

Private Healthcare Market Study

Report on the market study and proposed decision to make a market investigation reference.

December 2011

OFT1396

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1 EXECUTIVE SUMMARY

- 1.1 The OFT is proposing to refer the market for privately funded healthcare services in the UK (PH) to the Competition Commission (CC) for a market investigation. This report sets out the OFT's reasons for proposing to refer the market and gives interested parties the opportunity to make representations.
- 1.2 The proposal for a market investigation reference follows an in-depth market study of PH by the OFT launched in March 2011.
- 1.3 The market for PH encompasses a range of medical treatments which are privately funded, either directly by patients or through their private medical insurance (PMI) policies, and provided to patients by consultants, medical and clinical professionals in private hospitals, clinics or units (PH facilities).
- 1.4 The total value of the market for acute PH in the UK was approximately £5 billion in 2009. Private hospital and clinics account for the largest part of this figure, generating an estimated £2.83 billion in revenue during 2009. Approximately 80 per cent of acute PH purchases are made through patients' PMI policies. On average 15.8 per cent of people are covered by such a policy in the UK (PMI funded patients).
- 1.5 The market for PH is likely to be an area of growing importance to the UK economy given, in particular, that demand for healthcare services is forecast to grow in line with an expanding and ageing UK population.¹ It may also be increasingly important to the delivery of NHS services as a result of reforms aimed at enabling providers of PH to play a larger role in delivering NHS treatment.
- 1.6 In this context, while the focus of this market study has been on privately funded healthcare for private patients, the OFT has also been aware of the developing linkages between PH and NHS services. It has focused, therefore, on setting out its findings in this report with a view to assisting those bodies with ongoing and new roles in regulating or reviewing healthcare services, including Monitor as the sector regulator

¹ Keynote, *Private Healthcare Market Report*, 2011

for health and the CC which, under legislative proposals, is to review the development of competition in the provision of healthcare services for the purposes of the NHS every seven years.

- 1.7 Through market studies, the OFT is able to undertake a holistic analysis of markets, drawing on its experience and understanding of competition and consumer problems across a wide range of markets. In addition to this, the OFT has developed specific expertise on competition and consumer problems across a range of health markets, including pharmaceuticals and NHS equipment. It has previously considered the PH market in 1999 and in recent mergers decisions in 2010.

Provisional market study findings

- 1.8 The OFT's report provisionally finds a number of features that, individually or in combination, prevent, restrict or distort competition in this market. The OFT considers that these features of the PH market impair the ability of patients, GPs and PMI providers to choose between competing service providers, including new entrants, on the basis of superior quality of services to patients and better value for money. This ultimately may result in patients paying higher prices and receiving lower quality and less efficient services. The features include:
 - 1.9 **Information asymmetries:** the OFT considers that there is a shortage of accessible, standardised and comparable information provided to patients, GPs and PMI providers in relation to the quality of PH facilities and of consultants. There also appear to be difficulties for PMI funded patients in assessing the risk of shortfall from particular consultants, whereby a consultant's fees exceed the benefit maxima that the patient's PMI provider will reimburse resulting in the potential for an additional payment by the patient. In addition, for self-pay patients, there are difficulties in easily comparing the prices charged by different PH facilities.
 - 1.10 In general, the OFT considers that this shortage of accessible, standardised and comparable information weakens the ability of patients and GPs to drive efficiencies and stimulate enhanced competition between rival PH facilities and between consultants, and may give rise to a dampening of competition in the market overall. The lack of access to information on quality and price for consultants produces a situation

where both the patient and PMI provider cannot differentiate between consultant performance and fees in order to judge whether they represent value for money. This may also be preventing the development of more flexible, less distortive methods for PMI providers to control consultant costs, whereby patients can choose between consultants on the basis of their respective fees and quality and pay a top-up fee to the consultant, above the maximum provided by their insurance cover, if a patient judges it to be worthwhile.

