

**SPIRE HEALTHCARE**

**COMPETITION AND MARKETS AUTHORITY  
PRIVATE HEALTHCARE MARKET INVESTIGATION**

**RESPONSE TO THE NOTICE OF INTENTION TO VARY THE  
ARTICLES 21 AND 22 OF THE PRIVATE HEALTHCARE  
MARKET INVESTIGATION ORDER 2014 AND BRING ARTICLE  
22 OF THE ORDER INTO FORCE**

**14 MARCH 2017**

This document provides the response (the *Response*) of Spire Healthcare (*Spire*) to the Notice of Intention to vary Articles 21 and 22 of the Private Healthcare Market Investigation Order 2014 (the *Order*) and bring Article 22 of the Order into force (the *Notice*) issued on 28 February 2017 by the Competition and Markets Authority (*CMA*).

## **1. EFFECTIVE DATES OF ARTICLE OF THE ORDER**

1.1 Spire welcomes the provisional implementation dates for Article 22. As Spire has submitted previously, providers and consultants need adequate time for the proper implementation of the remedy and providers and consultants will need the provisional time periods to ensure the Order is appropriately implemented.

## **2. VARIATION OF THE ORDER (ARTICLE 22.7 OF THE ORDER)**

2.1 The CMA is proposing to amend the wording of Article 22.7 of the Order in order to align it with the drafting of para. 11.600 of the Final Report.

2.2 As previously submitted by Spire, notwithstanding the fact that the proposed new wording may correspond more closely to the Final Report, the proposed amendment corresponds to a variation of the Order. Under section 162 (2) (c) EA, an enforcement order can only be varied by reason of any change of circumstances. The CMA has not alluded to any facts which could amount to a change in circumstances for these purposes and has adduced no evidence to justify the variation. In fact, there has been no material change which could justify the need to amend the Order. Therefore, the statutory requirements allowing the CMA to vary the Order are not met and, as such, the existing drafting of Article 22.7 of the Order must remain unchanged.

2.3 Furthermore, even if it were procedurally possible, the proposed variation should not be accepted on grounds of substance and practicality. The amendment amounts to a material change to the Order, since it effectively extends the scope of the obligation beyond admitted patients to also cover patients undergoing outpatient procedures. The current wording of Article 22.7 of the Order is clear: operators of private healthcare facilities are only required to obtain written confirmation (of receipt of the required information from consultants) from admitted patients, which would only cover patients for day case and inpatient procedures. There are good practical reasons for the decision to refer only to admitted patients. It is cumbersome and potentially confusing for patients to be asked to sign an additional written form when they are coming in as an outpatient. It would also impose a very considerable new burden on operators of private healthcare facilities, particularly with respect to tests or treatment given on the same day of the consultation, since it is unlikely the provider will know in advance what outpatient tests or treatment the patient will receive. If the CMA insists, despite not meeting the statutory requirements, to require providers to obtain signed written confirmation for outpatient treatment and tests, then there should be an exemption for outpatient tests and treatments on the same day.

2.4 The “Private Healthcare Market Investigation Order 2014 (as amended)” published by the CMA on 28 February 2017 removes the following words from the end of Article 22.7: “Alternatively, private hospital operators shall take equivalent measures, as approved by the information organisation and its members to monitor and enforce compliance with article 22.” The “Draft Private Healthcare Market Investigation (Variation and Commencement) Order 2017” published on the same date

states that only the opening sentence has been replaced and therefore the above sentence has not been removed. Spire assumes that the “Draft Private Healthcare Market Investigation (Variation and Commencement) Order 2017” is correct and not the “Private Healthcare Market Investigation Order 2014 (as amended)”. However, as it is not clear, Spire submits that there has been no change of circumstances to justify the removal of the relevant sentence. The wording should be reinstated as it gives flexibility for private hospital operators to develop an equivalent, more efficient and patient friendly measure, as approved by PHIN, such as a paperless, electronic form of confirmation.

2.5 The CMA also confirmed in its Explanatory Memorandum published on 28 February 2017, that hospital operators may supply private patients with the required information on behalf of consultants. Where the hospital operator has done so, and therefore knows the letter was issued to the patient, it would be inconvenient and cumbersome for the patient, and unnecessary and inefficient for the provider, to ask the patient to sign a form confirming they received a letter which the hospital has sent them. Therefore, Article 22.7 should be amended to state that the hospital operator does not have to obtain the patient’s confirmation where the hospital operator has issued the fees letter to the patient on behalf of the consultant.