
Competition Act 1998

Decision of the Office of Fair Trading
No CA98/09/2003

BetterCare Group Ltd/North & West Belfast Health & Social
Services Trust
(Remitted case)

18 December 2003
(Case no CE/1836-02)

SUMMARY

In its judgment on 1 August 2002, the Competition Commission Appeal Tribunal decided that the North & West Belfast Health & Social Services Trust was engaging in economic activities and, therefore, acting as an undertaking for the purposes of the Competition Act 1998, in running its statutory residential homes and engaging in the contracting out of social care to independent providers. It remitted the BetterCare Group's original complaint, made on 23 November 2000 alleging an abuse of a dominant market position by the North & West Belfast Health & Social Services Trust, to the OFT.

Following investigation of the BetterCare Group's complaint under the Competition Act 1998, the OFT has found that the Eastern Health and Social Services Board and the Department of Health, Social Services and Public Safety are not undertakings for the purposes of the Competition Act 1998 in setting rates to be paid by Health & Social Services Trusts to the BetterCare Group for the provision of residential and nursing home care services and, in the case of the Department of Health, Social Services and Public Safety, setting the budget for statutory homes. It has also found that the North & West Belfast Health & Social Services Trust has not engaged in any abuse for the purposes of the Chapter II prohibition of the Competition Act 1998.

The OFT has therefore decided to close the case with findings that:

- it has no jurisdiction under the Competition Act 1998 to consider the behaviour of the Eastern Health and Social Services Board and the Department of Health, Social Services and Public Safety since they are not undertakings in this case for the purposes of the Competition Act 1998
- the North & West Belfast Health & Social Services Trust has not engaged in any abuse and, therefore, has not infringed the Chapter II prohibition of the Competition Act 1998.

Confidential information (within the meaning of Rule 30(1)(c) of the OFT's Rules and section 244(3) of the Enterprise Act 2002) contained in square brackets is indicated by [C] in the original version of this decision and has been redacted from the published version.

PART I THE FACTS

A The complaint

1. On 23 November 2000 the Managing Director of the BetterCare Group Ltd ('BetterCare Group') wrote to the Office of Fair Trading ('OFT') complaining that the North & West Belfast Health & Social Services Trust ('N&W') was abusing its dominant position as the sole purchaser of residential and nursing home care services from the BetterCare Group, by offering unreasonably low contract prices and unfair terms. The OFT declined to deal with the complaint on the grounds that the N&W was not acting as an undertaking within the meaning of the Competition Act 1998 ('CA98').
2. The BetterCare Group appealed the OFT's findings and the Competition Commission Appeal Tribunal¹ ('CCAT') found that the OFT had made a decision that the Chapter II prohibition was not infringed as regards the subject matter of the BetterCare Group's complaint.² The OFT's decision itself was then appealed to the CCAT pursuant to section 46(3)(b) of the CA98.
3. The CCAT considered the substance of the decision at a further hearing. In its judgment in *BetterCare II* handed down on 1 August 2002,³ the CCAT decided that the N&W was engaging in economic activities and, therefore, acting as an undertaking for the purposes of the CA98, in running its statutory residential homes and engaging in the contracting out of social care to independent providers. It remitted the BetterCare Group's original complaint, made on 23 November 2000, to the OFT.
4. The BetterCare Group's allegations of abuse of a dominant market position by N&W can be summarised as follows:⁴
 - paying significantly higher prices to its own statutory homes than it pays to the BetterCare Group and other privately owned homes
 - paying prices for purchasing residential and nursing home services to the BetterCare Group and other privately owned homes which are uneconomic
 - the above two factors make it difficult/impossible for the BetterCare Group and others to provide adequate service

¹The functions of the CCAT were transferred to the Competition Appeal Tribunal on 1 April 2003 by virtue of section 12 of the Enterprise Act 2003, brought into force by the Enterprise Act 2002 (Commencement No. 2, Transitional and Transitory Provisions) Order 2003, SI 2003/766.

² Case 1006/2/1/01 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 6, Judgement 26 March 2002. This is referred to in this decision as *BetterCare I*.

³ Case 1006/2/1/01 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7. This is referred to in this decision as *BetterCare II*.

⁴ As detailed in paragraph 202 of the CCAT judgment. The BetterCare Group has not provided any further allegations of abuse to the OFT since that time and has not commented upon this summary when given an opportunity to comment upon the OFT's provisional findings in this case.

levels/remain in business, not least because the N&W is able to pay higher salaries to attract trained staff

- additionally, the arrangements for 'topping up' (whereby the families of residents placed by the N&W in privately owned homes are expected to contribute some £30 per week to the cost of care) tend to favour the N&W's statutory homes⁵
- the N&W has refused to negotiate the prices or contractual terms, or take sufficient account of rises in the cost of living, or of the different costs associated with different types of case, or to define or apply proper eligibility criteria for different kinds of patient.

5. From September 2002 the OFT investigated the BetterCare Group's complaint and obtained information from the BetterCare Group, the N&W, the Eastern Health and Social Services Board ('EHSSB') and the Department of Health, Social Services and Public Safety ('DHSSPS') to supplement that previously obtained by the OFT in connection with its earlier handling of the BetterCare Group's complaint and the proceedings before the CCAT.

B The parties

i DHSSPS

6. The DHSSPS is a government department in Northern Ireland responsible for developing and promoting policies and strategies which are to lead to good health and well being.⁶ It must also ensure the delivery of effective, high quality health and social care and provide an effective fire service. Each year it concludes a 'Public Service Agreement' ('PSA') with the Northern Ireland Executive Assembly. The Assembly was suspended on 14 October 2002 and dissolved on 28 April 2003; its responsibilities have reverted back to the Secretary of State for Northern Ireland since then. The PSA includes the following:
 - a short statement of the DHSSPS's aims and objectives
 - the key targets relating as far as possible to outputs and outcomes to be achieved in support of each objective
 - the budget allocations with each objective
 - references to the relevant sections of the 'Programme for Government' ('PFG') to which the PSA objective and targets relate.
7. The relevant statutory framework in Northern Ireland ('NI') operates within three tiers: the DHSSPS, Health and Social Services Boards ('Boards') and Health and Social Services Trusts ('Trusts').

⁵ This allegation was not part of the BetterCare Group's original complaint to the OFT or the Notice of Application to the CCAT. It was raised in the witness statements of Charles Caldwell of the BetterCare Group and Janet Montgomery of The Registered Homes Confederation of Northern Ireland Ltd, submitted in *BetterCare II*.

