CO·OPERATION & COMPETITION PANEL
FOR NHS-FUNDED SERVICES

# Transfer of NHS Barking & Dagenham's community health services business to North East London NHS Foundation Trust

## EXECUTIVE SUMMARY


1. The Cooperation and Competition Panel (CCP) has examined a proposed 'hosting arrangement' between NHS Barking & Dagenham's community health services provider (BDCS) and North East London NHS Foundation Trust (NELFT). The CCP recommends that the proposed transaction be allowed to proceed as it is unlikely to impose any material costs on patients or taxpayers by reducing the scope for patient choice or competition and will benefit patients and taxpayers by allowing NHS Barking & Dagenham to focus on its commissioning responsibilities.

2. There is, however, a risk that this hosting arrangement will delay the introduction of any patient choice and competition in community services that is appropriate beyond what would have otherwise occurred. As a result, the CCP expects NHS Barking & Dagenham to work in close cooperation with the London Strategic Health Authority (SHA) on the development and implementation of its commissioning strategy so as to minimise this risk.

3. Under the terms of the hosting arrangement BDCS will be transferred to NELFT, and NELFT will be granted a two year contract (with the possibility of two 6 month extensions) by NHS Barking and Dagenham to provide community services. We consider this arrangement to be a merger for the purposes of a CCP review as BDCS will come under the control of NELFT.

4. The CCP when considering a merger assesses 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.

5. In assessing the possible costs to patients and taxpayers of this merger, the CCP has examined the services to patients currently provided by BDCS and NELFT, and considered whether the merger would, either now or in the future, reduce the number of providers that patients in the area could choose from for community services, or reduce the number of bidders for community services contracts. While there is currently relatively little patient choice or competition in community services in Barking and Dagenham, the government's vision for community services, as set out in the Next Stage Review[1], provides – among other things – for significantly greater patient choice in the coming years.

6. We believe that, in the absence of the merger, NELFT may commence providing community health services and compete with BDCS for patients and/or contracts. However, there is a substantial number of potential providers of community services in Barking and Dagenham, including other PCT-owned community health services providers, acute trusts, independent sector providers and third sector providers. As a result, our view is that the loss of NELFT as a


[1]Department of Health, *NHS Next Stage Review: Our vision for primary and community care*, July 2008.

potential provider of community health services as a result of the merger would not have a material effect on the extent of competition for patients or community services contracts.

7. We also considered whether the merger might reduce competition in community services or mental health services because of the referral of patients between BDCS and NELFT. We conclude that the merger would not give rise to a material adverse effect on patients or taxpayers as a result of vertical integration between BDCS and NELFT due to the limited extent of referrals between BDCS and NELFT.

8. NHS Barking & Dagenham and NELFT told us of a number of benefits to patients and taxpayers that they consider are likely to arise from the merger. We agree that patients and taxpayers will derive benefits from NHS Barking & Dagenham becoming a commissioning only organisation, and that benefits are also likely to be derived from the stronger governance arrangements and financial controls that NELFT will bring to BDCS.

## PARTIES

9. NHS Barking & Dagenham is the Primary Care Trust (PCT) for the Barking and Dagenham borough area in North East London. It is responsible for commissioning health services on behalf of the local population (approximately 177,000 persons) as well as directly providing services through its own community health services business (Barking & Dagenham community services – BDCS). It had a net operating cost of £254 million in 2007-08, and employs around 660 staff.[2]

10. BDCS provides a range of community health services to adults, children and young people, including community nursing, community rehabilitation services, podiatry, community dental services, physiotherapy, special needs school nursing, health advisers in schools and smoking cessation services. It has an annual budget of £30.3 million for 2008-09, of which 92 per cent was derived from NHS Barking & Dagenham.[3] (The remaining 8 per cent of BDCS revenues were derived from the provision of services to other PCTs.)

11. NELFT provides mental health services across the four London Boroughs of Barking & Dagenham, Havering, Redbridge and Waltham Forest. These include both community-based and acute services to children, young people and adults. It serves a population of approximately 859,000 persons, had total income of approximately £116 million in 2007-08, and employs around 1,700 staff.[4]

## TRANSACTION

12. The transaction concerns the planned transfer of BDCS from NHS Barking & Dagenham to NELFT. The terms of the transfer are set out in a draft contract (the ‘transfer contract’) between NHS

[2] Barking and Dagenham Primary Care Trust, Annual Report and Accounts 2007/2008 – available at www.bdpct.nhs.uk.
[3] Newchurch, *Provider services review and future options: Report for the Barking & Dagenham PCT Board*, November 2008.
[4] North East London NHS Foundation Trust, Annual Report 2007/08 – available at www.nelmht.nhs.uk.

