

## Draft Private Healthcare Market Investigation Order 2014

### [MODIFIED DRAFT FOR CONSULTATION]

1. On 4 April 2012 the Office of Fair Trading made a reference to the Competition Commission (CC) under section 131 of the Enterprise Act 2002 (the Act) concerning the supply of privately-funded healthcare services in the UK.
2. On 2 April 2014 the successor body to the CC, the Competition and Markets Authority (CMA), published its report titled *Private Healthcare Market Investigation* (the report).
3. In the report, the CC concluded 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.
4. The CC indicated in its report that it intended that the CMA would implement some remedies by an order rather than by undertakings.
5. On 15 July 2014, in accordance with section 165 of, and paragraph 2(1)(a) of Schedule 10 to, the Act, the CMA published a Notice of its intention to make ~~this~~ Order as part of a package of remedies to remedy, mitigate or prevent the ~~AECs~~, which it had identified in the report.
6. On 8 September 2014, having considered the representations made in accordance with its Notice of 15 July 2014, and in accordance with section 165 of and paragraph 2(4) of Schedule 10 to the Act, the CMA gave notice of its intention to modify the Order.
7. The CMA has taken into account the representations, which it received in response to its further consultation, and now issues this Order.

## ORDER

The CMA makes this Order in performance of its duty under section 138, within the period permitted by section 138A of the Act, and in exercise of its powers under section 161 of, and Schedule 8 to, the Act and under sections 86 and 87 (as applied by section 164) of the Act.

### PART 1

#### General

#### 1. Title, commencement, application and scope

- 1.1 This Order may be cited as the Private Healthcare Market Investigation Order 2014 ~~and save for article 20 (information on consultant's fees) shall come into force on the commencement date.~~
- 1.2 Parts 1 and 2 come into force on the day this Order is made.
- 1.3 Article 2018 (equity participation schemes) shall come into force on the day this Order is made in respect of arrangements entered into on or after that date (new arrangements) and on 6 April 2015 in respect of arrangements entered into prior to the date of this Order (existing arrangements). The remainder of Part 3 comes into force on 6 April 2015.
- 1.4 Article 22 (information on consultants' fees) shall come into force at such time as the CMA will determine. The remainder of Part 4 comes into force on 6 April 2015.
- 1.35 This Order applies to any person providing, or entering into arrangements with persons providing, privately-funded healthcare services in England, Wales, Northern Ireland or Scotland.

#### 2. Interpretation

- 2.1 In this Order –

'Act' means the Enterprise Act 2002;

'AEC' means adverse effect on competition for the purposes of section 134(2) of the Act;

'CMA' means the Competition and Markets Authority;

**'commencement date'** means ~~6 April 2015~~ the date specified for the relevant provision in article 1.2, 1.3 or 1.4;

**'consultant'** means a registered medical practitioner who holds or has held or is qualified to hold an appointment as a consultant in the national health services in a speciality other than general practice or whose name is on the register of specialists kept by the General Medical Council;

**'EBITDA'** means earnings before interest, taxes, depreciation and amortisation;

**'fair market value'** 'national health service' means –

~~(a) in England, the case of listed securities, the closing mid-market price of the relevant securities on the day of the transfer;~~

~~(b) in the case of a non-transferable share option, the closing mid-market price of the underlying shares on the day when the share option is granted; and~~

~~(c) in the case of a share or interest not listed on a recognised exchange, either:~~

~~(i) the value of the relevant share or interest as at the date of transfer or, NHS; in Scotland, NHS Scotland; in Wales, NHS Wales; and in the case of an option, the date of grant, as estimated in good faith Northern Ireland, Health and using fair and reasonable assumptions and a recognised valuation methodology by an investment bank, accountancy firm or other person authorised for the purposes of the Financial Services and Markets Act 2000; or~~

~~(ii) the value of the relevant share or interest calculated as at the date of transfer, or in the case of an option, the date of grant, by reference to the valuation formula Social Care;~~

**'Notice'** means notice in writing;

**'outpatient-only facility'** means a facility which provides outpatient services, but does not provide inpatient or day case services;

**'outpatient'** means a private patient treated in a private hospital, consulting room or clinic, who is not admitted;

**'PPU'** means a private patient unit, which is a facility ~~operated by or on behalf of the public~~ within a national health service in England, Wales, Northern Ireland or Scotland providing medical care to private patients. Such units may