- 1.11 **Concentration:** The PH provider market appears to be concentrated at the national level. At the local level there appear to be areas of high concentration, such as areas where there is no alternative fascia PH facility within a 30 minute drivetime of a PH facility (solus PH facilities), and some local markets with PH facilities that PMI providers consider to be 'must have' because they account for a large proportion of PMI providers' spend or are the only PH facility to provide a particular specialism or procedure in the local area.
- 1.12 The existence of solus and 'must have' PH facilities means that PMI providers are dependent on the PH providers that own these facilities in order to provide nationwide coverage for their policyholders.
- 1.13 The size of the larger PMI providers appears to result in a degree of buyer power in that PH providers are, to some extent, dependent on these larger PMI providers for the financial viability of their facilities. However, there may be limits on the PMI providers' ability to exercise their buyer power. Firstly, in order to provide nationwide coverage, PMI providers need to purchase PH in most local markets, including areas with solus and 'must have' PH facilities as described above. Ownership of these facilities appears to give PH providers bargaining leverage over PMI providers. Secondly, since it is GPs that usually recommend consultants to patients, and consultants who then often determine the patient's choice of PH facility, the PMI providers have limited ability currently to direct patients to different PH facilities. Therefore, as the buyer power of the PMI providers appears not to be countervailing, the larger PH providers may have a degree of market power.
- 1.14 Forty-four per cent of anaesthetists are part of an Anaesthetist Group (AG). Prior to, and during the course of, the market study, the OFT received a number of complaints from patients regarding their inability to

find an anaesthetist who will charge within PMI provider fee schedules. These complaints have been supported by submissions and evidence from PMI providers as part of the market study that high concentration of AGs in some local markets may raise prices. In the light of these complaints, the OFT suspects that the prevalence of AG groups is also a feature of the market which may reduce price competition in local markets (particularly in view of switching costs such as the costs associated with postponing treatment or travelling to an alternative facility).

1.15 **Barriers to entry.** For the reasons analysed in chapter 8, the OFT considers that a number of features of the PH market combine to create significant barriers to entry. These are:

- Certain conditions imposed by larger PH providers as part of the recognition of their facilities on PMI networks which may restrict the ability of PMI providers to recognise new entrants attempting to offer competing PH services on their networks. For example, some PH providers impose conditions on PMI providers that they be consulted on the recognition of a new entrant on a PMI providers' network, or that impose price rises on a PMI provider should a new entrant be recognised.
- The practice of many consultants is to treat most of their private patients at one main PH facility. Since patients are insured by different PMI providers, this practice means that new entrants, attempting to offer competing PH services, need to be recognised on all of the main PMI networks in order to attract a sufficient number of consultants to practice at their facility (the 'consultant drag' effect).
- Incentives paid directly or indirectly by PH facilities to consultants to encourage them to treat all, or a higher number, of their patients at their facility. These incentives may further discourage consultants from treating patients at the facilities of new entrants, attempting to offer competing PH services.

In addition, in this context, the OFT notes the possibly emerging trend of the provision of financial incentives to GPs by PH providers in order to

encourage those GPs to refer patients to the PH provider's facilities. This trend may also have the potential to develop as a barrier to entry.

- 1.16 This combination of concerns around informational asymmetries, aspects of local concentration and wider barriers to entry, either individually or in combination, has the potential to prevent, restrict or distort competition in the PH market. The OFT considers that these significant underlying features of the PH market are more appropriately investigated further by way of a market investigation reference (MIR) and that the CC has recourse to the range of remedies which may prove appropriate to address the concerns identified by the OFT. Such remedies could include, for example, compelling the provision of certain information, the imposition of supply or pricing obligations on PH facilities, or potential bans on the imposition by PH providers with market power of certain types of contractual provision.
- 1.17 The OFT provisionally considers that the statutory test in section 131 of the Enterprise Act 2002 for making a reference is met and, taking into account the relevant criteria set out in the OFT's guidance document on MIRs, has provisionally concluded that the evidence points in favour of exercising the OFT's discretion to make a reference to the CC for the supply of PH.

