppliers of particular tests.

cold services, they are likely to have a choice of providers for cold tests, similar to those available to GPs and community service providers.

84. The parties submitted that the same providers of pathology services described at paragraph 76 would continue to constrain the JV. They noted that NHS acute trusts' equipment and space on their premises would normally be made available to the successful provider for hot tests.
85. They further submitted that GSTS won contracts to provide pathology services to King's College Hospital NHS Foundation Trust and Bedford Hospital NHS Trust and bid to provide these services to North West London Hospitals NHS Trust. Similarly, IPP/Taunton, Somerset and Yeovil bid for a joint contract for the Royal Berkshire NHS Foundation Trust and Heatherwood and Wexham Park NHS Trust as well as for North West London Hospitals NHS Trust. The parties submitted that Barts Health NHS Trust (the existing provider) secured the provision of virology and cell pathology, to Homerton University Hospital NHS Foundation Trust.³⁸
86. The OFT is of the view that this data supports the view that NHS acute trusts, partnerships between NHS acute trusts and private providers and standalone private providers are bidding and being awarded contracts to supply pathology services to NHS acute trusts. The 15 instances, highlighted by the parties, of individual NHS acute trusts tendering their pathology services in the OJEU since 2011 suggest that the partnerships and providers are likely to vary across the UK, with NHS acute trusts likely to bid near their existing facilities and private providers willing to bid across a wider geography. Any loss of competition as a result of the JV is therefore likely to be greatest in (North West) London.
87. Third party responses suggested that at least four other providers will continue to constrain the JV post-merger. Further, NHS acute trusts which are or intend to be customers of parties to the JV or the JV did not raise significant concerns. Three noted that there were a number of providers that could meet their needs, including one that indicated that eight potential bidders had responded to their recent procurement exercise. Another noted that their shortlist included both NHS and private providers.

³⁸ The parties also submitted that University Hospitals of Leicester NHS Trust was awarded the contract to supply pathology services to Great Western Hospitals NHS Foundation Trust and the contract to supply Queen Victoria Hospital NHS Foundation Trust was awarded to Brighton and Sussex University Hospitals NHS Trust.

88. A few third parties noted that it may be difficult to return pathology in-house once it has been outsourced. However, a number of NHS acute trusts still provide in-house services and for these NHS acute trusts the option of retaining the services remains as a constraint on providers of pathology services wishing to supply services to them.
89. The parties currently provide routine hot and cold tests for NHS acute trusts.³⁹ The OFT received some limited comment to the effect that the potential competition from UCLH and RFL might be weaker in the provision of routine pathology tests to NHS acute trusts than to GPs and community service providers. This is supported by comments received from a number of NHS acute trusts about their own intentions, providing services from their sites rather than setting up or taking over other laboratories. Albeit, the OFT notes that some NHS acute trusts have bid to provide pathology services to other NHS acute trusts in London.
90. Therefore, given the limited current competition between the parties and, in any event, that a sufficient number of competitors will continue to provide a strong competitive constraint, the OFT is of the view that the Transaction will not give the JV the ability to increase price or worsen non-price aspects of the competitive offering (such as quality of results and turnaround times). The OFT therefore believes that the Transaction does not give rise to a realistic prospect of a SLC in the supply of routine pathology services to NHS acute trusts.

Specialist tests to NHS acute trusts

91. The parties submitted that two or more of them overlap with respect to 38 specialist tests. These tests represent less than [] per cent of total test volumes for RFL and TDL and little more than [] per cent for UCLH. They identified at least two or more other providers of each test and for 29 of these,⁴⁰ they identified at least three or more other UK providers.⁴¹ One

³⁹ TDL provides pathology services for [], [] and [] (together with UCLH). RFL provides these services to [].