Barking and Dagenham and NELFT. The transfer contract is accompanied by a further contract (the 'commissioning contract') between NHS Barking and Dagenham as commissioner and NELFT as provider, which sets out the terms and conditions for the provision of community health services. The commissioning contract is for a two year duration with the option of two 6 month extensions.

13. The proposed transfer of BDCS to NELFT follows a review by NHS Barking & Dagenham of options for BDCS, which commenced in August 2008. This review took place in the context of the broader policy requirement for greater separation between the commissioner and provider arms of PCTs.[5]

14. The review commissioned by NHS Barking & Dagenham identified four options, namely:
    - establishing BDCS as an arm's length autonomous provider organisation (APO) (whereby BDCS would remain within NHS Barking & Dagenham, but would have a separate board, separate financial accounts, an independent business plan and devolved decision making powers);
    - immediately divesting BDCS either as a single unit or in parts through a competitive process;
    - a transfer of BDCS to Havering PCT; and
    - a transfer of BDCS to NELFT.

15. A competitive divestment of BDCS was dismissed as an option by NHS Barking & Dagenham as 'it was felt that transaction risks around the immaturity of the market and experience as world class commissioners outweighed the advantages of the option, with the risk of the safety and continuity of appropriate services being compromised'.[6]

16. The three remaining options of: (1) establishing an arm's length APO, (2) transfer to Havering PCT, and (3) transfer to NELFT were then evaluated against the following criteria:
    - *Patients*: continuity of safe and appropriate services for patients; enhance patient choice; address health inequalities through local knowledge and partnership working;
    - *Patient/PCT/Staff*: encourage innovation and service integration, particularly with social services;
    - *Staff*: safeguard the future interests of BDCS staff; and
    - *PCT*: value for money, both in the commissioning of services and the divestment of any assets; minimisation of the risks of transaction by treating all potential service suppliers equally and fairly and through processes and procedures that are transparent and robust; and achieve the PCT's strategic direction.

17. The evaluation concluded that a transfer of BDCS to NELFT scored the highest of the three options, and NHS Barking & Dagenham has subsequently proceeded to take steps to implement this option. Our evaluation of this option is set out in the remainder of this report.

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[5] Department of Health, *Transforming Community Services: Enabling new patterns of service provision*, January 2009.
[6] Newchurch, 2008, p.23.

## JURISDICTION

18. The CCP considers the proposed transfer of BDCS to NELFT to be a merger because as a result of the proposed transfer two organisations which are independent of each other (ie BDCS and NELFT) would come under the common control of NELFT.

19. Following notification of the merger, the CCP decided that proposed transfer of BDCS to NELFT met the CCP's acceptance criteria for a merger inquiry. That is:
    i. the proposed arrangement falls within the scope of Principle 9 of the Principles and Rules;
    ii. the CCP is the most appropriate body to consider this matter;
    iii. NELFT and NHS Barking & Dagenham have made available the relevant and applicable information on the case to the CCP; and
    iv. the combined turnover of NELFT and BDCS exceeds the relevant threshold of £35 million.

20. As a result, the CCP accepted the case on 26 May 2009, published a notice to this effect on its website on that date, and invited submissions by interested individuals and organisations. Consistent with its draft interim merger guidelines[7] the CCP should complete its Phase 1 review by 21 July 2009.

21. The CCP's review of this transaction, and its advice and recommendations in relation to it, fall within the broader regulatory framework overseen by Monitor, the independent regulator of NHS Foundation Trusts. Monitor will consider the CCP's advice and recommendations in relation to NELFT's proposed investment in BDCS, and, if necessary, may require NELFT to implement the CCP's recommendations in accordance with the compliance framework for Foundation Trusts.

22. In considering this transaction as a merger, having regard to Principles 9 and 10, the CCP has not considered whether the award to NELFT 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.[8] Procurement questions are for consideration by the CCP only on appeal from SHAs' dispute resolution processes pursuant to the CCP's terms of reference.

23. Consistent with the CCP's terms of reference, the CCP has not considered the appropriateness of NELFT as an acquirer of BDCS other than in terms of the impact of the merger on patient choice and competition. Responsibility for the selection of NELFT as the acquirer of BDCS and for the quality of services following the merger remains with NHS Barking & Dagenham and, in relation to service quality, also the Care Quality Commission in due course.

[7] The CCP's draft interim merger guidelines are available at www.ccpanel.org.uk.
[8] Department of Health, PCT Procurement Guide for Health Services, May 2008.

