

## **PRIVATE HEALTHCARE MARKET INVESTIGATION**

### **Notice of intention to vary articles 21 and 22 of 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), the dates for complying with the various requirements of article 22 and article 24 of the Order, and an amendment to article 21.2(b) to simplify and clarify the text.
2. This Notice also invites submissions on the CMA's provisional decision that there has not been a 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. Any submissions in response to the proposed modifications outlined in this Notice should be made within 14 days of the date of this Notice and submitted by email 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 services, by preventing patients from exercising effective choice, thereby reducing competition between consultants on the basis of quality and price.<sup>2</sup>

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<sup>1</sup> [The Private Healthcare Market Investigation Report](#) dated 2 April 2014 (CMA 25).

<sup>2</sup> [The Private Healthcare Market Investigation Report](#), paragraph 10.9.

7. 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).
8. On 10 October 2016, following the dismissal of FIPO's appeal,<sup>3</sup> the CMA published a Notice of its intention to vary the Order and bring article 22 of the Order into force. The CMA also invited submissions on whether there had been a material change of circumstances since the preparation of the Report relevant to the remedies in article 22.
9. Having considered the submissions made in response to that Notice, the CMA has provisionally decided that there has not been a material change of circumstances and thus it remains appropriate to bring article 22 into force. The CMA's reasons are set out in provisional decision annexed to this Notice.
10. The CMA has also provisionally decided to make certain modifications to the time frames for complying with article 22 and article 24 of the Order, as previously consulted upon and to modify article 21.2(b). The proposed modifications and the reasons for them, are set out below.

## **Proposed timeframe for complying with article 22**

### ***(a) Duty on consultants to provide fee information to the Information Organisation (PHIN)***

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 original wording of this provision required consultants to comply with the duty to provide fee information to PHIN from a date no later than 1 December 2016.
13. In our consultation published on 10 October 2016, we proposed amending this deadline to 30 June 2017.
14. In light of the responses to our consultation, we have provisionally decided that the deadline should be further postponed until **31 December 2018**.

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<sup>3</sup> [Federation of Independent Practitioner Organisations v CMA](#) [2016] EWCA Civ 777.

15. We have also provisionally decided that article 22.1 should be varied to make it clear that it is permitted for PHIN to require information on a lower number of standard procedure fees than the 50 specified in article 22.1, having regard to the performance information PHIN will publish under article 21 of the Order.
16. The reasons for these modifications are: (i) to allow consultants a comparable time period to prepare for their duty to provide fee information to PHIN (about 20 months) as they would have had under article 22.1 had commencement of these provisions not been delayed by the proceedings brought by FIPO; and (ii) having regard to paragraph 11.619 of the Report, by linking the fee information provided to PHIN with the performance information provided to PHIN, to keep such information focussed and targeted and so of more benefit to patients.

**(b) *Duty to provide private patients with information letters, prior to outpatient consultations, and prior to further tests or treatment***

17. 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 set out in article 22.3 prior to outpatient consultations and the information set out in article 22.4 prior to any further tests or treatment.
18. In our consultation published on 10 October 2016, we proposed giving a period of two months to comply with the obligations in article 22.2.
19. In light of the responses to our consultation, we have provisionally decided that the duty to provide information to patients prior to outpatient consultations arises from **31 December 2017** and the duty to provide information to patients prior to any further tests or treatment arises from **28 February 2018**.
20. The reasons for these modifications are that in the light of the responses we received, we accepted that a longer period was required for operators of private healthcare facilities to make compliance arrangements, and for consultants to prepare templates for supplying patients with the relevant information. We considered that about nine months was sufficient time to put in place arrangements as regards the information to be provided to outpatients, and 11 months as regards the information to be provided to patients prior to further tests or treatment.

**(c) *Duty on operators of private healthcare facilities to ensure compliance***

21. We have provisionally decide to substitute a new article 22.7 and to add a new article 22.8 to make it clear that the responsibility of operators of private

healthcare facilities to ensure that patients undergoing any procedure sign a form confirming that they have received the required information as to costs etc from their consultant, extends to all procedures – whether inpatient, day-case or outpatient procedure (including diagnostic scans and tests). The proposed new article 22.8 clarifies that this duty does not apply to operators in the case of a private patient attending a consultation at premises which are not part of the relevant operator’s facilities, and so long as the patient does not thereafter have treatment at the operator’s facilities pursuant to the consultation.

22. The reasons for these modifications are to respond to doubts raised by some parties as to the scope of the obligation, and to make it clear that, in accordance with paragraph 11.600 and footnote 1115 of the Report, the duty on operators of private health facilities to ensure compliance extends to all procedures, whether inpatient, day-case or outpatient procedures.

**(d) *Duties of the Information Organisation (PHIN)***

23. We have provisionally decided to amend article 24.6 to make it clear that the duty on PHIN to publish information on its website extends both to performance information and fees information. We have also provisionally decided that the deadline by which fees information must be published by PHIN should be **30 April 2019**.
24. The reasons for these modifications are to clarify that the duty on PHIN to publish performance information on its website continues to be 30 April 2017, but that, in the light of the delay to the commencement of the duty on consultants to supply fee information to PHIN, arising from the appeal brought by FIPO, the date by which PHIN must publish such information on its website is 30 April 2019.

**(e) *Duty to provide performance information***

25. In order to make article 21.2(b) correspond more closely to paragraph 11.571(b) of the Report, and to deal with the uncertainty of some operators of private healthcare facilities as to how such information should be provided, article 21.2(b) has been varied to make it clear that performance information provided to PHIN should include the NHS number of UK patients or equivalent patient identification number, but should not provide a pseudonymised equivalent.