

Guidance for Fertility Clinics on Consumer Law:

Helping fertility clinics comply with their
consumer law obligations

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1. Summary

What is the CMA and why is it producing this guidance?

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority and has powers to tackle practices and market conditions that disadvantage consumers and hinder their decision making.
- 1.2 As part of its role, the CMA produces guidance for businesses to clarify their consumer law obligations and promote compliance.
- 1.3 The main purpose of this guidance is to help fertility clinics¹ understand and comply with their existing obligations under consumer law. This guidance sets out the CMA's views on consumer law. It is not a substitute for the law itself, and does not replace the role of the courts, which is to provide the definitive interpretation of consumer law based on the facts of each case. Alongside this guidance for clinics, the CMA is also publishing a guide for patients, which sets out their rights under consumer law.²
- 1.4 Every year around 70,000 cycles of IVF treatment take place in the UK.³ The UK fertility market is worth around £320 million annually,⁴ and has enjoyed steady growth over recent years. Fertility clinics provide an extremely important service for those struggling to have a baby and many patients have positive experiences of the clinics where they have treatment.
- 1.5 However, media coverage of the sector, CMA reviews of clinic websites and published research, and discussions with the Human Fertilisation and Embryology Authority (HFEA), the Advertising Standards Authority (ASA) and patient groups, all indicate that certain clinic practices may be preventing or inhibiting patients from making informed choices.

¹ See paragraphs 2.14 to 2.17.

² [Fertility treatment: a guide to your consumer rights](#)

³ For example in 2019, almost 53,000 patients had 69,000 fresh and frozen IVF cycles and 5,700 DI cycles at HFEA licensed fertility clinics in the United Kingdom (UK). Figures include both NHS-funded and self-funded treatment. [HFEA, Fertility trends 2019: trends and figures, May 2021](#)

⁴ The IVF component of this accounted for £298.5 million and the remaining £19.3 million is spent on Intrauterine Insemination. Laingbuisson *In Vitro Fertilisation: UK Market Report, May 2018*

1.6 Consumer law gives important protections to fertility patients. The CMA's discussions with the HFEA, and other organisations and people with knowledge of the sector, have highlighted a general lack of awareness about how consumer law applies in the sector. These discussions have also made clear that guidance on consumer law would be helpful for clinics and patients. Increased compliance with consumer law should help address some of the concerns identified in the sector, such as:

- (a) Patients being unable to make meaningful comparisons between clinics' prices because of the way some clinics present misleadingly low headline prices, which do not include essential elements of treatment.
- (b) Patients being faced with unexpected additional costs during treatment.
- (c) Clinics providing partial or misleading information on their success rates.
- (d) Patients not being properly informed by clinics of the limited evidence base for add-on treatments increasing the chances of a live birth, or the risk associated with certain add-on treatments.

1.7 The CMA understands that consumer law obligations and rights may not always be at the forefront of clinics' and patients' thinking. Clinics, and patients themselves, may not naturally consider patients also to be consumers. Nevertheless, consumer law protects these transactions and complying with consumer law is an important consideration when providing fertility treatment.

1.8 Compliance with consumer law is important not only for protecting patients but also for maintaining the reputation of the fertility sector and supporting open and fair competition amongst clinics, which itself serves patients' interests. It also helps to reduce the number of complaints made by patients and avoid disputes between clinics and patients.

1.9 This guidance is particularly important at a time when an increasing proportion of patients pay for treatment themselves. In particular, the share of IVF cycles funded by the NHS has declined in England, Wales and Northern Ireland over recent years, with the majority of cycles being self-funded.⁵

⁵ [HFEA, *Fertility trends 2019: trends and figures*, May 2021.](#)

- 1.10 A single cycle of IVF can cost patients around £5,000,⁶ and at some clinics upwards of £20,000. As most cycles sadly are not successful, for many patients this is not a one-off purchase,⁷ and they can spend many thousands of pounds over the months and years they undergo treatment.
- 1.11 The CMA's decision to publish guidance was taken before the coronavirus (COVID-19) pandemic hit the UK in the Spring of 2020. The CMA recognises the challenges that the fertility sector - along with many others in the UK - have been facing as a result of the pandemic. Many clinics will already be reviewing their practices and terms in light of the changing circumstances so this guidance is now even more timely.
- 1.12 The HFEA fully supports the CMA's work to develop this guidance and the CMA has worked closely with the sector regulator throughout the process. This guidance sits alongside HFEA regulation.

What does consumer law require clinics to do?

- 1.13 Consumer law sets minimum standards that apply to various aspects of clinics' dealings with patients. In particular, consumer law requires that:
- (a) Clinics do not mislead patients (including by omission) or otherwise engage in unfair commercial practices. This obligation applies before as well as after a patient has entered into a contract with a clinic. It also applies in circumstances where a potential patient does not enter into a contract with a clinic at all. It means that clinics must do certain things, such as provide key information upfront, so prospective and existing patients can make informed decisions.
 - (b) Clinics must ensure that their contracts with patients are fair. Clinics must not put patients at an unfair disadvantage, by tilting the rights and responsibilities under the contract too much in their own favour.
- 1.14 The law also requires that clinics consider the difficult circumstances in which people find themselves when they are making decisions about fertility treatment.

⁶ HFEA webpage: www.hfea.gov.uk/treatments/explore-all-treatments/in-vitro-fertilisation-ivf/

⁷ On average a patient has 2.5 cycles of treatment, data provided by HFEA.

For those buying fertility treatment, there are few, if any, purchases that are more important. Discussions with patient groups, and the research the CMA commissioned with patients,⁸ have highlighted a range of factors that can make people vulnerable when they are buying fertility treatment. For example:

- This is a complex purchase, involving estimations of risk and probability, where outcomes are inevitably uncertain.
- By the time people arrive at a clinic many will have been trying unsuccessfully to have a baby for many months or years. The emotional impact of this can be significant.
- Patients often want to do all they can to increase the chances of having a baby.
- Most patients in the UK are not used to buying healthcare, particularly directly from a provider.⁹ The information asymmetries between those providing the fertility treatment and those buying the treatment are generally significant, and patients place a great deal of faith in what they are told by clinics.

1.15 The guidance specifically considers the law as it applies to clinics. However, UK consumer law applies more widely and also protects patients in their dealings with other businesses active in the fertility sector such as sperm banks, businesses selling complementary fertility treatments and businesses offering different payment options for fertility treatment. The guidance includes some examples of commercial practices which may be relevant not only to clinics but also to other businesses active in the sector.

1.16 Chapter 2 provides further information on why the CMA has produced this guidance and sets out the CMA's views on the factors that can make people vulnerable when they are buying fertility treatment. It also summarises what clinics need to do and the potential consequences of breaching consumer law.

1.17 Chapter 3 sets out what information clinics need to provide to prospective and existing patients and when they need to provide it. It explains that to comply with

⁸ [CMA's Self-Funded IVF Research Report](#)

⁹ In the fertility sector insurance companies rarely act as intermediaries between patients and healthcare providers.

consumer law, clinics must not provide misleading information to patients, or fail to provide all the relevant 'material' information they need to make informed decisions. It also provides examples of conduct which is likely to constitute a 'misleading act' or 'misleading omission'.

- 1.18 Chapter 4 describes what clinics should do to ensure that their commercial practices are fair, in particular to ensure that their commercial practices meet the consumer law standard of professional diligence.
- 1.19 Chapter 5 focuses on what clinics should do to ensure that their contractual terms are fair. It discusses different types of terms, such as variation terms and refund and cancellation terms, and the ways in which they may be unfair to patients. It also explains the importance of ensuring that terms are transparent, as well as substantively fair.
- 1.20 Chapter 6 sets out what clinics should do to ensure that their complaints handling processes are fair.
- 1.21 Annex A provides an overview of the relevant legislation.

What do clinics need to do?

- 1.22 Clinics should read this guidance, consider how it applies to them, and ensure they are complying with consumer law in their dealings with patients. If necessary, they should make changes to their practices, policies (such as in relation to the provision of information to patients) and terms.
- 1.23 Clinics should also make sure that all patient-facing staff, including clinical staff and all staff involved in producing patient-facing materials, understand these requirements and comply with them. Under consumer law, clinics are legally responsible for the actions of their staff, who are acting in the clinic's name, or on the clinic's behalf, in their dealings with patients.
- 1.24 The CMA advises that other businesses active in the fertility sector also read this guidance and consider how it, and the relevant consumer law principles, apply to them.
- 1.25 If a clinic, or any other business operating in the sector, is unsure of its legal obligations, it should seek independent legal advice.

1.26 If a clinic, or any other business active in the sector, does not comply with consumer law, the CMA and other bodies, such as local authority Trading Standards Services or DETI in Northern Ireland, can bring civil court proceedings against them,¹⁰ to stop infringements and seek compensation on behalf of patients. They can also bring criminal prosecutions.¹¹ The ASA can take action against misleading advertisements that contravene the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code). Moreover, clinics may face legal action from patients, who may bring legal proceedings for a clinic's breach of contract or seek redress in the courts for certain breaches of consumer law.

¹¹ In respect of specified breaches of consumer law, which include a number of breaches of the CPRs: misleading omissions; misleading actions; aggressive practices; and conduct contrary to the requirements of professional diligence. In Scotland, criminal proceedings are brought via the Crown Office and Procurator Fiscal Service (COPFS).

2. Introduction

The CMA's mission and powers

- 2.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority.¹² Its objective is to make markets work well for consumers, businesses and the broader economy.
- 2.2 The CMA has a range of consumer powers to tackle practices and market conditions that present challenges for consumers and hinder their decision making. This includes powers to protect consumers from unfair contract terms (for which it has the lead role) and unfair commercial practices. As part of its role, the CMA also produces guidance for businesses to clarify their legal obligations and promote compliance.
- 2.3 The CMA shares these enforcement powers with other bodies, such as local authority Trading Standards Services (TSS). The CMA also shares certain consumer functions with other agencies. In particular, the ASA, which has a lead role for ensuring compliance with specified consumer law¹³ in non-broadcast advertising (for example print, posters, direct marketing and online, such as a clinic's website) and under the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code).¹⁴ This means that if the CMA were to identify a consumer law issue relating to non-broadcast advertising it would usually refer this to the ASA to consider.¹⁵

Why produce guidance for fertility clinics?

- 2.4 The CMA's engagement with the HFEA and stakeholders, including clinics, the professional bodies and patient representative groups, highlighted a general lack of awareness about how consumer law applies in the sector and that guidance on consumer law would be helpful for fertility clinics and patients. Ensuring compliance with consumer law should help address some of the concerns in the

¹² It was established in April 2014 and took over many of the functions previously performed by the Office of Fair Trading (OFT) and the Competition Commission.

¹³ Namely, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

¹⁴ See: [ASA Advertising codes](#)

¹⁵ See: www.gov.uk/government/publications/CMA-and-ASA-memorandum-of-understanding-on-consumer-protection-issues

sector which the CMA has identified during its research and discussions with stakeholders. These concerns include:

- Patients being unable to make meaningful comparisons between clinics' prices because of the way some clinics present misleadingly low headline prices, which do not include essential elements of treatment;
- Patients being faced with unexpected additional costs during treatment;
- Clinics providing partial or misleading information on their success rates; and
- Patients not being properly informed by clinics of the limited evidence base for add-on treatments increasing the chances of a live birth, or the risk associated with certain add-on treatments.

2.5 Funded cycles in England have fallen from 40% in 2014 to 32% of cycles in 2019. In Wales, they fell from 42% to 39% over the same period. In Northern Ireland, they fell from 50% to 34%.¹⁶ Over the same period. With more patients paying for their treatment, consumer law will apply to an increasing proportion of patients.¹⁶

2.6 Compliance with consumer law is important not only for protecting patients but also for maintaining the reputation of the fertility sector and supporting open and fair competition amongst clinics, which in itself serves patients' interests. It also helps to reduce the number of complaints made by consumers and avoid disputes between clinics and patients.

Patient vulnerability

2.7 Consumer law requires that traders¹⁷ take any vulnerability on the part of consumers into account in their dealings with them.

¹⁶ In 2019, the majority of IVF cycles that took place in the UK as a whole were in England. [HFEA, *Fertility trends 2019: trends and figures, May 2021*](#).

¹⁷ See Footnote 117 for definition of a trader.

- 2.8 In certain market contexts, all consumers can experience vulnerability, albeit to differing degrees. Vulnerability can mean that consumers are especially susceptible to detriment given the specifics of a market.
- 2.9 Deciding to purchase fertility treatment is a significant decision, both financially and emotionally, and for many people it will be a stressful purchase. It is the CMA's view that most, if not all fertility patients will be vulnerable to some degree. The vulnerable circumstances in which patients find themselves are an important consideration in deciding how consumer law applies in this sector. The CMA notes, for example:
- (a) This is a complex purchase, involving estimations of risk and probability, where outcomes are inevitably uncertain. These are challenging concepts for many consumers in any market.¹⁸
 - (b) By the time people arrive at a fertility clinic many will have been trying unsuccessfully to have a baby for many months or years. The emotional impact of this on the patient and their partner can be significant.
 - (c) As the CMA's commissioned research with patients¹⁹ and conversations with patient representative groups have highlighted, patients often want to do all they can to increase the chances of having a baby, particularly where they have had previous unsuccessful treatment or think their chances of success are low.
 - (d) In addition, most patients in the UK are not used to buying healthcare, particularly directly from a provider.²⁰ The information asymmetries between those providing the fertility treatment and those buying the treatment are generally significant, and patients place a great deal of faith in what they are told by clinics.
 - (e) Some patients have a deference to the medical profession and would not question, or may feel uncomfortable, questioning what they are told.
 - (f) The CMA knows from its research with patients and discussions with patient representative groups, that cost is an important factor for many

¹⁸ See for example www.fca.org.uk/publication/occasional-papers/occasional-paper-8

¹⁹ [CMA's Self-Funded IVF Research Report](#)

²⁰ In the fertility sector insurance companies rarely act as intermediaries between patients and healthcare providers.

patients, but some patients feel reluctant to raise issues of cost with a clinic, fearing it may look like they do not want a baby 'enough' or that they cannot afford treatment.

- (g) Furthermore, the nature of treatment means that once a cycle is underway and they are taking medication, it is unlikely that a patient, even if unhappy with the clinic, will walk away or be able to change clinic.

What does this guidance cover?

2.10 This guidance sets out the CMA's views on how consumer law applies to clinics in the fertility sector. It does not provide advice on other laws or rules, for example those enforced by the sector regulator, the HFEA, or the Care Quality Commission or equivalents, or those on medical regulation or other guidelines relevant to the sector.

2.11 This guidance covers:

- Information provision – what information clinics should provide to prospective patients and existing patients and when (Chapter 3).
- Commercial practices - what clinics should do to ensure that their commercial practices are fair, in particular to ensure that their commercial practices meet the objective standard of professional diligence (Chapter 4).
- Contract terms – what clinics should do to ensure that their terms are fair (Chapter 5).
- Complaints handling – what clinics should do to ensure that their complaints handling processes are accessible, clear and fair (Chapter 6).
- The key applicable consumer protection legislation - Consumer Protection from Unfair Trading Regulations 2008 ('CPRs'); Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('CCRs'); and Parts I and II Consumer Rights Act 2015 ('CRA') (see Annex A).

- 2.12 You should be aware that there is some overlap between the information you are required to provide to patients under the CPRs, the CCRs and the CRA. The requirements of each are set out in this guidance at Chapter 3, paragraphs 3.9 to 3.53 and paragraphs 3.54 to 3.61, Chapter 5, paragraph 5.3 and Chapter 6, paragraph 6.2. Although there is some overlap, they are not the same and compliance with one does not ensure compliance with the other.
- 2.13 The examples of possible breaches of consumer law provided in this guidance are based on issues that the CMA considers are likely to be most relevant to the sector based on the consumer research it has commissioned, HFEA published reports and research,²¹ and information provided by stakeholders. Those examples are not intended to be exhaustive and the guidance does not cover every situation in which an infringement may occur. The CMA recognises the innovative nature of the sector and that what is considered acceptable clinical practice may change over time.

Who is this guidance for?

