**The Office of Fair Trading provided the following statement in response to questions from HSJ about its jurisdiction over mergers between NHS trusts and foundation trusts:**

“The Enterprise Act 2002 imposes a duty on the OFT to refer completed and anticipated mergers to the Competition Commission for further investigation if it believes that it is or may be the case that two or more enterprises have ceased to be distinct or arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.

“The OFT considers it is in principle capable of exerting jurisdiction, under the provisions of the Enterprise Act 2002, to review mergers or acquisitions (mergers) involving Foundation Trusts and NHS Trusts. Whether a particular merger qualifies for investigation would depend on the circumstances of the individual case in question, including whether the jurisdictional thresholds are met.

“It is ultimately for the Competition Commission, if a merger is referred, or the courts, if a decision of the OFT or the Competition Commission is challenged, to conclude whether the activities of a particular NHS Trust constitute an ‘enterprise’ within the meaning of the Enterprise Act 2002.

“The OFT has been monitoring this issue for some time since the healthcare market is evolving significantly. Each case will be assessed on the basis of its own facts and merits. To date, the OFT has not considered it appropriate for it to seek jurisdiction over transactions between Foundation Trusts and NHS Trusts which are currently being reviewed by the Co-operation and Competition Panel.

“The OFT operates a ‘voluntary’ system of merger control and parties are expected to undertake a self-assessment of whether a merger proposal would qualify for review under the Enterprise Act 2002 and, if so, would raise competition concerns. The OFT does operate a system of informal advice whereby parties can speak with the Mergers Group confidentially in order to obtain advice on their proposed arrangements. The OFT would encourage merging parties to contact it at an early opportunity to discuss the application of the Act to a particular merger situation, particularly where competition concerns cannot easily be ruled out.

“The OFT considers its duties as an independent competition authority. However, it works closely with other public authorities where appropriate, and is working closely with the Department of Health and Monitor on issues relating to the mergers in the healthcare sector.

“The OFT’s view that NHS Trusts may fall within the definition of an ‘enterprise’ as per the Enterprise Act 2002 is distinct from its application of the Competition Act 1998. The OFT has recently published guidance on the application of the Competition Act to public authorities (see <http://www.oft.gov.uk/shared_oft/ca-and-cartels/OFT1389.pdf>) and recently secured voluntary assurances from eight NHS hospital trusts that they will no longer exchange commercially sensitive information about their Private Patient Unit prices, to ensure they comply with competition law (see <http://www.oft.gov.uk/news-and-updates/press/2012/71-12>)”