Other market study findings

- 1.18 This report makes two recommendations to address particular issues that arose in the course of the market study. The OFT is pleased to be able to make these immediate recommendations following its engagement with participants and regulators in the PH market which it hopes will have some impact even before any definitive view is reached on an MIR.
- 1.19 First, responding to concerns expressed by consumers as to the level of extra payments sought from some consultants that are not covered under their PMI policies (shortfall payments), the OFT has since engaged with the FSA on this issue. Consequently, the FSA is in contact with the Association of British Insurers (ABI) and PMI providers to ensure that the PMI providers make clear the possibility of a shortfall payment as a result of the limits which apply to the amount payable under their policies. The aim will be to ensure that PMI providers make the risk of

shortfall payments clear to their customers both at the point of sale and at the time a patient makes a claim under a PMI policy. The OFT welcomes this development.

- 1.20 Second, the development of partnership arrangements between PPUs of NHS/Foundation Trusts and PH providers has the potential to either exacerbate or alleviate concentration in local PH markets. Local market concentration may increase if a PH provider that is already present in the local market partners with the PPU. This is because the partnering arrangement may remove any competitive constraint on the relevant PH provider offered prior to the partnering arrangement and reduce choice for PH patients and PMI providers. On the other hand, a partnership arrangement between a PPU and a new PH provider in the local market has the potential to provide a platform for entry and thereby to increase competition.
- 1.21 The OFT has therefore made a recommendation to the Department of Health and to the NHS/Foundation Trusts when seeking to agree partnership arrangements with PH providers to consider whether any arrangements between PPUs of Foundation/NHS trusts and PH providers may increase concentration in certain local markets with a consequent reduction in choice for patients, and a potential reduction in competition in those local markets. To this end, the OFT has also recommended that NHS/Foundation Trusts seeking to agree partnership arrangements with PH providers consider whether their arrangements are qualifying mergers and whether, as a result, to notify the arrangements to the OFT. This market study has also flagged to the OFT issues around whether Private Patient Units (PPUs) may be at a potential competitive advantage in PH markets due to any implicit, non-market benefits they could receive from their connections to NHS Trusts. Chapter 9 therefore considers how the principles of competitive neutrality might apply to publicly funded organisations competing in the PH market.

Consultation

- 1.22 The OFT is consulting on its proposed decision to make a market investigation reference to the CC.

1.23 The OFT invites comments by **30 January 2012**. Comments should be sent to:

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2 INTRODUCTION

- 2.1 The OFT aims to make markets work well for consumers. It achieves this by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive.
- 2.2 The OFT is well placed, with its unique market study tool, to pursue valuable, holistic analyses of markets – both from a competition and consumer angle. Market studies are a non-intrusive and efficient instrument for diagnosis, cure or both. They can ensure that issues are not left unexamined. They can also be a means of applying informed technical skills to bespoke analyses of issues, such as whether barriers to competition are on the supply side or the demand side, whether they may be remediable and whether any potential remedies might have unintended consequences.
- 2.3 The OFT has embarked on this market study with considerable experience of considering issues across the PH sector, having considered several mergers across privately funded healthcare services and Private Medical Insurance (PMI) sectors and most recently having reviewed the merger of two PH providers in October 2010.² However, the last formal market review of the provision of PH was more than a decade ago, in 1999.³ The OFT also has a decade of experience of using and developing its market study tool.
- 2.4 This market study comes at a time of potential change in the wider landscape of healthcare provision in the UK, although no significant changes are anticipated to the PH market in the UK in the short-term. The OFT has engaged with a wide range of stakeholders throughout this market study and has focused, therefore, on setting out its findings in

² Since 2008 three mergers have been reviewed by the OFT in this sector, these are: (i) Completed acquisition by General Healthcare Group of control of four Abbey hospitals and de facto control over Transform Holdings Limited previously part of the Covenant Healthcare Group, October 2010, (ii) Completed acquisition by Spire Healthcare Limited of Classic Hospitals Group Limited, July 2008, and (iii) Completed acquisition by General Healthcare Group of assets of Nuffield Facilities, May 2008. The most recent being the Completed acquisition by General Healthcare Group of control of four Abbey hospitals and de facto control over Transform Holdings Limited previously part of the Covenant Healthcare Group, October 2010