- 2.14 This guidance is primarily aimed at providers of fertility treatment who treat self-funded patients. This includes both private and NHS clinics, as well as clinicians working in a self-employed capacity²² and any business or individual where they are acting in the name of the clinic or on behalf of a clinic.²³ However, consumer law is not only relevant where a clinic is providing fully self-funded treatment. Fertility clinics will be subject to consumer law wherever they are acting as a trader.²⁴

²¹ HFEA *Fertility treatment 2019: trends and figures*, June 2020; HFEA, *Pilot national fertility patient survey*, 2018; HFEA, *State of the Fertility Sector 2018-19*.

²² Clinicians working in a self-employed capacity are subject to consumer law in their own right where they are acting as a trader (see footnote 117 for the definition). The most common examples of this arising are where: (a) they act as a self-employed 'satellite', providing advice and/or treatment directly to patients; and (b) where they are engaged by a clinic on a consultancy basis providing advice and/or treatment to patients. In the latter case, a clinic will also likely have responsibility under consumer law. It will depend on the circumstances which aspects of consumer law apply to a self-employed clinician. Self-employed clinicians therefore need to be cognisant of, and compliant with, consumer law. For the avoidance of doubt, not having a direct contract with a patient does not mean a self-employed clinician does not have obligations under consumer law relating to information provision.

²³ An example of which is a person engaged by a clinic to conduct their public relations or marketing.

²⁴ This is a fact-sensitive question and it is ultimately for fertility clinics themselves to assess, in the specific circumstances in which they operate, whether or not consumer law applies in respect of their interactions with some or all of their patients. For the definition of a 'trader' in consumer law, see Annex A.

- 2.15 In particular, in the CMA's view, consumer law will apply to a fertility clinic's terms and commercial practices in relation to the provision of any treatment that is paid for by a patient. This includes where a patient pays for their treatment in full and where they pay for any element of their treatment (over and above their free NHS treatment). This is the case whether the clinic is an NHS or a private clinic, and irrespective of the legal status of the clinic and whether the clinic is acting on a 'not-for-profit' or a 'for profit' basis.
- 2.16 The CMA would not generally expect consumer law to apply in relation to the provision of treatment that is funded by the NHS and which is provided to a patient free of charge, whether by an NHS or a private clinic.²⁵
- 2.17 References to clinics in this guidance includes clinics that are licensed by the HFEA under the Human Fertilisation and Embryology Act 1990 and clinics (or individuals acting in a self-employed capacity) that offer a satellite service whereby they carry out aspects of fertility treatment with patients, such as assessment and monitoring, but which are not directly licensed by the HFEA.²⁶ In this guidance 'you' refers to clinics and includes those individuals who either own or have individual or collective responsibility for managing a clinic. 'You' also refers to self-employed clinicians in the circumstances in which consumer law applies to them.²⁷
- 2.18 Consumer law applies throughout the UK. Consequently, this guidance will be relevant to providers of fertility treatment based:
- Anywhere in England, Wales, Scotland or Northern Ireland; and
 - Outside the UK in so far as they are carrying out business in the UK.
- 2.19 So, for example, where a clinic which is based outside the UK but is marketing specifically to patients based in the UK (for example, through participating in a trade show taking place in the UK, engaging in a UK social media campaign or using a UK based website to advertise its services), the clinic will need to ensure that its marketing complies with UK consumer law, even if the treatment itself

²⁵ The CMA notes, however, that clinics may nonetheless be required to meet requirements under other rules and regulations outside the scope of this guidance which provide similar protections for patients.

²⁶ Clinics that are not HFEA licensed but undertake aspects of fertility treatment such as diagnostics and treatment plans may be registered with the Care Quality Commission in England for the regulated activities of Treatment of Disease, Disorder or Injury and Diagnostic and Screening Procedures.

²⁷ See footnote 22.

takes place overseas. Similarly, if a clinic is entering into contracts with patients during such a trade show, they should ensure the terms of those contracts are fair.

- 2.20 The focus of this guidance is on those providers of fertility treatment described in paragraphs 2.14 to 2.19 above. However, UK consumer law applies more widely and also protects patients in their dealings with other businesses active in the fertility sector such as sperm banks, businesses selling complementary fertility treatments and businesses offering different payment options for fertility treatment. The guidance includes some examples of commercial practices which may be relevant not only to clinics but also to other businesses active in the sector.
- 2.21 Although this guidance is principally for clinics, it will also be of interest to potential and existing patients, their partners and representatives, fellow enforcers of consumer law, namely local authority TSS, professional bodies, and the HFEA.
- 2.22 Alongside this guidance the CMA has published a guide for patients to help them understand their rights and how consumer law applies in the sector.

Relationship with sector-specific regulation

- 2.23 Consumer law sets minimum standards that apply to various aspects of clinics' dealings with patients. It sits alongside other sector-specific and general medical professional laws, regulations, standards and guidelines overseen by, for example, the HFEA (the sector regulator), the General Medical Council, the Royal College of Nursing, the Association of Clinical Embryologists, the Health and Care Professions Council, the National Institute for Health and Care Excellence and the Care Quality Commission. As highlighted in paragraph 2.10, this guidance does not provide advice on any sector-specific and general medical professional laws, regulations and standards.
- 2.24 Although this guidance is concerned with the application of consumer law, failing to comply with sector-specific and general medical professional laws, regulations, standards and guidelines may be relevant to the CMA's view that consumer law has been infringed, and vice versa (see paragraphs 4.3 to 4.9 of Chapter 4 and paragraphs 1.8 to 1.10 of Annex A).

- 2.25 Although there is some overlap between consumer law and the HFEA's regulatory requirements they are not the same and compliance with one does not guarantee compliance with the other. You should pay close attention to both consumer law and the sector-specific regulatory requirements.
- 2.26 The HFEA provides guidance to clinics on how to meet their sector legal obligations in their Code of Practice.

What do clinics need to do?

2.27 As a clinic you need to:

- Read and consider carefully how this guidance applies to you and whether you need to make changes to your practices, such as the information you provide to patients before and during treatment, and your policies and terms, to make sure you are complying with the law.
- Make any changes to your practices, policies and terms that are necessary to ensure that your clinic complies with the law.
- Consider a wider review of your internal procedures and processes in order to support your compliance with consumer law - for example, to make sure that important information is clearly, accurately and prominently provided to patients (including on websites, in patient portals, in written marketing materials such as brochures and in response to telephone enquiries).
- Make sure that all patient-facing staff, including clinical staff and all staff involved in producing patient-facing materials, understand these requirements and comply with them. Under consumer law, you are legally responsible for the actions of your staff, who are acting in your name, or on your behalf, in their dealings with patients.

Clinics, and all businesses in the fertility sector, are responsible for ensuring their own compliance with consumer law

2.28 This guidance sets out the CMA's views on when clinics' practices and terms are likely to comply with, or infringe, consumer law. It is not a substitute for the law itself, and does not replace the role of the courts, which is to provide the definitive

interpretation of consumer law based on the facts of each case. Clinics, if in doubt, should seek their own independent legal advice on the interpretation and application of consumer law.

- 2.29 By considering and implementing this guidance, clinics will clearly be better placed to ensure that they are complying with consumer law and treating their patients fairly. Ultimately, a clinic is responsible for ensuring its own compliance with the law, regardless of whether the clinic is directly licensed by the HFEA or not.²⁸ You may also wish to speak to your local TSS for advice, for example as part of a primary authority relationship.²⁹
- 2.30 As set out above, this guidance has specifically considered the law as it applies to clinics. However, the CMA advises that other businesses active in the fertility sector also read this guidance and consider how it, and the relevant consumer law principles, applies to them and make changes to ensure compliance with consumer law, as applicable.

What happens if clinics do not comply with consumer law?

- 2.31 If a clinic, or any business active in the fertility sector, infringes consumer law, it may face action by:
- (a) The CMA or other bodies that enforce general consumer law (such as local authority TSS or DETI in Northern Ireland). These bodies can act to stop you infringing the law by bringing civil proceedings for a court injunction³⁰ (and, where appropriate, seek compensation for affected patients). They can also bring criminal prosecutions.³¹
 - (b) Patients themselves, who may bring legal proceedings for a clinic's breach of contract or seek redress in the courts for certain breaches of consumer law. Patients may also use consumer law to defend any action brought by

²⁸ A satellite clinic (clinic A) may be liable under consumer law in its own right, even where it is working with or for another clinic (clinic B). However, where it is acting on behalf of clinic B, clinic B will also likely have responsibility under consumer law. Exactly how consumer law applies will depend on the particular circumstances. For the avoidance of doubt, having a direct contract with a patient is not a pre-requisite for consumer law to apply.

²⁹ Primary Authority is a means for businesses to form a legal partnership with a local authority, which then provides assured and tailored advice on complying with trading standards law (including consumer law). For more information, see www.gov.uk/guidance/local-regulation-primary-authority-what-is-primary-authority.

³⁰ Or an interdict, in Scotland.

³¹ See footnote 10.

you, for example where you are seeking to recover debts allegedly owed. In particular, a patient may be able to rely on unfair terms legislation, which provides that an unfair term cannot be relied on by you.

- (c) The HFEA, the sector regulator, where the conduct of concern falls below the acceptable standards, as set out in the relevant licensing conditions and Code of Practice.
- (d) The ASA, which can take action against misleading advertisements that contravene the CPRs and the CAP Codes. Its Codes cover advertising and marketing communications, which are likely to include clinics' information, websites, leaflets and posters directed at prospective patients. The ASA has published an enforcement notice which provides guidance on the rules when advertising IVF fertility treatment.³²

³² [ASA's Enforcement Notice: Fertility treatments](#)

3. Ensuring that prospective and existing patients get the information they need to make informed decisions

Introduction

- 3.1 It is important that you provide prospective and existing patients (and, where relevant, their partners),³³ with the information they need, at the time that they need it, and in a format that is clear and easy to understand. This is so that the significant decisions they are going to make about matters such as which fertility clinic to choose, and what treatments to buy, are properly informed. This is particularly important in this sector given the significant financial and emotional commitment that patients are investing in those decisions. Patients may be unable or extremely reluctant to abandon a cycle of treatment once they have started taking their medication, even if they are unhappy. This places a premium on ensuring that patients' decisions are properly informed.
- 3.2 This Chapter sets out the CMA's views on your consumer law obligations, as set out in the CPRs and CCRs (see paragraphs 3.9 to 3.61 respectively), relating to what, when and how information should be provided to prospective and existing patients.
- 3.3 Your consumer law obligations extend to information that is provided by you verbally, visually and in writing, for example:
- at clinic open days and events or at trade shows
 - information in brochures, on your website generally and specific patient portals
 - in your social media
 - during consultations and in consultation letters
 - in your terms and conditions (see Chapter 5)

³³ You will sometimes have responsibilities to provide information to others. One example would be in the context of surrogacy with IVF, where the would be parents are the consumers purchasing treatment, with rights under consumer law and who will need to be provided with information that is usually provided to the patient undergoing standard IVF.

The guidance also sets out some examples that may, in the CMA's view, breach consumer law.³⁴

- 3.4 Information should be clear, accurate, and easy to find. It should be provided in a way, and at a time, that ensures prospective and existing patients can understand and engage with it before making any decisions about whether to have fertility treatment and, if so, which clinic and treatments to choose.
- 3.5 The information provided should enable prospective and existing patients to make properly informed decisions, at the right stage of their patient journey (see paragraphs 3.16 to 3.20). It is therefore important for you to understand what information you need to provide and when, to help ensure you are complying with consumer law. In particular, you should:
- (a) Provide the 'material information' that prospective and existing patients need **at each stage** of your dealings with them (see paragraph 3.12 to 3.15);
 - (b) Provide prospective patients with the necessary 'pre-contract information' required under the CCRs **before a contract is entered into** (see paragraphs 3.54 to 3.55). The CMA notes that the patient may have more than one contract with a clinic and other contracts with different businesses in the fertility sector (see paragraphs 3.16 to 3.17);
 - (c) Ensure the pre-contract information **remains accurate and up to date**, as any changes to it require the express consent of the patient (see paragraph 3.59); and
 - (d) Specifically bring to the patient's attention any important terms and conditions so that patients can genuinely understand their rights and obligations **before agreeing to treatment**. For example, a term that allows you to refer patients for treatment to another clinic at a different location, a term that restricts the time period in which treatment must be taken or terms that explain your refund policies (see paragraph 5.13 of Chapter 5).

³⁴ See paragraph 2.13.

Responsibility for what your staff say and do when presenting and providing information

- 3.6 You should ensure that all staff in contact, indirectly or directly, with prospective and existing patients understand what they need to do to comply with consumer law. You are responsible for the information provided and presented by your staff, including how and when it is provided and presented. You are also responsible if they fail to provide it. Such information may be provided, for example, through your advertising, in brochures, on your website, in patient portals, or through the conversations your staff may have by telephone, at clinic open days and during consultations.
- 3.7 If you commission any third parties to produce promotional materials for you, for example advertisements, brochures or content on your website, then you are also responsible for ensuring these materials comply with consumer law. These are your materials, even if produced for you by a third party. Similarly, if you advertise the services of a third party and use information provided by them to do so, then you should ensure that this information is also consumer law compliant. This is because you are responsible for all the information you provide even when it relates, for example, to the services of a third party that has been written by that third party.

Sector-specific regulation

- 3.8 As explained in paragraphs 2.23 to 2.26, alongside your consumer law obligations, there are also sector-specific regulatory requirements. Some of these relate to information provision, in particular, there are the requirements set out in the HFEA Code of Practice.³⁵ This includes, for example, that information is to be provided about the potential immediate and longer-term risks of the treatment and any treatment add-ons used, and that a costed treatment plan ('CTP') is to be provided to patients before treatment starts (HFEA Code of Practice requirements 4.6 and 4.9 respectively refer).

The CPRs

- 3.9 The CPRs set out broad rules outlining when commercial practices are unfair,

³⁵ For more information visit: [hfea.gov.uk/Code of Practice/9th edition/December 2019](https://hfea.gov.uk/Code%20of%20Practice/9th%20edition/December%202019)

including a prohibition on misleading actions and misleading omissions.³⁶ These prohibitions aim to ensure, in particular, that consumers get the information they need to make informed decisions in relation to products and services they are offered.

- 3.10 In order to comply with the CPRs, the information you provide to prospective and existing patients about the treatment and services you offer must be truthful. You should also ensure that such information is not presented to patients in a way that is likely to deceive them, even if the information presented is factually accurate.
- 3.11 The CPRs also require you to provide ‘material information’ at the time your prospective or existing patients need it, so that they can make informed decisions about matters such as whether to have fertility treatment and, if so, which clinic and treatments to choose.

