



Merger of West Sussex Health and South Downs Health NHS Trust

EXECUTIVE SUMMARY

1. The Cooperation and Competition Panel (CCP) has examined the proposed merger of the provider services arm of West Sussex PCT (West Sussex Health) with South Downs Health NHS Trust. Our advice to the Department of Health and South East Coast Strategic Health Authority (SHA) is that the proposed merger is consistent with the Principles and Rules of Cooperation and Competition (Principles & Rules).
2. The terms of the proposed merger provide that West Sussex Health will transfer from West Sussex PCT to South Downs Health. South Downs Health will, at the same time, enter into a community services agreement with West Sussex PCT for the provision of community services by the merged entity. West Sussex PCT will retain full ownership and control over the premises currently used by West Sussex Health.
3. Under a management contract between West Sussex PCT and South Downs Health that came into effect in August 2009, South Downs Health is already responsible for the management of community services provided through West Sussex Health. This management contract should have been reviewed by the CCP under the merger provisions of the Principles and Rules before it came into effect. We remain concerned that NHS organisations are continuing to integrate businesses prior to review by the CCP. This could have significant adverse consequences for employees and possibly patients where the CCP finds that the transaction is not consistent with the Principles and Rules and recommends that the organisations be separated.
4. When considering a merger, we assess whether it may give rise to costs to patients or taxpayers as a result of a loss of choice or competition and, where this is the case, whether these costs are offset by benefits to patients or taxpayers arising from the merger.¹ In assessing the possible costs to patients and taxpayers of this merger, we have examined the services to patients currently provided by West Sussex Health and South Downs Health and considered whether the merger, in reducing the number of bidders for community services contracts, would have a significant impact on patient choice or competition.
5. Our advice and recommendations are based on our evaluation that the merger is unlikely to impose any material costs on patients or taxpayers by reducing the scope for patient choice or competition. This is because there are a substantial number of potential providers of community services in West Sussex and Brighton & Hove and the surrounding areas. Our view is that the loss of one competitor would not have a material effect on the extent of patient choice or competition, although we have some concern about the increase in the concentration of

¹ The term 'cost' is used in this report to refer to any detriment, whether financial or otherwise.

service providers in the area, particularly in Brighton & Hove. In this case, it has not been necessary for us to evaluate the patient and taxpayer benefits that West Sussex PCT considers would accrue as a result of the transaction.

PARTIES

6. West Sussex Health is the community health services provider arm of West Sussex PCT and has been operating under a management contract with South Downs Health since August 2009. West Sussex PCT is the Primary Care Trust (PCT) for West Sussex. It is responsible for commissioning health services on behalf of the population in its PCT area of approximately 776,300 people. During 2009/10 the budget for community services in West Sussex was £90.6 million. Almost all of West Sussex Health's services are commissioned by West Sussex PCT and less than 1% being commissioned by Brighton & Hove PCT and NHS East Sussex Downs & Weald PCT.
7. South Downs Health is an NHS provider of community health services based in Brighton & Hove with a local population of approximately 252,600 people). It is a community services provider separate from the PCT. South Downs Health has budgeted income for 2009/10 of £48.7million, of which around 85 per cent comes from Brighton & Hove PCT, around 8 per cent from East Sussex Downs & Weald PCT and around 7 per cent from West Sussex PCT.

TRANSACTION

8. In the context of the broader policy requirement for greater separation between the commissioner and provider arms of PCTs, West Sussex carried out an option appraisal on the future of West Sussex Health.² Three options for the future of West Sussex Health were identified. These were:
 - i. West Sussex Health should merge with South Downs Health;
 - ii. West Sussex Health should merge with Innovations in Primary Care;³ and
 - iii. West Sussex Health should be established as a free standing NHS Trust or Community Foundation Trust.
9. On 26 March 2009 the board of West Sussex PCT approved a recommendation that West Sussex Health and South Downs Health should be integrated. It was decided by the board to enter into a management contract in advance of a full merger.
10. A management contract was signed by the boards of West Sussex PCT and South Downs Health on 30 July 2009 and has been in effect since 1 August 2009. Under the management contract, South Downs Health is responsible for the management of community services provided through West Sussex Health. In order to carry out its responsibilities South Downs Health established an integrated governance committee and a finance and performance committee which report to the boards of both West Sussex PCT and South Downs Health and via the Management Contract Review Meeting to the West Sussex PCT Board.

² Department of Health, *Transforming Community Services: Enabling new patterns of service provision*, January 2009.

³ Innovations in Primary Care (IPC) is a company limited by shares with West Sussex GPs and staff only, representing approximately 300 GPs.

11. West Sussex PCT told us that it 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.
12. 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.
13. Following implementation of the management contract, the Board of West Sussex PCT agreed in October 2009 that West Sussex Health should formally merge with South Downs Health. The terms of the proposed acquisition are set out in draft heads of terms: '*Heads of Terms, Related to Transfer of Arrangements of Provider Services*'. The agreement is between West Sussex PCT and South Downs Health. The proposed transfer date is 1 April 2010, by order of the Secretary of State.

JURISDICTION

14. The transaction, which we consider to be both the management agreement and the proposed acquisition by South Downs Health of West Sussex Health, is a merger for the purposes of a CCP review, as West Sussex Health will be controlled by South Downs Health.
15. Following notification of the transaction, we decided that it met our acceptance criteria for a merger inquiry. Specifically:
 - i. the proposed arrangement falls within the scope of Principle 9 of the Principles and Rules of Cooperation and Competition;
 - ii. the CCP is the most appropriate body to consider this matter;
 - iii. the parties had made available sufficient relevant and applicable information on the case to the CCP; and
 - iv. the combined turnover of West Sussex Health and South Downs Health exceeds the relevant threshold of £35 million.
16. As a result, we accepted the case on 28 October 2009, published a notice to this effect on our website on that date, and invited submissions by interested individuals and organisations. Consistent with our draft interim merger guidelines we are required to complete our Phase 1 review by 23 December 2009.⁴

⁴ The CCP's draft interim merger guidelines are available at www.ccp-panel.org.uk.

