

Anticipated pathology joint venture between Cambridge University hospitals NHS Foundation Trust, Colchester Hospital University NHS Foundation Trust, East and North Hertfordshire NHS Trust, Hinchingsbrooke Health Care NHS Trust, the Ipswich Hospital NHS Trust and West Suffolk NHS Foundation Trust

ME/6427/14

The OFT's decision on reference under section 26 given on 27 March 2014. Full text of decision published 09 April 2014.

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

PARTIES

1. **Cambridge University Hospitals NHS Foundation Trust, Colchester Hospital University NHS Foundation Trust, East and North Hertfordshire NHS Trust, Hinchingsbrooke Health Care NHS Trust, The Ipswich Hospital NHS Trust and West Suffolk NHS Foundation Trust** (together the **JV Partners**) are all acute hospitals, which currently provide a range of services including pathology.
2. **Transforming Pathology Partnership (TPP)** is the contractual joint venture (JV) that the JV Partners intend to set up to provide community and acute pathology services.

TRANSACTION

3. The JV Partners have signed a Consortium Agreement (the Agreement) to enter into a contractual pathology joint venture, TPP, on 1 April 2014. Under the Agreement, Cambridge University Hospitals NHS Foundation Trust (Cambridge) will hold a [less than 25] per cent share, Colchester Hospital University NHS Foundation Trust a [less than 25] per cent share, East and North Hertfordshire NHS Trust a [less than 25] per cent share, Hinchingsbrooke Health Care NHS Trust a [less than 25] per cent share, The Ipswich Hospital

NHS Trust a [less than 25] per cent share and West Suffolk NHS Foundation Trust a [less than 25] per cent share (the JV).

4. Each of the JV Partners will transfer staff, equipment and assets as well as existing space used to deliver these pathology services. The services provided by TPP will include blood sciences, microbiology, histopathology, cervical cytology, hospital phlebotomy and, where commissioned, community phlebotomy. In addition, the Investment Plan of September 2012 indicates that genetics, stem cell and tissue typing whilst not part of the JV, will be provided to TPP [].
5. Cambridge will act as the JV host (JV Host) for the duration of the Agreement but the JV will operate at arm's length from Cambridge. In due course, it is anticipated that the contractual JV will convert to a structural one, with a separate legal identity. This decision relates only to the terms of the contractual JV.
6. The JV has been agreed in response to a tender organised by the NHS East of England Strategic Projects Team¹ for community pathology services.

JURISDICTION

7. For the Office of Fair Trading (OFT) to have jurisdiction to review the anticipated JV under the provisions of the Enterprise Act 2002 (the Act), the OFT must believe 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.²
8. A relevant merger situation arises where two or more enterprises cease to be distinct and either the turnover or the share of supply is met.³

¹ Now hosted by the Greater East Midlands Commissioning Support Unit.

² Section 33(1) of the Act. The OFT's merger investigation involves the analysis of two issues: 1) consideration of whether the OFT has jurisdiction that is, the legal power to review the transaction (the jurisdictional test); and, if so, 2) an assessment of the competitive impact of the merger on a market or markets in the UK (the substantive analysis). A lack of jurisdiction means the OFT does not need, and is not able, to decide on the substantive competitive assessment. Therefore, the OFT has first considered in this case whether it has jurisdiction to consider the TPP Joint Venture (that is, whether it gives rise to a relevant merger situation).

³ Section 23 of the Act. The turnover test is met if the UK turnover of the enterprise being taken over exceeds £70 million. The share of supply test is met if, as a result of the merger, 25 per cent or more of goods or services of any (reasonable) description in the UK or a substantial part of the UK are supplied by or to the merging parties and the merger enhances that share of supply.

Enterprises ceasing to be distinct

9. In this particular case, the OFT has carefully considered whether, as a result of the JV, any JV Partner will cease to be distinct from (that is, have some degree of control over) any enterprise contributed by another JV Partner. Put another way, the OFT considered whether one or more of the JV Partners will acquire control of TPP.⁴ The lowest level of control under the Act that may give rise to a 'relevant merger situation' is 'material influence'. In conducting its assessment, the OFT focusses on whether one or more of the JV Partners has the ability to materially influence policy relevant to the behaviour of TPP in the market place.⁵

No individual JV Partner will have material influence over TPP

10. Having reviewed the Agreement, the OFT found that:

- TPP has been structured so that each JV Partner (of which there are currently six) will have one non-executive director on the TPP Management Board (which is comprised of 16 individuals).⁶
- Most decisions of the board will be taken by simple majority of the Partnership Management Board such that no one JV Partner can veto any decision.
- Some reserved matters ([] certain employment matters; adding new JV Partners) require a majority in number of the JV Partners and over 50 per cent of the shareholdings to be in favour. As a result, none of the JV Partners individually will have a veto right over any of the key strategic decisions relating to TPP.
- Unanimity is required for a number of provisions, but these provide shareholder protection rights and do not confer the ability to materially influence policy relevant to the behaviour of TPP in the marketplace.⁷

11. Cambridge will be the JV Host and has the highest shareholding in TPP. The OFT also notes that a third party who responded to the OFT's invitation to comment indicated that Cambridge has been placed in a position such that all

⁴ In the interests of simplicity, and given the conclusion ultimately reached, the OFT in this section refers to 'control over TPP'.