⁶ As set out in its 'Public Service Agreement', which sets out its responsibilities under the 'Programme for Government'.

ii EHSSB

8. The EHSSB was established by the DHSSPS under the Health & Personal Social Services (Northern Ireland) Order 1972 (Article 16(1)). Article 17⁷ empowered the DHSSPS to delegate certain functions relating to the administration of certain health and personal social services. Schedule 1 Part 1 Articles (1) and (2) set out the constitution of the Boards as separate legal entities from the DHSSPS. The EHSSB commissions health and social services for its resident population across the nine programmes of care⁸ for the delivery of services to those in need of these services. It has agreements with provider trusts (community health and social care services trusts, hospital trusts and an ambulance service trust) for the delivery of services to those in need of its services. It fulfils this task in a variety of ways such as assessing the needs of its resident population, assessing how resources should be allocated and giving directions to trusts consistent with the DHSSPS's policies, guidance and targets. It also monitors services delivered as well as the statutory functions that have been delegated to the Trusts in its area.⁹

iii N&W

9. The DHSSPS was given the power to establish Trusts under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991¹⁰ ('the 1991 Order'). Under Article 10(4) the Trusts were to be established as separate legal entities. Part II of Schedule 3 of the 1991 Order makes detailed provision for, in particular, the duties, powers and status of the Trusts. This includes the power to enter into contracts with independent providers.¹¹
10. The N&W was established in September 1993.¹² It provides health and personal social services in the Belfast postal areas BT 11-15. It manages nine residential homes - known as statutory homes - and six of these provide the same categories of care as the one residential home which the BetterCare Group owns: this is residential care for the elderly, which is provided by the BetterCare Group at its Tennant Street home.¹³ The N&W provides no nursing home care itself but purchases all its requirements from the independent sector.¹⁴

⁷ See Annex 1, where the key legislation referred to in this case is set out.

⁸ The elderly programme includes preventive measures, domiciliary care, rehabilitation services, residential care, nursing home care and terminal care.

⁹ Paragraphs 12-15 below.

¹⁰ SI 1991/194.

¹¹ Paragraph 16 of Schedule 3 of Part II of the 1991 Order. See Annex 1.

¹² The North and West Belfast Health and Social Services Trust (Establishment) Order (Northern Ireland) 1993, SI 1993/352 as amended by the North and West Belfast Health and Social Services Trust (Establishment) (Amendment) Order (Northern Ireland) 1994, SI 1994/112.

¹³ Paragraph 11 below.

¹⁴ Encompassing voluntary and private care.

iv BETTERCARE GROUP

11. The BetterCare Group is a private limited company which owns around 30 homes in the UK. It provides residential and nursing home care in two homes in the Shankill area of Belfast. Glencairn Care Centre is a nursing home which provides 75 nursing care places to the elderly, physically disabled and terminally ill. Tennant Street has 16 residential care places for the elderly and 49 nursing care places for the elderly, elderly mentally ill and physically disabled. Both homes are registered with the EHSSB and located within the jurisdiction of the N&W.

C Background

i PROVISION OF SOCIAL CARE

12. The primary duty in relation to the provision of social care is to be found in Articles 4 and 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 ('the 1972 Order').¹⁵ This duty is placed upon the DHSSPS and has been delegated to the Boards under the Functions of Health and Social Services Boards (No 1) Direction (Northern Ireland) 1973.¹⁶ Article 36¹⁷ of the 1972 Order deals with payments where the DHSSPS - now delegated to the N&W¹⁸ - arranges accommodation with independent providers. The power to set rates to independent providers of residential and nursing home care is contained in Articles 15(1A)¹⁹ and 36(3) of the 1972 Order and was delegated to the Boards under the 1973 Direction in Paragraph 3 and Column 1.
13. Under Article 3 of the Health and Personal Social Services (Northern Ireland) Order 1994,²⁰ the Boards were given the power to delegate a range of *their* functions with the DHSSPS's approval to the Trusts, including in relation to matters such as childcare, mental health services, adoption and health and personal social services provision. In exercise of its powers under Article 3, the DHSSPS made the Health and Social Services Trusts (Exercise of Functions) Regulations (Northern Ireland) 1994 ('1994 Regulations').
14. With effect from 1 April 1994, the EHSSB delegated a number of its functions to the N&W and other Trusts. The 1994 Regulations set out the functions which could be delegated and these included Articles 15, 36 and 99 of the 1972 Order which relate to the provision of

¹⁵ See Annex 1.

¹⁶ This was issued by the DHSSPS and sets out how that function is to be exercised by the Boards.

¹⁷ Replaced pursuant to Article 25 of the 1991 Order, and amended by paragraph 2(3) of Schedule 1 of the Registered Homes (Northern Ireland) Order 1992.

¹⁸ Paragraphs 14-15 below.

¹⁹ As amended by Part II of Schedule 5 of the 1991 Order and paragraph 2(2) of Schedule 1 of the Registered Homes (Northern Ireland) Order 1992.

²⁰ See Annex 1.

accommodation and the payment and recovery of contributions towards social care.²¹

15. The EHSSB produced a document entitled 'Arrangements for the Delegation of Statutory Functions', dated April 1994, listing the sets of rules, guidelines and procedures that the N&W and other Trusts were to follow in discharging each of the delegated functions.²² In relation to Article 36(3) of the 1972 Order the N&W is to make payments 'to other parties for the provision of accommodation according to pre-determined agreements...'.²³ It is to do so by following the EHSSB's 'Contract for the Provision of Residential and Nursing Home Care Services' which provides for the contract fee for services to be paid in accordance with set tariffs produced by the EHSSB and which are listed at Appendix 2 to that Contract. This Contract was between the EHSSB and care providers until the establishment of the N&W, which then took over contractual responsibilities as set out below.²⁴

ii FINANCIAL ARRANGEMENTS

16. As regards the financial arrangements for public funding for personal and social care in NI, in December each year following debate by the Northern Ireland Executive²⁵ the PfG and budget is approved. It is currently the Secretary of State for Northern Ireland who approves the budget. The PfG includes a PSA for the DHSSPS that indicates how the DHSSPS will contribute to the overall PfG. Following this, the DHSSPS decides on the precise allocation of its budget within the general targets set out in the PfG.
17. The Minister for Health, Social Services and Public Safety issues a Priorities for Action ('PfA') document that sets out plans of action under various programmes of care. Associated with the PfA, early in the following calendar year, the DHSSPS issues an allocation letter to the Boards, which details the total resources being allocated to each of the four Boards (the EHSSB being one of these). The letter also quantifies the extra monies being made available to the Boards and the Trusts to be directed towards the targets set out in the PfA.
18. The EHSSB then agrees a 'Service and Budget Agreement' ('SBA') with each of the Trusts operating in its area taking into account the PfA and the allocation of resources from the DHSSPS. The SBA has two elements:

²¹ Under Article 2, columns 1 and 2 of the Health and Social Services Trusts (Exercise of Functions) Regulations (Northern Ireland) 1994.

