10 November 2016

BMI Healthcare Limited

CMA – Private Healthcare Market Investigation

Response to formal consultation on terms of draft variation Order

10 November 2016

Introduction

1. BMI Healthcare welcomes the opportunity for engagement in relation to the proposed variation of the Private Healthcare Market Investigation Order 2014 (the "Order") and the bringing into force of Article 22 of the Order.

2. Whilst we remain supportive of Article 22 of the Order and the 'mischief' identified in the Private Healthcare Market Investigation Report published on 2 May 2014 (the "Report") which the Article is designed to address, we have some concerns with the proposed change of scope of Article 22 and proposed timescale for its coming into force, as set out in the draft variation Order published by the Competition & Markets Authority ("Draft Variation Order") on which we comment further below.

3. If anything in our response is unclear or would benefit from further clarification, we would be happy to discuss further.

General Comments

4. In passing, we note the summary of the Order and Draft Variation Order, as set out in paragraph 7(a) of the consultation document, does not entirely reflect the CMA's proposed variations regarding Article 22. In particular, this paragraph suggests that consultants are required to provide private patients with …the "estimated cost of .. tests or treatment.." whereas Article 22 and the proposed varied Article 22 requires communication by consultants of (only) the consultant cost of the treatment pathway, rather than also of the hospital costs of the treatment pathway. This is an important (and in our view, sensible) differentiation in the Order as it makes the

distinction between the consultants' responsibilities and those of the private healthcare operator as far as ensuring patients receive clear information about the costs of their treatment pathway, clear.

5. We note also a few typographical errors in the Draft Variation Order. For ease of reference, we set these out in the Appendix to this document and below, our substantive comments on the Draft Variation Order and other areas of consultation.

Article 22.1

6. The phrase "consultants providing private healthcare services" extends to radiologists, anaesthetists, histopathologists (etc), although it is not clear to us whether such consultants are also required to provide the information set out in Article 22.1, particularly since many of these specialties don't offer outpatient consultations. The content of Article 22.3 and 22.4(b) seems to us to acknowledge such consultants are not included, but it would be helpful if the CMA could take this opportunity to clarify this in the introductory wording to Article 22.1.

7. We note the CMA's intention to provide PHIN (the information organisation) with further time to determine the standard form for receipt of information regarding outpatient consultation fees and the standard procedure fees, by extending the timescales for consultants' provisions of such information. We are supportive of such additional time being provided for compliance with this Article.

8. We note the proposed change (in Article 22.1(b)) from "the 50 types of procedure most frequently undertaken by the consultant" to "each [*our emphasis*] type of procedure undertaken by the consultant". Given the number of consultant sub-specialties, we are concerned that to identify "each" type of procedure and set this out for patients in a meaningful manner might be too ambitious a requirement. In particular, compliance with this Article would potentially result in a comprehensive pricing database but one which is difficult for patients to navigate in a way which also enables them to match such pricing data with published outcomes measures (by hospital operator and consultant) to enable patients to make an informed decision on their choice of consultant and hospital. As PHIN is responsible for determining the standard form for such information to be provided and mindful of the requirements of Article 23 regarding the board members of (and expertise available to) PHIN, we suggest it might be appropriate for PHIN also to determine for which procedures each specialty is required to provide information to it.

Article 22.2

9. We note no amendments are proposed to this Article. Save for our comment at paragraph 6 above regarding the consultants to which this requirement should sensibly be addressed, and at paragraph 18 below regarding the date on which Article 22 comes into force, our only comment is to suggest that the reference to "private patients" is instead amended to "privately-funded patients" (to mirror the wording in Article 22.7).

Articles 22.3 and 22.4

10. We note no amendments are proposed to these Articles. Save for our comment at paragraph 6 above regarding the consultants to which this requirement should sensibly be addressed, and at paragraph 18 below regarding the date on which Article 22 comes into force, our only comment is to suggest that the reference to "patient" is instead amended to "privately-funded patient", as it makes no sense for such information to be provided to patients whose care is funded by the NHS.

Article 22.5

11. No amendments are proposed to this Article. Our only comment is set out in paragraph 18 below regarding the date on which Article 22 comes into force.

