

Completed acquisition by Optimax Clinics (Unlimited) of Ultralase Limited

ME/5898/13

The OFT's decision on reference under section 22(1) given on 29 July 2013. Full text of decision published 6 September 2013.

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

1. **Optimax Clinics (Unlimited)**¹ ('**Optimax**') operated 22 clinics and eight consultation centres providing refractive eye surgery in the UK before its acquisition of Ultralase. Optimax's turnover in the UK for the year-ended December 2011 was £[] million.
2. **Ultralase Limited ('Ultralase')** operated 23 clinics and three consultation centres providing refractive eye surgery in the UK prior to being acquired by Optimax. It was owned by a banking consortium who held it is a joint venture vehicle, CVLC Group ('**CVLC**') immediately preceding its sale.² Ultralase's turnover for the year ended December 2011 was £[] million.

TRANSACTION

3. Optimax completed the transaction on 5 November 2012. The transaction was made public on 3 December 2012.

JURISDICTION

4. As a result of this transaction Ultralase and Optimax (together, the '**parties**') have ceased to be distinct. The turnover test set out in section 23 of the Enterprise Act 2002 (the Act) is not met. The merged parties

¹ The OFT understands that Optimax has very recently changed its status to that of a limited company.

² The consortium comprised Bank of Scotland, RBS, Lloyds Banking Group and Bank of Ireland.

overlap in the provision of refractive eye surgery in the UK submitting that their combined share of supply in refractive eye surgery in the UK exceeds 25 per cent. In addition, the OFT believes that it is or may be the case that the parties have a share of supply of in excess of 25 per cent in refractive eye surgery in a number of local areas comprising a substantial part of the UK in particular in a number of local areas where a merger to monopoly is created by the merger.³ As such, the OFT considers that the share of supply test in section 23(4) of the Act is met.

5. The OFT therefore believes that it is, or may be the case, that a relevant merger situation has been created.

TIMING

6. The statutory clock has been suspended under section 25(2) of the Act and the OFT's administrative timetable has not been started due to information requests pending since January 2013.
7. The Act provides for the OFT to request such information as is required for the purpose of making a reference. The consequences for the merger parties of not responding to such a request are that the OFT may extend the four-month statutory timetable for as long as the response to the information requested is overdue.⁴ The OFT is conscious, however, of the need to progress its investigations, particularly in cases raising the risk of pre-emptive action. The OFT cannot allow a merger investigation to remain open at phase one indefinitely, in the absence of requested information.
8. In this case, a period of five months was granted to Optimax since the statutory timetable was first extended. Optimax did not indicate by which date the information would be provided in full although some further information was provided. The OFT considered that the risk of further pre-emptive action was significant and would only increase over time, as well as potential harm arising to customers given the closure of a number of clinics/consultation centres where the merger parties were located in close geographic proximity to each other and the potential for the merger to impact the incentives of the merger parties in those local areas. As a result, the OFT felt that such a process could not continue indefinitely and it was left with no option but to continue with its investigation on the basis of the

³ Milton Keynes/Southampton and Chelmsford/Southend.

⁴ See section 31(2) of the Act.

information that was available. In the absence of a satisfactory submission that would have started the OFT's administrative timetable and restarted the statutory clock, the OFT sent Optimax an Issues Paper.

9. Given the overall time during which the information requests had been outstanding with no timescale for a complete response provided by the parties and, conscious that the transaction completed over six months before with a notable amount of integration having taken place since, the OFT considered that it had to complete its assessment of the case as a first phase authority based on the information that was available to it.

COUNTERFACTUAL

10. The OFT considers the effect of the merger compared with the most competitive counterfactual. In practice, in completed mergers, the OFT generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. In this case, that counterfactual would be the continuation of pre-merger competition between Ultralase and Optimax. However, the parties submitted that absent the merger Ultralase would have exited the market meaning that this merger would not result in a substantial lessening of competition.
11. The OFT will assess a merger against a counterfactual different from the pre-merger conditions of competition where, based on the evidence available to it, it considers that the prospect of these conditions continuing is not realistic (or where there is a realistic counterfactual that is more competitive than the pre-merger conditions of competition). The OFT notes that where a merger raises concerns relative to the pre-merger situation, the OFT is reluctant to clear the merger based on an alternative counterfactual and will only do so when it has sufficient compelling evidence.⁵
12. In forming a view on an 'exiting firm' scenario, the OFT will consider:
 - a) whether the firm would inevitably have exited the market (through failure or strategic exit)

⁵ *Merger Assessment Guidelines* (CC2 and OFT1254, September 2010), paragraph 4.3.5. See also for example *Kerry Foods Limited/Headland Foods Limited*, OFT decision of 12 July 2011, paragraph 10.

- b) whether there would have been a substantially less anti-competitive alternative purchaser for the firm or its assets, and
- c) what would have happened to the firm's sales in the event of its exit.⁶

13. If the OFT cannot reach a sufficient level of confidence in relation to each of these considerations it will use the pre-merger situation as its counterfactual. The OFT's assessment against each of the criteria of the exiting firm test is set out below.

(a) Inevitability of exit

- 14. The OFT assessed the financial position of Ultralase in the period preceding the transaction. In doing so, it assessed the extent of restructuring activity and the potential for further restructuring, taking into account the profile of assets and liabilities and the action the management had taken to address the firm's position.
- 15. The OFT notes that Ultralase was owned by a consortium of large banks who had been the main secured creditors of the business and had become effectively, through CLVC, the parent company of Ultralase. As a result, the OFT has also considered – in addition to the mere ability to meet the financial obligations of Ultralase, which the bank consortium would have been able to do – the willingness of the banks to provide additional funding to Ultralase. As part of its assessment, the OFT examined whether CVLC had taken the strategic decision to exit.

Assessment of Ultralase's financial position

- 16. The OFT investigation found that Ultralase endured several years of poor financial performance before its secured creditors (who had become its owners, CVLC) sold the business to Optimax. []. In support of the financial position of Ultralase Optimax submitted management accounts for each of the assessment centres and group-wide accounts.
- 17. The business had been experiencing a general decline in sales since 2008. Sales in the industry had been reduced by around 29 per cent between

⁶ *Merger Assessment Guidelines*, paragraphs 4.3.8 to 4.3.18.

2009 and 2012.⁷ Optimax submitted that Ultralase was suffering from a significant []. It explained that most enquiries take around six months to be converted into sales and that enquiries provide a good basis on which to predict income over the following six months. Internal documents provided substantiate Optimax's assertion.

18. As a consequence of the financial position Ultralase found itself in, the banks instructed Grant Thornton to prepare a report on the viability of the business in January 2012, titled 'Project Photon'. The content of this is discussed further below in the section covering the potential for the owners of Ultralase to restructure the business.
19. Optimax explained that an additional concern for Ultralase was the withdrawal of one of two providers of consumer interest free credit facilities (Creation) in May 2012. Given the substantial cost of laser eye treatments (which typically ranges from £2000 to £3,500), many patients rely on access to interest free credit. By mid-2012, Ultralase was solely dependent upon []. The Grant Thornton report noted further concerns about the likelihood of Ultralase being able to extend []. Ultralase operated [].⁸ Any substantial change to [] would be expected to have adversely affected Ultralase cash flow position.
20. In a subsequent contingency planning review written in July 2012, Grant Thornton made it clear that in the event of a major funding requirement leading to insolvency proceedings ([]) the firm would be forced to appoint an insolvency practitioner. The document makes it clear that Grant Thornton would not advise trading [] and that the only credible options post appointment would be sale as a going concern or divestment of assets.⁹
21. Turning to its financial position immediately preceding the sale, Optimax submitted that Ultralase would [] have inevitably failed. Ultralase's management accounts immediately prior to the sale indicate that it had a positive EBITDA but had made a loss once non-operating expenses such as interest payments were taken into account and had been in steady decline for a number of years. [] and Ultralase would have experienced a funding

⁷ Keynote estimated that the laser eye surgery sector fell by 29 per cent between 2009 and 2012.

⁸ Project Photon Opportunity overview, p. 24

⁹ Grant Thornton (2012), 'Project Photon contingency Planning Review' dated 17th July 2012, page 19.

gap. Grant Thornton made it clear in their contingency report that a significant unmet funding gap (whatever the cause) would lead to Ultralase exiting from the market.

22. The OFT notes that []. Without some form of alternative funding source or additional funding from its owners, it appears likely that Ultralase would have had to enter some form of insolvency proceedings.

Potential for restructuring the business to ensure its continued survival

23. By way of background, Ultralase was acquired by 3i Group in 2008. It was restructured in 2010 when its lenders (Barclays, Royal Bank of Scotland, Lloyds and Bank of Ireland) agreed to write off all of Ultralase's mezzanine debt and some of the senior debt in exchange for the majority of the shares in Ultralase. The banks held their equity interest in Ultralase through a joint venture vehicle, CLVC, until its sale. Ultralase's senior management were the other shareholders in CLVC.
24. In November 2011 Grant Thornton were appointed by CLVC to review the short term cash position of the business and to advise on the timing and appropriateness of putting the business up for sale given the risks to the business being unable to continue to trade. The cash flow review work was able to be extended in December 2011 to incorporate (i) an assessment of the prognosis for the market and Ultralase's position within it; and (ii) assisting management with building a more appropriate business plan to reflect the market outlook and the need for cost restructuring (the analysis for which became the Project Photon report outlined above).
25. This indicated that the business was in decline and that actions to reduce the company's cost would need to be made, this included exploring the renegotiation of contracts with surgeons, possible redundancies, making changes to the infrastructure of the business by relinquishing leases of some premises, or otherwise reducing running cost by using some clinics as assessment centres thus reducing the need for medical staffing. Given that many leases were for five or 10 years the report considered that the owners would have to make significant severance payments to landlords for any changes to be made in this regard.
26. In early 2012 the business appointed Chief Restructuring Officer to support the assessment and potential delivery of the above actions and initiatives.