## FRAMEWORK FOR MERGER ASSESSMENT

24. The framework that the CCP uses to assess mergers between healthcare providers is provided by the Principles and Rules of Cooperation and Competition (Principles and Rules) and the CCP's draft interim merger guidelines.

25. The relevant provisions of the Principles and Rules are:
    - Principle 9: 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.
    - Principle 10: Vertical integration is permissible when demonstrated to be in patient and taxpayers' best interests and protects the primacy of the GP gatekeeper function; and there remains sufficient choice and competition to ensure high quality standards of care and value for money.

26. The CCP's draft interim merger guidelines set out a cost-benefit framework for the assessment of mergers under these two Principles.[9] That is, where a merger may give rise to 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 so as to determine whether the proposed transaction is likely to result in a net benefit to patients and taxpayers.[10]

27. Consistent with this framework, this report provides:
    - an assessment of the costs to patients and/or taxpayers that may arise from the proposed merger;
    - a discussion of the benefits to patients and/or taxpayers that may arise from the proposed merger; and
    - a conclusion that weighs up the expected costs and benefits.

## DEVELOPMENT OF CHOICE AND COMPETITION IN COMMUNITY SERVICES

28. The following paragraphs set out the broader context in which the proposed transfer of BDCS to NELFT 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.

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[9] 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,* 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.

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

29. The vision for community services was set out in the *NHS Next Stage Review: Our vision for primary and community care* published in July 2008. In relation to the development of choice and competition in community services, it stated that there would now be a 'stronger focus on extending patient choice in ... community care' (p.27), and that 'patient choice should extend to a wide range of community-based services' (p.28) as a means of helping to drive continuous quality improvement.

30. There are, of course, many other components of the Next Stage Review vision for community care that go beyond patient choice and competition, such as 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.

31. *Transforming Community Services: Enabling new patterns of provision*, published in January 2009, sets out how the Next Stage Review vision for community care will be realised. The guiding principles set out in this document in relation to patient choice and competition state that:
    - 'Proposals [for future organisational options for community services] must enable patient choice and personalisation' (p.19); and
    - 'PCTs should also encourage – where necessary – entry by other appropriate potential providers' (p.20).

32. 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' (p.28).[11] PCTs are required to engage in a planning process to deliver these objectives, with detailed plans for transforming community services developed by October 2009,and procurement and implementation plans being developed in late 2009 and 2010.

33. Further, 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' (p.30).

34. NHS Barking & Dagenham has provided us with internal documents showing that it has a program to develop its commissioning plans for community services in line with the requirements of Transforming Community Services. Consistent with this, NHS Barking &

[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.

Dagenham's plan for the procurement of community services (following the expiry of its commissioning contract with NELFT following the proposed transfer of BDCS to NELFT) is currently at a relatively early stage of development with completion due in October 2009.

## ASSESSMENT OF MERGER COSTS

35. 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 (ie the costs of the merger), this section:
    - first, identifies the services and geographic area (ie the market or markets) in which the merging parties compete; and
    - second, assesses the extent of any loss in patient choice and competition in this market (or markets) as a result of the merger.

### MARKET DEFINITION

36. 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[12]) and the geographic area in which competition between BDCS and NELFT takes place.

37. A number of approaches have been employed by economists over the years 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.

38. Under the hypothetical monopolist test, consideration is given to the extent to which consumers (in this case, patients or commissioners) would respond if a hypothetical single provider of a service (or group of services) were to offer a poorer quality (or higher priced[13]) 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.

[12] We use the terms 'product' and 'service' interchangeably in this document.
[13] Most 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.

39. 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.

40. 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.

**Product market**

41. The services supplied by BDCS and NELFT are set out in paragraphs 8 and 9 above. The starting point for our consideration of the relevant market(s) affected by this merger is the community services supplied by BDCS.[14]

42. In principle, the relevant product market(s) for our analysis might be:
    - separate product markets for each community service (eg podiatry, district nursing etc); or
    - a single product market for all community services; or
    - a product market that includes community services and other health services such as acute services and/or mental health services.

43. 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 product market for the supply of all community services.[15] This is primarily due to the large number of actual and possible community services providers in the area capable of providing the services provided by BDCS either as a whole and individually (see paragraphs 62 to 67).[16]

44. 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

[14]We refer to the community health services supplied by BDCS as 'community services' in the remainder of this report.

[15]As it is usually the case that PCT provider organisations supply the same core set of the community services, this might suggest that PCT provider arms compete across the broad range of community services, with some possible exceptions for specialist services.