Material information under the CPRs

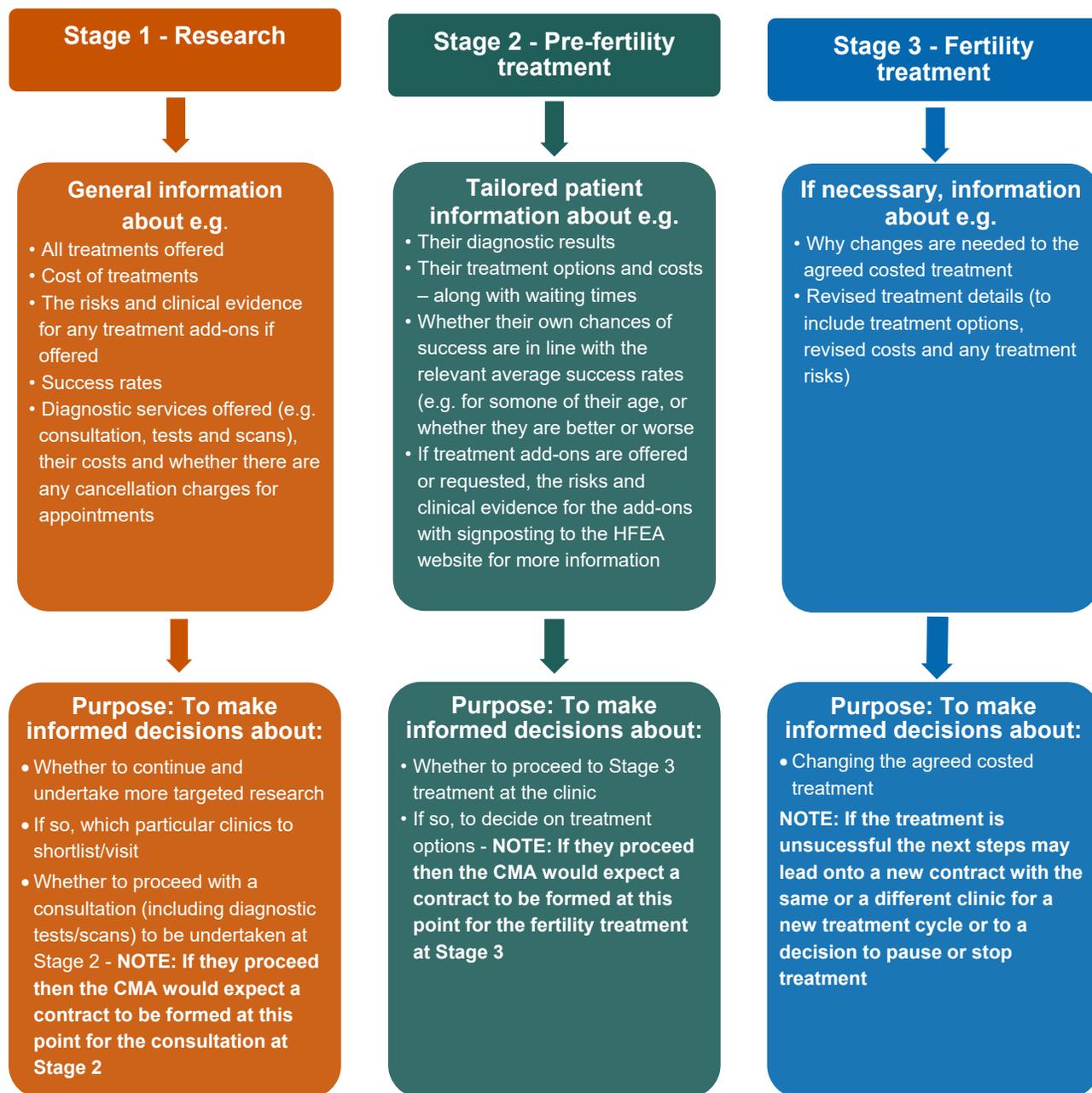
- 3.12 It is a breach of the CPRs to omit or hide material information, or to provide material information in a manner that is unclear, unintelligible, ambiguous or untimely, where this is likely to cause the average patient to make a different transactional decision. A ‘transactional decision’ means any decision taken by prospective and existing patients relating to whether or not to purchase fertility treatment, services or medication, and whether or not to exercise a contractual right in relation to the treatment, services or medication
- 3.13 Under the CPRs ‘material information’ means the information that prospective and existing patients need to make informed transactional decisions. Material information does not necessarily include all the information that might be of interest, or that is important to particular patients.
- 3.14 What constitutes material information is dependent on the stage in the patient journey (see paragraphs 3.16 to 3.20). Material information is also likely to vary depending on different patients’ needs, medical circumstances and the treatments being offered to them.

³⁶ See Annex A for further information.

- 3.15 As a general rule, aspects of the information you provide will become more tailored as patients progress through the stages of a patient journey. By way of illustration, the information you provide about your clinic's success rates to all prospective patients, for example on your website, will be more general in nature, than that which you provide later on, for example in face to face appointments when you talk to a patient about the results of their diagnostic tests and scans.

Stages of the patient journey

- 3.16 When most prospective and existing patients are considering undertaking and paying for fertility treatment, there are likely to be three main stages in the patient journey. Consumer law applies at each stage. During these stages more than one contract may be formed between you and the patient, for example one contract for the initial diagnostic consultation, scans and tests, followed by a separate contract, if the patient decides to proceed, for the fertility treatment itself.
- 3.17 Patients may also interact with other businesses in the course of their fertility treatment and may form contracts with them too, if they decide to buy treatments and services from them directly, for example, for medication or complementary treatments. These businesses also have obligations under consumer law to provide material information to patients.
- 3.18 Examples of both the information to be provided at each stage, and the associated transactional decisions are illustrated below, with further detail at paragraphs 3.21 to 3.46.



3.19 The three stages, illustrated above, are based upon a cycle of IVF/IUI/ICSI and should be recognisable to most patients. There will of course be other stages and information requirements for those patients who have bought other types of treatment, for example, multi-cycle packages, unlimited cycle packages, and/or refund programme packages, donor IVF, egg sharing arrangements or IVF with surrogacy (see paragraphs 3.47 to 3.49).

- 3.20 Not all patients will need or want to go through all the above three stages for information provision. For example, some prospective and/or existing patients:
- (a) May choose not to consider and shortlist clinics at Stage 1 because they have already decided to go to a particular clinic based on a recommendation of a friend or a desire to stay with a clinic that provided their NHS funded treatment. Such prospective patients would still need to be provided with relevant material information, for example about the costs of any pre-treatment consultation, tests and scans.
 - (b) Who are remaining with the clinic that provided their funded NHS fertility treatment or who are agreeing to a further cycle of treatment at a clinic where they have previously paid for treatment. Such patients will generally not research their clinic options and may not need all or any of the diagnostic services carried out at Stage 2 if the earlier results are still valid (i.e. not time expired). In common with paragraph 3.20 (a) above, such prospective patients would still need to be provided with relevant material information.
 - (c) May choose not to proceed to Stage 2 or to Stage 3 after completing Stages 1 or 2 respectively.

Stage 1 – Research

The material information that you need to provide to prospective patients at this stage is the information they need to make informed decisions about matters such as whether to continue researching fertility treatment, which clinics to shortlist and which clinic to choose for the pre-fertility treatment activities (consultation, tests and scans) at Stage 2

- 3.21 Prospective patients may initially look for information about clinics in a number of places. They may be drawn to your clinic at this point through, for example, the use of a search engine or a third party website you are listed on, or through your general advertising, marketing and promotional activities.
- 3.22 The information you provide, in all the ways it is provided (see paragraph 3.3), plays a crucial role in enabling patients to decide whether to have treatment and, if so, to compare what clinics offer and their prices.

3.23 A prospective patient's commitment to a clinic is likely to grow over the course of their research. This is why it is important at this stage for you to provide material information:

- At a time that ensures that prospective patients can understand and engage with it.
- In all the places prospective patients are likely to look for it (including on your website, where most are likely to look for it).
- In a clear and simple manner that prospective patients can understand and process, without being overwhelmed with unnecessary information.

3.24 Material information should be prominently highlighted and be complete. For example, when you use your website to advertise add-on treatments you should not omit information about the clinical evidence and, if relevant, the risks associated with such treatments.

3.25 There will be some patients who may choose not to research their clinic options, as they already have a preferred clinic (see paragraph 3.20). However, you still need to provide such patients with the material information they need to make an informed decision about, for example, whether to proceed with their preferred clinic. The CMA would expect this to include information on websites about, for example:

- (a) What is included in any advertised headline price and/or a set price for a cycle of IVF, IUI or ICSI, donor or surrogacy IVF etc;³⁷
- (b) Any known additional costs patients will have to pay on top of this, for example, for medication, where you should provide a reliable indication of the additional cost;³⁸ and
- (c) If you do not offer a cycle of treatment for a set package price, alongside your price lists, an indication of what the essential elements of treatment are for all patients, so that prospective patients can work

³⁷ The advertised headline price for a cycle package should include all compulsory charges where the amount a patient must pay is known upfront.

³⁸ One way of achieving this is to provide an indicative cost range.

out what the minimum cost is going to be for a cycle of IVF, IUI, ICSI, donor IVF or IVF with surrogacy. You should also provide information about any other known costs that they will need to pay, for example, for medication.

- 3.26 After initially researching treatments and clinics, if prospective patients decide to proceed, then this is likely to result in one or more clinics being shortlisted for further research, which may involve visits to those clinics, for example during open days. This may result in patients then choosing to go to one or more of their shortlisted clinics for a diagnostic consultation, tests and scans.
- 3.27 Failing to provide truthful, clear and timely material information at this stage may result in prospective patients wasting their time by shortlisting and viewing clinics that are not affordable or not consider others that may be more affordable or suitable for them. In some cases it may also cause them to incur unwarranted costs (for example the cost of attending a consultation).
- 3.28 When prospective patients are considering booking an appointment with you for a diagnostic consultation, tests and scans, it is important they are provided with the material information they need to inform that decision. The CMA would normally expect such information to include, for example:
- (a) Details about what the consultation consists of;
 - (b) The cost of the consultation and any diagnostic tests and scans;
 - (c) The possibility that additional diagnostic tests, and costs, may be necessary once the results of the first tests are known;
 - (d) Whether the results of any tests and scans already undertaken will be accepted; and
 - (e) Details of any cancellation charges if they fail to attend the consultation appointment.
- 3.29 You are responsible for providing the above information before any appointment for the diagnostic consultation is made. You could do this by, for example, providing it on your website and directing callers to it. You should confirm this information by telephone or online when patients contact you to book an appointment. This will stop patients from being surprised by the costs if they would otherwise only learn about these when they turn up for the appointment, or are presented with a bill.

- 3.30 For more detail on the CMA’s views about the material information that you should provide at Stage 1, see Table 1 on pages 31 to 34.
- 3.31 In addition to your consumer law obligations to provide material information, you should be aware that you have additional consumer law obligations under the CCRs to provide certain information to patients before they are bound by any contract with you. These further obligations are explained more fully at paragraphs 3.54 to 3.55. You need to ensure that you have met these requirements before a patient concludes a contract with you for a diagnostic consultation.³⁹

Stage 2: Pre-fertility treatment

The material information that you need to provide to patients at this stage is the information they need to make informed decisions regarding whether to proceed and, if so, how best to proceed with Stage 3 fertility treatment

- 3.32 At Stage 2, for patients to be able to make informed decisions about whether and how to proceed with Stage 3 fertility treatment, the CMA would expect the information that will be material for them, to be more tailored to their circumstances and needs. For example, now that you have the results of their diagnostic tests and scans, you should provide information about their treatment options and whether their own chances of success are in line with the relevant average success rates (e.g. for someone of their age), or whether they are better or worse.
- 3.33 Patients may have already formed a view about their possible chances of success, based on the generic success rate information you provided at Stage 1. At Stage 2, it is important for them to know if and why their test results and medical history suggests their own likely chances of success have now changed, for the better or worse. Such information may influence their decision on whether to proceed with fertility treatment and which treatments to have.
- 3.34 After discussing the treatment options, for those patients who wish to proceed,⁴⁰

³⁹ Some patients may choose to pay and have consultations, tests and scans at more than one clinic, where this is the case they will likely have contracts with each of these clinics.

⁴⁰ Other patients may decide not to proceed immediately, for example due to financial pressures, or proceed to Stage 3 but at a different clinic or decide not to have further treatment at all. If they decide to change clinic, then they may need to repeat some of the earlier stages of the patient journey.

you should provide, amongst other things, full and clear information about the agreed treatment and costs. This should include information about the circumstances in which changes to treatment and costs are reasonably foreseeable, for example:

(a) That medication dosages may need to change depending on how the patient responds to treatment; or

(b) If the patient becomes pregnant, that a pregnancy scan and additional medication will be needed.

- 3.35 The information should also explain what the impact for the patient is likely to be, for example an indicative cost range for additional medication or the actual cost for an additional scan if required. The CMA would expect this information to be provided in writing before the patient decides to proceed with treatment, so it can be properly considered.⁴¹
- 3.36 If the costed treatment options you have provided to patients are only valid for a short time, you should make this clear. You have a responsibility under consumer law to provide up to date information about costs and a further consumer law obligation under the CCRs to provide accurate pre-contract information (see paragraphs 3.54 to 3.55).
- 3.37 At Stage 3, patients are very vulnerable in situations where changes are made after treatment is underway. This is because it is unlikely that at this stage they will want to change clinic and continue their treatment elsewhere. They may struggle to meet surprising additional costs and feel awkward questioning such costs or not feel able to do so whilst undergoing treatment. This is why it is so important at Stage 2 to provide accurate and comprehensive information about the possibility and circumstances under which treatment and costs may need to change **before** patients agree to treatment.
- 3.38 For more detail about the material information you should provide at Stage 2, see Table 1 on pages 31 to 36.

⁴¹ It is a requirement of the HFEA Code of Practice (paragraph 4.9) that a costed treatment plan be provided before treatment starts. This should detail the main elements of the treatment proposed (including investigations and tests), the cost of that treatment and any possible changes to the plan, including their cost implications.

Stage 3: Fertility Treatment

Once patients are in treatment you should continue to provide them with the material information they need to make informed decisions about changes to their agreed treatment or, if treatment is unsuccessful, about their next steps

- 3.39 Prior to Stage 3 treatment commencing, the CMA would expect you to have a written contract in place setting out the agreed treatment and costs (see Chapter 5).
- 3.40 During Stage 3, some patients may need to make decisions about changes to their agreed treatment, which may have an impact on costs. The CMA understands that changes may be necessary for medical reasons once treatment is underway. For example:
- (a) Medication dosages may need to change to reflect how patients have responded to stimulation and as a result they may need to buy more medication mid-cycle. Such changes should not come as a surprise, since you should already have alerted patients, at Stage 2, to the possibility that changes may become necessary; and
 - (b) The CMA also understands that sometimes for medical reasons, it may be necessary to make decisions about changing the treatment at short notice and some clinics may seek consent to certain, less rare, changes in advance. For example, it may emerge on the day of egg retrieval that ICSI is needed.
- 3.41 Whilst changes may become advisable or necessary medically, patients should still be given material information about those changes, for example, why the changes are necessary and whether there are any cost implications before deciding whether to proceed. In the CMA's view, the material information that you should provide during Stage 3 is likely to include the information listed in Table 1 on page 36.
- 3.42 In addition to changes in treatment, some patients, if treatment has been unsuccessful, may have a post treatment consultation with you at the end of Stage 3. If so, they may wish to discuss their treatment options going forward, in which case the type of material information provided at Stage 2 will normally be required again. This is because the patient is considering entering into a new contract with you for further treatment.

- 3.43 Whilst the CMA can see that there may be a medical need to change a patient’s agreed treatment at Stage 3, the CMA is likely to have concerns about your compliance with consumer law where you market non-essential add-on treatments to a patient after the treatment plan has been agreed, particularly where there has been no change in the patient’s medical circumstances (see paragraph 4.9(c)).
- 3.44 If a patient themselves raise the possibility of buying add-on treatments from you, then the CMA is unlikely to be concerned as long as you have provided that patient with the information they need to make a fully informed decision about buying them, such as information about costs, the potential benefits to that patient of the add-on treatment and, if relevant, any risks.
- 3.45 For more detail about the material information you should provide at Stage 3, see Table 1 on page 36.

The material information you should provide at Stage 1, Stage 2 and/or Stage 3

- 3.46 In the CMA’s view, in order to allow patients to make informed decisions, the material information that you should provide at the different stages of a patient journey, is likely to include the information set out in Table 1 below.

Table 1 – Material information at Stages 1, 2 and 3

Material information	Stage 1 (Research)	Stage 2 (Pre-fertility treatment)	Stage 3 (Fertility treatment)
1. The clinic location where treatment will take place.	Y	Y	
2. The advertised price of treatment, for example, a cycle package price for IVF, IUI, ICSI, donor IVF and then information about:	Y		

Material information	Stage 1 (Research)	Stage 2 (Pre-fertility treatment)	Stage 3 (Fertility treatment)
<p>(a) What tests, treatments, medication or other services, such as counselling, are included in the package prices.⁴²</p> <p>(b) What necessary elements and costs, if any, are not included in the package prices, for example, if relevant, you should indicate whether the cost of medication will be additional and provide a reliable indication of the additional cost.⁴³</p> <p>(c) Additional treatment, services and costs, not included in the package price, that may become necessary, subject to how the treatment cycle progresses, such as blastocyst culture, pregnancy scans/blood tests, luteal support medication, embryo freezing and storage.</p>			
<p>3. If advertised or offered, the costs of any add-on treatments, along with the risks, benefits and the nature of the clinical evidence base for having these treatments (with signposting to the HFEA website).</p>	Y	Y	

⁴² The advertised headline price for a cycle package should include all compulsory charges where the amount a patient must pay is known upfront.