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~~be separate units dedicated to private patients or be facilities within a public health service site which are made available~~inpatient, day-case patient or outpatient privately-funded healthcare services to private patients ~~either on a dedicated or non-dedicated basis;~~

**'PPU arrangements'** means any arrangements ~~under which~~between a ~~public~~national health authority ~~engages~~service and a private hospital operator to operate, manage or otherwise provide privately-funded healthcare services at a PPU in England, Wales, Northern Ireland or Scotland;

**'private healthcare facility'** means any facility providing ~~medical treatments~~privately-funded healthcare services on an inpatient, day-case and/or outpatient basis ~~which charges fees for its services, and includes~~may include a PPU;

**'private healthcare provider'** means a person providing privately-funded healthcare;

**'private hospital'** means a facility which provides privately-funded inpatient hospital services, and may include a PPU;

**'private hospital operator'** means a person ~~who operates~~operating a facility providing ~~inpatient~~private hospital services including a PPU and charges fees for it ~~where relevant a national health service in relation to a PPU providing privately-funded inpatient healthcare services and for the avoidance of doubt includes all interconnected bodies corporate within the meaning of section 129(2) of the Act;~~

~~'private healthcare provider'~~ means a healthcare provider which charges fees for its **'privately funded'** means paid by individuals either directly or through private medical insurers or by any other means apart from the national health services;

~~'private patient'~~ means a patient who is charged for medical healthcare services either as a self-pay patient or as an insured patient;

**'recognised stock exchange'** means the London Stock Exchange and any stock exchange outside the UK which is designated for the time being as a recognised stock exchange by the Commissioners for Her Majesty's Revenue and Customs;

**'referring clinician'** means a healthcare professional who ~~is not employed~~has been granted practising privileges by a private hospital operator ~~but~~and/or has the rightability to refer patients for treatment or tests at a private hospital;

'valuation formula' means a formula which values a share or interest by reference to:

- (a) a reasonable multiple of the EBITDA of the relevant enterprise in the 12 months immediately prior to the transfer of the relevant share or interest, or the grant of the relevant option; or
- (b) a fair and reasonable projection of future cash flows of the relevant enterprise, discounted by using a fair and reasonable discount rate, as from the date of the accounts prepared immediately prior to the date of the transfer of the relevant share interest or the grant of the relevant option, but in any event as from a date not earlier than 12 months immediately prior to the date of transfer or grant;

'working day' means any day which is not a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom, a day appointed for public thanksgiving or mourning, or a Saturday, a Sunday, Good Friday or Christmas Day.

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2.2 Section 11 of the Interpretation Act 1978 applies to this Order except where words and expressions have been expressly defined.

### **3. Investigation powers**

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3.1 Section 174 of the Act shall apply to the enforcement functions of the CMA under this Order.

### **4. Directions**

4.1 The CMA may give directions falling within paragraph 2 of this article to:

- (a) a person specified in the directions; or
- (b) a holder for the time being of an office so specified in any body of persons corporate or unincorporate.

4.2 Directions fall within this paragraph if they are directions:

- (a) to take such actions as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order; or
- (b) to do, or refrain from doing, anything so specified or described which the person might be required by this Order to do or refrain from doing.

4.3 The CMA may vary or revoke any directions so given.

## PART 2

### PPU arrangements

#### **35. Purpose**

**35.1** The purpose of this part is to address 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 by giving the CMA power:

(a) to review PPU arrangements other than those which give rise to a relevant merger situation for the purposes of section 23 of the Act; and

(b) to take appropriate action, following such a review, where a private hospital operator facing weak competitive constraints in ~~its catchment~~ local area has entered into or intends to enter into PPU arrangements in the same area, ~~so that~~ and the arrangements result, or may be expected to result, in a substantial lessening of competition in the provision of privately-funded healthcare services in that area.

**35.2** The appropriate action which may be taken by the CMA includes prohibiting the making or performance of the arrangements and accepting undertakings from the parties concerned.

#### **46. Duty to provide information**

**46.1** The CMA may, by Notice to any person it reasonably considers to be a party to PPU arrangements, or proposing to enter into PPU arrangements, require ~~them~~ that person to supply to the CMA such information as the CMA may require for the purposes of this Order.

