HSJ LOCAL briefing

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BOURNEMOUTH AND POOLE MERGER

HSJ Local Briefing is our new in-depth analysis of the key issues facing the NHS's major health economies

sarah.calkin@emap.com
@sjcalkin

In brief

Issue Royal Bournemouth and Christchurch Hospitals and Poole Hospital foundation trusts are planning to merge. They claim this is essential to ensure continued provision of quality services in the are, but the Competition Commission is reviewing the plans and could block them.

Context The proposed merger is the first between two NHS organisations to have been reviewed by the Office of Fair Trading, and therefore the first to be referred to the commission. The recent announcement that the OFT will be reviewing all NHS mergers involving foundation trusts means the decisions taken in this case will have implications for other trusts planning to merge.

Outcome With both sides in uncharted territory no-one is certain of what the outcome will be at this stage. However, unless it radically changes its approach to competition in the NHS, it seems unlikely the commission will simply wave the merger through without conditions.

The story so far

The boards of Royal Bournemouth and Christchurch Hospitals and Poole Hospital foundation trusts announced their intention to merge in November 2011. At that time financial problems had left Poole in breach of the terms of its authorisation with FT regulator Monitor. The trusts claimed the merger was necessary to ensure the sustainability of services in the face of growing pressure on the NHS. The merger was referred to the Office of Fair Trading in May 2012, in line with clause 79 of the 2012 Health and Social Care Act, which stipulated that mergers between FTs came under the jurisdiction of the OFT rather than Monitor or the Co-operation and Competition Panel.

In January this year the OFT announced it was referring the proposals to the Competition Commission, after concluding the merger would leave patients and commissioners with "few realistic alternative providers". The commission has commenced its investigation and has required the trusts to sign undertakingsto have an independent observer present at all major meetings between them while the probe is underway. The commission is due to make a decision by 24 June but can extend the period by up to eight weeks.

National context

Last month Monitor confirmed the OFT would be responsible for reviewing all mergers involving NHS foundation trusts. The OFT believes NHS trusts are capable of being considered "enterprises" under the terms of the 2002 Enterprise Act, and therefore a merger between an NHS trust and an FT could qualify for OFT investigation.

If, as in this case, the OFT finds there is a risk of a substantial lessening of competition it will refer the case to the commission for a full investigation. The number of mergers in the pipeline means the outcome and judgements in the Bournemouth and Poole merger will have wider significance for the NHS, particularly the 47 trusts which HSJ revealed last month do not have a "standalone solution" for attaining foundation trust status. Most of these are expected to look to look to merger as a solution.

What is the Competition Commission investigating?

RBCH and Poole are less than 12 miles apart and comprise two of the three acute NHS providers in Dorset. In 2011-12, RBCH had an income of £239.8m, while Poole had revenue of £195m. Both have about 600 beds.

The Competition Commission must decide whether a merger of the two organisations will lead to a "substantial lessening of competition" and if so whether there are any "relevant customer benefits" that would outweigh the loss. Crucially, to be considered relevant any benefits must be achievable only through a merger.

The commission will also consider the loss of competition through the merger against the "counterfactual" – what would happen if the merger did not go ahead and what the impact that would have on competition. According to the issues statement published by the commission at the beginning of the process this will include taking account of "changes required to parties' provision of services due to budgetary constraints and/or for clinical purposes".

A paper published last year in the The Economic Journal suggests one approach the commission might take. Choice of NHS funded hospital services in England includes among its authors the commission's adviser Walter Beckert and its director of economic analysis Kate Collyer, who joined the commission from the Co-operation and Competition Panel last year.

The paper develops what the authors claim is the first model for simulating mergers between hospitals where price is regulated. The study examines data from almost 40,000 patients who had hip replacements in England during 2008-09. The model is based around the principle that hospitals compete on quality and aims to measure the impact on patient choice of a decline in quality at a provider, defined using mortality rates, following a merger.

The model uses the concept of "elasticity of demand" whereby if following a merger quality declines and there is no subsequent drop off in demand, the merger can be determined to have a negative impact on choices available to patients. If this is the case then, the paper argues, "the greater the offsetting benefits must be to ensure the merger does not adversely affect quality".