⁴³ One way of achieving this is to provide an indicative cost range.

Material information	Stage 1 (Research)	Stage 2 (Pre-fertility treatment)	Stage 3 (Fertility treatment)
<p>4. If applicable (i.e. not already included in a package price), whether the patient can purchase their medication from elsewhere with a prescription provided by the clinic (and if so what the prescription charge is) and any other important details relevant to medication (e.g. the possibility that additional medication may need to be purchased at very short notice).</p>		Y	
<p>5. The success rates of the clinic (taking into account the HFEA's Code of Practice, for example according to age groups, specifying the relevant period the rates refer to etc).</p>	Y		
<p>6. The diagnostic tests and scans that will be undertaken, with explanations as to what they are for as well as the following:</p> <p>(a) The costs of the consultation at Stage 2 together with the costs of the diagnostic tests and scans.</p> <p>(b) Whether you will accept the results of any previous diagnostic tests and scans, for example carried out by the</p>	Y		

Material information	Stage 1 (Research)	Stage 2 (Pre-fertility treatment)	Stage 3 (Fertility treatment)
<p>NHS or paid for at another clinic and if so under what circumstances.</p> <p>(c) The possibility that more diagnostic tests and scans may be necessary, based on the results of the routine diagnostic tests and scans.</p>			
<p>7. Whether any aspects of the service will, or could be, carried out by a different clinic in the same group or another clinic. If so, by who, where and in what circumstances.</p>	Y	Y	
<p>8. Up to date waiting times for treatment (if applicable).</p>		Y	
<p>9. The results of the patient's diagnostic scans and tests undertaken at Stage 2.</p>		Y	
<p>10. If applicable, any further diagnostic scans and tests that may be necessary, along with the costs, once the results of the initial scans and tests undertaken (see No 9 above) are known.</p>		Y	
<p>11. Information about whether the patient's chances of success, based on their test results, are in line with the average for someone of their age, or better or worse.</p>		Y	

Material information	Stage 1 (Research)	Stage 2 (Pre-fertility treatment)	Stage 3 (Fertility treatment)
12. The treatment options and costs based on the patient's tests and scan results. Information should be provided about what treatment and services are included in these options, why and whether there are any particular risks associated with these options.		Y	
<p>13. Details about the agreed treatment should include:</p> <p>(a) What treatments and services the patient will be having along with the costs.</p> <p>(b) If not included in the above, the cost of the initial medication to be purchased.</p> <p>(c) Information about reasonably foreseeable changes to treatment and costs.⁴⁴ For example, that additional medication may need to be purchased depending on how the patient responds to treatment.</p> <p>(d) Information about the additional treatments, services and costs that</p>		Y	

⁴⁴ This should include the cost associated with such changes or, where this is not known in advance, a reasonable estimate or indicative range for the associated costs.

Material information	Stage 1 (Research)	Stage 2 (Pre-fertility treatment)	Stage 3 (Fertility treatment)
<p>may become necessary, subject to their progress, such as blastocyst culture, pregnancy scans/blood tests, luteal support medication, embryo freezing and storage.</p>			
<p>14. Any proposed changes to the agreed treatment, to cover:</p> <p>(a) Why the agreed treatment needs to change.</p> <p>(b) Details about the revised treatment options.</p> <p>(c) Cost implications of any agreed changes to the treatment (for example, extra costs or refunds).</p> <p>(d) If applicable, details of any particular risks associated with the revised treatment.</p> <p>(e) If applicable, any costs going forward, for example, for embryo storage and a frozen embryo transfer if embryo freezing is being recommended.</p>			Y

3.47 There may of course be other stages and different information requirements, for prospective and existing patients, who are considering or buying other types of

treatment, for example, multi-cycle packages, unlimited cycle packages, and/or refund programme packages, donor IVF, egg sharing arrangements or IVF with surrogacy.

3.48 You are responsible for providing them with the material information they will need, at the time they will need it in order to take informed decisions, during the relevant stages of their patient journeys. For example:

(a) At Stage 1, any prices for multi-cycle, unlimited and/or refund programmes, that you advertise on your website,⁴⁵ should be meaningful for prospective patients. With this in mind, the CMA considers that you are more likely to comply with your consumer law obligations where you provide potential patients with a representative price range, as opposed to just one low starting price that will only apply to a small subset of patients. You should also:

- i. Explain the factors that are relevant to any advertised price range (for example, how these are based on prospective patients' ages); and
- ii. Explain any factors that will determine what the actual price will be for patients (for example, based on their age and medical circumstances).

(b) At Stage 2, once you have the details of prospective patients, such as their age and, if relevant, the results of their diagnostic tests and scans, you will need to provide them with the actual price of their treatment so they can decide if they wish to proceed.

3.49 A third party that offers multi-cycle packages, unlimited cycle packages or refund programmes is under the same consumer law obligations as clinics to provide the material information that prospective and existing patients need to make informed decisions. Similarly, you have responsibilities if you advertise the services of a third party and use information provided by them to do so (see paragraph 3.7).

⁴⁵ In the CMA's view, such information should be on your website as this is where prospective patients will commonly look for it.

Misleading Omissions

- 3.50 The information you provide should not omit or hide material information. Nor should you provide material information in a manner which is unclear, unintelligible, ambiguous or untimely.
- 3.51 Where you do so, this may constitute a misleading omission under the CPRs.⁴⁶

Examples of possible misleading omissions include where a clinic or other business:

- (a) Omits or hides information, or only provides partial information, about treatment and/or costs on its website,⁴⁷ instead directing prospective patients to contact them for such information, or further information, by phone or e-mail.
- (b) Omits to publish the clinic's most recent HFEA verified data on success rates.
- (c) Offers, recommends or provides information about optional add-on treatments but omits information about:
 - i. Clinical evidence for such treatments, particularly where none exists or is limited in nature;
 - ii. Any risks associated with these add-on treatments;
 - iii. The HFEA's information and traffic light system for add-on treatments.⁴⁸
- (d) Omits to explain why certain treatments are necessary or are being recommended – for example not explaining why ICSI is being recommended.
- (e) Advertises donor egg treatment, but omits the fact that the donor egg treatment takes place in partnership with a clinic abroad, under a different regulatory framework, or using imported eggs and/or sperm for example.
- (f) Omits to declare a conflict of interest or personal financial interest (such as commission) that a clinician may have with respect to a treatment, product

⁴⁶ Regulation 6(1) of the CPRs. See further Annex A.

⁴⁷ Where a clinic uses its website in order to provide information about its IVF treatments.

⁴⁸ For more information, visit the [HFEA's treatment add-ons](#).

or service they are offering at the clinic or where they are recommending the services of other businesses, for example, businesses that offer complementary therapies, such as acupuncture.⁴⁹

- (g) Advertises IVF as 'natural' but omits to explain that the treatment will involve the same medical procedures as 'conventional' IVF.
- (h) On egg freezing – fails to explain the effect of age on the likely outcome or the limited nature of the evidence base for the success rates for live births resulting from frozen eggs.
- (i) On donor sperm – fails to explain that ICSI may be needed and why, and the additional cost involved.
- (j) On IVF with surrogacy – fails to provide upfront information about surrogacy fees, for example what these additional fees are for, how much they are and when they are payable during treatment.
- (k) Fails to inform a patient when they have had the results of their diagnostic tests and scans whether their chances of success are in line with the relevant average success rates (e.g. for someone of their age) or better or worse.
- (l) On multi-cycle packages, unlimited packages and refund programmes – fails to provide information, about:
 - i. What is included in the fee for the package/programme;
 - ii. Whether there are any necessary additional costs over and above the fee for the package/programme e.g. medication, tests or scans or additional treatments required by the clinic;
 - iii. The eligibility criteria for being accepted onto the package/programme, including whether a medical review or screening tests are needed, and if so the cost of these;
 - iv. What is classed as a 'success' of the programme, for example a live birth or clinical pregnancy;
 - v. Where relevant, any time limits for completing all cycles;
 - vi. Where relevant, the clinics where treatment can take place.

⁴⁹ As required by the [GMC in their good medical practice document](#).

(m) On egg sharing arrangements, fails to provide information about:

- i. The cost of the discounted treatment and what this includes along with information about anything else that will be needed on top of this that is not included in the price provided, for example, medication costs;
- ii. Whether there is a minimum number of eggs required in order for the egg sharing arrangement to proceed;
- iii. How the eggs will be shared between the patient and donor recipient;
- iv. What impact the egg sharing arrangement may have on the egg sharers chances of success from that cycle.

(n) Makes material information difficult to find or it is unclear, unintelligible, ambiguous or untimely through, for example, putting it on a website that is hard to navigate, providing it in a number of different places, providing links which do not navigate the user to the correct place or burying it in small print.

Misleading Actions

3.52 The information you provide should not contain false information. Nor should it, or its overall presentation, in any way deceive, or be likely to deceive, prospective or existing patients, even if the information is factually correct. You should be very conscious when describing treatments of how patients are likely to interpret what you say to avoid misleading them.

3.53 Providing misleading information may constitute a misleading action under the CPRs.⁵⁰

Examples of possible misleading actions include where a clinic or other business:

⁵⁰ Regulation 5 of the CPRs – see further Annex A. In addition to engaging in a misleading commercial practice under the CPRs, you may also infringe the Advertising Standards Authority's self-regulatory 'UK Code of Non-broadcast Advertising and Direct and Promotional Marketing' (CAP Code). Adherence to the CAP Code is required in the HFEA Code (paragraph 4.8).

- (a) Makes unsubstantiated claims that compare a clinic favourably to others, for example, 'best centre in London' or 'best success rates'.
- (b) Claims that success rates are better than they are by, for example,
 - i. Relying on more favourable but out of date results;
 - ii. Promoting the results of a subset of patients, whose results are more favourable, in a way that suggest such rates are more broadly applicable to a wider range of patients;
 - iii. When part of a group, only giving prominence to the more favourable results of a clinic within that group;
 - iv. Advertising percentage success rates without reference to the size of the cohort, where to do so provides a misleading picture of success.
- (c) Advertises unrealistically low headline prices in order to appear very attractive to prospective patients – with essential elements of treatment and costs only revealed later in the process.⁵¹
- (d) Makes false or unsubstantiated claims about the success or effectiveness of treatments, such as egg freezing and/or optional add-on treatments.
- (e) Presents a treatment or test as standard in the sector, or medically necessary for all patients when this is not the case.
- (f) Misrepresents an add-on treatment as new or innovative, when this is not true, i.e. has been available for a number of years.
- (g) Makes false claims about the availability of donor eggs, sperm and/or embryos and where these have been obtained (UK or abroad). This includes where claims are made about having gametes available from particular ethnic groups.
- (h) Misrepresents the quality of donor sperm being sold.
- (i) Advertises special price promotions, such as claiming treatments are discounted for a 'limited time only' where:

⁵¹ This is called drip pricing. The Chartered Trading Standards Institute (CTSI) has published [guidance on pricing practices to assist businesses to comply with consumer law](#).

- i. There is no end date for the promotion; and/or
 - ii. The advertised, discounted, price continues to be applied after the promotion end date; and/or
 - iii. The clinic knows or reasonably suspects that it will not be able to supply the treatments at the advertised price.⁵²
- (j) On multi-cycle packages and refund programmes - misrepresents the benefits of the packages,⁵³ for example, by:
- i. Advertising cost savings but not comparing prices on a like-for-like basis.
 - ii. In relation to refund programmes, implying that all patients may benefit from the advertised claims of 100% refunds where this may not be the case, for example **bold** claims of 100% refund when small print says “up to” 100%.

The CCRs requirements

3.54 In addition to the information requirements set out above, consumer law also requires that you give or make available certain information to patients before they are bound by a contract with you.⁵⁴ As explained in paragraph 2.12, there is some overlap between the information requirements under the CPRs and the CCRs but they are not the same, and compliance with one does not ensure compliance with the other.

3.55 The ‘pre-contract information’ that you need to provide and how you need to provide it will depend on how the contract is entered into with the patient.⁵⁵ For the purposes of the CCRs, a patient’s contract is likely to be a distance contract,⁵⁶ where for example it is entered into over the phone or by email or an

⁵² Such practices are likely to also breach paragraphs 5 and 7 of Schedule 1 to the CPRs (‘banned practices’) - see Annex A, paragraph 1.17 for further information. The Chartered Trading Standards Institute (CTSI) has published [guidance on pricing practices to assist businesses to comply with consumer law](#).

⁵³ This includes claims made on your website which relate to services offered by third party providers.

⁵⁴ The CCR pre-contract information requirements do not apply to contracts for medicinal products.

⁵⁵ The CMA would not generally expect there to be a contract in place for these purposes in relation to fertility treatment that is being paid for by the NHS. However, a contract with NHS patients might be formed if you sell them any additional treatments and services on top of their free NHS treatment, for example for add-on treatments.

⁵⁶ See Annex A, paragraph 1.20, for further information about distance contracts.

on-premises contract,⁵⁷ where for example, it is entered into in person at your clinic or following an in-person meeting with a patient at your clinic.⁵⁸

3.56 It might be the case that you enter into more than one contract with a patient paying for their treatment. For example there may be:

(a) A contract for the initial diagnostic consultation, scans and tests (which could be a 'distance contract').

(b) A contract, if the patient decides to proceed, for the fertility treatment itself (which could be an on-premises contract or a distance contract where there is a repeat patient).

(c) A contract where a patient purchases add-on treatments or additional services.

(d) A contract with NHS funded patients for any extra treatments and services they are buying from you on top of their free NHS funded treatment.

3.57 In respect of each on-premises or distance contract, you need to give or make available to prospective patients the pre-contract information, set out in Table 2 below, in a clear and comprehensive manner before they are bound by your contract.⁵⁹ One way of ensuring you achieve this is to provide the contract and relevant pre-contract information in writing to patients to read (and take away if desired) before they agree to be bound by it. For the purposes of the CCRs, pre-contract information is only 'made available' if the patient can reasonably be expected to know how to access it. This is particularly important where you provide such information within an electronic patient information and consent platform. For off-premises contracts, you need to give prospective patients the information set out in Table 2 in a clear and comprehensible manner.⁶⁰

⁵⁷ See Annex A, paragraph 1.21, for further information about on-premises contracts.

⁵⁸ For completeness, the CMA notes that in the alternative, a patient's contract could be an off-premises contract. This may be the case, for example where you and the patient enter into the contract in a place that is not your clinic. See Annex A paragraph 1.22 for further information about off-premises contracts.

⁵⁹ For on-premises contracts, the full list of information to be provided is contained in Schedule 1 CCRs. For distance contracts, the full list of information to be provided is contained in Schedule 2 CCRs. Regulation 13(4) of the CCRs sets out the information to be provided for distance contracts where the means of distance communication limits the space or time to display the information.

⁶⁰ This information must be given on paper or, if the consumer agreed, on another durable medium, and must be legible. For off-premises contracts, the full list of information to be provided is contained in Schedule 2 CCRs.

Table 2 – Pre-contract Information

Pre-contract Information
(Points 1 to 5 are relevant for on-premises contracts. Points 1 to 6 are relevant for distance contracts and off-premises contracts)
1. The identity of the clinic (such as the clinic's trading name), the geographical address at which the clinic is established and the clinic's telephone number.
2. A reasonably full description of the treatment and services you will provide. You should give as much information as the means of communication allows.
3. The total price of the treatment and services which you will provide, inclusive of taxes. Where elements of the price cannot reasonably be determined in advance, ⁶¹ you should explain how those elements of the price will be determined.
4. The arrangements for payment and delivery of the treatments and services you'll provide and the timeframe in which you undertake to provide the treatment and services.
5. Where applicable, the clinic's complaint handling policy.
6. For distance and off-premises contracts only: (a) In addition to the identity and contact information outlined in 1 above the clinic's email address, to enable the patient to contact the trader quickly and communicate efficiently. (b) That the patient has a right to cancel the contract within the cancellation period without giving any reason; ⁶² how they can exercise their right to cancel; the circumstances in which their right to cancel is lost; and the consequences of exercising their right to cancel where they have expressly

⁶¹ For example, because the price may vary due to individual circumstances.

