SUMMARY

The Director General of Fair Trading has made a decision that North & West Belfast Health and Social Services Trust (N&W) is not acting as an undertaking to the extent that it purchases residential and nursing care (social care) for the disadvantaged in society using monies raised by taxation. Therefore, N&W has not infringed the Chapter II prohibition of the Competition Act 1998 in this regard.

The Competition Commission Appeals Tribunal (CCAT) concluded that the Director had made the decision following its consideration of an appeal under the Act by BetterCare Group Ltd, which provides social care in Northern Ireland. BetterCare had complained to the OFT that N&W, BetterCare’s main customer in the North and West Belfast area, was abusing a dominant position by offering unfairly low prices and unfair terms in its purchases from BetterCare of Social Care. OFT had rejected BetterCare’s complaint on the grounds that N&W when purchasing social care for the disadvantaged in society was not acting as an undertaking. The CCAT concluded that the views given by OFT in its correspondence with BetterCare amounted to a decision that the Chapter II prohibition had not been infringed and, as such, was appealable to the CCAT. The CCAT has still to hear argument as to whether or not N&W is acting as an undertaking under the Act when it purchases Social Care from the independent sector for the disadvantaged in society using monies raised by taxation.
Mr C A Caldwell
Managing Director
Bettercare Group Ltd
1 Boucher Crescent
Belfast BT12 6HU

Dear Mr Caldwell

**Competition Act 1998**

**North and West Belfast Health and Social Services Trust (North and West)**

I refer to your e-mail of 23 November 2000 regarding the above.

You contend that North and West is abusing a dominant position in the supply and provision of nursing home care services. You are concerned that North and West, is acting in an anti-competitive manner, in its role as the prime purchaser of services in your area, by virtue of the level of fees it pays for nursing home care services.

The Office has received several complaints about local authorities (LAs) and it may be useful to you if I provide you with some background as to the Office’s jurisdiction with regards to the activities of LAs.

I should first explain the competition powers available to the Director General of Fair Trading (DGFT). The CA98 prohibits agreements, practices and conduct that have a damaging effect on competition in the UK. Chapter I of the CA98 covers anti-competitive agreements between undertakings and Chapter II covers the abuse of a dominant position. The CA98 gives the DGFT powers to investigate if he has reasonable grounds for suspecting that an undertaking is infringing either of the prohibitions and powers to impose fines, up to a maximum of 10% of turnover. The DGFT also has powers under the Fair Trading Act 1973 to enquire into possible abuses of monopoly and uncompetitive practices and, if appropriate, refer the matter to the Competition Commission for a full investigation. We have looked at your complaint under the Chapter II prohibition of the CA98.

It might be helpful at this point if I set out the facts about local authorities’ (LAs) general role in the care sector as we understand them. As you are aware, LAs are obliged, usually by statute, to purchase certain services, for example residential care, B&B accommodation and nursing home care services (collectively ‘Social Care’) for the disadvantaged in society. The purchase of Social Care is regarded as necessary because the market fails to satisfy the housing needs of the entire population.
LAs are also active in the economic business of supplying Social Care. An LA, then, has two identities in the circumstances described above - as the primary buyer of Social Care and as a supplier of nursing home care services. This would appear to be the case with North and West whom you say also supplies nursing home care services.

It is important to note that the CA98 only applies to agreements between undertakings (Chapter I) or the conduct of undertakings (Chapter II). The key issue is therefore whether an LA will, in any particular circumstance, be an undertaking for this purpose. Pursuant to section 60 of the CA98, the definition of an undertaking depends on the case law of the European Court of Justice. In Höfner & Elser, the European Court of Justice said:

‘in the context of competition law,...the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed’.

Clearly, an LA can act as an undertaking when it is engaging in economic activity, but, in our view, an LA will probably not be acting as an undertaking when it is exercising its ‘public interest-type’ functions.

On the basis of the facts set out above, we take the view that LAs are not undertakings for the purposes of the Chapter I and II prohibitions to the extent that they are purchasing Social Care for the disadvantaged in society using monies raised by taxation. We consider that the activities of an LA acting as the purchaser of Social Care of last resort in an area of zero or less than full economic value are not the activities of an undertaking engaging in economic activity. In this context, the role of government is to correct market failure and so, inevitably, LA spending will affect markets and raise competition issues of a general policy nature. However, such spending does not raise legal issues under the CA98 and so the DGFT has no power to intervene.

