

## **PRIVATE HEALTHCARE MARKET INVESTIGATION**

### **Notice of Intention to vary the Private Healthcare Market Investigation Order 2014 and to bring Article 22 of the Order into force**

1. This Notice concerns the bringing into force of Article 22 of the Private Healthcare Market Investigation Order 2014 (the Order) and the dates for complying with the various requirements of Article 22. Article 22 requires consultants to give private patients certain specified information as to their fees and other relevant matters prior to an outpatient consultation or treatment, and to supply the Private Healthcare Information Network (PHIN) with certain specified information as to their fees and their standard terms and conditions.
2. The Notice also invites submissions on whether there has been any material change of circumstances since the preparation of the Private Healthcare Market Investigation Report<sup>1</sup> (the Report) in April 2014, relevant to the remedies in Article 22.
3. A draft of the instrument varying the Order is annexed to this Notice.
4. We invite responses on this Notice by Thursday 10 November. Responses should be sent to Tom Akhgar ([tom.akhgar@cma.gsi.gov.uk](mailto:tom.akhgar@cma.gsi.gov.uk)).

#### **Background**

5. The CMA made the Order on 1 October 2014, as part of a package of measures to remedy, mitigate or prevent the adverse effects on competition identified by the CMA in the Report.
6. Article 22 is in Part 4 of the Order (Articles 20 to 25) which is aimed at remedying the lack of independent, publicly available performance and fee information on consultants. The Report found that this lack of information gave rise to an adverse effect on competition in the provision of consultant

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<sup>1</sup> [Private healthcare market investigation: final report](#) dated 2 April 2014.

services, by preventing patients from exercising effective choice, thereby reducing competition between consultants on the basis of quality and price.<sup>2</sup>

7. More detail on the requirements in Article 22 are set out below. In summary, Article 22 provides that:
  - (a) Consultants providing private healthcare services have a duty to provide:
    - (i) PHIN with information about their fees and standard terms and conditions; and (ii) private patients with fee and related information prior to an outpatient consultation or treatment, including the estimated cost of the consultation, tests or treatment, and other relevant information.
  - (b) Operators of a private healthcare facility have a duty: (i) to require consultants, as a condition of exercising practising rights at that facility, to comply with their duty to provide the information specified in Article 22 to patients; (ii) to provide consultants with an appropriate template, as approved by the CMA, for this purpose; and (iii) to ensure compliance by consultants with Article 22, by asking privately-funded admitted patients to sign a form confirming they have received the relevant information, or alternatively by other, equivalent, measures.
8. Part 4 of the Order (with the exception of Article 22) was brought into force on 6 April 2015. However, Article 22 was not brought into force pending the outcome of a legal challenge made by the Federation of Independent Practitioner Organisations (FIPO).
9. The legal challenge brought by FIPO has been dismissed both by the Competition Appeal Tribunal<sup>3</sup> and by the Court of Appeal,<sup>4</sup> and, subject to any views and evidence provided in response to this Notice, the CMA now intends to update the time limits in Articles 22 and 24 of the Order and to bring Article 22 into force.
10. This Notice sets out the CMA's proposals for the dates for complying with the following duties created by Article 22:
  - (a) Duty of consultants to provide fee information to PHIN (Article 22.1).
  - (b) Duty of operators of private healthcare facilities to ensure that consultants comply with their duty to provide private patients with relevant information (Articles 22.2 and 22.7).

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<sup>2</sup> *Private healthcare market investigation: final report*, paragraph 10.9.

<sup>3</sup> *Federation of Independent Practitioner Organisations v CMA* [2015] CAT 8.

<sup>4</sup> *Federation of Independent Practitioner Organisations v CMA* [2016] EWCA Civ 777.

- (c) Duty of consultants to provide private patients with information prior to:
- (i) an outpatient consultation (Articles 22.3 and 22.6); and (ii) further tests or treatment (Articles 22.4 and 22.5).

## **Proposed time frame**

### **(a) *Duty of consultants to provide fee information***

11. Article 22.1 requires consultants providing private healthcare services to provide PHIN with information as to: (i) their outpatient consultation fees; (ii) fees for their most frequently performed standard procedures; and (iii) their standard terms and conditions. This information must be in a format as provided by PHIN.
12. The Report states in paragraph 11.618 that the principal aim in requiring consultants to provide information on their fees is to ensure that privately-funded patients are adequately informed regarding the costs of private healthcare, thereby stimulating competition on price between consultants, by facilitating shopping around by patients.
13. For these purposes paragraph 11.621 of the Report states that the fee information is to be consultants' 'list prices', leaving them free to charge more or less than this level, as they considered appropriate, in particular cases.
14. Consultants must also provide PHIN with their standard terms and conditions (including any exclusions or caveats) in a standard form as determined by PHIN.
15. In deciding an appropriate time frame for bringing this duty into effect we have taken into account that time will be needed for PHIN to provide an appropriate format for the fee information and a standard form for the terms and conditions, in addition to specifying appropriate arrangements for collection of the fee information. We have, however, also taken into account that parties have been aware of these requirements since the Order was made in October 2014, some two years ago.
16. In accordance with paragraph 11.601 of the Report, Article 22.1 of the Order currently requires consultants to comply with the duty to provide fee information to PHIN from a date no later than 1 December 2016. In view of the delay caused by the litigation brought by FIPO, we consider that this is too short a time frame to enable the necessary preliminary work of providing an appropriate format and specifying appropriate collection arrangements to be carried out properly.

