CMA
Competition & Markets Authority

Anticipated acquisition by Portman Healthcare (Group) Limited of Dentex Healthcare Group Limited

Decision on relevant merger situation and substantial lessening of competition

ME/7017/22

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 3 February 2023. Full text of the decision published on 2 March 2023.

Please note that [✂] indicates 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.

SUMMARY

1. The Competition and Markets Authority (**CMA**) has found that Portman Healthcare (Group) Limited (**Portman**)'s anticipated acquisition of Dentex Healthcare Group Limited (**Dentex**) (the **Merger**) gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) in the provision of private and NHS dental treatments in certain local areas, and in relation to competition between dental practices for NHS orthodontic contracts tendered in one regional area. Portman and Dentex are together referred to as the **Parties** or the **Merged Entity**.

2. Portman and Dentex are two of a relatively small number of large corporate dental groups active in the UK and are currently the fourth and fifth largest corporate groups in the UK (by number of practices). Portman currently operates 209 dental practices in the UK and Dentex currently operates 149 dental practices in the UK. Both Parties have grown in recent years, partly via acquisitions. They focus on providing private dental treatments, but both also provide NHS dental treatments to patients.

3. The CMA assessed the potential impact of the Merger on competition for patients of private and NHS dental treatments at the local and national level. Dental practices also compete to win contracts to provide NHS treatments, which are tendered by NHS Integrated Care Boards (**ICBs**) for the geographic area for which they have

commissioning responsibility. The CMA therefore also assessed the potential impact of the Merger on competition for such NHS contracts.

4. At the local level, the CMA considered the impact of the Merger on competition in the areas surrounding each of the Parties' dental practices (six miles for NHS dental treatments and eight miles for private dental treatments). The CMA considered that competition concerns would arise in any local area where the Parties overlap and would have a combined share of (i) 35% or more of NHS dental treatments, or (ii) 30% or more of sites offering private treatments, provided in each case the Merger gives rise to an increase in the Parties' combined share of at least 5%.

5. The CMA found that the Merger would not give rise to competition concerns in most local areas in which the Parties operate. The CMA did, however, find a realistic prospect of an SLC in relation to the provision of:

   (a) NHS orthodontic treatments in two local areas, being the areas within six miles of Portman's Truro Smile Clinic and Dentex's River Truro practice, in Truro (Cornwall); and

   (b) private dental treatments in seven local areas, being the areas within eight miles of:

      (i) Portman's Abbey Mead and Dentex's Harwood dental practices in Tavistock (Devon);

      (ii) Portman's Moor Dental and Dentex's Devon Dental Centre of Excellence dental practices, in Ashburton (Devon); and

      (iii) Dentex's Trimdon, Spennymoor and Bowburn dental practices, in the Durham/Spennymoor area.

6. The CMA is therefore concerned that service levels may be worse compared to what they would be without the Merger in the local areas listed above, and that prices for some private dental treatments may rise compared to what they would be without the Merger.

7. At the national level, the CMA did not find competition concerns. While the Parties are the fourth and fifth largest chains in the UK, the CMA examined their position among national, corporate dental groups and found that the Parties have a low combined share of supply. The Merged Entity would face competition from several large national corporate dental groups, some of which are considerably larger than the Merged Entity.

8. In relation to competition for NHS contracts, the CMA found that under their existing contracts the Parties would have a near monopoly in NHS contracts to supply orthodontic treatments within the geographic boundary of the NHS ICB for Cornwall

& Isles of Scilly. The CMA found that the Parties have faced limited competition from third parties in previous tenders for NHS orthodontic contracts in this area and were likely to face weak competition in future tenders. The CMA therefore considered that the Merger would give rise to a realistic prospect of an SLC in relation to competition for NHS orthodontic contracts within the Cornwall & Isles of Scilly ICB. The CMA is concerned that future bids for NHS orthodontic tenders in this ICB may offer a lower quality of service and/or fewer additional services than it would without the Merger.

9. The Parties accepted that the test for reference to an in-depth investigation was met in relation to the areas in which the CMA identified competition concerns. The Parties waived their right to certain procedural steps, including a case review meeting, and requested that the CMA proceed directly to a consideration of undertakings in lieu of a reference to an in-depth investigation (ie remedies). The CMA accepted this request.

10. The CMA is therefore considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (the **Act**). The Parties have indicated that they intend to propose remedies that might be acceptable to the CMA, and have until 10 February 2023 to do so. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

ASSESSMENT

PARTIES

11. Portman currently operates 209 dental practices in the UK and has an interest in acquiring a further [20-30] dental practices.[1] Portman is active across the UK (ie in all four UK nations) and also operates dental practices in the Republic of Ireland, Isle of Man, Norway, Belgium and France.[2] Portman is controlled by Core Equity Holdings (**CEH**), a European private investment firm.[3]

12. Portman's UK turnover for the financial year ended 30 September 2021 was approximately £200 million.[4]

13. Dentex currently operates 149 dental practices in the UK and has an interest in acquiring a further [20-30] practices (which are included in the transaction).[5] Dentex's practices are located mainly in England and Scotland, with two practices in Wales and no practices in Northern Ireland.[6] Dentex has a number of shareholders, the largest of which is Universal Partners Investments Bidco, which is a 100% subsidiary of Universal Partners Limited (**UP**), a private equity business that made an initial investment in Dentex in April 2017.[7]

14. Dentex's UK turnover for the financial year ended 31 March 2022 was approximately £125 million.[8]

15. Both Parties provide a range of private and NHS dental services to patients. NHS dental services include general dental, orthodontic, and a small number of minor oral surgery (**MOS**) treatments. Private dental services include general dental treatments and a broad range of specialist treatments. Both Parties are primarily

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[1] Final Merger Notice submitted by the Parties to the CMA on 15 December 2022 (**FMN**), paragraph 7. For the purposes of the CMA's assessment, a Party is considered to have an interest in acquiring a site if it has reached the stage of signing Heads of Terms for the acquisition of that site (such sites being referred to as **HoT sites**). The CMA included these sites in its competitive assessment for the purposes of identifying overlaps between the Parties. See FMN, paragraph 8.
[2] FMN, paragraphs 6 and 30.
[3] FMN, paragraph 34.
[4] FMN paragraph 59.
[5] FMN, paragraph 7.
[6] FMN, paragraph 6. The Parties have very limited presence in Wales, with an immaterial increment, and the distances between the Parties' sites significantly exceed the catchment areas used in the CMA's local competitive assessment (see paragraph 95 below). In relation to competition for the award of NHS contracts in Wales, the Parties do not overlap as neither hold NHS contracts of the same type in Wales. See FMN, paragraphs 79 and 80. With respect to Northern Ireland, the Merger does not give rise to an increment as Dentex is not active there at all. This Decision therefore does not consider the Parties' practices in Wales or Northern Ireland any further.
[7] FMN, paragraph 43.
[8] FMN, paragraph 58.

focussed on private dentistry, with 21% of Portman's revenue and [10-20] % of Dentex's revenue derived from NHS services.[9]

TRANSACTION

16. On 23 August 2022, Portman entered into a share purchase agreement with Universal Partners Investments Bidco, minority investors, management sellers and a nominee for certain employees who hold shares in Dentex (together **Sellers**), pursuant to which Portman will, upon completion, acquire the entire issued share capital of, and sole control over, Dentex.[10]

17. The Parties submitted that the Sellers had always [✂].[11] The Parties further submitted that, given the growth plans of Dentex, the business requires additional equity capital to fund its business plan, and that a sale would introduce a new shareholder that can support this future growth, as well as creating liquidity for Dentex's existing shareholders.[12]

18. The Parties submitted that the Merger rationale for Portman and CEH is to expand Portman's dental practice network, given that there is significant scope for consolidation in dental services, and to provide enhanced investment in service provision to Dentex's patients, clinicians and other employees.[13]

PROCEDURE

19. The CMA gave notice of commencement of its Phase 1 investigation on 16 December 2022, with the first day of its investigation being 19 December 2022.

20. During the State of Play call, the CMA confirmed to the Parties that it intended to consider the Merger at a Case Review Meeting due to concerns regarding the impact of the Merger on competition for the provision of NHS orthodontic treatments and various private dental treatments in certain local areas, and in competition between dental practices for contracts to provide NHS orthodontic treatments in the Cornwall & Isles of Scilly ICB area.[14]

21. Subsequently, on 13 January 2023, the Parties notified the CMA that they accepted that the test for reference under section 33(1) of the Act is met on the basis that the

[9] FMN, paragraph 76.
[10] FMN, paragraph 39.
[11] The Parties submitted that [✂]. See FMN, paragraph 43 and footnote 24.
[12] FMN, paragraph 44.
[13] FMN, paragraph 50.
[14] CMA guidance documents: Mergers: Guidance on the CMA's Jurisdiction and Procedure (**CMA2**), January 2022, paragraphs 9.29 to 9.41.

