
Completed acquisition by Care UK Group of HWH Group Limited

ME/5840/12

The OFT's decision on reference given on 27 February 2013. Full text of decision published 8 March 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.

PARTIES

1. Care UK Group (the **Group**) is the parent company of Care UK Clinical Services Limited (**Care UK**). The Group is comprised of four divisions, namely Health Care, Community Services, Mental Health and Residential Care Services. The Group's operations are made up of its Social Care business and its Health Care business. The Health Care business operates as a single division, and is run by Care UK and its subsidiaries. The Social Care business is divided into three operating divisions: Residential Care, Community Services and Mental Health. The combined worldwide turnover for the Group was £487.5 million.¹
2. HWH Group Limited's (**Harmoni**) principal activities comprise of the provision of Primary Healthcare, Offender Healthcare (**OH**) services, IT managed services and support services to other Healthcare organisations. Harmoni's healthcare services business comprises of Out of Hours (**OOH**) services, NHS 111 (**111**) services, and walk-in (**WI**) services. Harmoni derives most of its revenue from its OOH services, although it is well positioned as a provider of 111 services, which is the new non-urgent 999

¹ Parties' response to enquiry letter dated 3 December 2013, Annex 10: *Care UK Health & Social Care Investment Limited: Annual report for Bondholders for the year ended 30 September 2012*, page 30.

telehealth and patient triage service that is replacing the NHS Direct.²
Harmoni's turnover for the year ended 31 March 2012 was £98.7 million.

TRANSACTION

3. Under a sale and purchase agreement dated 5 November 2012, Care UK completed the acquisition of the entire issued share capital of Harmoni for a consideration of 47.6 million (the **Transaction**).³

JURISDICTION

4. The OFT considers the Transaction has resulted in two enterprises ceasing to be distinct as set out in section 23(1)(a) of the Enterprise Act 2002 (the **Act**).
5. Harmoni's turnover for the last financial year (ending 31 March 2012) was £98.7 million. Accordingly, the turnover test in section 23(1)(b) of the Act is met.
6. Therefore, the Transaction has resulted in the creation of a relevant merger situation for the purposes of section 23 of the Act.

TIMING

7. The parties made a satisfactory submission on 21 December 2012. Initial Undertakings were agreed and signed on 19 December 2012. The administrative deadline is 27 February 2013. The statutory deadline is 11 March 2013.

MARKET DEFINITION

PRODUCT SCOPE

8. Both Care UK and Harmoni have a range of activities in the provision of publicly-funded primary medical care and community health services. The

² The Government is in the process of phasing-in a new national '111' number as a single point of access for patients requiring urgent (but not emergency) medical care to improve ease and speed of access to unscheduled care for patients. This is to replace the NHS Direct service under the NHS Direct number.

³ Sale and Purchase Agreement between Care UK and Harmoni dated 5 November 2012, Clause 3.1.

activities of the parties overlap in three areas: the provision of OOH services; the provision of OH services; and the operation of WI services. Each of these is considered in greater detail below.

OH services

9. The parties submitted that OH services provide primary and secondary healthcare to prison inmates, which includes custody healthcare and other ancillary services. These services are commissioned by Primary Care Trusts (**PCTs**) in their geographical areas, and they are either sub-contracted to third parties, or provided in-house by staff within the National Offender Management Service.⁴ The parties explained that contracts are typically three to five years in duration. Further, the PCTs will generally appoint a single provider of OH services for a single prison or for multiple prisons. As a result, competition takes place for, rather than in, the market.
10. Third parties' views obtained from the OFT enquiry during the market investigation supported the above analysis and understanding of the OH services market.

OOH services

11. In the parties told the OFT that contracts to provide OOH services are tendered by local PCTs or NHS commissioning groups,⁵ as all NHS GP practices are required to provide 24-hour cover for their patients.^{6,7} As such, if a patient urgently needs to see a GP when a GP practice is closed (in the evening, at the weekend or on a public holiday), and the patient cannot wait until the surgery is open,⁸ then the patient can call the OOH service using a given phone number, and is then:

⁴ Previously HM Prison Service.

⁵ OOH services contracts are typically three to five years in duration and cover the provision of OOH services in the local geographical area in which the PCT is responsible for commissioning primary care.

⁶ The OFT notes that this is the regulatory position with respect of England. The parties do not overlap in Scotland, Wales or Northern Ireland.

⁷ The Government is in the process of transferring the responsibility for commissioning the bulk of NHS secondary care services in England, (including most hospital and community health services), from PCTs and Strategic Health Authorities to Clinical Commissioning Groups.

⁸ Generally, GP surgeries are open between 8am and 6.30pm, Monday to Friday.

