



# Competition in the healthcare sector

The latest update from the Competition law team - February 2010

## NHS Kingston and Churchill Medical Centre

**NHS Kingston's decision to deny the opening of a new branch surgery is inconsistent with the Principles and Rules for Co-operation and Competition, CCP finds.**

### Summary

The Co-operation and Competition Panel (CCP) has ruled that NHS Kingston's decision not to allow a GP Practice, Churchill Medical Centre (Churchill), to provide NHS services from a new branch surgery is inconsistent with the NHS Principles and Rules for Co-operation and Competition (PRCC).

### Background (as reported by the CCP)

NHS Kingston is a Primary Care Trust that commissions and delivers healthcare in the Royal Borough of Kingston to a registered population of around 187,000. The PCT area is divided into a number of wards, one of which is Tudor ward.

Until 2007, two GP practices were operating at 192 Tudor Drive in Tudor ward. During 2007 the doctors responsible for these practices were suspended from the GP register. NHS Kingston asked Churchill to act as a temporary locum for both practices.

In late 2007 Churchill proposed to NHS Kingston that it open a surgery at 164 Tudor Drive, less than 100 metres from the practices at 192 Tudor Drive. NHS Kingston had not at that time decided how to proceed with the two practices at 192 Tudor Drive. Churchill offered to open the surgery without financial assistance from NHS Kingston.

NHS Kingston advised Churchill that it could not be stopped from developing the new surgery, but would do so at its own risk. Churchill obtained planning permission to use 164 Tudor Drive as a GP surgery and equipped and refurbished the premises. In early March 2008 NHS Kingston tendered for the provision of primary medical services for the combined practice lists of the 192 Tudor Drive practices. Later that month, NHS Kingston wrote to Churchill informing it that the terms of its PMS contract only allowed it to provide NHS services from its existing surgeries in Kingston and Surbiton. NHS Kingston stated that its approval was needed for Churchill to provide NHS services from the new branch surgery.

In late March 2008 Churchill requested NHS Kingston's consent to add 164 Tudor Drive to the premises from which it could provide services under its PMS contract. In mid-July 2008 NHS Kingston refused that consent, on the basis of its expected impact on existing GP services and because there was no need for additional GP services in the area. Later that month NHS Kingston announced that AT Medics had won the tender to provide services from 192 Tudor Drive.

On 23 June 2009 Churchill asked the CCP to consider whether NHS Kingston's refusal to allow it to provide NHS services from the new surgery at 164 Tudor Drive was consistent with the PRCC.

### Facts

On 18 December 2009 the CCP concluded that NHS Kingston's conduct had been inconsistent with the PRCC.



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In reaching its decision, the CCP performed its analysis of 'conduct' - assessing whether NHS Kingston's conduct gave rise to an adverse effect (or cost) to patients or taxpayers as a result of a loss of patient choice or competition, and if it did, whether the conduct was offset by benefits to patients or taxpayers.

Applying this methodology, it found:

- a significant number of Churchill patients would benefit from their preferred GP practice opening a surgery closer to their homes
- other Churchill patients may benefit from reduced congestion at Churchill's hub practice in Norbiton
- the new surgery at 164 Tudor Drive may encourage other GP practices in the locality to improve their quality of service to prevent patients transferring to 164 Tudor Drive
- any adverse effects on patients and taxpayers would be small or immaterial (taking into account Churchill's willingness to develop the surgery at its own cost)

For these reasons, the CCP recommended to the Department of Health and London SHA that NHS Kingston should allow Churchill to provide NHS-funded services from 164 Tudor Drive.

### Comment

CCP Director Andrew Taylor commented:

"We carefully considered NHS Kingston's concerns that allowing the new branch practice to open may negatively impact on the viability of a nearby practice and impose additional financial costs on NHS Kingston. However, the Panel's view is that any potential adverse effects arising from the opening of the new branch surgery are likely to be small or immaterial. Any such effects would not be sufficient to outweigh the potential benefits to local patients and taxpayers of improved access, choice and quality derived from the introduction of the new branch surgery."

This case is an important development in the CCP's decisional practice – it is the first CCP decision on a 'conduct' case involving specific parties. The ruling emphasises that the CCP will act to enforce the PRCC where that is necessary to secure patient and taxpayer benefit.

To PCTs it sends a general signal that efforts to manage local markets within the NHS may be subject to increasing CCP scrutiny in future – particularly where those efforts may stifle competition between healthcare providers.

For healthcare providers this ruling is good news. In future they can look to the CCP and the PRCC to support action that they take to compete for business within the NHS – provided that they can show that it promotes patient choice and competition and produces benefits for patients and taxpayers.

