

PRIVATE HEALTHCARE MARKET INVESTIGATION

Notice of intention to make an Order under section 165 of and Schedule 10 to the Enterprise Act 2002 and public consultation on the proposed Order

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 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.
4. 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) 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, gives rise to an AEC; and
 - (c) 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, gives rise to an AEC.

5. Section 138(2) of the Act requires the CMA within six months, beginning with the date on which it published the report, to take such action as it considers to be reasonable and practicable to remedy, mitigate or prevent the AEC concerned and any detrimental effects on customers resulting from the AEC.
6. Applications have been made to the Competition Appeal Tribunal (CAT) for a review of some of the decisions in the report (the proceedings). These applications have been made by:
 - (a) HCA International Limited (HCA), seeking an order that the CMA's finding of AECs in relation to HCA's hospitals and its decision to require divestiture should be quashed and remitted to the CMA;
 - (b) AXA PPP Healthcare Limited, seeking an order that those passages of the report which address the scope of the remedies required to address the AEC in relation to HCA's position in oncology in central London and/or the inapplicability of the PPU review remedy to the PPU at Guy's and St Thomas' NHS Healthcare Trust, and those passages of the report which address the assessment of anaesthetist consultant groups, should be quashed and remitted to the CMA for reconsideration; and
 - (c) the Federation of Independent Practitioner Organisations, 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.
7. On 25 June 2014, the CAT made an order that the decisions of the CMA finding an AEC in relation to HCA's hospitals, and requiring HCA to divest itself of either the London Bridge Hospital together with the Princess Grace Hospital, or else the Wellington Hospital together with the Wellington Hospital Platinum Medical Centre, be suspended and have no effect until:
 - (a) the expiry of the time limit for appealing the final determination of the main application; or
 - (b) the expiry of any further order of the CAT or any appellate court continuing such suspension.
8. The CMA will not bring article 22 (Information concerning consultants' fees) into force until the proceedings have been finally determined, and considers that

none of the remedies which it now intends to implement by this order is within the scope of the proceedings.

9. The CMA indicated in its report that it intended that the CMA would implement some remedies by an order rather than by undertakings.
10. On 15 July 2014 the CMA gave notice of its intention to make an Order, and invited representations on the draft Order. In light of the representations received the CMA has modified the Order and now invites written representations on the modified draft Order from any interested person or persons.
11. This notice and the modified draft Order, together with an explanatory memorandum and a response to the consultation document, have been published on the CMA website.
12. In accordance with paragraph 2(5)(c) of Schedule 10 to the Act, which requires that consultation extends for a period of not less than seven days from the date of publication of this notice, representations should reach the CMA by 5pm on 17 September 2014.
13. Comments on this modified draft Order should be made by email to private-healthcare@cma.gsi.gov.uk or in writing to the Project Manager, Private Healthcare Market Investigation, Competition and Markets Authority, Victoria House, Southampton Row, London WC1B 4AD.

(signed) ROGER WITCOMB

Group Chair

8 September 2014