The Chief Restructuring Officer prepared the above cost reduction proposals into a plan called Project Iris. Those elements of the plan with low upfront cost were implemented under the title Project Iris Lite. Grant Thornton had estimated that to deliver Project Iris in its entirety, the business would require additional funding of between £3.5 million and £4.0 million. The owners of Ultralase were reluctant to spend further capital through increasing the borrowings of the company as they were not confident that this would enable the company to repay its outstanding loans owed to them or indeed improve the position for the creditors of the company.

27. The analysis conducted by Grant Thornton in July 2012 concluded that the sale of the business as a going concern was in the best interest of stakeholders as due to the nature of a healthcare business, and with [].

Willingness of owners to provide additional funding

28. The evidence presented to the OFT indicates that Ultralase's ability to meet its financial obligations and the ability to restructure itself depended on the support of its owners. This is made clear in a letter from the banks to the OFT stating that a report from the Chief Restructuring Officer, '....showed that operational changes were required to the business, and that significant further funding would be required not only to implement the operational turnaround, but also to enable the business to continue to trade through to the end of 2012.'
29. The OFT has been in correspondence with the banks to ascertain their likely course of action absent a successful sale of the business. They indicated that they had considered three options for the business; (i) restructuring, (ii) sale, (iii) insolvency. The Chief Restructuring Officer's turnaround plan would have required a significant investment of money, with the banks indicating that they considered the debt recoveries to be uncertain. The banks stated that a sale was considered preferable to an insolvency procedure as they did not believe Ultralase could have funded itself through an administration process and as such it would be likely to be liquidated.
30. In response to the documents prepared by Grant Thornton, the bank signalled to the OFT that their preference would be no further investment. 'The turnaround plan made it clear that the business required more financial

restructuring... And also required a significant investment of both money and time, in both case for uncertain returns. The banks therefore considered whether option 2 (selling the business) or option 3 (insolvency) would be more suitable for us and for the business itself (emphasis added).

31. The banks stated that they were reassured on a number of occasions that the sale to Optimax would proceed and as such they had not reached a firm conclusion on what they would have done if a sale to Optimax had not proceeded. The evidence of the commercial context and the advice provided by Grant Thornton suggests it seems very unlikely that they would have made the significant cash injection required. The OFT understands that the high level of debt already underpinning the business; the payments due in December 2012 and the fact that interest payments were being accrued influenced their decision. Even if further funding had been made available, it appears very unlikely that this would have only been intended to facilitate the subsequent sale of the business.
32. In summary, the evidence available to the OFT is consistent in supporting the view that the banks had taken the strategic decision to dispose of the Ultralase business and that in the absence of a sale, Ultralase would have inevitably exited the market.
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Conclusion on inevitability of Ultralase exit

34. The OFT considers that, on the basis of the evidence available to it, the exit of the Ultralase business was inevitable.

b) Whether there would have been a substantially less anti-competitive alternative purchaser for the firm or its assets

35. The OFT has assessed whether any alternative bidders that would have maintained Ultralase as an effective competitor in the market for refractive eye surgery had shown an active interest in acquiring Ultralase and, if so, whether they represented a substantially less anti-competitive alternative to Optimax. The OFT considers the parties to have been close competitors in the supply of refractive eye surgery and therefore any credible interest in purchasing all or such part of Ultralase which would have maintained it as an effective competitor to Optimax or would have provided for new entry or expansion is pertinent to this limb of the exiting firm scenario.
36. Optimax submitted that although there were other indicative bidders, these were not 'realistic bidders' in the sense that they would not have been likely to have proceeded to make a purchase of Ultralase or a significant part of it.

The process of marketing the Ultralase business

37. The OFT understands that the marketing of the business for sale commenced in May 2012. Grant Thornton contacted around 50 potential bidders (for example, overseas providers of similar services, general healthcare providers, private equity bidders and competitors). Of the potential bidders contacted, two bidders (excluding Optimax) were invited to a second-stage of the bidding process. They signed non-disclosure agreements and were on this basis invited to carry out preliminary due diligence and provided with access to company information in a data room.
38. One private equity firm, which specialises in investing in healthcare markets, made an initial bid in July 2012 of £15 million for Ultralase. Optimax made a bid of £[] million. Grant Thornton's objectives were to achieve the highest price possible, manage the risk of no bid being made and ensure a decision was made before Ultralase ran into any potential cashflow problems. Grant Thornton indicated that they had concerns over execution risk with both Optimax and the private equity firm. The private equity firm lowered its bid to below £13 million in September 2012 following initial due diligence, and it indicated to the OFT that it would have undertaken full financial and legal due diligence before it proceeded with the transaction. In contrast, Optimax informed the OFT that it proceeded with the transaction without undertaking any due diligence. Grant Thornton advised CVLC that Optimax's bid should be accepted as it had a lower execution risk.

39. Accordingly, there was at least one other credible bidder besides Optimax who at the time of the acquisition remained interested in acquiring Ultralase and would have represented a substantially less anti-competitive purchaser. The OFT notes that the potential alternative purchaser had already undertaken some due diligence, obtained soft funding commitments, drawn up some initial business plans and had even selected a CEO designate to run the business. This evidence supports the credibility of the alternative bidder's interest in acquiring Ultralase. In response to questions by the OFT the private equity firm was unable to rule out the possibility that it would have proceeded with the acquisition following full due diligence. The OFT notes that the possible unwillingness of alternative purchasers to pay the asking price, or the highest price, to a seller does not rule out the fact that there is no less anti-competitive purchaser, especially if the OFT considers it realistic that an offer had been, or would be likely to have been, made above liquidation value.¹⁰ The OFT notes that the estimated liquidation value of Ultralase was around £5 million and that following initial due diligence, the private equity firm still made a bid of just below £13 million (that is more than Optimax paid). Against, this background, the OFT cannot reach a sufficient level of confidence that the private equity bidder would not have pursued a bid at least above liquidation value if it had gone on to undertake a full financial and legal due diligence.
40. As a result, the OFT considers, on the basis of the evidence available to it, that there was a realistic prospect of a viable alternative purchaser who would have been a substantially less anti-competitive buyer than Optimax.¹¹ The OFT therefore does not consider that the requirements of the second limb of exiting firm test have been met. It has therefore not considered the third limb of the test in this case.

Conclusion on counterfactual

41. The OFT believes it has been presented with sufficiently compelling evidence to lead it to believe that Ultralase would have inevitably exited the market absent the merger. However, on the basis of the evidence available to the OFT, the OFT is not able to exclude the possibility that there is a realistic prospect of a substantially less anti-competitive alternative to the merger under consideration. For this reason, the OFT considers that the

¹⁰ *Merger Assessment Guidelines*, paragraph 4.3.17.

¹¹ *Merger Assessment Guidelines*, paragraph 4.3.10.

correct counterfactual to assess the merger against is the *status quo ante*, that of the pre-merger conditions of competition. It has therefore been necessary to go on and undertake a detailed competitive assessment at a local and national level in this case.

COMPETITIVE ASSESSMENT

MARKET DEFINITION

PRODUCT MARKET

42. The parties overlap in the supply of refractive eye surgery.
43. The OFT's approach to product scope is generally to consider first if narrow candidate markets can be widened through substitution on the demand-side. If appropriate, the OFT then considers if substitution on the supply-side allows several products, which are not demand-side substitutes to be aggregated into one wider market.¹²

Types of procedures

44. Refractive or laser eye surgery procedures such as LASEK and LASIK can be used to correct astigmatism, short-sightedness or long-sightedness by reshaping the inner eye, specifically the cornea. The implantation of intraocular lenses (IOLs) involve similar procedures but are microsurgical rather than laser based refractive eye surgery, and can be used to treat cataracts, short-sightedness or long-sightedness.
45. Optimax identifies LASEK and LASIK as the two principal types of laser eye surgery in which their activities overlap.

LASIK and LASEK

46. LASIK is the most common form of laser eye surgery. Optimax submitted LASIK accounts for 85 per cent of laser eye treatments in the UK with LASEK accounting for the remainder.
47. LASIK involves creating a thin flap on the cornea to access the underlying tissue. This can leave the eye structurally weaker and exacerbate damage if the patient sustains an injury to the eye after surgery. This means LASIK

¹² See *Merger Assessment Guidelines*, paragraphs 5.2.6 to 5.2.19.

is not suitable for some customers whose lifestyles involve a higher risk of impact to the eye, those whose work involves strict eyesight requirements or those who have certain eye conditions or very poor vision. LASEK is the most common alternative treatment for these patients.