Merger raises a realistic prospect of an SLC arising from horizontal unilateral effects in relation to:

(a) The provision of NHS orthodontic treatments in local areas defined as the areas within six miles of Portman's Truro Smile Clinic and Dentex's River Truro practice, located in Truro (Cornwall); and

(b) The provision of private dental treatments in local areas defined as the areas within eight miles of:

(i) Portman's Abbey Mead and Dentex's Harwood sites, located in Tavistock (Devon);

(ii) Dentex's Trimdon, Spennymoor and Bowburn sites, located in the Durham/Spennymoor area (Durham); and

(iii) Portman's Moor Dental and Dentex's Devon Dental Centre of Excellence sites, located in Ashburton (Devon); and

(c) The competition between dental practices for contracts to provide NHS orthodontic treatment within the geographic boundary of the Cornwall & Isles of Scilly ICB.

22. As set out in the CMA's guidance, merger parties can waive their rights in relation to certain procedural steps within a merger investigation in order to enable a binding outcome to be arrived at more quickly.[15] The Parties requested that the case proceed directly to the consideration of undertakings in lieu of a reference to an in-depth investigation (**UILs**). As part of the request, the Parties agreed to waive their procedural rights to challenge the position that the test for a reference is met during a Phase 1 investigation, including their rights to receive and respond to an issues letter setting out the case for reference and attend an issues meeting.

23. In keeping with the process set out in its guidance, the CMA has had regard to its administrative resources and the efficient conduct of the case and decided that it was appropriate to proceed to consideration of UILs.

JURISDICTION

24. A relevant merger situation exists where two or more enterprises have ceased to be distinct and either the turnover or the share of supply test is met.[16]

[15] CMA guidance documents: Mergers: Guidance on the CMA's Jurisdiction and Procedure (**CMA2**), January 2022, paragraphs 7.8 to 7.13.
[16] CMA guidance documents: Mergers: Guidance on the CMA's Jurisdiction and Procedure (**CMA2**), chapter 4; Section 23 of the Act.

25. Each of Portman and Dentex is an enterprise within the meaning of section 129 of the Act. As a result of the Merger, Portman will acquire the entire issued share capital of Dentex. Accordingly, Portman and Dentex will cease to be distinct for the purposes of sections 23(1)(a) and 26 of the Act.

26. The UK turnover of Dentex exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.

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

28. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 19 December 2022 and the statutory 40 working day deadline for a decision is on 15 February 2023.

COUNTERFACTUAL

29. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers, the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.[17]

30. In this case, the CMA has not received any evidence supporting a different counterfactual and the Parties have not put forward arguments in this respect. Therefore, the CMA has considered the Merger against a counterfactual of the prevailing conditions of competition.

BACKGROUND

Types of dental treatment

31. Dental treatments are broadly categorised into general dental treatments and specialist dental treatments. General dental treatments cover a range of work that aims to protect and maintain oral health, such as routine consultations, teeth cleaning, fillings, and tooth extractions. Specialist dental treatments cater to specific

[17] CMA guidance documents: Mergers: Merger Assessment Guidelines (CMA 129), from paragraph 3.12.

patient needs and include orthodontics, MOS, endodontics, restorative dentistry, prosthodontics, periodontics, and implants.[18]

32. In the UK, patients can obtain dental treatments either privately or (fully or partially) funded by the NHS. However, only certain types of treatments are funded by the NHS: general dental treatments, orthodontics, [19] and MOS.

NHS-funded treatment: competition for the award of NHS contracts

33. In England and Wales, a dental practice must hold an NHS contract in order to provide NHS-funded treatment to patients. NHS commissioning entities tender these contracts, and dental practice operators bid for them.[20] Competition for NHS contracts may be referred to as 'competition for the market'.[21]

34. In England and Wales, NHS contracts specify the number of NHS-funded treatments that a practice must aim to administer and the remuneration that the NHS will pay the practice for those treatments. These specified treatments are referred to as 'units of dental activity' (**UDA**s) for general treatment and, in the case of orthodontic treatment, 'units of orthodontic activity' (**UOA**s). On rare occasions (typically when there is insufficient capacity in NHS hospitals), the NHS will also rely upon contracts with dental practices for the performance of MOS.[22] NHS contracts also specify other aspects of the overall offer to patients including the practice(s) from which the dental services are to be delivered and minimum opening hours.

35. General dental services contracts are awarded in perpetuity, whereas 'specialist' treatment contracts are awarded for a fixed term before being retendered. For example, tenders for orthodontic treatments have recently been for an initial seven-year period, with the possibility of an extension for three years.[23]

Independent practices, corporate groups and the trend of growth by acquisition

36. Providers of dental treatment include independent practices and corporate groups.

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[18] FMN, paragraph 3.
[19] FMN, paragraph 2.
[20] The system in Scotland is different. In Scotland, individual clinicians enter arrangements with the NHS whereby they obtain NHS list numbers. There are no restrictions on how many patients can be added to a dentist's list as long as that dentist can manage the list, and there are no minimum/maximum requirements for the services that can be provided. As such, the CMA found that there is no competition for the market to provide UDAs and UOAs in Scotland. The Parties do not have MOS contracts in Scotland and as such submitted they did not have insight into the tender process for such contracts in Scotland. See FMN, paragraphs 93-95. This Decision therefore does not consider competition for the market in Scotland any further.
[21] For example, the CMA's decisions in the investigation of the completed acquisition by Riveria Bidco Limited of Dental Partners Group Limited, 23 August 2022 (***Riviera/Dental Partners***) and the investigation of the completed acquisition by Oasis Dental Care (Central) Limited of JDH Holdings Limited, 28 July 2014 (***Oasis/Smiles***). By contrast, competition in the market takes place at a local level between dental practices.
[22] FMN, paragraph 93.
[23] FMN, paragraph 93.

37. Independent practices are typically run by a single individual or a small group of individuals. They are typically individual practices, although sometimes may form part of a small group of practices located in the same local area or region.

38. Corporate groups, on the other hand, operate a considerable number of dental practices in various locations in different regions in the UK, and are typically owned by large corporations or private equity firms.[24] Combined, the Parties would be the third largest corporate dental group in the UK.[25] Both Parties have strategies to grow by acquisition.[26]

FRAME OF REFERENCE

39. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, 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. The CMA will take these factors into account in its competitive assessment.[27]

40. The Parties overlap in the supply of NHS and private general and specialist dental treatments in the UK, and in competition for the market to provide NHS dental services.

Product scope

Competition for the award of NHS contracts

41. In line with the Parties' submissions and the CMA's approach in recent decisions, the CMA has considered the Merger in relation to competition for the award of contracts to supply general dental and orthodontic treatments to NHS patients.[28] The CMA has also considered the Merger in relation to competition for the award of contracts to supply MOS treatments.

[24] For example, Palamon Capital Partners is an investor in MyDentist, currently the largest corporate group of dental practices in the UK (by number of practices), and both of the Parties are owned by private equity investors.
[25] Bupa and MyDentist remain larger than the Parties with approximately 448 and 560 practices respectively.
[26] For example, Acquirer Internal Document, Annex 023 to the FMN, 'Project Sabre, Commercial Vendor Due Diligence', of April 2022, pages 157-160 and Acquirer Internal Document, Annex 016 to the FMN, 'Core Equity Holdings First Round Bid IC document – 31 May 2022', pages 4 and 16. The Parties' ongoing acquisition strategy is also reflected in their HoT site numbers.
[27] CMA guidance documents: Mergers: Merger Assessment Guidelines (CMA 129), paragraph 9.4.
[28] FMN, paragraph 197, and Parties response to question 5 of the CMA's 4th request for information, dated 19 December 2022. *Riveria/Dental Partners*, paragraphs 42 to 44 and *Oasis/Smiles*, paragraph 42 each considered general dental and orthodontic treatments, but not MOS.

Provision of dental treatments to patients

Patient type – NHS and private patients

42. The Parties initially submitted that it can be left open whether there is a distinction between NHS and private patients as no competition concerns arise even if NHS patients and private patients were considered separately.[29]

43. The evidence received by the CMA in the course of its merger investigation suggested that distinguishing between patients receiving NHS and private treatment, consistent with the CMA's decisions in *Riviera/Dental Partners* and *Oasis/Smiles*, remains appropriate in light of both demand and supply side factors.[30]

44. Accordingly, the CMA has considered the impact of the Merger in relation to the provision of NHS dental treatments and private dental treatments separately.