**46.2** Any person to whom a Notice is given under paragraph 1 of this article shall be under a duty to supply the information required save that no person shall be required to supply any information which he could not be compelled to supply in evidence in civil proceedings before the High Court in England and Wales, or Northern Ireland, or the Court of Session in Scotland.

**46.3** The Notice shall state –

(a) the information required;

(b) the period within which the information is to be provided; and

(c) the possible consequences, in accordance with section 167 of the Act, of not providing the information within the stated period and in the required manner.

~~46.4~~ A person may give notice to the CMA prior to entering into PPU arrangements of material facts concerning the proposed arrangements.

## **57. Review**

~~57.1~~ If the CMA reasonably believes that PPU arrangements have been created, or are in progress or contemplation and will be carried into effect, it shall ~~within a reasonable time decide~~ decide whether to conduct a review in accordance with article 7.2.

7.2 In a review under this article, the CMA shall within a reasonable time decide:

- (a) whether PPU arrangements have been created, or are in progress or contemplation and will be carried into effect;
- (b) whether those arrangements have resulted, or may be expected to result, in a substantial lessening of competition in the provision of privately-funded healthcare services in the relevant local area; and if so
- (c) whether it should take action for the purpose of remedying, mitigating or preventing the substantial lessening of competition or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition.

~~5-27.3~~ In deciding the questions mentioned in ~~paragraph 1 of this~~ article 7.2, the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant PPU arrangements concerned.

~~6.7.4~~ No review under this article shall be started more than four months after the day on which material facts about the relevant PPU arrangements were given to the CMA or were made public so as to be generally known or readily ascertainable.

## ~~8~~ **Investigation powers**

~~6.1~~ Section 174 of the Act shall apply to the enforcement functions of the CMA under this Order.

## **7. Relevant customer benefits**

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- 78.1** For the purposes of this part, a benefit is a relevant customer benefit if –
- (a) it is a benefit to customers or future customers in the form of –
    - (i) lower prices, higher quality or greater choice of private healthcare services in any market for private healthcare services in the UK (whether or not the market to which the substantial lessening of competition concerned has, or may have, occurred or may occur); or
    - (ii) greater innovation in relation to such services; and
  - (b) the CMA believes that –
    - (i) the benefit has accrued as a result of the creation of the PPU arrangements concerned or may be expected to accrue within a reasonable period as a result of those PPU arrangements; and
    - (ii) the benefit was, or is, unlikely to accrue without the creation of the relevant PPU arrangements concerned or a similar lessening of competition.

## **89. Remedial action**

**89.1** If the CMA decides that the relevant PPU arrangements have resulted, or may be expected to result, in a substantial lessening of competition and that it should take action in accordance with article 5-47.2 (c), it may take such remedial action under paragraph 2 of this article 9.2 as it considers to be reasonable and practical to remedy, mitigate or prevent the substantial lessening of competition, or any effect which has resulted from, or may be expected to result from, the substantial lessening of competition.

**89.2** Such remedial action ~~shall~~may include:

- (a) prohibiting the making or performance of the PPU arrangements;
- (b) requiring the parties to the PPU arrangements to terminate the arrangements;
- (c) requiring the parties to the PPU arrangements to do anything which the CMA considers appropriate to facilitate the provision of the relevant private healthcare services; and
- (d) accepting undertakings from such of the parties concerned as the CMA considers to be appropriate to take such action as it considers to be appropriate to remedy, mitigate or prevent the substantial lessening of

competition or any adverse effect of the substantial lessening of competition concerned.

#### ~~9.~~ 10. **Cancellation**

~~9~~10.1 The CMA shall cancel its review of any arrangements under article ~~57~~ if it considers that the arrangements concerned have been abandoned.

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#### ~~11.~~ 10. **Notices and consultation**

~~40~~11.1 The CMA shall, so far as is practicable, when proposing to make a decision on the questions mentioned in article ~~5-47.2~~ in a way which it considers likely to be adverse to the interests of ~~any~~ relevant party, consult that party before making that decision.

~~40~~11.2 The CMA shall publish, with its reasons, any decision taken under article ~~8-7 (review), article 9~~ (remedial action) or article ~~910~~ (cancellation).