It is perhaps salutary to remember these words from the CCP's Executive Summary in the Consultants Non-contracted Hours case, since they summarise the CCP's philosophy:

"While we recognise that health services are different in many ways from other services, we would nevertheless expect increased patient choice and competition to encourage greater choice and convenience for patients, greater pressure on service providers to increase quality, greater innovation in service provision and more bidders for PCT contracts leading to improved services and better value for money."



## Merger of West Sussex Health and South Downs Health NHS Trust

### CCP approves merger of West Sussex PCT's provider services arm with South Downs Health NHS Trust.

#### Summary

The Co-operation and Competition Panel (CCP) has approved under the Principles and Rules for Co-operation and Competition (PRCC) the proposed merger of West Sussex PCT's provider services arm (the Provider Arm) with South Downs Health NHS Trust (South Downs Health).

South Downs Health is already responsible for the community services provided by the Provider Arm under a management contract. The CCP considered that this contract should have been reviewed by the CCP under the PRCC as a merger before it took effect. The CCP issued a warning to NHS organisations that they must seek CCP approval before putting a merger transaction into effect.

This has important implications for PCT provider arm restructuring processes. CCP approval will be needed for provider arm divestments, and PCTs should organise their divestment timetables accordingly. Informal advice can be obtained from the CCP, and PCTs will do well to make use of this at an early stage of any divestment process.

#### Background

West Sussex PCT is the Primary Care Trust for West Sussex. It commissions health services for the population in its PCT area - around 776,300 people. The Provider Arm is West Sussex PCT's community health services provider. South Downs Health is a separate NHS provider of community health services based in Brighton & Hove.

As a result of the policy requirement for greater separation of PCT commissioner and provider functions (Transforming Community Services: Enabling new patterns of service provision – DH 2009), West Sussex PCT decided in March 2009 to integrate the Provider Arm with South Downs Health. It entered into a management contract on 30 July 2009 in advance of the merger, under which South Downs Health is responsible for the management of community services delivered by the Provider Arm.

#### Facts

The CCP assessed the merger using its standard methodology, analysing whether it would give rise to costs to patients or taxpayers as a result of a loss of choice or competition (and if it would, whether those costs would be offset by resulting patient or taxpayer benefits).

The CCP concluded that there is a large number of potential providers of community services in West Sussex, Brighton & Hove and the surrounding area, and that the loss of one competitor (the Provider Arm) would not have a material effect on patient choice or competition. It therefore advised the Department of Health and South East Coast SHA that the merger was consistent with the PRCC and should be allowed to proceed.

However, the CCP noted that West Sussex PCT:

"put in place the management contract after receiving advice that it enabled the parties to bypass the CCP review process and avoid any perceived delay, which was considered might jeopardise the merger and prove a risk to patient welfare. The advice received by West Sussex PCT was incorrect. The effect of the management contract was to bring West Sussex Health under the control of South Downs Health NHS Trust, and as a result constituted a reviewable merger under the Principles and Rules and should have been notified to the CCP before it came into effect. Whilst we recognise that West Sussex PCT received advice from their local SHA, the PCT should nevertheless still have approached the CCP for guidance".



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The CCP continued:

"We do not agree that bypassing CCP review procedures in any way lowers risks to patients. Rather, organisations that integrate businesses prior to a CCP review run the risk that the CCP will recommend that these businesses subsequently be separated, which could have significant consequences for employees and possibly patients. In this instance, as we recommend elsewhere, the parties should have consulted with, and sought advice from, the CCP."

### Comment

CCP Director Andrew Taylor commented:

"The CCP remains concerned that NHS organisations are continuing to integrate businesses prior to review by the CCP. The risks to organisations of putting a merger into effect without CCP approval are serious. If a subsequent CCP review was to conclude that such a merger is inconsistent with the Principles and Rules it may recommend the merger parties be separated. This would no doubt have significant consequences for the organisations concerned, their employees and patients. Where there is any uncertainty as to whether a proposed arrangement constitutes a reviewable merger under the Principles and Rules, parties should seek informal advice from the CCP."

This has important implications for the 'Transforming Community Services' process, as any mergers that result from re-organisation processes will need to be notified to and approved by the CCP.

Paragraph 3.71 of the Department of Health's 'Operating Framework for the NHS in England 2010/11' requires that:

"To provide certainty for staff and a stable foundation for service transformation, by March 2010 PCTs must have agreed with SHAs proposals for the future organisational structure of all current PCT-provided community services."

Those proposals, if they involve restructuring through divestment and merger, will need to take account of the need for CCP approval. PCTs will do well to approach the CCP for guidance as they formulate their plans, and before they finalise and commit to them. That should ensure that the restructuring option they choose is compatible with the PRCC and acceptable to the CCP – making the formal CCP review and approval process a formality.

