

Case No COMP/M 3669
- Blackstone (TBG
CareCo)/ NHP

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 9 (3)
Date: 01/02/2005



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 01.02.2005
SG-Greffe(2005) D/200492

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 9(3) DECISION

Commission Decision referring Case No COMP/M.3669 Blackstone (TBG CareCo)/ NHP to the competent UK authorities pursuant to Article 9 of Council Regulation No 139/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004¹ on the control of concentrations between undertakings, and in particular Article 9(3) thereof,

Having regard to the notification given by the undertaking TBG CareCo Limited, which is an affiliate of the Blackstone Group, on 9.12.2004 pursuant to Article 4 of the above-mentioned Council Regulation,

Having regard to the communication sent by the UK Office of Fair Trading to the DG Competition of the European Commission on 12.1. 2005,

whereas:

1. On 9.12.2004, the undertaking TBG CareCo Limited ("TBG", UK), which is an affiliate of the Blackstone Group ("Blackstone", USA), notified to the Commission, in accordance with Article 4 of Council Regulation (EC) No 139/2004 (the "Merger Regulation"), a concentration. The notification relates to the acquisition of control of the whole of the undertaking NHP plc ("NHP", UK) by way of public bid announced on 29.11.2004.

¹ OJ L 24/1, 29 January 2004

2. The UK Office of Fair Trading (“OFT”) received a copy of the notification on 14.12.2004.
3. On 12.1.2005, the Commission received a request made by the OFT (“OFT request”) pursuant to Article 9 of the Merger Regulation, to refer to it the entirety of the notified transaction. The OFT request is based on Article 9(2)(b) of the Merger Regulation. The OFT considers that the notified transaction affects competition in local markets for the provision of care home services for the elderly in the UK, within at least three local authorities (Arbroath, Nottingham and Port Talbot). According to the OFT these markets present all the characteristics of distinct markets and do not constitute a substantial part of the common market.
4. The notifying party was informed on 14.1.2004 of the referral request made by the OFT. The notifying party also received a copy of the request at the same time. The notifying party submits in its observations of 19.1.2005 that the conditions for referral under Art. 9(2)(b) are not met, disagreeing with the OFT on the delineation of the markets as well as on the impact of the transaction on competition in UK local markets.

I. THE PARTIES AND THE OPERATION

5. **TBG** is a newly established acquisition vehicle which is ultimately owned by the US based **Blackstone**. Blackstone is an international private merchant-banking firm active mainly in financial advisory services, private equity investing and property investing. It has recently acquired Southern Cross Healthcare Limited (Southern Cross), a UK based company which operates care homes for the elderly in the UK.
6. **NHP** is a UK listed company also active in the care home sector in the UK. It has a portfolio of properties which it leases to care home operators including its subsidiary Highfield Care Limited (Highfield).
7. The transaction will involve the acquisition by TBG of sole control of NHP by way of a UK recommended public offer.
8. Both Blackstone (via Southern Cross) and NHP are active in the UK private care home market for the elderly. NHP owns care home properties and leases them out to third parties whereas its subsidiary Highfield, and Southern Cross operate and run care homes for the elderly.

II. COMMUNITY DIMENSION

9. Blackstone and NHP have a combined aggregate world-wide turnover of more than EUR 5 billion [...]. Each of the undertakings have a Community-wide turnover in excess of EUR 250 million [...], but they do not each achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

III. ASSESSMENT

10. As noted above, the OFT has made a request under Article 9 paragraph (2)(b) seeking a referral of the whole of the notified concentration on the basis that the concentration

in question affects competition on a market within the UK, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

11. Pursuant to Article 9(3) of the Merger Regulation, when a Member State informs the Commission pursuant to paragraph 9(2)(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that the conditions for referral specified in Art. 9(2)(b) are met.
12. The Commission has therefore sought to assess, firstly, whether a market may be identified within the UK which presents all the characteristics of a distinct market, and whether the present transaction affects competition in that distinct market. Secondly, the Commission has sought to assess whether this distinct market affected by the operation does not constitute a substantial part of the common market. Pursuant to Art. 9(3), if these conditions specified in Art. 9(2)b are met, the Commission has an obligation to refer the whole or part of the case to the OFT.

