

PRIVATE HEALTHCARE MARKET INVESTIGATION

Explanatory note to accompany the Private Healthcare Market Investigation Order 2014

1. On 2 April 2014 the Competition and Markets Authority (CMA) published its report titled *Private healthcare market investigation* (the report).
2. In the report, the CMA decided that:
 - (a) features of the markets for privately-funded healthcare services each (and, in certain circumstances, in combination) prevent, restrict or distort competition, and thereby have an adverse effect on competition (AEC); and
 - (b) the CMA should take action to remedy, mitigate or prevent the AECs and detrimental effects flowing from these features.
3. In particular, the CMA decided that:
 - (a) high barriers to entry and expansion for private hospitals, and weak competitive constraints on private hospitals in many local markets including central London in the provision of privately-funded healthcare by private hospital operators, in which we included NHS private patient units, give rise to an AEC;
 - (b) the existence of certain benefits and incentive schemes operated by private hospital operators which reward referring clinicians (directly or indirectly) for treating patients at, or commissioning tests from, their facilities are a feature in the provision of privately-funded healthcare services by private hospital operators that gives rise to AECs in the markets for the provision of hospital services by private hospitals; and
 - (c) lack of publicly available information as to performance measures of private healthcare facilities, and lack of sufficient publicly available performance and fee information on consultants providing privately-funded healthcare services, gives rise to an AEC.
4. The CMA indicated in its report that it intended that the CMA would implement some remedies by an Order rather than by undertakings.

5. Applications have been made to the Competition Appeal Tribunal (CAT) for a review of some of the decisions in the report (the proceedings). In particular, the Federation of Independent Practitioner Organisations is seeking an Order that the remedy to improve the public availability of information on consultants' fees, and the CMA's decision that the buyer power of certain private medical insurers did not give rise to any AEC, should be quashed and remitted to the CMA for reconsideration.
6. For this reason, article 22 (information on consultants' fees) will not come into force at the same time as the remainder of the Order, and the CMA will take a decision concerning this article 22 when the proceedings have been finally determined.
7. The Order is divided into four parts: Part 1 (General); Part 2 (PPU arrangements); Part 3 (Referring clinicians) and Part 4 (Information).

Possible consequences of not complying with the Order

8. Section 167 of the Enterprise Act 2002 (the Act) places a duty on any person to whom the Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action. In addition, the CMA can seek to enforce the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.
9. The CMA has power under the Order to give directions, including directions to a person in their capacity as an office-holder, for the purpose of carrying out, or ensuring compliance with, the Order.

Review of this Order

10. The CMA has a duty under section 162 of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances.
11. The CMA indicated in the report that it would review the effectiveness of the remedy set out in Part 3 of the Order within three years of the date of the Order and the remedy set out in article 21 of the Order within four years of the date of the Order.

Status of this explanatory note

12. Nothing in this explanatory note is legally binding. In the event of a conflict between this explanatory note and any provision of the Order, the Order shall prevail.

Part 1 (General) – articles 1 to 4

13. Article 1 (title, commencement and scope) provides that the Order will come into force on different dates as follows. Parts 1 and 2 of the Order will come into force on the day the Order is made. Article 18 (equity participation schemes) will come into force on the day the Order is made as regards new schemes, but as regards existing schemes will come into force on 6 April 2015. The remainder of Part 3 will come into force on 6 April 2015. Article 22 (information on consultants' fees) will come into force on a day to be appointed by the CMA (but not before the final outcome of the proceedings) and the remainder of Part 4 will come into force on 6 April 2015. The Order will apply to privately-funded healthcare services in England, Wales, Northern Ireland or Scotland.
14. Article 2 (interpretation) includes definitions of various terms used in the order, some of which were not defined in the report. In particular, the term 'referring clinician' is used to mean a healthcare professional who has been granted practising privileges by a private hospital operator and/or has the ability to refer patients for treatment or tests at a private hospital.
15. Article 3 applies the investigation powers given for permitted purposes (including enforcement functions) by section 174 of the Act.
16. Article 4 provides that the CMA may give directions as to compliance with the Order.

Part 2 (PPU arrangements) – articles 5 to 12

17. Article 5 sets out the purpose of this part of the Order, which is to remedy the AEC which arises from high barriers to entry and expansion for private hospitals and weak competitive constraints on private hospitals in many local markets including central London in the provision of privately-funded healthcare by private hospital operators, including in PPUs. The CMA will have power to review PPU arrangements and to take action where a private hospital operator, facing weak competitive constraints in a particular local area, acquires, or intends to acquire, the right to carry on PPU arrangements in the same area and the arrangements will, or may, result in a substantial lessening of competition in the provision of privately-funded healthcare services in that area.
18. Article 6 enables the CMA to require information about PPU arrangements from the parties. It also allows the parties to volunteer information about proposed PPU arrangements prior to entering into such arrangements.

19. Article 7 gives the CMA power to review PPU arrangements to decide whether the arrangements have resulted, or may be expected to result, in a substantial lessening of competition (SLC), and if so, whether to take action to remedy, mitigate or prevent the SLC. In doing so, the CMA may have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant PPU arrangements concerned.
20. Article 8 describes a 'relevant customer benefit' for the purposes of this part of the Order in terms which mirror those used for the purposes of market investigations in section 134(8) of the Act.
21. Article 9 gives the CMA power to take remedial action to remedy, mitigate or prevent an SLC resulting from PPU arrangements. Such action may be to prohibit the making or performance of the PPU arrangements; to require the termination of the arrangements; to accept appropriate undertakings; or to require the parties to take appropriate action in relation to the relevant private healthcare services being provided.
22. Article 10 enables the CMA to cancel a review if it considers that the arrangements concerned have been abandoned.
23. Article 11 requires the CMA, so far as is practicable, to consult a party before taking a review decision which is likely to be adverse to the interests of that party, and to publish (with reasons) any decision taken as to remedial action or the cancellation of a review.
24. Article 12 excludes from the scope of this part of the Order any arrangements which give rise to (or would if pursued give rise to) a relevant merger situation within the meaning of section 23 of the Act.

