

# **DRAFT PRIVATE HEALTHCARE MARKET INVESTIGATION ORDER 2014**

## **Response to consultation**

### **Introduction**

The Competition and Markets Authority (CMA) received 15 responses to the formal consultation on the draft Private Healthcare Market Investigation Order, which was published in July 2014. We found these comments helpful and constructive. This note sets out the changes of substance which have been made to the Order as a result of those submissions. Pure drafting changes, made to clarify the intended meaning, and non-material changes (such as typographical and spelling errors) are not discussed in this note.

### **Article 1 – Commencement**

The commencement dates of the Order have been changed as follows. The remedy enabling the CMA to review PPU arrangements (articles 5 to 12) will now come into force on the day the Order is made. The CMA had regard to the fact that parties have been aware of this proposed remedy from at least the date the report was published in April 2014, and so will have had six months to take the new provisions into account in any PPU arrangements they may be contemplating. The CMA also had regard to paragraph 13.18 of the report which anticipated that the majority of the remedies would be implemented by October 2014.

The remedy in article 18 as to referring clinicians directly or indirectly becoming party to equity participation schemes will also come into force on the day the Order is made. Existing equity participation schemes, however, will not be required to comply with the new requirements until 6 April 2015. This is consistent with paragraph 11.463 and footnote 1,051 of the report.

The commencement dates for the remainder of the Order remain unchanged. Article 22 (Information on consultants' fees) will come into force on a day to be appointed by the CMA. The remaining provisions of Parts 3 and 4 of the Order will come into force on 6 April 2015.

### **Article 4 – Directions**

An express power to give directions to carry out or ensure compliance with the Order has been added in accordance with section 87 of the Enterprise Act 2002 (the Act),

as applied to market investigation enforcement orders by section 164(2)(b) of the Act. This change was made in response to some parties raising the question how some parts of the Order, for example the information remedy provisions, were likely to be enforced by the CMA.

#### **Article 7.4 – Time limit for commencing PPU reviews**

A time limit for commencing a review of any PPU arrangements of four months from the day on which material facts about the relevant PPU arrangements were given to the CMA or were in the public domain has been added. Some parties were concerned that without such a time limit (which is comparable to section 24(1) of the Act in relation to mergers) there would be legal uncertainty as to when particular PPU arrangements were no longer subject to the risk of review under article 7 of the Order.

#### **Article 14.4 – ‘Package fees’ not subject to general prohibition on inducements to referring clinicians**

Some parties considered that it was unclear whether payments made to a referring clinician from ‘package fees’ agreed between the relevant private hospital operator and a private patient or the medical insurers of that patient would be caught by the general prohibition on inducements to referring clinicians. It was not intended that such payments would be included within the prohibition and for the avoidance of doubt, additional provisions have been added to this effect.

#### **Article 16.3 – Meaning of ‘fair market value’ when applied to higher-value services**

Paragraph 11.445 of the report sets out how the CMA considered that a fair market value of higher-value services should be determined for the purposes of the general prohibition on inducements to referring clinicians. Provisions reflecting this description have now been added to article 16 of the draft Order. (A separate description of ‘fair market value’, as regards securities and options, is given in article 18.6.)

#### **Article 18 – Equity participation schemes**

One party was concerned that the scope of the prohibition in article 18.1 on equity participation schemes would encompass arrangements whereby a private hospital operator had an equity participation scheme in a GP’s practice, even though the relevant GP would not be incentivised by these arrangements to make referrals to that private hospital operator. We accepted that this was not the intended effect of

the general prohibition, and so, for the avoidance of doubt, a new article 18.2 has been added to make this clear.

Parties pointed out that the list of conditions in article 18.3, which give exemption from the general prohibition on equity participations schemes for such schemes made before the date of the report (2 April 2014), had omitted condition (e). This was unintentional and the drafting error has been corrected.

#### **Article 19 – Publication on website**

Some words have been added to article 19.3 to make it clear, for the avoidance of doubt, that information giving details of payments made to referring clinicians for providing ancillary services at a private hospital must be kept up to date. This reflects paragraph 11.446 of the report.

#### **Article 21 – Information concerning performance**

Some parties pointed out that article 21.1(g) (unplanned patient transfers) did not make it clear that this applied to such transfers from a private healthcare facility or PPU to a facility of one of the national health services. Additional words have been added to make this clear.

A new provision has been added as article 21.5 to make it clear that private hospital operators are not required to provide information concerning outpatient activity to the information organisation. This is because we consider that such a requirement would be disproportionate having regard to the volume of information this would create and the limited use in having such information publicly available.

#### **Article 22 – Information concerning consultants**

Article 22.1(b) has been amended to limit the information consultants need to provide to the information organisation on standard procedure fees. Such information need only be provided for the 50 types of procedure most frequently undertaken by the relevant consultant. This change has been made to ensure that the obligations on consultants to provide information are proportionate, having regard to the use in having such information publicly available.

#### **Article 25 – Duties of private medical insurers**

A new provision has been added as article 25.2(b) requiring private medical insurers to include standard wording informing patients seeking to obtain pre-authorisation for treatment that helpful information as to consultants and private hospitals is available on the website of the information organisation. This was included in paragraph 11.573 of the report, but was omitted from the draft Order.