48. LASIK has a faster and less painful recovery time than LASEK. LASIK patients typically return to work and leisure activities within two or three days of their laser eye surgery.
49. LASEK eye surgery accounts for below 15 per cent of all laser-based procedures which are carried out. In contrast to LASIK, where a flap is created, LASEK is a surface procedure where the surgeon removes the cornea's outer skin, and uses a laser to reshape the exposed substance of the cornea. Because the cornea's surface is removed in LASEK, the levels of discomfort and recovery times are higher than with LASIK. However, the healed eye will typically be structurally stronger after LASEK than LASIK.
50. The OFT considers that different treatments are unlikely to be substitutable from a patient's perspective given that a particular treatment will be required – or preferred – dependent on the suitability of the patient and their needs. The OFT therefore considers there to be no, or only very limited, potential for substitution on the demand side.
51. On the supply side, the OFT may aggregate products when firms have the ability and incentive quickly to shift capacity between these different products depending on demand for each, and the same firms compete to supply these products and the conditions of competition between the firms are the same for each.¹³
52. In relation to LASIK and LASEK, the OFT understands the same surgeons and much of the same equipment are used to perform both types of surgery. Marketing of procedures appears to be similar for both procedures. Indeed a patient may not have an a priori preference or know which procedure he or she is eligible for until after an initial consultation. The OFT notes that most clinics¹⁴ offer both LASIK and LASEK and the competitive conditions for the supply of both procedures appear to be the same.

¹³ See *Merger Assessment Guidelines*, paragraph 5.2.17.

¹⁴ The OFT understands that all of the merger parties clinics offer both procedures as do their major rival providers. Nevertheless, some exceptions have been identified with Hillsborough Private Clinic in Belfast possibly being an exception
www.hillsboroughprivateclinic.com/treatment.aspx?title=laser-eye-surgery

53. The OFT in this case, can leave open to what extent LASEK and LASIK should be regarded as forming part of the same relevant market given that both parties provide LASIK and LASEK at each of their clinics and the sources of competitive constraints for both of these services appear to be the same. As a result, considering LASIK and LASEK together or separately makes no material difference to the competitive assessment.

Intraocular Lenses (IOLs)

54. Patients with very poor vision may not be suitable for LASIK or LASEK due to the level of tissue that would need to be removed to sufficiently reduce the refractive error.¹⁵ An alternative for these patients is Intraocular lenses (IOLs), also referred to as implantable contact lenses. An IOL is surgically implanted into the cornea. The lens is permanent (although it can be surgically removed) and needs no maintenance. This class of procedure is also used for the treatment of cataracts,¹⁶ and is called refractive lens exchange (RLE). The eyes are usually treated one at a time, with the second treated only once the first eye has healed. Once an IOL has been implanted, it restores vision nearly immediately, with the full effect reached after about three weeks.
55. Patients can technically be treated with IOLs, even if they are eligible for laser based procedures. In practice however, IOLs are typically used when laser eye surgery is not appropriate as IOL procedures are more invasive, more expensive and more time-consuming for the patient. Third parties have indicated that the quality of equipment and surgeons can extend the range of prescriptions that can be treated through laser based procedures. Therefore, the point at which IOLs are preferred to laser eye surgery can differ across providers. As with LASIK and LASEK, the OFT considers that different treatments are unlikely to be substitutable from a patient's perspective. As a result, the OFT does not consider IOLs to be constrained on the demand-side from other types of corrective surgical procedures, such as LASIK and LASEK nor do more invasive IOL procedures competitively constrain laser based surgical procedures.

¹⁵ See also www.londonvisionclinic.com/are-you-suitable/treatment/intra-ocular-lens

¹⁶ www.rcophth.ac.uk/core/core_picker/download.asp?id=994&filetitle=Patient+Guide+to+Ex+aminer+Laser+Refractive+Surgery+July+2011

56. On the supply-side, IOL procedures use different equipment and require different facilities to LASIK and LASEK and so switching capacity between these procedures is difficult. Furthermore not all clinics provide IOL procedures and Optimax submitted a different set of providers (including all cataract surgeons) are active in IOLs. As a result, the conditions of competition in the supply of IOLs are different to that of laser eye surgery treatment. The OFT does not consider there to be sufficient scope for substitution on the supply-side to warrant including IOLs in the same relevant market as laser eye surgery.

Refractive eye surgery and other methods of vision correction

57. The OFT has not previously concluded on the market definition in relation to the supply of laser eye surgery although it has considered the provision of optical services in bricks and mortar opticians,¹⁷ namely (contact) lenses and lenses for glasses. The decision indicated that laser eye surgery is a permanent alternative and potential substitute, but that in practice more traditional methods of vision correction and laser eye surgery did not place a strong competitive constraint on each other.
58. In this case, on the demand side, the OFT received no evidence that customers would substitute refractive surgery, such as laser eye surgery, with contact lenses or glasses in response to a small but significant non-transitory increase in price. As a result, the OFT does not consider glasses or lenses to be in the same product market to laser eye surgery.
59. On the supply side, specialist facilities, equipment and staff with specific qualifications are required to enable a practitioner to carry out laser eye surgery, most of which are not found in traditional opticians. Optimax's submission indicates that the surgery would require some licensing by the Care Quality Commission over and above that of a standard optician and surgeons need to be registered with the GMC and Royal College of Ophthalmologists. Optical Express appears to be the sole company which provides both refractive surgery and glasses and contact lenses on a significant scale. A major provider of contact lenses or glasses would therefore generally not also provide laser eye surgery.

¹⁷ ME/4014/09 - Proposed joint venture between Alliance Boots Limited and Dolland & Aitchison Limited in relation to their respective optical businesses

60. The OFT considers that there is insufficient scope for demand or supply side substitutability between glasses/contact lenses and refractive eye surgery to warrant a market that includes both.

The treatment process and delivery of refractive surgery

61. Before treatment, patients will have one or more consultations to assess suitability and determine the most appropriate treatment. Laser eye surgery (i.e. LASIK and LASEK) is generally performed on an outpatient basis. Patients will typically receive check-ups and aftercare following surgery.
62. These services – the surgery itself, the check-ups and the aftercare – are generally supplied together by a single provider, however they are not necessarily provided at the same location. A number of firms in the industry operate a hub and spoke structure to varying degrees. This involves having a network of consultation centres at which customers may be initially assessed and then provided treatment at a smaller number of clinics.¹⁸ Ultralase employed consultation centres in some areas such as Aberdeen, Norwich and Exeter. Optimax used consultation centres more extensively, particularly around London. Optical Express appears to have a particularly heavy reliance on consultation centres.
63. The OFT has examined the extent to which, first, there may be scope for consultation, treatment and aftercare to be considered separately, and, second, the extent to which treatment centres and consultation centres may be considered together.
64. In relation to the different stages of assessment, the OFT notes that some providers charge a separate fee for consultation and other providers offer consultation and treatment at different locations (consultation centres separate from treatment centres). However, as mentioned above, the OFT also recognises these services are generally purchased by the patient together as a bundle. The OFT does not propose to separately assess the impact of the merger on consultation, treatment and aftercare services.
65. In relation to treatment and consultation centres, the parties overlap in the provision of both. Optimax submitted that consultation centres and treatment centres are demand-side substitutes as they both provide the

¹⁸ In some cases the actual surgery is performed at a subcontracted hospital. The parties appear to use their own treatment facilities, except for some instances of IOL procedures.

gateway to receiving the same treatment. Clearly a treatment centre, which provides both consultation and treatment services, will represent an effective substitute to a consultation centre. While the OFT acknowledges that consultation centres may provide a competitive constraint to treatment centres, this may be a more limited constraint than that provided by another treatment centre. In support of this, internal documents submitted by Optimax point to the number of procedures generated by a rationalised consultation centre ranging from [] to [] per cent of those of a treatment centre (and generating [] to [] per cent of the revenue of a treatment centre).¹⁹ Therefore, the OFT has distinguished between consultation and treatment centres for the purposes of the competitive assessment.

66. IOL treatment is a microsurgical procedure and thus requires sterile operating theatres which are more costly than the facilities used for laser based procedures. IOL treatment is accordingly provided at fewer clinics than laser-based procedures for both the parties and their main laser surgery competitors.²⁰ In effect, the parties operate a more extreme hub and spoke network with regard to IOLs, with laser-orientated treatment centres and consultation centres both effectively being used as consultation centres for IOLs. For example, Ultralase 2012 management accounts indicate IOL assessments were carried out at [] locations but treatments were only carried out in [].
67. While Optimax submitted that a much wider range of providers offer IOLs, no evidence was provided supporting this and the OFT has been unable to establish if this is the case. As a result, the OFT has focused its assessment principally on the supply of laser eye surgery procedures.

Conclusion on product scope

68. The OFT's investigation has found that there is limited scope for demand side substitution between different sight correction options since each product has specific characteristics and is associated with specific costs.
69. The OFT has assessed the merger on the basis of LASEK and LASIK refractive eye surgery together. IOLs are considered to form a separate

¹⁹ These figures are taken from a Grant Thornton review of Ultralase, which assesses the costs and benefits of converting six treatment centres into consultation centres as part of a clinic rationalisation strategy.