⁶² A patient will have a statutory right to cancel a distance contract or an off-premises contract except in limited circumstances. There is no statutory right to cancel a contract to the extent it is for the supply of prescribed medicine. The normal cancellation period ends at the end of the 14 days after the day on which the contract is entered into. If the patient is not informed of their right to cancel, the cancellation period will be extended.

requested the service starts during the cancellation period, namely that the patient is required to pay the clinic's reasonable costs for services already supplied.

(c) Where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the patient at the request of the clinic.

(d) Where the clinic is acting on behalf of another clinic, the geographical address and identity of that other clinic.

(e) If different from the address provided in relation to point (d) above, the geographical address of the place of business of the clinic, and, where the clinic acts on behalf of another clinic, the geographical address of the place of business of that other clinic, where the patient can address any complaints.

Confirmation of a distance contract

3.58 Where you agree a distance contract with a patient, the CCRs require that you provide a confirmation of the distance contract to the patient in a durable medium. This should be provided within a reasonable time and in any event before any service is commenced under the contract. An example of durable medium is an email with documents attached that a patient can later refer to. A website link is not a durable medium as websites may be changed and so would not be a permanent record of what the patient had been given. A patient portal may be able to meet the requirements of a durable medium provided that the clinic cannot remove and change information unilaterally and provided that a patient can access the portal for an adequate period of time (which depends on all the circumstances) after the patient's contract with a clinic is terminated.⁶³

⁶³ Where an off-premises contract is entered into you must give the prospective patient a copy of the signed contract or a confirmation of the contract. This must be provided on paper or, if the patient agrees, on another durable medium and at the latest, before any service is commenced under the contract.

Making changes to the pre-contract information

- 3.59 Consumer law provides that the pre-contract information you provide to a prospective patient is to be treated as a term of the contract that you subsequently enter into with them.⁶⁴ It is therefore important for you to ensure that the pre-contract information is accurate and up to date, because otherwise you may breach the terms of your contract with the patient. This may be particularly relevant where you are relying on pre-contract information that is provided on your website, in pre-printed leaflets and marketing materials or on a patient information and consent platform.
- 3.60 Consumer law provides that you cannot rely on any change to the pre-contract information provided to a patient (whether such a change takes place before or after the contract is entered into) unless that change has been expressly agreed between you and the patient. In practical terms, this means you will need to highlight changes to pre-contract information promptly and obtain the patient's consent before proceeding on the basis of the change. This may be particularly important, for example, if you are updating a standard price list that has previously been provided to the patient.
- 3.61 Where a change to pre-contractual information is made after a contract has been entered into, there may be certain circumstances in which you can rely on a variation clause to agree such changes with a patient. However, any such clause must be fair in accordance with unfair terms legislation. This is discussed further at paragraphs 5.19 to 5.30 in Chapter 5.

⁶⁴ Contract law governs when a contract is concluded (i.e. entered into). The most obvious example is where a clinic provides a patient with written contractual terms and the patient then signs such terms to confirm their agreement. Contracts can also be made orally, partly in writing and partly orally, and implied from the conduct of both clinic and patient.

4. Ensuring that your commercial practices meet the standard of professional diligence under consumer law

- 4.1 This Chapter sets out the CMA's views on the steps clinics should take to ensure their commercial practices are fair, in particular in relation to meeting the objective standard of professional diligence under Regulation 3(3) of the CPRs.
- 4.2 Regulation 3(3) CPRs is therefore a further important protection for patients within the CPRs, over and above the prohibitions against misleading omissions and misleading actions, which we describe in Chapter 3.
- 4.3 Regulation 3(3) CPRs prohibits commercial practices which contravene the requirements of 'professional diligence' and which are likely to appreciably impair the average patient's ability to make an informed decision, thereby causing them to take a different decision as a result.
- 4.4 'Professional diligence' is defined as the standard of special skill and care which a clinic may reasonably be expected to exercise towards patients, which is commensurate with either honest market practice or the general principle of good faith in the fertility sector.⁶⁵ A shorthand way of describing the standard is that it is intended to reflect what patients would reasonably expect of a clinic.
- 4.5 To the extent there is poor current practice across the fertility sector, this will not represent the standard of professional diligence, as this is not what a reasonable patient would expect of a clinic that is acting in accordance with honest market practice or good faith.
- 4.6 As set out at paragraphs 2.23 to 2.26, there are a number of sector-specific and general medical professional laws, regulations and standards which, when considered either individually or collectively, are likely to inform the standard of professional diligence that you are expected to meet. These include those published by the HFEA, the General Medical Council, the Royal College of Nursing, the Association of Clinical Embryologists, the Health and Care Professions Council, the National Institute for Health and Care Excellence and the Care Quality Commission. Consequently, if your commercial practices fail to

⁶⁵ As explained further at paragraph 1.9 of Annex A.

meet these standards,⁶⁶ you may also be at risk of breaching the requirements of professional diligence under the CPRs, depending on the individual circumstances.

- 4.7 Further, where you breach other provisions of the CPRs, for example the prohibitions against misleading actions or omissions, or if you engage in any of the practices listed in Schedule 1 of the CPRs, this may also demonstrate your failure to comply with the requirements of professional diligence.
- 4.8 As a result, you will need to consider how the consumer law obligations relating to professional diligence impact the wide ranging aspects of the services you provide. The vulnerable circumstances of patients, at the time they are making decisions about treatment(s), will also be important considerations for a court when assessing the extent to which you are behaving in a professionally diligent manner.
- 4.9 Set out below are some indicative examples of where clinics' commercial practices may fail to comply with the requirements of professional diligence:⁶⁷
- a) The use of ICSI for all patients undergoing IVF treatment.
 - b) A clinic prescribing a patient that is taking part in an egg donor programme a higher dose of medication than they would have prescribed if the patient were not sharing their eggs, in order to produce more eggs.

In the above two examples, concerns may arise given patients are in a vulnerable position⁶⁸ and some patients will be exposed to costs and/or medical risks that are unjustified on the basis of their specific clinical circumstances.

- c) Proactively marketing an add-on treatment to a patient after the treatment plan has been agreed, where there is no evidence to demonstrate a material change in the patient's circumstances. This is a particular concern where a patient is expected to make a quick decision.

⁶⁶ Complying with the standards set out in these codes and guidance may not be sufficient of itself in order for a clinic to be acting in accordance with the requirements of professional diligence.

⁶⁷ The CMA recognises that what is considered acceptable clinical practice in the sector may change over time, and as a result, what is considered to be 'professionally diligent' may also change over time.

⁶⁸ As set out at paragraph 2.9.

- d) Employing sales or marketing techniques intended to pressurise patients or prospective patients into purchasing treatment or a consultation, without allowing them sufficient opportunity to properly consider the offer. This could include certain advertising promotions at trade shows, such as advertising price discounts or the chance to 'win' treatment, which require prospective patients to sign up to treatment immediately to benefit from the discounts on offer.
- e) Failing to offer patients access to counselling services before they consent to treatment.⁶⁹
- f) Failing to declare a conflict of interest or personal financial interest (such as commission) that a clinician may have with respect to a treatment, product or service they are offering at the clinic or where they are recommending the services of other businesses.⁷⁰ For example, businesses that offer complementary therapies, such as acupuncture.

⁶⁹ As required under section 3 of the HFEA Code of Practice 9th edition and recommended at section 1.1.2.4 of the NICE clinical guidelines 'Fertility problems: assessment and treatment'.

⁷⁰ The GMC's guidance on '*Financial and commercial arrangements and conflicts of interest*' states 'If you, or someone close to you, or your employer, has a financial or commercial interest in an organisation providing healthcare.....you must not allow that interest to affect the way you prescribe for, advise, treat, refer or commission services for patients. You must be open and honest with your patients about any such interests that could be seen to affect the way you prescribe for, advise, treat, refer or commission services for them.'

5. Ensuring that terms and conditions between clinics and patients are fair

- 5.1 Where a consumer is paying for goods or services there will be a contract between the parties which covers the terms of the service or nature of the goods to be supplied.⁷¹ This is the case, even when that service is a medical one and the consumer is also a patient.⁷²
- 5.2 As set out at paragraphs 3.16 and 3.17, a cycle of treatment may result in the patient entering into more than one contract. This may involve the patient entering into different contracts with the same clinic at different stages of the patient journey, for example, for the initial consultation and then later on for the provision of treatment. Alternatively, the patient may enter into a contract with more than one clinic. For example, this may occur where a satellite clinic provides the initial consultation, scans, tests and monitoring services but refers the patient to a licenced clinic to carry out those services that are licensed by the HFEA. The patient may also enter into separate contracts with third party businesses when purchasing other goods and/or services linked to fertility treatment.⁷³ This may occur, for example, when purchasing:
- Donor eggs or sperm via an egg or sperm bank; and/or
 - A multi-cycle or refund programme; and/or
 - Personalised support services aimed at co-ordinating the patient journey; and/or
 - Medication and/or associated courier services.
- 5.3 To help you comply with consumer law, the CMA would normally expect that your contracts with patients are in writing. The following table sets out examples of the key pieces of information that the CMA would normally expect to see within your contracts. That said, it's important to note that your consumer law obligations to provide information as described elsewhere in this guidance, for example, under the CPRs and the CCRs, are such that only providing this information within your contract may be insufficient to ensure you comply with your obligations.

⁷¹ This includes where the patient qualifies for NHS funded treatment and chooses to purchase additional goods or services from the clinic that are not funded by the CCG. In this scenario, the CMA considers there will be a contract between the clinic and patient covering the additional goods and services purchased directly from the clinic.

⁷² Where relevant, references to 'patient' includes intended parents that have entered into a contract with a clinic as part of an IVF with surrogacy agreement.

⁷³ Consumer law will also apply in these circumstances.

Examples of the key pieces of information that the CMA would normally expect to be included within the terms are set out below:

- (a) An explanation of the services that are to be provided to patients under the contract and the price to be paid for them;
- (b) Any important conditions attached to the service being offered – for example:
 - i. If there is a time limit on completing the treatment, such as if a set number of cycles need to be completed within a specified time; and/or
 - ii. The circumstances in which treatment may be delayed, such as if a suitable donor needs to be identified before treatment can commence; and/or
 - iii. If patients are required to purchase medication directly from the clinic or a chosen supplier;
- (c) Information about why and how the treatment (and who provides the treatment) may vary;
- (d) Information about why and how the agreed price may vary in the future (in circumstances where no changes are made to the agreed treatment). For example, for contracts for egg or embryo storage, which may last a number of years;
- (e) The name and location(s) of the clinic(s) where treatment will be carried out, including, where applicable, whether a partner or third-party business will be carrying out any aspects of the service at a different location;
- (f) How and when payments are to be made and to whom, including where the clinic has arranged for a partner or third party to provide some of the services;
- (g) Information about any costs involved should the patient wish to use services offered by third parties – for example if patients need to pay

a fee to the clinic in order to transfer their eggs/embryos/sperm to a third party;

(h) Cancellations and refund policies, including where the patient has purchased a multi-cycle or refund programme; and

(i) Complaints-handling policy.

5.4 Unfair terms legislation (Part 2 of the CRA 2015) aims to protect consumers against unfair contract terms. It applies to all your terms and as such all terms are potentially subject to a test of fairness under the legislation.

5.5 Where 'terms' are referred to in this section, this includes all wording which gives rise to an obligation or right between the clinic and the patient. This wording may be contained in contracts, agreements, conditions, policies, consumer notices⁷⁴ and regulations.⁷⁵

5.6 You should ensure that your terms are user friendly, clear and unambiguous (see paragraphs 5.8 to 5.14 below). They also need to be substantively fair (see paragraphs 5.15 to 5.25 below). As described at paragraph 2.9, patients are likely to be in a vulnerable position compared to you. The vulnerable circumstances of patients, at the time the contract is agreed, and when any term is being enforced subsequently, will be important considerations for a court when assessing the fairness of your terms.

5.7 If a term is found by a court to be unfair, it will not be binding on patients and cannot be enforced. Patients may also be able to rely upon the unfair terms

⁷⁴ A consumer notice is any notice that relates to rights or obligations between a trader and consumer or where the trader is seeking to exclude or restrict their liability towards a consumer. Consumer notices can include announcements, written or verbal, and any other communication which is intended to be seen or heard by a consumer. It is important to note that a term in a consumer notice need not technically have contractual effect for it to be challenged as unfair.

⁷⁵ Depending on the circumstances, it may also be contained in your correspondence with patients including consultation letters, brochures, information packs, on your website, patient information portals, on a poster in your clinic, or even word of mouth such as what a staff member might say to prospective patients at an open evening or during a consultation before an agreement has been reached to proceed with treatment.

legislation in any legal proceedings they bring themselves against you or in defence of a claim where you try to enforce an unfair term.

Ensuring that your terms are user-friendly, clear and unambiguous

- 5.8 Your terms should be easily located by and accessible to prospective patients. They should also be brought to prospective patients' attention in a timely manner before they agree to any treatment (for example, when arranging an initial consultation and/or undergoing tests or scans and/or when agreeing to treatment options and costs).⁷⁶ Patients should always have an appropriate opportunity to read and understand terms before they accept them.
- 5.9 Furthermore, where treatment involves a number of stages, the CMA would expect you to direct patients to the terms and conditions that are directly relevant to that particular stage of treatment.
- 5.10 In particular, unfair terms legislation also requires that your written terms are transparent, i.e. written in plain and intelligible language and are legible. The wording used in your terms should be simple, clear and informative, so that patients can genuinely understand their rights and obligations before agreeing to them.

Terms are more likely to be clear and unambiguous where you:

- (a) Set out all the rights and obligations arising under the contract in one document. Where you fail to do this, terms may not be incorporated into the contract and may be unenforceable against patients;
- (b) Include upfront 'key facts' sections or executive summaries, highlighting particularly surprising or important terms at the beginning;
- (c) Set out your terms in plain and simple language that an ordinary person would understand, avoiding legal jargon and where necessary explain any medical terms;

⁷⁶ In order to comply with information requirements under the CPRs (see paragraph 3.12 to 3.15), the CMA would also expect patients to be clearly signposted to important information, for example, via your website, in brochures and during visits to a clinic.

(d) Are clear about their meaning, to avoid any ambiguity or confusion;

(e) Use meaningful headings to make your terms easy to navigate.

5.11 As well as helping you to comply with your obligations under consumer law, setting out your terms clearly will save you time in answering questions and reduce the likelihood of disputes.

Binding patients to hidden terms

5.12 A provision that purports to bind patients to terms that they have not had the chance to become familiar with or understand, may be unfair under consumer law. In the CMA's view, this may occur where, for example:

(a) Terms are deemed to have been accepted by patients by signing a document, such as a letter setting out their treatment options and costs, in circumstances where different terms are provided in a variety of locations, making them difficult to find and review. The CMA has been made aware of examples where terms are provided on different pages of a clinic's website, in separate documents provided to patients, and some provided verbally during face-to-face meetings;

(b) Terms are only provided after patients have entered into a contract (whether in writing or not) for example, for tests, procedures or consultations. In these circumstances, patients will not be aware of key terms of the contract nor had the opportunity to consider these and other applicable terms;

(c) Terms are written in language that is difficult to understand (for example, using jargon or unfamiliar medical terms without explanation).

5.13 You should also ensure that any terms that may be particularly surprising or important, and especially those whose significance may be missed, are specifically brought to the patient's attention.⁷⁷ You should not assume that patients can identify terms which are important, or which may operate to their

⁷⁷ The CMA notes, however, that terms will still need to be fair even if they are brought to the attention of patients. What is a fair term is discussed further in paragraphs 5.15-5.18.

disadvantage. Non-exhaustive examples of such terms could include:

- (a) Terms restricting the time period during which treatment must be completed, for example, when purchasing a multi-cycle package. A term which sets a deadline for completing treatment which may be unachievable for some patients may be unfair (see also paragraph 5.65). It is important that patients are made aware of factors which may affect their ability to complete treatment within a set time period;
- (b) Terms that provide you with a wide discretion to delay treatment, particularly where the patient continues to be bound to the contract.⁷⁸ For example a term which allows treatment to be delayed when you are unable to locate a suitable donor;
- (c) A term that requires patients to purchase medication from the clinic or from a supplier chosen by the clinic, especially where this may result in higher medication charges than if purchased independently from a pharmacy of the patient's choice.⁷⁹ The CMA recognises that in some scenarios patients may benefit from purchasing their medication via the clinic or their chosen supplier. For example, where the bargaining power of the clinic means they can offer the product at a lower price than competing providers or where there is a need to provide medication at short notice. However, the CMA is also aware of instances where patients would have been able to purchase medication from an independent supplier at a significantly reduced price;
- (d) A term that allows you to refer patients to an alternative clinic for treatment or parts of treatment. When choosing a clinic, patients are likely to have factored in information which is directly relevant to their chosen clinic, for example, the success rates for, or location of, the clinic they understood would be providing the treatment. If any part of their treatment may be carried out by another clinic, the contract should set out clearly the

⁷⁸ Under Chapter 4, section 52 of the CRA, where the contract does not expressly fix the time for the service to be performed, and does not say how it is to be fixed, the contract is to be treated as including a term that the trader must perform the service within a reasonable time. What is a reasonable time is a question of fact.