³ www.of.gov.uk/shared_of/market-studies/40_99.pdf

this report with a view to assisting regulatory bodies with ongoing and new roles in regulating or reviewing healthcare markets, including Monitor as the economic regulator for health and the Competition Commission (CC) which, under current legislative proposals, is to review the development of competition in the provision of healthcare services for the purposes of the NHS every seven years.⁴

2.5 The OFT launched the PH market study in March 2011 following its own preliminary research, prompted by submissions made by a number of participants across the sector, which together called into question whether the market for PH is working well for consumers. This research pointed to a number of changes in the market for PH over the last decade, in particular consolidation amongst PH providers since the last OFT review in 1999, a move by PMI providers away from vertical integration and an evolving, and potentially more complex, interaction between the PH market and the NHS.

2.6 The PH market may also be increasingly important to the delivery of NHS services as a result of ongoing Government initiatives, such as the 'any willing provider' initiative, which are aimed at enabling NHS patients to obtain medical treatment from PH providers. The NHS is the second

⁴ Health and Social Care Bill, section 76

The Competition Commission must review—

(1) the development of competition in the provision of health care services for the purposes of the NHS, and

(2) the exercise by Monitor of its functions under this Part in relation to the provision of health care services for those purposes.

(3) Before beginning a review under this section, the Commission must publish a notice specifying the matters it proposes to consider in the review.

(4) In carrying out the review, the Commission must consider whether those matters have or may be expected to have any effects adverse to the public interest.

largest purchaser of PH and the proportion of NHS patients treated in PH has more than doubled in the last four years.⁵

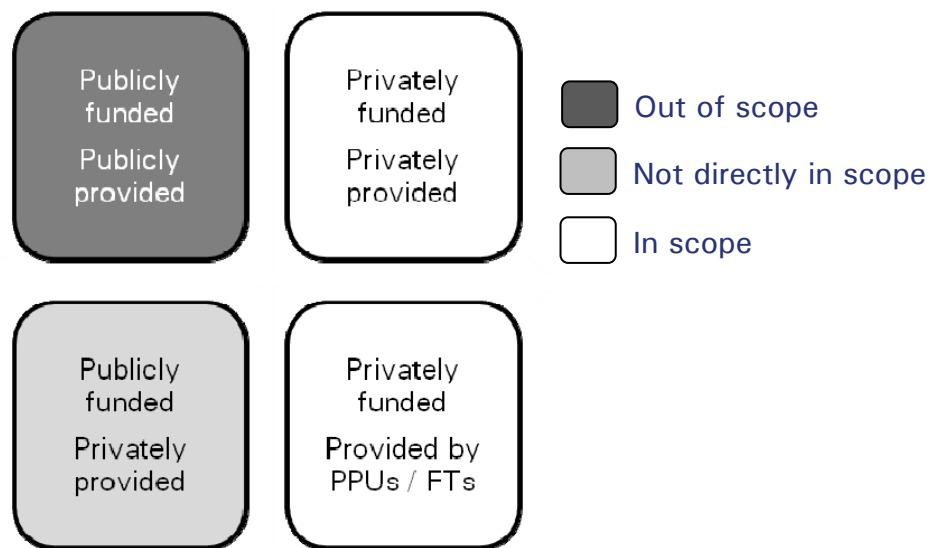
2.7 Submissions and meetings held with a range of market participants during the OFT's consultation on the proposed scope of the study confirmed that these issues merited further investigation.

Scope of the Market Study

2.8 The focus of the market study is on the provision of PH, which includes the provision of PH by privately funded public providers (for example, by Private Patient Units (PPUs) of NHS Trusts as well as private providers).

2.9 This is depicted in figure 2.1 below, which also shows that publicly funded healthcare provided by the NHS is not within the scope of this study.