17. The CCP's review of this transaction and its advice and recommendations in relation to it, fall within the Department of Health's policy framework. In this context the Department of Health and SHA will consider the CCP's advice and recommendations in relation to the proposed merger and may require the parties to implement any recommendations made by the CCP.⁵
18. In considering this transaction as a merger, having regard to Principle 9, the CCP has not considered whether the award of the commissioning contract complies with Principles 1 and 3 (which concern commissioning services from the best providers and transparent and non-discriminatory commissioning and procurement) or with the PCT Procurement Guide.⁶ Procurement questions are for consideration by the CCP only on appeal from SHAs' dispute resolution processes pursuant to the CCP's terms of reference.
19. Also consistent with our terms of reference, we have not considered the appropriateness of South Downs Health as an acquirer of West Sussex Health, other than in terms of the impact of the merger on patient choice and competition. Responsibility for the selection of South Downs Health as the acquirer of West Sussex Health resides with West Sussex PCT. Responsibility for the delivery of services following the merger remains with the commissioners; and, in relation to service quality, the commissioners and the Care Quality Commission.

FRAMEWORK FOR MERGER ASSESSMENT

20. The framework that we use to assess mergers between healthcare providers is set out in the Principles and Rules and our draft interim merger guidelines. The relevant provision of the Principles and Rules is Principle 9, which states: *"Mergers, acquisitions, de-mergers and joint ventures are acceptable and permissible when demonstrated to be in patient and taxpayers' best interests and there remains sufficient choice and competition to ensure high quality standards of care and value for money."*
21. Our draft interim merger guidelines set out a cost-benefit framework for the assessment of mergers under this Principle.⁷ That is, where a merger may give rise to detriments (or costs) to patients or taxpayers as a result of a loss of choice or competition, then these will be weighed up against any benefits to patients or taxpayers that may arise from the merger. From this analysis the CCP will determine whether the proposed transaction is likely to result in a net benefit to patients and taxpayers.⁸
22. Consistent with this framework, this report provides an assessment of the detriment to patients and/or taxpayers that may arise from the proposed merger. We have not considered it necessary to assess the benefits to patients and/or taxpayers that may arise from the proposed merger, as we have not identified any material detriment.

⁵ Section 20(i) of the NHS Act 2006 provides that an SHA may give directions to a PCT about its exercise of any function.

⁶ Department of Health, PCT Procurement Guide for Health Services, May 2008.

⁷ A merger might give rise to costs to patients and taxpayers if it diminishes patient and commissioner choice and competition. As set out in the *Framework for Managing Choice and Competition*, published by the Department of Health on 16 May 2008, patient choice and competition in the NHS can be expected to improve quality and safety in service provision, improve health and well-being, improve standards and reduce inequalities in access and outcomes, lead to better informed patients, generate greater confidence in the NHS, and provide better value for money.

⁸ Where the CCP finds that there are no costs to patients or taxpayers arising from a merger, it will not necessarily critically evaluate patient or taxpayer benefits ascribed to the merger by the merger parties.

DEVELOPMENT OF CHOICE AND COMPETITION IN COMMUNITY SERVICES

23. The following paragraphs set out the broader context in which the proposed merger is taking place in terms of the development of choice and competition in community services. This is important as our assessment needs to consider the impact of the merger on both patient choice and competition currently, and the capacity for choice and competition to develop in the future.
24. The Department of Health has said in relation to the development of choice and competition in community services that there would now be a “stronger focus on extending patient choice in ... community care”, and that “patient choice should extend to a wide range of community-based services” as a means of helping to drive continuous quality improvement.⁹ There are, of course, many other components of the Department of Health’s vision for the provision of community care that go beyond patient choice and competition (for example, listening and responding to patients and local communities, ensuring that services fit together and promoting healthy lives). However, as our analysis of this merger requires us to consider its impact on patient choice and competition, it is on these aspects that we have focused as they provide the context for our assessment of the merger’s impact.
25. The Department of Health has also set out how its vision for the provision of community care will be realised.¹⁰ The guiding principles set out in relation to patient choice and competition provide that:
- i. “Proposals [for future organisational options for community services] must enable patient choice and personalisation”; and
 - ii. “PCTs should also encourage – where necessary – entry by other appropriate potential providers”.
26. In preparing commissioning strategies for community services, PCTs are required to “set out an indication of which services may be subject to seeking any willing PCT-accredited provider (AWPP) status or competitive tendering, and over what timescale”.¹¹ PCTs are required to engage in a planning process to deliver these objectives. Furthermore, PCTs are advised that in “drawing up their supply-side strategy [they] will have to balance the need to sustain viable, high-quality suppliers, whilst promoting choice and innovation through encouraging new entrants. In particular, the PCT will need to be clear about any shifts towards vertical or horizontal integration which result in a reduction in competition or choice. The development of existing provider organisations should not in the medium term concentrate the provision of services in a more limited number of organisations”.¹²
27. The Department of Health told us that they expect all PCTs to begin to develop commissioning specifications for transforming community services, giving a priority to common long-term

⁹ NHS Next Stage Review: Our vision for primary and community care, July 2008, pp 27 and 28.

¹⁰ *Transforming Community Services: Enabling new patterns of provision*, published in January 2009, pp 19 and 20.

¹¹ The AWPP model is a variant of the basic any willing provider (AWP) model which is described in the PCT Procurement Guide (Department of Health, May 2008). It retains the core features of the AWP model, namely open access for providers of defined services who: are registered with the Care Quality Commission to provide the defined service; agree to comply with appropriate standard NHS contract terms; are paid at the national tariff or some other agreed local common rate for the services; and who get no guarantee of activity volumes. In addition, the relevant PCT is able to set service specific accreditation requirements, such as service standards or access requirements.