Treatment type

45. The Parties submitted that there is often no clear distinction between general and specialist treatments, as well as between different types of specialist treatments.[31]

46. Consistent with the observations made in its investigations of the completed acquisition by Bupa Finance Plc of The Oasis Healthcare Group Limited in 2017 (***Bupa/Oasis***) and *Riviera/Dental Partners*, in which the CMA assessed the impact of the merger in relation to general dental treatments separately from specialist dental treatments, and separately in relation to each type of specialist dental treatment,[32] and based on the evidence available to it, the CMA does not consider that there is substitutability between different types of dental treatment.

47. In particular, different dental issues require different dental treatments, and therefore demand side substitution is limited. In relation to supply side substitution, some specialist treatments must be carried out by dentists with specialist training. Further, the CMA notes that most of the Parties' practices and many competitor practices only offer a limited range of specialist services, indicating that supply side substitutability may be limited.

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[29] FMN, paragraph 156.
[30] See *Riviera/Dental Partners*, paragraphs 47-53 for a discussion of such demand and supply factors. See also *Oasis/Smiles*, paragraph 42. In particular, due to the higher price of private dental services, patients have limited willingness and ability to switch from NHS to private treatments, and due to the limited availability of NHS treatments, private patients have limited ability to switch from private to NHS treatments. On the supply side, only practices with a contract to do so can perform NHS treatments.
[31] FMN, paragraph 157. The Parties submitted that specialist treatments provided to NHS patients are typically limited to orthodontics. FMN, paragraph 163.
[32] *Bupa/Oasis*, paragraph 40; *Riviera/Dental Partners*, paragraph 60.

48. Notwithstanding the above, in light of the Parties' submissions in this case, the CMA considered whether cosmetics and sedation should each be considered as separate frames of reference:[33]

(a) In relation to cosmetics, the CMA found that customers demand cosmetic treatments for specific reasons (either aesthetic or psychological) for which other treatments are not substitutes. Further, the CMA found evidence, including from the Parties' internal documents and the way in which they and others generally market the treatment, that suppliers view cosmetics as a separate treatment category.[34] As such, the CMA considered cosmetics as a separate frame of reference.[35]

(b) In relation to sedation, the CMA found that there is no standalone customer demand for sedation. Instead, sedation is provided in conjunction with various other treatment types only in particular circumstances and is more appropriately considered a support service that most general practices are able to offer.[36] As such, the CMA did not consider sedation as a separate frame of reference.

Independent practices and corporate groups

49. The CMA considered whether it would be appropriate to assess the impact of the Merger according to a separate product frame of reference for the provision of dental services by corporate groups.

50. As set out in paragraphs 36-38 and 120-121, there are some differences between independent practices and corporate groups. While such differences are relevant to an assessment of closeness of competition, the CMA has found that the lack of brand awareness by consumers means that a separate product frame of reference for corporate groups is not appropriate at a local level. The CMA considers that it can be left open as to whether corporate and independent practices should comprise separate product frames of reference at the national level since it has found no competition concerns at that level on either basis.

[33] The Parties submitted that cosmetics consists of treatments already captured under various other existing treatment categories, that every general dental practice could offer treatments that could be considered cosmetic, and that true cosmetic treatments only account for an extremely small percentage of treatments delivered by dentists (see FMN, paragraphs 134 and 141).
[34] Examples include advertising by Portman's 14 sites branded as 'Portman Smile Clinics', as well as various other sites owned by both Parties. Internal documents include Target Internal Document, Annex 023 to the FMN, 'Project Sabre Commercial Vendor Due Diligence – April 2022', Target Internal Document, Annex 025 to the FMN, 'Project Sabre Dentex Management Presentation – June 2022' and Acquirer Internal Document, Annex 041 to the FMN, 'Portman dental care Customer and competitor understanding Debrief Qualitative research'.
[35] Cosmetics was also recognised by the CMA in *Riviera/Dental Partners* as a separate category of specialist treatment.
[36] The Parties also submitted that there is no specific type of dental practitioner that provides sedation services (see FMN paragraphs 129-132).

Conclusion on product scope

51. Accordingly, the CMA has assessed the Merger with respect to the following product frames of reference for the provision of dental treatments to patients:

    (a) The provision of each of NHS general dental treatments, NHS orthodontic services, and NHS MOS; and

    (b) The provision of private general dental treatments and specialist dental treatments in each of the following areas: orthodontics, MOS, prosthodontics, periodontics, endodontics, restorative, implants, and cosmetics.

Geographic scope

Competition for the award of NHS contracts

52. The Parties submitted that the relevant geographic market in relation to competition for contracts to provide NHS dental treatments was the geographic boundary of the relevant NHS commissioning entity, which the Parties submitted to be seven NHS England regional bodies.[37]

53. Although the CMA agrees that competition for contracts to provide NHS dental treatments should be assessed for each NHS commissioning entity, the CMA understands that by 1 April 2023 dental commissioning responsibility will have been transferred from the seven NHS England regional bodies to 42 ICBs. [38] ICBs have considerably smaller geographic boundaries than the NHS England regional bodies. In some cases, ICBs have already taken over dental commissioning responsibility.[39] Since merger assessments are prospective, the CMA has therefore considered the impact of the Merger on competition for NHS dentistry contracts within the geographic areas corresponding to the boundary of ICBs.[40] In its competitive assessment, the CMA has considered any constraint imposed by bidders located outside that geographic area but who could nevertheless bid for relevant contracts.[41]

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[37] FMN, paragraphs 146-149. The seven regional bodies are NHS East of England, NHS London, NHS Midlands, NHS North East & Yorkshire, NHS North West, NHS South East, and NHS South West.
[38] ICBs were established by the Integrated Care Boards (Establishment) Order 2022, which came into effect from 1 July 2022. See NHS England, The Integrated Care Boards (Establishment) Order 2022.
[39] Note of a call with NHS of 21 November 2022.
[40] CMA guidance documents: Mergers: Merger Assessment Guidelines (CMA 129), paragraph 2.7. The CMA found that NHS commissioners tender contracts for dental activity in contract lots, which are designed to meet needs identified by oral health needs assessments, which are carried out for each local authority area (smaller than the boundary of ICBs), and sometimes for even smaller geographic areas. The CMA found that bidders often bid for multiple lots within an ICB. See, for example, Note of a call with NHS of 02 December 2022.
[41] FMN, paragraphs 150-152, citing *Oasis/Total*, paragraph 52. See also third party response to CMA questionnaire, dated 31 October 2022. In line with the CMA's conclusion in previous decisions, the CMA found that bidders not located within the boundary of the relevant commissioning entity should be taken into

Provision of dental treatments to patients

Local competition

54. The Parties submitted that the impact of the Merger may be analysed on the basis of 80% customer catchment areas around the Parties' sites.[42]

55. The CMA considers that competition between individual dental practice sites occurs on a local basis and that on the demand side, location is one of the key factors for many patients in choosing which dental practice to attend.[43]

56. In the assessment of mergers in local geographic markets, the CMA's practice has typically been to identify the catchment area within which the majority of the customers of each of the merging Parties' sites are located, with the majority usually being defined as 80% of customers.[44]

57. For these reasons, the CMA considers that an appropriate starting point for the geographic frame of reference is a catchment area in which 80% of customers are located.

National competition

58. Both Parties operate groups of dental practices in the UK. The Parties submitted that competition does not take place at the national level.[45]

59. The CMA has seen evidence in the Parties' internal documents to suggest that there is a national dimension to competition. In particular, both Parties benchmark themselves against other dental groups with wide presence, rather than against practices with a local focus, both Parties' growth strategies appear to be set on a national basis, and there is some key commercial decision-making at group level.[46]

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account in its competitive assessment on the basis that such providers can still credibly bid for contracts. During 2018-2022, Portman successfully bid for 12 NHS contracts in England in areas specified by a tender where it did not operate beforehand.

[42] FMN, paragraphs 173-174.

[43] See FMN, paragraphs 21 and 108, Target Internal Document, Annex 023 to the FMN, 'Project Sabre, Commercial vendor Due Diligence', of April 2022, page 8, and *Riviera/Dental Partners*, paragraph 65.

[44] See, for example, *Riviera/Dental Partners* and *Oasis/Smiles*.

[45] FMN, paragraph 78.

[46] For example, Acquirer Internal Document, Annex 030 to the FMN, 'Portman Dental Care Pricing Project – Customer and Competitor Summary', pages 28-32 and Acquirer Internal Document, Annex 035 to the FMN, 'Portman Dental Care Strategic Plan YR 21 – Board Discussion – 31 March 2021', page 30 benchmark treatment pricing against corporate competitors. See also FMN, paragraphs 114-125. Both Parties note that some strategic decision-making is taken at practice level, sometimes on the basis of group-level guidance or recommendations.