Figure 2.1 Focus on privately funded healthcare



2.10 The NHS's role as a purchaser of PH is also not directly within the scope of this market study due to various features which distinguish publicly funded healthcare from the PH market. In particular, pricing is set at the

⁵ Laing and Buisson, *Laing's Healthcare Market Review*, 2010-11, page 44.

level of the NHS tariff⁶ and the patient pathway and specification are set by the commissioning Primary Care Trust.^{7 8} By contrast, PH patients generally receive a number of additional perceived benefits such as greater choice of a consultant, the date of an outpatient appointment, and more immediate access to treatment. Pricing for PH, however, is negotiated separately with each purchaser, the large majority of whom are PMI providers acting on behalf of their customers (PMI funded patients) and this market study also examines this role.

- 2.11 The latest figures for PMI penetration show that approximately 15.8 per cent of the UK population are covered by a PMI policy. The market study focuses particularly on the PMI providers' relationships with PH providers, consultants and GPs.⁹

Overview of the PH Market

- 2.12 The market for PH encompasses a range of medical treatments which are privately funded and provided to patients via private hospitals/clinics and PPUs (referred to in this report as 'PH facilities'), through the services of consultants and medical and clinical professionals who work within these facilities.¹⁰
- 2.13 The OFT's consideration of PH has primarily focused on the provision of the acute¹¹ medical/surgical and diagnostic procedures provided in such

⁶ <http://data.gov.uk/dataset/payment-by-results-2010-11-national-tariff-information>

⁷ www.nhs.uk/NHSEngland/thenhs/about/Pages/authoritiesandtrusts.aspx#primary

⁸ Although not part of this market study, the NHS' role as a purchaser of PH was part of the Co-operation and Competition Panel's review of the 'Any Willing Provider' initiative, which reported in July 2011.

⁹ Private Healthcare – A Scoping Paper, OFT 1295, December 2010

¹⁰ Chapter 4 sets out an analysis of the product market and geographic market definitions in relation to PH services in the UK.

¹¹ For the purposes of this market study, acute care is defined as short-term treatment via a range of medical/surgical procedures commonly delivered by PH facilities within inpatient and outpatient settings. This excludes treatment for long-term conditions

PH facilities (including acute facilities with overnight beds and acute day surgery facilities/clinics) to privately funded patients (PH patients). However as set out in its Final Statement of Scope,¹² any findings and recommendations that the OFT makes will have a more general application across a wider range of PH services, and will not just be limited to those that are directly within scope.

- 2.14 In 2009, the total value of the market for acute PH in the UK was estimated at just over £4.94 billion. PH facilities account for the largest part of the overall PH market, generating an estimated £2.83 billion in revenue during 2009. Fees to surgeons, anaesthetists and physicians generated an estimated £1.64 billion in 2009.¹³ The remaining £0.47 billion is revenue generated by private inpatient and outpatient treatment in NHS facilities, for example in PPUs.

Evidence and Process

- 2.15 During the course of this market study, the OFT has received a large number of submissions from a range of interested parties active across the PH market, including: PH providers, PMI providers, consultants, other medical professionals, and professional bodies.¹⁴
- 2.16 The OFT has also commissioned and published four reports from independent consultants.
- The first report contains findings from a survey of 400 GPs (the OFT GP survey) and 400 consultants (the OFT consultant survey) via telephone and on-line interviews, to provide evidence and

¹² Private healthcare – final statement of scope, OFT 1295f, March 2011

¹³ Laing and Buisson, *Laing's Healthcare Market Review 2010-2011*, Table 1.2, page 35. Note the £4.94bn total market figure does not include revenue from the purchase of acute care by the NHS from independent facilities, revenue from mental health facilities or long-term care of the elderly.