Will there be a substantial lessening of competition?

A major disagreement between the trusts and the OFT is about the extent to which the two organisations compete currently. The trusts argue the services they provide are complementary and any competition is "limited". However, the office concluded they were underplaying the extent of competition between them, based on an analysis of procedures using Healthcare Resource Group data. The OFT dismissed the trust's arguments that the HRG analysis did not taken into account of the different contexts in which these procedures were being delivered, ie: in a specialist or generalist setting or elective and non-elective.

The table on page 29 of the OFT's decision paper lists five subsets of services and sets out the trusts' arguments as to why they could not be considered to be competing. It is summarised in the table overleaf.

Despite the trusts' arguments the OFT found competition concerns in relation to each of the service subsets, including group E where the service is provided by University Hospitals of Southampton Foundation Trust.

It said: "This merger will remove the choice of those patients which would choose one of the hospitals over the other merger party's hospitals based on criteria other than the consultants, which will be the same in both hospitals."

In response, the trusts commissioned the King's Fund to

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Specialty	Merger parties' views
Group A Rheumatology; rehabilitation; general medicine; general surgery; geriatric medicine	Some overlaps between the merger parties (but only limited activity relates to elective inpatient).
Group B Clinical haematology; dermatology	The merger parties focus on different sub-specialties.
Group C Palliative medicine; cardiology; oral surgery	The merger parties sharing or have visiting consultants. There is little or no scope for competition.
Group D Medical oncology; gynaecology; vascular surgery; neurology; ear, nose and throat; trauma; orthopaedics	The merger parties offer complementary rather than competing services for these specialties. Their services might differ substantially from one another – inpatient/ outpatient care; elective/non-elective; basic/complex care.
Group E Cardiothoracic surgery	The services are provided by a third party.

produce a paper on how competition operates in the NHS for submission to the Competition Commission. The paper argues that choice and competition should be seen as just one "instrument" to drive improvement.

The trusts submitted the merger should be reviewed in the context of the population living within a 40-60 minute drive away. They claimed that once merged they would be constrained by Dorset County Hospital , Hampshire Hospitals, Salisbury, University Hospital Southampton and Yeovil District Hospital foundation trusts; as well as independent sector treatment centres and Lymington New Forest Hospital, a community hospital run by Southern Health Foundation Trust. All are within a 40 minutes drive for some patients in the RBCH and Poole catchment area. However, the OFT disagreed that any or all of these hospitals would be sufficient to constrain the merged entity and found a more appropriate travel time was 20-30 minutes.

The Competition Commission has commissioned Ipsos Mori to poll local residents on how far they would be prepared to travel.

Relevant customer benefits

The trusts propose to reconfigure five services following the merger: maternity, haematology, emergency department, acute general surgery and cardiology. They argue this will lead to improved service quality. However, the OFT agreed with advice from Monitor that only the improvements proposed in maternity services could not be achieved without merger.

For example, Monitor concluded the trusts' plans to consolidate heamotology services, in line with National Institute for Health and Clinical Excellence guidance, were not a relevant customer benefit as commissioners had plans to commission a single service in future anyway.

The counterfactual

Poole chief executive Chris Bown told HSJ concerns about services in the absence of a merger centred around the scale of Poole and its existing case mix, which is more than 80 per cent non-elective activity, as well as on achieving the level of savings required in future.

He said it would be inappropriate to comment further while the investigation was ongoing.

Recent advice from KPMG stresses the need to provide "compelling evidence" to convince the OFT the parties might fail to provide high-quality services in the absence of a merger and that it should decide against a referral to the Competition Commission for this reason alone. In Dorset the OFT accepted "some form of reorganisation of clinical services" would be required if the merger did not go ahead.

However, the regulator concluded that as "detailed evidence on service reorganisation relating to particular clinical services or operational matters" had not been provided by the merger parties or the commissioners there was "insufficient evidence to depart from the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger."

The trusts have since strengthened their argument and the evidence behind it in submissions to the commission. A recent paper to RBCH's March board meeting argued that without the £17m of savings that would be released through the merger, neither organisation would be able to secure sufficient income to maintain the full range of services.