²⁰ See for example: www.opticaexpress.co.uk/stores/england.html

market. However, given the absence of evidence allowing these procedures to be assessed separately the OFT has only been able to assess these to a limited extent alongside LASIK and LASEK.

GEOGRAPHIC MARKET

70. Optimax submitted that competition is primarily local as few providers operate nationally and while providers may set headline prices at a national level, all discount prices reflect local competitive conditions.
71. The merger has resulted in the reduction of large national refractive eye surgery providers from three to two in the UK as a whole and a reduction in competing fascia in a number of local areas within the UK. The OFT has considered the extent to which the merger may have had or be expected to have an impact on both national and local dimensions.

National competition

72. The evidence available to the OFT indicates several important parameters of competition may be determined at national level and therefore be subject to national competition.
 - **Pricing:** both Ultralase and Optimax had national pricing strategies pre-merger. While discounts are offered at a local level, the overall price list, from which deviation occurs, is set nationally.
 - **Marketing and promotions:** Optimax's submission indicates that promotions are determined at national level.²¹ Both Ultralase and Optimax are active in national marketing strategies and management accounts show that marketing costs are primarily incurred at group rather than local level. Promotions, including price matching strategies of competitors, also appear to apply nationally.
 - **Procurement:** Optimax discusses its use of equipment on its website, and appears to use the same lasers in all of its facilities, which suggests that procurement decisions are taken at national level. Third parties have indicated that the quality of laser equipment influences the quality of treatment.

²¹ Paragraph 8.6 of submission

- **Service levels:** For example, decisions regarding the treatment process, such as the extent to which consultants are involved, are determined at national level. Equipment decisions, as mentioned above, are determined at national level and can influence the quality of treatment. Surgeons also vary in skill and experience, and the choice of consultants may be determined at national level.

73. The nature of national competition in respect of these parameters is considered further in the competitive assessment below. Evidence that the parties made decisions on important competitive parameters at a national level indicates that there may be a national dimension to competition. Optimax provided data purporting to demonstrate a significant degree of price dispersion at the local level, with average clinic level pricing for LASIK treatment at Optimax between January and June 2012 ranging from £[] in [] to £[] in []. Optimax also submitted that the evolution of prices over time does not follow a uniform national pattern, suggesting local competition.
74. The OFT acknowledges that there is a degree of local competition and price dispersion across clinics may support this, alongside other factors affecting demand (and costs) in local areas. Nevertheless, the OFT does not consider this evidence precludes competition on underlying national prices and notes the degree of price dispersion across local areas highlighted in data provided by Optimax is limited.²² In any event, even if national decisions were driven to a potentially lower degree by local conditions, they may also be driven by a national response to the actions of competitors.²³
75. For these reasons the OFT has considered the effect of the transaction using a national – UK - frame of reference to determine whether it may result in a loss of competition at a national level.

²² Page 14 of the Response to the Issues Paper.

²³ In addition Optimax submitted that it has also opened a number of consultation centres in recent years. Despite requests, Optimax did not provide details of the extent of these openings and, in particular, if they were in local areas in which Ultralase was already active. If this were the case, the OFT considers that additional national concerns may arise from Optimax as a potential entrant against Ultralase, over and above any local overlaps (discussed below), although the OFT has been unable to verify if this is the case.

Local competition

76. As outlined above, Optimax submitted that competition occurs primarily at a local level. It submitted that because customers must attend a clinic for laser eye surgery, any analysis of the geographic frame of reference must begin with the location of the customer and their willingness to travel. As such it will largely be the presence of competitors within a local area that will determine the competitive constraints on the parties.
77. Average prices vary by local area and []. Other elements of the competitive offering such as national pricing promotions and fit-out of the clinics and consultation centres may also be 'flexed' at the local level to increase the margin achieved at clinics which face relatively less competitive pressure.
78. The OFT has previously decided that in cases where there are multiple local areas, catchment areas can provide a pragmatic starting point for delineating the scope of local competition and identifying competitive overlaps. The OFT has generally defined this catchment area to include the area over which the large majority of customers (generally 80 per cent) are located.²⁴
79. Optimax has estimated the 80 per cent catchment area based on the origin of customers for each of the Optimax treatment and consultation centres.²⁵ This analysis did not distinguish IOL patients from other patients. Based on this analysis, the OFT notes that the average distance travelled by customers ranges from 10 miles to 60 miles.
80. Optimax also indicated that it believes that the catchment areas it has identified may be conservative given the market is presently contracting and, as a result of this, the distance customers are willing to travel will necessarily increase. It also argues that distance may be less of an important factor in choosing a provider of laser eye surgery given that it is carried out once (with perhaps three or four visits in total). It is also a relatively high value purchase which may suggest that a preference for a local service is not as strong a factor as it could be. Optimax submitted that the overall market size has reduced by around 29 per cent in the past

²⁴ See OFT/CC Commentary on Retail Mergers, paragraph 2.14.

²⁵ In the absence of evidence on the origin of Ultralase customers, Optimax has used data from its own clinics and re-centred using these data on the acquired Ultralase clinics.

three years and that as the market contracts it is inevitable that typical journey times will increase (and local markets will also become larger), however, no evidence has been presented to demonstrate that journey times are increasing over time.

81. The catchment area data is from 2012 and so the OFT considers it to accurately reflect the current travel patterns and preferences of customers.
82. Given the wide range of distance measures across the relevant locations the OFT has taken the catchment area as defined by 80 per cent of each clinic's customers. These catchment areas represent only a starting point for local market analysis. For example, catchment areas do not reflect other important factors such as the relative proximity of clinics within a catchment area.

Conclusion on geographic market

83. The OFT assesses the transaction at a UK and local level. For local analysis, the OFT has used the parties estimates of 80 per cent catchment areas as the starting point of its local geographic market analysis. Given that there appear to be several national parameters of competition the OFT has also assessed the national impact of this merger.

HORIZONTAL ISSUES

NATIONAL

Market Shares

84. Optimax provided internal documents which contain estimates of their own and their competitors' market shares by volume of patient treatments. The data is based on figures on the number of Intralase LASIK procedures, which account for around 85 per cent of all laser based procedures.

		Volume		Clinics	
		Count	Share	Count	Share (per cent)
High Street Chains	Ultralase	[]	[15 to 25]	21	[15 to 25]
	Optimax	[]	[15 to 25]	21	[15 to 25]
	Optical Express	[]	[30 to 40]	35	[25 to 35]
Large independents and small chains	Moorfields	[]	[0 to 10]	1	[0 to 10]
	Focus Clinics	[]	[0 to 10]	1	[0 to 5]
	London Vision Clinic	[]	[0 to 10]	1	[0 to 5]
	Advanced Vision Care	[]	[0 to 5]	1	[0 to 5]
	Centre for Sight	[]	[0 to 5]	1	[0 to 5]
	Accuvision	[]	[0 to 5]	3	[0 to 5]
	Optegra	[]	[0 to 5]	5	[0 to 5]
Independents	Nuffield Exeter	[]	[0 to 5]	1	[0 to 5]
	Laser and Lens Network (surgeon I)	[]	[0 to 5]	1	[0 to 5]
	Laser and Lens Network (surgeon II)	[]	[0 to 5]	1	[0 to 5]
	Kirkwood Fyfe	[]	[0 to 5]	1	[0 to 5]
	NHS (Manchester, St James Leeds, Sheffield)	[]	[0 to 5]	3	[0 to 5]
	Hillsborough Private Clinic	[]	[0 to 5]	1	[0 to 5]
	Other Independents	[]	[0 to 5]	20	[15 to 25]
	Total	99,726		118	

Source: Parties' internal documents

85. The data indicates that the parties have a combined market share of around [40 to 50] per cent, with Optical Express the only other significant player with a market share of [30 to 40] per cent. Two third parties have supported these estimates, one estimated the parties and Optical Express together have a national market share of about [75 to 85] per cent.

86. The OFT has concerns that on a national level there will only be two significant players and that the concentration at a national level raises significant prima facie competition concerns.

Closeness of competition

87. Optimax submitted that Ultralase was not an effective competitor to it pre-merger and that they were not close competitors: []. Optimax submitted a draft report prepared by Grant Thornton in late 2012 assessing the viability of the Ultralase business. Within this there were comments from providers of refractive eye surgery which stated that independent and high street providers were not in competition with one another. Within the internal business review prepared by Grant Thornton refractive eye surgery providers were categorised as 'High Street chains', large individual clinics, hospitals and small chains and independents. In addition, Optimax submitted that there were significant price differences between them []. As a result, it submitted that even though the firms' activities may have lain in the same product market, there was little competitive interaction between them.
88. However, in support of the parties competing closely with each other a key competitor overview and mystery shopping exercise conducted by Grant Thornton and included within its review of the Ultralase business includes only Optimax and Optical Express as competitors to Ultralase. The OFT considers that this is evidence that it considered these two companies as being its closest competitors.