[16]In other cases, however, particularly where there may be more specialist services supplied by a community services business, it may be necessary to analyse the merger at the level of one or more individual community services either in addition, or instead of, a more aggregated analysis.

respond to changes in service quality from a position where only one community service provider was available to them.[17]

45. 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.[18] 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.[19]

46. 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. 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. However, we have not reached a definitive conclusion on this point as it is not material to our findings in this case.

47. 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. It is also possible, although in our view less likely, that the relevant product market(s) may also include other healthcare services, such as acute services. However, as the effect of the merger does not differ substantially between different possible definitions of the product market we have not found it necessary to reach a conclusion on this point.

**Geographic market**

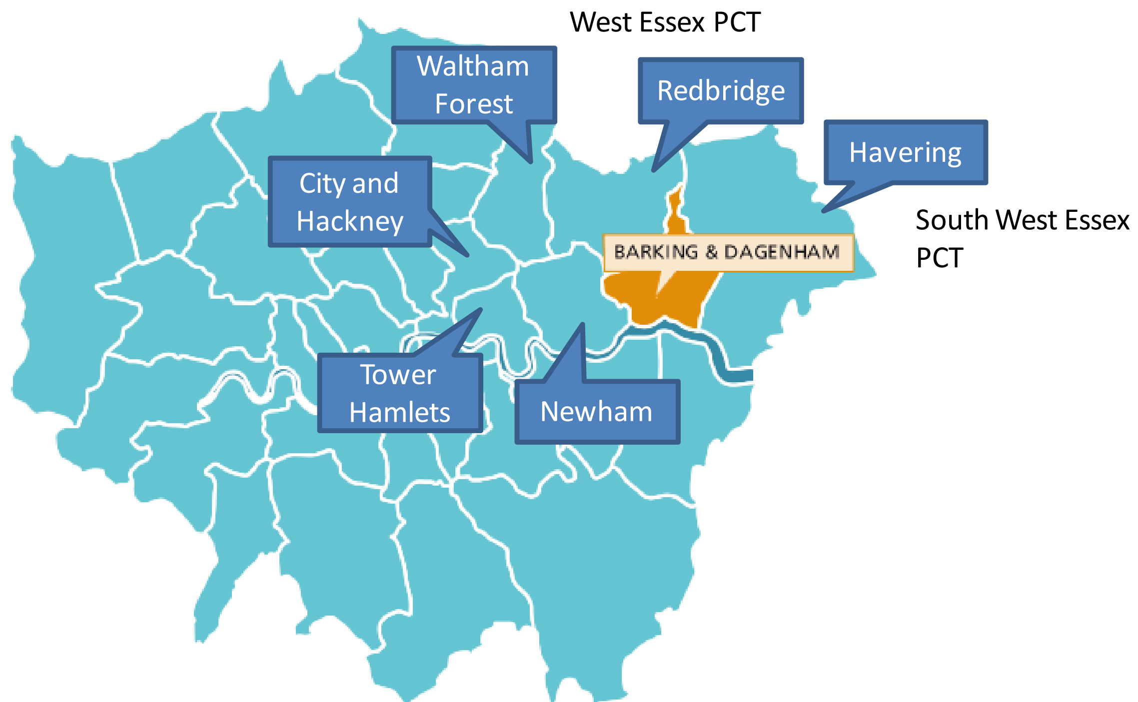
48. The second dimension to a market is its geography. That is the area over which suppliers compete for patients. Candidate geographic markets for analysing this merger might, for example, be:
    a. the Barking and Dagenham borough area;
    b. North East London (eg Barking and Dagenham and surrounding boroughs, such as Havering, Redbridge and Newham); or
    c. wider than North East London.

[17] The 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.

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

[19] This, in essence, is the 'hypothetical monopolist' test.

**Figure 1: London PCT boundaries**




*Source*: London SHA

49. For services provided by BDCS, residents of Barking and Dagenham do not currently have the opportunity to choose alternative providers outside of Barking and Dagenham. 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 BDCS, patients could not choose another from outside the borough. (This would only change if NHS Barking & Dagenham were to commission jointly community services with other PCTs and thus enable patients within Barking and Dagenham to access services from elsewhere.) As a result, the relevant geographic market for assessing the impact of the merger is the Barking and Dagenham borough area.

**Findings on market definition**

50. In summary, the relevant product market for analysing this merger may be individual community services, or community services as a whole or, although less likely, community services and other healthcare services, such as acute services. The relevant geographic market for analysing this merger is the Barking and Dagenham borough area.

