

Award of contracts to SSP Health Limited to manage and operate 22 General Medical Practices in Merseyside

ME/5822/12

The OFT's decision on reference under section 26 given on 8 August 2013. Full text of decision published 22 August 2013.

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**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. **Sefton Primary Care Trust (Sefton PCT)** was the primary care trust (PCT)<sup>1</sup> commissioning and providing some healthcare services in Sefton, Merseyside. Relevant to the present case, it provided directly primary care services in nine GP practices in Sefton subject to the terms of NHS Primary Care Trust Medical Services (PCTMS) contracts.<sup>2</sup>
2. **Liverpool Primary Care Trust (Liverpool PCT)** was the commissioning organisation of the NHS in Liverpool. Relevant to the present case, Liverpool PCT had also commissioned the primary care (GP) services for 13 GP practices in its area.
3. **Liverpool Community Healthcare NHS Trust (LCH)**<sup>3</sup> was the community services provider arm of Liverpool PCT. It provided

<sup>1</sup> The secondary care commissioning functions of the PCTs were transferred to the newly created Clinical Commissioning Groups (CCGs) on 1 April 2013. Responsibility for commissioning primary care services was transferred to NHS England and their regional teams (Merseyside team). This decision assesses this transaction (or these transactions) in the context of the new regime.

<sup>2</sup> PCTMS contracts allowed PCTs to provide primary care services themselves. They aimed at increasing capacity in geographic areas where other type of NHS contracts (including those with private providers) had produced a shortfall of services to cover the relevant population.

<sup>3</sup> Community Healthcare Trusts are NHS organisations set up for the purposes of becoming a service provider combining the provisioning functions of the PCTs. For this

primary healthcare services to Liverpool PCT in 11 practices in Liverpool subject to the terms of NHS Alternative Primary Medical Services (APMS) contracts<sup>4</sup> entered into with Liverpool PCT.

4. **SSP Health Ltd (SSP)** is a privately-owned company which supplies primary care services in 19 GP practices in the North West of England<sup>5</sup> to around 66,000 patients located in seven PCTs.<sup>6</sup>

## TRANSACTION

5. Sefton PCT and Liverpool PCT (whose responsibilities, given the changes introduced on 1 April 2013, have transferred to NHS England, Merseyside Area Team, which is the body we refer to where relevant throughout the rest of this decision) conducted a joint tender process to select one (or more) provider(s) to supply primary medical and other care services from 22 GP practices, under their duty to provide primary care services to the local population in Merseyside. This took place in the context of the Department of Health's (DH) programme known as Transforming Community Services, under which PCTs were required to separate (either functionally or structurally) their commissioning from their provider activities.<sup>7</sup> This resulted in creating purely contractual relationships between those two separate activities.
6. On 1 February 2013, SSP entered into nine APMS contracts with Liverpool PCT and into 11 APMS contracts with Sefton PCT (together, the Contracts).
7. Under the Contracts, which have been awarded for a term of three years,<sup>8</sup> SSP provides certain primary medical services to patients in

purpose, many PCTs have already transferred (or reallocated) all the relevant assets, staff, rights and liabilities to these newly created organisations.

<sup>4</sup> Under APMS contracts, PCTs could enter into individual contracts with charitable or private sector primary care, as well as foundation trusts service providers for the provision of GP services to their local populations.

<sup>5</sup> With one or more practices at Wigan, Bolton, Astley, Great Lever, St Helens, Lowton, Newton Le Willows, Chorley, Ince, Longside, Liverpool, Salford, Mossley and Wildness.

<sup>6</sup> These figures do not include the practices included in this transaction.

<sup>7</sup> *Transforming Community Services: Enabling new patterns of provision*. A publication by the Department of Health. 13 January 2009. Paragraphs 4.12, 5.10-5.13.

<sup>8</sup> They also include a provision enabling both parties to agree an extension for a further period of two years.

Merseyside.<sup>9</sup> The Contracts also include certain enhanced services<sup>10</sup> and a mix of additional healthcare services<sup>11</sup> (the Medical services).