²² In accordance with Article 4 of the Health and Personal Social Services (Northern Ireland) Order 1994, SI 1994/4290.

²³ As set out in Appendix A page 5.6 of the EHSSB's 'Arrangements for the Delegation of Statutory Functions' under 'Associated Policies/Procedures'.

²⁴ Paragraphs 21-23 below.

²⁵ Paragraph 6 above.

- rolling forward services already being delivered and the associated resources
 - applying additional funding in line with the targets in PfA.
19. The EHSSB is required in the PfA to produce a 'Health and Wellbeing Investment Plan' that outlines how it intends to apply the totality of its funds in response to PfA requirements. The DHSSPS must endorse this plan before any additional funding can be allocated to the Trusts.
20. In turn, each Trust is required in the PfA to submit a 'Trust Delivery Plan' for the DHSSPS's approval. This plan describes how the Trust intends to use all its resources to meet its obligations in the SBA, to meet the targets in PfA and any managerial objective which the DHSSPS has set for the Trust²⁶. As can be seen from the above, the EHSSB and N&Ws' flexibility as to how allocated funds are spent is strictly supervised by the DHSSPS, which itself is currently subject to detailed directions by the Secretary of State for Northern Ireland.

iii THE CONTRACTUAL ARRANGEMENTS BETWEEN THE N&W AND THE BETTERCARE GROUP & FUNDING OF PLACEMENTS

21. The N&W is empowered to enter into such contracts as it sees fit. Its dealings with the BetterCare Group are on the basis of a standard form contract (for which it took over responsibility from the EHSSB in 1994) called 'Contract for the Provision of Residential and Nursing Home Care Services'.²⁷ The Contract contains detailed provisions governing the relationship between the parties. Of significance is clause 13.1.1 which states that:
- 'The fees per place per week which the Trust [N&W] agrees to pay to the Home are listed in Appendix 2'.
22. Appendix 2 is a list of tariffs per category of care compiled by the EHSSB.²⁸ The N&W is obliged to follow these tariffs.²⁹
23. Articles 36 and 99 of the 1972 Order³⁰ as amended state that the full cost to the Trust of providing the accommodation is to be recovered from the resident subject to his/her ability to pay. The N&W is required under paragraph 1.008³¹ of the DHSSPS's 'Charging for Residential Accommodation Guide' to carry out a financial assessment of all public-supported service users in residential homes and nursing homes. The

²⁶ Paragraphs 6(2)(e) and 8 of Part II of Schedule 3 of the 1991 Order as amended. See Annex 1.

²⁷ Paragraph 15 above.

²⁸ Paragraph 15 above.

²⁹ Paragraph 15 above.

³⁰ See Annex 1. These Articles deal with the independent sector and statutory homes respectively.

³¹ Paragraph 1.008 states 'Where a resident is unable to pay the standard rate in either a Board managed or an independent sector home, the Board must assess his ability to pay using regulations made for that purpose.' The Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993, Article 3.

Guide is issued under Article 17(1) of the 1972 Order and Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993.

iv RATE SETTING FOR THE INDEPENDENT SECTOR

24. The rates that are paid for residential and nursing home care were previously determined in line with the 'Income Support' rates that were applied prior to April 1993. Until then the cost of paying for residential and nursing home care was largely met from the 'Social Security' budget. In April 1993, with the introduction of the 'People First Community Care Reforms', new arrangements were introduced for the payment for residential and nursing home care. The responsibility and budget for meeting the costs of such care for new clients, in cases where residents were unable to meet the cost from their own resources, transferred from the Social Security Agency to the DHSSPS. Those people in residential home care and nursing home care at the time of the changeover had their existing rates of 'Income Support' protected and continued to meet their care costs from that source. These people retained a 'Preserved Right' to this benefit and the DHSSPS/the EHSSB was not involved in payment for their care.
25. The Boards became responsible in April 1993 for arranging and funding care for new clients entering residential home care and nursing home care. This was under the powers delegated to the Boards under the Functions of Health and Social Services Boards (No. 1) Direction (Northern Ireland) 1973 dated 14 September 1973 in paragraph 3 and column 1. This allowed the Boards to set the rates to be paid to the independent sector under Articles 15(1A) and 36(3) of the 1972 Order. The EHSSB continued to set the rates after the N&W was established in 1994.³²
26. In arriving at an appropriate weekly amount to be paid by the authorities to the independent sector homes the Boards took account of the prevailing 'Income Support' rates for equivalent accommodation and linked their increases to the corresponding rates in place for those with 'Preserved Rights'. The EHSSB wrote to the N&W annually informing it of the fee rates it had set. In 2001-2002 the EHSSB increased the rates for nursing care by 4.5 per cent and broke with the linked increases.

v THE INTRODUCTION OF A SINGLE TARIFF

27. In 2002 the DHSSPS informed the Boards that it wished to see standard fee rates for the independent sector across NI.³³ In response to this the Chief Executives of the four Boards in NI established a 'Working Group' to consider a range of issues, including action to bring forward proposals regarding the standardisation of fee rates for the independent sector throughout NI. The DHSSPS indicated to the 'Working Group' the

³² Paragraphs 15 and 22 above.

³³ Responses to the OFT enquiries from the DHSSPS, 26 February 2003 and the EHSSB, 22 January 2003.

additional resources that would be available to increase fees for 2002-2003. This resulted in a set of regional standard rates being recommended to the DHSSPS. These recommendations were approved by the DHSSPS.³⁴ From April 2002 the standard tariffs have applied consistently throughout NI. It was set out as a requirement at point 7 of the 2002/2003 PfA issued by the DHSSPS.³⁵ It stipulated:

'Boards and Trusts should implement a single agreed tariff for residential and nursing home care from 1 April 2002 which will recognise the contribution made by the independent sector.'