60. The CMA has, therefore, also considered competition for the provision of dental treatments to patients at a national level.[47]

COMPETITIVE ASSESSMENT

61. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.[48] Horizontal unilateral effects are more likely when merging parties are close competitors. The CMA assessed whether it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the following frames of reference:[49]

   (a) Competition for the award of NHS general dental, orthodontic and MOS contracts separately within the geographic area corresponding to the boundary of ICBs;

   (b) The provision of NHS and private general dental treatments, and different types of NHS and private specialist dental treatments separately in local areas; and

   (c) The provision of NHS and private general and specialist dental treatments nationally.

Competition for the award of NHS dental contracts

62. Dental practices compete for contracts that allow them to provide NHS dental treatments to patients. Contracts to provide general dentistry services are awarded in perpetuity, whereas contracts to provide orthodontic services are awarded for a fixed term before being retendered.[50] The CMA considered whether the Merger might lead to a reduction in the number of bidders and/or quality of bids for dental contracts tendered by the relevant NHS commissioning entities.

NHS orthodontic contracts

63. The CMA heard that there are various ways in which the Merged Entity could in principle degrade the quality of its bid in future tender process if it faced weaker competition post-Merger, including through:

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[47] The CMA has left open whether, at a national level, separate product frames of reference exist for each speciality and for NHS and private work as the CMA does not consider that its findings in relation to competition at a national level would change regardless of how the product frame of reference is defined.
[48] CMA guidance documents: Mergers: Merger Assessment Guidelines (CMA 129), paragraph 4.1.
[49] The assessment of these theories of harm has been carried out on the basis of the Parties' sites in the UK, including both those already owned and HoT sites.
[50] See paragraph 35.

(a) Proposing to provide treatments through less qualified clinicians (eg, therapists rather than dentists);[51]

(b) Reducing the number of clinical staff proposed to be employed at the practice (increasing patient waiting times);[52] and

(c) Reducing or eliminating the offer of additional care on top of the contracted UOAs, which often forms part of high-quality bids (eg, the provision of free oral health care to children).[53]

64. The CMA also heard that, in general, tenders for NHS contracts for UOAs tend to be attractive to bidders since such contracts are lucrative.[54]

Parties' submissions

65. The Parties initially submitted that the Merger does not give rise to any concerns in relation to competition for NHS contracts for UOAs because NHS orthodontics form a limited part of the Parties' activities, and any practice within the geographic area specified by the NHS tender could choose to submit a bid at relatively low expense such that the Merger will not materially affect the number of credible bidders in any particular area.[55] Additionally, the Parties submitted that market shares are not an important indicator of the strength of competition in this market.[56]

CMA assessment

66. In order to assess the effect of the Merger on competition for NHS orthodontic contracts and the effect on the number of credible bidders in ICB areas, the CMA has examined (where data are available) previous bidding for these contracts. As highlighted in the CMA's assessment below, historical bidding data was not available in all instances. The CMA therefore also considered the Parties' current shares of overall UOAs in each ICB area given that shares of supply reflect bidding activity and the strength of bidding in the previous tender (to some degree). The CMA next considered evidence from third parties who said that they intend to bid in future tenders in particular ICB areas where the Parties were strong bidders in the previous tender (as indicated by high shares of supply), and the views of the NHS commissioners with responsibility for the relevant areas.

67. The CMA did not find the Parties' submission that NHS orthodontics forms a limited part of the Parties' activities to be relevant. The CMA focused its assessment on

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[51] Note of a call with NHS of 09 December 2022, paragraph 15.
[52] Note of a call with NHS of 09 December 2022, paragraph 15.
[53] Other examples include running oral health information sessions in the community, the offer of orthodontic appointments outside of school hours, and the offer of treatment options like colourful braces. Note of a call with NHS of 09 December 2022, paragraph 22.
[54] Note of a call with NHS of 09 December 2022, paragraph 10.
[55] FMN, paragraph 202.
[56] FMN, paragraph 203.

those ICBs in which the Parties' combined shares of UOAs are the highest (both with and without an increment), as set out in Table 1 below.[57]

Table 1: Parties' combined shares of supply of UOAs

ICB	*Parties' combined share of UOAs (%)*	*Increment (%)*
ICBs in which the Parties have overlapping activities		
Cornwall & Isles of Scilly	[90-100]	[20-30]
Hampshire & Isle of Wight	[40-50]	[10-20]
Surrey Heartlands	[30-40]	[10-20]
North East & North Cumbria	[30-40]	[10-20]
ICBs in which the Parties do not have overlapping activities		
Bristol, North Somerset & South Gloucestershire	[40-50]	-
Devon	[40-50]	-
Sussex	[40-50]	-
Kent & Medway	[30-40]	-

Source: Annex 081 to the FMN.

Devon; Sussex; and Kent & Medway ICBs

68. The Parties do not have overlapping activities in respect of NHS orthodontics in the Devon, Sussex and Kent & Medway ICBs. Historical bidding data for the contracts won by either one of the Parties in each of the Devon, Sussex and Kent & Medway ICBs (which account for the minority of UOAs in each of these areas) showed that the other Party did not compete in those tenders. Across those contracts won by the Parties, there were other third-party bidder(s) in each ICB,[58] in addition to those bidding on contracts ultimately won by third parties, which account for the majority of UOAs in each of these areas.[59] The NHS commissioners with responsibility for each of Devon, Sussex, Kent & Medway ICBs did not express concerns about the impact of the Merger on competition for NHS UOA contracts in these ICB areas.[60]

69. The CMA therefore does not believe that the Merger gives rise to a realistic prospect of an SLC in relation to competition for the award of NHS UOA contracts in the Devon, Sussex and Kent & Medway ICB areas.

[57] This includes ICBs without an increment in the Parties' shares. The CMA examined historical bidding data in these areas given the possibility that one Party has previously bid against the other and therefore provided a competitive constraint, whether or not they ultimately won a contract for UOAs in that ICB.
[58] Due to acquisitions by third parties in the meantime, the competing bidders in the tenders won by the Parties is now equivalent to eight in Kent & Medway, six in Sussex and one in Devon.
[59] Historical bidding data was provided by the NHS. See also Notes of calls with NHS of 09 December 2022 and 29 November 2022.
[60] Notes of calls with NHS of 09 December 2022 and 29 November 2022.

Bristol, North Somerset & South Gloucestershire ICB

70. No historical bidding data was available to the CMA in respect of the Bristol, North Somerset & South Gloucestershire ICB. [61] However, the CMA notes that Portman does not hold contracts to deliver UOAs in this area, such that the Parties do not have overlapping activities in respect of NHS orthodontics in this ICB. Further, third-party practices can and do bid for UOA contracts in this area (and together account for the majority of UOAs in this ICB area). Additionally, Portman only has a minimal presence in the area corresponding to Dentex's contract lot.[62]

71. The NHS commissioners with responsibility for Bristol, North Somerset & South Gloucestershire ICB did not express concerns about the impact of the Merger on competition for NHS UOA contracts in these ICB areas.[63]

72. In light of these factors, the CMA does not consider that the Merger gives rise to a realistic prospect of an SLC in relation to competition for the award of NHS UOA contracts in the Bristol, North Somerset & South Gloucestershire ICB area.

Hampshire & Isle of Wight and Surrey Heartlands ICBs

73. The Parties have overlapping activities in respect of NHS orthodontics in the Hampshire & Isle of Wight and Surrey Heartlands ICBs. Historical bidding data for the contracts won by the Parties (which account for the minority of UOAs in each of these areas) showed that the Parties did not bid against each other in tenders in Surrey Heartlands, but did bid against each other in two of those tenders in Hampshire & Isle of Wight. Taking account of acquisitions that have occurred since the time of those tenders, there are currently six independent or corporate dentists that participated in tenders won by one of the Parties in Hampshire & Isle of Wight and four that participated in tenders won by one of the Parties in Surrey Heartlands. The majority of UOAs in these areas were won by third parties, not by one of the Parties. Various competitors, including three corporate providers, told the CMA they were likely to bid in a future UOA tender in these areas.[64]

74. The NHS commissioners with responsibility for Hampshire & Isle of Wight and Surrey Heartlands ICBs informed the CMA that there was significant interest in recent tenders and were likely to be sufficient other credible bidders to impose a constraint post-Merger.[65]

[61] The CMA understands that this is likely to be due to the contract procurement taking place prior to the 2017/2018 procurement in which many other UOA contracts were tendered. Note of a call with NHS of 09 December 2022.
[62] Annex 082 to the FMN.
[63] Note of call NHS of 09 December 2022 .
[64] Third-party responses to the CMA's questionnaire.
[65] Note of call with NHS of 29 November 2022.