51. 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 identity precisely the market that is most appropriate for analysing the effects of the merger. However, for the purposes of explaining our competitive assessment in the following section we refer to the market for community services in Barking and Dagenham as the market being affected by this merger.

**ASSESSMENT OF THE PROPOSED MERGER'S EFFECT ON PATIENT CHOICE AND COMPETITION**

52. There are two ways in which the merger between BDCS and NELFT might affect patient choice and competition in community services.[20]
    a. First, there may be a reduction in patient choice or competition resulting from the loss of a potential provider of community services (horizontal effects).
    b. Second, there may be a reduction in patient choice or competition along the care pathway as a result of the relationship between BDCS and NELFT as referrers of patients to each other (vertical effects).[21]

53. There are also two distinct time periods for considering the effect of this merger. First, the two to three year period following the completion of the proposed merger, when NELFT will, in effect, have an exclusive right to provide the services currently provided by BDCS under the terms of the commissioning contract that is being put in place as part of this transaction. Second, the period after the expiry of this contract, when NHS Barking & Dagenham re-commissions these services either through competitive tendering or through a patient choice framework (the Any Willing PCT-accredited provider – AWPP – model).

**Horizontal effects**

54. Currently, there is little patient choice in community services in Barking and Dagenham, and a limited degree of competitive tendering by NHS Barking & Dagenham for community services. However, we expect that the scope for patient choice and competition in community services in Barking and Dagenham will increase in the coming years (see paragraphs 27 to 32). As a result, in assessing the competitive impact of the merger, we need to bear in mind its impact on the development of patient choice and competition, and compare this situation to one where the merger did not take place (ie the 'counterfactual').

55. There are three aspects to this counterfactual. First, the fate of BDCS in the absence of the merger, second, the development of patient choice and competition in community services in Barking and Dagenham absent the merger, and third, whether NELFT would have started providing community health services in the absence of the merger. In relation to BDCS, in the absence of the proposed merger with NELFT, BDCS would have either been transferred to Havering PCT or established and maintained as an autonomous service provider within NHS Barking & Dagenham (see paragraph 15). In our view, however, the appropriate counterfactual for the assessment of the effects of the proposed merger between BDCS and NELFT is the

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[20]We also considered whether the merger might have an impact on mental health services as a result of BDCS no longer having the potential to commence supplying mental health services in North East London in competition with NELFT. We did not think this likely for two reasons. First, we were told that it would be more difficult for a community services provider to enter mental health services than vice versa due to a lack of experience in mental health services and a lack of management capacity. Second, we saw no indication that this was an option considered by BDCS.

[21]We considered and dismissed two other ways in which the merger might result in a loss of patient choice and competition. First, the scope for the merger to give rise to coordinated effects. The merger does not significantly increase the ability and incentive of providers in the supply of community services to coordinate because these organisations are not currently active in the same relevant market. Second, the scope for the merged entity to bundle services so as to extend market power from one provider in one market into another (ie conglomerate effects). The merger does not give rise to conglomerate effects because PCT's commission community services and mental health services separately and in very different ways, making it difficult (if not impossible) for the merged entity to bundle the services together.

retention of BDCS by NHS Barking & Dagenham as a provider of community services independent of other providers of healthcare services.[22]

56. In relation to the development of patient choice and competition in community services in Barking and Dagenham absent the merger, we considered whether NHS Barking & Dagenham would have introduced a greater degree of patient choice and competition within the next two to three years (ie the period under the draft commissioning contract in which the merged entity will, in effect, exclusively provide the services currently provided by BDCS) in the absence of the merger.

57. 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 conditions and end of life care, to start building momentum for change from 2010. 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.

58. London SHA told us that it expects PCT commissioners to have articulated their commissioning strategy for community services for two to three priority areas by the end of October 2009, and for their entire commissioning strategy for community services to be complete by September-November 2010. It said that it would be reasonable to assume that for some community services patient choice and competitive tendering would be the appropriate way forward. As part of the commissioner performance regime, London SHA will be ensuring that PCTs are making progress against their commissioning strategy during 2010-11 and thereafter.

59. Given that the commissioning contract with NELFT is likely to prevent the competitive tendering of services currently provided by BDCS until at least July or August 2011 (and perhaps up to one year later if the contract is extended in line with the provision for two 6 month extensions), then the proposed merger may result in a delay in the introduction of choice and competition in the long term care and end of life care services provided by BDCS compared to the Department's expectations.