28. The Boards and the Trusts are bound to follow the directions of the DHSSPS in accordance with Article 17(1)(a) of the 1972 Order, Article 3 of the Functions of Health and Social Services Boards (No 1) Direction (Northern Ireland) 1973 and Paragraph 6(2) of Schedule 3 of Part II of the 1991 Order.³⁶

vi ADDITIONAL CARE

29. The only differentiation from the agreed single tariff permitted is in respect of additional care, namely where high dependency and/or special needs cannot be accommodated and funded through the normal standard tariff arrangements. This is primarily in the learning disability, mental health and physical disability programmes of care. It has been the practice that the 'host' Trust (in which the care home is situated) negotiates a home-specific specialist rate on behalf of all four Trusts in the EHSSB's area.³⁷
30. Consequently the N&W is allowed to agree additional rates for independent providers, over and above the published tariffs for standard care, if a social worker believes that an applicant's needs cannot be fulfilled under one of the standard rates. This has occurred only in relation to two elderly BetterCare Group patients - with learning difficulties and physical disability - in the last five years so its use is extremely limited.³⁸

vii FUNDING FOR STATUTORY HOMES

31. The funding for statutory homes is included in the overall funding budgets of the Trusts determined by the DHSSPS and has been increased in line with inflation and pay awards.³⁹ When an individual chooses to take up a position in a statutory home the Trust responsible does not receive an additional payment but meets the cost from this budget. Article 99 of the 1972 Order states that the full cost to the Trust of providing the

³⁴ Responses to the OFT enquiries from the DHSSPS, 26 February 2003 and the EHSSB, 22 January 2003.

³⁵ For an explanation as to the process of how the PfA is issued see paragraphs 17-20 above.

³⁶ See Annex 1.

³⁷ Letters to the OFT of 22 January 2003 and 4 February 2003 from the EHSSB and the N&W respectively.

³⁸ E-mails to the OFT from the N&W of 5 and 20 June 2003.

³⁹ Letter to the OFT from the DHSSPS of 26 February 2003.

accommodation is to be recovered from the resident subject to their ability to pay. This means that all individuals will have to make some form of contribution to their care, even if it comes entirely from their state benefit, and thus not all the cost to the N&W is met by the overall funding budget.

32. The budget for statutory homes is subject to annual inflation and pay award uplifts as determined by the National Joint Council for Local Government Services in the UK and is reduced by income received from residents who have the means to contribute. In providing or purchasing residential and nursing home care the Trusts, such as the N&W, must recover a contribution towards their costs from those residents who have the means to meet these costs. Where residents cannot meet the full cost of care, then they do have to make some contribution on a means tested basis even if it is made up entirely of their state benefit.⁴⁰

PART II LEGAL AND ECONOMIC ASSESSMENT

A Relevant body

33. Although the BetterCare Group's complaint is against the N&W, in reality the N&W only has limited autonomy in the area of the alleged abuse, namely the prices paid to independently-owned residential and nursing care homes. The N&W only determines prices paid for additional care.⁴¹ The rates paid to the independent sector are set as follows:

Period	Type of Care	Rate Setting Body
1.4.93 - 31.3.02 ⁴²	Standard Care	EHSSB
1.4.02 -	" "	DHSSPS
1.4.93 - 31.3.94	Additional Care	EHSSB
1.4.94 -	" "	N&W

34. In considering the abuse alleged against the N&W, it is relevant to note that both the DHSSPS and the EHSSB have been, at different times, the relevant bodies which set the rates at which the N&W purchases residential and nursing home care from the BetterCare Group. The DHSSPS is, in addition, the budget setter for statutory homes (which is relevant to the allegation that these homes were given preferential treatment).

B Undertakings

35. The CCAT decided in *BetterCare II* that the N&W was acting as an undertaking, both in the purchasing of social care from the BetterCare Group and the direct provision by its own statutory homes. The CCAT gave various arguments to support its conclusion that the N&W's

⁴⁰ Paragraph 23 above.

⁴¹ Paragraphs 29-30 above.

⁴² After 31 March 2002, uniform rates for NI proposed by the four Boards were endorsed by the DHSSPS.

activities in running its statutory residential homes and engaging in the purchase of social care from independent providers are, for the purposes of the CA98, to be regarded as economic activities for the purpose of deciding whether the N&W is an undertaking within the meaning of section 18(1) of the CA98.⁴³ The BetterCare Group's complaint was solely against the N&W so the issue of whether the EHSSB and the DHSSPS are undertakings was not addressed by the CCAT. In March 2003 the judgment of the Court of First Instance ('CFI') in *FENIN*⁴⁴ was handed down. This case is relevant to the issue of whether purchasing by a public body is an economic activity. On 14 May 2003 FENIN appealed the CFI's judgment to the European Court of Justice.

a Position of N&W

36. With judgments in *FENIN* and another relevant case, *AOK*,⁴⁵ still awaited, the OFT has decided to make no finding as to whether or not the N&W is acting as an undertaking as it does not affect its decision under the CA98 in relation to the alleged abuse of a dominant position by the N&W. This decision therefore proceeds to consider whether the N&W is dominant (if it were an undertaking) under the CA98 and whether it has abused any such dominance.

b Position of DHSSPS and EHSSB

37. The activity of providing and purchasing social care is performed by the N&W under the powers delegated to it. The DHSSPS and the EHSSB are not direct providers or purchasers of social care and are not involved in offering goods and services on a market so the OFT considers that they cannot be engaged in any economic activity.⁴⁶
38. The EHSSB and the DHSSPS set rates to be paid to independent care providers and in the case of the DHSSPS, sets the budget for statutory homes. The rates at which the tariffs and budgets are set is influenced by the overall level of resources available to Boards to commission community care services, which is dependent on the annual allocation of resources by the Secretary of State for Northern Ireland.⁴⁷ The activity of allocating public funds in order to discharge particular social functions⁴⁸ by setting rates to be paid for places in statutory and private care homes are clearly not of an economic nature but typically those of a public

⁴³ Paragraph 290 of the CCAT judgment.

⁴⁴ Case T-319/99 *Federacion Nacional de Empresas de Instrumentacion Cientifica, Medica, Tecnica y Dental (FENIN) v European Commission*.

⁴⁵ Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband v Ichthyol-Gesellschaft Cordes and Others*. Advocate General Jacobs gave his opinion in this case on 22 May 2003 and the ECJ judgment is awaited.

⁴⁶ Case C-35/96 *European Commission v Italy* [1998] ECR I-3851, paragraph 36 and Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganale v European Commission* [2000] ECR II-1807, paragraph 36.

⁴⁷ Paragraphs 16-20 above.

⁴⁸ Paragraph 8 above.

authority.⁴⁹ The OFT considers that setting rates/setting a budget to be paid for social care does not amount to economic activity.