¹² *Community Services: Enabling new patterns of provision*, published in January 2009, pp 28 and 30

conditions and end of life care. This is in the context of PCTs needing to offer patients with long-term conditions choice, linked to the roll-out of individual care plans. The Department of Health has produced a standard community services contract for use in the commissioning of community services.¹³

28. We note that the recently announced 'NHS as preferred provider' policy may have some impact on the extent of competitive tendering for community services and other health services. We understand that this policy does not preclude the possibility of competitive tendering for services, but may change the way in which competitive tendering is used by PCTs. As a result, in assessing mergers under the Principles and Rules, the CCP will continue to examine the effect of a merger on both patient choice and the effectiveness of future competitive tenders, while recognising that the way in which competitive tendering may be used in the future could change as a result of this policy.

DEVELOPMENT OF PATIENT CHOICE AND COMPETITION IN COMMUNITY HEALTH SERVICES IN WEST SUSSEX AND BRIGHTON & HOVE

29. The two commissioners most relevant to our review of services provided by West Sussex Health and South Downs Health are Brighton & Hove PCT and West Sussex PCT. We are aware of an early agreement between the two PCTs to jointly commission some services in the future, but at this stage there is no detail on how this might be implemented.
30. East Sussex Downs & Weald PCT, a PCT adjacent to both Brighton & Hove and West Sussex PCT, commissions some services from the merging parties, although these are a very small percentage of their income. Any detriment created by the merger would therefore be expected to primarily impact on patients in the West Sussex PCT and Brighton & Hove PCT areas. Our analysis therefore focuses on these two PCTs.
31. Brighton & Hove PCT is a medium size, city-based PCT. Its annual expenditure on community health services in 2009/10 was £51 million, with £47 million of this contracted to South Downs Health.¹⁴ Five other community health providers have contracts with Brighton & Hove PCT totalling £4 million between them.
32. Brighton & Hove PCT has tendered five community services in the last three years: out-of-hours district nursing, community anticoagulation services, community alcohol services, an urgent care contact centre and community diabetes. Brighton & Hove PCT have told us that they currently have no plans for any significant tenders during 2010 as they develop their future commissioning plan, although there are plans for tenders in 2011.
33. The out-of-hours district nursing contract was awarded to South East Health, a GP consortia organisation. South Downs Health, the incumbent provider, was one of the unsuccessful bidders. The four shortlisted bidders comprised an NHS trust, a social enterprise, a private company and

¹³ The standard contract is available at http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dH_091451

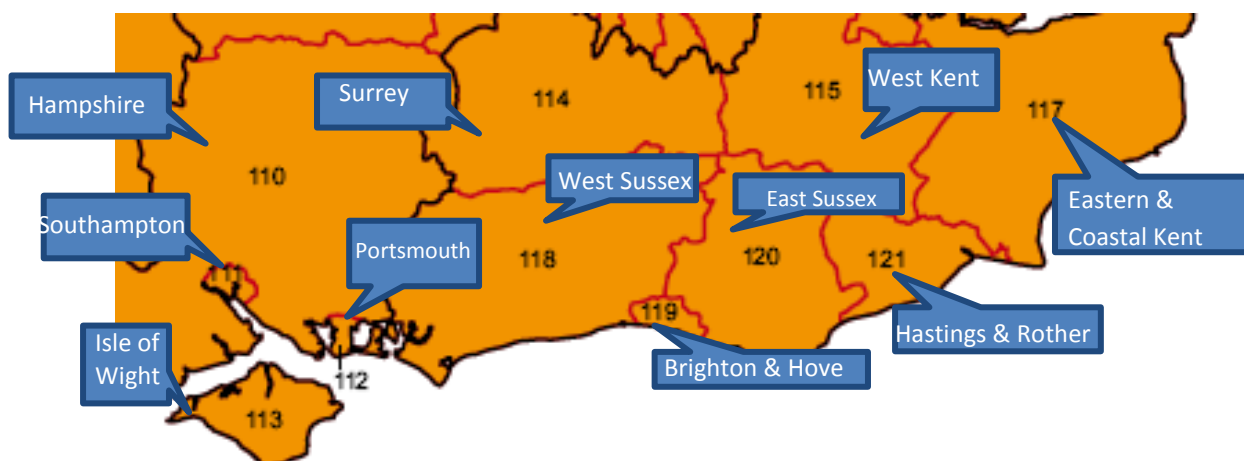
¹⁴ <http://www.brightonandhovepct.nhs.uk/about/documents/StrategicCommissioningPlanMar09.pdf> p20.

a third sector provider. Other bidders for Brighton & Hove PCT Tenders include a number of national private healthcare providers, regional NHS providers and third sector providers.

34. Brighton & Hove PCT does not own the NHS estate from which community health services in its area are currently provided, this belongs to South Downs Health. When established in 2002, Brighton & Hove PCT was the only PCT in England not to take control of local community health services, leaving South Downs Health in possession of the NHS estate it was operating from.
35. West Sussex PCT is a large PCT, both in terms of population and area. Its annual budget is approximately £1 billion, with around £90 million allocated to commissioning community health services in 2009/10. West Sussex PCT has 23 contracts with providers other than West Sussex Health, although most of these are small with values of around £100,000 or less per annum. The largest of its contracts with other providers is with South Downs Health (for children's services and rehabilitation services) worth £[X] per annum.
36. West Sussex PCT has staged two competitive tenders for community health services in the last 3 years, for an integrated sexual health service and for a health centre in Crawley. There were three shortlisted bidders for each tender. The sexual health tender was won by Worthing & Southlands Hospital Trust. West Sussex Health bid jointly with Royal West Sussex Trust. The third bidder was a GP consortium. The health centre contract was awarded to Health4Crawley, a GP-owned company. Other bidders were a national independent provider, and a GP consortium.
37. At the beginning of the option appraisal process, it was intended that a three year community services contract would be carried out by West Sussex PCT in respect of plans for West Sussex Health. However, during the process, guidance was received that the community services contract would include an agreement that services worth 10-15 per cent of the contract would be market tested in years two and three of the post-merger contract.¹⁵ Details of the services intended to be market tested can be found in Appendix 4. Brighton & Hove PCT is also intending to tender services in the future.