Article 22.6

12. We note no amendments are proposed to this Article. Save for our comment at paragraph 6 above regarding the consultants to which this requirement should sensibly be addressed, and at paragraph 18 below regarding the date on which Article 22 comes into force, our only comment is to suggest that the reference to "patient" is instead amended to "privately-funded patient", as it makes no sense for such information to be provided to patients whose care is funded by the NHS.

Article 22.7

13. The first sentence in this Article is proposed to be varied to extend the circumstances (and therefore the number of occasions) at which an operator of a private healthcare facility has to check with a privately-funded patient that 'their' consultant has complied with the terms of Article 22.4. Logistically, given GPs can refer direct for many diagnostics (particularly blood tests and scans), it will be difficult to ensure that it is only those referred by consultants who are asked to sign such paperwork, in turn running the risk of causing confusion for some patients.

14. Given many of these diagnostics do not in fact require any consultant involvement (and for those that do, only very rarely would a consultant charge separately to the

fee charged by the hospital) it seems to us disproportionate to require that patients be asked when they attend for the same to sign further paperwork. We propose the wording in the Draft Variation Order in this regard instead be amended to "..every privately-funded patient undergoing any inpatient, day case or outpatient procedure, including endoscopy but excluding other diagnostic tests or scans at that facility..".

15. Whilst the second part of Article 22.7 provides for the possibility of an alternative mechanism for patients to confirm whether or not 'their' consultant has provided the required information to them, such alternative mechanism is required to be approved by "PHIN <u>and its members</u>" [*our emphasis*]. Given the increased numbers of members of PHIN since the publication of the Order, it seems to us reasonable that such alternative mechanism need only to be approved by PHIN, not also its members.

16. It would also be helpful if the CMA could perhaps give advance approval (by means of the variation order) to some acceptable alternative mechanisms, such as obtaining such confirmation verbally (provided the same was recorded by the operator of the private healthcare facility), by email, online or as part of (another) form. Such alternative mechanisms would also help operators fulfil their corporate social responsibilities to reduce (wherever possible) the use of paper within their businesses and would also recognise that many operators of private healthcare facilities have, in the two and a half years since the Report was published, changed their methods of engaging with patients. Many have significantly reduced the level of paperwork, instead looking to communicate with patients via phone, email or mobile phone app. We therefore propose replacing "to sign a form confirming" with "to confirm" leaving operators with discretion on how best to manage this requirement to reduce the administrative burden on both patients and operators and perhaps adding some of the example alternative mechanisms described above in the associated Notes to the variation order.

Article 22.8

17. We would suggest changing "private patient" to "privately-funded patient" to mirror the wording used in Article 22.7.

Article 22 - Commencement

18. Article 3.1 deals with when Article 22 (as varied) will come into force. Whilst in its consultation, the CMA notes the requirements as regards private hospital operators has been around for some time, until the conclusion of the FIPO appeal, it was not

clear on whether the CMA would propose any changes be made to Article 22, making meaningful preparation difficult.

19. There are a number of steps required of operators of private healthcare facilities – specifically preparing a template for consultants to provide the pricing information specified in Articles 22.3 and 22.4, liaising with the CMA for its approval to such template and cascading the same to consultants. There will then be a short implementation period. Whilst we have made comments on the requirements above, as currently worded operators of private healthcare facilities need also to develop a form in order to comply with Article 22.7 – or to seek approval from PHIN to alternative measures – and then to implement its use. As some aspects of the process (engaging with CMA and, if required, also PHIN and its members) are not within the direct control of operators, two months seems too short a period and we would therefore suggest Article 22 comes into force six months from publication of the variation order in order to ensure sufficient time for operators to complete the various steps set out above.

BMI Healthcare
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Appendix

We would note the following typographical errors in the Draft Variation Order:

- Article 1.1 – we believe the date of the variation order would be 2016 (the year of such variation order) rather than the date of the (original) Order
- Article 2.1, 22.1(a) – “from” (penultimate line of paragraph (a)) should be “form”
- Article 2.1, 22.1(b) - “from” (penultimate line of paragraph (a)) should be “form”
- Article 2.2, second line – reference to “Article 2.8” should be to “Article 22.8”
- Article 2.3, second and third lines – for consistency, replace “private patient” with “privately-funded patient”
- Article 2.4 – 24.6 – second line change “three years” to “four and a half” or to “five years” (since the report was published on 2 May 2014 and the final proposed date for publication is 30 September 2018)
- Article 3.1 – it would be helpful to note that this applies to Article 22 (as amended).