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Completed acquisition by British United Provident Association Limited of ANS 2003 plc

The OFT's Decision on reference under section 22 of the Enterprise Act 2002 given on 10 January 2006. Full text published 7 February 2006.

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**PARTIES**

1. **British United Provident Association (BUPA)** operates health insurance funds and the provision of healthcare facilities, including 252 care homes (with 17,700 beds) in the UK. Its annual turnover in the year ended 31 December 2004 was £3.6 billion.
2. **ANS 2003 plc (ANS)** was the holding company of a group of companies operating (prior to the acquisition) 44 care homes (with a total of 3,124 beds) in the UK. ANS' turnover in the year ended 31 March 2005 was £83.3 million.

**TRANSACTION**

3. BUPA acquired the whole of the issued share capital of ANS on 5 August 2005.
4. The extended statutory deadline for consideration of this transaction expires on 20 January 2006 and the OFT's administrative deadline expires on 10 January 2006.

**BACKGROUND**

5. On 5 April 2005, the OFT cleared the completed acquisition by the Blackstone Group of NHP plc<sup>1</sup> and on 16 December 2005 cleared the completed acquisition by Southern Cross Healthcare Group Limited of Cannon Capital Ventures Limited.<sup>2</sup> Like the current transaction, these acquisitions concerned the supply of (residential and nursing) care home services in the UK. Notwithstanding substantial shares in some areas, the OFT believed that there existed specific constraints, mainly in the form

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<sup>1</sup> <http://www.offt.gov.uk/NR/exeres/4AED8926-32BF-4D4C-8F62-C624C92FFCAD.htm>

<sup>2</sup> <http://www.offt.gov.uk/Business/Mergers + EA02/Case + lists/2005/Southern + Cross.htm>

of low barriers to entry and expansion and the local authorities' countervailing buyer power, to counteract any potential competition concerns.

## **JURISDICTION**

6. As a result of this transaction BUPA and ANS have ceased to be distinct. The UK turnover of ANS exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

## **RELEVANT MARKET**

### **Product market**

7. In the previous cases outlined at paragraph 5 the OFT has segmented this market into services provided by (i) care homes providing residential care and (ii) care homes that provide nursing care. While residential care consists of the provision of personal care for the elderly, nursing care caters for persons suffering from sickness, injury or infirmity, and requires the presence of staff with specific nursing/medical qualifications. The funding of care is either done by the local authority (local funding authority) - with some additional funding from local health authorities in the case of nursing care - or by, or on behalf of, the resident themselves (so called 'self-funders'). However, residents may also decide to top-up the local authority funding where this does not meet the whole of the cost of a particular care home.
8. On the demand side, it is considered that individuals requiring high levels of care could not readily substitute their need for nursing care. The additional care required for nursing as opposed to residential care is reflected in prices for the former being on average £151 per week higher than for residential care.<sup>3</sup> However, there is evidence that on the part of local authorities, some substitution between nursing and residential care could exist because local funding authorities seek to place people in (less expensive) residential care rather than nursing care whenever possible.
9. For those requiring residential care, nursing care may provide a substitute, although residents may not necessarily want to be surrounded by substantially less able individuals. Care at home supported by other local authority services could also to some extent be considered an alternative for residential care and it is currently government policy to promote this option.

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<sup>3</sup> Average weekly fees are £496 for private nursing care for elderly people and £345 for private residential (personal) care. (Source: Care of Elderly People, UK Market Survey 2004, Laing & Buisson).

10. In terms of supply side substitution, to start providing nursing care, a residential home would have to hire additional nursing staff in order to provide 24 hour nursing cover and register with the Commission for Social Care Inspection. However, 'care homes with nursing' in general do not have all of their capacity allocated to nursing, and within these homes, capacity can be switched between nursing and residential care with greater ease.
11. The above considerations suggest that there may currently exist at least a degree of demand and supply-side substitution between residential and nursing care homes. However, given that this might not apply to a sufficient number of customers and that most third parties have suggested the two forms of care to be distinct, they have been considered separately. In view of the lack of competition concerns arising from this transaction even on the narrowest frame of reference, it was not necessary to conclude on the product frame of reference.