¹⁵ Options for Change Board Paper, 26 March 2009

Figure 1
PCT map of the South East



Source: CCP

ASSESSMENT OF MERGER COSTS

38. To assess the likely effect of the merger on patients and taxpayers as a result of any loss of choice or competition arising from this merger (the costs of the merger) this section assesses:

- the extent of patient choice or competition in the supply of community health services in the areas of West Sussex and Brighton & Hove prior to and in the absence of the merger; and
- the extent of any loss of patient choice or competition in the supply of community health services in West Sussex and Brighton & Hove as a result of the merger between West Sussex Health and South Downs Health.¹⁶

39. Appendix 3 identifies the services and geographic area (the market or markets) in which the merging parties compete (market definition). The relevant product market for analysing this merger could be individual community health services or community health services as a whole. The relevant geographic market for analysing this merger is the West Sussex and Brighton & Hove areas.

40. As our assessment of the effect of this merger would not vary with our findings on market definition, we do not consider it necessary to make a definitive finding as to the market that is most appropriate for analysing the effects of the merger. For the purposes of explaining our competitive assessment we refer to the market for community health services in the areas of West Sussex PCT and Brighton & Hove PCT as the markets being affected by this merger.

41. The proposed merger may reduce competition in community health services due to the loss of a potential provider of community health services by:

- i. removing a potential bidder/entrant in the supply of community health services; or

¹⁶ The effect of the loss of a potential competitor (i.e. as a result of it merging with a potential competitor) is measured not only by how many other potential competitors remain, but by their relative credibility as bidders in relation to the merging parties.

- ii. removing an actual provider of community health services, thereby reducing patient choice (under an Any Willing PCT Provider (AWPP) model of service provision).
42. At the present time the predominant mode of choice and competition in community services in West Sussex, Brighton & Hove and elsewhere, is competitive tendering, which relies on commissioner choice and competition for the market. The AWPP model, which would introduce patient choice and competition in the market, has not to date been widely used. As a result, in evaluating the impact of the merger we have focused on the effect of the merger on commissioner choice.
43. When assessing the competitive impact of a merger, we consider its impact in comparison with a situation where the merger did not take place (the counterfactual).^{17 18} We consider that the appropriate counterfactual to the proposed merger is the establishment of West Sussex Health as an independent community foundation trust which would be a strong competitor to South Downs Health across a range of services. In this context we use the counterfactual to inform our assessment of the impact of the merger on future competition in the areas of West Sussex and Brighton & Hove.
44. To assess the effect of the proposed merger on competition we examined the extent of competition in community services prior to and absent the merger, we considered:
- i. in respect of similar services provided by West Sussex Health and South Downs Health;
 - ii. evidence of competition in community health services in West Sussex PCT and Brighton & Hove PCT;
 - iii. an assessment by West Sussex Health and South Downs Health of who they consider their potential community health providers to be; and
 - iv. the future bidding intentions of third parties.

Similar services provided by West Sussex Health and South Downs Health

45. Where two providers of community health services each provide similar services, we expect that it would be possible for those two providers to compete in tenders for those services. Where there are a number of similar services, there is a possibility that there will be a loss of competition for services being tendered, depending on the number of other potential providers.
46. West Sussex Health and South Downs Health are the largest providers of community health services in their respective areas. The parties identified a wide range of similar services which they each provide; for example intermediate care, district nursing occupational therapy, Falls teams, HIV services, Smoking cessation services. West Sussex Health provide a full range of children's services while South Downs Health provides children's services via the Brighton & Hove Children's and Young People's Trust (to whom it seconds its staff). There are therefore a substantial number of similar services that each party provides (although not the geographic

¹⁷ As we noted in paragraph 8, West Sussex PCT considered a range of potential alternatives to the proposed merger through an option appraisal exercise. It was concluded that the establishment of their provider services arms as a community foundation trust, distinct from West Sussex PCT, to be the next best alternative to a merger with South Downs Health.

¹⁸ We will not necessarily take the next best option as the counterfactual. We take the most competitive credible option to be the relevant counterfactual.

area in which they currently provide those services).²⁰ We estimate that this overlap accounts for approximately 76% of turnover at South Downs Health and 66% at West Sussex Health.²¹

47. The merging parties told us that were they not to merge, they would expect to compete with one another in Brighton & Hove PCT and West Sussex PCT. Due to the large number of similar services provided by West Sussex Health and South Downs Health, there is potential for a substantial loss of competition in the area and we will next analyse the number of other potential providers of community health services in the area.

Evidence of competition in community health services in West Sussex and Brighton & Hove

48. Recently completed competitive tendering can indicate the competitive landscape in the PCT areas. A limited amount of competitive tendering has occurred in West Sussex PCT and Brighton & Hove PCT, which is consistent with national patterns. However, as mentioned in paragraphs 32 and 37, both PCTs have prepared or are preparing detailed commissioning strategies for their existing community services over the next two to three-year period. Accordingly, a number of services are likely to be put out to tender over that period.^{23 24}

49. Analysing various community health service providers' past bidding behaviour in West Sussex and Brighton & Hove, we found that most PCT provider arms had in the past either bid for community service contracts within, or adjacent to, the area in which they are located. West Sussex Health and South Downs Health have both previously bid in West Sussex PCT, Brighton & Hove PCT and East Sussex Downs & Weald PCT.²⁵

50. Since 2006, when services have been tendered by West Sussex PCT or Brighton & Hove PCT, a range of providers have bid. These potential providers have come from a range of sectors and include both local and national organisations. For example, we consider:

- Worthing & Southlands Hospital's (now Western Sussex Hospitals NHS Trust) winning bid for integrated sexual health services in West Sussex, demonstrates the interest for acute providers in aligning community health services with their core services;
- South East Health's winning bid for out-of-hours district nursing shows a social enterprise winning a bid to provide a focused service in part of its geographical area; and
- Harmoni, winning a tender for an urgent care contact centre, is an example of a nationally-operating private healthcare provider targeting a PCT area where it did not have existing business.