## Acquisition of Bedfordshire and Luton Partnership NHS Trust

**CCP to study relationship between property, co-operation and competition in the NHS, as it approves acquisition of Bedfordshire and Luton Partnership NHS Trust by South Essex Partnership University NHS Foundation Trust.**

### Summary

The Co-operation and Competition Panel (CCP) has recommended to Monitor and the Department of Health that the proposed acquisition of Bedfordshire and Luton Partnership NHS Foundation Trust (BLPT) by South Essex Partnership University NHS Foundation Trust (South Essex) [should be allowed to proceed](#).

As a result of the inquiry the DH and Monitor have asked the CCP to study the relationship between property, co-operation and competition in the NHS.

### Background

BLPT provides mental health and learning disabilities services, as well as social care, to a population of around 600,000 in Bedfordshire and Luton. BLPT had income of approximately £76 million in 2008/9, of which 87% was derived from PCTs.

South Essex provides mental health and learning disabilities services to a population of around 715,000 in South Essex and forensic mental health services to the whole of Essex. Its income of £114.3 million in 2008/9 was mainly derived from local PCTs.

Having shortlisted four bidders for BLPT, in September 2009 East of England Strategic Health Authority recommended South Essex as the preferred bidder.

### Facts

The CCP found that the acquisition of BLPT by South Essex would not adversely affect choice and competition in Bedfordshire and Luton, as there was a range of bidders in the area that would ensure high quality care and value for money when current contracts expired.



The CCP also considered whether the acquisition would make it harder for commissioners to switch to other providers, as a result of South Essex controlling assets essential for the provision of mental health services in Bedfordshire and Luton. [The CCP concluded that this was not an issue specific to South Essex, since it was likely that BLPT would have been acquired by one of the other NHS Foundation Trusts that bid for it, if it had not been acquired by South Essex.](#)

### Comment

[CCP Director Andrew Taylor](#) commented: "In the course of our analysis we identified a potential concern that commissioners might, as a result of the transaction, experience a loss of control of properties key to the delivery of mental health services in the area [...] As a result of our inquiry, we have been asked by the DH and Monitor to undertake a wider study of the relationship between property, co-operation and competition in the NHS."

This study will be similar to that conducted by the CCP in relation to Consultants' Non-contracted hours, which ran from April to September 2009. This new study appears to be of broad scope. Interested parties will do well to watch for developments throughout 2010, and should consider taking the opportunity to influence the CCP's thinking by responding when it invites submissions.

## Mergers of Bexley Care Trust's community services unit with Oxleas NHS Foundation Trust and South London Healthcare NHS Trust

### CCP approves mergers of Bexley Care Trust's community services unit with Oxleas NHS Foundation Trust and South London Healthcare NHS Trust.

#### Summary

The Co-operation and Competition Panel (CCP) has recommended to the Department of Health and Monitor that the proposed mergers of part of the Bexley Care Trust community services provider unit with Oxleas NHS Foundation Trust (Oxleas), and another part with South London Healthcare NHS Trust (South London Healthcare), [should be allowed to proceed.](#)

#### Background

Bexley Care Trust commissions health services for around 219,000 people in its area in South East London, and provides community health services through a provider arm.

Oxleas is an NHS Foundation Trust that provides mental health and learning disability services in Bexley, Bromley and Greenwich. Oxleas provided community health services in Bexley between 1994 and 2000. South London Healthcare provides acute and some community health care services in the Bexley, Bromley and Greenwich areas. It is the result of the amalgamation in April 2009 of three hospital trusts – Queen Mary's Sidcup NHS Trust, Queen Elizabeth Hospital NHS Trust and Bromley Hospitals NHS Trust.

In light of a policy requirement to separate PCT commissioner and provider arms, Bexley Care Trust decided in January 2009 to transfer the specialist children's services operated by its provider arm to South London Healthcare, and to transfer all other community health care services provided by its provider arm to Oxleas.



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As a result of the two mergers, 88 staff and 19 service lines will transfer from Bexley Care Trust to South London Healthcare, and 370 staff and 22 service lines will transfer to Oxleas. Bexley Care Trust will not transfer any fixed assets or property to either South London Healthcare or Oxleas, and will be able to re-commission the transferred services in the future.

## Facts

The CCP applied its standard test when examining both mergers, assessing whether they would cause detriment to patients or taxpayers as a result of a loss of choice or competition, and if they would, whether the detriment would be offset by resulting benefits.

The CCP considered that the mergers were unlikely to cause any material detriment to patients or taxpayers by reducing choice or competition, since a number of potential bidders for tendered community services would remain in the Bexley area.