⁷⁹ The CMA considers that even where such a clause is drawn to the attention of consumers, it may still be unfair. This will depend on all of the circumstances but one important factor will be the extent of any potential price differential.

circumstances in which this may happen and this should be brought to the patient's attention before patients commit to treatment;

- (e) Terms that provide you with discretion to substitute clinicians, with or without notice. This is particularly important where patients are expecting specific clinicians, for example, where the treatment was advertised with continuous care by the same clinician, or by a particular clinician, as a feature of the service;
- (f) Terms that relate to a financial commitment for the patient following completion of the initial treatment. For example, terms relating to the ongoing storage of eggs or embryos; and
- (g) Terms that set out the circumstances in which a patient is able to proceed with an egg sharing arrangement. For example, terms relating to the minimum number of eggs that need to be produced, or where either the donor or recipient change their mind after treatment has started.

5.14 Complying with the information requirements set out in Chapter 3 and ensuring that your terms are user-friendly and transparent will help them to be fair. However, your terms also need to be substantively fair (see below).

What is an unfair term?

5.15 Generally speaking, your contract terms will be unfair if they put patients at an unfair disadvantage. The law applies a 'fairness test' that starts by asking whether the wording used tilts the rights and responsibilities between the patient and clinic too much in favour of the clinic (for example, where your terms give you the right to make significant changes to the contract without the patient's consent).

5.16 Part 2 of the CRA sets out a specific fairness test⁸⁰ and illustrates what 'unfairness' means by listing some types of terms that are likely to be unfair. For example, your terms may be unfair if they cause or allow any of the following:

- (a) Patients being denied full compensation when things go wrong.

⁸⁰ See paragraphs 1.28 to 1.37 of Annex A.

- (b) Patients losing prepayments or being denied refunds when services are not performed as agreed.
- (c) Patients being subject to disproportionate financial sanctions or charges when they breach a term of the contract.
- (d) Changes to the terms of the contract or service provided after the contract has been agreed, without a valid reason specified in the contract.

- 5.17 Clinics should not, whether deliberately or unconsciously, take advantage of the patient's circumstances to their detriment. When setting their terms clinics should factor in the typical characteristics of patients in this sector, such as a lack of experience or unfamiliarity with medical procedures and their willingness to do all they can to increase their chances of having a baby. Clinics also need to actively take the legitimate interests of their patients into account when setting their terms. Clinics should consider whether it is reasonable to assume that patients would agree to such terms if the respective negotiating positions of the clinic and patient were equal.
- 5.18 The following sections provide examples of the types of terms that could be open to challenge for being unfair and explain how you can help ensure that you comply with your consumer law obligations.

Variation clauses - Terms that allow a wide discretion to vary the service being provided

- 5.19 For your contracts to be considered fairly balanced, patients should be entitled to receive the service they expect based on the pre-contract information and the agreed terms, and not something that is, in any significant respect, different.
- 5.20 As discussed in Chapter 3, it is important that patients are provided with clear and accurate information about the service (in particular the specific treatment) that is being provided for the agreed price under the contract. This includes information about specific changes that the clinic considers may be needed based on the patient's particular medical circumstances, or changes that are often required by a subset of patients. It is important that patients understand what the treatment involves and if additional costs are likely, and if so in what

circumstances so they can make an informed decision about proceeding with treatment.

- 5.21 However, the CMA recognises that sometimes it may be necessary for you to make adjustments to the service (in particular the treatment) that has been expressly agreed with the patient. Once the patient is bound by the contract, unless the patient agrees, such changes can only be made where there is a specific right to vary the terms of the contract. A variation clause is particularly likely to raise fairness concerns where it allows for significant changes to be made to the patient's detriment (for example, by reducing the quality of the service provided, such as where treatments that have been agreed at the outset are later withdrawn for non-medical reasons) or where its use can result in changes that are unexpected and unforeseeable to the patient (such as transferring the patient to an alternative clinic for treatment or part of their treatment).
- 5.22 To help you comply with your consumer law obligations, you should ensure that any variation term clearly, accurately and unambiguously specifies the circumstances in which you can make changes. It is particularly important that patients can foresee and understand when such changes may be made and how such changes may affect them. It is not enough, for example, to simply state that any reasonable changes may be made as it will not be clear what this is likely to mean to patients in practice.
- 5.23 However, given the nature of your contracts, as well as making sure the scope of any potential changes are clearly set out, it is particularly important that the potential for changes (both in terms of when changes may occur, and what the changes may be) are as narrow as possible. This is because, for example, patients will often be unable or reluctant to stop treatment or switch to another clinic if they are unhappy with the change, because of the cost, stress and inconvenience involved and the potential negative impact on their health. Terms that allow changes which are necessary to reflect changes in law or sector regulations are generally unlikely to raise fairness concerns, whereas terms which allow you to make changes for your own commercial reasons are more likely to raise consumer law compliance issues.
- 5.24 For the avoidance of doubt, the CMA would be unlikely to object to a variation in service where patients request and receive add-on treatment(s) after the

treatment plan has been agreed.⁸¹

Variation clauses – Terms that allow a wide discretion to vary the agreed price (in circumstances where the agreed treatment plan has not changed)

5.25 Balanced contracts require that patients receive the treatment they expect, in exchange for paying a price they expect. Terms which give you, in effect, a unilateral, unlimited right to increase the price of your treatment, after the contract has been agreed with the patient, are likely to be unfair under consumer law. Concerns are also likely to arise where a term allows you significant discretion in deciding when and by how much the price may change or where a term allows for a change to the price when the contract covers a relatively short period of time (for example, where the patient is expected to complete treatment shortly after entering the contract).⁸² This is especially the case where patients would have little or no practical choice but to pay the higher price or cancel their treatment (which they may be unable or extremely reluctant to do).

Examples of potentially unfair price variation terms include:

- (a) *Prices are correct as of DD/MM/YYYY but are subject to variation and review without notice*
- (b) *Prices may be subject to change*

5.26 Price increase terms need to be treated with great care, in particular so that they do not allow you to increase your prices arbitrarily once the contract has been agreed by both parties. It is the CMA's view that the use of price variation terms is more likely to be appropriate where the contract covers a long period of time, such as may be the case with frozen egg storage, as it may be difficult to accurately predict how costs may fluctuate, especially where some of those costs may be outside of your control.

⁸¹ Provided information, such as the benefits and risks of any add-on treatments, are clearly explained to patients in a timely manner and when they are in a position to consent – see paragraph 3.44.

⁸² As set out at paragraphs 3.59-3.60, the pre-contract information should set out how long the offer price is valid for. If the price changes before the patient accepts the offer the new price must be expressly agreed between you and the patient.

- 5.27 As with variation terms on the service to be provided (see paragraph 5.22 above), transparency is a critical part of assessing the fairness of a term, so that prospective patients can foresee changes and understand the practical implications for them.
- 5.28 Where a genuine reason for a price variation term exists, to ensure compliance with consumer law, your price variation terms should set out clearly the circumstances in which the agreed price may change and the method of calculating the change. This should enable patients to foresee, on the basis of clear, objective and intelligible criteria, the changes that may be made and evaluate the practical implications for them, before entering the contract.
- 5.29 Simply stating that your fees may go up as a result of ‘increased lab costs’ or ‘the wider national economic picture’ or merely stating that any increases will be ‘cost reflective’ or ‘reasonable’ will not make your terms fair, as patients will be unable to foresee what sort of changes such wording allows, and in what circumstances. Such vague wording also provides significant scope to make unexpected changes, to the detriment of patients and fails to recognise that, generally speaking, you are likely to be much better able to anticipate changes in your costs than patients are. For example, where you contract with patients to store their frozen embryos or eggs for a number of years, a term that fails to set out in an appropriately clear and specific way the circumstances and reasons for a future price increase for storage services, along with an indication of the level of increase, is likely to be unfair.
- 5.30 The CMA would expect that you provide patients with advance written notice of the change in their fees, before it takes effect, so that they may take steps to avoid the price increase. For example, moving their eggs or embryos to an alternative location and obtaining a refund of any prepaid fees.

Ending the contract

- 5.31 Where your terms give you a wide discretion to end the contract,⁸³ whether for no reason at all or for vaguely defined reasons, such terms are likely to be unfair. This is likely to be the case even where you provide patients with

⁸³ Whether by suspension or termination.

advance notice and a refund of prepayments, because of the significant imbalance in rights and obligations arising under the contract.

Example of a potentially unfair term:

(a) We may terminate the contract at any time and at our sole discretion, including for any of the following reasons

(i) You do not comply with these terms or do not agree to any change in our terms.

5.32 However, you are not obliged to provide services unconditionally. In this context, fairness is more likely to be achieved where your terms allow you to end the contract only if patients are in serious breach of their obligations under the contract, where there is a genuine medical reason for not proceeding with treatment, or where it is genuinely impossible for you to continue providing treatment for reasons beyond your control (i.e. exceptional reasons).

5.33 The CMA considers that legitimate reasons for ending a contract could include:

(a) It is the clinician's professional opinion that continuing the treatment would not be suitable based on the patient's circumstances;

(b) The decision to end the contract reflects changes in the relevant laws and regulatory requirements;

(c) The patient fails to provide the required consent to allow treatment to continue, or make payments in accordance with the terms of the contract without good reason.

5.34 Where it is necessary to end the contract (either by the patient or the clinic) patients may be due a refund of payments made in advance or a reduction in outstanding fees. This is covered in the following section.

Cancellation and Refunds

5.35 The CMA appreciates that patients may not want to focus on cancellation and refund policies when commencing their treatment, given the negative

connotations this may have. However, before patients commit to treatment it is important that they understand what their rights are in different scenarios, including in the event that their treatment does not progress as originally planned.

- 5.36 It is important for you to carefully assess whether your cancellation and refund terms are likely to be considered fair. Transparency will be a key part of your assessment and your terms are more likely to be fair if they clearly set out when a patient will be entitled to a refund, and the amount due (or where this is not known, the basis on which the refund will be calculated). However, transparency alone is not sufficient to ensure fairness.
- 5.37 At paragraphs 5.38 to 5.59, the CMA sets out its views on when it considers cancellation and refund terms are more likely to be fair. This covers a range of scenarios, including whether you are providing a single cycle of treatment or a number of cycles as part of a multi-cycle, unlimited or refund programme ('multi-cycle programmes').

Cancellation by the patient

- 5.38 From time to time patients may wish to cancel the contract. This may occur before any of the service is provided or after some, but not all, of the service is provided. For example, this may occur where the patient has fallen pregnant naturally while waiting for treatment to begin. Regardless of whether the patient is purchasing a single treatment cycle or a multi-cycle programme, terms which set out your cancellation charges or applicable refunds when consumers cancel are more likely to be fair where they reflect an amount intended to cover your actual losses resulting directly from the cancellation (e.g. costs already incurred or net loss of profit).⁸⁴
- 5.39 Terms which allow you to retain anything over and above this amount in the event of cancellation, therefore, are more likely to be considered unfair. For example, a term providing that a patient is not entitled to any refund in respect of sums they have paid in advance (prepayments), regardless of the amount of any costs and losses caused by the cancellation of the contract, is likely to be unfair.

⁸⁴ For example, your actual costs minus the amount you have saved from not providing the services.

- 5.40 Your cancellation charges (including any terms allowing you to retain any prepayments), therefore, should reflect a genuine estimate of your direct loss. As you would be under a duty to mitigate your losses in such circumstances, the CMA would not expect this to include any sum that could reasonably be saved (for example, by cancelling any services that are due to be outsourced to a third party where this is possible).
- 5.41 The right to a refund (or a reduction in the amount owed by the patient) should not be diluted through other terms (such as termination charges). Where such terms would have the effect of requiring a patient to pay compensation over and above a clinic's genuine pre-estimate of loss, the patient is likely to face a disproportionate financial sanction as a result of cancelling the contract.

Cancellation by the clinic

- 5.42 There may be circumstances where you need to cancel the contract,⁸⁵ for example because you are no longer able to provide the treatment as expected. For example, this may arise where you cancel the contract because of a lack of availability of staff or equipment. Another potential example may be where you cancel the contract as a result of Government public health measures because you are unable to provide treatment or the patient is unable to receive treatment. You may need to cancel the contract before any of the service is provided or where some, but not all, of the service is delivered.
- 5.43 Where clinics are unable to provide any of the services set out in the contract, the CMA considers that the law will generally allow patients to obtain a refund for any prepayments, or avoid future payments where treatment is paid for in arrears. This is the case both in relation to a single treatment cycle and multi-cycle programmes.
- 5.44 Where clinics cancel the contract after some but not all of the agreed services have been provided,⁸⁶ the CMA would expect, as a minimum, for patients to receive a full refund in respect of the services or parts of the services that have not been provided. However, in some circumstances, especially where the reason for cancellation is within your direct control, consumer law may also

⁸⁵ This could be a contract for a single treatment cycle or a multi-cycle programme

⁸⁶ See further below in relation to where treatment is unable to continue due to medical or health concerns.

require that patients receive a refund in relation to some or all of the services already provided prior to you cancelling the contract. Such a situation may arise, for example, where the patient has obtained no significant benefit under the contract prior to the cancellation e.g. because they would need to repeat – and pay for - the treatment, including medication, already provided under a new contract with a clinic. A patient should not be out of pocket when you cancel a contract and they are not at fault (and in some circumstances they might be entitled to compensation for breach of contract).

5.45 Other refund terms

(i) Single cycle of treatment

5.46 There may be other circumstances where you may provide some, but not all, of the services set out in your contract with a patient, for example, where a patient is unable to continue a cycle of IVF once it has started due to medical or health concerns.

5.47 You may offer a service that incorporates a number of procedures as part of a ‘treatment package’ in exchange for a set price. This is likely to include, as a minimum, those procedures that you consider patients will ordinarily require in order to complete a cycle of treatment. Some clinics may also include additional services, for example, add-on treatments (such as assisted hatching or PGT-A), or embryo freezing and storage, within their set treatment packages.⁸⁷

5.48 It is the CMA’s view that where such a treatment package is provided, in order to comply with consumer law you should provide a refund to a patient if the treatment cycle stops before an egg collection procedure takes place. This is because the CMA considers that the earliest point at which a cycle can be considered completed is when an egg collection procedure has taken place. Where no such procedure takes place, the CMA expects there to be significant cost savings for the clinic as a result of parts of the treatment cycle not being provided.

5.49 In such circumstances, the CMA would generally expect a fair refund to reflect a

⁸⁷ Alternatively, the patient may purchase these separately on top of the treatment package.

genuine pre-estimate of the expected cost savings⁸⁸ to the clinic as a result of the cycle not being completed as expected.⁸⁹ Accordingly, the amount representing a fair refund is likely to increase in line with the number of additional services, such as add-on treatments or embryo freezing and storage, that the clinic has included in their treatment packages, if these additional services are not then provided. In addition, the CMA would also expect the patient to receive a refund for services that have been purchased in addition to the treatment package (for example, assisted hatching or embryo freezing and storage), but which are not provided.

5.50 Some clinics go further than just providing a refund where no egg collection procedure takes place, for example providing a partial refund if fertilisation fails or treatment does not progress to embryo transfer. As a minimum the CMA would expect the patient to receive a refund for add-on treatments or additional services that have been purchased in addition to the set treatment package, but which are not provided.⁹⁰ As set out at paragraph 5.36, clinics need to bring their refund policies to the attention of patients before they agree to treatment. Some patients will want to take clinics' refund policies into account when they choose where to have treatment.

