

Client Alert

Antitrust Practice Group

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The UK's Private Healthcare Market is Under the Competition Spotlight

The market for privately funded healthcare services in the UK has been referred to the UK's Competition Commission (CC) for investigation. The Office of Fair Trading (OFT) (the UK's competition regulator) suspects that competition for private healthcare is prevented, restricted or distorted. The CC will investigate whether the OFT's concerns are well-founded.

UK Healthcare

The UK has a National Health Service (NHS) funded through general taxation that provides a comprehensive range of free healthcare services to UK residents.

Patients can also privately fund their medical treatment or receive private cover for free through a private medical insurance policy (usually provided by their employer to encourage them to spend less time off sick). Private cover can be convenient, since waiting times are usually shorter, appointments are tailored to the individual, and there is a choice of consultant. Yet the OFT raises concerns that patients and doctors are found to be struggling to choose between competing service providers: there is, according to the OFT, an apparent lack of comparable information on prices, quality of service, and value for money of different private healthcare service providers.

Why the Scrutiny?

The OFT appreciates the growing impact of the private healthcare sector on the UK population and the economy. The private healthcare market was valued at £5 billion in 2009¹ and is expected to grow in line with an ageing UK population and a consequent growth in the demand for healthcare provision. The OFT wants to ensure that the market works well. Yet it is concerned that private patients and their GPs face difficulties selecting private healthcare providers.

The OFT published a report following its private healthcare market study in December 2011, examining competition and consumer issues affecting the private healthcare market. It concluded with a provisional decision to refer the market to the CC for further investigation. A public consultation was held in January 2012. In light of the report and the public submissions, the OFT has confirmed its initial decision that the private healthcare market

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could work better for patients and has thus referred it to the CC for further investigation.

OFT Findings

The OFT's report found a number of features that, individually or in combination, allegedly prevent, restrict or distort competition in the UK private healthcare market. Key findings according to the OFT include:

- Barriers to entry for new private healthcare providers. For example, some larger private healthcare providers can impose price increases or set other conditions if an insurer proposes to recognise a new entrant on its network. Also, there are incentives given by private healthcare providers to consultants, such as loyalty payments for treating patients at a particular facility, which could raise those barriers further.
- Lack of easily comparable information available to patients, GPs or health insurance providers. Competition between private healthcare providers and between consultants may be able to be more effective if this is addressed. Also, treatment costs are not always transparent for private patients.
- There are only a few significant market players. Also, there is a limited number of larger health insurance providers at a national level. Some larger insurance providers generally rely on local hospitals owned by private providers to be able to provide full national coverage to policyholders. This may give a degree of market power to healthcare providers in these areas.

Recommendations for Health Insurance Providers

The OFT made a recommendation in response to consumer concerns of the level of extra payments sought from some consultants that are not covered under their private medical insurance policies (shortfall payments). The OFT has engaged private medical insurers, the Financial Services Authority (the UK financial services sector), and the lobbying organisation for the insurance industry (ABI) to seek to ensure that insurance providers make clear to patients the possibility of a shortfall payment.

Potential Outcomes

The CC will perform an independent investigation to decide whether competition is in fact prevented, restricted or distorted and, if it finds this to be the case, it will consider and decide what remedies are available. Since the OFT has developed an understanding of the private healthcare market, it has given some consideration in its report to potential remedies the CC may consider to address any adverse effects the CC might identify. Suggestions from the OFT include:

- A commitment by private healthcare providers to publish clear, accessible and comparable quality information.
- The development of a 'choice-tool' for private patients by which self-pay prices could be better compared between rival facilities.
- A recommendation to NHS Trusts or the Department of Health that certain partnership arrangements should not be undertaken with a private healthcare provider that has more than a certain share of the local market, or be subject to establishing certain conditions of access.

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- A ban on agreements between private healthcare providers and private medical insurers that concern the recognition of new, rival facilities.

Policy and Regulatory Context

The competition law probe of private healthcare coincides with a number of ongoing policy and regulatory developments. The CC investigation is not unexpected and may be considered to reflect pressure on the OFT to take more consumer-focused action. The OFT has been criticised for producing too few competition decisions relative to its EU counterparts.

UK competition law is undergoing reform with the aim to generate efficiencies and reduce regulatory burdens. The government is set to establish the Competition and Markets Authority (CMA) which will effectively merge the competition law functions of the CC and the OFT. Regulation of the healthcare sector is now performed by the newly reformed Monitor, that seeks to promote economic, efficient and effective healthcare services. Monitor will soon have competition law powers to tackle specific abuses and restrictions that act against patients' interests, ensuring, amongst other things, that there is a level playing field for all providers. The CMA will also have consumer enforcement powers.

Next Steps

The CC has a maximum period of two years (*i.e.* by 3 April 2014) to prepare and publish its final report, although it will be under pressure to complete its inquiry before then. Any interested party is invited to provide the CC with a summary of its views, to assist the CC in identifying the key issues, to be received by 2 May 2012. An immediate step will be for interested parties, including private healthcare providers and insurers, to review the OFT's findings and consider where their interests lie. The CC will probe the issues in detail and whether, in fact, the prevailing market situation is indicative of a competitive market. It may also be asked whether the alleged lack of information is due to the fact that, while the services are private, private insurance companies rather than patients pay for healthcare and these private insurance companies have a great deal of insight into the prices, quality and value which in turn provides competitive constraint. In light of the impending UK competition law facelift, it will be interesting to see how the CC conducts this investigation into the private healthcare market and what remedies, if any, it will put forward.

King & Spalding has extensive experience in relation to market investigations in the UK and in the EU. We can offer a multidisciplinary team combining our competition law specialists as well as healthcare industry sector experts. Our team have acted on numerous UK market investigation references to the CC including store cards and related insurance, payment protection insurance, and groceries. We have also advised major players in relation to European Commission sector inquiries including in the pharmaceutical, energy, business insurance and retail banking sectors.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

¹ OFT's report on the private healthcare market study, December 2011