## **JURISDICTION**

8. For the OFT to have jurisdiction to review the transactions under the provisions of the Enterprise Act 2002 (the Act), the transactions must amount to a relevant merger situation. In order for a completed transaction to amount to a relevant merger situation, two or more enterprises must have ceased to be distinct not more than four months prior to the OFT's decision on reference (subject to extensions) and either the turnover or the share of supply must be met.<sup>12</sup> This definition covers different types of transactions, including the transfer of assets and some types of outsourcing arrangements.<sup>13</sup>

### **Application of Section 27 of the Act**

9. SSP submits that each Contract should be assessed individually and separately from the others.
10. The OFT believes that the transactions between the same two parties in the present case form part of an arrangement between the same parties or interest. Thus, it would fall within the discretionary powers of the OFT to treat all of the Contracts between Liverpool PCT and SSP and Sefton PCT and SSP, respectively, as having occurred simultaneously on the date on which the latest of them occurred and forming part of two sets of arrangements.<sup>14</sup> However,

<sup>9</sup> These are primarily the 'essential services' as described in the National Health Service (General Medical Services Contracts) Regulations 2004 and set out the providers' obligations in providing general primary care services to the practice's patients.

<sup>10</sup> Enhanced services include both national and local enhanced services such as extended hours' services.

<sup>11</sup> Additional services include vaccination and immunisation services.

<sup>12</sup> The turnover test is met if the UK turnover of the enterprise being taken over exceeds £70 million. The share of supply test is met if the merging parties together supply or obtain 25 per cent or more of goods or services of any (reasonable) description in the UK or a substantial part of the UK (and where the merger enhances that share of supply).

<sup>13</sup> OFT527 Mergers - Jurisdictional and procedural guidance, Enterprise Act 2002, June 2009. Paragraph 3.1 *ff*.

<sup>14</sup> Subsection 27(5) of the Act states that 'the decision-making authority may, for the purposes of a decision, treat successive events to which this subsection applies as having occurred simultaneously on the date on which the latest of them occurred'.

the OFT does not need to conclude on this point, as it has no bearing on the outcome of this case.

### **Enterprises ceased to be distinct**

11. The OFT's Jurisdictional and Procedural Guidance discusses the factors that the OFT will consider when determining whether two or more enterprises have ceased to be distinct.<sup>15</sup> Two enterprises cease to be distinct if they are brought under common ownership or common control. Control in this context ranges from what is known as 'material influence', which is the lowest level of control which could give rise to a relevant merger situation, to a controlling interest, known as a 'legal control'.
12. In this case the OFT has assessed whether SSP has acquired material influence over the 22 GP practices such that they are no longer distinct from its existing operations. OFT guidance describes material influence as the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. In particular, the OFT will assess whether the acquirer has gained the ability to materially influence the strategic direction of a company and its ability to define and achieve its commercial objectives.<sup>16</sup>
13. The Contracts provide several areas in which NHS England (Merseyside Area Team), will retain control over the operations and

Further, subsection 27(6) of the Act states that '[s]ubsection (5) applies to successive events – (a) which occur within a period of two years under or in consequence of the same arrangements or transaction, or successive arrangements or transactions between the same parties or interests; and (b) by virtue of each of which, under or in consequence of the arrangements or the transaction or transactions concerned, any enterprises cease as between themselves to be distinct enterprises'.

In addition, subsection 27(7) of the Act states that '[t]he decision-making authority may, for the purposes of subsections [25](5) and [25](6)[of the Act], treat such arrangements or transactions as the decision-making authority considers appropriate as arrangements or transactions between the same interests'. And subsection 25(8) of the Act states that '[i]n deciding whether it is appropriate to treat arrangements or transactions as arrangements or transactions between the same interests the decision-making authority shall, in particular, have regard to the persons substantially concerned in the arrangements or transactions concerned'.

<sup>15</sup> OFT527 Mergers - Jurisdictional and procedural guidance, Enterprise Act 2002, June 2009.

<sup>16</sup> OFT527 Mergers - Jurisdictional and procedural guidance, Enterprise Act 2002, June 2009, paragraph 3.15.

management of the GP practices. Indeed, the Contracts include an enhanced level of performance monitoring against key performance indicators and consent rights over strategic decisions, such as the change of some services, the opening hours or the change of location. In particular, NHS England (Merseyside Area Team):

- determine the premises from which the Medical services should be supplied
- set the normal and extended working hours
- determine the comprehensive specifications for the delivery of essential and enhanced local services to be provided by SSP from those premises<sup>17</sup>
- determine the level of qualification and experience of the staff to deliver the Medical services
- oblige SSP to comply with any direction set or instructions given by the commissioning organisation to SSP relating to SSP's staff appraisal system, and
- contain extensive information sharing for routine audit of quality indicators.