60. However, the extent to which the merger and the commissioning contract gives rise to a delay in the introduction of patient choice and competition compared to what would happen in the absence of the merger is not clear. This is because NHS Barking & Dagenham told us that the reason that it is pursuing this merger is so that it can focus on its commissioning responsibilities and has sufficient time to organise itself to effectively commission community services once the proposed commissioning contract with NELFT for community services comes to an end. That is, it is not clear that NHS Barking & Dagenham would be able to organise itself to effectively commission community services more speedily in the absence of the proposed merger.

61. We also considered whether, in the absence of the merger, NELFT would have competed with BDCS to provide community services in Barking and Dagenham once NHS Barking & Dagenham

[22]We note that NHS Barking & Dagenham may have sought to combine BDCS with the provider arm of Havering PCT (which has itself been combined with the provider arms of Redditch and Waltham Forrest PCTs) to form Outer North East London Provider Services. However, this transfer itself would have been subject to review by the CCP and may have raised concerns about its consistency with the Principles and Rules. As a result, we do not consider this to be an appropriate counterfactual against which to assess the proposed merger between BDCS and NELFT.

started to either competitively tender for these services or introduce patient choice. There is some indication that this would have been the case.

62. NELFT's business plan before anticipating this merger states that its strategy for growth will be to develop 'services that are complementary to core business and areas outside of core business which build on strengths within the Trust'.[23] A number of mental health providers [✂] and the NHS Confederation told us that entry into the supply of community services could be an attractive option for mental health trusts, particularly if they are based in geographic regions (such as rural areas) where their other opportunities for growth are limited. Further, the relatively recent organisational links between mental health services and community services as well as the expertise that mental health trusts have in delivering community-based services were also noted.

63. We could not discount the possibility that in the absence of the merger NELFT would have competed to supply these services when NHS Barking & Dagenham decided to commission them competitively. This is somewhat supported by NELFT's recent bids for three community services contracts: a drugs programme (Waltham Forest PCT with the London Borough of Waltham Forest); psychological therapies in primary care (Havering PCT); and, Havering drug alcohol action team (Havering PCT with the London Borough of Havering) – albeit each of these contracts had a major mental health component.

64. On the basis that in the absence of the merger NELFT was a potential supplier of community services, we considered whether the merger would give rise to a loss of patient choice and competition in these services.

65. Currently, there is a plurality of providers of community services in North East London, including other PCT provider arms, independent sector providers and third sector providers. PCT provider arms in the region include Outer North East London Community Services (the result of a merger between the PCT provider arms in Havering, Redbridge and Waltham Forest), and the provider arms of the PCTs in Newham, City & Hackney and Tower Hamlets. The provider arms of West Essex and South West Essex PCTs (see Figure 1) are also relatively near to Barking and Dagenham.

66. It seems that each of the four community services providers in North East London, and possibly also the provider arms in West Essex and South West Essex, could offer community services under contract to NHS Barking & Dagenham. This view is supported by evidence of PCT provider arms supplying services outside their home PCT. For example, BDCS supplies community phlebotomy services to Havering and Brentwood PCTs as well as paediatric audiology services to South West Essex PCT. Outer North East London Community Services told us that it has bid for services in Camden, Newham and Brighton and that it would be happy to bid for contracts in a wider geographic area. It told us that it would bid across the full range of community services as its current portfolio is extensive.

[23]NELFT, *Integrated Business Plan 2008/9-2012/12*, 3 March 2008.

67. The provider arm of Newham PCT told us that it had in the past two to three years participated in a tender for community services (podiatry) in Waltham Forest, and that in the future it would bid for suitable health and social care contracts, most probably in all North East London PCTs (ie Barking and Dagenham, Hackney, Tower Hamlets, Newham, Waltham Forest, Redbridge and Havering). The community services providers based in neighbouring PCTs are well positioned to enter and commence supply of all individual community services in Barking and Dagenham. This indicates that they are likely to be important potential entrants.[24]

68. Other NHS organisations could also conceivably offer community services in Barking and Dagenham. We asked six acute trusts based in north London and Essex (of which four replied) whether they would be interested in providing community services in Barking and Dagenham. Barking, Havering and Redbridge University Hospitals NHS Trust told us that it currently provides some services in the community. It also told us that it may wish to increase its provision of community services in the future and that it would probably be interested in tendering for community services contracts in Barking and Dagenham and the surrounding areas. The three other Trusts (Newham University Hospital NHS Trust, Princess Alexandra Hospital, and Basildon and Thurrock University Hospital) told us that their immediate focus would be to offer community service to their local population, though one (Basildon and Thurrock University Hospital) told us that it may consider surrounding regions in future.