²⁰ South Downs Health provides a number of different services outside of the boundary of Brighton & Hove PCT, with at least ten different services provided in East Sussex Downs & Weald PCT, Hastings & Rother PCT, West Sussex PCT and other PCT areas. In West Sussex, South Downs Health provides services for children with complex disabilities, phlebotomy, adult speech and language therapy and rehabilitation services for inpatient stroke patients.

²¹ Appendix 1 and Appendix 2.

²³ West Sussex Health 2009-2014 Strategic Commissioning Plan. <http://www.westsussex.nhs.uk/about-us/commissioning/>
²⁴ <http://www.brightonandhovepct.nhs.uk/about/documents/StrategicCommissioningPlanMar09.pdf>

²⁵ West Sussex Health has bid for two contracts; it was successful in a bid for a diabetes service in East Sussex Downs & Weald PCT worth £45,000 per annum, and unsuccessful in its bid to provide diabetes services in Brighton & Hove PCT (this contract was awarded to South Downs Health).

51. West Sussex Health and South Downs Health have bid against each other in a tender once since 2006. However, in the absence of the proposed merger, it is our view that it is likely that they would become strong competitors in the future, subject to local commissioners undertaking competitive tenders in the future. As the merger is removing one potential service provider in the area, there is potential for an adverse effect on competition to arise in the event there is an absence of alternative potential providers.
52. Brighton & Hove PCT have told us that they are concerned that if South Downs Health continues to retain its entire estate it may adversely affect the ability of new providers to enter the market. Brighton & Hove PCT told us that appropriate locations for the provision of community services can be hard to find in its city area.²⁶ In this context South Downs Health's ownership of the estate may restrict competition and patient choice, thereby reducing the pressure on South Downs health to maintain and improve upon the quality of care provided to patients. However, this barrier to entry does not appear to be heightened by the merger and so does not materially impact on our assessment of the merger.²⁷
53. We next look at whether there is a sufficient range of providers in the area to mitigate any adverse impact on patients and taxpayers that might arise from the loss of a strong competitor in the area.

The parties' assessment of their potential competitors

54. We considered whether the transaction would lead to the loss of a particularly important (or close) competitor to South Downs Health such that there would be an adverse impact on competition. In the context of competitively tendered services, a merger may adversely affect patients and/or taxpayers if the merging parties would often be two of the most effective competitors bidding in a competitive tender and if the alternatives would be significantly less preferred than the merging parties.²⁸ We therefore considered the alternative providers.
55. The parties told us that there are a number of PCT provider service arms providing community health services at the boundaries of the areas that West Sussex Health and South Downs Health provide community services (for example; West Kent Provider Services; East Sussex Provider Services; Surrey Provider Services; Hampshire Provider Services; and Central Surrey Health).
56. South Downs Health told us that these organisations could be interested in contracts for existing community and clinic based services that are tendered in geographically close areas. South Downs Health considers that these organisations are relevant competitors.

²⁶ South Downs Health holds 39 properties, half under freehold. 17 properties are purpose built and therefore it may not be simple to provide alternative premises should South Downs Health not provide access.

²⁷ We have considered whether ownership by an incumbent organisation, of the property used for the provision of community services in a local area, can be a barrier to entry that can reduce the scope for the commissioners to switch provider. 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. In that case, the incumbent service provider has lower property costs than an entrant and accordingly an advantage in the bidding process

²⁸ Where it is difficult for other providers to enter or reposition their services to compete more effectively with the merged parties then it is also likely that a merger will adversely affect patients and/or taxpayers.

57. South Downs Health told us that acute trusts could also provide a full range of community services within their existing catchment areas. For this reason South Downs Health considers the following local acute trusts to be potential competitors: Western Sussex Hospitals NHS Trust; Queen Victoria NHS Foundation Trust; Surrey & Sussex Hospitals NHS Trust; Brighton & Sussex University Hospitals Trust; and Portsmouth Hospital NHS Foundation Trust. South Downs Health suggested that Sussex Partnership NHS Foundation Trust would be a particularly strong competitor in tenders for primary and community mental health services.
58. Two general practice organisations were identified as potential bidders by South Downs Health: Brighton Integrated Care Service (BICS) and Innovations in Primary Care, who were considered to have good local knowledge in West Sussex.²⁹
59. South Downs Health also said that there are a number of major national and international private healthcare providers that could bid for a full range of community services. For example it named United Health Care, Harmoni and Care UK as relevant competitors.
60. South Downs Health suggested that there are also voluntary sector organisations that are interested in providing services to complement core services provided by South Downs Health. However, these voluntary sector organisations are suggested by South Downs Health to perhaps lack the capacity to deliver services requiring large resources.

Future bidding intentions of third parties

61. To assess the potential for other providers to bid for services in the area in the future, we contacted a variety of providers in the South East of England area to ascertain their future bidding intentions. Potential providers in the areas of West Sussex PCT and Brighton & Hove PCT fall into three broad categories:
- i. **Large NHS community provider organisations.** Often they have experience of providing a full range of community health services in their “home” PCT areas. As well as any newly merged entity, there are provider organisations in neighbouring PCT areas which already provide some services in West Sussex or Brighton & Hove. These include: Portsmouth Community & Mental Health Services; Southampton Community Healthcare; Hampshire Community Health Care; the provider arm of East Sussex Downs & Weald PCT and West Kent PCT; and Surrey Community Health Services.
 - ii. **Other NHS organisations.** These are often acute or mental health providers that have less experience of providing community based services. These include: Surrey and Borders Partnership Trust; Western Sussex Hospitals NHS Trust; Surrey and Sussex Hospitals NHS Trust; Portsmouth Hospitals NHS Trust; Queen Victoria Hospital NHS Trust; Brighton & Hove University Hospitals NHS Trust; Sussex Partnership; and Mayday Healthcare NHS Trust. Some of these providers are only willing to bid for certain services which suit their existing portfolio.
 - iii. **Independent providers.** These might be small and local, such as South East Health and Innovations in Primary Care who are already active in the area. Brighton & Hove PCT and West Sussex PCT are also both working with other small independent providers to

²⁹ Another NHS Trust described BICS as a strong local competitor.

increase their capacity and make them more capable future bidders for services being commissioned, for example Brighton Integrated Care Service. There are also large, national providers who have told us that they are interested in bidding for tenders in the area or who already provide services in the area, such as Care UK and Harmoni.