14. Failure to comply with these obligations under the Contracts will lead to the ability of NHS England to terminate the Contracts. NHS England has the right to 'step-in' in a defined set of circumstances. These circumstances include events creating an immediate and serious threat to the health and safety of patients, as well as situations which might result in a material interruption in the provision of the Medical services and other emergency situations. Such intervention could lead to the termination of the Contracts by NHS England (Merseyside Area Team). The OFT also notes that [ ].<sup>18</sup>

15. Termination of the Contracts (whatever the reason) will trigger the end of any licence or right of use of the premises, equipment, confidential information and other assets belonging to NHS England.

<sup>17</sup> These specifications state patient pathways to manage certain medical conditions, stipulate targets for delivery of key performance indicators (KPI) to be tightly monitored on a regular basis throughout the term of the Contracts and provide for regular payments to SSP for the provision of the Medical Services depending on the achievement of those KPIs.

<sup>18</sup> Contract for Primary Medical Services at Seaforth Village Practice between Sefton Primary Care trust and SSP Health Ltd dated 1 March 2013, paragraph 55.1.

It will also trigger the obligation on SSP to facilitate the transfer to NHS England (or a new provider appointed by the commissioners) of staff and contracts entered into with third parties to deliver the Medical services.

16. The OFT also notes that the ownership of the properties involved, assets and other rights has not changed as a result of the Contracts. SSP will only be entitled to the use of the properties, assets and intellectual property rights for the duration of the Contracts and subject to customary tenancy conditions. These include:
  - strict restrictions on the possible use of the premises
  - a requirement to obtain consent prior to any work being carried out
  - the prohibition to transfer, assign, or otherwise part with possession of any lease, licence or other agreement for occupation of the premises.
17. Given the above, the OFT considers that SSP has not acquired the ability to materially influence the strategic direction of these GP services.
18. In the present case, the parties submitted that the Contracts will last for a term of three years (with a possible extension for up to two more years, if requested by SSP and agreed by NHS England, Merseyside Area Team). After the three- (or five-) year term, the commissioners will re-tender the Contracts as specified under these.<sup>19</sup>
19. The OFT notes that the Act does not define the period of time that a merger situation should last in order to qualify as a relevant merger situation. The OFT is therefore of the view that any transaction no matter how short in duration could qualify as a relevant merger situation. However, there may be circumstances where the duration of the contract may affect the ability to materially influence the

<sup>19</sup> The OFT has reviewed internal financial and strategy documents from SSP. These confirm that, contrary to the submissions by two third parties, all parties have entered into the Contracts with an understanding that they will last for three years and after that time, a fresh procurement process will have to take place.

strategic direction of a company and its ability to define and achieve its commercial objectives.

20. In this case, the OFT does not need to conclude on the evidential weight attributable specifically to the duration of the Contracts given that, taking account of all the evidence outlined and referred to above, the OFT has already come to the view that the Contracts do not confer material influence on SSP.

#### **Conclusion on 'enterprises ceased to be distinct'**

21. On the basis of the above, the OFT believes that there is no realistic prospect that there has been a change of control as SSP has not acquired a sufficient level of control (that is at least material influence) over the GP practices.
22. As a result of this transaction, SSP and the GP practices originated in Sefton PCT and Liverpool PCT respectively have not ceased to be distinct and thus, no relevant merger situation has been created, in light of the specific circumstances of this case.
23. To the extent that there are future changes to the arrangements (including the Contracts) or any subsequent events affecting the services affected by these arrangements and/or Contracts and/or services, these could conceivably change the jurisdictional analysis.

#### **DECISION**

24. On the basis of the information available to it, the OFT has decided that the award of the Contracts by Sefton PCT and Liverpool PCT, respectively, to SSP does not qualify for investigation under the merger provisions of the Act, because it has not led to any two enterprises ceasing to be distinct for the purposes of section 26 of the Act. A relevant merger situation has, therefore, not been created.