

Tom Akhgar
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD
Email: tom.adkgar@cma.gsi.gov.uk

14 December 2016

Dear Tom

PHIN Response to CMA “Notice of Intention to vary the Private Healthcare Market Investigation Order 2014 and to bring Article 22 of the Order into force” (Notice published 10 October 2016)

Introduction

1. PHIN welcomes the opportunity to respond to the above CMA Notice.
2. PHIN thinks it very important that Article 22 is brought into force in an effective, as well as timely, manner. PHIN has some concerns about the likely effectiveness of the approach outlined in the Notice and proposes some significant amendments to the proposed variation Order in this Response.
3. PHIN has previously proposed a timeline for implementation of Article 22 to the CMA that roughly mirrored the timetable allowed in the original order. We have noted, however, the CMA’s understandable desire for early implementation, in stages if necessary, and have proposed a compromise arrangement. This remains a very challenging timetable.
4. PHIN is concerned by the CMA’s view at paragraph 27 of the Notice that “...we have taken into account that consultants and PHIN have known since October 2014 that these requirements *would* come into force at some time...”. We note that, to the best of our knowledge, no practical preparations for the publication of fee information have in fact been undertaken whether by PHIN, by private hospital operators or by consultants. We believe that the timetable for implementation should reflect the reality of the starting conditions.

5. We feel that it is also necessary to consider the timing of implementation with respect to the ongoing implementation of Article 21 of the Order, giving due consideration to focus and resources of all respondents, including PHIN.
6. PHIN is absolutely committed to the aims and objectives of Article 22 and believes that it can be successfully implemented so as to produce good information on fees that makes it more likely that potential patients will be able to make well-informed decisions. Unfortunately, there is also scope within the construction of Article 22 to permit that information may be published that fulfills the stated requirements and yet would not provide an effective remedy to the adverse effects on competition found by the CMA. This risk could be exacerbated by a timetable that prioritizes speed of implementation over effectiveness. To help mitigate against this potential we have proposed that the form of proposed publication, which PHIN will design in consultation with stakeholders, should be agreed with the CMA prior to implementation.
7. PHIN proposes to focus on the collection and publication of self-pay prices before considering what related information might be provided in respect of insured patients.
8. We propose a formulaic clarification (restriction rather than expansion) in relation to the requirement for consultants to publish “the standard procedure fee for the 50 types of procedure most frequently undertaken by the consultant”.
9. PHIN’s major recommendations are that:
 - a) The “Duty of consultants to give private patients relevant information” is brought into force at a later date than proposed and ideally at the same time as the “Duty of consultants to provide fee information [to PHIN]” and the “Duties on operators of private healthcare facilities”;
 - b) The duties of all three parties (consultants, hospital operators and PHIN) are brought into force first for “outpatient consultations”, and second for “further treatment and tests”; and
 - c) Article 22.1 of the original Order be amended to read:

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 31 December 2017, information as regards their standard 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 to be determined by the information organization and agreed by the CMA no later than 30 June 2017; that information to be published by PHIN no later than 30 April 2018; and
 - (b) from a date no later than 30 September 2018, information as regards the standard procedure fee for any procedure constituting 5% or more of the consultant’s total privately funded activity, where the procedures covered

collectively shall represent no less than 80% of the consultants' total privately funded activity, and associated standard terms and conditions, plus any exclusions or caveats; expressed in a standard form as determined by the information organization and agreed with the CMA no later than 31 March 2018; that information to be published by PHIN no later than 31 December 2018.

10. PHIN believes that the suggested approach would improve the implementation of these remedies in the following two critical ways:
 - a. Allowing scope for some consultation and alignment across the industry before the implementation of processes concerning sending of letters from consultants to patients, where in our view a rush to implement letters in two months could only be addressed locally and without any central co-ordination, and has the potential to inhibit rather than promote the wider aims of Article 22; and
 - b. Acknowledging and allowing for the very real need to focus the resources of PHIN, private hospital operators and consultants to meet the CMA's existing requirement to publish "information as to performance required by Article 21 by a date no later than 30 April 2017" until that task has been achieved.
11. The following sections of this Response set out: Background, Rationale, Recommendations, Conclusions and Annexes. A Summary table of duties, responsibilities and proposed deadlines re Article 22 proposed by PHIN can be found at **Annex A**. A full summary of PHIN's proposed amendments to the Order and Variation Order can be found at **Annex B**.

