

DRAFT PRIVATE HEALTHCARE MARKET INVESTIGATION ORDER 2014

Responses to consultations

Introduction

1. The Competition and Markets Authority (CMA) received 15 responses to its July 2014 consultation on the draft Private Healthcare Market Investigation Order, and 11 responses to its September 2014 consultation on the modified draft Order. 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.

General

2. Some parties suggested that as the report had indicated an intention for the CMA to review some of the remedies (paragraph 80 – Incentives to Referring Clinicians remedy; paragraph 83 – Information remedy), a provision to this effect should have been included in the Order. However, we considered that, as section 162 of the Act already imposes a duty on the CMA to keep under review the carrying out of the Order, and to consider from time to time whether the Order should be varied or revoked in the light of a change of circumstances, it was not necessary to duplicate this by a provision in the Order.

Article 1 – Commencement

3. 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.

4. The remedy in article 18 as to referring clinicians directly or indirectly becoming party to 'new' equity participation schemes (ie those entered into on or after 2 April 2014 – the date of the report) will also come into force on the day the Order is made. Equity participation schemes made prior to 2 April 2014, 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.
5. 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 2 – Interpretation

6. Some parties drew attention to the fact that PPUs were at present only found in England, and that the definition of PPU in the draft Order was not identical to that in the report. We agreed that the definition of PPU should correspond more closely to the definition in the report and made the relevant changes, but we considered that the report had taken into account the fact that at present PPUs are only found in England.

Article 4 – Directions

7. 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 – PPU reviews

8. Some parties suggested that the PPU review remedy should closely follow merger control law and procedure. Thus they suggested that the CMA should decide whether to refer PPU arrangements to a CMA Group for detailed (2nd stage) review, or accept undertakings in lieu of a reference; that the reviews should have fixed time limits; and so on.
9. We considered that the report did not envisage such an approach. The remedy is being made under Part 4 (Market Studies and Market Investigations), not Part 3 (Mergers), of the Act. Paragraph 11.304 of the report states that the remedy is directed specifically at PPU arrangements which are structured in such a way that they do not constitute a merger.

Although the competition test that is to be applied in such a review resembles the substantial lessening of competition test used in merger control, there may be differences in its application.

10. Paragraph 11.317 of the report states expressly that the PPU review decision would be taken in all cases without a stage 2 reference being made, and that there would be no 'safe harbour' or 'de minimis' exception. The report does foresee that in some cases undertakings may be accepted as a condition of giving clearance, and that 'relevant customer benefits' (as defined by section 134(8) of the Act) can be taken into account, so both of these have been included in the Order.
11. As regards time limits, some parties were concerned that the Order as originally drafted did not have a time limit (which is comparable to section 24(1) of the Act as regards mergers) for commencing a review, and that 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. We agreed and added 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.
12. Other parties suggested that a PPU review should itself be subject to a time limit. However, we noted that the report had considered this in paragraph 11.330 and had decided that PPU reviews should not be subject to a specified time limit.
13. One party suggested that the reference in article 7.2(b) of the Order to 'relevant local area' should be changed to 'relevant geographic area' so that this would enable a review to consider regional and national issues. We did not agree, noting that the report states that the purpose of the remedy is to address barriers to entry by restricting a private hospital operator facing weak competitive constraints in a local area from acquiring the right to manage a local PPU in the same local area.

Article 14 – General prohibition on inducements

14. Some parties considered that it was unclear, for the purposes of article 14.4 of the Order, 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.

15. One party was concerned that the general prohibition on incentives which were intended to induce a referring clinician to refer private patients to, or treat private patients at, a particular private hospital would apply to all healthcare professionals with practising privileges, whether or not they had the ability to refer patients. We did not agree, as we considered that the definition of 'referring clinician' in article 2.1 clearly covers two possibilities – (a) a healthcare professional who has been granted practising privileges and has the ability to refer patients for treatment or tests at a private hospital; or (b) a healthcare professional who has the ability to refer patients for treatment or tests at a private hospital. The definition does not include a healthcare professional who lacks the ability to refer patients for treatment or tests at a private hospital.
16. One party was concerned that the effect of providing in article 14.4 that arrangements between clinicians and parties other than private hospital operators would not be subject to Part 3 of the Order (Referring clinicians) was that arrangements between clinicians and healthcare operators who do not admit inpatients (such as diagnostic and testing facilities) would not be caught. We agree that this will be the case, but we consider that this corresponds to paragraph 11.433 of the report, which expressly states that the remedy should not extend to any arrangements which involve only clinicians, or are made between clinicians and parties other than private hospital operators.

Article 16 – Higher-value services

17. 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 were added to article 16 of the original draft of the Order. (A separate description of 'fair market value', as regards securities and options, is given in article 18.6.)

Article 18 – Equity participation schemes

18. One party considered that the Order should not prevent consultants having a stake in a private hospital where they had practising privileges, so long as they did not refer patients to that hospital. We consider that the Order does not necessarily have this effect. The Order places conditions on a referring clinician having an equity stake in a private hospital. In particular, the equity stake must not be linked to a requirement on that referring clinician, whether express or implied, to refer patients to that private hospital. This corresponds to paragraph 11.481 of the report.

19. One party was concerned that the prohibition would apply where a referring clinician had a share in equipment used in a private hospital even if the private hospital owner did not have a share in that equipment, and we agreed to add some words to exclude the prohibition in such circumstances.
20. One party considered that in article 18.1 it was not clear whether the term 'indirectly' covered interests held by family members or a trust (reflecting paragraph 11.466 of the report), so we have added some words to make this clear, and have added a definition of 'immediate family'.
21. 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.
22. One party considered that the prohibition should not apply to arrangements between private hospital operators and referring clinicians as regards very small facilities (eg clinics founded and run by fewer than five to ten consultants). In considering this point we took into account that the aim of this remedy is to ensure that competition between private hospital operators for patients is carried out on the basis of the quality and price of the healthcare services they offer rather than the value of benefits and inducements paid by hospital operators to clinicians to encourage referrals. Arrangements as regards small facilities would not be prohibited outright, but would be subject to the same conditions that apply to other equity participation schemes.
23. We noted that in the case of benefits provided to clinicians such as free or discounted consulting rooms and secretarial services, we had not made any exception for new consultants, on the basis that the fact that such consultants were only starting on their career did not change the potentially distortive effect on referral behaviour of such an inducement (paragraph 11.477 of the report). In the same way, we considered that the potentially distortive effect on referral behaviour of having an equity share in a clinic would apply even where the clinic was small, and that there was no basis for giving an exemption to such arrangements.
24. Parties pointed out that the list of conditions in article 18.3, which gave 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

25. One party was concerned that private hospitals may use a valuation formula which enables them to use a valuation formula for article 18 purposes which is an undervaluation. We have therefore required private hospitals to publish on their website both the methodology used to estimate the fair market value of shares or interests for the purposes of article 18.6 and, where the methodology involves the use of a formula, to publish also the relevant formula.
26. 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.
27. The drafting of article 19.3 has been changed to make it clear that the obligation on private hospitals to publish details of duties and payments applies only when a referring clinician has both practising rights at a private hospital and a part-time job at the same private hospital. It is not intended to require private hospitals to publish details of duties of, and payments made to, all clinicians with practising privileges at the relevant hospital.

Article 21 – Information concerning performance

28. 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.
29. 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

30. 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

31. 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.