75. In light of these factors, the CMA does not consider that the Merger gives rise to a realistic prospect of an SLC in relation to competition for the award of NHS UOA contracts in the Hampshire & Isle of Wight and Surrey Heartlands ICB areas.

North East & North Cumbria ICB

76. The Parties do have overlapping activities in respect of NHS orthodontics in the North East & North Cumbria ICB. No bidding data was available for the North East & North Cumbria ICB. The Parties' combined share of UOAs in this ICB is around [30-40]%.[66] The CMA heard from various competitors that it was likely that they would bid in a future UOA tender in this area.

77. NHS commissioners with responsibility for North East & North Cumbria ICB said they did not have concerns about the Merger based on the current position of the Parties in the area and that in general there is interest in tenders for NHS orthodontic contracts.[67]

78. In light of these factors, the CMA does not consider that the Merger gives rise to a realistic prospect of an SLC in relation to competition for the award of NHS UOA contracts in the Hampshire & Isle of Wight, Surrey Heartlands and North East & North Cumbria ICB areas.

NHS Cornwall & Isles of Scilly ICB

79. The Parties do have overlapping activities in respect of NHS orthodontics in the Cornwall & Isles of Scilly ICB. Historical bidding data for the contracts won by the Parties indicated there was only one third-party bidder in the Cornwall & Isles of Scilly ICB and that the Parties bid against each other for one of the contracts.[68] This indicates that the Parties are close competitors for UOA contracts in this ICB. A small number of corporate providers indicated they would be likely to bid in a future tender, and none of the independent practices who responded to the CMA's questions on this point indicated that they were likely to bid in the future in this area.

80. The closeness of the Parties as competitors is reflected in their shares of UOAs. The Parties have a combined share of supply of [90-100] % in UOAs in the Cornwall & Isles of Scilly ICB, with an increment of [20-30] %.[69] Portman's UOA contract is

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[66] Two of Portman's contracts contributing to this share have since been lost to a competitor and are now 'wind-down' contracts only. Under a 'wind-down' contract, the site may only complete treatment plans for existing patients, and may not take on new NHS patients. Email from the Parties to the CMA of 14 December 2022.

[67] Note of call with NHS of 02 December 2022.

[68] Historical bidding data was provided by the NHS. The competing bidders for Portman's contract held by the Truro Portman Smile Clinic were Dentex's River Practice sites and [✂]. The competing bidder for Dentex's contract held by its River Practice Truro site was also [✂].

[69] The Parties submitted that these estimates may be overstated on the basis that a competitor (Smile Together) may hold a contract for UOAs (though the Parties also submitted that the competitor had not delivered any UOAs in the 2019-2020 period). The CMA found these UOAs may be [✂] and that even if this

held by the Truro Portman Smile Clinic, with UOAs also delivered at the St Austell and Bude Portman Smile Clinics

81. The NHS commissioners responsible for the ICB expressed concerns about the impact of the Merger, explaining that it was possible for a bidder not facing competition to degrade the quality of their bid.[70] The NHS noted that given the specialist nature of orthodontics, there are a limited number of candidates with the necessary qualifications to bid for the contract, and that there is a shortage of specialist dental providers in the area.[71]

82. For the reasons above, the CMA considers that there is a realistic prospect that the Merger will give rise to an SLC as a result of horizontal unilateral effects in the award of NHS UOA contracts in the geographic area corresponding to the Cornwall & Isles of Scilly ICB.

NHS general dental and MOS contracts

83. The evidence available to the CMA does not indicate that the Parties have been close competitors for UDAs in any ICB area.[72] There is also no ICB in which both Parties hold an NHS MOS contract,[73] and therefore there is no overlap between the Parties in relation to current MOS contracts.[74] Furthermore, no NHS commissioning team raised concern about the impact of the Merger on NHS general dental or MOS contracts.

84. On this basis, the CMA does not consider that there is a realistic prospect that the Merger will give rise to an SLC as a result of horizontal unilateral effects in the award of NHS general dental or MOS contracts in any ICB region.

Horizontal unilateral effects in the provision of dentistry services at a local level

85. The Parties overlap in the local provision of some of the treatments identified in paragraph 51 in England.[75] To assess horizontal unilateral effects at a local level,

contract were included in the market share calculations, the CMA estimates that the Parties would still have a combined share of [80-90]%. Emails from NHS of 9 and 10 January 2023.

[70] See paragraph 64.

[71] Note of a call with NHS of 09 December 2022.

[72] Indeed, share of supply data for UDAs show that together the Parties' highest share is [10-20] % in Lincolnshire ICB area. Note that contracts to provide general dentistry services are awarded in perpetuity (see paragraph 36).

[73] Similarly, the Parties do not overlap in relation to MOS contracts in any of the seven NHS England regions.

[74] Parties' response to question 5 of the CMA's 4th request for information, dated 19 December 2022.

[75] In relation to Scotland, while there are 11 Party sites that overlap with a site of the other Party (seven Portman sites and four Dentex sites), given the large number of remaining competitors (at least 97) in each of the relevant local areas (based on information provided by Public Health Scotland; see Public Health Scotland: Dental Practices and Patient Registrations), the CMA has not considered it necessary to assess further given the lack of competition concerns that may arise on any conceivable basis. Local overlaps in Scotland are not therefore discussed further in this Decision.

the CMA has considered each of the frames of reference identified in paragraph 51 separately.

Use of a decision rule

86. The CMA considered whether applying a decision rule would be an appropriate approach to assess the impact of the Merger on competition at a local level.

87. The Parties noted that the CMA has in some previous cases used a two-stage filtering approach.[76] However, in line with the CMA's approach in *Riviera/Dental Partners*, the Parties presented their competitive assessment on the basis of a decision rule.

88. The CMA considers that the use of a decision rule is appropriate in the context of this case. A decision rule facilitates the efficient conduct of the CMA's investigation and ensures that all local areas of overlap are assessed systematically by reference to the same factors, rather than having regard to different factors in different local areas.

89. Furthermore, as set out further below, the decision rule takes into account the key parameters of local competition, including proximity, relative competitor strength and (in the case of NHS treatments) capacity to compete for new customers. The CMA has not received evidence suggesting that there are specific additional parameters of competition that should be taken into account. As such, the CMA is satisfied, based on an assessment of the evidence taken in the round, that the decision rule identifies those local areas which give rise to a realistic prospect of an SLC.

Design of the decision rule

90. When designing an appropriate decision rule to use for this assessment, the CMA considered several factors, including:[77]

    (a) The catchment areas within which competition is thought to take place;

    (b) The competitor sites which should be included in the effective competitor set;

    (c) The appropriate concentration measure(s) to be used in order to reflect competitive conditions; and

[76] FMN, paragraph 212. Under a two-stage approach, an initial filter is applied to identify areas requiring further examination, and then a more detailed competitive assessment takes place to determine whether there is a realistic prospect of an SLC in these areas.
[77] The Parties noted that additional aspects could be incorporated into a decision rule whereby if a site fails on only one speciality, fails by a small margin, and that speciality accounts for a small proportion of site revenue, then that site could be said to pass the decision rule (FMN, paragraph 263). The CMA did not consider it appropriate to add such additional limbs to the decision rule given that the CMA is not able to apply the same rules to competitor sites on a systematic basis across all local areas.

(d) The appropriate threshold(s) above which the CMA considers there to be a realistic prospect of a SLC in each local area.

Catchment areas

91. In line with decisional practice, the CMA has determined the applicable catchment areas by calculating the average 80th percentile distance (based on customer home location data) for 129 Portman and 105 Dentex practices (where data on both patient location and treatment data was available).[78] The average catchment area for each frame of reference is set out in Table 2 below:

Table 2: Catchment areas for each frame of reference by location, in miles (to the nearest mile)

Patient type	*Treatment*	*Average catchment, miles*
Private	General	8
	Orthodontics	8
	Minor Oral Surgery	9
	Prosthodontics	8
	Periodontics	8
	Endodontics	9
	Restorative	8
	Implants	12
	Cosmetics	9
NHS	General	6
	Orthodontics	5

Source: CMA analysis of Parties' data and FMN Table 13.e submission

92. In considering the size of the appropriate catchment areas to use, the CMA had particular regard to the following:

(a) Generally, the Parties' average catchment areas for private treatments are eight or nine miles and for NHS treatments six miles. Average catchment areas did not materially change when excluding sites with few observations or when flexing the percentile set used to calculate the size of the catchment.

[78] This approach is in line with the Parties' submission (FMN, paragraph 174). This approach captures approximately 57% of the total number of Party sites. Data was not always available including where : (i) data related to HoT sites, (ii) data could not be extracted from the patient management system, or (iii) patient information was not recorded. Where data was available, the CMA found that catchment distances did not change materially when more patient data was used (see FMN, paragraph 194).

