

Remedies Officer
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD

10 November 2016

Sent by email to: tom.akhgar@cma.gsi.gov.uk

Dear Mr Akhgar

The British Medical Association (BMA) is an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care. We have a membership in the region of 170 000, which has been growing year on year. We very much welcome the opportunity to respond to an issue of considerable importance to our members. The BMA welcomes the opportunity to respond to the Competition and Markets Authority (CMA) consultation on:

- 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.
- Whether there has been any material change of circumstances since the preparation of the Private Healthcare Market Investigation Report in April 2014, relevant to the remedies in Article 22.

Response

1. The BMA has participated fully throughout the Private Healthcare Market Investigation, including intervening in support of the CMA before the Competition Appeal Tribunal in response to the unsuccessful application for judicial review brought by AXA PPP Healthcare Limited.
2. The BMA notes paragraphs 31-32 of the CMA's Notice which state:



“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.”

3. The BMA submits since the CMA published its Final Report in April 2014 there has been a material change of circumstances which renders Article 22 no longer an appropriate remedy.
4. In the original evidence given by the BMA and others, attention was drawn to increasingly restrictive processes applied by (PMIs) Private Medical Insurers. However, the Competition Commission decided not to investigate the activities of the PMIs.
5. Since the publication of the Final Report the following facts and matters which have taken place against a backdrop of the market power of the PMIs continuing to increase and increased market concentration (including as a result of the AXA PPP/Simplyhealth Limited merger which was cleared by the CMA on 21st July 2015, Case ME/6531/15).
 - Fee capping and restrictive fee practices which started with BUPA and AXA PPP have spread to other insurers who feel the need to bring these in, to remain competitive with the duopoly of AXA and BUPA.
 - “Open referral” practices are increasing. Open referral is a mechanism which places the selection of consultants in the hands of insurers completely undermining the traditional referral practice in which the GP in consultation with the patient makes a referral to a specific consultant.
 - Bans on top-up fees are widespread and enforced by e-billing practices which prevent the consultant having a direct contractual relationship with the patient.
 - For example, the BMA understands that BUPA fix consultation rates for new members signing up with BUPA. So when a patient calls BUPA, they are directed to a new consultant with lower fees which eliminates patient choice.
 - Established consultants are regularly coming under pressure to reduce their consulting fees and to bring their procedural fees in line with the fees prescribed by BUPA and AXA PPP. A failure to comply with these demands leads to the threat and frequently, the reality of derecognition by the insurer.
 - Increased PMIs’ interference in clinical decisions, including diverting patients to non-medical providers and preventing access to certain forms of treatments.
 - Insurers, in particular BUPA, have reduced their benefit levels for many common procedures sometimes by up to 50 percent despite the fact those benefit levels have not been increased in the last 2 decades. Those benefit levels are now being used as maximum fee levels.
 - The benefits allowed by some insurers, e.g. AXA, are dependent upon the status of the consultant offering the treatment so that a patient of a consultant who refuses to sign up to AXA PPP’s contract will have a lower level of benefit than a patient having similar treatment from a consultant who has signed up to AXA PPP’s contract. This is clearly designed to force consultants into restrictive

contracts with the insurer but has the additional effect of penalising patients who choose to exercise choice of consultant.

- The restrictive action by insurers have been most acutely felt by younger consultants but increasingly all consultants in Private Practice are being adversely affected. While superficially a downward pressure on fees would appear to be in the interest of patients, the reality is very different as the expenses of maintaining a Private Practice have increased inexorably and Private Practice is increasingly unprofitable. Newer consultants are not choosing to engage in Private Practice. Older consultants are ceasing to carry out Private Practice and patients will find the availability of consultants will become increasingly restricted.
6. As a result, there has been a material reduction in consumer choice and patient detriment in the form of denial of chosen consultant, denial of chosen facility, denial of preferred treatment and frustrated consumer expectations on use and transferability of policy benefits.
 7. Under section 138(3) of the Enterprise Act 2002 the CMA's duty to implement the remedies in its Final Report does not apply where there has been a material change of circumstances.
 8. The BMA submits that the developments outlined above constitute such a material change in circumstances that the CMA is required to investigate and take into account.
 9. This is because the CMA imposed its fee information remedy to address what it found to be a lack of publicly available information on consultant fees which it found to be an adverse effect on competition (AEC).
 10. These new developments fundamentally are contrary to the findings that led to the imposition of the fee information remedy as originally conceived.
 11. Accordingly, the BMA submits that the changed circumstances require the CMA to consider what remedy, if any, can be effective to address a finding of an AEC to the extent that it can be maintained in the current market environment.
 12. In the changed market circumstances and unless the PMIs' practices described above are addressed, the fee information remedy can make no difference because it operates against an already distorted fee structure where the benefit levels prescribed by the PMIs operate as minimum and maximum (fixed) fees and in reality patient choices are restricted by the PMIs. For this reason we have not addressed the point about the dates for complying with the various requirements of Article 22.
 13. In conclusion, the BMA wishes to stress that it is not against the fee information remedy or the quality remedy in principle. However, in order for the fee information remedy to have any effect or improve consumer choice, it must operate against a genuinely competitive market where fees can be set by consultants independently and are not distorted by PMI practices as is currently the case.

14. The BMA thus calls upon the CMA to now consider whether its fee information remedy should be retained, supplemented or abandoned, or even suspended pending a wider investigation of the PMI market.

Yours sincerely

Raj Jethwa
Director of Policy