

# A thorough examination for the private healthcare sector

On 4 April 2012, the Office of Fair Trading (OFT) decided to refer the markets for the supply and acquisition of private healthcare in the UK to the Competition Commission (CC) for an in-depth market investigation.



## Testing times

**Market investigation references can be expensive and time consuming for those involved.**

The CC's terms of reference are wide, but it is likely to focus on the issues identified by the OFT, including:

- the lack of information allowing quality comparisons between different private healthcare providers;
- high concentration levels of providers, particularly in local geographic markets;

- barriers to entry, such as difficulties for new private healthcare providers in getting recognised by main insurers, and incentives payments paid by providers to consultants and GPs;
- insufficient warnings for insurance patients of the possibility of facing shortfall prices, where services exceed the level of their policy cover; and
- the prevalence of anaesthetists forming local groups with common fee levels.

While the CC has two years to get to grips with the issues, a key challenge will be to predict accurately the impact

## Key issues

- Why has the OFT decided that the private healthcare sector should be scrutinised?
- What are the issues that the CC is likely to consider?
- How long will the investigation take?
- How will market developments – such as those flowing from the new Health and Social Care Act – be taken into account?

of a number of important ongoing market developments and, in particular, those that will flow from the recently enacted Health and Social Care Act 2012.

## Background

The Circle Partnership, a new private healthcare provider, made a formal complaint to the OFT in September 2010. The complaint alleged that network agreements between national private healthcare providers and private medical insurance providers are anticompetitive and create barriers to new entrants. In response to this and several other complaints that the OFT had received in recent years from a range of interested stakeholders, the OFT launched a

study of the sector in March 2011 and published a consultation document of its findings the following December. The scope of the study included not only the barriers to entry in the market, but the nature of competition in the provision of private healthcare, the levels of concentration across providers, the potential constraints on the ability of consultants and other medical professionals to practice and constraints on consumers in relation to how they access and assess information and how they exercise choice in the provision of private healthcare. As a result of the study, the OFT has concluded that there are a number of features, individually or in combination, which restrict or distort competition in this market, and which could be appropriately remedied by the CC, assuming it identifies similar concerns.

### Why is this market considered important?

The total value of the private healthcare market in the UK in 2010 was approximately £5 billion and the market is likely to be of growing importance to the country's economy, given an expanding and ageing UK population. In addition, private providers will be increasingly relevant to the delivery of NHS services following the passage of the Health and Social Care Act.

### The OFT's conclusions

The OFT suspects that there are a number of features of the market that, individually or in combination, prevent, restrict or distort competition. In its view, these factors result in reduced choice for patients and may also reduce competition between private healthcare providers and between consultants by impairing the ability of the patients, consumers, GPs and private medical insurance providers to

## The Health and Social Care Act 2012

The CC's investigation of the private healthcare market comes against a backdrop of wider healthcare market developments. The Health and Social Care Act 2012 gained royal assent on 27 March 2012 and introduced a number of radical changes to the NHS, including competition reforms. Under the Act, the independent regulator for NHS Foundation Trusts, Monitor, is accorded concurrent powers with the OFT to investigate suspected breaches of competition law in the healthcare sector – i.e., the prohibitions on anticompetitive agreements and abuse of dominance under the Competition Act 1998 – and to refer healthcare markets for investigation by the Competition Commission under the Enterprise Act 2002. In addition, the Act gives Monitor specific powers in relation to procurement issues and extends normal merger control rules to cover mergers, acquisitions and joint ventures involving NHS foundation trusts.

For private providers, the new Act creates risks as well as possibilities. Plans for increased public and private cooperation are likely to create more commercial opportunities for the provision of public healthcare. However, the Act also abolishes the cap on the proportion of revenues that NHS Foundation Trusts may earn from private patients, meaning that private providers could face new competition from the NHS in the private healthcare sector.

choose between competing service providers on the basis of superior quality and better value for money.

The potentially problematic factors highlighted by the OFT market study are as follows.