(b) The CMA considered whether, in line with its approach in some previous cases,[79] different catchment areas should be adopted for M25, other urban, and rural areas. In general, average catchment areas did not vary materially between these types of areas, so the CMA considered it unnecessary to segment catchment areas on this basis on the facts of this case.

(c) While for private patients the catchment areas for many treatment types are on average around eight miles, average catchment areas are significantly larger for implants (12 miles). However, the average catchment size for implants is based on a relatively small number of sites with a relatively small number of observations in each, such that the CMA, in line with the Parties' submissions, considered it appropriate to apply the eight mile catchment area to all private treatments, including implants.

93. Given the above, the CMA concluded that catchment areas of six miles for NHS treatments and eight miles for private treatments, irrespective of where the practices are located, are appropriate.

Effective competitor set

94. The Parties submitted that any dental practice registered with the Care Quality Commission (**CQC**) in England, subject to certain limited exceptions,[80] should be included as part of the competitor set for this assessment.

95. The CQC monitors, inspects and regulates dental services, including by monitoring the suitability of premises and ensuring that practices are safe and well-managed.[81] In order to supply dentistry services in England, a practice must be registered with the CQC.[82]

96. The CQC has a dataset which provides information on all dental sites in England that are regulated by the CQC.[83] For each practice in the CQC dataset identified as a rival by the Parties, the Parties have identified the treatments offered by that rival and whether the treatment is offered as an NHS or private service (or both). Given the above, for the purposes of the local competitive assessment, the CMA has considered any practice included in the CQC dataset, identified to be offering a particular treatment and located in the relevant geographic area to be a competitor of the Parties in that given treatment.[84]

[79] See, for example, *Bupa/Oasis*.
[80] The Parties excluded locations which are not primarily dental practices, such as prisons and hospitals, from the competitor set (FMN, footnote 205).
[81] The CMA notes that the CQC standards are minimum standards, and that its investigation has considered the possible impact of the Merger on the overall standard of service offered, including aspects of quality that are not covered by CQC standards.
[82] FMN, paragraphs 102 and 232.
[83]See Care Quality Commission: Using CQC data, last accessed 25/01/2023.
[84] With the exception of the dental practices in eg prisons and hospitals as highlighted above.

Concentration measures(s)

- The Parties' submissions

97. With respect to the private decision rule, the Parties initially submitted that a share of sites measure, combined with a fascia count limb, should be used to assess the impact of the Merger on local competition.[85]

98. With respect to the NHS decision rule, the Parties initially submitted that a share of UDAs or UOAs should be used to assess the impact of the Merger on local competition.[86]

- The CMA's analysis

99. The CMA considers that fascia count may be an appropriate measure of concentration if (among other considerations) brand is important to customers and customers choose between the fascia in their local area and where the offering at each individual store will be similar. Under this approach, practices with the same branding or fascia are considered to be acting together and therefore will constitute one fascia irrespective of how many practice sites have that fascia. A 'share of sites', however, takes into account how many practices within the same ownership are in a local area and may be a good measure of concentration if brand is not very important or visible to the customer. The share of sites can also be a useful measure in cases where factors such as distance are an important driver of competition since it aggregates sites within the area in which competition mostly takes place.[87]

100. The evidence obtained in this case suggests that the most important factor determining competition is location, and therefore distance, rather than brand. For example:

    (a) The Parties' submissions make clear that location is a key driver of competition, alongside availability, quality of service, and relationship with the dentist.[88] The Parties' internal documents support this and recognise location to be an important factor for patients.[89]

[85] The Parties' proposed fascia count measure was based on research into the ownership of practices, using the CQC dataset but corrected in some instances (FMN, paragraph 284).
[86] To calculate these shares, the Parties obtained the market size measure from publicly available NHS datasets (2019-2020 NHS Dental Statistics Report for UDAs and 2020 Dentistry Report for UOAs) and used their internal data to determine the number of UDAs and UOAs contracted to them. FMN, paragraph 268.
[87] CMA: Retail Mergers Commentary (CMA 62) , paragraphs 3.21-3.24.
[88] FMN, paragraphs 21b and 108.
[89] For example, Target Internal Document, Annex 023 to the FMN, 'Project Sabre, Commercial vendor Due Diligence', of April 2022, page 8; Acquirer Internal Document, Annex 030 to the FMN, 'Portman Dental Care pricing project – Customer and Competitor summary', of April 2022, page 4; Acquirer Internal Document, Annex 048 to the FMN, 'Portman Dental Care Strategic Pricing Project Steering Committee' (page 31).

(b) The Parties submitted that the local reputation of the practice (or even a particular dentist) in a corporate group remains a far more important factor than a corporate brand for customers looking to select a practice.[90] Furthermore, the Parties submitted that corporate brands are not well-known to the public, with the exceptions of Bupa and MyDentist.[91] The Parties' internal documents support this in respect of the Parties' own brands.[92]

(c) Neither of the Parties have unified branding across their practices, Portman makes minimal changes to sites joining the corporate group (eg, changing signage and colours to fit the corporate brand),[93] and there is no patient-facing corporate branding applied to Dentex sites.[94]

101. Given the above, the CMA considers that a share of sites is the most appropriate measure to apply to the private decision rule in this case, and that including an additional limb based on fascia (as proposed by the Parties) is not appropriate.[95]

102. For NHS dental treatments, the CMA notes that in each local area data is available on the number of UDAs and UOAs contracted to each practice. The CMA considers that, in comparison to a site count measure, a measure taking into account the number of UDAs and UOAs can provide an indication of a practice's current competitive strength and capacity to compete for new patients. As such, the CMA considers that a share of UDAs and UOAs is the most appropriate measure to apply to the NHS decision rule in this case.

Concentration thresholds

- The Parties' submissions

103. With respect to the private decision rule, the Parties initially submitted that the concentration thresholds applied should be higher than those relevant for a 'typical' market, due to factors including:[96]

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[90] FMN, paragraph 112.
[91] FMN, paragraphs 109-110. See also Acquirer Internal Document, Annex 034 to the FMN, 'Portman Dental Care Strat Plan Exec Session 1 – Customer Insight – 25 January 2021', page 6.
[92] Acquirer Internal Document, Annex 016 to the FMN, 'Core Equity Holdings First Round Bid IC document', page 9, which refers to brand awareness of both Portman and Dentex; Acquirer Internal Document, Annex 049 to the FMN, 'Portman Dental Care Strategic Pricing Project Steering Committee', page 25; Acquirer Internal Document, Annex 041 to the FMN, 'Portman Dental Care Customer and Competitor Understanding', (page 78).
[93] The exception is Portman's 14 practices branded as 'Portman Smile Clinics'.
[94] FMN, paragraph 111.
[95] The CMA also considered whether it was appropriate to consider a measure of share of supply based on staffing levels at each practice. Such a measure could provide an indication of a practice's current competitive strength and capacity to compete for new customers. However, due to data limitations (namely a lack of data on rivals' staffing levels, and the assumptions that would be required to split staff between NHS and private work and between different specialities) the CMA decided not pursue such a measure.
[96] FMN, paragraph 231.

(a) The regulated nature of dentistry, which reduces the scope for competition;

(b) Low costs to patients in switching between private providers;

(c) Significant out-of-market constraints imposed by NHS dentistry on private dentistry, meaning that patients can generally decide to switch easily between the two (even ‘in the chair’);

(d) Shared aspects of quality across treatment categories; and

(e) Low barriers to entry and low barriers to expansion into different treatment categories.[97]

104. With respect to the NHS decision rule, the Parties additionally submitted that most aspects of quality are shared with, and likely to be driven by, private dentistry, practices generally have no capacity to take on new NHS patients, and given the under-supply of NHS services, competition is not likely to play a significant role in practices’ behaviour.[98]

105. The Parties submitted that, on that basis, no competition concerns could plausibly arise in overlap areas for private dental treatments where the Parties have a combined share of sites below 35%.[99] With respect to the NHS decision rule, the Parties submitted that, on that basis, no competition concerns could plausibly arise in overlapping local areas with a combined share of UDAs or UOAs below 40%.[100] The Parties submitted that they view these thresholds as extremely conservative and that they should be considered minimum thresholds.[101]

- The CMA’s analysis

106. The threshold chosen for determining whether competition concerns arise is a case-by-case assessment taking into account all the facts and circumstances of a given case. In considering an appropriate threshold, the CMA notes that a starting point of 30% to assess competition concerns is broadly consistent with the CMA’s recent practice.[102] The CMA may use higher or lower thresholds in cases if there is

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[97] The CMA has considered a number of these factors in its analysis of the appropriate thresholds to apply, in paragraphs 106-121. Barriers to entry and expansion are discussed separately at paragraphs 128-129 of the Decision.
[98] FMN, paragraph 228.
[99] FMN, paragraph 260. The Parties also proposed that no concerns would arise if the combined share of sites was below 40%, so long as there are at least 10 competing fascia. However, as set out in paragraphs 100-102, the CMA did not consider it appropriate to adopt a fascia count limb.
[100] FMN, paragraph 225.
[101] FMN, paragraph 226.
[102] See, for example, *Riviera/Dental Partners*, paragraph 104; *Acquisition by CVS Group plc or Quality Pet Care Ltd (trading as The Vet)*, February 2022, paragraph 142.

significant evidence or analysis available to support such a position and/or if there is evidence, or a lack of evidence, of material out-of-market constraints.[103]

107. In addition to the factors put forward by the Parties, the CMA also considered whether closeness of competition and the corporate nature of both of the Parties justifies a higher or lower threshold, as set out further below.