It seems clear from the information in your letter that the activities that concern you arise from North and West’s activities as a purchaser of Social Care (i.e. nursing home care). In our view, for the reasons explained above, these activities do not fall for consideration under competition legislation and the DGFT is therefore unable to intervene. Generally, complaints about how local authorities spend their money raise ‘best value’ concerns and might be addressed to:

(a) the Department of the Environment, Transport and the Regions (which has responsibility for LAs generally) or the Department of Trade and Industry (which has responsibility for broad competition policy issues as opposed to the precise terms of the CA98);

(b) the Department of Health (for breaches of the Community Care Act);

(c) the relevant District Auditors or National Audit Office; or

(d) local politicians (who are responsible for local spending policies).

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That being said, you will appreciate that this is a preliminary view of officials and neither binds the DGFT nor is a substitute for statutory guidance. You should seek your own legal advice before coming to a final view yourself. We should be happy to receive detailed legal representations on our preliminary view should you think that we have adopted the wrong approach or misunderstood the situation.

Yours sincerely

Keith Davis
Competition Policy Division – CB5
Dear Sirs

North and West Belfast Health and Social Services Trust (N&W)
Complaint by BetterCare Group Ltd

Thank you for your letter of 21 June, on behalf of your client, BetterCare Group Ltd, commenting on the Office’s letter to your client of 29 November 2000. I apologise for the delay in replying.

We have considered the matters you raised and have the following comments to make.

You have outlined the constitution, functions and powers of N&W and argued that it is engaged in economic activity (alongside its public interest responsibilities) and so can be viewed as an undertaking for the purposes of the Competition Act 1998 (“the CA98”). We are grateful to you for clarifying N&W’s status and functions. We also note the case law you cite in support of your contention that local authorities can be undertakings, in particular those cases where so-called public law activities have been held to be economic activities. This is a complex area but we do not consider that the additional information on N&W’s activities or the case law you cite alters the views expressed in our letter of 29 November 2000.

We do not dispute that N&W may be engaged in economic activities for certain purposes and therefore may be an undertaking for those purposes. However we do not share your view that N&W is acting as an undertaking for all purposes.

As you note in your letter, N&W appears to have two principal activities: as a purchaser of social care services for persons in need using monies raised by taxation; and as a supplier of social care services in competition with the voluntary and private sector.

The European Courts have held that it is necessary to distinguish between public authorities and public undertakings. [See in particular Case 118/85 Commission v Italy [1987] ECR 2599.] This recognises the fact that state entities can act either by
exercising public powers or by carrying on economic activities by offering goods and services on the market. In order to determine whether the CA98 applies, it is therefore necessary to consider the precise nature of the activities being exercised in each case rather than the entity’s legal form or powers. Merely because an entity carries on some economic activities does not mean it is an undertaking for all purposes. [See also Hofner & Elser, to which you refer, where the German Federal Employment Agency had two roles: supplying procurement services in competition with private bodies, which was regarded as an economic activity, and administering unemployment benefits, which would not be.]

Looking at local authorities, including healthcare trusts such as N&W, our current view is that they can act as an undertaking when they are engaging in economic activities, such as supplying residential accommodation in competition with private sector care homes, but they would not appear to be when they are exercising their ‘public interest-type’ functions. By this we mean functions which are typically those of the State. These are activities which are not generally provided on a commercial basis in competition with private sector business and which fulfil an exclusively social function. [See in particular Case C-343/95 Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa [1997] ECR I-1547 and Eurocontrol, to which you refer in your letter.]

The abuse your client is alleging, namely non-cost related low prices offered by N&W for residential and nursing home care services, relates to N&W’s activities as a purchaser of social care. The purchasing of such services for the disadvantaged in society using monies raised by taxation would seem to be typically those of the State and would not appear to be of an economic or commercial nature. Therefore, when acting as a purchaser of social care we do not currently consider that N&W is acting as an undertaking for the purposes of the CA98.

Please note that in answer to your comments about our reference to a local authority acting as a purchaser of ‘last resort’, we mean purchasing social care services for those who cannot afford to pay for them independently and would otherwise have to do without. This is regardless of whether they are placed in local authority or voluntary or private care homes.

I hope the above helps to clarify our position.

Yours faithfully

David Golledge
Competition Branch 6
Dear Sirs

North and West Belfast Health and Social Services Trust (“N&W”)
Complaint by BetterCare Group Ltd

Thank you for your letter of 31 August on behalf of your client, BetterCare Group Ltd, commenting on the Office’s letter to you of 25 July.

We have read and noted your further comments about the Office’s views on undertakings, relevant case law and the activities of N&W. We have also noted that you have not provided any new evidence on this matter. While we were interested to read these comments, we regret to inform you that we are not persuaded that this is sufficient to cause us to alter our original opinion (given in earlier correspondence).

Our response to your complaint is based on a lack of reasonable grounds to suspect an infringement of the Competition Act 1998. We believe that the complaint rejection is not a decision capable of appeal within sections 46 and 47 of the Act.

Yours faithfully

David Golledge
Competition Branch 6