Market definition

Relevant product market

13. According to the OFT request, the concentration would affect competition in the UK in the provision of care home services for the elderly, especially in nursing homes. The market for the supply of care homes for the elderly, possibly subdivided at least into two product markets; nursing homes and residential homes, would therefore constitute a distinct product market. Furthermore, the OFT submits that certain specialised nursing care services might be considered separately from general nursing care services.
14. The parties define the product market as one single market covering the supply of care homes for the elderly, without categorising the market into “residential” and “nursing” care homes. They submit that there is no legal distinction between the two categories, many homes are dual use, individuals’ needs may vary over time and the range of services provided within the two categories may be greater than between them.
15. However, the OFT submits that it has in previous merger decisions² considered nursing homes to be separate from residential homes, even though no conclusion has been made. Regarding demand side substitution, a nursing home (in which a qualified nurse is present) would be the only alternative care home for a person requiring medical care, and residential homes do not provide a competitive constraint. On the supply side it has been argued that it is not straightforward to switch from a residential to a nursing home or to being a dual purpose home, due to for example staffing needs and costs.
16. The market for the operation of care homes for the elderly has not been defined in previous Commission cases. The results of the Commission market investigation

² MP/19/97 - Takare PLC/Court Cavendish Group plc and MP/224/97 - BUPA/Care First Group plc

suggest that a market for the supply of care home services exists, but that there is not enough evidence to fully conclude on whether or not the market should be subdivided, even though third parties indicate clear differences between nursing and residential care homes.

17. According to the Commission market investigation a residential care home would typically be one providing accommodation with full board and personal care, while a nursing home provides in addition the constant involvement of a qualified nurse. Third parties submit that in addition to the lack of demand side substitutability, differences in public funding maintain a differentiation between the two care sectors. According to the market investigation providers also normally concentrate on either nursing or residential care. Some third parties furthermore suggest that the product market might be separated also according to specialist services, for example for dementia.
18. For the purposes of this decision it is, however, not necessary to conclude whether narrower product markets exist, since the criteria for referral under Art. 9(2)(b) of the Merger Regulation are fulfilled in any event.

Relevant geographic market

19. The OFT submits that the geographic scope of the provision of care home services in the UK is local. In the above mentioned OFT cases³ the geographic market has been considered to be local, with proximity to the elderly people's own homes and local community, defined as a five-mile radius, but chains of substitution applied in urban areas.
20. The parties submit in their notification that, from the supply side, the geographic scope is national, as the conditions for operating a care home are broadly similar across the UK. From the demand side, however, many residents opt for a care home that is close enough to relatives or friends to maintain regular contact. The parties consider that the narrowest possible geographic scope would be an area corresponding to a 15-20 minute drive time. The parties also submit there is a degree of inter-local authority funding to indicate a wider market.
21. As already mentioned above, the market for the operation of care homes for the elderly has not yet been defined by the Commission. According to the Commission's investigation the geographic scope of the market can, however, be considered as local. The submissions of third parties clearly imply that the UK care home market would be local in scope, within a radius of 3-10 miles at its narrowest. This has been identified as the average physical distance from previous place of residence that people are willing to consider when selecting a care home. It has also been submitted that as local authorities offer guidance and the largest part of the funding to service users coming from their administrative area, and would for example provide lists of care homes, local authority areas might be an appropriate proxy for the geographic scope.
22. It may therefore be concluded that for the purposes of competition analysis in this case, it is appropriate to analyse the markets for care home services in the UK as

³ MP/19/97 - Takare PLC/Court Cavendish Group plc and MP/224/97 - BUPA/Care First Group plc

local. However, for the purposes of this decision the exact practical delineation of these local markets (radius of 3-10 miles, local authority boundaries, or other appropriate proxy) may be left open, since the criteria for referral under Art. 9(2)b of the Merger Regulation are fulfilled in any event.