¹⁴ Such as the British Medical Association, Federation of Independent Practitioner Organisation and the Association of Anaesthetists of Great Britain and Ireland, consumer organisations and individual consumers.

information on the relationship and interactions between GPs, consultants and patients.¹⁵

- Both these surveys were accompanied by a second report that sought to examine – mainly via a review of publicly available source information – the extent, nature and profile of the GP and consultant workforce in order to provide additional context for this market study (OFT population report).¹⁶
- The third report covers research which involved in-depth interviews with 40 patients who had recently received, or were currently seeking private treatment (the OFT patient interviews).¹⁷
- The final report, commissioned by the OFT and undertaken by the economic consultants Oxera, assesses the different techniques for defining markets for PH in the UK (OFT market definition report).¹⁸

2.17 In the interests of efficacy and transparency, the OFT also held a number of focused, follow-up sessions on specific issues with relevant market participants and sought views at various stages of this market study, including on its provisional findings, from an expert panel comprising representatives from the Department of Health, Monitor, the Competition and Cooperation Panel (CCP), the Care Quality Commission (CQC) and leading academics in health economics.

2.18 In early September 2011, the OFT also held two roundtable discussions with 36 different organisations (including those active in the PH sector

¹⁵ GHK, *Programme of Research Exploring Issues of Private Healthcare Among General Practitioners and Medical Consultants – Final Survey Report*, August 2011, available at: www.of.gov.uk/shared_of/market-studies/Final-Survey-Report-08-2011.pdf

¹⁶ GHK, *Programme of Research Exploring Issues of Private Healthcare Among General Practitioners and Medical Consultants – Population Overview Report*, August 2011, available at: www.of.gov.uk/shared_of/market-studies/Population-Overview-Report-1.pdf

¹⁷ Opinion Leader, *The Patient Journey: Research to support the OFT's private healthcare market study*, August 2011, available at: www.of.gov.uk/shared_of/market-studies/The-Patient-Journey-Report.pdf

¹⁸ Oxera, *Techniques for defining markets for private healthcare in the UK*, 2011

and public bodies¹⁹) to consider its emerging findings regarding the provision of price and quality information by consultants and PH facilities, and to investigate further whether the OFT's concerns in this area could be addressed and, if so, within what time frame. A high level summary of these discussions can be found at Annex B.

2.19 This report presents the findings of the OFT's market study and its recommendations as to the next steps. In particular, it presents the evidence and reasoning behind the OFT's provisional decision to refer the PH market to the CC.

2.20 The report is structured as follows:

- Chapter 3 provides an overview of the PH market and the patient journey for patients accessing PH
- Chapter 4 considers market definition, examining how the market for PH has national and local dimensions with potentially some regional aspects
- Chapter 5 considers issues around information asymmetries, outlining the types and availability of information to support informed choice with regard to accessing PH
- Chapter 6 considers the levels of concentration of PH and PMI providers in the PH market and whether these give rise to market power
- Chapter 7 examines the levels of concentration of anaesthetists
- Chapter 8 examines the conditions of entry and expansion in the PH market and whether there are barriers to new entrants
- Chapter 9 details other market findings and recommendations
- Chapter 10 provides the OFT's reasoning for the proposed decision to consult on making a Market Investigation Reference to the CC.

¹⁹ Public bodies present at the roundtable discussions included: Department of Health, CQC, and the Council for Healthcare Regulatory Excellence (CHRE).

2.21 The OFT has been supported by a range of stakeholders during the course of this market study and would like to thank each of them for their input and for sharing their valuable knowledge of this sector.