39. In *AOK*⁵⁰ Advocate General Jacobs found that the sickness funds' rate setting for medicines was an economic activity because their main activity of providing sickness funds was.⁵¹ Here the activities of the DHSSPS and the EHSSB are those of public authorities of which rate setting and budget setting is an integral part and as such these are not economic activities: the DHSSPS and the EHSSB are therefore not acting as undertakings in this case for the purposes of the CA98.⁵²

C Market definition

40. Defining the relevant market (or markets) for care services for the elderly has proved difficult. Since the consumers of these services, the elderly in the N&W's area, are for the most part not the purchasers of them (the main purchasing body being the N&W itself) assessing the degree of substitutability between different services by applying the accepted methodology of the SSNIP test⁵³ is not feasible.

i PRODUCT MARKET

41. The BetterCare Group's complaint concerned residential and nursing home care. The characteristics of these services differ. To the extent that they are perceived as meeting different needs, it seems likely that a consumer who had been assessed as needing one type of care and whose financial contribution was fixed irrespective of the type of care received would not readily switch to a different type of care in response to differential price increases. In particular, because nursing home care and residential home care are suitable for different people it is unlikely that there is much demand side substitutability between them.
42. However, the product market could also include domiciliary care (care provided in the home). It appears that domiciliary and residential home care may meet similar needs or at least substantially overlap in that most applicants eligible for domiciliary care would also qualify for residential home care. The N&W has advised the OFT that those clients assessed as requiring domiciliary care would also meet the criteria for residential home care. The former is more economic to supply and it has been a priority of the DHSSPS (following government policy) since the early 1990s to enable elderly people to live in their own homes if they so wish.

⁴⁹ Case C-364/92, *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-343/95, *Diego Cali & Figli* [1997] ECR I-1547 paragraphs 22-23.

⁵⁰ Paragraphs 43-46 of the Advocate General's opinion.

⁵¹ The reason that the two activities were so linked was because the purchase prices affected a key input of the health insurance services which the entities in question offered on the market.

⁵² Paragraphs 28-30 of *SAT Fluggesellschaft v Eurocontrol*.

⁵³ Small but Significant Non-transitory Increase in Price test. See paragraphs 3.1-3.5 of OFT Guideline *The Competition Act 1998 Market Definition*, OFT 403 March 1999.

43. In terms of supply side substitutability it may be that a supplier of nursing home care could quite easily switch to supplying residential home care or vice versa. On the basis of the evidence available the market is no wider than domiciliary care, residential home care and nursing home care and it is possible that each one is in a separate market.

ii GEOGRAPHIC MARKET

44. As regards the geographic market, the N&W informed the OFT that it can place residents anywhere in NI. For the year ending 1 April 2002, 72 per cent of the beds purchased by the N&W for all categories of residential and nursing home care⁵⁴ were within its own area. The extent to which the N&W can place people elsewhere is constrained by the fact that most of those concerned choose to be placed close to their families. This suggests that the N&W's area is likely to be the relevant geographic market.⁵⁵

iii CONCLUSION

45. The OFT has not reached a firm view on the definition of the relevant product or geographic market as this is not critical to its decision since it has found no abusive behaviour by the N&W.⁵⁶

D Dominance

46. The N&W purchases over 70 per cent by value and volume of both residential and nursing home care places for all categories of care in its own area of operation. Other purchasers, which are mainly other Trusts, have very small shares. The OFT has not sought to obtain figures for domiciliary care but given the relative poverty of the area the N&W's market share is likely to be as high. It may well be the case that the N&W is dominant as a purchaser in its own area.⁵⁷

CONCLUSION

47. The OFT has not, however, reached a final view on the dominance issue as it is not critical to its decision.

⁵⁴ Elderly, elderly mentally ill, physical disability, mental health, addiction and learning disability.

⁵⁵ Paragraph 10 above.

⁵⁶ Paragraphs 58, 64 and 66 below.

⁵⁷ Case 85/76 *Hoffman La Roche & Co AG v European Commission* [1979] ECR 461 paragraph 39. The OFT considers that a high market share as evidence of a dominant market position is relevant whether dominance as a supplier or purchaser is being considered.

E Abuse

48. The OFT has considered the alleged abuses⁵⁸ under Chapter II of the CA98, namely that the N&W as the dominant purchaser of residential and nursing home care services is abusing its dominance by:
- directly or indirectly imposing unfair purchase prices or other unfair trading conditions⁵⁹ (i.e. paying uneconomically low prices to private residential and nursing homes)
 - applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage⁶⁰ (i.e. by price discrimination between statutory residential homes and private residential homes).
49. To prove an infringement the OFT must have strong and compelling evidence, taking into account the seriousness of what is alleged.⁶¹
50. The OFT has categorised the alleged abuses as excessively low purchase pricing and price discrimination.⁶² Excessively low purchase pricing allegations relate to both residential and nursing home care. Price discrimination only applies to residential home care since the statutory homes only provide residential home care. 'Topping up' is discussed after these.⁶³

i ALLEGED EXCESSIVELY LOW PURCHASE PRICING

51. The BetterCare Group alleged that low (and discriminatory) purchase pricing by the N&W made it difficult for the BetterCare Group and other providers to provide adequate service levels and thus to remain in business.
52. The N&W does not set the prices it pays for standard care for the elderly as they are determined by tariffs published annually and set by the EHSSB pre-1 April 2002 and the DHSSPS thereafter.⁶⁴ The N&W may only pay above these tariffs for those with additional needs - primarily in the learning disability, mental health and physical disability programmes of care. The relevant social worker decides when a client is eligible for an additional needs payment and only two BetterCare Group patients have

⁵⁸ Paragraph 4 above.

⁵⁹ Section 18(2)(a) of the CA98.

⁶⁰ Section 18(2)(c) of the CA98.

⁶¹ Case 1001/1/1/01 *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading*, Judgment 15 January 2002, paragraphs 108-109.

⁶² The allegations in paragraph 4 above, apart from 'topping' up, fall into either category so it is logical to deal with them under these headings. 'Topping up' allows independent homes to price discriminate and charge some applicants more. The OFT therefore considers this allegation separately from the price discrimination considered in paragraphs 59-64 below.

⁶³ Paragraphs 65-66 below.

⁶⁴ Paragraph 33 above.

been eligible for this payment over the last five years. The N&W's autonomy in this connection is therefore extremely limited. Since the N&W does not set the prices for residential and nursing home care for the elderly that the BetterCare Group is paid it cannot have committed an abuse under Chapter II of the CA98 even if it were found to be paying excessively low prices.