Impact on competition in the supply of care home services in the UK

23. The transaction will lead to some horizontal overlaps whichever way the product or geographic market is defined. According to the parties' estimate, if the care home market was to be considered as one single product market, their combined market shares at national level in the UK would be [0-5]% based on the number of homes and [0-5]% based on the number of beds provided.
24. If separate markets are considered, the OFT submits that this operation would affect competition especially in the provision of nursing home services.
25. The above described delineation of the geographic market into local markets with a radius of 3-10 miles has not been applied by the parties exactly in their assessment. Therefore, the OFT submits that doubts remain about the reliability of the market share estimates and about the impact of the transaction on competition. During the Commission investigation, market share estimates have been provided according to two different proxies for the geographic market.
26. According to the information submitted in the notification, if postcode areas were considered, overlaps between the parties' activities would occur in 12 areas. The parties would have a combined market share above 15% in 3 of these areas (Arbroath, Glenrothes and Runcorn).
27. A revised analyses based on local authority areas instead of postcode would lead to affected markets in 10 local authorities. The highest estimated market share would be [25-30]% in Neath-Port Talbot.
28. As past OFT cases have suggested that nursing homes should be treated differently in economic terms to residential care homes, the parties were requested to submit data separately for these services. This analyses results in three high market share areas where competition would be affected especially in the provision of nursing home services. The first area is Arbroath (Scotland) where the parties would have a combined market share of approximately [55-60]% of nursing beds according to postcodes and [25-30]% on a local authority basis (Southern Cross operates 2 and Highfield 1 nursing home in Angus which is the local authority in the area). The second area is Nottingham (England) where the combined market share would be estimated to be [40-45]% of nursing beds on a local authority basis (both parties operate 3 nursing homes in Nottingham). The third area is Neath-Port Talbot (Wales) where the biggest overlap concerns residential homes with a combined market share of approximately [40-45]% on a local authority basis (both parties operate 1 residential home in the area). The market situation being very fragmented, the parties would become the biggest provider at least in these areas.
29. Furthermore, the OFT considers that information should be analysed even in a more detailed manner and that it remains unclear which product market would be the correct scope for assessing the impact of the merger. Market share estimates might change accordingly.

30. The parties suggest that there are a number of reasons why a substantial lessening of competition is unlikely to occur. Most importantly, they argue that local authorities, which provide funding to care home service users, have a significant degree of buyer power.
31. The OFT considers that even though it is generally recognised that local authorities have buyer power when negotiating care home fees for individuals, third party responses have not been sufficient to identify the extent of buyer power in the areas giving rise to high market shares. In general, the buyer power of local authorities might be constrained for example by their legal obligation to find care homes for people meeting the criteria. Furthermore, the OFT submits that the buyer-power of self-paying individuals is low.
32. The results of the Commission market investigation confirm that there is some concern in the market regarding the potential limitation of service users' choice and the local authorities' buyer power as a result of care home service providers merging. Some concern has also been raised about the lessening of choice regarding the requirement to pay top-up fees which some providers demand in addition to local authority funding rates.
33. In the light of the above, it can therefore be concluded in line with the OFT's assessment, that the concentration affects competition within the meaning of Art. 9(2)b of the Merger Regulation, in the supply of care home services in a number of local markets in the UK.

Non-substantial part of the common market

34. Regarding the three local authorities, which have been identified above, and which seem to be more specifically affected by the proposed transaction, the OFT estimates that the value of the care home market in each of the above identified local authorities is within the range of £6 to £10 million. Each of these markets would therefore amount to a small proportion of the total UK estimated spend on residential community care services of £10 billion. In addition, the GDP for the three areas noted above is only a small proportion of the total UK GDP.
35. Considering more specifically factors such as the economic importance of the services and territories concerned, the volume of cross-border trade concerned, as well as general geographic factors, the three local areas most affected by the present operation (Arbroath, Nottingham and Port Talbot) do not constitute a substantial part of the common market. Furthermore, the above mentioned local markets do not cover a substantial part of the common market even if aggregated.

IV. CONCLUSIONS

36. The Commission finds that the conditions for referral laid down in Article 9(2)b of the Merger Regulation are met in the present case. When these conditions are met, according to Article 9(3), the Commission does not have discretion over whether to refer the case or not. Furthermore, in this case, it appears appropriate to refer the whole of the transaction.
37. It is therefore concluded that the concentration should be referred to the OFT with a view to the application of the national competition laws of the UK.

HAS ADOPTED THIS DECISION:

Article 1

In accordance with Article 9 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, the notified concentration consisting in the acquisition of sole control by the Blackstone Group (via TBG Careco Limited) of NHP plc, is hereby referred to the competent UK authorities

Article 2

This Decision is addressed to the United Kingdom.

Done at Brussels,

For the Commission

Neelie KROES

Member of the Commission

Signed