⁴⁰ Where only two other providers were identified by the parties, for three of these tests, the parties are not close competitors as one of them (UCLH) is the more specialist provider. Further, for another test, a third party competitor [] not identified by the parties indicated that it could provide the test. With respect to the other five tests the parties' volume were less than [] tests a year for all but one, suggesting that the constraint from existing providers is likely to be sufficient to constrain the JV. Where the volume was high, the OFT received evidence to

third party competitor, [], confirmed that they could provide the tests where the parties had identified them as competitors, and another, [], confirmed this for all but two of the tests where the parties had highlighted them as competitors.⁴²

92. Third parties indicated that there were a number of providers they could turn to. Some customer responses suggested that in a small number of cases, two or more of the parties would be close alternatives. However, only one raised concerns about a reduction in competition and this customer indicated that a number of other providers are available for it to use.
93. More generally, third parties indicated that for some tests, the provider of a particular test is determined by which NHS acute trusts are research centres in the field in question and that such tests involve very low volumes, as supported by the parties' own data, and providers could be some distance away.
94. Therefore, the parties face a number of constraints from existing providers in all overlapping specialty tests. The OFT is therefore of the view that the Transaction will not give the JV the ability to increase price or worsen non-price aspects of the competitive offering (such as quality of results and turnaround times). The OFT therefore believes that the Transaction does not give rise to a realistic prospect of a SLC in the supply of specialist pathology services to NHS acute trusts in the UK.

suggest that other providers outside the market, that is in Europe, could offer a constraint. This was also true for another test.

⁴¹ These varied by type of test but included Central Manchester University Hospitals NHS Foundation Trust, HPA PHE Colindale, Liverpool School of Tropical Medicine, Transforming Pathology Partnerships (Ipswich Hospital NHS Trust), South West London Pathology, University Hospitals Birmingham NHS Foundation Trust, Leeds Teaching Hospitals NHS Trust, Newcastle Hospitals NHS Trust, Micropathology Limited, Synlab UK Limited, London School of Hygiene and Tropical Diseases, Imperial, GSTS Pathology LLP, East Kent Hospitals University NHS Foundation Trust, Great Ormond Street Hospital, Oxford Laboratory Medicine, Birmingham Heartland Hospital (part of Heart of England NHS Foundation Trust), Surrey Pathology Services, HPA Rare and Imported Pathogens Laboratory Porton Down, Homerton University Hospital NHS Foundation Trust, Barts Health NHS Trust, St John's Dermatology institute – King's College London, Luton and Dunstable University Hospital NHS Foundation Trust.

⁴² In both cases, this meant there were still at least two UK suppliers identified by the parties. In addition, in one case a supplier from outside the market, in Europe, could also offer a constraint. In the other, the number of tests was under [], the parties submitted entry would be easy and the OFT was able to identify other parties through the assay finder website (www.assayfinder.com/), which several third parties highlighted as their method of finding providers of specialist tests.

BARRIERS TO ENTRY AND EXPANSION

Routine cold tests for GPs and community service providers

95. The parties submitted that barriers to entry are low albeit equipment for the provision of pathology services is specialised and may be costly even if it is easy to access. They noted that any new entrant would need access to buildings (easy to come by), specialist equipment, pathologists, logistics (albeit own network not required) and management. The parties also noted that TDL is an example of a new entrant.
96. Among third parties, views were mixed on the ease with which a provider already supplying pathology could enter another geographic area. Two private providers argued that there were no significant barriers to them bidding for work in London. Several providers emphasised that for many test types it is possible to send them outside London, making it possible for a provider based elsewhere to supply pathology customers in London. However, some responses highlighted the difficulties involved in setting up pathology facilities or expanding into a new area. Considerations include investment in facilities, equipment (which could include significant investment) ability to meet turnaround times, resources, capacity, IT infrastructure, specialised logistics (transport), relevant staff. The OFT notes that an internal document [].⁴³
97. However, as the Transaction does not give rise to concerns over unilateral effects for the supply of routine cold pathology services to GPs or community service providers within a one-hour drive time of the parties' customers, there is no need for the OFT to reach a firm conclusion regarding barriers to entry and expansion.

Routine cold and hot tests to NHS acute trusts

98. As noted above at paragraph 95, the parties submitted that barriers to entry are low. Third party responses discussed above at paragraph 96 also apply to routine cold and hot tests to NHS acute trusts. The OFT also notes that in this instance, the parties submitted that an NHS acute trust tendering this service would offer their existing equipment and space on their premises to external bidders, or would expect the bidder to set up a new, rapid response laboratory on its premises.

⁴³ [].