⁵ OFT Jurisdictional and Procedural Guidance, June 2009, at paragraph 3.15.

⁶ This structure is set out in the Agreement. The additional members are independent, namely: (i) six Executive Members recruited through open competition (the interim posts have been held by five members seconded from five of the JV Partners) and (ii) a Chairman and two non-Executive members recruited using an executive search and selection agency. While the Chairman was previously a non-Executive Director of Cambridge, his responsibility will be to the TPP board and his professional duties will be for the benefit of TPP (as opposed to his former employer). The fact that one or more members of staff may previously have worked at a JV Partner does not in itself give that JV Partner material influence over TPP.

⁷ Schedule 3, Part 1, clause 10 of the Agreement, reserved matters: in summary, these are [].

the other working practices of the JV Partners are placed under Cambridge's control and decisions all appear to need to be referred to Cambridge. In light of this, the OFT focussed particularly on whether or not the position Cambridge holds would give it material influence. The OFT found that:

- Being the host means that Cambridge will employ the staff and be the contractual counterparty for anyone contracting with TPP. It will also own or licence assets from the other JV Partners.⁸ However, the JV will be operated at arm's length from the JV Host on the terms of the Agreement. The OFT notes that, under the Agreement entered into by the JV Partners, it will be the Partnership Management Board and not Cambridge taking the decision as to whether and on what terms to contract. The OFT considers that this supports the view that Cambridge's host status and shareholding does not give it the ability to materially influence policy relevant to the behaviour of TPP in the marketplace.
- Whilst Cambridge may be the only hospital to supply cytogenetic testing, which is highly specialised, this will not form part of the JV and instead will [].
- Cambridge chose different IT equipment to the other JV Partners. However, this does not show Cambridge acquired material influence as, whilst the JV Partners discussed the subject and a consensus was formed, it was ultimately a decision for each JV Partner's board to make independently and Cambridge did not require others to change systems.
- In its assessment the OFT considered whether the corporate/industry expertise of any nominated director of a JV Partner would give them the ability to materially influence the policy of TPP. The parties submitted that none of the JV Partners or their nominated directors has any particular commercial/industry or strategic status or expertise that might result in other JV Partners or directors choosing to follow their lead. A third party who responded to the OFT's invitation to comment noted Cambridge is a teaching hospital and has a number of specialists. However, given that all of the JV Partners currently provide pathology services, the OFT does not consider that this in and of itself would give Cambridge the ability materially to influence the policy of TPP.

12. The OFT has considered whether Cambridge could exert material influence over TPP by threatening to exit from it. However, the parties submitted that another foundation trust could act as JV Host (the Agreement sets out a

⁸ A Cambridge representative will also be present at the Remunerations Committee of TPP in order to ensure compliance with equality obligations. In addition, the TPP Medical Director will report to the TPP Chief Executive and Cambridge Medical Director jointly since, under the Care and Quality Commission rules, the medical quality issues will formally be the responsibility of the Cambridge Medical Director.

mechanism for this) and the Agreement follows the principle of neutrality of the JV Host such that it will not be better or worse off than the other JV Partners. Further, the JV Partners are contractually committed to TPP for a period of at least [] unless there is unanimous agreement to terminate it or three of the JV Partners serve exit notices.⁹ The OFT therefore does not consider that Cambridge could exercise material influence by threatening to exit TPP.

13. Taking all of the above factors in the round, the OFT is therefore of the view that neither Cambridge nor any other of the JV Partners will acquire material influence over TPP.

Are the JV Partners associated persons?

14. The OFT considered whether the JV Partners are associated persons for the purposes of the Act and thus should be viewed as acting together.¹⁰
15. However, the OFT did not receive any evidence to suggest that any of the JV Partners are associated persons (in particular, they have not signed an agreement to act jointly to make an acquisition and there are no cross-directorships between any of the JV Partners). As such, the OFT is of the view that the JV Partners are not associated persons.
16. To the extent that there are future changes to the contractual arrangements between the JV Partners, these could conceivably change the jurisdictional analysis.

THIRD PARTY VIEWS

17. Third party comments have been taken into consideration and discussed above where relevant. For completeness, a third party who responded to the OFT's invitation to comment raised concerns that it would be foreclosed from providing the JV Partners with pathology services. However, the OFT has found that the JV does not lead to two or more enterprises ceasing to be distinct and it therefore does not have jurisdiction to review the JV.

⁹ The Agreement states that [].

¹⁰ Under section 127(4)(d), two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporated or to secure control of any enterprise or assets shall be regarded as associated. This situation will most commonly arise where the acquiring persons are related or have a signed agreement to act jointly to make an acquisition (OFT Jurisdictional and Procedural Guidance, June 2009, at paragraph 3.43).

DECISION

18. On the basis of the information available to it, the OFT has decided that the anticipated pathology joint venture between Cambridge University Hospitals NHS Foundation Trust, Colchester Hospital University NHS Foundation Trust, East and North Hertfordshire NHS Trust, Hinchingsbrooke Health Care NHS Trust, The Ipswich Hospital NHS Trust and West Suffolk NHS Foundation Trust does not qualify for investigation under the mergers provisions of the Act, because the transaction does not lead to two or more enterprises ceasing to be distinct, as defined in section 26 of the Act. The OFT believes that a relevant merger situation has, therefore, not been created.