Quality differentiation

89. Optimax submitted that laser eye surgery providers compete over a number of parameters, with price and quality being the most important. It submitted that most providers, including Ultralase, have sought to position themselves as high quality providers and that Optimax and Optical Express compete more strongly on price.
90. Third party comments have confirmed that there is a price-quality spectrum. Some aspects of quality include whether or not consultant surgeons are used for initial consultations, the level of precision and patient-specific customisation allowed by the laser equipment used, and the skill and experience of the surgeon. As mentioned above, these factors

may influence whether certain marginal patients are treated with IOLs or laser-based procedures, and this may impact on patient outcomes. There are also different levels of customisation of LASEK and LASIK both across provider groups and individual practices within the same group.

91. A number of third parties have confirmed that Optimax, along with Optical Express, are generally perceived as the cheapest options. One competitor indicated the closest competitors in terms of quality to Ultralase were Accuvision and Focus Clinics although these two suppliers have a much weaker national presence than the merger parties and Optical Express.

Sourcing of customers and marketing

92. There may be some differentiation between providers in terms of how customers are sourced. Optimax indicated in their submission that referrals by doctors or opticians are not common in the industry.²⁶ However, some competitors have indicated they source customers primarily through references from GPs. Third parties have also indicated that Optical Express harnesses its database of contact lenses and glasses customers to source refractive surgery customers. As a result, the OFT considers that Optimax and Ultralase – with the same methods of attracting customers – may represent close substitutes to each other for customers relative to other providers.
93. Third parties indicated that marketing and brand awareness are an important way of attracting customers. Given the parties' large marketing spend and overall size, they were likely to be in a better position than smaller providers to attract customers through marketing. This suggests that the parties may have been differentiated from their competitors in terms of their ability to attract customers or be attracting different customers (for example, those persuaded to undergo treatment by marketing, as opposed to through GP referrals).

Price matching

94. Optimax submitted that the level of price competition between it and Ultralase was likely to have been limited before the merger. It submitted a list of all cases in 2012 in which Optimax agreed a discount on a price match/price beat basis. Optimax submit that in the majority of cases it

²⁶ Paragraph 8.2

price matched against Optical Express and not Ultralase. The sample of discounts provided by Optimax relates to all price match/price beat discounts given in 2012, yet this data indicates that price matching only occurs for a limited proportion of Optimax customers: only 150 discount examples were provided across 21 clinics, around 17 of which were in clinics with no overlaps between the parties and 30 of which were from the post-merger period.²⁷ The OFT considers that only very limited weight can be placed on this data.

Conclusion on national competition

95. As discussed above, some elements of the parties' competitive offering occur at national level. Given the degree of concentration at a national level and the evidence pointing to the closeness of substitution between the parties, the OFT is concerned that the merger may result in higher list prices, including a reduction in national promotional activity and/or a reduction in some quality aspect of the parties' offering (such as the equipment used, the extent to which surgeons are used throughout the process or the skill and experience of the surgeons). However, given the OFT's assessment in relation to competition concerns in local areas below,²⁸ the OFT has not found it necessary to conclude on the extent to which competition at a national level may be lessened as a result of the merger.

LOCAL ANALYSIS

96. The OFT has investigated whether the merger may give rise to unilateral effects at the local level and, in particular, the extent to which the merger may give rise to increases in prices (including price reductions less than would otherwise occur with competition between the merger parties) and other factors resulting in a deterioration to the competitive offering. In its local analysis the OFT has considered and weighed a number of factors within the local areas to assess the level of the potential loss of

²⁷ Only [] patients were offered a price match by Ultralase in 2012.

²⁸ The OFT notes that the areas identified in the local analysis below as problematic account for a substantial proportion of both parties' national network of clinics and consultation centres. The changes in competitive conditions in these overlapping areas may also create an incentive for Optimax to increase national lists prices, weaken their promotional efforts, or otherwise weaken their competitive offering on a national basis. The merger may therefore harm competition nationally, including those areas in which the parties did not overlap before the merger, although, as outlined above, the OFT has not found it necessary to conclude on the extent to which the merger may give rise to national competition concerns.

competition, including: the reduction of competing fascia in any area as a result of the transaction; those competitors that evidence suggests provide a competitive constraint to the parties; and the views of third parties and information on third party treatment volumes. The OFT has considered and weighed the evidence available in each local area and reached its conclusion based on an overview of the evidence in each individual area.

97. However, the OFT notes that in this case, the information and evidence available to conduct its assessment has been limited. In the absence of more comprehensive information, the OFT has had to rely on the evidence that is available to it and, as a result, has taken a cautious approach as a first phase review body in interpreting this evidence.

Catchment areas and fascia counts

98. As outlined above, in order to identify the overlaps between the parties, an 80 per cent catchment area around each of the parties' stores has been used. This catchment area has also formed the basis for a preliminary fascia count filter of overlapping stores.
99. Optimax used a fascia count within the catchment areas as a filtering mechanism to identify those areas that appeared most problematic.
100. Optimax acquired 26 clinics (23 treatment centres and three consultation centres) from Ultralase. These are listed in the table below. The OFT does not consider there to be any likelihood of unilateral effects arising as a result of the merger in local areas where there was no overlap between the merger parties or where they will continue to face sufficient competition post-merger.
101. The OFT considered in this case that a local area creating a fascia reduction of 4 to 3 or fewer within the catchment areas calculated by Optimax, as a starting point, was a reasonable indication, in the absence of other evidence, that competition concerns may arise and these areas warrant further analysis based on the limited evidence available.²⁹ The OFT

²⁹ The OFT notes a number of potential issues with the parties' analysis. For instance, Optimax used straight line distances rather than distance by road when constructing the catchment area and deciding which competitors to include, and that the radius employed for the Ultralase facilities are the radius of the closest Optimax facility, and is based on Optimax patient data. While these issues do not appear to affect the extent of overlaps between the parties, they may have an effect on fascia counts and this is taken into account in identifying areas which are

has not received sufficient information on number of treatments carried out at a local level to assess the transaction on the basis of market shares.

Effective competitor set

Smaller competitors

102. The OFT notes that the parties and Optical Express were substantially larger than other providers in the industry. Accuvision and Optegra appear to be next biggest in terms of number of clinics, but with just five and six clinics respectively, they are substantially smaller than the three largest firms. Some third parties have raised general concerns about the ability of small and independent providers to compete with national brands such as the parties and Optical Express. They have also pointed to the large marketing costs associated with raising brand awareness. Without a sufficient marketing spend, it may be that small firms struggle to convince customers that their price-quality combination offers value relative to the Optimax, Ultralase and Optical Express. Nonetheless, it appears from the evidence available (below) that Optegra and Accuvision may provide some constraint on the parties in the local areas in which they are present.
103. Optimax provided several emails indicating that they were monitoring and responding to the presence of Accuvision in some local areas and the discount analysis, albeit limited in scope, pointed to [] of Accuvision's prices in a number of the local areas where it is present alongside the parties. The presumed low level of treatments Accuvision provides in comparison with the parties is not at a level which would indicate it represents the same strength of constraint as that of the parties on each other. Nevertheless, the OFT acknowledges that Accuvision will likely provide some, albeit limited, constraint and considers this as part of the competitive assessment. Optegra operate a similar number of clinics to Accuvision and provides around 500 treatments across its clinics. The OFT believes that it provides some constraint on the parties.

considered to raise concerns. While the OFT considers that these points suggest that the catchment areas provided by the parties may provide an overly optimistic view of the number of competing fascia to the parties in local areas, they have nevertheless been used as a basis for the analysis.

104. In most local areas the OFT has been unable to verify the number of treatments carried out by other independent providers of laser eye surgery or, in the absence of evidence similar to that provided for Accuvision and Optegra,³⁰ the extent to which they were competing with the parties. Where the OFT has received evidence on sales by competitors at a local level, the sales levels were substantially below those of the parties, suggesting the competitive constraint they exert on the parties may be relatively weak compared to the constraint the parties exert on each other. In other instances, other rival clinics are providing a substantially differentiated offering to that of the parties, on the basis of price or patient recruitment.
105. Without a clear indication of the number of treatments carried out by these providers – or a clear indication as to the constraint they provide to the parties – the weighting that can be given to them in terms of the competitive constraint they provide against the parties is limited. The OFT has therefore excluded these other providers from its fascia count on a cautious basis.
106. Given the absence of evidence from the parties to indicate that these other rival clinics provide a clear competitive constraint on them the OFT has removed all competitors except Optical Express, Accuvision and Optegra from its initial fascia count.

Moorfields and private hospital groups

107. Optimax submitted that Moorfields Eye Hospital, through its private patients 'arm', provides a significant competitive constraint, both in London and the surrounding areas. In particular Optimax submitted that Moorfield's will have a much larger catchment area than the parties, as it has both an excellent reputation and a single site, as such Optimax believes that it will exert a constraint over a much larger geographic area than one of the parties' treatment centres.
108. The OFT notes that based on the market share information submitted by the parties, Moorfields conducts around [] LASIK eye procedures per year, giving them a national market share of around [0 to 10] per cent. However,

³⁰ Evidence was also provided for one other competitor active in Belfast and a number of other locations in Ireland, Optilase.

the OFT notes that a Grant Thornton report, prepared for Ultralase,³¹ contains an overview of the UK laser eye market structure. This report contains a quote from Moorfields which says, 'our prices went up with the inflation. We are not affected by the discounting of the high street. It's a different market.' Additionally, based on information on its website a laser eye procedure at Moorfields costs in excess of £4,000, in contrast to an average revenue for the parties of around £[1,500 – 2,000].³² Further, the parties have provided no evidence demonstrating that Moorfields exerts a competitive constraint on them.