#### ~~44~~12. **Exclusion**

~~44~~12.1 This part does not apply to arrangements to the extent to which they give rise to, or would if pursued give rise to, a relevant merger situation within the meaning of section 23 (relevant merger situations) of the Act.

### **Part 3**

#### **Referring clinicians**

#### ~~42~~13. **Purpose and general prohibition**

~~42~~13.1 The purpose of this remedy is to address the AEC which arises from private hospital operators operating schemes and conferring ~~significant benefits and inducements which reward referring clinicians~~ directly or indirectly ~~on a referring clinician in return for them giving preference to treating private patients at, or commissioning tests from,~~ the facilities of the relevant private hospital operator ~~when treating private patients or referring private patients for treatment or tests.~~

#### ~~42-2~~14. **General prohibition**

~~14~~.1 Any scheme ~~or arrangement,~~ whether legally enforceable or not, ~~inducement, gift or hospitality that or incentive, which is intended to induce or may affect the way~~ reasonably be regarded as inducing a referring clinician ~~prescribes for, treats or refers to refer~~ private patients ~~or commissions services for to, or~~

treat private patients at the facilities of a particular private hospital operator, is prohibited.

~~42.3~~42.4.2 Private hospital operators and referring clinicians each have a duty not to give or accept such ~~inducements~~incentives, not to enter into such schemes, and to terminate any such schemes as are already operating no later than the commencement of this Order.

~~42.4~~42.5.3 The prohibitions in this part apply notwithstanding that the relevant obligation or relevant financial or other advantage may have effect for a limited period of time, is made subject to specified exceptions, or includes an overriding obligation on the referring clinician always to act in the patient's best medical interests or to adhere to GMC accepted professional standards or guidelines ~~on good practice~~.

~~42.5~~42.6.4 For the avoidance of doubt, the prohibitions in this part of the Order do not apply to: any contract of employment ~~or~~; 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 insurers of that patient for a procedure.

### **43.15. Direct incentives**

~~43.15.1~~ A private hospital operator is prohibited from offering any direct incentive to, or creating an obligation on, a referring clinician ~~inducing or requiring him~~ to give preference to the facilities of that private hospital operator when treating private patients or referring private patients for treatment or tests.

~~43.15.2~~ A referring clinician is prohibited from requesting, agreeing to receive or accepting any direct ~~benefit~~incentive from, or any obligation from, a private hospital operator ~~inducing or requiring him~~ to give preference to the facilities of that private hospital operator when treating patients or referring patients for treatment or tests.

~~43.15.3~~ For the purposes of this article, the term direct incentive describes schemes or arrangements between private hospital operators and referring clinicians ~~which link, implicitly or explicitly, the value of the rewards provided to a referring clinician to the value of that individual clinician's conduct to the private hospital operator and includes~~ such as the following:

- (a) payments made to a referring clinician by reference to ~~each patient~~the number of patients he has referred ~~to~~, or ~~test~~tests he has commissioned ~~at, the facility or facilities of a particular private hospital operator;~~
- (b) payments made to a referring clinician by reference to ~~a share~~the proportion of the ~~revenue received from each patient he has~~clinician's private patients referred for tests or treatment ~~at the facility or facilities of a particular private hospital operator;~~
- (c) payment to a referring clinician ~~of a share~~, calculated by reference to the revenue received from the patients he has referred ~~to the facility or facilities of a particular private hospital operator~~, of the overall profits of the private hospital operator;
- (d) an allocation of shares in an equity participation scheme, the value of which allocation is based on the revenue received from private patients the relevant referring clinician has referred for tests or treatment ~~at the facility or facilities of a particular private hospital operator;~~
- (e) arrangements allowing a clinician to use services and facilities, including secretarial and administrative services, and consulting rooms, free or for a discounted charge, where the value of the benefit given is calculated by reference to the revenue received from private patients he has referred for treatment or tests ~~at the facility or facilities of a particular private hospital operator;~~
- (f) remuneration paid by a private hospital operator to a referring clinician under a contract for services, ~~other than~~which constitutes an inducement to refer private patients for treatment or tests at the facility or facilities of the relevant private hospital operator and is not remuneration which is reasonable and proportionate having regard to the nature of the services being supplied; and
- (g) any other arrangement which creates a direct link between the benefit conferred on a referring clinician by a private hospital operator and the revenue received by the private hospital operator from private patients the referring clinician has referred for treatment or tests ~~at the facility or facilities of a particular private hospital operator.~~

#### **4416. Higher-value services**

4416.1 If all the applicable conditions in ~~paragraph 2 of this~~ article 16.2 are satisfied, the general prohibition in article ~~42.214~~ does not apply to higher-value services provided by a private hospital operator to a referring clinician, of a type such as the following:

(a) secretarial and administrative services; ~~and~~

(b) the right to use consulting rooms; and

~~14(c)~~ contributions to professional indemnity insurance in respect of private patients.