(ii) Multi-cycle programmes

5.51 With multi-cycle programmes, the patient typically pays an upfront fee for a 'package' that incorporates either a set number of treatment cycles or an unlimited number of treatment cycles over a set period of time, in return for a material discount on the per-cycle cost. Patients may like the greater cost certainty that such packages may offer them.

5.52 The service provided as part of such a multi-cycle programme is typically

⁸⁸ The CMA would expect this to include both any costs that are saved and any costs that could reasonably be saved (for example, by cancelling any services that are due to be outsourced to a third party where this is possible).

⁸⁹ The CMA recognises that the precise cost savings associated with any particular patient whose treatment cycle stops before the egg collection procedure takes place, is likely to vary to some degree. Accordingly, where clinics are using standard terms and conditions, the CMA acknowledges that a fair term does not require that a different refund must be calculated for each individual patient and the CMA is unlikely to be concerned where the refund reflects a genuine pre-estimate of the expected typical or average cost savings, in such circumstances.

⁹⁰ In the CMA's view, a partial refund may also be needed where such add-on treatments or additional services are included in a set package price (rather than being sold separately) but are not provided, particularly where the price paid by the patient for the package reflected the cost of providing these services.

considered to have been provided in full (i.e. completed) either when all of the cycles included within the programme have been completed, or following a live birth, regardless of which cycle of treatment results in the live birth. Clinics' terms may provide that no refunds are due where a patient pays upfront for a multi-cycle programme but no longer needs each individual cycle because they achieve a live birth as a result of one of the cycles included in the programme. Generally speaking, provided a clinic is transparent with patients about the clinic's refund policy, the CMA considers that such terms are unlikely to raise fairness concerns.⁹¹

5.53 However, as with a single treatment cycle, if the patient purchases add-on treatments and/or additional services in addition to those that are included in the multi-cycle programme (for example, assisted hatching, PGT-A or future storage services), the CMA would expect the cost of these services to be refunded where the patient has paid for them but the clinic does not provide them.

5.54 In some circumstances treatment may not proceed due to medical or health concerns, for example, this may be where the patient has completed the first of three cycles without registering a live birth and is advised against continuing with future treatment. In this scenario the CMA considers that patients would normally be expected to pay for the services that they have received but be entitled to a refund which reflects the services that are not provided. Terms that provide for an appropriate pro rata refund, which fairly takes into account any discount applied as a result of the patient purchasing more than one cycle in advance, are unlikely to raise fairness concerns.

Other issues to consider when assessing the fairness of your cancellation and refund terms

5.55 The following paragraphs will be relevant when assessing the fairness of your cancellation and refund terms, regardless of the reason for cancellation.

Payment in arrears

⁹¹ The CMA notes that fairness concerns are more likely to arise as the number of cycles paid for within the multi-cycle package increases. This is because, for example, the risk that patients are paying for cycles that they could not reasonably be expected to need or want increases.

- 5.56 Where a patient has not paid in advance, rather than providing a refund, the CMA would expect clinics to apply the above principles in a similar manner so as to reduce the amount owed by an equivalent amount.

Non-refundable deposits and admin fees

- 5.57 It is also important for you to be aware that where an advance payment by a patient is described as non-refundable, a patient may still be entitled to a refund in line with the principles set out in paragraphs 5.38 to 5.56. The fact that an advance payment is described as non-refundable does not in itself determine whether a refund is due because the terms may still be unfair where a patient is paying for services that they have not received.⁹²
- 5.58 The CMA also considers that clinics should not charge an admin fee (or equivalent) for processing refunds being provided to patients in line with the principles set out in paragraphs 5.38 to 5.56.

Credit Notes

- 5.59 Regardless of whether you or a patient cancels the contract, where patients have a right to a refund or a reduction in price, you should not mislead or pressure them into accepting a credit note to be used against future treatment in lieu of a refund or reduction in price. Furthermore, if you are offering a credit note, you should ensure that a refund or a reduction in price is also clearly and easily made available to patients. Any restrictions that apply to a credit note (or similar), such as the period in which credits must be used or services re-booked, must also be fair and made clear to patients.

Examples of potentially unfair terms include:

- (a) PGT-A testing must be paid for in full before treatment commences and is non-refundable should treatment be abandoned following egg collection; or

⁹² For further information see [Unfair Contract Terms Guidance](#) - Retention of prepayments on consumer cancellation – Schedule 2, Part 1, paragraph 4, and Trader’s right to cancel without refund – Schedule 2 (second half), Part 1, paragraph 7.

- (b) If you cancel your treatment no refund will be issued in any circumstances; or
- (c) All services will be cancelled if you develop Covid-19 or you place yourself at risk of Covid-19 infection. You will be liable for the full cost of the treatment.

Excluding or restricting your liability to your patients

5.60 A contractual term may be considered unfair where it unduly excludes or restricts a clinic's liability towards patients. There are examples of such terms on both the 'grey list'⁹³ and the list of terms 'blacklisted' under the CRA 2015, i.e. prohibited or deemed not to be binding.

Examples of terms which are blacklisted include terms that:⁹⁴

- (a) Exclude the clinic's liability if it fails to provide the service (i.e. treatments) to the required standard (i.e. with reasonable care and skill);⁹⁵
- (b) Exclude the clinic's liability if it fails to provide the treatment it has agreed to provide, in accordance with information about the clinic or treatment that is binding on the clinic;⁹⁶
- (c) Restrict the amount of compensation a clinic can be required to pay for breach of any of the patient's statutory rights to less than the price the patient is required to pay under the contract;
- (d) Exclude or limit patients' statutory remedies under the CRA, or make a statutory remedy more difficult for the patient to enforce;⁹⁷

⁹³ This lists terms which may be regarded as unfair. The 'grey list' is contained in section 63(1) together with Schedule 2, Part I CRA 2015.

⁹⁴ Further advice on [exclusion and limitation clauses is available in CMA 37](#). Annex A of CMA 37 contains examples of terms which may be unfair.

⁹⁵ See section 57(1) CRA 2015.

⁹⁶ See section 57(2) CRA 2015. The CRA makes any information about the clinic or the treatment which is said or written to a patient binding on the clinic where this is (i) provided to the patient by or on behalf of the clinic; and (ii) taken into account by the patient when entering into the contract or when making any decision about the treatment after entering the contract. This is subject to certain qualifications, such as where any change to the information has been expressly agreed between the clinic and the patient (see further s50(2) CRA 2015).

⁹⁷ Blacklisted under section 57(4) CRA 2015.

(e) Exclude or limit the clinic's liability in the event of death or personal injury to patients resulting from negligence on the part of the clinic.⁹⁸

5.61 Examples of terms likely to be considered unfair include terms that have the object or effect of:

- (a) Excluding or limiting the clinic's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the clinic (other than by negligence – see paragraph 5.61(e) above);
- (b) Inappropriately excluding the legal rights of the patient (over and above their statutory rights) where the clinic has failed to provide the treatment it has agreed to provide;
- (c) Inappropriately limiting the legal rights of the patient (both their statutory rights, to the extent this would not be blacklisted⁹⁹, and any other legal rights) where the clinic has failed to provide the treatment it has agreed to provide;
- (d) Excluding or hindering a patient's right to take legal action or exercise any other legal remedy they may have, for example, by limiting the time in which a patient can bring a claim.

5.62 In order to improve the likelihood that your contractual terms are fair, you should avoid unnecessary 'legal jargon' or vague or uncertain wording (for example, '*we may exclude or limit our liability so far as the law permits*'), since the practical effect is unclear for patients. Similarly, the mere addition of a statement that '*statutory rights are not affected*' will not make an unfair term acceptable.

5.63 A clinic may also wish to limit its liability where it has been unable to provide the treatment in accordance with what had been agreed in circumstances where the clinic does not think it is at fault. For example, a clinic may have been let down by a supplier, or it may not be able to provide the service because the necessary staff, equipment or supplies are unavailable.

⁹⁸ Blacklisted under section 65(1) CRA 2015.

⁹⁹ In the CMA's view, any term limiting the amount of compensation payable to a patient where a clinic has not met its statutory obligations is highly likely to be unfair.

- 5.64 Even though a clinic might consider that they are not at fault, this does not mean the clinic can exclude or limit its liability through the terms of its contract. Indeed, such a term may be blacklisted because the clinic may nonetheless have failed to exercise reasonable care and skill by not taking appropriate mitigating action. Even where a clinic has exercised reasonable care and skill, it may still be unfair for the clinic to seek to exclude or limit the clinic's liability, for example, because the clinic can mitigate the risk more effectively than the patient (the CMA notes the patient may not even know about the risk).
- 5.65 Similar fairness concerns can also arise in other situations where a consumer assumes a risk arising under a contract. For example, where a consumer is required to complete the IVF or egg freezing cycles included in a multi-cycle package within an unreasonably short timeframe. Although there are naturally a number of inherent risks in the provision of fertility treatment, where the set timeframe for completing the treatment is unreasonably short, fairness concerns may arise. For example, patients may not be in a position to know if the timescale is feasible, whereas a clinic is likely to be better placed to assess what a feasible timeframe would be. In addition, a patient may be unable to meet the timeframes through no fault of their own including for reasons that are to some extent under the control of the clinic, for example, due to limits in available staff.
- 5.66 It is important to consider whether a fully informed consumer with equal bargaining strength could be expected to agree to the term. As part of the fairness assessment the CMA will also consider whether a potentially onerous term is clearly expressed and brought to the patient's attention before they enter into the contract.¹⁰⁰

Assigning the contract

- 5.67 If you transfer patients' rights under a contract to a different clinic, this is called an 'assignment' (or, in Scotland, an 'assignation').¹⁰¹ As a result, patients may find themselves dealing with a different clinic. Where ownership of a clinic changes hands, the rights and obligations under patients' contracts are likely to

¹⁰⁰ It's important to note that on its own, this isn't sufficient to render an otherwise unfair term fair.

¹⁰¹ This may arise where a clinic is purchased by a new owner.

transfer with it. To ensure compliance with consumer law, the patient's legal position should be unaffected by the transfer.

- 5.68 As a general rule, contracts may not be unilaterally varied in these circumstances and may only be terminated in accordance with their terms. Therefore, once the new owner is in place, the CMA would expect them to abide by the terms of the patient's contract, including the provisions on variation. If, as is typical, the original owner requires a promise from the new owner in respect of any failure on the new owner's part to continue to perform ongoing business contracts, this too will be a restriction on the new owner's ability to renegotiate contracts.
- 5.69 Where terms give a clinic the right to 'assign' or 'transfer' its rights and obligations¹⁰² to a different clinic and where this may significantly prejudice the patient's rights, this is likely to infringe consumer law. A term is unlikely to be fair if it allows for the 'transfer' of rights and obligations that could result in, for example, existing patients having to deal with a clinic which offers an inferior service. To help you to comply with your consumer law obligations, you should ensure that you consult with patients before 'transferring' rights and obligations so that they understand the implications. You must obtain their consent to any transfer or change that may adversely affect them, and do so before it takes place.

¹⁰² Generally, only the benefits under the contract can be 'assigned' and not the obligations/burdens under the contract, for instance the provision of services by the trader to the consumer. In practice, parties often behave as though the burden of the contract can also be assigned. It is the CMA's view that such a course of dealing may be classified in legal terms as a novation (that is the old contract is replaced with a new contract between the consumer and the new trader on the same terms as the last) or as an assignment of the benefit of the contract coupled with the subcontracting of the obligations to the new business. What is said in this section is considered to apply whether assignment or novation is involved.

6. Ensuring your complaints handling processes are accessible, clear and fair

- 6.1 There may be times when patients are dissatisfied with their experience at a clinic or have problems that they want investigating. It is important that you encourage and respond to feedback and demonstrate that you are committed to resolving any complaints quickly, fairly and effectively. This will help you to address the needs and expectations of patients and maintain a high standard of care and quality service.
- 6.2 Consumer law requires you to give or make available to prospective patients information about your complaints handling policy before they become bound by any contract with you. You also risk infringing consumer law if your policies, practices or terms have the effect of discouraging someone from making a complaint or from escalating it if they are unhappy with how it has been dealt with.¹⁰³
- 6.3 To help you to comply with your consumer law obligations, you should ensure that you have a written complaints handling procedure which is:
- (a) Easy to find;
 - (b) Easy to understand and use;
 - (c) Written and followed in such a way that complaints are dealt with fairly and effectively, with due regard to the upset and worry that they could cause to patients undergoing treatment or contemplating further treatment (as well as clinic staff);
 - (d) Applied consistently across your clinics, where you have more than one.
- 6.4 Alongside your consumer law obligations, there are statutory sector-specific regulations and guidance on handling complaints that you must also follow, for example the HFEA's code of practice,¹⁰⁴ and the requirements of these often

¹⁰³ This could amount to a misleading omission under the CPRs, as it may influence patients' decisions whether or not to pursue a complaint.

¹⁰⁴ [Section 28 of the HFEA's code of practice.](#)

overlap. The sector rules and guidance are relevant to assessing the standards you should follow to comply with your obligations under consumer law.

You are more likely to comply with your consumer law obligations where:

- (a) Your complaints handling procedure is easily located and visible to current patients. For example, by ensuring that it is:
 - Clearly signposted (i.e. easy to find and access) on your website;
 - Highlighted in your brochures, leaflets, or information packs for patients;
 - Set out in your terms and conditions with patients;
 - Prominently on display in your clinic.
- (b) You have a written complaints procedure which sets out clearly where and how complaints can be made, including:
 - Who to approach to discuss a complaint;
 - Who is responsible for handling the complaint. For example, a complaints manager;
 - How to complain if the subject of the complaint would otherwise be handling it;
 - The different ways in which complaints can be submitted.
- (c) You set out clearly the type of issues your complaints procedure covers and what is not covered by the procedure;
- (d) You have a quick, simple and streamlined procedure for resolving complaints early and with as few steps as necessary;
- (e) You acknowledge complaints quickly and ensure that complainants are kept informed at all times of the next steps in the complaints handling procedure;
- (f) You set out clear and reasonable timescales within which complainants can expect to hear back about their complaint;

- (g) You ensure that any investigation of a complaint is carried out by someone who is independent of (and not the direct subject of) the concerns raised, so as to avoid conflicts of interest;
- (h) You clearly explain your decision in writing (so there is a record), giving details of the outcome of the complaint and any action taken.

- 6.5 If the complainant is not satisfied with how you have handled their complaint, you should tell them about the further forms of action that are available to them under your internal complaints handling procedure (as well as explaining how they can escalate the complaint to relevant independent external bodies such as the HFEA, the General Medical Council, the Nursing and Midwifery Council, the Health and Care Professions Council or the Independent Sector Complaints Adjudication Service).
- 6.6 You should make clear in your written complaints handling procedure and decision letter that if a complainant remains dissatisfied with how you have dealt with their complaint or your decision, they may have the right to escalate the complaint externally, and make them aware of how and to whom they can escalate their complaint with the relevant contact details.
- 6.7 Failing adequately to follow your own complaints handling procedure in practice or similar complaint procedures under relevant sector rules or other guidelines (for example, by failing adequately to respond to complaints or not properly investigating them) may mean that you fall below the standards of 'professional diligence' required under consumer law.
- 6.8 Under consumer law you are responsible for the actions of anyone acting in your name or on your behalf. It is not enough to have an accessible and fair complaints handling procedure; it must also be followed in practice. You should therefore ensure that your staff are trained in and have a good understanding of your complaints handling procedure, how it works, their role and responsibility in reporting and resolving complaints raised with them, and their role in supporting people if they want to make a complaint.

Annex A - Overview of legislation

1.1 This Annex gives a high-level overview of your main obligations to patients under relevant consumer protection legislation, namely:

(a) The Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

(b) The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs).

(c) The Consumer Rights Act 2015 (CRA).