99. However, as the Transaction does not give rise to concerns over unilateral effects for the supply of routine cold and hot pathology services to NHS acute trusts, there is no need for the OFT to reach a firm conclusion regarding barriers to entry and expansion.

Specialist tests to NHS acute trusts

100. The parties submitted that barriers to entry in a particular test may be caused by the need to acquire a particular type of equipment as well as expertise to perform the type of analysis. This may be influenced by the volume of tests. However, they noted that 15 tests where they overlap have low barriers to entry. The parties also provided examples of new tests that UCLH and RFL had started providing.⁴⁴

101. One third party competitor noted that in the areas of haematological malignancy diagnostics it would be very difficult to start carrying out a new test. However, another noted that it is easy to obtain equipment albeit the interpretation and validation of the laboratory practice to comply with Clinical Pathology Accreditation standards takes more time. In addition, several NHS acute trusts indicated that they regularly review the set of tests that they send away and decide whether to begin supplying in-house. Most indicated that if there is sufficient demand by volume, it is relatively simple to begin carrying out many new tests.

102. As such, there is evidence to suggest that for around half the specialist tests in which the parties overlap, the parties will be constrained by potential competition from providers that do not currently offer it, including current customers who may have incentives to switch to providing a test in-house.

103. However, as the Transaction does not give rise to concerns over unilateral effects for the supply of specialist cold pathology services to NHS acute trusts within the UK, there is no need for the OFT to reach a firm conclusion regarding barriers to entry and expansion.

⁴⁴ RFL is now providing MERS PCR for the new Coronarvirus in [] and UCLH developed Hepatitis D RNA/Hepatitis D RNA PCR and IL28b genotyping as a result of the increase in requests. []

BUYER POWER

Routine cold tests for GPs and community service providers

104. The parties submitted that when CCGs tender pathology services they will have buyer power since the contracts are reasonably large. Only one CCG noted that it felt it had negotiating power albeit the JV may reduce this. The parties also submitted that community service providers will have a strong position by virtue of the fact that the contracts they tender out are reasonably sizeable. Views from NHS acute trusts were mixed, with some noting that buyers have buyer power through negotiating strength and others that they could not prevent a price increase.

105. However, as the Transaction does not give rise to concerns over unilateral effects for the supply of routine cold pathology services to GPs or community service providers within a one-hour drive time of the parties' customers, there is no need for the OFT to reach a firm conclusion regarding countervailing buyer power.

Routine cold and hot tests to NHS acute trusts

106. The parties submitted that given the contracts put out to tender by NHS acute trusts are reasonably sizeable, this will strengthen the position of NHS acute trusts. As noted above at paragraph 104, views from NHS acute trusts were mixed.

107. However, as the Transaction does not give rise to concerns over unilateral effects for the supply of routine cold and hot pathology services to NHS acute trusts, there is no need for the OFT to reach a firm conclusion regarding countervailing buyer power.

Specialist tests to NHS acute trusts

108. The parties did not make any specific submissions in relation to countervailing buyer power by NHS acute trusts in relation to specialist tests.

109. However, as the Transaction does not give rise to concerns over unilateral effects for the supply of specialist cold pathology services to NHS acute trusts within the UK, there is no need for the OFT to reach a firm conclusion regarding countervailing buyer power.

THIRD PARTY VIEWS

110. Third party comments have been taken into consideration and discussed above where relevant.
111. None of the private healthcare providers that responded raised any competition concerns. The majority of CCGs did not raise any competition concerns. One CCG was concerned that it brought together four of its five closest providers, UCLH, RFL, North Middlesex and Barnet & Chase Farm. However, this CCG noted its willingness in principle to contract with any provider that could meet its requirements for turnaround time and quality. In any event, whilst the OFT has not relied on any constraint exercised by North Middlesex on the JV, the OFT understands that even though pathology tests will be outsourced by North Middlesex to the JV, North Middlesex has the ability to continue to compete independently for contracts to provide pathology services, and to set its own price. In addition, the parties submitted North Middlesex []. A minority of other CCGs were concerned that it would reduce local choice and resilience in case of problems at one provider's laboratory. As set out above, the OFT found that there would be sufficient alternative providers to offer a competitive constraint.
112. Of the NHS acute trusts that are current or planned customers of the JV, the majority did not raise any competition concerns. Only one expressed concern that the JV may reduce their negotiating power and that the process of forming the JV may have a detrimental impact on performance. However, they also indicated that there were other providers they could turn to.
113. Views from pathology providers were mixed. A couple who serve the private healthcare sector expressed concerns but these are dealt with above (see footnote 23). Some NHS providers noted that the JV, because of its economies of scale, could make it harder for smaller providers to bid for work and undertake research and development. However, the OFT understands that there will be other providers with similar scale to constrain the JV. One provider was concerned at the cost of switching. However, the OFT does not consider this to be merger specific and, as noted above, a number of respondents considered switching to be possible such that other providers will constrain the merged entity. Further, one noted that TDL's purchasing power as a non NHS organisation may give