- given advice over the phone on how to best manage their symptoms (telehealth service)
 - asked to come into the nearest OOH centre (WI service) or
 - offered a home visit from a GP or nurse (home visit service).
12. The parties' submission indicated that OOH services contracts are typically three to five years in duration and cover the provision of OOH services in the local geographical area in which the PCT is responsible for commissioning primary care.
13. Further, the parties submitted that commonly, PCTs have provided OOH services by entering into arrangements with GPs but over the last few years, they are increasingly contracting out these services to other providers. Accordingly, GPs may either provide OOH services themselves (known as 'opting-in') (**Opt-in**) or leave it to the PCT to provide OOH cover (known as 'opting-out') (**Opt-out**) in return for foregoing part of the GP's remuneration. The parties estimated that about 90 per cent of GPs have Opted-out and, therefore, the PCTs are responsible for providing the vast majority of OOH services for NHS patients. This segmentation is considered further in the competitive assessment below.
14. The parties also stressed in their submission that PCTs can provide OOH services in competition with alternative providers, bidding for contracts in the same way as third party operators. Under the Transforming Community Services provisions relating to the separation of PCT commissioning and operations, all PCT provider arms are required to bid for these services on the same basis as third party providers.⁹ Overall, providers include GP co-operatives, social enterprises (charities) and commercial healthcare providers. Generally, the PCTs appoint a single OOH provider in each PCT area. As such, the parties argued that competition takes place for, as opposed to in, the market.
15. Third parties' views obtained from the OFT enquiry during the market investigation supported the above analysis and understanding of the OOH services market.

⁹ The requirement for PCTs to separate operational provider services and commissioning functions was included in the NHS Operating Framework for 2008/09.

WI services

16. In describing the ambit of WI services, the parties explained that these services comprise of a range of unscheduled care services including NHS walk-in clinics, GP-led health centres,¹⁰ urgent care centres (**UCCs**), and minor injuries units. Each of these WI services offer convenient access for all NHS patients, without the need for an appointment (and whether or not the patient is GP-registered). The parties submitted that all of these individual services have sufficient elements in common to be considered under WI services. The OFT received no evidence or third party comments to suggest that further levels of segmentation were necessary in this case.¹¹
17. The parties indicated that WI services are tendered by PCTs to third party providers and tend to include medical procedures and treatments for minor injuries and illnesses which require urgent medical attention, but which may not necessarily warrant care at the local accident & emergency department (**A&E**), for example, infections, rashes and dressing care. Nonetheless, a patient may be admitted to a WI centre following a GP appointment, or because the patient requires further medical attention, or following a referral from an OOH service.
18. Furthermore, the parties explained that WI centres are usually managed by a nurse, and may be co-located with NHS facilities, such as GP practices or hospital A&E departments, particularly where NHS commissioners are seeking to alleviate the pressure on local A&E services and prioritise the delivery of emergency care. As such, WI centres tend to have extended opening hours (e.g. UCCs are often open 24 hours a day, seven days a week). According to the parties, competition to operate a WI service is determined by a tender process run by an NHS trust or PCT/NHS commissioner. Such tenders attract a range of different types of provider

¹⁰ GP-led health centres would typically offer a range of services to patients, such as GP services, a pharmacy, as well as treatment for minor illnesses and injuries as part of a WI service.

¹¹ The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the OFT may aggregate several narrow relevant markets into one broader one on the basis of considerations about the response of suppliers to changes in prices. Please see *Merger Assessment Guidelines*, Section 5.2, paragraph 5.2.17.

as part of a bidding market. Accordingly, and as with OH and OOH services, competition occurs for, as opposed to, within the market.

19. Third parties' views obtained from the OFT enquiry during the market investigation supported the above analysis and understanding of the WI services market.

Nature of competition

20. PCTs often follow EU procurement procedures and go out to tender when placing NHS contracts. Within the relevant services under consideration in this Transaction, some competitors have identified factors which they consider are important in order to maximise their chances of winning contracts in tender processes. These factors include: a local and national footprint of delivering the same or similar services; the ability to create service platforms; sharing management and common infrastructure; and having sufficient resources to implement and manage the relevant contract.
21. Other important factors identified by competitors included: the ability to off-set costs across multiple customers; knowledge and understanding of local customer needs and desires; flexibility to NHS commissioners' and patients' needs – suggested as a competitive advantage for small providers; and delivering the required quality within the submitted tender price. However, some competitors considered cost to be a key factor.

Conclusion on product market

22. The OFT has not considered it necessary to conclude on the product market in this case. It has assessed the Transaction on the bases of OH, OOH and WI services separately.