3 MARKET OVERVIEW AND THE PATIENT JOURNEY

Introduction

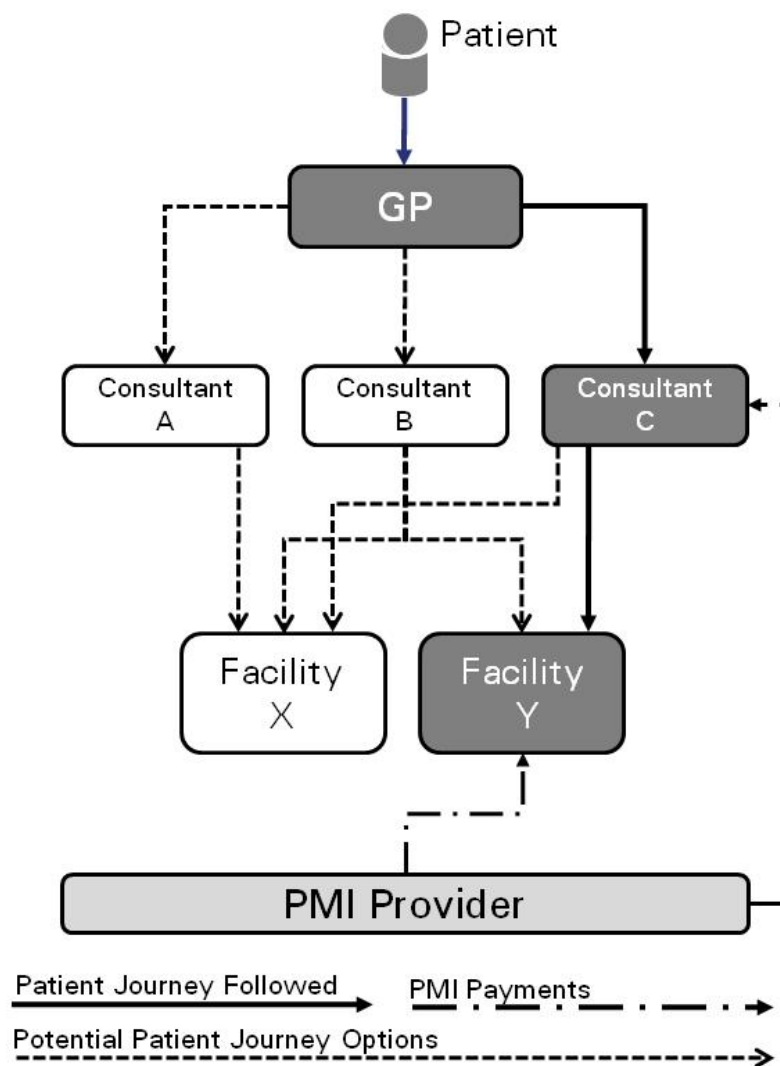
- 3.1 This section provides an overview of the PH market, exploring how the various market participants interact and the role of PMI in the context of PH. It also considers, where relevant, the role of privately funded public providers of PH, namely the NHS via the work of PPU's.
- 3.2 The PH market consists of five key participants: the PH patient, the General Practitioner (GP), the PH provider, the consultant, and, for most PH patients, their PMI provider. These five sets of participants are discussed in turn below.

The Patient Journey

- 3.3 The route a PH patient takes from requiring treatment through to being treated in a PH facility is often termed the 'patient journey'. Figure 3.1 below shows the typical patient journey, which is based on submissions from stakeholders, the OFT patient interviews, the OFT GP survey and the OFT consultant survey.
- 3.4 GPs act as the key interface in directing PH patients to consultants and PH facilities, and in the provision of information to PH patients about their options of PH provider and consultant. Consultants also occupy a central position within the patient journey as GPs refer patients to consultants (rather than to PH facilities) in the majority of cases. The roles of GPs and consultants are also examined below.
- 3.5 The patient journey presented in this chapter represents the typical route via which most PH patients will access PH. However, the OFT notes, as seen in the OFT patient interviews, that alternative routes are also possible where a patient may place greater or lesser reliance on the different market participants identified.²⁰

²⁰ For more details on these alternative routes, please see: OFT patient interviews, pages 18-21

Figure 3.1 Typical Patient Journey for a PMI funded patient



PH Patients

- 3.6 In the majority of cases, the PH patient will in the first instance visit a GP when they become unwell. The GP will determine the best course of action for a patient after assessing their symptoms. One of the possible routes a GP can take thereafter is to refer the patient to a specialist consultant (or, far less frequently, a particular PH facility). At this point, the patient has a decision to make regarding whether their treatment is to be funded by the NHS or if they are going to fund their treatment privately (either via the use of their PMI policy if possessed by the patient, or by funding it personally (self-paying)). The decision to be treated privately may depend on many factors. The OFT patient

