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, gave rise to an AEC;

   (b) private hospital operators operating schemes and conferring significant benefits and inducements directly or indirectly on a referring clinician, in return for him giving preference to the facilities of the relevant private hospital operator when treating private patients or referring private patients for treatment or tests, gave rise to an AEC; 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, gave 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 power of private medical insurers to constrain consultants' fees and control consumer choice did not give rise to any AEC, should be quashed and remitted to the CMA for reconsideration.

6. For this reason, article 20 (information on consultants' fees) will not come into force with the remainder of the Order on 5 April 2015, and the CMA will take a decision concerning this article 20 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).

Part 1 (General) – articles 1 and 2

8. Article 1 (title, commencement and scope) provides that the order (save for article 20) will come into force on 5 April 2015, and will apply to privately-funded healthcare services in England, Wales, Northern Ireland or Scotland. Article 20 (information on consultants' fees) will not come into force, pending the final outcome of the proceedings.

9. Article 2 (interpretation) includes some terms which were not used in the report. In particular, the term 'referring clinician' is used to mean a healthcare professional who is not employed by a private hospital operator, but has the right to refer patients for treatment or tests at a private hospital..

Part 2 (PPU arrangements) – articles 3 to 11

10. Article 3 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 its catchment area, acquires, or intends to acquire, the right to carry on PPU arrangements in the same area, so that the arrangements will, or may, result in a substantial lessening of competition in the provision of privately-funded healthcare services in that area.

11. Article 4 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.

12. Article 5 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.

13. Article 6 applies the investigation powers given for permitted purposes (including enforcement functions) by section 174 of the Enterprise Act 2002 (the Act).

14. Article 7 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.

15. Article 8 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.

16. Article 9 enables the CMA to cancel a review if it considers that the arrangements concerned have been abandoned.

17. Article 10 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.

18. Article 11 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 12 to 17

19. Article 12 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 significant benefits and inducements directly or indirectly on a referring clinician as these may affect the way a referring clinician prescribes for, treats or refers private patients or commissions services for private

patients at the facilities of the relevant private hospital operator. For these purposes a ‘referring clinician’ means a healthcare professional who is not employed by a private hospital operator, but has the right to refer patients for treatment or tests at a private hospital, and private hospital operators and referring clinicians each have a duty not to give or accept such inducements, or enter into such schemes. This part of the Order does not apply to any contract of employment, or any arrangements made between clinicians and parties (including other clinicians, insurers and private healthcare providers) who are not private hospital operators.

20. Article 13 prohibits a private hospital operator from offering direct incentives inducing 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. The term direct incentive describes schemes or arrangements between private hospital operators and clinicians which link, implicitly or explicitly, the value of the rewards provided to a clinician to the value of that individual clinician’s conduct to the private hospital operator, and examples of such arrangements are given.

21. Article 14 deals with higher-value services, and permits these so long as four conditions are satisfied. The conditions are: *(a)* the referring clinician must pay the open 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; *(c)* the goods and services so offered by the relevant private hospital must be disclosed on the hospital’s website; and *(d)* a private hospital must publish on its website details of all referring clinicians practising at that hospital who have a share or financial interest in that hospital or in equipment used in that hospital.

22. Article 15 provides that the prohibition 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 an inducement, if a description and the cost of providing all such low-value services being provided to referring clinicians is published on the relevant private hospital’s website.

23. Article 16 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; 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.

24. 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 them from providing healthcare services to 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.

25. Article 17 requires a private hospital operator to publish on the website of the relevant private hospital or facility details of all referring clinicians practising at that hospital who have a share or financial interest in that hospital or in equipment used in that hospital.

Part 4 (Information) – articles 18 to 23

26. Article 18 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 patient episode data to the information organisation for publication, and consultants to provide fee information to patients, as well as to the information organisation.

27. Article 19 specifies the information which a private healthcare facility must provide to the information organisation, on a regular basis, as from a date no later than 1 September 2016, so long as any disclosure or use of information relating to an individual patient is only made with the consent of that person. 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.

28. Article 20 will require consultants to provide fee information both to the information organisation and also to patients, using a standard template document, and specifies the information to be provided.

29. Article 21 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 essential members of the board.

30. Article 22 sets out the duties of the information organisation, which include submitting a five-year plan, which has been approved by its members, for approval by the CMA including how it intends to comply with the data protection principles. 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.

31. Article 23 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.