GEOGRAPHIC SCOPE

23. The parties submitted that their business activities are in England. They have not bid for contracts in Scotland and Northern Ireland, and whilst they have bid for contracts in Wales they have not secured any contracts in there. The parties submitted that the conditions for competition are broadly

similar throughout the UK, and so there is no particular reason for a geographic segmentation of the market by country.¹²

24. From the demand-side, the market may be local or regional as the services are tendered by PCTs and NHS commissioners. Patients (end users) are local.
25. PCTs gave the OFT mixed responses in relation to the geographic ambit of their tenders. Some indicated that they have a preference for local providers, whilst others indicated that they tender their contracts at a national level and invite any provider operating across the UK to submit bids (irrespective of whether the tendered services is for OH, OOH or WI services).
26. Public reports also indicated that providers can be local, regional or nationwide. For example, the Laing & Buisson report identified The Practice, Malling Health, and Virgin Healthcare (Assura Medical Ltd) as nationwide providers.¹³ In addition to these providers, Bondcare Medical Services, Chilvers McCrea and Nestor Primecare were identified as nationwide providers by a separate report.¹⁴ Both of these reports identified both Care UK and Harmoni as providers with a nationwide geographical spread.
27. Some of the parties' competitors confirmed that bidding for certain contracts occurs at a UK-wide level. For example, one competitor confirmed that its geographic coverage for OH services contracts is national, and that it provides a range of integrated healthcare services across the UK. Another competitor also indicated that it bid for OH services contracts at a UK level and despite the fact that the majority of its bids for OOH services contracts are focused on central or the South East of England, it will consider any UK tender.

¹² In the parties' submission, they provided estimates of the total addressable market in the case of OOH, based on England, and in the case of OH, based on England and Wales, being the only figures available to the parties, and are therefore conservative estimates of the total UK market.

¹³ *Primary Care & Out of Hospital Services UK Market Report 2011/12*, researched and written by William Laing, page 49.

¹⁴ NHS Support Federation: *'NHS Unlimited? Who runs our GP services? A study of GP services put out to tender by the NHS'*, pages 8 and 9.

28. However, within WI services, competitors who offer these services did not confirm that they bid for WI services contracts on a national level. One competitor indicated that in providing WI services, its business is focused primarily on the South East.
29. Further, and as mentioned above, the parties were identified as nationwide operators but their bidding data did not confirm that their performance was consistent across the UK or across regions of England. For example, bidding data suggested that from 2010 to November 2012, neither party participated in over 50 per cent of tenders identified by the parties, for OH services contracts in England and Wales. Similarly, neither party had participated in over 50 per cent of tenders for contracts to supply OOH services in England during the same period. This evidence was supported by some customers who did not identify either one or both of the parties as active in their specific regions. For example, Harmoni was not considered to be present in the Yorkshire region by one customer, and another customer located in Berkshire indicated that both parties were not very active in their geographic market.

Conclusion on geographic market

30. Overall, the OFT considers that the evidence provided by the parties and third parties in this case is mixed, and insufficient to conclude on whether the geographic market is national or regional. On a cautious basis, the OFT has assessed the Transaction for all three services on the basis of England and Wales (separately) as well as, where relevant to a specific service, regions within England. Nevertheless, given that no competition concerns arise, the OFT does not need to conclude on the geographic market.

COMPETITIVE ASSESSMENT

UNILATERAL EFFECTS

31. The parties overlap in the provision of OH, OOH and WI services.
32. Horizontal mergers give rise to unilateral effects where they increase the ability and incentive of merging parties to increase prices or reduce the quality of service post-merger.¹⁵ The OFT has therefore assessed the

¹⁵ *Merger Assessment Guidelines*, Section 5.4.

likelihood of a realistic prospect of anti-competitive unilateral effects occurring as a consequence of the Transaction.

CLOSENESS OF COMPETITION

33. The parties submitted that they are not close competitors. The parties emphasised that each of the overlap markets can be characterised as broad based and highly fragmented, with a plethora of strong national and regional providers routinely bidding to secure NHS-funded service contracts. As such, competition arises in relation to the contracts which are put out to tender. Given this view, the parties provided details of bids that each party had competed in 2010, 2011 and up to November 2012.