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

- 1.2 The CPRs prohibit traders,¹⁰⁵ including in this sector, fertility clinics, from using unfair commercial practices towards consumers. The term ‘commercial practice’ is broad in scope and time, and includes any practice directly connected with the promotion, sale or supply of goods or services to consumers. It can be a single act or omission or be a course of conduct over time.
- 1.3 The CPRs set out broad rules outlining when commercial practices are unfair. Broadly speaking, the CPRs prohibit clinics from engaging in unfair practices in their dealings with patients. They prohibit misleading actions, misleading omissions and aggressive practices where they are likely to have an impact on patients’ decisions. Part of the aim of these prohibitions is to ensure that prospective and existing patients get the information they need to make informed decisions in relation to any products and services offered by the clinic.
- 1.4 The CPRs can apply at any stage of a clinic’s interaction with prospective patients and existing patients, including before they have chosen which clinic to use, when deciding whether to proceed with treatment or agreeing a treatment plan, and any time after treatment has commenced. Examples of commercial practices include the publication of promotional material in brochures and on your website, through to how you enforce your contract terms. It is important to note

¹⁰⁵ The definition of a trader under the CPRs is, “(a)...a person acting for purposes relating to that person's business, whether acting personally or through another person acting in the trader's name or on the trader's behalf, and (b) ...[]...includes a person acting in the name of or on behalf of a trader”.

that you do not need to have entered into a contract with a patient for the CPRs to apply.

1.5 The CMA's general guidance on the CPRs can be found on the CMA's [website](#).

The scope of the CPRs – practices affecting the decisions of the 'average consumer'

1.6 For there to be a breach of the CPRs, practices must have,¹⁰⁶ or be likely to have, an effect on the 'transactional decisions'¹⁰⁷ of the 'average consumer'.¹⁰⁸ This is not confined to decisions by a prospective or existing patient about whether or not to sign a contract, but can include a wide range of decisions, for example whether or not to:

- Browse your website
- Make initial enquiries to, or visit, your clinic (even if they eventually choose a different clinic)
- Pay for a consultation and/or diagnostic tests
- Pay for treatments, including any optional add-ons
- Raise or pursue a complaint or concern
- Seek a refund
- Cancel or delay treatment

¹⁰⁶ One important exception to this is the list of 31 specific practices in Schedule 1 CPRs which will be unfair in all circumstances, i.e. there is no requirement to demonstrate that these practices have or are likely to have an effect on the patient's transactional decisions.

¹⁰⁷ A 'transactional decision' is any decision taken by a consumer whether it is to act or refrain from acting concerning – (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or (b) whether, how and on what terms to exercise a contractual right in relation to a product.

¹⁰⁸ Under the CPRs, you will need to consider the needs of the average patient, taking into account the typical characteristics of a patient in this sector, such as a lack of experience or unfamiliarity with medical procedures and their willingness to do all they can to increase their chances of having a baby. See regulation 2(2)-(6), CPRs.

When will your practices be unfair under the CPRs?

- 1.7 The CPRs prohibit you from engaging in the following types of unfair practices.¹⁰⁹

The ‘general prohibition’ on unfairness: (Regulation 3(1), CPRs)

- 1.8 Regulation 3(1) of the CPRs contains the general prohibition of unfair commercial practices. A commercial practice is unfair if, amongst other things, it fails to meet the requirements of professional diligence and it appreciably impairs (or is likely to appreciably impair) an average consumer’s ability to make an informed decision, causing them to take a different decision as a result.
- 1.9 ‘Professional diligence’ is an objective standard of special skill and care which a clinic may reasonably be expected to exercise towards patients and which is commensurate with honest market practice or the general principle of good faith in the fertility sector. It is intended to reflect what patients would reasonably expect of a clinic.
- 1.10 There are a number of sector specific laws, regulations and standards applicable in the fertility sector, which may inform the objective standard. Further information on the general prohibition and examples of practices that may contravene the requirements of professional diligence are set out at paragraphs 4.1 to 4.9 of Chapter 4 (Ensuring that your commercial practices meet the standard of professional diligence under consumer law).

Misleading actions and misleading omissions (Regulations 5 and 6, CPRs)

- 1.11 Regulations 5 and 6 of the CPRs prohibit commercial practices that are misleading (whether by action or omission), and that cause or are likely to cause the average consumer to take a transactional decision they would not otherwise have taken.

¹⁰⁹ General [guidance on the CPRs can be found on the CMA’s website](#). This includes guidance on aggressive practices (regulation 7, CPRs) which restrict people’s decision-making ability through intimidation or exploitation and the 31 specific practices that are banned in all circumstances.

Misleading actions

- 1.12 You must not give prospective or existing patients false information about a wide range of matters listed in the CPRs¹¹⁰, or present information in a deceptive way (even if it is factually correct). This includes information about the main characteristics of the treatment,¹¹¹ the price of treatment or the manner in which the price is calculated (such as what is included in any headline price and details of treatment that patients may need to pay for on top of this, for example, for medication). Examples of misleading actions can be found in paragraph 3.53 of Chapter 3.

Misleading omissions

- 1.13 You must not mislead prospective or existing patients by failing to give them the information they need to make informed decisions about your services ('material information'). This includes where you omit information, or provide it in an unclear, unintelligible, ambiguous or untimely manner, and it causes or is likely to cause patients to take a different decision as a result.¹¹²
- 1.14 Furthermore, where you provide prospective patients with information about the characteristics and costs of fertility treatment (an 'invitation to purchase'¹¹³), you must ensure that you provide them with the total price of your service, including any mandatory extras and, where there are additional charges that cannot reasonably be calculated in advance, the fact that such charges will or could be payable and how they will be calculated.
- 1.15 Chapter 3 sets out more detailed advice on the types of information that prospective or existing patients will need to make informed decisions and at what stage of the patient journey this information needs to be provided. Examples of misleading omissions can be found in paragraph 3.51.

¹¹⁰ The full list is at regulation 5(4) of the CPRs.

¹¹¹ The main characteristics are defined at regulation 5(5) of the CPRs.

¹¹² Regulation 6(1) CPRs. Whether a commercial practice is a misleading omission will be assessed in its factual context taking account of the matters set out in regulation 6(2) CPRs.

¹¹³ The CPRs make special provision for commercial practices which amount to an 'invitation to purchase', i.e. a commercial communication which describes the characteristics of fertility treatment and the price to be paid and which thereby enables a prospective patient to decide whether to proceed with such treatment. For such communications, the CPRs specify information that is automatically to be regarded as material such that its omission is therefore a breach of the prohibition against misleading omissions.

Aggressive practices and practices considered to be unfair in all circumstances

- 1.16 The CPRs prohibit practices which are likely to significantly impair a the average consumer's freedom of choice or conduct through the use of harassment, coercion or undue influence, and which cause or are likely to cause them to take a different decision as a result.
- 1.17 There are also 31 specific practices listed in Schedule 1 CPRs, which will be unfair in all circumstances. They include:
- (a) 'bait advertising' i.e. making an invitation to purchase at a specified price without disclosing the existence of reasonable grounds a clinic may have for believing it will not be able to provide treatment at that price;¹¹⁴
 - (b) Claims that a particular treatment or product (such as complementary medicines) can cure a particular diagnosis;¹¹⁵ and
 - (c) Falsely stating that a particular product or treatment will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.¹¹⁶

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

- 1.18 Under the CCRs, clinics¹¹⁷ are required to give or make available¹¹⁸ certain pre-contractual information to prospective patients, and to do so 'in a clear and comprehensible manner'¹¹⁹ before they are bound by a contract. This is set out in more detail in paragraphs 3.54 – 3.57 of Chapter 3. The CCRs also provide

¹¹⁴ Schedule 1, paragraph 5 CPRs.

¹¹⁵ Schedule 1, paragraph 17 CPRs.

¹¹⁶ Schedule 1, paragraph 7 CPRs.

¹¹⁷ The obligations in the CCRs apply to traders, which are defined as "a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf".

¹¹⁸ Something is made available to a patient only if that patient can reasonably be expected to know how to access it. For 'off-premises' contracts, the required pre-contract information must be given to the patient.

¹¹⁹ Unless the required information is already apparent from the context (e.g. the postal address where the patient is meeting you at that same address).

patients with additional cancellation rights in certain circumstances for contracts made at a distance or 'off-premises'. This statutory pre-contractual information is to be treated as legally binding on the clinic in the same way as what is said in the contract itself.

- 1.19 The CCRs apply to contracts that are 'on-premises', to 'distance' contracts and to 'off-premises' contracts.¹²⁰
- 1.20 A 'distance contract' is defined in the CCRs as '*...a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.*' This would include, for example, where the contract to have pre-fertility treatment diagnostic tests, scans and a consultation is agreed over the phone or online.¹²¹
- 1.21 Contracts for fertility treatment are likely to be 'on-premises' contracts¹²² where a patient enters into a contract with a clinic either on the clinic's premises or following an appointment on the clinic's premises. In circumstances where the patient does not visit the clinic before entering into a contract for treatment, for example, if the initial consultation happens by telephone and the clinic accepts results from previous tests and scans, then the contract for the fertility treatment is likely to be a 'distance contract' and the patient will have additional cancellation rights.
- 1.22 An 'off-premises contract' includes contracts that the clinic and the patient enter into in person in a place that is not the clinic's business premises. This might include, for example, at a trade fair. The definition also includes contracts that are entered into following an offer which is made by the patient at a place that is not the clinic's business premises but when both the patient and clinic are present 'in person'. Again, this might include where the consumer makes an offer

¹²⁰ For more advice visit [Business Companion's guide on premises sales, consumer contracts on premises sales](#).

¹²¹ Under the CCRs, where clinics agree a distance contract with a patient confirmation of the distance contract must be provided on a 'durable medium' within a reasonable time after the contract is entered into, and before treatment commences. An example of a durable medium would be an email with documents attached, which the patient can retain and use to access the documents at a later date. A website link would not be a durable medium as websites may be changed and so would not be a permanent record of what the patient had been given.

¹²² The CCRs define an 'on-premises contract' as "a contract which is neither off-premises nor a distance contract".

at a trade fair.¹²³

- 1.23 Further information about patients' cancellations rights can be found in Table 2 at paragraph 3.57 of Chapter 3. General guidance on the CCRs can be found on the Chartered Trading Standards Institute's website [here](#).

The Consumer Rights Act 2015 (CRA)

- 1.24 The CRA sets out various rights and remedies for consumers (i.e. patients) in relation to your¹²⁴ contracts for goods and services with them (Part 1). The CRA also protects them against contract terms (and notices) that could be used to give you an unfair advantage over them (Part 2).

Part 1, CRA

- 1.25 Part 1 of the CRA introduces a term in your contracts with patients that you will perform your service with reasonable care and skill¹²⁵. Where you fail to meet this standard, you will be in breach of contract and the CRA provides a patient with remedies over and above those available for breach of contract.¹²⁶
- 1.26 The CRA also 'blacklists' terms which seek to relieve you of statutory obligations you owe to patients (blacklisted terms are automatically unenforceable against patients).¹²⁷ This guidance covers this in more detail at Chapter 5 paragraphs 5.60 – 5.66.
- 1.27 Part 1 of the CRA also introduces¹²⁸ as a term in your contracts with patients anything¹²⁹ that is said or written to the patient, by or on behalf of the trader, about the trader or service, that is taken into account by the patient when deciding to enter into the contract or when making any decision about the service after entering into the contract. This includes any information that must be

¹²³ See further regulation 5 of the CCRs. Where an off-premises contract is entered into you must give the prospective patient a copy of the signed contract or a confirmation of the contract. This must be provided on paper or, if the patient agrees, on another durable medium and at the latest, before any service is commenced under the contract.

¹²⁴ The CRA applies to a 'trader' in respect of their conduct with a consumer. The definition of a trader in the CRA is the same as that used in the CCRs, namely "a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf".

¹²⁵ Section 49(1), CRA.

¹²⁶ They include the right to repeat performance / a price reduction (section 54(1) CRA 2015).

¹²⁷ As per section 57 CRA.

¹²⁸ As per section 50 CRA.

¹²⁹ Subject to limited exceptions – see section 50(2) CRA.

provided to the patient under certain provisions¹³⁰ of the CCRs. Any change to the information provided under the CCRs (whether before entering the contract or later) is not effective unless expressly agreed with the patient.¹³¹

Part 2, CRA

- 1.28 Part 2 of the CRA aims to protect consumers against unfair contract terms and notices.¹³² To comply with Part 2 of the CRA you must ensure that your contract terms and notices are fair. A term is unfair *'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'*.¹³³ If a term is not fair, it will not be legally binding on a patient.
- 1.29 In assessing whether the 'significant imbalance' test is met, it is necessary to consider whether the wording used tilts the rights and responsibilities between the patient and clinic too much in favour of the clinic. For instance, by granting the clinic a beneficial option or discretion or power, or by imposing on the consumer a disadvantageous burden or risk or duty, whether financial or non-financial.
- 1.30 As the significant imbalance is concerned with the parties' rights and obligations under the contract, the focus of the fairness assessment is on potential, rather than actual, outcomes for patients as a result of the contractual term.
- 1.31 The concept of *'good faith'* is intended to have a broad application and to ensure that the fairness assessment includes *'an overall evaluation of the different interests involved'*. The requirement of good faith embodies a general principle of *'fair and open dealing'*. It looks to good standards of commercial morality and practice.
- 1.32 In terms of fair dealing, this requires that clinics should not, whether deliberately or unconsciously, take advantage of the patient's circumstances to their

¹³⁰ Namely regulation 9, 10 or 13 of the CCRs

¹³¹ Section 50(5) CRA.

¹³² A consumer notice is wording that may not form part of a contract, but which relates to the rights or obligations between a clinic and patient. This could include statements made in writing or orally in your other communications – for example, brochures, welcome packs, on your website, on a poster in your clinic, or what a staff member might say to a prospective patient before they agree to IVF treatment. These statements are treated in the same way as if they were a term in your contract with patients.

¹³³ There are certain exemptions from the fairness test. The main exemption is commonly called 'the core exemption' and relates to terms that specify the main subject matter of the contract or set the price – provided they are transparent and prominent.

detriment. When setting their terms¹³⁴ clinics should factor in the typical characteristics of patients in this sector, such as a lack of experience or unfamiliarity with medical procedures and their willingness to do all they can to increase their chances of having a baby. Clinics also need to actively take the legitimate interests of their patients into account when setting their terms. Clinics should consider whether it is reasonable to assume that patients would agree to such terms if the respective negotiating positions of the clinic and patient were equal.¹³⁵

1.33 In terms of open dealing, terms should be *‘expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously’*¹³⁶ to patients. You should not assume that patients can identify terms which are important, or which may operate to their disadvantage.¹³⁷

1.34 The CRA illustrates what ‘unfairness’ means by listing some types of terms that are likely to be unfair. For example, your terms may be unfair if they cause or allow any of the following:

- (a) Patients being denied full compensation when things go wrong.
- (b) Patients losing prepayments or being denied refunds when services are not performed as agreed.
- (c) Patients being subject to disproportionate financial sanctions or charges when they breach a term of the contract.
- (d) Changes to the terms of the contract or service provided after the contract has been agreed, without a valid reason specified in the contract.

1.35 Your terms must also be transparent. This means that they should be expressed in plain and intelligible language and, when in writing, be legible.¹³⁸ Critically,

¹³⁴ Section 62(5) CRA 2015 – “In assessing fairness, a court will: (a) take into account the nature of the subject matter of the contract; and (b) refer to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends”.

¹³⁵ See CJEU case C-415/11 *Aziz v Caixa D’Estalvis de Catalunya, Tarragona i Manresa*, at paragraphs 44, 45 and 69.

¹³⁶ *Director General of Fair Trading V First National Bank*, Lord Bingham of Cornhill, [2001] UKHL 52, paragraph 17

¹³⁷ See for example, *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), and *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm), at paragraph 21.

¹³⁸ Sections 68(1) and (2) CRA 2015.

they should be easy to understand and put patients in a position where they can make informed choices about what they are signing up to.

- 1.36 Your terms should not contain concealed pitfalls or ‘traps’. You should take extra steps to prominently highlight surprising or important terms and bring them to the patients’ attention at the earliest opportunity, so that they understand and appreciate all the essential features of the contract before agreeing to it.
- 1.37 Further information on the steps you need to take to ensure your terms meet the fairness test and are user-friendly, clear and unambiguous is at Chapter 5. The CMA has also produced general guidance on the unfair terms provisions in Part 2 of the CRA (and a shorter overview guide for businesses). This should be read in conjunction with this guidance and can found on the CMA’s webpages - see [CMA 37](#).