Background

11. When the CMA's Private Healthcare Market Investigation Order was laid in October 2014, it was already subject to an appeal to the Competition Appeals Tribunal (CAT) on Article 22, brought by the Federation of Independent Practitioner Organisations (FIPO). Therefore, Article 22 was not brought into force immediately. On 25 July 2016 the Court of Appeal heard and dismissed FIPO's appeal against the earlier majority CAT decision, bringing to an end to the appeals process.
12. In paragraph 27 of the Notice CMA state " ...we have taken into account that consultants and PHIN have known since October 2014 that these requirements *would* come into force at some time...." However, it should be acknowledged that it was not practically possible to engage stakeholders in planning to implement Article 22 whilst an appeal process was ongoing and that the outcome was not certain.

Rationale for PHINs suggested approach

13. Article 22 places inter-connected duties on consultants, hospital operators and PHIN. PHIN's duties in relation to Article 22 concern the publication of prices per Article 22.1, and it has no formal duties in relation to the remaining Articles 22.2-22.7. However, in practical terms the duties placed on the operators of private healthcare facilities ("hospitals") at Articles 22.2 and especially 22.7 are likely to have a considerable bearing on how Article 22.1 is implemented.
14. PHIN believes that consultants will require extensive and systematic support from hospital operators to discharge their duties under Article 22 consistently and accountably. PHIN similarly believes that hospital operators may request and require support from PHIN (beyond that envisaged in the Notice) to help them fulfill their duties in an efficient and accountable manner.
15. Under the proposed variation Order, consultants would be required to provide "letters" to both outpatients and inpatients within two months of the commencement of the variation Order (circa March 2017). This creates a number of potential issues:
 - The early and individually led implementation of the "letters" requirement, by consultants, would be far more difficult and onerous for hospital operators to monitor effectively than a more systematic, managerially led, IT supported approach, directed by the hospital operators and "dovetailing" with their duties.
 - There would be no potential for alignment of the structure of or rules for pricing between consultants, hospitals or provider organisations, and significant variation would be inevitable. This has the potential to actually produce an adverse effect for patients where information received from two consultants is not directly comparable, for example where one specifies the full cost of treatment including hospital charges and the other specifies only his/her own charges
 - This would potentially distract private hospital operators and consultants from engagement with preparation for publication of performance information in accordance with Article 21, required by a date no later than 30 April 2017.

Recommendations

Aligning commencement dates between parties

16. Given the rationale above, PHIN now proposes that the commencement (“bring into force”) dates for the duties required of all parties in the proposed variation Order be more closely aligned.

Outpatient Appointments

17. **PHIN recommends** that the duties of consultants and hospital operators in relation to “outpatient consultations” commence from 30 September 2017.

This recommendation would entail amendment of Articles 22.2, 22.3 and 22.7 in a manner similar to that already proposed for Article 22.1.

18. PHIN believes that this approach would give it sufficient time to recommend, if requested, consistent formats to consultants for information about “outpatient consultations”. It would also give hospital operators sufficient time to work with their consultants to:

- Develop their own “consistent formats” if preferred;
- Amend their consultant contracts/PSAs;
- Collect, verify and digitise the information required under Article 22.3 (a), (b) and (c);
- Organise consultants’ historic OP fees information into the proposed consistent formats and help consultants evaluate the financial implications of the proposed formats on their future incomes,
- Put in place information systems that would enable consultants to produce the required letters efficiently, and also allow the hospital operators to monitor consultant compliance (both directly and/or via patient feedback).

19. **PHIN also recommends** to CMA, as a consequence of the above recommendation, that it is required to meet the duties of Article 24.6 to publish information on “outpatient consultations” by 30 April 2018 rather than 30 September 2017. This would require adjustment of date in the proposed amendment of Article 24.6 of the Order, presented in Article 2.4 (b) of the proposed variation order.

