CMA
Competition & Markets Authority

PRIVATE HEALTHCARE MARKET INVESTIGATION

Summary of responses to the consultation on the Notice of Intention to vary the Private Healthcare Market Investigation Order 2014 and bring article 22 of the Order into force

Background

1. On 2 April 2014 the Competition and Markets Authority (CMA), published its report titled *Private healthcare market investigation: Final report* (the report).

2. On 1 October 2014 the CMA made the Private Healthcare Market Investigation Order 2014 (the Order) as part of a package of measures, in accordance with section 138 of the Enterprise Act 2002 (the Act), to take action to remedy each adverse effect on competition (AEC) decided in the report.

3. On 25 July 2016 the Court of Appeal dismissed an appeal brought by the Federation of Independent Practitioner Organisations against the decision of the Competition Appeal Tribunal dismissing an appeal against two decisions of the CMA in the report. These were (i) that the power of the private medical insurers (PMIs) to constrain consultants' fees and to control consumer choice did not give rise to any AEC; and (ii) that there was an AEC arising from the lack of independent publicly available performance and fee information on consultants, and that caused the distortion of competition between consultants by preventing patients from exercising effective choice.

4. On 10 October 2016, the CMA gave Notice of Intention to vary the Private Healthcare Market Investigation Order 2014 and to bring article 22 of the Order into force. In doing so, the CMA is under a duty under section 183(3) of the Act to make its decisions as to remedial action consistent with its decisions taken in the report unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.

5. On 28 February 2017, the CMA consulted on its provisional decision on possible material change of circumstances and gave further Notice of Intention to vary the Order and bring article 22 of the Order into force.

6. In the course of this consultation, the CMA received 17 submissions relating to the Intention to vary the Order and bring article 22 of the Order into force. Non-confidential versions of the responses received are available on the CMA's webpages.[1] The changes which have been made to the Variation Order as a result of those submissions are set out in an Explanatory Note, also available on the CMA's webpages.[2] This paper gives reasons why certain suggested changes were not made. Minor changes (such as correction of typographical and spelling errors, clarifications included in the Explanatory Note, and other consequential changes) are not discussed in this paper.

7. Responses considered here relate to two aspects of the Order: (i) an audit mechanism for consultant fees; and (ii) requirements relating to outpatients in article 21 and article 22.

Audit mechanism for consultant fees

8. Article 22 of the Order requires information concerning consultant fees to be supplied to the information organisation. One respondent (PHIN) said that there was no clear approach in the Order to assure the accuracy of the fees supplied, and suggested the introduction of an audit mechanism.

9. The CMA recognises that there may be a risk that inaccurate fees are supplied to PHIN for publication. The introduction of a systematic audit mechanism would, however, increase regulatory costs and introduce additional costs for consultants and/or hospital operators supplying information on behalf of consultants. These costs were not considered in the report and were not taken into account in the decision to make the Order. The CMA is therefore of the view that to require the introduction of an audit mechanism would go beyond the scope of the decision.

10. In addition, we note that patients will have recourse to existing consumer protection legislation in the case where consultants engage in any unfair or misleading pricing practices.

Outpatient information

11. Article 21.1 of the Order requires every operator of a private healthcare facility to supply performance information to the information organisation. Article 21.5 specifies that the duty to supply performance information in article 21.1 does not require a private hospital operator to supply the information organisation with information concerning outpatient activity. Article 22 requires consultants

[1] Private healthcare market investigation: Implementation of Article 22 of the 2014 Order.
[2] Private healthcare market investigation: Implementation of Article 22 of the 2014 Order.

to submit information for outpatient consultation fees to the information organisation.

12. One respondent (PHIN) said there was an inconsistency between articles 21 and 22 which could create significant practical challenges to implementation of the remedies and the creation of meaningful information for patients. PHIN said the ideal route to resolving these issues would be to remove article 21.5 or reword it to improve consistency and integrity in the Order overall.

13. In specifying article 21.5 the CMA intended that the duty of hospital operators to supply performance information would be proportionate, excluding for example outpatient consultations for which performance metrics would be difficult to design and/or of limited benefit to patients. For this reason, we have decided that it would not be appropriate to remove article 21.5 and thereby require the collection of performance information on all outpatient activity, since this would significantly increase the scope of the remedy and the associated costs with an unclear benefit to patients given the nature of much outpatient activity. However, we observe that the intention of article 21.5 was not to remove the obligation to supply performance information for significant medical procedures, such as cataract operations, where patients would find the publication of performance information useful.

14. The CMA notes PHIN's concerns regarding the publication of outpatient fee information without corresponding performance information. However, the CMA considers that a change to the Order should be on the basis that there is clear evidence that either the effectiveness of the remedy is being undermined. This could be due, for example, to PHIN being unable to identify large numbers of consultants providing services intended to be caught by the Order or to services being redefined as outpatient services to circumvent the Order, or due to significant negative unintended consequences, such as consultant outpatient consultation fees being pushed up due to their publication in the absence of accompanying performance measures.[3] The CMA is required by section 162 of the Enterprise Act to monitor the operation of its remedies and considers that this duty will provide an opportunity to address issues that may arise for outpatient performance information during the implementation of article 22.

[3] This outcome may occur where the level of fees is seen by customers to be a proxy for the quality of the service provided.