### **Geographic market**

12. There are a number of national elements to the supply of care homes, as the conditions for operating a care home are broadly similar across the UK and national registration and standards requirements apply. However the parties to this merger submitted that fragmentation in the care home market makes competition at the local level more relevant.
13. From the demand side, many residents (whether funded by the local authority or self funded) opt for a care home that is close enough to relatives or friends to maintain regular contact. Our third party enquiries in this and previous cases suggest that the narrowest possible geographic frame of reference should be a 15-20 minute drive time within a given location. This corresponds to radii of three to ten miles, depending on the nature of the area (rural or urban). In addition (and again in line with the analysis in the OFT's previous cases) the merger's impact on competition at a local authority level has also been considered.

### **HORIZONTAL ISSUES**

#### **Shares of supply**

14. Looking in further detail at the local data split between residential and nursing care, although there are 10 areas where the parties' joint share of supply exceeds 25 per cent on the radius basis and nine areas where the parties' share of supply exceeds 25 per cent on a local authority basis the OFT has focussed its analysis in this decision on those areas where combined shares of supply are at the upper end of this scale. The lack of competition concerns at the level of these higher combined

shares of supply (particularly given the comments below on ease of entry and buyer power which apply across all areas of overlap) means that it is not necessary to consider in detail all the areas of overlap in this decision. An analysis of the data in the remaining areas not covered in detail below shows no specific competition issues arising in these areas where sufficient post-merger competition will remain.

15. On a local authority basis, there are two areas (West Berkshire and Reading) where the parties will have the majority of nursing homes (60 per cent and 67 per cent, respectively) and beds (65 per cent and 51 per cent by beds, respectively). For nursing care in the Bexley area, the parties would have a 51 per cent share of supply by beds, but only two out of the six homes in the area.
16. In West Berkshire, the two remaining homes in the local authority area are owned by Southern Cross Healthcare Group Limited. It is of note however that West Berkshire Council currently has a contractual arrangement with the ANS home which prohibits unilateral fee increases.
17. In the Reading Borough Council (RBC) area, it could be considered that post-merger there remains only one other care home providing nursing (Lifestyle care), although it would account for 49 per cent of all beds. However, some sources, e.g. Laing and Buisson, list Austen House as also being in Reading as it is very close to the local authority border. If it is included in the analysis, the parties' share of supply would fall to 50 per cent by homes and 40 per cent by beds. RBC has block contracts with BUPA and ANS homes within its local authority areas. Block contracts are offered either to potential entrants in an area, or to existing homes, and require the home to guarantee a certain proportion of supply to a local authority in turn for the local authority agreeing to place a certain number of residents in that home. Under block contracts, prices are agreed for a certain period of time (in some cases up to fifteen years); their infrequency and length may mean that they display the characteristics of bidding markets, where even a few bidders can generate effective competition. RBC has told us that its spot contracts are subject to annual inflation uplift.
18. Shares of supply on a radius basis around Newbury Dalecare (in West Berkshire) give the parties a post-merger share of supply of 50 per cent by nursing homes, and 51 per cent by nursing beds. There would be three remaining competitors, with 25 per cent, 19 per cent and 5 per cent share of supply respectively by beds.
19. Taking a radius approach around Devizes Dalecare in Wiltshire would result in a share of supply of 59 per cent by nursing beds, although only 33 per cent by nursing home numbers. There would be five other competitors within the relevant radius.

20. With regard to self-funders, a survey conducted as part of the OFT care home study<sup>4</sup> found that 88 per cent of residents looked at four homes or less before making their choice. An assessment of the data resulting from this particular merger shows that on a radii analysis the number of care home operators ('fascia') in an area will remain at or above that number in all areas in respect of both nursing and residential care.
21. On a national basis, the provision of care homes is still characterised by very low levels of concentration. Table 1 shows the shares of supply of the main operators, by bed numbers across all care homes. The low combined share of supply and limited increment created by this merger do not raise any concerns on a national level and the sector remains unconcentrated if split between residential and nursing care.