17. As noted in paragraph 13, the relevant information will be list prices for outpatient consultations and standard procedure fees for those procedures undertaken by consultants, as well as standard terms and conditions. While such information may already be readily available to consultants, it is important that the fees listed by different consultants are prepared on a clear and consistent basis in order to enable patients to make meaningful comparisons. In certain cases, this may require that list prices are differentiated by relevant patient characteristic, eg age, comorbidities etc. We have taken these issues into account in considering the timetable for requiring the submission of fee information to PHIN. We consider that consultants should be able to provide list prices for outpatient consultations to PHIN by 30 June 2017 for publication on PHIN's website.
18. However, we recognise that defining 'procedures', for the purpose of notifying standard procedure fee information appropriately, will require more extensive consultation with hospitals, consultants and other expert bodies. Therefore, we consider that an additional 12 months should be given to enable the necessary preliminary arrangements to be carried out, and that the date in Article 22.1 as regards notifying standard procedure fee information should be amended to read '30 June 2018'. We consider that this period is required in order to allow PHIN to design, test and make available to consultants a suitable IT interface onto which consultants can upload details of their procedure fees, as well as their terms and conditions.

**(b) *Duties on operators of private healthcare facilities***

19. Operators of private healthcare facilities are required by Article 22.2 to make it a condition of permitting a consultant to provide private healthcare facilities at their facility that the relevant consultant provides privately-funded patients with the information required by Article 22.3 (outpatient consultations) and Article 22.4 (further tests or treatment).
20. In particular, Article 22.7 requires operators of private healthcare facilities to ask privately-funded patients to sign a form confirming that the relevant consultant did provide them with the relevant information, or alternatively, to take equivalent measures, as approved by PHIN, to monitor compliance by consultants with their duties under Article 22.
21. We have taken into account that private hospital operators will need to take steps, such as adjusting the terms of the practising privileges agreements with relevant consultants, producing template letters for consultants which have been approved by the CMA, and establishing a system for checking with patients that they had received the relevant information.

22. Nevertheless, as private hospital operators have been aware for over two years that these steps would need to be taken at some point in time, we consider that a period of **two months** from the date of the instrument bringing Article 22 into force will give them sufficient time to make the necessary preparations to comply with the obligations in Article 22.2 and Article 22.7.

**(c) *Duty of consultants to give privately-funded patients relevant information***

23. Article 22.3 requires consultants to supply the following information to a private patient prior to an outpatient consultation: (i) the estimated cost of the consultation; (ii) details of financial interests the consultant may have in the medical facilities and equipment used at the premises; (iii) a list of insurers which recognise the consultant; (iv) a statement reminding insured patients to check with their insurers whether their policy will provide cover; and (v) the website address of PHIN, together with a statement, in standard wording agreed with PHIN, indicating that this will provide useful information on the quality of performance of hospitals and consultants.

24. Article 22.4 requires consultants to disclose the following information to private patients prior to further tests or treatment: (i) the reasons for the further tests or treatment; (ii) an estimate of the cumulative cost of the treatment pathway; (iii) a statement of any services which have not been included in the estimate; (iv) the website address of PHIN together with a statement, in standard wording agreed with PHIN, indicating that this will provide useful information on the quality of performance of hospitals and consultants. Where the tests or treatment are given on the same day as the consultation, patients can be told this information orally.

25. We consider that at least some of these requirements are consistent with the guidance on financial and commercial arrangements and conflicts of interest given by the General Medical Council in its [Good Medical Practice](#). This suggests that consultants will need only a short period to adapt their current arrangements to comply with the specific requirements of Articles 22.3 and 22.4.

26. We have taken into account that PHIN will need time to provide consultants with standard wording to use to indicate to patients that PHIN's website will give them useful information on the quality of performance of hospitals and consultants, so that consultants are able to comply with Article 22.3(e) and Article 22.4(d).

27. However, we have also taken into account that consultants and PHIN have known since October 2014 that these requirements would come into force at

some point in time, and we consider that a period of **two months** from the date of the instrument bringing Article 22 into force will give them sufficient time to make the necessary preparations.

