

A tale of nine hospitals

The UK Competition Commission is trying to increase competition in the private healthcare market

by Gillian Sproul*

On 16 January 2014, the Competition Commission proposed the sale of nine UK private hospitals, including London Bridge and Princess Grace, with a view to increasing competition in Britain's £5bn private healthcare industry. Competition Commission panel chair Roger Witcomb announced the proposal, saying that "many private hospitals face little competition" leading to "higher prices for insured patients".

The Competition Commission's January proposal is a provisional decision on the appropriate remedy for the competition problems it has found in the market. However, it would be unusual for its final decision to depart materially from the provisional decision. That final report is likely to be issued before 1 April 2014, because the Competition Commission's market investigation powers and its existing portfolio of cases will be transferred to the new Competition and Markets Authority (CMA) on that date and the Competition Commission will then cease to exist.

In-depth investigation

The proposal is the outcome of the Competition Commission's in-depth investigation into the private healthcare industry over nearly two years. In its provisional findings report of August 2013, it supported the concerns identified by the Office of Fair Trading when it referred the market for investigation by the Competition Commission on 4 April 2012. (The Office of Fair Trading will also cease to exist on 1 April.) The Competition Commission's findings are that competition in privately-funded healthcare services is adversely affected by:

- weak competition faced by private hospitals in many local areas, leading to higher private medical insurance premiums and charges for private patients;
- high barriers to new players entering the market, and existing players expanding their offering, owing to the high capital costs of setting up a private hospital, the likely response from existing operators and the current flat demand for private health services – these barriers also push up premiums and charges;
- incentive schemes encouraging consultants to choose particular providers for diagnosis and treatment;
- a lack of available information for patients (and GPs) on the performance of hospitals and consultants; and
- a lack of transparency in relation to the full costs of treatment for private patients.

Proposed remedies

The detailed proposal for remedying these competition concerns, if confirmed in the Competition Commission's final

report, will be implemented by the new CMA and is as follows:

- Divestiture of nine private hospitals – HCA must sell two hospitals in central London and BMI must sell seven hospitals in Greater/Outer London, the Home Counties and the north-west of England.
- Any purchaser of these hospitals will need to be approved in advance as a suitable purchaser, which will include demonstrating to the regulator's satisfaction, in writing and at a hearing, that it has the appropriate financial resources, commitment and expertise.
- The CMA will review any proposal by a private operator to enter into an agreement to operate a private patient unit (PPU) in an NHS hospital in a local area where it faces little competition.
- Incentive schemes provided by private hospitals to clinicians to encourage patient referrals to their facilities or for particular treatments or tests will be prohibited or restricted.
- Information on the performance of private hospitals and individual consultants must be published and patients must be provided with consultant fee information.

The divestiture proposals are the most severe of these remedies, prompting resistance from the industry. If they are carried through, HCA, the world's largest private hospitals group, will have to sell two major London hospitals – the London Bridge and Princess Grace. BMI, which has 66 UK hospitals, will have to sell seven major hospitals outside central London, including either the Bishops Wood or the Clementine Churchill hospital in north-west London and either Cavell or Kings Oak in north London. It is worth noting that the proposal is a significant retreat from the Competition Commission's August 2013 indication that it might require BMI, HCA and Spire Healthcare to sell off a total of 20 hospitals – although perhaps cold comfort to HCA and BMI, who still have to divest.

Private patient units

The Competition Commission also proposes to require proposed transactions between NHS trusts and private hospital operators for the operation of a private patient unit to be reviewed on a case-by-case basis, either under the UK merger rules or under similar competition-related criteria to be set out in an order. This may impact on NHS hospitals such as UCLH and St Mary's, whose Lindo Wing saw the birth of Prince George last year. There are currently 83 National Health Service hospitals with private wings, but as the Health and Social Care

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Act 2012 has removed the limit on the volume of private profits earned by NHS trusts, the expectation is that there should be an increase in PPUs. This ruling is interesting, as PPUs are a lower-risk means of entering or expanding in the market, and the reason for this level of control is to ensure that PPU transactions do not concentrate market power in a local area in any one operator's hands.

Looking ahead

The Competition Commission has clearly wanted to come up with a range of remedies that will drive competition in

the market going forward, while delivering the best results for consumers. However, the Commission's proposals have not been uncontroversial.

The consultation on the proposals has now ended, and the next step is the Competition Commission's final decision. It remains to be seen whether the final remedies that the Competition Commission proposes remain the same as proposed – although it would be unusual if they were not at least broadly the same. It also remains to be seen whether the final remedies are challenged in the UK Competition Appeal Tribunal and, if so, on what grounds.