109. Optimax also submitted that private hospital groups exert a competitive constraint on them. The OFT has not been provided with sufficient evidence to conclude whether they exert any competitive constraint on the parties and has therefore excluded them from its fascia count. However, the OFT note that the market share information provided by the parties suggest that private hospitals such as Nuffield conduct substantially fewer procedures per site than any of the national players.

Consultation centres

110. As outlined above, both the parties and some other providers in the market, such as Optical Express, operate under a hub and spoke structure under which customers may be initially assessed for treatment at a consultation centre and then provided treatment at a clinic. As explained above, the OFT considers that these are likely to provide some constraint on the parties although to a lesser degree than treatment centre. The OFT has therefore taken a cautious approach and not included competing consultation centres in its initial fascia count filter. However, consultation centres are taken into account as part of the OFT's competitive assessment in those local areas where they are present.

Potential entrants

111. Optimax has indicated potential entrants place a competitive constraint on the parties in a number of areas. The maps provided by the parties also include potential entrants into the market. Given that these are not actual market participants, nor in any instances has it become clear in the course

³¹ Project Photon – Phase 2, 24 January 2012

³² Treatment revenue continued, slide 94 of Project Photon.

of the OFT's enquiry that these have any intention of providing services in competition with the parties or will enter to a sufficient scale, the OFT has also excluded these from its fascia count filter.

Evidence of clinic closures as evidence of closeness of competition

112. Shortly after completion of the transaction, Optimax undertook a review of clinics and assessment centres and as a result it closed 13 Ultralase clinics, three Ultralase consultation centres and two Optimax consultation centres.³³ Pre-merger, Ultralase operated 23 clinics and three consultation rooms, and Optimax operated 22 clinics and eight consultation rooms. Therefore, the closures represent a substantial portion of Ultralase's national network of clinics. The OFT considered whether closures can be considered to constitute evidence of closeness of competition.
113. Optimax submitted that the closure of clinics is not the result of a unilateral effect on the basis that: (i) the OFT assumes all rivalry between the parties is lost on completion of the merger, and there cannot be any further loss of competition after the merger; and (ii) the closures would be relevant if they represented evidence that the merged group had the incentive and ability to withdraw capacity. Optimax further noted that there is evidence of excess capacity in the industry, that the closures were required to restore the viability of Ultralase and the parties face significant competitive constraints in all areas in which closures occurred.
114. Optimax has explained that it took proximity of clinics and profitability into account when deciding on clinic closures.³⁴ Internal documents provided by Optimax explain the rationale for individual closures. However, it appears that the majority of clinic closures were based on proximity to an Optimax clinic and did not mention sales or profitability. In some areas factors other than just proximity were mentioned as determining closure:[].

³³Consulting Rooms closed: Aberdeen, Exeter, Norwich, Cardiff (Optimax), Guildford (Optimax). Clinics closed: Birmingham, Bristol, Glasgow, Hammersmith, Leeds, Maidstone, Manchester, Newcastle, Northampton, Nottingham, Reading, Southampton and Tottenham Court Road.

³⁴ A document submitted by the parties stated 'In making its decisions, Optimax took into account: **Proximity**: clinics were most likely to be selected for closure if there was an Optimax and an Ultralase clinic in a particular location, and the capacity of the Optimax clinic was sufficient to cope with the combined demand for treatments at both clinics. ([a separate document] shows all of Optimax's clinics had, and still have, substantial spare capacity). **Profitability**: the ability of clinics to make a contribution to central costs was also taken into account.'

115. In general, however, the OFT considers that close proximity between overlapping Ultralase clinics or consultation centres to be an important factor in determining which clinics or consultation centres would be closed. Even if it were the case that sales and positive operating profits were key factors in determining which stores were closed, the OFT considers that both these factors would have been partly determined by the extent of competition in the respective local area.
116. Furthermore, the OFT is not convinced that profitability was an outcome determinative metric in considering closure of specific clinics or consultation centres. []. This suggests that clinic level profitability was not a concern at most of the closed clinics and consultation centres that were closed.
117. If the parties were strongly differentiated and not close competitors, then diversion between the parties would be low, and it would not be a profitable strategy to close otherwise profitable clinics. The closure of profitable clinics suggests that Optimax expected to recapture a substantial proportion of the 'lost' future sales associated with a closed Ultralase clinic. The OFT therefore considers that it cannot not rule out the possibility that the closure of profitable, or potentially profitable, clinics suggests that: (i) the parties compete closely for the same customers; and (ii) there is significant diversion between the parties in those areas. Moreover, the low fascia count also suggests diversion is likely to be significant, given the absence of effective competitors remaining post-merger.
118. Optimax submitted that it closed the clinics in order to make better use of the available capacity in a particular local area. It would make financial sense to do this, according to Optimax, whether or not there was any competition between the overlapping clinics. For example, if both Optimax and Ultralase had a clinic in a particular town but were not competing at all, it would still make sense to close one clinic and increase utilisation at the other.
119. The OFT acknowledges the parties' cost rationalisation arguments in relation to the closure of clinics and that there are other factors that may have driven the closure decision beyond the closeness of competition. However, the OFT also notes that in order to increase capacity utilisation at one of the clinics, there would likely still have been an expectation that the

demand from the closed clinic would transfer to the other existing clinic of the parties (in order to increase capacity utilisation at that clinic) and not simply disperse amongst other rival providers.

120. Based on the above, the OFT considers that the decision to close Ultralase clinics in geographically overlapping areas does generally provide an insight into the extent of competition between the parties pre-merger and is probative of an expectation of 'diversion' or capture by the parties post-merger following closure. However, the closures are not considered to be determinative of the parties being close competitors but rather indicative that they may have been.

Geographic closeness of competition

121. The OFT's concerns are stronger in those areas where the parties are closest geographic competitors. The geographic proximity of the parties and their competitors has been taken into account in the OFT's analysis.
122. Similarly, the OFT is able to place more weight on the competitive strength of competitors when they are in closer proximity to the merger parties.

Local area analysis

123. Based on the information available, and the above analytical framework, the OFT considers that the parties did not overlap in four local areas – Aberdeen, Cambridge, Edinburgh and Norwich – where Ultralase were active meaning that these areas have not been considered further.
124. The OFT has concerns that the merger may give rise to a realistic prospect of a substantial lessening of competition in at least six local areas where competing fascia are reduced from three to two or fewer (taking account of Optical Express, Accuvision and Optegra). The OFT is concerned that as a result of the merger prices may rise or service levels may decline in these local areas. These local areas are considered briefly below.

Milton Keynes/Northampton and Chelmsford/Southend (category A)

125. These two overlapping areas are considered together as category A areas since they raise similar issues. Prior to the merger Ultralase operated a treatment centre in Northampton and Chelmsford, while Optimax operated

a treatment centre in Milton Keynes, 19 miles away from Northampton, and in Southend, 19 miles from Chelmsford. The catchment area was estimated to be 22 and 19 miles for Milton Keynes/Northampton and Chelmsford/Southend, respectively, resulting in the parties overlapping in both areas. In both areas there are no competing treatment centres. Optical Express operates a consultation centre within both catchment areas, which may provide a limited competitive constraint to the parties. Optimax has since closed the Ultralase clinic in Northampton shortly after completion and before Initial Undertakings were signed.

126. The OFT considers that the merger effectively results in a two to one situation in treatment centres. Even taking account of the Optical Express consultation centre, there are limited competitive constraints on the parties post-merger. In Milton Keynes/Northampton the OFT is aware that Woodland Hospitals and Blakelands Hospital (owned by Ramsey Healthcare) may offer laser eye surgery but no evidence was presented to indicate that they are a competitive constraint on the parties.
127. In addition, the parties submitted that patients would consider providers in London as a viable alternative to providers in the area. The parties provided information that trains journeys from Milton Keynes to London Euston take from 36 minutes with off-peak return fares from £14.50, and a car journey takes one hour and 16 minutes. Trains from Northampton to London Euston take from 52 minutes with off-peak return fares from £10.00, and a car journey takes around one hour and 28 minutes. The OFT did not receive any information that clinics in London provide a competitive constraint on the parties in this local area. The OFT notes that the catchment area is 22 miles, and that the closest part of the M25 is 28 miles from Milton Keynes. Central London is about 50 miles away.
128. In the Chelmsford/Southend catchment area, the parties submitted that Laser Sight Essex as well as providers in London provided a constraint on the parties but no evidence of this was presented.
129. As a result the OFT cannot consider them as providing a relevant constraint on the parties, resulting in the test for reference being met in relation to the Northampton and Milton Keynes overlap area and the Chelmsford and Southend overlap area.