## **Variation and commencement of the Order**

28. Article 22.7 of the Order is intended to give effect to paragraph 11.600 of the Report. However, we consider that the opening sentence may not clearly reflect the terms of paragraph 11.600, and we therefore propose to substitute a form of words which follows the text of paragraph 11.600 more closely. We shall make it clear that we shall not require private hospital operators to enforce compliance in respect of patients who have had an outpatient consultation off-site, not in the relevant hospital, and have required no further treatment.
29. On this basis, and for the reasons set out above, we propose to:
  - (a) vary Article 22.1 to make the operative dates 30 June 2017 (outpatient consultation fee and standard terms and conditions information); and 30 June 2018 (standard procedure fee information);
  - (b) vary Article 22.7 to make the text of the opening sentence correspond more closely to paragraph 11.600 of the Report;
  - (c) bring Article 22 into force on a date two months after the day on which the instrument varying the Order is made; and
  - (d) vary Article 24.6 to update the dates for PHIN to comply with its publishing obligations as follows: 30 September 2017 (outpatient consultation fees and standard terms and conditions information); and 30 September 2018 (standard procedure fees information).
30. A draft order making these changes is annexed to this Notice.

## **Material change of circumstances**

31. The CMA is required by section 138(3) of the Enterprise Act 2002 to take remedial action which is consistent with its decisions as included in the Report, unless there has been a material change of circumstances since the preparation of the Report, or the CMA otherwise has a special reason for deciding differently.
32. We are therefore inviting submissions on whether there has been any material change of circumstances since the preparation of the Report, which is relevant to the remedies in Article 22.

## Private Healthcare Market Investigation (Variation) Order 2016

[DRAFT FOR CONSULTATION]

1. On 4 April 2012 the Office of Fair Trading made a reference to the Competition Commission (CC) under section 131 of the Enterprise Act 2002 (the Act) concerning the supply of privately funded healthcare services in the UK.
2. On 2 April 2014 the successor body to the CC, the Competition and Markets Authority (CMA), published its report titled *Private healthcare market investigation: final report* (the report).
3. In the report, the CMA concluded that:
  - (a) features of the markets for privately-funded healthcare services each (and, in certain circumstances, in combination) prevent, restrict or distort competition, and thereby have an adverse effect on competition (AEC); and
  - (b) the CMA should take action to remedy, mitigate or prevent the AECs and detrimental effects flowing from these features.
4. The CMA indicated in its report that it intended that the CMA would implement some remedies by an order rather than by undertakings.
5. On 1 October 2014 the CMA made the Private Healthcare Market Investigation Order 2014, in performance of its duty under section 138 of the Act, within the period permitted by section 138A of the Act, and in exercise of its powers under section 161 of, and Schedule 8 to, the Act, and under sections 86 and 87 as applied by section 64 of the Act.
6. On 10 October 2016, in accordance with section 165 of and paragraph 2(1)(a) of Schedule 10 to the Act, the CMA published a Notice of its intention to vary the Order and bring Article 22 of the Order into force.
7. The CMA has, in accordance with paragraph 2(1)(b) of Schedule 10 to the Act, considered the representations made in accordance with the Notice and now makes this Order.

# ORDER

The CMA makes this Order in exercise of its powers under section 161(4) of, and Schedule 8 to, the Act and under sections 86 and 87 (as applied by section 164) of the Act.

## 1. Title, commencement and interpretation

- 1.1 This Order may be cited as the Private Healthcare Market Investigation (Variation) Order 2014 and comes into force on the day it is made.
- 1.2 In this Order ‘the Principal Order’ means the Private Healthcare Market Investigation Order 2014.

## 2. Amendment to the Principal Order

- 2.1 For Article 22.1 of the Principal Order substitute:

‘22.1 Consultants providing private healthcare services shall provide on a regular basis the following information to the information organisation –

- (a) from a date no later than 30 June 2017, information as regards their outpatient consultation fees, which may be expressed as either a fixed fee or an hourly rate, and associated standard terms and conditions, plus any exclusions or caveats, expressed in a standard form as determined by the information organisation; and
- (b) from a date no later than 30 June 2018, information as regards the standard procedure fee for each type of procedure undertaken by the consultant, and associated standard terms and conditions, plus any exclusions or caveats, expressed in a standard form as determined by the information organisation.’

- 2.2 For the opening sentence of Article 22.7 of the Principal Order substitute:  
‘Subject to Article 2.8, the operator of a private healthcare facility shall ask every privately-funded patient undergoing any inpatient, day-case or outpatient procedure, including diagnostic tests and scans at that facility, to sign a form confirming that the relevant consultant provided the information required by Article 22.4, and shall take appropriate action if there is evidence that a consultant has failed to do so.’
- 2.3 Following Article 22.7 add: ‘22.8 The duties in Article 22.7 owed by the operator of a private healthcare facility do not apply in the case of a private patient who attends a consultation at premises which are not part of the



relevant facility and who does not thereafter have treatment at the relevant facility pursuant to attending the consultation.'

2.4 For Article 24.6 of the Principal Order substitute:

'The information organisation shall publish performance information on its website, as specified by this Order, in stages during the three years following the publication of the report, and shall publish:

- (a) information as to performance required by Article 21 by a date no later than 30 April 2017;
- (b) information as to outpatient consultation fees required by Article 22.1(a) by a date no later than 30 September 2017; and
- (c) information as to standard procedure fees required by Article 22.1(b) by a date no later than 30 September 2018.

### **3. Commencement of Article 22 of the Principal Order**

3.1 Article 22 of the Principal Order comes into force on XXXX [*ie two months from the date of the Order*]