In addition, the CCP noted that each of the hospital trusts that merged to create South London Healthcare were given a Quality of Financial Management rating of 'weak' by the Care Quality Commission for the 2008/9 year, and that London SHA has given South London Healthcare the status of 'financially challenged'. The CCP examined whether post-merger South London Healthcare could reduce its spending on the specialist children's services and use the savings to meet other financial obligations – reducing service quality and leading to a deterioration in the children's services acquired from Bexley Care Trust.

The CCP accepted that South London Healthcare would have limited incentive to use funding for children's services to meet other financial obligations, since at £4 million the value of the contract is less than 1% of South London Healthcare's revenues. The CCP was also reassured by a range of measures implemented by South London Healthcare to improve its long-term financial position, and was also assured by South London Healthcare that in the next three years it would not reduce expenditure on the specialist children's services it will acquire (provided that commissioner funding for those services is not reduced).

Finally, the CCP accepted that Bexley Care Trust would monitor and safeguard South London Healthcare's service quality, and that it was able to do so through the provisions of the NHS community services contract 2010/11.

## Comment

This case is noteworthy for the CCP's scrutiny of the financial status of South London Healthcare, and whether it might lead to a deterioration in service quality post-transfer.

In doing so, the CCP took a broad approach to its remit – examining questions of potential 'detriment' (financial or otherwise) that appear to have been unrelated to any 'loss of choice or competition'.

Parties to prospective NHS mergers will do well to note that in future the CCP may require assurances that go beyond issues of choice and competition.

It may be that the test applied by the CCP (in this case at least) shifted subtly – from the assessment of detriment to patients and taxpayers as a result of a loss of choice or competition, to a broader assessment of detriment to patients and taxpayers including as a result of a loss of choice or competition.

## Merger of Portsmouth City Teaching PCT's provider arm with the provider arm of Southampton City PCT

### CCP approves transfer of Portsmouth City Teaching PCT's provider arm to Southampton City PCT.

#### Summary

The Co-operation and Competition Panel (CCP) has recommended to the Department of Health and South Central SHA that the proposed merger of the provider arm of Portsmouth City Teaching PCT (Portsmouth Community and Mental Health Services) with the provider arm of Southampton City PCT (Southampton Community Healthcare) should be allowed to proceed.



## Background

Portsmouth City Teaching PCT (Portsmouth PCT) commissions healthcare services for the population of Portsmouth city. It also provides community and mental health services through its provider arm, Portsmouth Community and Mental Health Services.

Southampton City PCT (Southampton PCT) commissions healthcare services for the population of Southampton, and also provides community services through its provider arm.

In 2009 Portsmouth PCT decided to divest its provider arm, following a review undertaken in the context of the requirement for separation of PCT commissioner and provider arms. The chosen option was a merger of Portsmouth Community and Mental Health Services with Southampton PCT's provider arm, Southampton Community Healthcare.

The merged provider will employ 4,200 staff and have a turnover of approximately £180 million. It will provide healthcare services in Portsmouth, Southampton and south Hampshire. At first it will be managed by Southampton PCT as a provider arm, with the intention that it will obtain Community Foundation Trust status in future.

Portsmouth PCT will commission services from the merged entity under the standard NHS contracts for community and mental health services, and will retain ownership and control of the NHS estate in Portsmouth.

## Facts

The CCP assessed whether the merger would cause detriment to patients or taxpayers as a result of a loss of choice or competition, and whether any detriment would be offset by resulting benefits.

It concluded that the merger was unlikely to lead to patient or consumer detriment by reducing patient choice or competition: first, there are a large number of potential bidders for community services contracts and mental health contracts in Hampshire, and second the merging provider arms do not compete and would only have been a weak competitive constraint on each other.

## Comment

This merger appears to have been reasonably straightforward for the CCP, and it was cleared nearly three weeks ahead of the CCP's Phase One review deadline.

However, it is noteworthy that the CCP stated in both its Press Release and in the Executive Summary to its full report that "[Portsmouth PCT will retain full ownership and control over the premises currently used by Portsmouth Community and Mental Health Services](#)". This echoes comments made by the CCP in the Bedfordshire and Luton case, and detailed elsewhere in this bulletin.

In the context of PCT provider arm divestment, the retention of relevant property assets by PCTs seems to be an important factor in ensuring that PCTs are able readily to recommission services - preserving the scope for PCT choice from among competing providers.

With the CCP having been asked by the Department of Health and Monitor to examine the relationship between property, co-operation and competition and competition in the NHS, this seems likely to be an issue that gets more close scrutiny in 2010.

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