– The regulated nature of the industry

108. The Parties submitted that regulation and requirements imposed by various bodies including the CQC, the General Dental Council, the Health and Safety Executive, the NHS and insurers sets a minimum standard for dentistry across the UK, both for private and NHS treatments.[104] These standards regulate pricing for NHS dental treatments and quality for all dental treatments.[105]

109. The CMA considers that the regulated nature of the industry is a relevant factor but that competition can nonetheless occur above a baseline set by regulation:

(a) For private dentistry, there can be competition over prices, which are not regulated and so will reflect specific competitive conditions, either locally or on a national scale.

(b) For both private and NHS dentistry, there can be competition on various non-price parameters, including quality of care, offering longer opening hours, and the quality of waiting areas and practice environment.

110. Nevertheless, in relation to NHS treatments, the CMA recognises that both price and some aspects of quality are regulated. The CMA heard from the NHS[106] and several third-party competitors[107] that practices do not typically need to compete for NHS patients as demand is high relative to availability of NHS dental services. However, to the extent that NHS practices do compete, the CMA considers that a low threshold is appropriate to preserve such competition, and further, the CMA understands that the supply of NHS dental treatments may be exposed to additional competition in the future.[108]

111. Accordingly, the CMA considers it appropriate that the decision rule threshold for NHS dentistry should be, to a limited extent, higher than for private dentistry.

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[103] *Completed Acquisition by VetPartners Limited of Goddard Holdco Limited*, June 2022, paragraph 168.
[104] FMN, paragraph 232.
[105] FMN, paragraph 90.
[106] For example, note of a call with NHS of 09 December 2022.
[107] Third-party responses to the CMA's questionnaire.
[108] The NHS are planning to introduce reforms for dental services which, among other things, will allow high-performing practices to increase their activity by a further 10%. See [NHS England » Better access to NHS dental services under new reforms] for details.

– The inability to degrade aspects of the competitive offering for treatments that fail a decision rule

112. The Parties submitted that aspects of their competitive offering (such as staff, equipment and waiting areas) are common across treatment categories such that they would be unable to degrade these aspects of their competitive offering on one treatment without the risk of losing revenue from other treatments.[109]

113. In relation to private treatments, the CMA notes that prices are set at an individual treatment level, [110] such that, even if other aspects of the competitive offering are more difficult to degrade in relation to one treatment without affecting the competitiveness of another treatment, the Merger may still lead to price rises on treatments that fail a decision rule.

114. The CMA also notes that there are non-price factors that differ between NHS and private treatments. For example, availability of appointments, opening hours available and waiting times may be different as between patients receiving NHS and private treatments, such that each could be degraded without impact on the other.

– The availability of out-of-market constraints as between NHS and private dentistry

115. The Parties submitted that for both NHS and private treatments there are significant out-of-market constraints because patients can generally switch between the two types of treatment. The Parties provided evidence that within one year, [20-30] % of Dentex's patients received at least one private and one NHS treatment.[111]

116. The CMA notes that this evidence does not distinguish between the two different directions of switching, ie (i) from NHS to private treatments and (ii) from private to NHS treatments.

117. In relation to the extent to which private treatments act as a constraint on NHS treatments, the CMA considers this is likely to be limited given the significant price and quality differentials between NHS and private treatments and that the price to patients for NHS treatments is regulated.[112]

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[109] FMN, paragraph 231.
[110] FMN, paragraph 231 notes that dentists set a price list for treatments. Internal documents also refer to treatment-level pricing, for example, Acquirer Internal Document, Annex 030 to the FMN, 'Portman Dental Care Pricing Project – Customer and Competitor Summary', pages 28-32 review Party and competitor pricing in various treatment categories and Acquirer Internal Document, Annex 051 to the FMN, 'Portman Dental Care Strategic Pricing Project Steering Committee 3', of 27 April 2022, page 6 notes that [✂].
[111] FMN, paragraph 245.
[112] Quality differentials may include availability of treatments, waiting times and convenience. For example, Acquirer Internal Document, Annex 030 to the FMN, 'Portman Dental Care pricing project – Customer and Competitor summary', of April 2022, page 25.

118. In relation to the extent to which NHS treatments act as a constraint on private treatments, the CMA also considers this is likely to be limited due to the lack of availability of NHS treatments. In particular, the CMA gathered evidence which indicated that the dental industry is currently experiencing difficulties in recruiting clinicians across the country,[113] and that demand far outstrips supply for all NHS dental services.[114] The Parties' internal documents also indicate that [✂];[115] [✂] [116] and that [✂].[117] The price for private treatments is unregulated. As such, as patients shift from NHS treatments to private treatments in reaction to NHS staffing issues and wait times, private treatment prices are likely to be driven up by the additional demand, causing a wider gap between the private treatment price and the regulated NHS treatment price.

119. Neither the Parties nor the CMA have identified other material out-of-market-constraints. Given the above, the CMA does not consider that there is sufficient evidence to indicate that material out-of-market constraints justify a higher threshold for NHS or private treatments.

– Closeness of competition between the Parties

120. The CMA considers that, in differentiated markets, horizontal unilateral effects are more likely when the merger firms are close competitors.[118] Given that each rival is weighted equally in the share of sites measure of the decision rule, the CMA has taken into account closeness of competition in considering the appropriate level at which to set the decision rule in this case. If the Parties are close competitors, equal weighting of the Parties and all competitors may understate the competitive constraint that the Parties exercise on one another, which would suggest that a lower threshold of concern may be appropriate.

121. The CMA has found evidence to indicate that the Parties are close competitors and weighting all competitors equally may understate the competitive constraint that the Parties exercise on one another. For example:

(a) Internal documents from both Parties highlight that they have similar offerings to each other, not only compared to independent dentists but also in relation to other corporate dental groups. These documents suggest that the Parties are viewed similarly by dentists,[119] and that they see themselves as similarly

[113] Note of a call with NHS of 21 November 2022.
[114] Note of a call with NHS of 09 December 2022.
[115] Acquirer Internal Document, Annex 020 to the FMN, 'Project Sabre, Core Equity Investment Committee Update', of 11 July 2022, page 23.
[116] Acquirer Internal Document, Annex 018 to the FMN, 'Project Sabre', of 06 July 2022, page 20.
[117] Acquirer Internal Document, Annex 030 to the FMN, 'Portman Dental Care pricing project – Customer and Competitor summary', of April 2022, page 25.
[118] CMA guidance documents: Mergers: Merger Assessment Guidelines (CMA 129), paragraph 4.8.
[119] Target Internal Document, Annex 023 to the FMN, 'Project Sabre Commercial Vendor Due Diligence Report', of April 2022, page 75.

positioned, both with a focus on private dentistry and a 'high quality and service' offering.[120]

(b) All of the large corporate groups, groups of practices and independent dentists who responded to the CMA's questionnaire stated that the Parties are close competitors.[121] Comments from these competitors included that the Parties 'both offer predominantly private dentistry', both 'have a central overarching corporate structure' and both own a large number of practices.[122]

(c) Both Parties are corporate groups. The Parties submitted that corporate groups do not have any particular advantage over independent practices, and that the corporate nature of a practice is usually not noticeable by customers.[123] However, the CMA considers that corporate practices are able to leverage the size of their network to improve their competitive offering, for example by cross-referring patients between group practices.[124] Further, the management structures of corporate chains may confer certain advantages. A third party noted that corporate practices tend to have more structured governance and leadership systems,[125] and the Parties noted that corporate groups are likely to have more developed processes for risk-management, compliance and regulatory adherence, as well as assistance with back-office tasks at the group level.[126] An internal document produced by the Parties also notes that corporates have [✂] while small groups have [✂] and independents [✂].[127]

(d) Both Parties' practices appear to be larger, on average, compared to other practices. On average, a Portman practice has 11 dentists/orthodontists and a Dentex practice has five dentists/orthodontists.[128] The CMA estimates that the average number of dentists per practice across the UK to be 3.8.[129] These