62. Eight large NHS organisations told us they intended to bid for a range of services in NHS Brighton & Hove and NHS West Sussex. These include provider arms and acute trusts. Not all of these potential providers would be in a position to bid for all services, but between them all, there is the potential for wide-ranging service provision.
63. Four social enterprises and two independent providers also told us they would intend to bid for a range of services in Brighton & Hove and West Sussex. The services they would bid for are likely to be more limited than the large NHS organisations and are likely to reflect existing strengths in their businesses. This is a group of providers that we would expect to expand in number in future years, as more local services are brought to competitive tender.
64. Four NHS Trusts told us that they intended to bid for a limited number of services in West Sussex but not in Brighton & Hove.
65. We also consider that as a result of their location and experience a number of other providers are likely to be in a position to bid for future tenders in West Sussex and Brighton & Hove, should they wish to:
 - i. West Kent Provider Services
 - ii. Surrey Provider Services
 - iii. Eastern & Coastal Kent provider Services
 - iv. Sussex Partnership NHS Foundation Trust

Conclusion

66. The evidence we have considered indicates that although the two largest community health service providers in the area are to merge, there are a number of large PCT provider organisations located adjacent to West Sussex PCT that are likely to be potential bidders for competitively tendered community services in these local markets.³⁴ As commissioners in the area begin to competitively tender a greater number of contracts, we would have expected West Sussex Health and South Downs Health to have become strong competitors in that environment absent the merger. In the future we expect that an increasing number of bids will come from PCT service providers located further away, given that some PCT service providers already bid for services outside their immediate and adjacent areas and others have indicated that they would consider doing so in the future.
67. Other NHS organisations could also potentially offer community services in West Sussex and Brighton & Hove. Particularly acute providers in close geographic proximity to West Sussex and Brighton & Hove. There are also a number of independent and third sector organisations that could provide services under a patient choice model, or bid for certain individual community

³⁴ We note that the majority of these large NHS organisations are geographically near to the West Sussex PCT area and are most interested in providing services to this area. Nonetheless, we consider that there are a number of potential large providers of community health services in the areas of both West Sussex PCT and Brighton & Hove PCT.

services contracts that might be tendered by West Sussex or Brighton & Hove. Several have already won contracts in the area and have told us that they expect to grow their capacity.

68. We have examined the potential for this merger to adversely affect patients and taxpayers by reducing the number of bidders in future tenders. We consider that the merger would eliminate an important competitor (since West Sussex Health will cease to be an independent organisation) but note that there are a large number of alternative bidders who are also likely to bid for future contracts. We therefore conclude on balance that this proposed merger is unlikely to give rise to a material detriment to patients or taxpayers.

ADVICE AND RECOMMENDATIONS

69. We find that the proposed merger between West Sussex Health and South Downs Health will not adversely affect the extent of patient of choice and competition in community services in the areas of West Sussex PCT and Brighton & Hove PCT in the future due to the considerable number of potential credible bidders in those areas. We have identified a potential cost through the consolidation of the two largest local community health service providers, although we consider that this is offset by the number of identified potential competitors in the area.
70. As we have not identified any significant costs to patients and taxpayers of the proposed merger, it has not been necessary for us to consider any benefits to patients and taxpayers that could be expected to accrue as a result of the merger.
71. Based on our analysis, we consider that the proposed merger is consistent with the Principles and Rules and recommend that it be allowed to proceed. However, we note that we might not come to the same conclusion in respect of similar proposed mergers in the future. This is because as further consolidations take place, the competitive landscape is likely to change. Each proposed merger will be assessed having regard to the competitive landscape which exists at the relevant time.
72. It is noted that the analysis, advice and recommendations set out in this report have been given by the CCP on the basis of information it has received to date. Should there be any change in respect of any of the matters referred to in this report, including but not limited to the terms of the proposed merger and the commissioning strategies of West Sussex PCT and Brighton & Hove PCT, we expect the parties to re-refer the matter to us for further consideration.

22 December 2009

COMMUNITY HEALTH SERVICES PROVIDED BY SOUTH DOWNS HEALTH

| <i>Service Group</i> | <i>Service Line</i> | <i>come (£000)</i> | <i>% of income</i> | <i>Overlap with West Sussex Health</i> |
|----------------------|--------------------------------------------------------------------------------------------|--------------------|----------------------|------------------------------------------------|
| Specialist | Speech & Language | [X] | [X] | [X] |
| Specialist | Sexual Health | [X] | [X] | [X] |
| Specialist | Dentistry | [X] | [X] | [X] |
| Specialist | Community Specialist HIV Team | [X] | [X] | [X] |
| Specialist | Foot Health | [X] | [X] | [X] |
| Specialist | Smoking Cessation | [X] | [X] | [X] |
| Specialist | Chailey services for children with complex disabilities | [X] | [X] | [X] |
| | Sussex Rehabilitation Centre, Inpatient stroke and acquired brain injury rehabilitation | | [X] | |
| Specialist | Brighton Sussex Rehabilitation Centre | [X] | [X] | [X] |
| Specialist | Community Neuro Rehabilitation Team/Neurology | [X] | [X] | [X] |
| Adults | Matrons | [X] | [X] | [X] |
| Adults | Continence & ED Service | [X] | [X] | [X] |
| Adults | Home Support | [X] | [X] | [X] |
| Adults | Phlebotomy and intravenous therapy | [X] | [X] | [X] |
| Adults | Chronic Respiratory Disease Service | [X] | [X] | [X] |
| Adults | Heart Failure Service | [X] | [X] | [X] |
| Adults | Diabetes | [X] | [X] | [X] |
| Adults | Tissues Viability | [X] | [X] | [X] |
| Adults | District Nursing | [X] | [X] | [X] |
| Adults | Community Beds | [X] | [X] | [X] |
| Adults | Integrated Community Equipment Store | [X] | [X] | [X] |
| Adults | Intermediate Care | [X] | [X] | [X] |
| Adults | Integrated Discharge Team | [X] | [X] | [X] |
| Adults | Occupational Therapy | [X] | [X] | [X] |
| Adults | Falls Service | [X] | [X] | [X] |
| Adults | Health Trainers | [X] | [X] | [X] |
| Adults | Osteoporosis | [X] | [X] | [X] |
| | | | | [X] |
| Children | Chailey Young People's Trust | [X] | [X] | |
| | Total | [X] | | |
| | | | Total overlap | Overlap % |
| | | | [X] | 73.5% |