53. In any event, the OFT has examined financial information provided by the BetterCare Group, including profit and loss accounts of its care homes in North and West Belfast and a selection of those in Great Britain for the period 1998-2002 as well as detailed staff costs for the BetterCare Group. The figures⁶⁵ provided by the BetterCare Group show that [...^{66 67}] [C] Consequently, the OFT considers that a decision to exit the market would depend upon the time span over which the BetterCare Group could reduce central costs as well as its expectations concerning future prices and performance.⁶⁸
54. The cost information, i.e. cost per resident per week, provided to the OFT by the BetterCare Group for its Glencairn and Tennant Street homes [...⁶⁹] [C] Consequently it is difficult for the OFT to evaluate the allegation of excessively low purchase pricing.
55. To provide an indicator of performance and costs on a wider scale, profit and loss account data was sought from the BetterCare Group's competitors in North and West Belfast. While the response rate was minimal,⁷⁰ it is pertinent to mention that the one care home which did respond made a profit in each of the last five years.⁷¹
56. Although, in principle, charging excessively low purchase prices could constitute an abuse of a dominant position,⁷² the OFT considers that it is only likely to do so in exceptional circumstances. In the absence of barriers to exit by suppliers from the relevant market, a purchaser which paid excessively low prices would be unable to obtain supply beyond the short term even if it was a monopsonist. Hence the OFT considers that excessively low purchase prices will normally be self-correcting and would not, absent price discrimination, usually justify action under Chapter II of the CA98 (although the OFT will of course consider each case on its own merits). The OFT does not have reason to believe that any exceptional circumstances arise in this case.

⁶⁵ See Annex 2.

⁶⁶ [...] [C] L'Estrange & Brett Solicitors' letter to the OFT of 14 April 2003.

⁶⁷ [...] [C]

⁶⁸ The OFT considers that whilst the costs and revenues generated at the homes themselves would finish with the homes' sale, it is likely that the central overheads associated with the homes will still be incurred by the BetterCare Group in the short term i.e. central costs are typically fixed costs which cannot be varied immediately with output (or in this case with client numbers).

⁶⁹ L'Estrange & Brett Solicitors' letter to the OFT of 14 April 2003.

⁷⁰ Data was requested from ten nursing homes and one written response was received.

⁷¹ [...] [C]

⁷² Paragraph 2.1 of OFT Guideline *The Competition Act 1998 Assessment of Individual Agreements and Conduct*, OFT 414 September 1999.

57. The BetterCare Group alleges that the N&W fails to apply proper eligibility criteria for its patients who require some additional form of care. The BetterCare Group has failed to provide any evidence to support this but did offer to provide witness statements from its care home managers. The BetterCare Group was also given an opportunity to comment on the OFT's provisional findings and has not commented on this (or any other points). The OFT's view is that any alleged failure by the N&W adequately to provide care for patients is a matter to be addressed between the N&W, the patient and the care home in accordance with any grievance/complaint procedures in place. It is not a competition issue under Chapter II of the CA98.⁷³

Conclusion

58. The OFT finds that as the N&W does not set the prices which the BetterCare Group is paid it cannot have committed an abuse under Chapter II of the CA98 even if it were found to be paying excessively low prices. Moreover:

- there is insufficient evidence that prices paid by the N&W to the BetterCare Group are excessively low, and
- paying excessively low purchase prices is likely to amount to an abuse under Chapter II of the CA98 only in exceptional circumstances, which the OFT has no reason to believe are present in this case.

ii ALLEGED PRICE DISCRIMINATION

59. This allegation only relates to residential home care since statutory homes do not provide nursing home care. Price discrimination can give rise to an abuse of a dominant position where there is evidence that prices were excessive or that it was used to exclude competitors.⁷⁴ The BetterCare Group claims there is a disparity between the rates paid for residential home care provided in its Tennant Street home and what the N&W pays for a residential home place in a statutory home.

60. The N&W does not pay its own homes a tariff as it does privately owned homes. Rather it funds its own homes directly out of its budget and, as such, a direct comparison of prices is not straightforward. The N&W suggested in evidence before the CCAT that any disparity is due to two factors:

- different wages paid to staff over which it has no influence as it follows the rates set by the DHSSPS, which are agreed nationally
- the N&W's higher management overheads.

⁷³ The OFT therefore did not accept the BetterCare Group's offer to provide witness statements on this issue.

⁷⁴ Paragraph 4.16 of OFT Guideline *The Competition Act 1998 The Chapter II Prohibition*, OFT 402 March 1999.

61. The OFT has not considered it necessary to either evaluate whether any disparity is justified by these cost differences as part of its decision or to assess the extent of any disparity between the price paid for a private residential home place and how much the N&W pays for a statutory home place.
62. The N&W cannot be said to be price discriminating as it has no choice as regards either the prices paid to the BetterCare Group or the funding it receives for the statutory homes. Except for additional care, either the EHSSB or the DHSSPS determines the rates paid to the BetterCare Group. The EHSSB set the rates to be paid to the independent sector from 1993 to 31 March 2002. The DHSSPS has set the rates thereafter.⁷⁵ The DHSSPS decides on the funding for statutory homes.
63. The BetterCare Group claims that the higher salaries paid by the N&W can more easily attract trained staff and force up the BetterCare Group's costs. However, any alleged discrimination could only relate to the N&W attracting the BetterCare Group staff to its residential homes for the elderly since these provide the same type of care as the BetterCare Group's residential unit at Tennant Street. There is no evidence that the N&W's residential homes for the elderly have recruited any staff from the BetterCare Group in the last five to nine years.⁷⁶

Conclusion

64. The OFT finds that the N&W does not set the prices paid to the BetterCare Group or determine the funding it receives for the statutory homes so it is not in any position to practice price discrimination.
- iii 'TOPPING UP'
65. The DHSSPS policy allows privately owned homes to charge the N&W placements above the set tariff if the applicant specifically chooses a higher priced home and a third party is prepared to fund the requisite extra amount. The BetterCare Group contends that this deters applicants to its homes who choose a place in a statutory home instead.⁷⁷ Figures provided by the BetterCare Group show that over the last five years [...⁷⁸] [C] The N&W has told us that the Residential Unit at Tennant Street rarely has vacancies and there is usually a waiting list. It is not aware of any instances of applicants choosing alternative facilities in preference to a third party paying a 'top up' fee.⁷⁹

⁷⁵ Paragraphs 27-28 above.

⁷⁶ The N&W's e-mail in response to the OFT's e-mail of 30 April 2003 referred to the last five years and L'Estrange & Brett Solicitors' letter to the OFT of 20 June 2003 referred to the last nine years.