them an unfair advantage. However, the OFT did not consider this to be merger specific.

114. Across customers and providers, a number of respondents either noted that existing TDL customers had experienced quality concerns (inaccurate or delayed results) or noted that the JV could offer worse quality, increase in price, weaken the link between pathology and other clinical priorities and harm career pathways and employment rights of pathologists (the OFT did not consider this to be a competition concern). However, as noted above, the OFT considers that there will be sufficient constraint from other providers such that customers could switch in the event of quality issues or increased prices. Some noted concerns around conflicts of interest given the relationship between senior NHS staff and TDL. However, the OFT did not consider this to be a competition concern affecting possible customers of the JV (rather than the parties themselves), since customers will continue to have a range of other providers to choose from.
115. One respondent to the invitation to comment raised concerns about commissioner/provider relationships within the JV (where they are the same), whether the arrangements favour one organisation over another (for example, in relation to required pension arrangements), whether State Aid applies, whether there was sufficient consultation and the ability to exit the JV. The OFT did not consider these to be concerns within the remit of its merger control review. However, the respondent also noted that the proposed JV limited competition, which is addressed above, and that the OFT should consider the competition impact on manufacturers of equipment. The OFT is of the view that given the small proportion the JV represents in the supply of pathology services in the UK and that the parties are not active in the manufacture of equipment, it will not give rise to a realistic prospect of a SLC in this respect.
116. Some third parties also noted that the merger could lead to positive effects noting that it could enhance the overall standard of pathology services in London and referring to the Review of NHS Pathology Services in England, chaired by Lord Carter.⁴⁵ One provider noted that the JV will increase competition with price benefits to customers.

⁴⁵ The Independent Review of NHS Pathology Services in England chaired by Lord Carter of Coles (first phase 2006 and second phase 2008).

ASSESSMENT

117. As a result of this Transaction, the pathology services of UCLH, RFL and TDL will cease to be distinct. The UK turnover of the businesses being contributed to the JV exceed £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.
118. The merging parties overlap in the supply of pathology services to NHS customers. Given there were no competition concerns under any possible segmentation, the OFT assessed the Transaction on the basis of:
- routine cold tests to GPs and community service providers within a one- hour drive time of the parties' customers
 - routine hot and cold tests to NHS acute trusts, on-site or nearby, and
 - specialist cold tests to NHS acute trusts in the UK.
119. The OFT found that the extent of competition between the parties is currently limited. This reflects the absence of significant competition in the supply of pathology services, albeit it may be stronger for specialist services. However, information from the parties and third parties suggested competition in pathology service is expected to increase. The OFT did not need to conclude on the exact conditions of competition that would have existed absent the JV as no competition concerns arose but, on a cautious basis, assessed the joint venture using the counterfactual that absent the merger the parties would compete to supply pathology services.
120. With respect to routine cold tests to GPs and community service providers, the OFT found that there are a sufficient number of competitors within a one-hour drive time of the parties' customers which will continue to provide a strong competitive constraint in any event such that the JV will not have the ability to increase price or worsen non-price aspects of the competitive offering (such as quality of results and turnaround times). The OFT came to the same conclusion in relation to routine cold and hot tests to NHS acute trusts.
121. Finally, with respect to specialist tests to NHS acute trusts, the OFT found that the parties face a number of constraints from existing providers in all overlapping specialty tests.

122. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

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