Who is in favour?

NHS England's South of England and Wessex local area team is unequivocal in its support.

Wessex director Debbie Fleming wrote to the commission to express the "strongest possible support" for the merger, stating that it "makes longer-term economic and sustainable organisation sense".

She added: "Finally, I should like to stress that this is a hugely important issue within our local community, and the ongoing delays associated with this decision could have a very detrimental impact on services. Whilst there are a number of risks that will need to be managed, all of the local commissioners support the proposed merger, and we are keen to see this progress as speedily as possible."

The Foundation Trust Network has also made submissions to the commission in favour of the merger. Chief executive Chris Hopson asks that the commission pays particular attention to changes required to provision of services due to NHS budget constraints if the merger does not go ahead.

He makes the point that the NHS market is unusual because of the lack of a direct link between purchaser and consumer, and that as a result supply and demand can become imbalanced.

He said: "Specifically, demand for NHS services is increasing... However, funding of NHS services is not expected to maintain pace with demand."

Who is opposed?

The Competition Commission has received representations from a "hospital provider" arguing against the merger. The letter, in which the name of the provider is redacted, states: "Each trust presents the strongest competitive constraint to the other, and although [redacted] would of course remain in the market competing against the parties to the

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merger inquiry for NHS funded healthcare episodes, [redacted] does not have the capacity to replace the constraint lost as a result of the merger. We believe competition for NHS activity within the local market would therefore be adversely affected should the trusts merge."

Based on GP referral data for Dorset in 2011-12, Poole has 23 per cent of the market, RBCH has 34 per cent and Dorset County Hospital Foundation Trust 27 per cent. Of the remaining 16 per cent, 4 per cent of referrals went to Salisbury FT and 8 per cent to others, including private providers. A spokesman for Dorset County said the trust had not sent the letter. Dorset Healthcare University Foundation Trust also said it had not sent the letter, while Salisbury expressed support for the merger in a hearing with the commission. Of the main private sector providers of acute hospital services in the Dorset area, Nuffield Health said they had not sent the letter while BMI Healthcare declined to comment while the investigation was ongoing.

There is some concern from the local community about loss of services as a result of the merger and resultant increased travel time and local MPs have spoken out against it.

What is the Competition Commission likely to recommend?

At the heart of the case is the continued disagreement over how much competition is actually taking place between the two trusts. HSJ understands establishing just how much overlap there is in the services provided by each organisation has been a big focus for the commission so far. Its conclusions on what counts as competition will be significant for other mergers.

The commission is taking a one dimensional view, in line with its remit, of what the impact will be on competition. Much of the argument in favour of the merger focuses on its necessity for the future sustainability of NHS acute services in Bournemouth and Poole – the counterfactual argument is that without the merger Poole in particular would fall over and so patients in the area would lose choice anyway. However, the FTN and the King's Fund are also making the case for special treatment for the NHS.

The arguments for NHS healthcare being a special case are not hard to make. You might argue, for instance, that in the business world any organisation being paid just 30 per cent of standard prices for activity above 2008 levels would have given up long ago, as emergency admissions have continued to rise – especially if 80 per cent of their activity was non-elective as at Poole. Meanwhile, as the FTN points out, rise in demand is outstripping increases in funding for supply. The King's Fund's submission to the commission points to an "asymmetry" in the competition authorities' approach, in that relevant customer benefits must be well evidenced but a substantial lessening of competition is assumed to be inherently bad.

How much consideration the commission will give to these factors is as yet unknown. A spokeswoman told HSJ they were "aware that looking at a NHS merger has differences from mergers in other sectors and we will of course take these into account".

The commission has scheduled separate hearings with each trust for the end of April and is scheduled to make a decision by the end of June. With both sides in uncharted territory, no one is certain of what the outcome will be. However, unless it departs sharply from the approach the OFT has taken to competition in this case, it seems unlikely at this stage that the commission will simply wave the merger through. The commission has the power to impose remedies, or conditions, on the parties in order for the merger to go ahead. It seems plausible the trusts could be subject to these kinds of conditions.