⁷⁷ The BetterCare Group's contention can only concern its residential placements at its Tennant Street home. We have had no evidence to support this allegation – see footnote 5 - despite the BetterCare Group being given an opportunity to comment on the OFT's provisional findings.

⁷⁸ L'Estrange & Brett Solicitors' letter to the OFT of 20 June 2003.

⁷⁹ The N&W's e-mail of 5 June 2003 to the OFT.

Conclusion

66. The OFT finds that there is insufficient evidence that 'topping up' arrangements serve to discriminate against residential care placements in the BetterCare Group's homes in favour of those in the N&W's.

F Exclusions

67. The OFT has not proceeded to consider whether any exclusions⁸⁰ under the CA98 apply since it does not consider that the N&W has been acting abusively.

G Effect on trade within the UK

68. Given that there is insufficient evidence of an abuse of a dominant market position under the CA98, it is not necessary to establish whether the N&W's conduct may affect trade within the UK.

PART III CONCLUSION

69. The OFT therefore finds that:

(i) the EHSSB and the DHSSPS do not carry out economic activities in respect of the provision of residential and nursing home care and therefore are not undertakings in this case for the purposes of the CA98. As such the OFT has no jurisdiction to assess their behaviour under the CA98.

(ii) as the N&W does not set the prices which the BetterCare Group is paid it cannot have committed an abuse under Chapter II of the CA98 even if it were found to be paying excessively low prices. Moreover:

- there is insufficient evidence that prices paid by the N&W to the BetterCare Group are excessively low, and
- paying excessively low purchase prices is likely to amount to an abuse under Chapter II of the CA98 only in exceptional circumstances, which the OFT has no reason to believe are present in this case.

(iii) the N&W has not infringed the Chapter II prohibition of the CA98 by price discriminating against the BetterCare Group in favour of its own homes as the N&W does not set the prices it pays or determine the funding it receives for the statutory homes so it is not in any position to practice price discrimination.

(iv) the N&W has not infringed the Chapter II prohibition of the CA98 by favouring its own homes through the 'topping up' arrangements as

⁸⁰ Namely Services of General Economic Interests Exclusion, Schedule 3 paragraph 4 of the CA98 and the Compliance with Legal Requirements Exclusion, Schedule 3 paragraph 5(2) and 5(3)(a) of the CA98.

there is insufficient evidence that 'topping up' arrangements serve to discriminate against residential care placements in the BetterCare Group's homes in favour of those in the N&W's homes.

Vincent Smith
Director, Competition Enforcement Division
Office of Fair Trading

18 December 2003

Glossary of Terms

AOK	AOK Bundesverband joined cases C-264/01, C-306/01, C-354/01 and C-355/01
BetterCare Group	BetterCare Group Ltd
BetterCare I	First CCAT Decision in BetterCare v Director General of Fair Trading case 1006/2/1/01 [2002] CAT6
BetterCare II	Second CCAT Decision in BetterCare v Director General of Fair Trading case 1006/2/1/01 [2002] CAT7
CCAT	Competition Commission Appeal Tribunal
DHSSPS	Department of Health Social Services and Public Safety
EHSSB	Eastern Health and Social Services Board
FENIN	FENIN v European Commission case T-319/99
NI	Northern Ireland
N&W	North & West Belfast Health & Social Services Trust
PfG	Programme for Government
PfA	Priorities for Action
PSA	Public Service Agreement
SBA	Service and Budget Agreement
1972 Order	Health and Personal Social Services (Northern Ireland) Order 1972
1991 Order	Health and Personal Social Services (Northern Ireland) Order 1991
1994 Regulations	Health and Social Services Trusts (Exercise of Functions) Regulations (Northern Ireland) 1994

ANNEX 1

RELEVANT LEGISLATION

[Note: all references to 'the Department' and 'the Ministry' in the following legislation should be taken to refer to the Department of Health, Social Services and Public Safety.]

The Health and Personal Social Services (Northern Ireland) Order 1972 SI 1972/1265

Article 4 provides:

'4. It shall be the duty of the Ministry –

(a)...

(b) to provide or secure the provision of personal social services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland;...'

Article 15, as amended by Part II of Schedule 5 of the Health and Personal Social Services (Northern Ireland) Order 1991 and paragraph 2(2) of Schedule 1 of the Registered Homes (Northern Ireland) Order 1992, provides:

'15 (1) In the exercise of its functions under Article 4(b) the Ministry shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate.

(1A) Arrangements under paragraph (1) may include arrangements for the provision by any other body or person of any of the personal social services on such terms and conditions as may be agreed between the Department and that other body or person.

(1B) ...

(2) ...

(3) ...

(4) The Ministry may recover in respect of any assistance, help or facilities under this Article such charges (if any) as the Ministry considers appropriate.

(5) In so far as it relates to the provision of accommodation, this Article is subject to Articles 36, 36A and 99.'

Article 17 states:

'17-(1) The Health and Social Services Boards shall—

(a) exercise on behalf of the Ministry such functions...with respect to the administration of such health and personal social services as the Ministry may direct;

(b)-(d)...

[1A...]

(2)...'

Article 36, which was replaced pursuant to Article 25 of the Health and Personal Social Services (Northern Ireland) Order 1991 and amended by paragraph 2(3) of Schedule 1 of the Registered Homes (Northern Ireland) Order 1992, provides:

'36(1) ... arrangements made by the Department under Article 15 may include arrangements with —

(a) any voluntary organisation or other person, being an organisation or person who —

(i) manages a residential care home and is registered under Part II of the Registered Homes (Northern Ireland) Order 1992 in respect of the home or is not required to be so registered by virtue of Article 4(4)(a) or (b) of that Order (certain small homes);

(ii) ...

(b) ...

(2) Arrangements under Article 15 for the provision of residential accommodation where nursing care is provided must be arrangements made with a voluntary organization or other person, being an organization or person managing premises—

(a) in respect of which the organisation or other person is registered under part III of the Registered Nursing Homes (Northern Ireland) Order 1992; or

(b) which do not fall within the definition of a nursing home in Article 16 of that Order by reason only of being managed or provided by a body constituted by a statutory provision or incorporated by Royal Charter, for the provision of accommodation in those premises.

(3) Any arrangements made by virtue of this Article shall provide for the making by the Department to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements; and, subject to paragraph (7), the Department shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this Article.

(4) Subject to the following provisions of this Article, a person for whom accommodation is provided under any such arrangements shall refund to the Department any payments made in respect of him under paragraph (3).

(5) Where a person for whom accommodation is provided, or proposed to be provided, under any such arrangements satisfies the Department that he is unable to make a refund at the full rate determined under paragraph (3), the Department shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to make a refund.

