Memorandum of Understanding between the Competition and Markets Authority and Human Fertilisation and Embryology Authority on consumer protection issues in the human fertilisation and embryology sector in the UK

Introduction

This Memorandum of Understanding ("MoU") sets out working arrangements between the Competition and Markets Authority ("CMA") and the Human Fertilisation and Embryology Authority ("HFEA") which they intend to apply, both generally and in relation to any specific work they may undertake in coordination with each other, given their respective roles relating to, respectively, the enforcement of consumer protection law across the United Kingdom and, the regulation of the human fertilisation and embryology sector in the UK ('the relevant functions').

This MOU records our understanding about how these working arrangements will operate in practice and records our commitment to the lawful sharing of expertise, information, ideas and experience, and to doing so efficiently and with a mutual regard for each other's regulatory functions and strategic objectives.

Legal Status and effect

This MOU is not legally binding and nothing in this MOU shall or is intended to:

- Create any legal or procedural right or obligation which is enforceable by either of the parties against the other; or
- Create any legal or procedural right or obligation which is enforceable by any third party against either of the parties, or against any other third party; or
- Prevent either of the parties from complying with any law which applies to them; or
- Fetter or restrict in any way whatsoever the exercise of any discretion which the law requires or allows the parties to exercise; or
- Create any legitimate expectation on the part of any person that either of the parties will do any act (either at all, or in any particular way, or at any particular time), or will refrain from doing any act.

Role of the CMA

1. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013 (ERRA) and works to promote competition for the benefit of consumers, both within and outside the UK, and to make markets work well for consumers, businesses and the economy.

2. The CMA's statutory responsibilities include enforcing consumer law to tackle practices and market conditions that make it difficult for consumers to exercise choice. The CMA will use its full range of powers to tackle market wide consumer problems or issues which affect consumers' ability to make choices. The CMA has regard to its published guidance on its approach to using its consumer protection enforcement powers[1] and its Prioritisation Principles[2] in making the best use of the CMA's resources to produce outcomes for UK consumers.
3. In exercising its statutory responsibilities, the CMA will co-operate with other relevant public authorities with a view to encouraging, where appropriate, a coordinated approach to enforcing consumer protection legislation.

Role of HFEA

4. The responsibilities and functions of the HFEA are set out in the Human Fertilisation and Embryology Act 1990 (as amended). The HFEA is a non-departmental public body established under the 1990 Act. In summary, the HFEA must:
    - issue licences under the Human Fertilisation and Embryology Act 1990 (as amended);
    - keep statutory registers pertaining to treatments carried out by licenced clinics, licences issued by the HFEA and incidents reported to the HFEA;
    - inspect establishments licensed under the Human Fertilisation and Embryology Act 1990 (as amended);
    - issue a Code of Practice setting out a statement of the general principles and guidance which it considers should be followed in the carrying-on of activities governed by the Human Fertilisation and Embryology Act 1990 (as amended);
    - promote compliance with the Human Fertilisation and Embryology Act 1990 (as amended) and the Code of Practice;
    - keep under review information about embryos, the provision of treatment services and activities governed by the Human Fertilisation and Embryology Act 1990 (as amended), and advise the Secretary of State about those matters;
    - provide advice and information for persons to whom licences apply or who are receiving treatment services or providing gametes or embryos for use for the purposes of activities governed by the Human Fertilisation and Embryology Act 1990 (as amended), or, may wish to do so.

General co-operation

5. The CMA and HFEA will work together with the aim of ensuring that a consistent and co-ordinated approach is taken in performing the relevant functions and any specific joint work they may undertake.

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[1] https://www.gov.uk/government/publications/consumer-protection-enforcement-guidance-cma58

[2] CMA 16, April 2014. see:
https://www.gov.uk/government/uploads/system/uploads/attachment data/file/299784/CMA16.pdf

6. The CMA and HFEA are committed to the following general principles and practices for co-operation between themselves in respect of the relevant functions:

(a) The CMA and HFEA will aim to engage with each other openly, sharing relevant information as appropriate and within legal constraints.

(b) The CMA and HFEA will consult each other at an early stage on any issues that might have significant implications for the other.

(c) The CMA will consider taking any enforcement action in relation to non-compliance with consumer protection legislation in the relevant sector with regard to published guidance on its approach to using its consumer protection enforcement powers and its prioritisation principles.[3]

(d) The HFEA will consider taking any relevant action in response to non-compliance identified at licenced clinics in accordance with its regulatory powers.

(e) The CMA and HFEA may liaise with each other as appropriate in relation to any enforcement action that either is considering taking in the relevant sector, and will liaise closely on projects on which they have agreed to take coordinated action. The aim of these arrangements is to achieve coordinated and consistent regulatory action in the relevant sector and to avoid, as far as is reasonably practicable, duplication of action or the taking of steps by one organisation which may impede action by the other.