**16.2** The conditions are:

(a) ~~The~~the relevant goods or services are charged to and paid by the relevant referring clinician at ~~full open~~fair market value; ~~;~~

(b) ~~The~~the relevant goods or services are made available on a non-discriminatory basis and on ~~equa~~equivalent terms to all clinicians with practising rights at the premises of the private hospital operator; ~~;~~ and

(c) ~~The~~the relevant goods or services offered to referring clinicians and the amount charged by the private hospital operator to referring clinicians in respect of each good and service concerned are published on the website relating to the relevant facility of the private hospital operator. (For the avoidance of doubt, this information should be published by reference to each good and service offered by the relevant facility, rather than by reference to each clinician.)

~~15~~16.3 For the purposes of this article the 'fair market value' of a service may be estimated by reference to the full cost including relevant allocated overheads to the private hospital operator of providing the relevant service, or if applicable a value estimated by reference to the cost of equivalent services in the same locality.

## **17. Low-value services**

~~15~~17.1 Subject to ~~paragraphs article 17.2 and 3 of this article~~17.3, the general prohibition in article ~~12.2~~14 does not apply to the following low-value services provided ~~by a private hospital operator to a referring clinician, of a type such as the following by a private hospital operator:~~

(a) general services provided to ensure clinical safety, including in-house training;

(b) basic workplace amenities, including free tea and coffee, subsidised meals provided on-site, stationery and, to the extent that they are available to staff and persons working at the facility generally and not just to a limited number of senior hospital executives, parking spaces;

- (c) general marketing, including production of consultant directories and general promotional events; and
- (d) general corporate hospitality, to the extent that it is proportionate and reasonable and is not provided by a private hospital operator with the intention of inducing, or may reasonably be regarded as inducing, a referring clinician to make referrals, or of rewarding them for having made referrals.

4517.2 Private hospital operators must disclose on the website relating to the relevant facility a description of any low-value service provided to a referring clinician of a type falling within (a) to (c), but need not disclose the cost of providing each such service or disclose the identity of the referring clinician concerned.

4517.3 Private hospital operators must disclose on the website relating to the relevant facility a description of, and the cost of providing, any specific events falling within (d) such as off-site conferences or annual dinners.

#### **4618. Equity participation schemes**

4618.1 Subject to ~~paragraph 2 of this article~~ 18.2 and 18.3, a referring clinician is prohibited from having, directly or indirectly, a share or financial interest in a private hospital or a facility owned or operated by a private hospital operator, in any partnership or other arrangement or venture created for the purpose of enabling a private hospital operator to offer private healthcare services, or in any diagnostic equipment or equipment used for treating patients.

4618.2 The prohibition in ~~paragraph 1 of this article~~ 18.1 does not apply to healthcare facilities used exclusively for the provision of primary healthcare services.

18.3 The prohibition in article 18.1 does not apply to arrangements if the following conditions are satisfied:

- (a) ~~The~~the relevant referring clinician must make full payment at fair market value at the time of acquiring the relevant financial interest or, in the case of a non-transferable option, at the time of exercising the option, and must exercise the option (or, if not exercised, the option must lapse) not more than 24 months from the date of grant of the option. ~~Any~~However, any funding for the purchase which is provided as a loan by the relevant private hospital operator and any payment which is deferred ~~is to be left out of account for the purposes of this condition. are not permitted;~~