#### Information asymmetries

The OFT found there to be a shortage of accessible, standardised and comparable information provided to patients and their advisors in relation to the quality of private healthcare services. In addition, information relating to pricing, in particular in relation to the risk of shortfall payments for private medical insurance holders, was considered difficult to access and assess. In the OFT's view, this lack of transparency weakens the ability of patients and GPs to stimulate competition between different providers and, through that, to increase their efficiency. Furthermore, confusion over pricing

may be preventing the development of more flexible methods by which private medical insurers may control consultant costs and allow patients to choose whether to pay a top-up fee for certain providers on the basis of their quality.

#### Concentration

At a local level, the OFT found that there are areas where there is only one private healthcare provider within a thirty minute drive-time. To the OFT, this suggests that there may be limited competition to attract patients, given their desire to be treated locally.

Purchasing of providers' services is concentrated at the national level. Large private medical insurers have buyer power due to the fact that providers are reliant upon inclusion in the insurers' networks. However, this buyer power may be constrained by the need to purchase services in most local markets and the fact that

exclusion of certain private healthcare services may lead to reputational problems.

The OFT noted that the development of partnerships between private patient units of NHS/Foundation Trusts and private healthcare providers could either promote or dampen competition in the sector. On one hand, local market concentration may increase as the competitive restraint acting on the private provider might lessen and choice for patients and private medical insurers may decrease. However, on the other hand, a partnership agreement has the potential to provide a platform for entry and therefore to increase competition.

### Barriers to entry

The OFT considers that there are significant barriers to entry to the private healthcare market. These include:

- requirements that are imposed by some private providers on private medical insurers as a condition of being part of their networks. For example, some insurers were found to be under obligations to consult current network members before a new entrant can be recognised, or to pay higher prices should a new entrant be included in the network;
- the need for new entrants to be recognised by all of the main insurers in order to attract a sufficient number of consultants to practice at their facility;
- incentives paid by private healthcare providers to consultants to encourage them to treat patients at their facility, and those offered by providers to GPs to encourage referrals to them; and

- the shortage of information on comparative quality of care, which makes it difficult for a new private healthcare provider to establish a reputation for quality.

### Anaesthetist Groups

The OFT identified a particular concern that anaesthetists often form groups with common fee levels, which may reduce price competition in local markets.

### OFT recommendations

In addition to making a reference to the CC, the OFT report made two separate recommendations to address issues that it identified during the market study.

- First, that insurers act to ensure that shortfall payments (required when a patient's insurance policy does not cover the full cost of treatment) do not come as an unwelcome surprise. The Association of British Insurers has confirmed that private medical insurers will either cover the full cost of treatment or will make clear the possibility of a shortfall payment both at the point of sale and at the time at which the patient makes a claim under their policy.
- Second, the OFT has recommended that, when seeking to agree partnership arrangements concerning private patient units, NHS Foundation Trusts should consider whether private patient units may be at a potential competitive advantage due to implicit non-market benefits that they could receive from the connection. In particular, the OFT suggests that both the NHS private patient unit and the private provider should pay a "market-consistent" rate of return

on assets used for the relevant activities.

### Comment

Market investigations are expensive and time-consuming for those involved. The Competition Commission's deadline for reporting its conclusions is April 2014. By then, it and the OFT will have become subsumed into a single Competition and Markets Authority, further to recently announced reforms. More importantly, the private healthcare market may have changed significantly by that time.

Market investigations always face a risk that the markets in question move too quickly for the regulator to pin down the issues of future importance, and to identify remedies that are both productive and without unintended consequences for consumers. That risk is particularly acute here, however. The Health and Social Care Act 2012 – see the box on the previous page – will bring substantial changes for public and private healthcare providers alike, and it will be a challenge for the Competition Commission to predict how those changes will impact on competition on the private healthcare sector.

Take, for instance, the removal of the cap on the proportion of revenues that NHS Foundation Trusts may earn from private patients. The OFT cites an impact assessment carried out by the Department of Health which found that most Foundation Trusts currently operate at a level significantly below their cap, suggesting that they may not be expected to make substantial use of the new opportunities to expand their private sector activities.

That of course ignores the possibility that it was the cap itself that made investments in offering private

services unattractive, such that its removal might spur a large expansion of competition from NHS Foundation Trusts. Given their size, resources and potential competitive advantages that would fundamentally change the structure of competition in the private healthcare market. But if that is what the future holds, will there be enough evidence of that by the time the Competition Commission prepares its final report?

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