Nottingham, Maidstone, and Glasgow (Category B)

130. These three local areas are considered together as category B areas since they raise similar issues. Both Ultralase and Optimax operated treatment centres in Glasgow, Nottingham and Maidstone, giving rise to three local area overlaps. Optical Express also operates a treatment centre and consultation centre within each of the three catchment area. No other relevant competitors exist within the catchment areas. Optimax pointed to a number of potential entrants but these entrants have not confirmed that they intend to begin provision of laser eye surgery.
131. In Glasgow there was some evidence of future entry by Nuffield but the OFT did not have evidence that any such entry would be timely, likely or sufficient to alter the OFT's assessment. In Nottingham, the parties submitted that that a private hospital north of Nottingham owned by BMI Healthcare, the UK's largest private hospital group, offers referrals and is a source of potential competition. BMI offers laser eye surgery in other locations. The OFT was unable to confirm that this entry would be timely, likely or sufficient such as to alter its assessment. Even if this were the case, the OFT considers that the potential entrants highlighted are private hospital groups that are significantly differentiated from the parties' competitive offering.
132. The merger therefore gave rise to a reduction in competing fascia from three to two in each of these local areas. Optimax has closed the Ultralase clinic in all three of these areas. As a result, the OFT considers the test for reference to be met in relation to each of these three overlap areas in Nottingham, Maidstone and Glasgow.

Liverpool/Chester (category C)

133. The Liverpool/Chester area constitutes one catchment area. Ultralase operated treatment centres in Liverpool and Chester, while Optimax operated in Liverpool.
134. Optical Express and the parties all operated within a mile of each other in the centre of Liverpool. Both these areas are caught within the same catchment area. Optical Express operates a treatment and consultation centre in the catchment area. Optimax submitted St Paul's Eye Unit, The New Birkdale Clinic and View Point Vision provide a constraint on the

parties. However, no evidence of this was presented by the parties and as a result, the OFT considers the merger results in a reduction in competing fascia from three to two. Given the loss of competition between the parties and the limited competitive constraint from competing providers, the OFT considers the test for reference is met in the Liverpool area. While no separate conclusion is drawn from the Chester area, the presence of Ultralase in Chester exacerbates the OFT's concerns about the degree of competition lost in Liverpool.

Other local areas

135. There are a number of other local areas³⁵ where one other competitor – generally Accuvision or Optegra³⁶ – is present alongside the parties and Optical Express. The evidence available to the OFT suggests that these clinics are conducting fewer treatments at their clinics, on average, than the merging parties, and so do not represent the same competitive constraint that the parties likely exerted on each other pre-merger. Nevertheless, it is clear from evidence provided to the OFT that these additional providers are representing some competitive constraint to the parties and should therefore be given weight as part of the competitive assessment.
136. The OFT considers that this additional competitive constraint means that the likelihood of competition concerns arising as a result of the merger is lower than those areas outlined above. Nevertheless, the extent to which the presence of an additional but smaller competitor is sufficient to discipline the parties post-merger is uncertain and not clear from the evidence available to the OFT. As a result, and given the strength of the competition concerns outlined in relation to the other local areas above, the OFT has not found it necessary to conclude on whether the test for reference is met in relation to these additional local areas.
137. In two further local areas,³⁷ both Accuvision and Optegra are present, alongside Optical Express. As with the other local areas above, the OFT has not found it necessary to come to a definitive conclusion on the extent of concerns in these areas but considers any concerns to be more limited than those areas outlined above.

³⁵ Including Belfast, Bristol, Cardiff, Manchester, Newcastle, Reading, and Southampton

³⁶ The exception being Belfast, where Optilase is present.

³⁷ Birmingham and Leeds.

London

138. The parties operate a number of different consultation or treatment centres in London, giving rise to a number of potential local overlaps. In each of the London catchment areas Accuvision is present, alongside Optical Express and numerous independent operators. The OFT has not been provided with sufficient evidence to conclude on the degree of competitive constraint from single independent clinic in London, but notes that collectively Focus Clinics, London Vision Clinic, Advanced Vision Care and Centre for Sight conduct around 7,500 treatments per annum. On balance, the OFT believes that these clinics collectively are likely to exert sufficient competitive constraint on the parties. However, given the strength of the competition concerns outlined in relation the other local areas above, the OFT has not found it necessary to conclude on whether the test for reference is met in relation to these additional local areas.

Table summarising findings

139. The following table summarises all of the local areas, categorised by the strength of the OFT's concerns. The table shows for each of Optimax and Ultralase whether the overlap is created by a clinic or treatment centre, whether closure was proposed or happened, the radius of the catchment area of the parties and fascia count reductions, and indicates the presence of Optical Express treatment/consultation centres, Accuvision and Optegra.³⁸

³⁸ There are usually two entries for each local area. These are listed consecutively and shaded the same colour. One entry is the catchment centred around Optimax and the other is the catchment area centred around Ultralase. In some cases the overlapping Optimax and Ultralase clinics are not in the same town. For example, the Optimax in Milton Keynes overlaps with the Ultralase in Northampton. In some cases three clinics may fall within the same catchment, for example, Optimax in Liverpool overlaps with Ultralase in Liverpool and Chester.

Group	Owner	Location	Type	Closed	Catchment Area Radius	Fascia count	Accuvision	Optegra	Optical Express Treatment	Optical Express Consultation
A	Optimax	Milton Keynes	Treatment		22 miles	2 to 1				✓
	Ultralase	Northampton	Treatment	✓	23 miles	2 to 1				✓
	Ultralase	Chelmsford	Treatment		19 miles	2 to 1				✓
	Optimax	Southend	Treatment		19 miles	2 to 1				✓
B	Optimax	Glasgow	Treatment		43 miles	3 to 2			✓	✓
	Ultralase	Glasgow	Treatment	✓	43 miles	3 to 2			✓	✓
	Optimax	Nottingham	Treatment		23 miles	3 to 2			✓	✓
	Ultralase	Nottingham	Treatment	✓	23 miles	3 to 2			✓	✓
	Optimax	Maidstone	Treatment		30 miles	3 to 2			✓	✓
	Ultralase	Maidstone	Treatment	✓	30 miles	3 to 2			✓	✓
C	Optimax	Liverpool	Treatment	Considered	16 miles	3 to 2			✓	✓
	Ultralase	Liverpool	Treatment		16 miles	3 to 2			✓	✓
	Ultralase	Chester	Treatment		16 miles	3 to 2			✓	✓
	Optimax	Belfast	Treatment	Proposed	36 miles	3 to 2			✓	
	Ultralase	Belfast	Treatment		36 miles	3 to 2			✓	
	Optimax	Bristol	Treatment		58 miles	3 to 2	✓		✓	✓
	Ultralase	Bristol	Treatment	✓	58 miles	3 to 2	✓		✓	✓
	Optimax	Cardiff	Consultation	✓	58 miles	3 to 2	✓		✓	✓
	Ultralase	Cardiff	Treatment		58 miles	3 to 2	✓		✓	✓
	Optimax	Manchester	Treatment		27 miles	3 to 2		✓	✓	✓
	Ultralase	Manchester	Treatment	✓	27 miles	3 to 2		✓	✓	✓
	Optimax	Newcastle	Treatment		36 miles	3 to 2	✓		✓	✓
	Ultralase	Newcastle	Treatment	✓	36 miles	3 to 2	✓		✓	✓
	Optimax	Reading	Treatment		22 miles	3 to 2		✓	✓	✓
	Ultralase	Reading	Treatment	✓	22 miles	3 to 2		✓	✓	✓
	Optimax	Southampton	Treatment		29 miles	3 to 2		✓	✓	✓
	Ultralase	Southampton	Treatment	✓	29 miles	3 to 2		✓	✓	✓

Optimax	Newton Abbott	Treatment		37 miles	3 to 2				✓
Ultralase	Exeter	Consultation	✓	37 miles	3 to 2			✓	✓
Optimax	Birmingham	Treatment		23 miles	3 to 2	✓	✓	✓	✓
Ultralase	Birmingham	Treatment	✓	23 miles	3 to 2	✓	✓	✓	✓
Optimax	Leeds	Treatment		26 miles	3 to 2	✓	✓	✓	✓
Ultralase	Leeds	Treatment	✓	26 miles	3 to 2	✓	✓	✓	✓
Optimax	York	Consultation		30 miles	3 to 2	✓	✓	✓	✓
Optimax	Guildford	Consultation	✓	22 miles	3 to 2	✓	✓		✓
Ultralase	Guildford	Treatment		22 miles	3 to 2	✓	✓		✓
Optimax	London Canary Wharf	Consultation		11 miles	3 to 2	✓		✓	✓
Optimax	London Chiswick	Consultation		7 miles	3 to 2	✓		✓	✓
Optimax	London Liverpool St	Consultation		18 miles	3 to 2	✓		✓	✓
Optimax	London NW3	Treatment		15 miles	3 to 2	✓		✓	✓
Optimax	London Victoria	Consultation		12 miles	3 to 2	✓		✓	✓
Ultralase	London (Harley St.)	Treatment		15 miles	3 to 2	✓		✓	✓
Ultralase	Tottenham Court Road	Treatment	✓	15 miles	3 to 2	✓		✓	✓
Ultralase	Hammersmith	Treatment	✓	15 miles	3 to 2	✓		✓	✓
Optimax	Croydon	Treatment		16 miles	3 to 2	✓		✓	✓
Ultralase	St Albans	Treatment	✓	22 miles	3 to 2	✓		✓	✓