(6) Regulations may make provision for the assessment, for the purposes of paragraph (5), of a person's ability to pay.

(7) Where accommodation in any home or premises is provided for any person under arrangements made by virtue of this Article and the Department, the person concerned and the voluntary organisation or other person managing the home or premises (in this paragraph referred to as 'the provider') agree that this paragraph shall apply –

(a) so long as the person concerned makes the payments for which he is liable under sub-paragraph (b), he shall not be liable to make any refund under paragraph (4) or (5) and the Department shall not be liable to make any payment under paragraph (3) in respect of the accommodation provided for him;

(b) the person concerned shall be liable to pay to the provider such sums as he would otherwise (under paragraph (4) or (5)) be liable to pay by way of refund to the Department; and

(c) the Department shall be liable to pay to the provider the difference between the sums paid by virtue of sub-paragraph (b) and the payments which, but for sub-paragraph (a), the Department would be liable to pay under paragraph (3).

(8) The Department may, on each occasion when it makes arrangements by virtue of this Article for the provision of accommodation for a person and irrespective of his means, limit to such amount as appears to the Department reasonable for him to pay the refunds required from him for his accommodation during a period commencing when the Department began to make the arrangements for him and ending not more than 8 weeks after that.'

36(A)...'

Article 99 (as replaced pursuant to Article 27 of the Health and Personal Social Services (Northern Ireland) 1991 Order) deals with the charges to be made by the Department of Health, Social Services and Public Safety in its own statutory homes. It provides:

'99(1) Where a person is provided under Article 15 with accommodation in premises provided by the Department, the Department shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this Article.

(2) Subject to the following provisions of this Article, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate determined by the Department for that accommodation and that standard rate shall represent the full cost to the Department of providing that accommodation.

(3) Subject to paragraph (4), where a person for whom such accommodation is provided, or proposed to be provided, satisfies the Department that he is unable to pay for the accommodation at the standard rate, the Department shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to pay for the accommodation.

(4) The liability of any person to pay for accommodation under this Article may be reduced by reason of any work which he performs and which assists materially in the management of the premises.

(5) Regulations may make provision for the assessment, for the purposes of paragraph (3), of a person's ability to pay.

(6) The Department may, on each occasion when it provides accommodation mentioned in paragraph (1) for any person and irrespective of his means, limit to such amount as appears to the Department reasonable for him to pay the payments required from him for his accommodation during a period commencing when the Department began to provide the accommodation for him and ending not more than 8 weeks after that.'

The Functions of Health and Services Boards (No 1) Direction (Northern Ireland) 1973

Article 3 states:

'3. Each Health and Social Services Board shall, as respect its area, subject to and in accordance with this direction and any other direction which may be given or any regulations made by the Ministry, exercise on behalf of the Ministry the functions of the Ministry relating to the health and personal social services under -

(a) the provisions of the Order

(b) – (d) ...'

The Health and Personal Social Services (Northern Ireland) Order 1991 SI 1991/194

Article 10 states:

'10.-(1) Subject to paragraph (2), the Department may by order establish bodies, to be known as Health and Social Services trusts (in this Order referred to as HSS trusts),-

- (a) to assume responsibility, in accordance with this Order, for the ownership and management of hospitals or other establishments or facilities which were previously managed or provided by a relevant body; or
- (b) to provide and manage hospitals or other establishments or facilities.

(2) ...

(3) ...

(4) Every HSS trust-

- (a) shall be a body corporate having a board of directors consisting of a chairman appointed by the Department and, subject to paragraph 5(2) of Schedule 3, executive and non-executive directors (that is to say, directors who, subject to paragraph (6), respectively are and are not employees of the trust);
- (b) shall have the functions conferred on it by an order under paragraph (1) and by Schedule 3; and
- (c) shall be a body to which section 19 of the Interpretation Act (Northern Ireland) 1954 (2) applies.

(5) –(9) ...'

Paragraph 6 of Part II of Schedule 3 states:

'6-(1) An HSS trust shall carry out effectively, efficiently and economically the functions for the time being conferred on it by an order under Article 10(1) and by the provisions of this Schedule...'

(2) An HSS trust shall comply with any directions given to it by the Department with respect to all or any of the following matters-

(a)-(d)...

(e) compliance with guidance or directions given (by circular or otherwise) to a relevant body;...

(f) ...'

Paragraph 6(2) of Part II of Schedule 3 was amended by section 44 of the Health and Personal Social Service Act (Northern Ireland) 2001 to state:

'An HSS trust shall comply with any directions given to it by the Department about the exercise of the trust's functions'

Paragraph 8 of Part II of Schedule 3 states:

'8. An HSS trust shall furnish to the Department such reports, returns and other information, including information as to its forward planning, as, and in such form as, the Department may require.'

Paragraph 16 of Part II of Schedule 3, as amended by section 44 of the Health and Personal Social Services Act (Northern Ireland) 2001, states:

'16. Subject to Schedule 4, an HSS trust shall have power to do anything which appears to it to be necessary or expedient for the purpose of or in connection with the discharge of its functions, including in particular power-

- (a) to acquire and dispose of land and other property;
- (b) to enter into such contracts as seem to the trust to be appropriate;
- (c) ...
- (d) to employ staff on such terms as the trust thinks fit.'

**The Health and Personal Social Services (Northern Ireland) Order 1994
SI1994/429**

Article 3 states:

'3. – (1) A Health and Social Services Board may, with the approval of the Department, by instrument in writing under seal provide for such relevant functions of the Board as are specified to be exercisable, in relation to the operational area of a specified HSS trust, by that HSS trust on behalf of the Board.

(2) –(12) ...'

Article 4 states:

'4 - (1) An HSS trust shall submit to a Health and Social Services Board a scheme for the exercise by the trust on behalf of the Board of relevant functions which are, or are proposed to become, so exercisable by the trust by virtue of an authorisation.

(2) A Health and Social Services Board may approve a scheme submitted to it by an HSS trust under paragraph (1), either without modifications or with such modifications as may be agreed with the trust.

(3) – (5) ...

(6) An HSS trust may at any time, and shall if so requested by a Health and Social Services Board on whose behalf any relevant functions are exercisable by the trust by virtue of an authorisation, submit a new scheme under this Article to the Board and paragraphs (2) to (5) shall apply to any such new scheme as they apply to a scheme submitted under paragraph (1).'

ANNEX 2

THE BETTERCARE GROUP: PROFIT AND LOSS ACCOUNTS

[...] [C]