Source: CCP analysis

COMMUNITY HEALTH SERVICES PROVIDED BY WEST SUSSEX HEALTH

| <i>Service Group</i> | <i>Service Line</i> | <i>Income (£000)</i> | <i>% of income</i> | <i>Overlap with South Downs Health</i> |
|----------------------|-----------------------------------------------|----------------------|--------------------|----------------------------------------|
| Specialist | Gatwick Port Health | [X] | [X] | [X] |
| Specialist | HIV Community Service | [X] | [X] | [X] |
| Specialist | Smoking Cessation | [X] | [X] | [X] |
| Specialist | TB Service | [X] | [X] | [X] |
| Specialist | Wheelchair Services | [X] | [X] | [X] |
| Specialist | Community Equipment Services | [X] | [X] | [X] |
| Specialist | Sexual Assault & Referral Service | [X] | [X] | [X] |
| Scheduled | Podiatry | [X] | [X] | [X] |
| Scheduled | Dentistry | [X] | [X] | [X] |
| Scheduled | Ear, Nose & Throat Outpatients | [X] | [X] | [X] |
| Scheduled | Musculo-skeletal Outpatients | [X] | [X] | [X] |
| Scheduled | Chronic Fatigue Syndrome / ME Outpatients | [X] | [X] | [X] |
| Scheduled | Chronic Pain Management | [X] | [X] | [X] |
| Adults | Community Health Access Points | [X] | [X] | [X] |
| Adults | Virtual Wards | [X] | [X] | [X] |
| Adults | Falls Prevention | [X] | [X] | [X] |
| Adults | Community Hospitals | [X] | [X] | [X] |
| Adults | Diagnostics | [X] | [X] | [X] |
| Adults | Minor Injury Units & Urgent Treatment Centres | [X] | [X] | [X] |
| Adults | Occupational Therapy | [X] | [X] | [X] |
| Adults | Stroke / Community Neuro Rehabilitation Team | [X] | [X] | [X] |
| Adults | Speech & Language Therapy | [X] | [X] | [X] |
| Adults | Physiotherapy | [X] | [X] | [X] |
| Adults | Continence | [X] | [X] | [X] |
| Adults | Intermediate Care | [X] | [X] | [X] |
| Adults | Chronic Obstructive Pulmonary Disease | [X] | [X] | [X] |
| Adults | Dietetics | [X] | [X] | [X] |
| Adults | Community Nursing | [X] | [X] | [X] |
| Childrens | Childrens Community Nursing | [X] | [X] | [X] |
| Childrens | Childrens Continuing Care | [X] | [X] | [X] |
| Childrens | Community Paediatrics | [X] | [X] | [X] |
| Childrens | Health Visiting | [X] | [X] | [X] |
| Childrens | Childrens Occupational Therapy | [X] | [X] | [X] |
| Childrens | Paediatric Physiotherapy | [X] | [X] | [X] |
| Childrens | School Nursing | [X] | [X] | [X] |
| Childrens | Childrens Short Stay Units | [X] | [X] | [X] |
| Childrens | Childrens Speech & Language Services | [X] | [X] | [X] |
| Childrens | Continence | [X] | [X] | [X] |
| Childrens | HPV vaccination | [X] | [X] | [X] |
| Childrens | Child Health Bureau | [X] | [X] | [X] |
| Childrens | Child Development Centre | [X] | [X] | [X] |
| Mental Health | Ford | [X] | [X] | [X] |
| Mental Health | Homeless | [X] | [X] | [X] |
| Mental Health | Primary Care Mental Health | [X] | [X] | [X] |
| | Total | [X] | | |
| | | | Total overlap | Overlap % |
| | | | [X] | 66.5% |

Source: CCP analysis

MARKET DEFINITION

1. The most helpful way in which to assess the effect that a merger has on competition is by first identifying (or defining) the markets in which competition between the merging parties takes place. There are two dimensions to any market: a product dimension and a geographic dimension. The following paragraphs discuss the products (or, more specifically, services in this case)³⁵ and the geographic area in which competition between West Sussex Health and South Downs Health takes place.
2. A number of approaches have been employed by economists to define markets in which the effects of a transaction or behaviour can be assessed. In line with international best practice, and consistent with our draft interim guidelines, the CCP uses the so-called 'hypothetical monopolist' test wherever feasible, as the basis for identifying and defining the markets affected by a merger. The purpose of this test is to help identify a market, being a service or group of services and a geographical area in which they are supplied and where providers of those services compete with one another. It is within this market that the effects of a merger can be assessed.
3. Under the hypothetical monopolist test, consideration is given to the extent to which consumers (in this case, patients or taxpayers) would respond if a hypothetical single provider of a service (or group of services) were to offer a poorer quality (or higher priced)³⁶ service (see paragraph 4.23 of the CCP's draft interim merger guidelines). Patients or commissioners may respond to lower quality (or higher prices in the case of commissioners) by using or commissioning a smaller volume of the service in question and they may use or commission other services or the same services from a provider in a different geographic area. When defining the product market, consideration is given to the other services patients and commissioners might use and when defining the geographic market, consideration is given to the other geographic areas where patients and commissioners might access services.
4. Healthcare markets are different from other markets as a result of the role played by both patients and commissioners, and we need to consider the responses of both when thinking about alternative service providers for the purposes of identifying a market affected by a merger. The capacity of patients or commissioners to access alternative service providers will be affected by whether, for example, the any willing provider model or competitive tendering is being used to supply services to patients.
5. In any merger, the services or geographic areas that are included in the market(s) identified as being affected by the merger can have a material bearing on the assessment of the extent to which choice and competition are affected by the merger. However, in other cases, particularly those which do not raise concerns it may have no bearing at all. That is, the CCP would reach the same conclusion that a merger did not give rise to a material adverse effect on patients or taxpayers regardless of how it defined the markets affected by the merger. In these latter cases, it will not usually be necessary for the CCP to reach a definitive conclusion on market definition, and in consequence, the CCP may choose not to do so in these cases.