69. 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 services contracts that might be let by NHS Barking & Dagenham. These include three organisations identified in the Newchurch report, namely Age Concern in Barking and Dagenham, LB of Barking and Dagenham Children's Services and the Local Optical Committee.[25] Two independent sector providers [✂] told us of their interest in bidding for future community services contracts in Barking and Dagenham (while noting the various constraints on participating in this market, such as pension arrangements for incumbent staff). This included an interest in both contracts for individual services as well as a contract for the supply of all of the services currently supplied by BDCS.[26]

70. We also looked at the recent history of bidding for community services contracts in North East London and South West Essex. As the nature of the services tendered differed significantly between contracts, and competitively tendering commenced relatively recently we need to be careful in interpreting the information. However, we examined tenders for 41 contracts and

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[24]We also contacted two PCTs in South East London across the Thames from Barking and Dagenham (Greenwich PCT and Bexley Care Trust). While these PCTs told us that they would consider bidding for contracts in nearby PCTs, both indicated that their focus would, at least initially, be in South East London.

[25]A Local Optical Committee (LOC) is a statutory body which represents the interests of local opticians at local health authority level and which contributes to debate on local health issues. The LOC in Barking and Dagenham indicated that it might be interested in offering some or all community services in the area. It said that it could potentially be an alternative provider of some or all of the services. They said that "we could engage optometrists in the area as we have done so with diabetic retinal screening".

[26]Potential suppliers of community services in Barking and Dagenham, for the most part, seem to be limited to the surrounding area of North East London and West and South West Essex. PCT provider organisations told us that they would be likely to focus on bidding for contracts in their own or neighbouring PCTs.

found that on average bids were received from 7 separate organisations.[27] We found that eight PCT provider organisations based in north London and Essex (Redbridge, Camden, Newham, Central Essex, Havering, West Essex, South West Essex and BDCS) bid for these contracts. Other NHS organisations, including NHS Trusts and Foundation Trusts based in London and the South East, bid for these contracts as did a number of independent sector and third sector organisations.

71. In our view, the evidence as to the existing number of community services providers in the area and recent bidding data indicates that there is a large number of potential bidders for community services contracts in Barking and Dagenham, including PCT provider organisations, other NHS organisations, the independent sector and third sector providers. We conclude from this that the loss of any competition between BDCS and NELFT to supply community services as a result of the merger would not have a significant material effect on patient choice or competition.[28]

72. We considered whether potential suppliers of community services in Barking and Dagenham faced significant barriers to entry that would render it difficult to compete against the merged entity in the future. We note that NHS Barking & Dagenham in its proposed transfer of BDCS to NELFT intends to retain the buildings required for the delivery of community services so as to facilitate new entry in the future. Given this, we have not identified any other significant barriers to entering the supply of community services in Barking and Dagenham.

73. In summary, we conclude that the loss of NELFT as a potential additional supplier of community services as a result of this merger does not give rise to any material costs to patients or taxpayers. We also conclude that any delay in the introduction of choice and competition into those services currently provided by BDCS as a result of the proposed merger is unlikely to be significant. There is, however, a risk that the introduction of patient choice and competitive tendering in community services In Barking and Dagenham is delayed beyond what is currently foreseen in the proposed hosting arrangement with NELFT. We address this risk in our advice and recommendations (see paragraphs 78 to 81).

**Vertical effects**

74. We also considered whether the merger might reduce competition in community services or mental health services because of the referral of patients between BDCS and NELFT. We might be concerned that the merger might result in the merged entity having the incentive and ability to exclude rivals in either the supply of community services or mental health services if:
    a. referrals from community services are important to NELFT (or vice versa); and
    b. post-merger the merged parties have market power in either the supply of community services or mental health services.

75. We conclude that the merger would not give rise to a material adverse effect on patients or taxpayers as a result of vertical integration between BDCS and NELFT as referrals from

[27] We received information from four PCT commissioners: Redbridge, Havering, Waltham Forest and South West Essex.
[28] Our conclusion is the same regardless of how NHS Barking & Dagenham decides to procure community services in the future (ie through introducing patient choice, and/or competitively tendering for the right to supply exclusively individual community services, or competitively tendering a single contract for the exclusive supply of all community services).

community services are not very important to NELFT accounting for only around 5 per cent of total referrals to NELFT and with the exception of the Child Development Team, BDCS does not receive any referrals from NELFT.[29]

## ASSESSMENT OF MERGER BENEFITS

76. In assessing whether a proposed merger could be expected to give rise to an adverse effect on patients and taxpayers, the CCP will have regard to any benefits to patients and taxpayers arising from the merger (see paragraph 5.51 of the CCP's draft interim guidelines). These benefits may take the form of higher quality services, a greater choice of services or greater innovation in relation to such services. Such benefits must be expected to accrue within a reasonable period from the merger and be unlikely to accrue without the merger.