MARKET SHARES AND BIDDING DATA

OH services

34. The bidding data provided by the parties show that there were 60 tenders submitted in the relevant period and that the parties participated in only nine contracts each, of which, they only competed against each other on two occasions. Furthermore, in the two instances that the parties competed against each other for a tender, only on one occasion was one of them successful (Harmoni). Given the small number of tender overlaps, and that these occurred in different regions, the OFT does not consider that the evidence indicates a possible competition concern at the regional level.
35. The bidding data evidence submitted does not indicate that the parties are each other's closest competitors such that the Transaction would be expected to eliminate a significant competitive constraint between them.
36. The views based on the analysis of the bidding data are consistent with the views based on analysis of the share of supply data provided by the parties. In 2012, the parties together accounted for around 18 per cent of OH services revenue in England and Wales (increment of six per cent), and in each of the regions of England the parties either had a low share of supply or did not overlap (the highest was in the East of England where the parties had won 29 per cent of the tenders in 2012).¹⁶ In Wales, neither party has no prison contracts but given that only four of the prisons (three percent) are located in Wales while 133 prisons are located in England, a

¹⁶ The regional analysis is based on number of tenders won.

segmentation of the data by revenue or by volume between England and Wales does not result in any material change to the view above.

37. Given the evidence available, the OFT does not consider that the Transaction will result in a realistic prospect of a substantial lessening of competition in the provision of OH services.

OOH services

38. The parties submitted bidding data for OOH services covering the period 2010 to November 2012. These data identified 35 tenders over the relevant period, of which, Care UK participated in four and Harmoni 14. In only one instance did the parties submit bids in the same tender (and neither won).
39. Furthermore, customers' views across regions of England were considered, and they did not suggest that there were general concerns about the Transaction. In nine out of the ten regions of England covered, views were received from at least one customer located in each region. Only one customer within the [] region expressed concern about the Transaction. Specifically, this customer indicated that the Transaction would minimally reduce the number of providers, and increase the market share for Care UK, carrying a potential risk of higher prices. This customer considered the parties to compete for OOH services. However, this customer identified four other alternative providers they would consider for OOH services. The customer also indicated that these alternative providers recently bid for their OOH services contracts. In addition, the customer considered that it had some buyer power which is a mitigating factor to any possible competition effects. Overall, the evidence did not seem to suggest that the Transaction will significantly eliminate options available to this customer to the extent that the OFT should be strongly concerned.
40. In addition to the customer mentioned above, several other customers also identified various options that they would consider if the parties stopped providing OOH services to them. This evidence suggested that customers have viable national, as well as local options in the market, which they could consider. Overall, none of the parties' customers indicated that the parties were their only options, such that, post the Transaction, they would have no options if prices were increased.

41. Consequently, the OFT does not consider that the Transaction raises a realistic prospect of a substantial lessening of competition with respect to OOH services.

WI services

42. The parties submitted bidding data for WI services covering the period 2010 to November 2012. These data showed that of the 23 tenders made over the period, the parties bid in one each, and these included separate tenders. This indicates that the parties are not close competitors. Moreover, given the lack of overlap between the parties, the OFT has not found it necessary to undertake regional analysis in this instance.
43. Moreover, analysis of bids already won (in the form of share of supply data) corroborate that competition concerns will not arise in WI services. The parties together account for around 10 per cent of WI services in England and Wales with an increment of around two per cent (whether measured by revenue, number of contracts or number of walk-in centres).
44. Consequently the OFT does not consider that the Transaction raises a realistic prospect of a substantial lessening of competition in regard to WI services.

BARRIERS TO ENTRY AND EXPANSION

45. When assessing possible supply-side responses, including entry, expansion and repositioning, the OFT will consider whether the response would be (i) timely, (ii) likely, and (iii) sufficient.¹⁷ In terms of timeliness, the guidance suggests that the OFT will look for entry to occur within two years.¹⁸
46. The parties submitted that barriers to entry to all three services (OH, OOH and WI services) are generally low and easily surmountable, as evidenced by the range of smaller operators and not-for-profit businesses that have successfully penetrated the market and represent attractive bidders under NHS procurement initiatives. To that end, the significant growth of not-for-profit groups, which includes social enterprises and GP co-operatives, has, in the parties' view, clearly demonstrated the capacity for different

¹⁷ *Merger Assessment Guidelines*, Section 5.8, paragraph 5.8.3.

¹⁸ *Merger Assessment Guidelines*, Section 5.8, paragraph 5.8.11.

providers to seize opportunities to expand their range of primary care services across a wide geographic area.

47. During the OFT's market investigation, third parties were asked about entry into each of the relevant service markets.
48. Third parties estimated that it would take between 12 to 24 months for de novo entry to occur in each of the relevant services. Further, third parties also provided similar estimates with respect to the length of time it might take an entrant to recover their initial entry investment. For each of the services, the range provided was between three to five years.
49. The OFT's market testing found that PCTs cover a proportion of the fixed costs. For example, in OH services, the healthcare services are provided within the prison grounds and the relevant premises are provided as part of the tendered contract to the OH service provider.¹⁹ Also, in the OOH services market, some premises are either owned by the PCT or another NHS body, and leased to the new provider at a pass-on cost or offered as part consideration for the OOH services being provided. Within WI services, contracts for tender will typically include a short lease of trust property for the delivery of WI services.
50. However, given that the OFT has not found competition concerns in this case, it has not found it necessary to conclude on barriers to entry and expansion.

