



Decision to proceed to Phase 2 inquiry regarding the acquisition of Bedfordshire and Luton Partnership Trust

PARTIES

1. Bedfordshire and Luton Mental Health and Social Care Partnership Trust (BLPT) provides a variety of mental health, learning disability services and social care to a population of approximately 600,000 in Bedfordshire and Luton.¹
2. It is currently proposed that BLPT be acquired by one of the following organisations:
 - i. Hertfordshire Partnership NHS Foundation Trust
 - ii. South Essex Partnership University NHS Foundation Trust
 - iii. Camden and Islington NHS Foundation Trust (in a strategic alliance with the Tavistock and Portman NHS Foundation Trust)
 - iv. Cambridgeshire and Peterborough NHS Foundation Trust (in partnership with South London and Maudsley NHS Foundation Trust)

TRANSACTION

3. In January 2009 the BLPT board resolved that transferring BLPT to an existing foundation trust would provide the best prospect for the provision of high quality modern mental health and learning disability services to its local communities. A tender process was initiated on 7 April 2009.
4. A new commissioning contract in the form of the National Standard Contract for mental health services is to be entered into between the successful bidder and NHS Bedfordshire and NHS Luton. This will be for a term of three years with an option to extend for a further two years and subject to a 12 month notice period. During the period of the new commissioning contract, NHS Bedfordshire and NHS Luton may competitively tender some of the mental health services they commission.
5. BLPT uses around 40 properties in providing mental health and learning disability services in Bedfordshire and Luton. These properties are variously owned by BLPT, local authorities and the PCT commissioners (NHS Bedfordshire and NHS Luton). We understand that it is intended that the estate of BLPT will transfer to the successful bidder with a commensurate increase in the amount of their outstanding Public Dividend Capital.²
6. In responding to the tender, the bidders have each set out their proposed investment in improving the estate and the provision of services. Those properties owned by entities other

¹ Please note that the Principles and Rules of Cooperation and Competition apply to NHS-funded services to patients. The social care services provided by BLPT are funded by local authorities and not the NHS. These services therefore fall outside the CCP's remit and they were not examined in the course of our merger inquiry.

² We are currently continuing to review the detail of this aspect of the transaction.

than BLPT (ie local authorities, NHS Bedfordshire and NHS Luton) will remain in their ownership (or part ownership where relevant) and leases to facilitate the provision of services from the estate will be entered into with the successful bidder. Where the ownership of properties cannot be established, a short form licence will be agreed. In addition, we understand that a property protocol will be signed, which is intended to grant the commissioners some informal influence over any estate used by the successful bidder for the provision of services (in the event the commissioners tender for services from another provider in the future).

ISSUES

7. Under Principle 9 of the Principles and Rules, we assess the impact of a merger on patients and taxpayers as a result of any loss in choice and competition. One reason why the merger between BLPT and one of the four bidders might reduce competition in mental health services is because there would be one less potential provider of local mental health community services (horizontal effects).
8. We consider that there are a number of mental health services providers that could be effective bidders for mental health services contracts in Bedfordshire and Luton, including other NHS organisations, and independent and third sector providers. In this context, the loss of any potential competition between BLPT and any of the four bidders to supply mental health services as a result of the merger is unlikely to cause a material adverse effect on patients or taxpayers. However, we are also considering whether potential suppliers of mental health services in Bedfordshire and Luton may face increased barriers to entry as a result of the merger (making it more difficult to compete against the merged entity in the future). To the extent that barriers to entry are increased by this transaction, this is likely to take place regardless of which bidder is selected.
9. Ownership by the service provider of the property used for the provision of care in a local area can reduce the ability of commissioners to switch to a new provider in the future. In this scenario an alternative service provider without access to key properties could incur significantly higher property costs than the incumbent provider as services need to be provided from an alternative location. Accordingly, the incumbent provider may have a significant advantage in any future bidding process that is not derived from the quality or underlying efficiency of its operations.
10. In our inquiry so far, we have been analysing whether the transfer of the estate from BLPT to the successful bidder would increase the barriers to entry faced by future bidders for mental health services in the area. In particular, we are considering whether any of the properties to be transferred are essential for the provision of mental health services, and whether the commissioners' ability to retender services would reduce as a result of the merger.
11. We note that Foundation Trusts, unlike NHS Trusts, are not subject to directions from the Secretary of State concerning the exercise of their functions under the National Health Service Act 2006, but may be subject to directions from Monitor. We are currently investigating whether a direction from the Secretary of State or Monitor could enable a PCT to gain access to property owned by an NHS Trust or a Foundation Trust, and as a result, whether the transaction may

affect the ability of commissioners to gain access to property that is required when commissioning services from alternative providers.

12. At this stage, there is some uncertainty about the terms on which some of the properties will transfer to the successful bidder. The concern of the CCP is that the terms of the transfer may have an adverse effect on the flexibility that commissioners would have to select alternative services providers in the future. In addition, the draft property protocol that we have seen provides the commissioners with only informal influence over property transferred to the successful bidder, should they wish to retender services using the existing estate. We are concerned that this may be insufficient to ensure that the commissioners' current ability to competitively tender services will be maintained in the future.
13. We are also analysing the value of the property transfer in this transaction to understand whether the successful bidder is likely to gain a financial advantage over other potential future service providers that would be greater than the incumbent provider already has. If potential entrants cannot access appropriate property in Bedfordshire and Luton on the same terms (e.g. at a comparable financial rate) as the successful bidder, the merger may increase the barriers to entry faced by potential providers in the future compared to the existing situation.
14. In our view there are concerns that warrant more detailed consideration about whether the barriers to entry faced by potential service providers in the future will increase as a result of this merger and have the effect of limiting competition.

DECISION TO PROCEED TO A PHASE TWO INVESTIGATION

15. Based on the issues outlined above, we have concluded that there is a realistic prospect that the acquisition of BLPT by any one of the four short-listed bidders will result in a material adverse effect on patients or taxpayers. The CCP considers that further investigation is warranted and we will now proceed to a Phase 2 investigation.
16. Our decision to proceed to Phase 2 should not be interpreted as reflecting on the transaction process conducted by East of England Strategic Health Authority.
17. The deadline for our Phase 2 investigation is 11 January 2010. We hope, however, that it will be possible to finalise our investigation well in advance of this deadline.

Andrew Taylor
Director, Cooperation and Competition Panel
18 September 2009