- (b) ~~The~~ relevant referring clinician 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 and options in the equity in any private hospital or facility at which they hold practising rights or have power to commission tests, or in any arrangement to offer private healthcare services at that private hospital or facility;
- (c) ~~The~~ relevant referring clinician must not have any obligation, express or implied:
  - (i) to refer patients for treatment or tests at the relevant private hospital or facility;
  - (ii) to perform a minimum percentage of his private practice, or to perform healthcare services for a minimum period of time, at the relevant private hospital or facility; and
  - (iii) to use specified equipment at the relevant private hospital or facility for a specified period of time or in relation to a specified number of patients;
- (d) ~~Any~~ dividend or profit share made by the relevant private hospital operator to the relevant referring clinician must be made strictly pro rata to the share or financial interest he holds in the relevant private hospital or facility; ~~and~~
- (e) ~~The~~ relevant referring clinician must not have any obligation, express or implied, which restricts ~~them~~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, or which in any other like manner restricts ~~their conduct~~him from providing healthcare services as regards the relevant private hospital or facility, or ~~as regards~~ the relevant ~~operator~~competitor.

~~16.3~~18.4 The prohibition in ~~paragraph 1 of this~~ article 18.1 does not apply to arrangements made before 2-April 2014 if, ~~before the commencement of this Order~~, conditions (b), (c) ~~(d)~~ and ~~(e)~~ of ~~this~~ article 18.3 are satisfied.

~~16.4~~18.5 The exemption conditions in ~~paragraph 2 of this~~ article 18.3 apply to options which are non-transferable options, but do not apply to any other kind of option.

18.6 For the purposes of this article, 'fair market value' means –

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(a) in the case of securities listed on a recognised stock exchange, the closing mid-market price of the relevant securities on the day of the purchase;

(b) in the case of a non-transferable share option, the closing mid-market price of the underlying shares on the day when the share option is granted; and

(c) in the case of a share or interest not listed on a recognised ~~47~~stock exchange, either:

(i) the value of the relevant share or interest as at the date of purchase or, in the case of an option, the date of grant, as estimated in good faith on an objective, independent basis, and using fair and reasonable assumptions and a recognised valuation methodology by a reputable, competent and capable investment bank, accountancy firm or other person authorised for the purposes of the Financial Services and Markets Act 2000; or

(ii) the value of the relevant share or interest calculated as at the date of purchase, or in the case of an option, the date of grant, by reference to the valuation formula.

## **19. Publication on website**

~~47~~19.1 A private hospital operator must publish on the website of the relevant private hospital or facility details of all referring clinicians for the time being practising at that private hospital or facility who have a share or financial interest in that private hospital or facility, or in equipment used in that private hospital or facility.

~~46.2~~19.2 The details required to be published in accordance with ~~paragraph 1 of this article 19.1~~ are:

- (a) the names of the relevant clinicians;
- (b) the value in percentage terms of the share or financial interest held by the relevant clinician, ~~as calculated in accordance with article 16.2;~~ and
- (c) the methodology used in accordance with article ~~46.2~~18.6 to estimate the fair market value of the share or interest.

19.3 A private hospital operator must publish on the website of the relevant private hospital or facility 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 and must keep such information up to date.

## Part 4

### Information

#### **4820. Purpose and scope**

**4820.1** The purpose of this remedy is to address the AEC which arises from the lack of publicly available information as to:

- (a) performance measures of private healthcare facilities; and
- (b) performance measures and fees of consultants providing privately-funded healthcare services;

by requiring that all operators of private healthcare facilities in the UK provide private patient episode data for processing and publication by the information organisation approved in accordance with the provisions of this Part of the Order, and that consultants provide fee information to patients by letter or email, using a standard template, and also to the information organisation.

#### **4921. Information concerning performance**

**4921.1** Every operator of a private healthcare facility shall, subject to ~~paragraphs 3 and 5 of this article~~ article 21.3 and article 21.5, supply the information organisation, ~~on a regular basis~~ quarterly from a date no later than 1 September 2016, with information as regards every patient episode of all private patients treated at that facility, and data which is sufficiently detailed and complete to enable the information organisation to publish the following types of performance measures by procedure at both hospital and consultant level:

- (a) volumes of procedures undertaken;
- (b) average lengths of stay;
- (c) infection rates (with separate figures for surgical-acquired and facility-acquired infection rates);
- (d) readmission rates;
- (e) revision surgery rates;
- (f) mortality rates;

- (g) unplanned patient transfers (from either the private healthcare facility or PPU to ~~either a different private healthcare facility or PPU~~ of one of the national health services);
- (h) a measure, as agreed by the information organisation and its members, of patient feedback and/or satisfaction;
- (i) relevant information, as agreed by the information organisation and its members and, where available, from the clinical registries and ~~audits~~ audits;
- (j) procedure-specific measures of improvement in health outcomes, ~~to the extent indicated as agreed~~ by the information organisation and its members to be appropriate; and
- (k) frequency of adverse events, ~~to the extent indicated as agreed~~ by the information organisation and its members to be appropriate.