COUNTERVAILING BUYER POWER

51. In some cases, an individual customer may be able to use its negotiating strength to limit the ability of a merged firm to raise prices. For countervailing buyer power to prevent a substantial lessening of competition, it is not sufficient that it merely existed before the merger. It must also remain effective following the merger.²⁰

¹⁹ This generally takes the form of a licence to occupy a designated space in the prison. The contract will also cover the provision of a phone line (although the provider would pay its own bill); basic equipment for GP services (for example, a patient bed or chair); and practice management software (for patient administration purposes). As such, the service provided is akin to a typical GP practice, and it may not be necessary to procure advanced high-value medical equipment.

²⁰ *Merger Assessment Guidelines*, Section 5.9.

52. The parties submitted that NHS commissioning groups enjoy significant purchasing power through their ability to leverage beneficial terms from a highly competitive tender process. NHS commissioners are well-resourced and informed purchasers and can be characterised as regional monopoly commissioners, as there are no alternative purchasers of these services.
53. Further, the parties stated that, in addition to their role as commissioners of primary care services, PCTs are capable of tendering, through their respective provider arms, to operate primary care services using the PCT's own resources. In that regard, the parties considered that the PCTs have the capacity to compete for the market too, thereby enhancing the competitive pressure on independent operators.
54. However, given that the OFT has not found competition concerns in this case, it has not found it necessary to conclude on countervailing buyer power.

THIRD PARTY VIEWS

55. The OFT received responses from competitors and customers, and third party comments have been taken into account where appropriate in the competitive assessment above.
56. In general, there were limited competition concerns in relation to the Transaction, and third parties generally perceived that there would be sufficient competition in the market remaining post-merger.
57. Two competitors raised slight concerns about conglomerate/bundling effects, which are considered in further detail below. However, no other potential theories of harm were raised by third parties, and the OFT did not receive any evidence to suggest other potential theories of harm were credible.

CONGLOMERATE/BUNDLING EFFECTS

58. Two competitors suggested that the merged entity might become the strongest provider of the combined OOH/111 services, with an advantage of combining locally based 111 services with OOH services. One of the competitors thought that the merged entity may have an advantage in

terms of its technology platforms, staffing and common management and processes. Whilst Harmoni currently offers 111 services, Care UK does not.

59. In accordance with the OFT's guidance, the OFT would be concerned if the Transaction created or strengthened the ability of the merged entity to use its market power in one of the concerned markets (the OOH or the 111 services markets) to reduce rivalry in the other market.²¹
60. The OFT notes that there is no overlap between the parties in 111 services, and that the Transaction does not materially strengthen Harmoni's position in OOH services and given that Harmoni currently offers both OOH and 111 services, Harmoni can already leverage any advantages from bundling in terms of technology platforms, staffing and common management and processes and there was no strong evidence suggesting that this was currently a major issue in the market.

ASSESSMENT

61. The OFT has undertaken its substantive assessment in relation to the supply of OH, OOH and WI services. The OFT has taken a cautious approach of adopting a geographic frame of reference of England and Wales, as well as considering England alone, as well as specific regions within England, where necessary. However, given the lack of competition concerns, it has not been necessary for the OFT to conclude on the geographic market.
62. In relation to unilateral effects, the parties are not close competitors in any of the relevant areas of activity. Bidding data information showed that the parties bid for either different contracts or, where they had bid against each other, more often than not they failed to win the contract in question. Instead, this was secured by another provider, suggesting that there are other strong and viable competitors to the parties within each of the relevant markets. Third parties corroborated these findings. Accordingly, the OFT considers that the Transaction is unlikely to give rise to a realistic prospect of a substantial lessening of competition involving unilateral effects with respect to OH, OOH or WI services.

²¹ *Merger Assessment Guidelines*, Section 4.1.5.

63. In considering conglomerate/bundling effects, the OFT does not believe that there is a realistic prospect of anti-competitive conglomerate/bundling effects arising between OOH and 111 services as a consequence of the Transaction. The OFT found that the parties do not overlap in the provision of 111 services and that the Transaction does not materially strengthen Harmoni's position in OOH services.

DECISION

64. This merger will therefore not be referred to the Competition Commission under section 22(1) of the Act.