

Bupa's response to the notice of intention to vary the Private Healthcare Market Investigation Order 2014 and to bring Article 22 of the Order into force

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 as directed by the information organisation, 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 from 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, calculated and expressed in a standard from form as determined by the information organisation.'

- 2.2 Under this Article 22.1, consultants shall provide to the information organisation information only on consultants' standard fee levels for a relevant service, and not information on fees that have been the subject of individual negotiation.

- ~~2.2.3~~ For the opening sentence of Article 22.7 of the Principal Order substitute:

'Subject to Article ~~22.8~~, every~~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 standard form developed by the information organisation for this

Comment [A1]: Note to CMA: we recognise that, in the context of the Final Report's consideration of the information remedy relating to consultant fee information, the CMA considers it appropriate for consultants to provide 'standard procedure fees' / 'list prices' to the IO (see paras 11.601 and 11.619 of the Final Report). Whilst we understand that the intention is for consultants to provide indicative rather than actual fees, the terms 'standard procedure fees' and 'list prices' are open to interpretation (e.g. as to the methodology used to calculate such prices). This risks consultants calculating 'standard fees' / 'list prices' in different ways, which would clearly hinder fee comparability and thus undermine the remedy. We have therefore add some language to make clear that, in addition to providing a standard form, the IO will also provide a fixed methodology for calculating the standard procedure fee.

Comment [A2]: Note to CMA: Bupa considers it important that it is clear that it is consultant 'list prices', rather than bilaterally negotiated prices, which consultants should be providing under this section. This is consistent with the CMA's approach to the type of fee level that should be provided to the Information Organisation by consultants (see in particular paragraph 11.619 of the Final Report). The addition of this sub-paragraph is intended to make this point clear.

purpose 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.'

~~2.32.4~~ 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 that operator's facility and who does not thereafter have treatment at the relevant that operator's facility pursuant to attending the consultation.'

~~2.42.5~~ 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_.

Comment [A3]: Note to CMA: the revised dates below all fall over three years after publication of the report on 4 April 2017. We would suggest simply deleting this highlighted sub-clause.

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*]