Information Sharing

7. To the extent permitted by law as set out below, the CMA and HFEA intend to share information on consumer protection issues in the relevant sector. In the case of projects on which they have agreed to take coordinated action they will aim to freely share any information either organisation has or acquires during the course of the project, to the extent legally permitted.

Information Sharing — Legal aspects

8. Under Part 9 Enterprise Act 2002 ("EA02"), information that comes to the CMA in connection with the exercise of its functions is "specified information" (section 238(1)). Where specified information relates to the affairs of an individual or any business of an undertaking the CMA can only disclose it, during the lifetime of the individual or while the undertaking continues in existence, under permitted gateways (section 237 of the EA02). Disclosure outside those gateways is a criminal offence.

9. Unless specified information is already properly and lawfully in the public domain (section 237(3) of the EA02), or a power or duty to disclose it exists outside Part 9 of the EA02 (section 237(6) of the EA02), the CMA may only disclose it where one of the following gateways exists:

(a) where the CMA obtains consent from both those providing the information and those to whom it relates (section 239 of the EA02);

[3] https://www.gov.uk/government/publications/consumer-protection-enforcement-guidance-cma58

(b) disclosure is required to meet an obligation under EC law (section 240 of the EA02);

(c) disclosure facilitates the exercise of the CMA's statutory functions (section 241 (1));

(d) disclosure facilitates the exercise by any person of functions under any legislation specified for the purposes of that subsection. The HFEA's functions under the Human Fertilisation and Embryology Act 1990 aren't currently specified (section 241(3) of the EA02);

(e) disclosure is for the purposes of, or in connection with, prescribed civil proceedings or prospective proceedings in the UK or elsewhere, or for the purposes of taking legal advice in relation to them, or for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings (section 241A of the EA02);

(f) disclosure is for certain purposes connected with criminal investigations and proceedings in the UK (section 242 of the EA02); or

(g) disclosure is to facilitate the performance of an overseas public authority's functions, in certain circumstances (section 243 of the EA02).

10. Even where a statutory gateway for disclosure exists, under section 244 of the EA02 the CMA must have regard to the following considerations before disclosing any specified information:

    (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure the CMA thinks is against the public interest;

    (b) the need to exclude from disclosure (so far as practicable) any information relating to the private affairs of an individual, or any commercial information relating to a business, whose disclosure might, in the CMA's opinion, significantly harm the individual's interests or the legitimate business interests of the undertaking to which it relates; and

    (c) the extent to which the disclosure of the information is necessary for the purpose for which the CMA is permitted to make the disclosure.

11. When sharing specified information with the HFEA, gathered using its information gathering powers under Schedule 15 to the Consumer Rights Act 2015 or otherwise, the CMA will usually do so in reliance on the powers set out in paragraph 12(c) above, that is on the basis that any such disclosure facilitates exercise of the CMA's functions.

12. By section 33A of the HFE Act 1990 (as amended) the HFEA is prohibited from disclosing information which falls within the definition of section 31(2) save where one of the exceptions set out in section 33A(2) to (5) can be relied on. Disclosure of information falling within section 31(2) other than in the prescribed circumstances is a criminal offence under section 41 of the HFE Act 1990. To the extent that disclosure of section 31(2) information may become necessary in the course of any joint investigation or cooperation with the CMA, the HFEA will seek to rely on an appropriate exception in order to facilitate the necessary disclosure.

13. In sharing, receiving and processing "personal data", both the CMA and the HFEA will comply at all times with the General Data Protection Regulation (GDPR)[4], the Data Protection Act 2018 and the Human Rights Act 1998.

14. The CMA and HFEA agree that where the CMA shares specified information with the HFEA pursuant to section 241(1) of the EA02 for the purpose of facilitating the exercise of the CMA's statutory functions, but the information is not made available to the public, that information must not be further disclosed by the HFEA other than with the CMA's agreement and must not be used by the HFEA for any purpose other than that for which it was disclosed.

15. For the avoidance of doubt, the CMA and HFEA will give effect to the above commitments only to the extent consistent with the lawful and proper performance of their statutory functions.

16. If a request is received by either party under the Freedom of Information Act 2000 in relation to information received from the other party then the receiving party will inform the other party and invite representations on the potential impact of any disclosure of such information.

17. The CMA and HFEA will protect the confidentiality and sensitivity of all unpublished regulatory and other confidential information received from each other.

Working arrangements

18. The CMA and HFEA will each nominate a member of their organisation to be responsible for day to day communications between the parties.

Reporting and review arrangements

19. This MOU will remain in force until terminated by either party. The parties will use their best endeavours to review its operation at least every two years.

20. Any changes to this MOU may be agreed in writing.

Date: 24/02/2020 Signed:

[4] Regulation 2016/679 on the processing on the processing of personal data and the free movement of such data known as the GDPR is an EU instrument. On EU Exit, the EU Withdrawal Act 2018 will incorporate the GDPR into domestic law.