77. NHS Barking & Dagenham and NELFT told us that the merger would deliver four benefits for patients and taxpayers.
    - First, 'the externalisation of provider services to NELFT enables the PCT to become a commissioning only organisation. This focus will enable the PCT to become world class commissioners, improving the procurement and performance management of services across the PCT portfolio. This will have a direct benefit to patients and taxpayers as services are improved, choice is increased, and value for money achieved'.
    - Second, 'the externalisation process itself directly facilitates future contestability of community services which in itself will bring benefits as outlined above'.
    - Third, 'the transfer to NELFT will bring gains from a stronger system of governance and financial control as a result of the application of the discipline of a Foundation Trust bringing improved value for money'.
    - Fourth, 'the transfer to NELFT supports a borough level focus for services which is a high priority for patients and residents'.

78. We agree that patients and taxpayers will derive benefits from NHS Barking & Dagenham becoming a commissioning only organisation, and that benefits are also likely to be derived from the stronger governance arrangements and financial controls that NELFT will bring to BDCS. We are less certain as to the other benefits advanced by NHS Barking & Dagenham, and as they are not material to our overall finding we have not reached any conclusion as to their presence or extent.

## ADVICE AND RECOMMENDATIONS

79. In conclusion, we find that the proposed merger between BDCS and NELFT will not adversely affect the extent of patient of choice and competition that takes place in community services in Barking and Dagenham in the future given the many other potential providers of community service in the area. Further, we do not consider that the proposed hosting arrangement will significantly delay the introduction of patient choice and competitive tendering, as appropriate, in community services in Barking and Dagenham provided that NHS Barking & Dagenham is able

[29] Patients of the Child Development Team can be referred to and from the Child and Adolescent Mental Health Services.

to promptly implement a comprehensive commissioning strategy for community services at the end of the hosting arrangement.

80. We consider that the merger will bring benefits to patients and taxpayers, particularly in terms of allowing NHS Barking & Dagenham to focus on its commissioning responsibilities, and we note the positive steps that NHS Barking & Dagenham is taking to facilitate patient choice and competition in the future, such as retaining ownership of the buildings required for the delivery of community services.

81. Based on our consideration of the costs and benefits to patients and taxpayers likely to arise from the proposed merger between BDCS and NELFT, we consider that the proposed merger is consistent with the Principles and Rules of Cooperation and Competition and recommend that it be allowed to proceed.

82. However, in carrying out our assessment we have identified a risk that the merger could delay the introduction of appropriate patient choice and competition could be delayed beyond what would otherwise be the case. This risk will be minimised if NHS Barking & Dagenham meets the London SHA timetable for the completion of its community services commissioning strategy by September-November 2010. Our expectation is that NHS Barking & Dagenham will work in close cooperation with London SHA to complete its commissioning strategy by November 2010 and will commence a procurement process no later than November 2010 so that it can have new service arrangements in place immediately following the two year term of the commissioning contract with NELFT.

30 June 2009

## Barking and Dagenham PCT Provider Services

| Service | Division |
|---|---|
| Grays Court (intermediate care for the elderly) | Adult |
| Specialist community public health nursing | Children and young people |
| Community nursing | Adult |
| Intermediate Care | Adult |
| Musculoskeletal | Adult |
| Community dental | Adult |
| Paediatric SALT | Children and young people |
| Other divisional budget | Children and young people |
| Rapid response team | Adult |
| Audiology | Children and young people |
| Upney Lane walk in centre | Adult |
| Other divisional budget | Adult |
| Smoking cessation | Children and young people |
| COPD Scheme | Adult |
| B&D CLDT | Adult |
| Adult SALT | Children and young people |
| Child protection | Children and young people |
| Diabetes community service | Adult |
| Podiatry | Adult |
| Salaried GPs | Adult |
| Health advisors in schools | Children and young people |
| Community medical services | Children and young people |
| Paediatric O/T | Children and young people |
| Community rehab services | Adult |
| Intermediate Care (unique care) | Adult |
| CHD scheme | Adult |
| Child development team | Children and young people |
| Community matrons | Children and young people |
| OD cancer | Adult |
| Community dietitians | Adult |
| Special needs school nursing | Children and young people |

Source: Newchurch, *Provider services review and future options, report for the Barking and Dagenham PCT Board,* November 2008