**Table 1: UK shares of supply, by care home beds**

| <b>Operator</b>                     | <b>No. of Beds</b> | <b>Share Market</b> |
|-------------------------------------|--------------------|---------------------|
| BUPA Care Homes (including ANS plc) | 21061              | 4.4                 |
| Four Seasons Health Care Ltd        | 20965              | 4.4                 |
| Southern Cross Healthcare Ltd       | 17159              | 3.6                 |
| Ashbourne Ltd                       | 10300              | 2.2                 |
| Barchester                          | 10004              | 2.1                 |
| Craegmore Ltd                       | 5878               | 1.2                 |
| Others (less than 1 per cent)       | 390833             | 82.1                |
| <b>Total beds (all providers)</b>   | <b>476200</b>      | <b>100</b>          |

*Source: Laing & Buisson (2005)*

### **Barriers to entry and expansion**

22. The key barriers to entry in the provision of care homes are the cost of land (which will vary by geography) and the registration requirements that providers are obliged to meet. As most ANS homes are in the south east of England, additional finance to buy land may a priori appear to pose a barrier to entry. In the decision in Southern Cross / Cannon (see para 5 above) the OFT noted that while the Department of Health's National Minimum Standards of Care need to be met, new care homes are being developed, especially by the main national chains, particularly in the nursing care segment. BUPA has told us that it has opened two new homes in 2005, both in the south and east of the country, and that it is in the process of purchasing six sites for further home build. National competitors, as table 1

<sup>4</sup> Care homes for older people in the UK. A market study. May 2005, OFT 780.

showed, still have only limited geographic coverage and there are many areas where one of the top national competitors will not be present. These competitors have submitted that they are in a stage of development, either building new homes or buying old care homes and refurbishing them.

23. It is of note that in Reading, the local authority has used block contracts to stimulate entry. RBC had told us that three years ago, they agreed a block contract with BUPA to encourage it to enter in the area.
24. In addition, it should be noted that the national minimum standards referred to above are not retrospective in that a residential care home seeking to re-register as a nursing care home would not have to meet certain specifications to the premises of the home which would be required of a new build and which might otherwise have resulted in substantial additional costs.
25. As regards the supply of nursing staff in the UK, none of the third parties indicated that this would be a problem.
26. On the basis of the above evidence, the OFT considers that new entry (or expansion), most likely from established care home groups and often sponsored by local funding authorities, would provide a sufficient competitive constraint in any of the areas of overlap considered above.

### **Buyer power**

27. Local funding authorities pay around two thirds of all care fees, which suggests that they hold some negotiation strength. However, their buyer power might be restricted by their legal obligation to find a place in a care home for people who meet their published criteria. Health authorities can also impose financial penalties on local funding authorities that fail to move people from hospitals into care homes within a specified time period.
28. Nonetheless, the OFT considers that the available evidence demonstrates that local funding authorities have countervailing buyer power. Third party evidence suggests that budgetary constraints sometimes result in cuts in demand until existing capacity is freed up. Moreover, the parties have provided documentary evidence to demonstrate that many local funding authorities only engage in limited negotiations with care home providers, and instead apply uniform charge increases.
29. In addition, funding authorities either have the option of self-supply or stimulating entry. A number of local authorities submitted that they have in the past promoted entry through the use of block contracts (see examples at paragraph 23 above).

## **VERTICAL ISSUES**

30. No vertical competition issues arise in this case.

## **THIRD PARTY VIEWS**

31. Third parties were in general unconcerned by this merger. A small number of local authorities expressed concerns about consolidation.

## **ASSESSMENT**

32. The parties overlap in the local supply of nursing and residential care home services, with the most significant overlaps occurring in the nursing care home sector. While there are a few local areas where, on the narrowest product frame of reference, the parties' post-merger shares of supply are around 50 per cent, the analysis suggests that in the areas of overlap there remains a sufficient degree of buyer power, and that the threat of new entry is considered to constrain the parties post-merger.

33. In terms of entry, there is evidence that national care home providers are currently developing new care homes. Also, homes currently providing residential care could re-register to offer nursing care. Moreover, a number of local authorities, including Reading, have relied on block contracts to encourage new entry.

34. There is evidence to suggest that the local funding authorities that finance around two thirds of all care fees will, post-merger, continue to have countervailing buyer power. The budgetary constraints local funding authorities face mean that many apply uniform charges which, first, leaves care homes little room for price increases and, second, appears to often result in a policy whereby a new resident is only placed in a home once a place has become available.

35. Third parties were generally unconcerned by the merger.

36. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

37. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.