~~4921.2~~ Operators of private healthcare facilities shall, subject to ~~paragraph 3 of this article~~ 21.3, include in the information supplied to the information organisation in accordance with this article:

- (a) the General Medical Council reference number of the consultant responsible for each patient episode occurring in the relevant facility;
- (b) the National Health Service or equivalent patient identification number ~~for alternative information from which an NHS number may be derived~~, or a pseudonymised equivalent, or, in the case of patients from outside the UK, a suitable equivalent identifier, as determined by the information organisation;
- (c) appropriate diagnostic coding, using the International Statistical Classification of Diseases (ICD) or other internationally recognised standard, as determined by the board of the information organisation, including full details of patient co-morbidities, for each episode; and
- (d) appropriate procedure coding, using the OPCS Classification of Interventions and Procedures, or other internationally recognised standard, as determined by the board of the information organisation, for each episode.

~~4921.3~~ Any ~~disclosure or use~~ processing of information relating to a particular person ~~must only personal data shall~~ be made ~~if it is made in accordance with the consent of that person~~ Data Protection Act 1998.

~~4921.4~~ Operators of private healthcare facilities shall pay an amount, calculated by reference to the number of private patients admitted by each

relevant private hospital operator in the preceding calendar year, to cover the reasonable costs of the information organisation in processing this information into a format, which enables comparison of the data and is likely to be comprehensible to patients.

~~19~~21.5 The duty in ~~paragraph 1 of this article~~ 21.1 does not require ~~ana private hospital~~ operator to supply the information organisation with information concerning ~~any outpatient consultations and treatments provided by an outpatient-only facility~~ activity.

## **2022. Information concerning consultants supplied to the information organisation and to private patients**

2022.1 Consultants providing private healthcare services shall provide ~~on a regular basis~~ to the information organisation, from a date no later than 1 December 2016, the following information ~~to in accordance with a format provided by the information organisation~~ –and shall keep such information up to date:

(a) outpatient consultation fees, which may be expressed as either a fixed fee or an hourly rate; ~~and~~

(b) the standard procedure fee for ~~each type~~ the 50 types of procedure most frequently undertaken by the consultant; ~~and~~

~~20(c)~~ standard terms and conditions, plus any exclusions or caveats, expressed in a standard form as determined by the information organisation.

22.2 The operator of a private healthcare facility shall, from the date this article 2022 is brought into force, and as a condition of permitting a consultant to provide private healthcare services at that facility, require the relevant consultant to supply private patients with information in writing to be provided:

(a) prior to outpatient consultations, in accordance with ~~paragraphs 3 and 5 of this article~~ 22.3 and article 22.6; and

(b) prior to further tests or treatment, whether surgical, medical or otherwise, in accordance with ~~paragraphs article 22.4 and 5~~ article 22.6;

and shall provide the consultant with an appropriate template approved by the CMA for these purposes, in standard wording and in a clearly legible font.

2022.3 Consultants must supply the following information to a patient prior to an outpatient consultation:

- (a) the estimated cost of the outpatient consultation or consultations, which may be expressed as a range, so long as the factors which will determine the actual cost within the range are explained;
- (b) details of financial interests of any kind, which the consultant has in the medical facilities and equipment used at the premises;
- (c) a list of all insurers which recognise the consultant;
- (d) a statement that insured patients should check with their insurer the terms of their policy, with particular reference to the level and type of outpatient cover they have; and
- (e) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

20.2.4 The following information must be disclosed by a consultant to a patient prior to further tests or treatment, ~~other than tests or treatment given on the same day as the consultation:~~