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[120] Acquirer Internal Document, Annex 035 to the FMN, 'Portman Dental Care Strategic Plan FY 21', of 31 March 2021, page 30.
[121] Third-party responses to the CMA's questionnaire.
[122] Third-party responses to the CMA's questionnaire.
[123] FMN, paragraph 266.
[124] The Parties' UOA contracts in Cornwall & Isles of Scilly both operate on the basis that they may deliver UOAs from sites other than the contract holding site (FMN, paragraph 274 and email from the Parties of 17 January 2023).
[125] Note of a call with NHS of 09 December 2022.
[126] FMN, paragraph 266.
[127] Acquirer Internal Document, Annex 023 to the FMN, 'Project Sabre, Commercial vendor Due Diligence', of April 2022, page 63.
[128] Parties response to question 3 of the CMA's 4th request for information, dated 19 December 2022. The Parties submitted that a lot of Portman staff are part-time, and that this therefore overstates the number of dentists/orthodontists actually working in a Portman practice at any one time.
[129] Based on approximately 11,000 dental practices in England (FMN, paragraph 7) and 42,066 registered dentists (the General Dental Council states that there were 42,066 dentists on the UK register in 2022: https://www.gdc-uk.org/news-blogs/news/detail/2022/01/17/total-number-of-registered-uk-dentists-remains-stable-following-renewal). The CMA considers this estimate of average number of dentists per practice may be an overestimate as not all registered dentists may be practicing (meaning there may be fewer dentists) and the number of practices is for England only (meaning there will be more practices). The CMA has not made an adjustment to this estimate to account for different working patterns (eg full or part time).

averages are consistent with third-party feedback which indicated that corporate practices tended to be larger, on average, compared to independent practices.[130] The CMA believes that the size of a practice provides a good indication of a practice's current competitive strength and capacity to compete for new customers, given that the size of a practice will broadly reflect consumer demand for its services.

Conclusion on the appropriate threshold

122. Given the above, the CMA believes that the following decision rule thresholds are appropriate to identify local catchment areas in which the Parties overlap giving rise to a realistic prospect of an SLC:

(a) For private treatments, a 30% combined share of sites with an increment of at least 5%; and

(b) For NHS treatments, a combined share of UDAs/UOAs (each considered separately) of 35% with an increment of at least 5%.[131]

Application of the decision rule

123. By applying the decision rule outlined in paragraph 122 above, the CMA has found that there is a realistic prospect of a SLC arising from horizontal unilateral effects in the provision of NHS orthodontic treatments in two local areas and in the provision of private dental treatments in seven local areas in England, as set out in Table 3 below.

Table 3: Combined shares and increments in each failing frame of reference

Party	*Site name*	*Site Postcode*	*Frame of Reference*	*Combined share (%)*	*Increment (%)*
Local area – Ashburton					
Portman	Moor Dental	TQ13 7DT	Private Implants	33.3	8.3
Dentex	Devon Centre of Excellence	TQ13 7AX	Private Implants	33.3	8.3
Local area – Durham/Spennymoor					
Dentex	Bowburn	DH6 5AU	Private Restorative	31.3	6.3
			Private Cosmetics	30.3	6.1
			Private General	30	6.7

130 Third-party responses to the CMA's questionnaire.
131 The CMA recognises that an increment threshold may not be appropriate in local areas where combined shares of sites are very high. The CMA did not find any areas, in relation to either private or NHS treatments, with very high shares of supply that did not fail the decision rule because of an increment less than 5%.

			Private Restorative	33.3	6.7
Dentex	Spennymoor	DL16 7LD	Private Cosmetics	32.3	6.5
			Private General	31	6.9
			Private Restorative	34.6	7.7
Dentex	Trimdon	TS29 6JH	Private Periodontics	34.6	7.7
			Private Cosmetics	34.6	7.7
			Private General	32	8
Local area – Tavistock					
Portman	Abbey Mead	PL19 8AU	Private Orthodontics	40	20
			Private Implants	33.3	16.7
Dentex	Harwood	PL19 8LF	Private Orthodontics	33.3	16.7
Local area – Truro					
Portman	Truro Smile Clinic	TR1 2SF	NHS Orthodontics (UOAs)	100	37.6
Dentex	River Practice	TR1 3AF	NHS Orthodontics (UOAs)	100	37.6

Source: CMA analysis of the Parties' data.
Notes: Combined shares and increments reflect share of sites for the private frames of reference and share of UOAs for the NHS frames of reference.

Horizontal unilateral effects in the provision of dentistry services at a national level

124. The CMA considered whether the Merger could give rise to horizontal unilateral effects in the provision of dentistry services on a national basis.

125. In particular, the CMA considered whether, as a result of the Merger in the context of the trend towards consolidation of dental practices in the UK, patients could face reduced choice and higher prices.

126. Given the differences between corporate and independent practices noted in paragraphs 36-38 and 120-121 above, including the wider geographic presence of corporate dental groups, as well as evidence from the Parties' internal documents showing that they view other corporate groups as close competitors,[132] the CMA considered the Parties' UK share of practices owned by corporate groups only. The Parties' combined share on this basis was around 18%.[133] A number of other

[132] For example, Acquirer Internal Document, Annex 035 to the FMN, 'Portman Dental Care Strategic Plan YR 21 – Board Discussion – 31 March 2021', page 30 and Acquirer Internal Document, Annex 030 to the FMN, 'Portman Dental Care Pricing Project – Customer and Competitor Summary', pages 28-32, which benchmark treatment pricing against corporate competitors.
[133] FMN, paragraph 85 and Annex 091.

corporate dental providers such as Bupa and MyDentist (each with more sites than the Merged Entity) and Rodericks/Dental Partners, Colosseum Dental, Bhandal Dental, Real Good Dental, Clyde Munro, and Riverdale will remain post-Merger.[134]

127. On the basis of the above, the CMA considers that the Merger does not give rise to competition concerns at the national level. The CMA notes that, in the event of further consolidation in the provision of dentistry services, it will consider whether competition concerns could arise at the national level based on the facts of the merger.

ENTRY AND EXPANSION

128. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent a SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.[135]

129. As set out in paragraph 21 above, the Parties accepted that the test for a reference to an in-depth investigation is met. Potential entry and expansion was taken into account in the CMA's competitive assessment relating to the competition for the market to provide NHS services. The Parties did not provide any additional evidence of potential entry in the areas that failed the CMA's decision rule relating to the provision of dental services within local catchment areas. Accordingly, the CMA does not have any evidence for it to believe that entry or expansion would be timely, likely or sufficient to prevent a realistic prospect of a SLC as a result of the Merger.

CONCLUSION ON SUBSTANTIAL LESSENING OF COMPETITION

130. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger may be expected to result in a SLC as a result of horizontal unilateral effects in relation to:

    (a) Competition in the award of NHS UOA contracts in the Cornwall & Isles of Scilly ICB;

    (b) The provision of NHS orthodontic treatments in two local areas, namely the areas within six miles of Portman's Truro Smile Clinic and Dentex's River Truro practice, located in Truro; and

    (c) The provision of private dental treatments in seven local areas, namely the areas within eight miles of:

[134] FMN, paragraph 83.
[135] CMA guidance documents: Mergers: Merger Assessment Guidelines (CMA 129), from paragraph 8.40.

(i) Portman's Abbey Mead and Dentex's Harwood dental practices located in Tavistock;

(ii) Dentex's Trimdon, Spennymoor and Bowburn dental practices, located in the Durham/Spennymoor area; and

(iii) Portman's Moor Dental and Dentex's Devon Dental Centre of Excellence dental practices, located in Ashburton.

131. As a result, the CMA is concerned that prices for private dentistry will increase, non-price factors of competition will be worse for both selected private and selected NHS dentistry services compared to the situation without the Merger and the Cornwall & Isles of Scilly ICB will receive worse bid terms in respect to UOAs (for example, via the factors listed in paragraph 63).

DECISION

132. Consequently, the CMA believes that it is or may be the case that (i) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC within a market or markets in the United Kingdom.

133. The CMA therefore believes that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.[136] The Parties have until 10 February 2023[137] to offer an undertaking to the CMA.[138] The CMA will refer the Merger for a phase 2 investigation[139] if the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if the CMA decides[140] by 17 February 2023 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it.

Sorcha O'Carroll
Senior Director, Mergers
Competition and Markets Authority
3 February 2023

[136] Section 33(3)(b) of the Act.
[137] Section 73A(1) of the Act.
[138] Section 73(2) of the Act.
[139] Sections 33(1) and 34ZA(2) of the Act.
[140] Section 73A(2) of the Act.