BARRIERS TO ENTRY AND EXPANSION

140. Entry or expansion of existing firms can mitigate the initial effect of the acquisition on competition, and in some cases may mean that there is no substantial lessening of competition. In assessing whether entry or expansion might prevent a substantial lessening of competition, the OFT considers whether such entry or expansion would be timely, likely and sufficient.³⁹ In terms of timeliness, the OFT's guidance indicates that the OFT will look for entry to occur within two years.
141. Optimax submitted that barriers to entry and expansion in laser eye surgery are low. It estimated that it would take around 10 months for a new entrant to establish itself at a new location, around six months for an existing provider. Based on evidence from Optimax's own recent branch openings, it estimated the cost of opening a new branch at around £[] and the annual running costs as about £[] per year.
142. Optimax also submitted that entry by existing providers of other regulated healthcare is most likely, and they would have many of the facilities such as operating theatres already in place. They would therefore be able to enter at lower cost and within four to six months.
143. The OFT received information from third parties on the costs and feasibility of entry. They estimated that capital equipment costs of about £600,000 per new clinic in addition to initial capital outlay of £1m and that it would take five years to recover costs from profits.
144. Optimax estimated that laser equipment costs around £[] assuming second hand equipment is used. It also estimated the costs of new equipment as £[]. Third parties confirmed that second hand equipment can be used, but that it may be less reliable and its service history may be difficult to verify. Given the importance of properly functioning equipment, some providers said they would not use second hand equipment. The parties estimated costs of entry to rise substantially if second hand equipment is not used.
145. The OFT notes that Optimax estimated initial marketing costs. It listed the initial marketing costs associated with opening a new clinic as £ []. It also lists ongoing marketing as one of several administrative overheads for a

³⁹ Merger Assessment Guidelines, paragraphs 5.8.1 to 5.8.3.

clinic. The annual costs of ongoing marketing are estimated to be about £[] per clinic per year.

146. Further examination of the management accounts provided by the parties show that most marketing costs are incurred centrally, at head office level, rather than at individual clinics. Marketing represents a substantial cost for both Optimax and Ultralase. Ultralase spent between £[] million and £[] million (on a full-year basis) per year on marketing in 2011 and 2012. Optimax spent about £[] million in 2012 and £[] million in 2011. Third parties have confirmed that branding is an important parameter of competition and that marketing costs (and the cost of equipment) may deter entry and/or expansion.
147. The OFT is currently sceptical as to the prospect of new entry, noting that Optimax has pointed to significant reductions in overall demand in recent years (29 per cent in the last three years) and that the trend for both Optimax and Ultralase as well as other providers is for clinics to be closed rather than opened. The OFT considers that these conditions do not support the prospect of entry constraining the parties.
148. The OFT has taken account of Optimax's submissions on potential entry in specific affected local areas in the OFT's assessment above. However, the OFT considers that the evidence received in this case on entry and expansion is not such that it is able to rely on this information to reach a general conclusion that any entry will be timely, likely and sufficient to outweigh the competition lost as a result of the merger.

THIRD PARTY VIEWS

149. The OFT received a limited response from competitors. As part of its investigation it contacted customers of Ultralase and Optimax but only obtained a limited number of responses. These responses were mixed and not sufficient in each local area to draw any firm conclusions on. Third party views have already been discussed in other parts of the decision where appropriate.

ASSESSMENT

150. The OFT believes that it is or may be the case that the share of supply test in section 23(2)(b) of the Act is met and, therefore, that a relevant merger situation has been created. This is because Optimax's share of supply of refractive eye surgery in the UK, is around [40 to 50] per cent following its acquisition of Ultralase.
151. Based on the evidence available to it, the OFT believes that Ultralase would have inevitably exited the market absent the merger. However, the OFT is unable to reach a sufficient level of confidence that another substantially less anti-competitive buyer, would not have made a bid, and that such a bid would not have been above liquidation value. For this reason the OFT does not believe that the merger meets the criteria of the exiting firm scenario.
152. Given the merger does not meet the exiting firm scenario the OFT has undertaken a detailed competitive assessment at local and national level in this case.
153. The OFT has considered an appropriate product market definition to consist of the supply of refractive laser eye surgery. On a cautious basis, the OFT has assessed this merger on the basis of LASEK and LASIK refractive eye surgery together. IOLs are considered to form a separate market. However, given the absence of evidence allowing these procedures to be assessed separately the OFT has only been able to assess these alongside LASIK and LASEK. While the OFT notes that patients go through the same network of consultation centres or laser treatment clinics to be referred on for surgery the OFT is also concerned that conditions of competition for IOLs may be materially different (for example rival providers of LASEK and LASIK may not also be active in IOLs and so the OFT concern may be greater in relation to IOLs).
154. The OFT considers that there are both national and local parameters of competition and has assessed the merger in relation to each of these.

155. On a national basis, competition issues may arise due to the combined entity having a market share of around [40 to 50] per cent with the presence of only one other main competitor remaining, Optical Express. At local level, the OFT has assessed whether the merger would lead to any fascia reduction within 80 per cent catchment areas centred around the target or acquirer of three to two or less. Although not directly counting Accuvision and/or Optegra as part of its fascia count the OFT considers that their presence in local areas in combination with the presence of an Optical Express consultation centre and/or treatment centre provides some constraint on the parties. In the areas where there is no Optical Express, the OFT has some doubts that the parties face competitive constraints such that any adverse competitive effects of the merger are defeated. On this basis, this merger raises competition concerns in relation to six local areas.

156. Consequently, for the reasons set out above, the OFT believes that it is or may be the case that the acquisition of Ultralase by Optimax may be expected to result in a substantial lessening of competition within a market or markets in the UK.

UNDERTAKINGS IN LIEU OF REFERENCE

157. Where the test of reference is met and therefore the OFT is under a duty to refer a merger to the Competition Commission, section 73 of the Act allows the OFT to accept binding undertakings from the parties concerned instead of making a reference to the Competition Commission. In doing so, the Act requires that the OFT should have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it (section 73(3)). The OFT's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger in a clear cut manner.⁴⁰

⁴⁰ See *Mergers: exceptions to the duty to refer and undertakings in lieu of a reference guidance*, OFT1122, December 2010.

158. In this case the parties offered undertakings in lieu in the form of divesting all clinics where the OFT found SLCs which created a merger to monopoly. They did not offer to divest any other clinics or assessment centres. In relation to any other areas where SLCs were identified the parties offered an 'open access' remedy whereby other providers of laser eye surgery could use the Group's facilities on a per-use, 'white label' basis and a price control whereby the merged entity commits not to raise prices above an identified level, and a monitoring trustee is employed (at the Group's expense) to police the Group's compliance with that price control.
159. In terms of the divestment remedy, the parties' offer did not include clinics in all of the local areas where the OFT has found a realistic prospect of a substantial lessening of competition. As such, the OFT does not consider that this remedy offer provides as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition identified. Therefore, the OFT has decided not to accept this proposed remedy.
160. In terms of the price control offer (and the accompanying monitoring trustee), OFT guidance says that it is generally unlikely that behavioural undertakings will be sufficiently clear cut to address the identified competition concerns.⁴¹ The OFT considers that that is the case in this instance. For example, the OFT considers that a price control remedy: would not address its concerns about a possible degradation in the quality of laser eye surgery treatment service levels; would be difficult to implement given the range of, and differences of complexity in, the treatments available; would make prices more transparent possibly leading to collusion with Optical Express; and may distort investment decisions to the detriment of customers or ossify business processes.⁴² Therefore, the OFT does not consider that this remedy offer meets its clear cut standard.
161. The offer to make available clinics to third parties is also behavioural in nature and the OFT does not consider that it meets the requisite clear cut standard. It has not been made clear to the OFT whether this remedy would lead to a collusive outcome between competitors or whether it would be made available on terms which are not competitive, thereby not

⁴¹ *Mergers: exceptions to the duty to refer and undertakings in lieu of a reference guidance*, paragraph 5.39.

⁴² *Mergers: exceptions to the duty to refer and undertakings in lieu of a reference guidance*, paragraph 5.40

providing a clear cut remedy. In addition, no evidence has been provided to the OFT showing 'white label' third party access to the clinics in the local areas identified as raising concerns would be sufficient to restore competition. Therefore, the OFT has rejected this remedy offer.

EXCEPTIONS TO THE DUTY TO REFER

162. While mergers can harm competition, they can also give rise to efficiencies. The Act enables efficiencies to be taken into account in the form of relevant customers benefits. These benefits are defined in section 30(1) of the Act, and are not limited to efficiencies affecting rivalry. Relevant customer benefits are a potential exception to the duty to refer a merger to the Competition Commission where they outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition from the merger as a whole.
163. Relevant customer benefits are limited by section 30(1) of the Act to be benefits to relevant customers in the form of:
- lower prices, higher quality or greater choice of goods or services or
 - greater innovation in relation to such goods or services.
164. Optimax submitted that as a result of the merger, prices at Ultralase had fallen and that there had been further investment in technology and improved customer safety. They also submitted that as a result of the merger []. They submitted some data indicating that the average cost of Ultralase procedures had reduced.
165. The extent of customer benefits created by the merger is not clear from the limited evidence presented by the parties. It is also far from clear that these would outweigh the substantial lessening of competition created by the merger.

DECISION

This merger will therefore be referred to the Competition Commission under section 22(1) of the Act.