- (a) ~~Confirmation of the reason for the relevant diagnosis, further tests or treatment;~~
- (b) ~~An~~ an estimate of the cumulative consultant cost of the treatment pathway which has been recommended. ~~In the case of an insured patient, this~~ This should either include all consultant fees that will be charged separately from the hospital fee, or should include contact details for any other consultants whose fees are not included in the quote. ~~For or, where applicable for~~ For or, where applicable for self-pay patients, ~~this should either be~~ this should either be the total package price for treatment, where the consultant has agreed this with the operator of the relevant private healthcare facility, ~~or the consultant only cost, where a package price has not been agreed.;~~
- (c) A ~~a~~ statement of any services which have not been included in the estimate, such as those resulting from unforeseeable complications. Where alternative treatments are available but the appropriate treatment can only be decided during surgery, the estimate should set out the relevant options and associated fees. ; ~~and~~

~~20.5~~ (d) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

22.5 For tests or treatment given on the same day as the consultation, the information specified in article 22.4 may be given orally rather than in writing.

22.6 Consultants shall supply patients with information in accordance with ~~paragraph article 22.3 of this article~~ at the same time as the outpatient consultation appointment is confirmed with the patient, and other than in case of emergency shall supply patients with information in accordance with paragraph 4 of this article either within ~~48 hours of the two working days following~~ the final (pre-treatment) outpatient consultation or prior to surgery, whichever is sooner.

~~20.622.7~~ The operators of a private healthcare facility shall ask every private admitted patient ~~attending these premises~~ to sign a form confirming that the relevant consultant provided the information required by this article, and shall take appropriate action if there is evidence that a consultant has failed to do so. Alternatively, private hospital operators shall take equivalent measures, as approved by the information organisation to monitor and enforce compliance of article 22.

### **2123. The information organisation**

2123.1 The CMA shall approve arrangements for establishing the information organisation and its governance for the purposes of this part of the Order in accordance with the provisions of this article.

2123.2 The board of the information organisation shall include:

- (a) two non-executive directors nominated by the CMA;
- (b) one non-executive director nominated by the board of the Association of the Independent Healthcare Organisations;
- (c) one non-executive director nominated by the ~~Health Committee of the Association of British Insurers;~~ private medical insurers collectively;
- (d) one non-executive director from an independent professional membership organisation of healthcare professionals; ~~and~~
- (e) two or more directors, whether executive or non-executive, with significant experience and expertise in the collection and processing of healthcare performance data.

### **2224. Duties of the information organisation**

2224.1 The information organisation shall prepare and submit to the CMA for approval a five-year plan, which has been developed in conjunction with, and approved by, its members, setting out how it proposes to collect the information specified in this Order and ~~comply with the data protection principles~~the basis on which it may licence access to this information in accordance with article 24.3.

2224.2 The information organisation shall offer membership to all private healthcare providers and private medical insurers and to some bodies representing consultants.

2224.3 The information organisation may seek subscriptions from its members in order to carry out the duties specified in this order, and may with the agreement of its members grant licensed access, which is in accordance with the Data Protection Act 1998, to its database ~~so long as no disclosure or use of information relating to a particular person is made without the consent of that person.~~

2224.4 The information organisation shall publish on its website:

- (a) its board minutes;
- (b) the five-year plan, as approved by the CMA;
- (c) a timeline for publication of the performance information specified in this Order;
- (d) details of its annual budget; and
- (e) an annual report, which sets out the progress made in fulfilling the five-year plan; explains any changes to the timetable or the nature of the information collected; and gives sufficient ~~audited~~ financial information to enable members to understand how their funds have been applied.

2224.5 The information organisation shall consult its members and may consult relevant experts on the methodologies it proposes to use to process its data and shall have its data sets and processing procedures ~~audited annually by an external auditor~~subject to periodic external independent accreditation, certification or audit.

2224.6 The information organisation shall publish performance information on its website, as specified by this Order, in stages during the three years following the publication of the report, and shall publish all such information no later than 30 April 2017.

2224.7 The information organisation shall ensure that the performance information which it publishes on its website is reviewed and updated, as necessary, no less than once every three months.

**2325. Duties of private medical insurers**

2325.1 Private medical insurers have a duty to inform patients that helpful information as to consultants and private hospitals is available on the website of the information organisation.

2325.2 Private medical insurers are accordingly required to include standard wording to this effect, as agreed with the information organisation, whenever informing a policyholder as to private healthcare providers and in communications sent to:

(a) any patient taking out or renewing a private medical insurance policy; and

(b) any patient seeking to obtain pre-authorisation for treatment.