20. Finally regarding outpatient consultation fees, **PHIN recommends** that the word “standard” is inserted into Article 22.1 (a) before the words “outpatient consultation fees” to reflect that “standard” fees (for self paying patients) might be different to the fees that a consultant charges for insured patients.

Further treatment and tests

21. Paragraphs 15 and 18 of the Notice illustrate well that the CMA understands the scale and complexity of the challenges, confronting consultants, hospital operators and PHIN jointly, of further defining consultants “procedures, treatments and tests” and associated consultant fee information to a common format and specification (of grouped procedures) that is both sufficiently precise and understandable to patients.
22. CMA also understands that after that challenge is successfully addressed, suitable IT interfaces will need to be developed between consultants, hospital operators and PHIN to record, collate, transfer, analyse and present the required information.
23. **PHIN recommends** that the duties of consultants and hospital operators in relation to “further treatment and tests” commence from 30 June 2018. This recommendation would entail amendment of Articles 22.2, 22.4 and 22.7 in a manner similar to that already proposed for Article 22.1.
24. On that basis PHIN supports CMA’s proposal (as set out in the proposed variation Order, Article 2.4 (c) that PHIN publishes information on “further treatment and tests” (as required by Article 24.6 of the Order) by 31 December 2018.

Clarifying the number of procedures about which fees information required

25. However **PHIN also recommends** that CMA also varies Article 22.1 (b) to read:
 - (b) From a date no later than 30 June 2018, information as regards the standard procedure fee for any procedure constituting 5% or more of the consultant’s total privately funded activity, where the procedures covered collectively shall represent no less than 80% of the consultants’ total privately funded activity, and associated standard terms and conditions, plus any exclusions or caveats; expressed in a standard form as determined by the information organization and agreed with the CMA no later than 31 March 2018; that information to be published by PHIN no later than 31 December 2018.
26. PHIN regards the amendment suggested above as a clarification or practical refinement of the CMA’s proposal, in all probability restricting the burden on the overwhelming majority of consultants, where very few will conduct 50 distinct procedures (per the original Order) in their private practice. Hence this is not any additional requirement. We can provide data to support this point.
27. To clarify how the above provision might work: If a consultant had 4 main procedures which constituted 90% of her work, each would represent >5% and those four collectively would be >80%, so those four would do for pricing. Conversely, if that consultant did 4 main procedures each of which was 10% (40% total), but lots of other procedures in low volumes, she would have to price some or all of the low-volume procedures to ensure that 80% of her practice were priced.

28. Consultant private practice tends to be quite specialised and focused within one specialty or sub-specialty, with consultants typically undertaking five to ten (grouped) procedures regularly. PHIN thinks that it would be more effective to focus consultants attention on accurate pricing for a limited number of procedures rather than asking them to generate more “nominal” prices for a wider set of procedures.

Hospital prices

29. The Order contains no requirement on the hospitals to publish prices for their services or for any services other than those directly offered by the consultant.
30. It is possible, in PHINs view, for the consultants and hospitals to fully comply with the requirements of Article 22 and yet to leave the consumer with a partial, and potentially misleading, view of the costs they are likely to experience and the relative value proposition of various combinations of hospital and consultant service providers. That would be a poor result in respect of the overall purpose of the Order.
31. Therefore, in making all the above recommendations, PHIN aims to maintain the goodwill of hospitals such that they (meaning all or a significant majority) voluntarily act to ensure that hospital prices are published alongside consultant fees to give the consumer a complete and informative view of price and value. This requires both PHIN and the CMA to act reasonably and sensitively with regard to the expectations and costs placed on hospital operators at all stages.

Material change of circumstances

32. PHIN offers no comments as to whether or not there has been any “material change in circumstances” relevant to the remedies in Article 22, since CMA’s report was published. Subject to data protection laws, PHIN stands ready to share any data or conduct any analysis that might assist the CMA in coming to a well-informed conclusion on that topic.