Part 3 (Referring Clinicians) – articles 13 to 19

25. Article 13 sets out the purpose of this part of the Order, which is to address the AEC which arises from private hospital operators operating schemes and conferring benefits which reward referring clinicians directly or indirectly for treating private patients at, or commissioning tests from, the facilities of the relevant private hospital operator.
26. Article 14 prohibits any scheme, arrangement or incentive which is intended to induce or may reasonably be regarded as inducing a referring clinician to refer private patients to, or treat private patients at, the facilities of a particular private hospital, and private hospital operators and referring clinicians each have a duty not to give or accept such incentives, or enter into such schemes. This part of the Order does not apply to any contract of employment, any arrangements made between clinicians and other parties (including other

clinicians, insurers and private healthcare providers) who are not private hospital operators or any payment to a referring clinician made from a package fee agreed between the relevant private hospital operator and a private patient or the medical insurer of that patient for a procedure.

27. Article 15 prohibits a private hospital operator from offering direct incentives to a referring clinician to give preference to the facilities of that private hospital operator when treating private patients or referring private patients for treatment or tests. Examples are given of such direct incentives.
28. Article 16 deals with higher-value services, and permits these so long as three conditions are satisfied. The conditions are: (a) the referring clinician must pay a price which reflects the fair market value for the relevant goods or services; (b) the relevant goods or services must be made available on a non-discriminatory basis and on equal terms to all clinicians with practising rights at the relevant private hospital; and (c) the goods and services so offered, and the amount charged, by the relevant private hospital must be disclosed on the hospital's website.
29. Article 17 provides that the prohibition in article 14 does not extend to low-value services, such as in-house training, basic workplace amenities, general marketing and general corporate hospitality which is proportionate and reasonable, and is not intended to be, and may not reasonably be regarded as, an inducement, if a description and (in the case of general corporate hospitality) the cost of providing all such low-value services being provided to referring clinicians is published on the relevant private hospital's website.
30. Article 18 prohibits a referring clinician from having, whether directly or indirectly, a share or financial interest in a private hospital; in diagnostic equipment or equipment used for treating patients; in a facility owned or operated by a private hospital operator (other than facilities used exclusively for the provision of primary healthcare services); or in any partnership or other arrangement or venture created for the purpose of offering private healthcare services. However, such arrangements are not prohibited if five conditions are satisfied.
31. The conditions are that the relevant referring clinician: (a) must make full payment at fair market value at the time of acquiring the relevant financial interest; (b) must not hold, directly or indirectly, more than 5% of the financial interest or of any class of shares or options over any class of shares; (c) must not have any obligation, express or implied, to refer patients for treatment or tests at the relevant private hospital; (d) must receive any dividend or profit share strictly pro rata to the share or financial interest they hold in the relevant private hospital or facility; and (e) must not have any obligation, express or

implied, which restricts him from providing healthcare services to private patients within a specified distance from the relevant private hospital or facility, or from having a share or financial interest in a competitor of the relevant private hospital operator.

32. Article 19 requires a private hospital operator to publish on the website of the relevant private hospital or facility details of all referring clinicians for the time being practising at that hospital who have a share or financial interest in that hospital or in equipment used in that hospital. Private hospital operators are also required to publish on the website of the relevant private hospital or facility, and to keep up to date, details of payments made to, and a summary of the duties performed by, any referring clinician who holds a position at or provides services to that hospital.

Part 4 (Information) – articles 20 to 25

33. Article 20 sets out the purpose of this part of the Order, which is to address the AEC which arises from the lack of publicly available information as to performance measures of private healthcare facilities and performance measures and fees of consultants providing privately-funded healthcare services. It requires all operators of private healthcare facilities to provide private patient episode data to the information organisation for publication, and consultants to provide fee information to patients, as well as to the information organisation.
34. Article 21 specifies the information which a private healthcare facility must provide to the information organisation, on a quarterly basis, as from a date no later than 1 September 2016. This duty does not apply to information concerning any outpatient activity. Operators of private healthcare facilities must contribute to the cost of publishing the information by paying an amount calculated by reference to the number of patients treated in the preceding calendar year.
35. Article 22 requires consultants to provide information about fees and standard terms and conditions to the information organisation and also to patients, using a standard template document, and specifies the information to be provided. Consultants are also required to provide certain specified information to patients prior to any outpatient consultation and any further tests or treatment.
36. Article 23 requires the information organisation, which will be responsible for publishing the performance measures of private healthcare facilities and performance measures and fees of consultants providing privately-funded

healthcare services, to be approved by the CMA and sets out certain requirements for the composition of the board of the information organisation.

37. Article 24 sets out the duties of the information organisation, which include submitting a five-year plan, which has been developed in conjunction with and approved by its members, for approval by the CMA, setting out how it proposes to collect the information specified in the Order and the basis on which it may licence access to this information. The organisation must offer membership to all private healthcare providers and private medical insurers, and to some bodies representing consultants, and must publish relevant information on its website including an annual report which sets out the progress it has made in fulfilling its five-year plan.
38. Article 25 sets out the duties of private medical insurers, including a duty to inform patients that helpful information as to consultants and private hospitals is available on the website of the information organisation.