

Private Healthcare Market Investigation (Variation and Commencement) Order 2017

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. Article 22 of the Order (giving effect to the decision in the report requiring information concerning consultants to be supplied to the information organisation and to private patients) was not brought into force, pending the outcome of an application by the Federation of Independent Practitioner Organisations (FIPO) to the Competition Appeal Tribunal for a review of that decision.
7. On 25 July 2016 the Court of Appeal dismissed FIPO's appeal against the decision of the Tribunal of 29 April 2015 dismissing FIPO's application.

8. 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. The Notice also invited submissions on whether there had been any material change of circumstances, relevant to article 22, since the preparation of the report.
9. On 28 February 2017 the CMA published its provisional decision on whether there had been any material change of circumstances and published a further notice of intention to vary the Order and bring article 22 into force.
10. The CMA, in accordance with paragraph 2(1)(b) of Schedule 10 to the Act, has considered the representations, which have been made in accordance with the two Notices, and now makes this Order.

ORDER

11. The CMA makes this Order in exercise of its powers under sections 161(4) and 165 of, and Schedules 8 and 10 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 and Commencement) Order 2017 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. Amendments to the Principal Order

- 2.1 In article 21.2(b) for the words 'or equivalent patient identification number or alternative information from which an NHS number may be derived or a pseudonymised equivalent,' substitute 'number, Community Health Index number, or Health and Care number, as the case may be'.
- 2.2 In article 22.1 of the Principal Order for '1 December 2016' substitute: '31 December 2018 and thereafter from time to time on a regular basis'.
- 2.3 In article 22.1(b) after 'consultant' insert the words ', or such lower number as the Information Organisation may require having regard to the performance information published in accordance with article 21.1'; and delete the final word 'and'.

- 2.4 In article 22.2 delete the words: 'from the date this article 22 is brought into force, and'.
- 2.5 In article 22.2(a) insert as the opening words 'as from 31 December 2017,'.
- 2.6 In article 22.2(b) insert as the opening words 'as from 28 February 2018,'.
- 2.7 For the opening sentence of article 22.7 of the Principal Order substitute:
'Subject to article 22.8, 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.'
- 2.8 Following article 22.7 of the Principal Order 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 facility and who does not thereafter have treatment at the relevant facility pursuant to attending the consultation.'
- 2.9 In article 24.6 of the Principal Order after 'performance information' insert the words 'and fees information' and after 'Order' delete the words 'in stages during the three years'.
- 2.10 In article 24.6 after 'shall publish all such' insert the word 'performance'.
- 2.11 In article 24.6 after '30 April 2017' insert the words 'and all fee information no later than 30 April 2019'.

3. Commencement of Article 22 of the Principal Order

- 3.1 Article 22 of the Principal Order comes into force on 28 June 2017.

(signed) ROGER WITCOMB
Group Chair
28 April 2017