Conclusion

33. PHIN is fully committed to ensuring that the duty imposed on it by CMA under Article 22.1 is discharged in a timely, effective and efficient manner. PHIN will also do everything it reasonably can, within available resources, to assist and support consultants, hospital operators and health insurers in the timely and effective discharge of their responsibilities under Articles 22 and 25 of the Order.
34. PHIN asks CMA to give serious consideration to its proposals, which are intended to ensure an orderly, effective, well-controlled and sustainable introduction of the duties required by Article 22 across the industry. It is, of course, legally incumbent on PHIN to meet the requirements imposed on it by any variation Order. Given this, PHIN would

greatly welcome the opportunity for further dialogue with CMA before any variation Order is finalized and published.

Matt James

Chief Executive

10 November 2016

Annex A – Summary table of duties, responsibilities and proposed deadlines re Article 22 proposed by PHIN

Order and/or variation Order Articles	Duty	Responsible party	Deadline	Notes
22.1 (a)	Determine OP fees format	PHIN	30 June 2017	Add date
22.1 9b)	Determine T&T fees format	PHIN	31 March 2018	Add date
22.1 (a) 2.1	Provide OP fees and T&Cs to PHIN	Consultants	31 Dec 2017	Change date in the VO Add “standard”
22.1 (b) 2.1	Provide procedures fees (as re-specified) and T&Cs to PHIN	Consultants	30 April 2018	Amend the VO re definition of required procedures
22.2 (a)	Ensure consultants provide OP fees and T&Cs to patients	Hospital Operators	30 Sep 2017	Add date
22.2 (b)	Ensure consultants provide T&T fees and T&Cs to patients	Hospital Operators	30 June 2018	Add date
22.3	Provide OP fees and T&Cs to patients	Consultants	30 Sep 2017	Add date
22.4	Provide T&T fees and T&Cs to patients	Consultants	30 June 2018	Add date
22.7	Obtain signed forms or equivalent confirming consultants have provided T&T fees and T&Cs to all patients	Hospital Operators	30 June 2018	Add date
24.6 2.4 (a)	Publish info on performance re Article 21	PHIN	April 2017	No change to VO

24.6 2.4 (b)	Publish info on OP fees	PHIN	30 April 2018	Amend VO date
24.6 2.4 (c)	Publish info on procedure/ T&T fees	PHIN	30 December 2018	No change to VO

Annex B – Summary of new or different amendments to the proposed variation Order recommended by PHIN

Article 22.1 of the Principal Order be amended to read:

“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 September 2017, information as regards their standard 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 to be determined by the information organization and agreed by the CMA no later than 30 June 2017; that information to be published by PHIN no later than 31 December 2017; and
- (b) from a date no later than 30 June 2018, information as regards the standard procedure fee for any procedure constituting 5% or more of the consultant’s total privately funded activity, where the procedures covered collectively shall represent no less than 80% of the consultants’ total privately funded activity, and associated standard terms and conditions, plus any exclusions or caveats; expressed in a standard form as determined by the information organization and agreed with the CMA no later than 31 March 2018; that information to be published by PHIN no later than 30 September 2018.

Article 22.2 of the Principal Order be amended to read:

“The operator of a private healthcare facility shall, as a condition of permitting a consultant to provide private healthcare services at that facility, require the relevant consultant to supply private patients with information in writing to be provided:

- (a) from a date no later than 30 September 2017, prior to outpatient consultations, in accordance with article 22.3 and article 22.6; and
- (b) From a date no later than 30 June 2018, prior to further tests or treatment, whether surgical, medical or otherwise, in accordance with article 22.4 and article 22.6;

and shall provide the consultant with appropriate templates approved by the CMA for these purposes, in standard wording and in a clearly legible font.”

Article 22.3. Add to the beginning of the first sentence of the Principal Order:

“From a date no later than 30 September 2017,”

Article 22.4. Add to the beginning of the first sentence of the Principal Order:

“From a date no later than 30 June 2018,”

Article 22.7. For the opening sentence of Article 22.7 of the Principal Order substitute:

“From a date no later than 30 June 2018, 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.”

Article 24.6. 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 31 December 2017; and
- (c) information as to standard procedure fees required by Article 22.1(b) by a date no later than 30 September 2018.