³⁵We use the terms 'product' and 'service' interchangeably in this document.

³⁶Most services in the NHS are subject to fixed prices in the form of a tariff. In community services, however, there is no fixed tariff for services, the cost of which (or price) is the subject of negotiation with the PCT.

Product market

6. The services supplied by West Sussex Health and South Downs Health are set out Appendices 1 and 2. In principle, the relevant product market(s) for our analysis might be:
 - separate product markets for each community service;
 - a product market for a set of community services;
 - a product market for all community services; or
 - a product market that includes community services and other health services such as acute services and/or primary care services.
7. In this case, we believe that the effects of the merger would be the same regardless of whether the relevant product market that is identified for the purpose of assessing competition is defined as separate product markets for the supply of individual community services or a single market for the supply of all community services. That is primarily due to the large number of actual and possible community services providers in the area capable of providing the services provided by West Sussex Health and South Downs Health either as a whole or individually.
8. We also considered the extent to which community service providers face competition from care provided in other settings (eg providers of acute care) and, as a result, whether these services should also be included in the same market as community services for the purpose of assessing the effect on patient choice and competition arising from the merger. To do so, we used the framework of the hypothetical monopolist test, focusing on how patients might respond to changes in service quality from a position where only one community service provider was available to them.³⁷
9. The product component of each community service can be thought of as consisting of two elements: the treatment that is provided (eg a dental treatment or a physiotherapy treatment) and the setting for that treatment (eg at home or at a community health facility). If there is only one community service provider available to a patient, then a patient, if dissatisfied with this service could, in principle, access the same treatment in an alternative setting (eg in an acute setting) if this was available.³⁸ If a sufficient number of patients were to do so in response to a small but significant reduction in service quality by the hypothetical sole provider, then the alternative service should be included in the same product market as the community service(s) in question.³⁹
10. For a number of reasons, including the inconvenience to patients of accessing treatments in an alternative setting, we think that it is unlikely that patients would significantly reduce the use of community services provided in a community setting in response to a small but significant reduction in the quality.⁴⁰ Commissioners will also be unlikely to fund the provision of the same service in both a community and acute setting since the provision in an acute setting would be

³⁷The PCT as commissioner could respond to a small but significant change in quality by changing provider. However, this would require them to facilitate entry of a new provider. We consider this to be more consistent with entry. The need for a PCT to contract with a new service provider for that service provider to be in a position to offer services to patients also means that we do not consider supply-side substitution (ie providers of care in non-community settings responding to a small but significant deterioration in quality by relatively quickly starting to offer community services in a community setting) to be possible at this stage.

³⁸For simplicity this assumes that patients would not stop treatment altogether if they were dissatisfied with the quality of service in a particular setting.

³⁹This, in essence, is the 'hypothetical monopolist' test.

⁴⁰This assumes that the range of existing service provision remains and that provision in a community setting is not closed.

more expensive and would run counter to the Department of Health policy of moving healthcare into settings closer to the home. On that basis, we think it unlikely that the product market for individual community services or community services as a whole includes, for example, the same or substitute services provided in an acute setting.

11. Given these considerations, we believe the relevant product market for competitive analysis of community services is the supply of individual community services *or* community services as a whole. At this stage we consider it unlikely that the relevant product market(s) also includes other healthcare services, such as acute services.

Geographic market

12. The second dimension to a market is its geography. That is the area over which suppliers compete for patients. Candidate geographic markets for analysing this merger might, for example, be:
 - i. the individual PCT area (eg separate markets for the West Sussex PCT and Brighton & Hove PCT areas) ;
 - ii. the individual PCT area and some or all adjacent PCT areas; or
 - iii. wider than the individual PCT area and all adjacent PCT areas.
13. For services provided by West Sussex Health and South Downs Health, residents do not currently have the opportunity to choose alternative providers outside of their PCT area. This is because it is their residential location that determines where they are eligible to access NHS-funded community services. As a result, if there were to be a reduction in service quality from their service provider, patients could not choose another provider from outside the individual PCT area.⁴¹
14. This would only change if commissioning arms of West Sussex PCT and Brighton & Hove PCT were to jointly commission community services with other PCTs, and thus enable patients within to access services from elsewhere, or if they were to introduce an AWPP model of provision for some services. As a result, the relevant geographic market for assessing the impact of the merger is the individual PCT areas of West Sussex PCT and Brighton & Hove PCT.

Findings on market definition

15. In summary, the relevant product market for analysing this merger may be individual community services or community services as a whole. The relevant geographic markets for analysing the effects of this merger are the areas of West Sussex PCT and Brighton & Hove PCT.
16. As our assessment of the effect of this merger would not vary with our findings on market definition, we do not consider it necessary to identify precisely the market that is most appropriate for analysing the effects of the merger. However, for the purposes of explaining our competitive assessment we refer to the markets for community services in the West Sussex PCT and Brighton & Hove PCT as the markets affected by this merger.

⁴¹ This is reflected in the income profile of each provider arm, with around 90% generated from the host PCT commissioner.

Community services to be reviewed for market testing

1. []