From: Dr Louise Strong
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Competition and Markets Authority

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Dear Sir / Madam

Complying with consumer law and the advertising codes in the fertility sector – a joint letter from the Competition and Markets Authority (CMA) and the Advertising Standards Authority (ASA)

1. We are writing to draw to your attention the further work of the Competition and Markets Authority (**CMA**) and the Advertising Standards Authority (**ASA**) in the fertility sector and the action you need to take.

Background

2. In June 2021 the **CMA** published consumer law guidance ("the Guidance") for fertility clinics. The **CMA** developed the Guidance because it had identified a number of clinic practices that may prevent or inhibit patients from making informed choices and considered that increased compliance with consumer law should help address some of the concerns it had identified in the sector. The **CMA**'s discussions with stakeholders had also highlighted a lack of awareness among clinics that consumer law applies in this sector. The aim of the Guidance was to help clinics understand and comply with their obligations under consumer law, in turn protecting patients' consumer rights.

3. At the same time as the **CMA** published its Guidance, the **ASA** also issued an Enforcement Notice to the sector, which provides guidance on the rules that apply to advertising fertility treatment.[1]

4. When publishing the Guidance and the Enforcement Notice the **CMA** and **ASA**, together with the Human Fertility and Embryology Authority (**HFEA**), wrote a joint letter to licensed clinics providing self-funded treatment in the UK. This letter directed clinics to read the Guidance and the Enforcement Notice and to review their practices and terms to ensure that they comply with consumer law and the Advertising Codes.[2] This letter also advised clinics that the **CMA** and **ASA** would carry out a review of compliance six months' later.

The Compliance Reviews

5. The **CMA** and **ASA** have now completed their respective reviews, and today the **CMA** has published a Report setting out its findings. The **CMA** and **ASA** shared information during our respective reviews[3] as some of the advertising claims for fertility treatments that the **ASA** has been considering as part of its review are similar to the issues the **CMA** has looked at.

6. **The purpose of this letter is to summarise the key findings from the CMA's compliance review and what we expect from fertility clinics (HFEA licensed and unlicensed clinics providing a satellite service). You should read the Report in full and review your information, practices and contract terms in light of the review findings. You should then take any necessary steps to ensure your clinic complies with consumer law and the CAP Codes.**

CMA's compliance review – what we found

7. Among the sample of clinics reviewed, the **CMA** found a mixed picture in terms of compliance with consumer law. For a small minority of the clinics reviewed it found no compliance concerns in any of the areas it assessed.

8. Positively, the **CMA** found that some clinics had made improvements since the publication of the **CMA's** Guidance and the **ASA's** Enforcement Notice. It was also noted that some clinics were continuing to make changes during the course of the review.

9. However, the **CMA** found compliance issues with the majority of the clinics it reviewed, albeit that in some cases these concerns were relatively minor.

10. Examples of the concerns the **CMA** identified during its review include:

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[1] In particular the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing ('the CAP code')
[2] The CMA and ASA have different roles and powers. Further information on our respective roles and powers is set out at Annex A.
[3] In accordance with information sharing gateways under Part 9 of the Enterprise Act 2002 and the MoU between the CMA and ASA dated June 2017

- concerns with the transparency of clinics' price information for patients in relation to IVF and egg freezing, both at the initial research stage (when patients are comparing clinics) and prior to agreeing to treatment with their chosen clinic;

- clinics advertising success rate claims, including superiority claims, without clearly identifying the basis of the claims, making it difficult for patients to meaningfully compare between clinics;

- clinics making success rate claims based on incorrect or out of date information, and creating a misleading impression about the clinic's more recent performance by implying that it is more impressive than it is;

- clinics failing to provide information about the evidence for, or risks associated with, certain treatment add-ons;

- clinics making claims that link success rates to the use of certain treatment add-ons without any, or adequate, explanation of the basis on which the claims were made;

- examples of potentially unfair terms.

11. Following the more detailed reviews the **CMA** wrote to certain clinics setting out the specific compliance issues we had identified with them. The **CMA** told these clinics that it expected them to review their practices and terms and make appropriate changes to ensure their compliance with consumer law.

12. All the clinics the **CMA** contacted have subsequently made changes to address compliance concerns. The **CMA** welcomes the constructive approach generally adopted by clinics and it is continuing to engage with some of the clinics to resolve a small number of outstanding issues. Examples of the positive changes that the **CMA** has seen during the review and following its direct engagement with clinics include clinics:

Price

- being more transparent about the costs that patients will incur before a cycle of treatment can begin;

- providing clearer information about what they include in the price for a cycle of treatment, and what they exclude;

- providing information about the price of essential elements of treatment which are excluded from the treatment package price, such as medication and blood tests;

- displaying clearer price information about the future costs associated with IVF and egg freezing treatment;

- providing more accurate, personalised price information following the initial consultation.

Success rates

- providing clearer information about the measures that have been used to calculate their success rates;

- removing from their websites success rates which are based on incorrect information or appeared to exaggerate the clinic's performance;

- removing from their websites unsubstantiated success rate claims, such as superiority claims.

Treatment add-ons

- updating webpages to provide additional information so that the potential benefits and risks of certain treatment add-ons, as well as the views of the HFEA, are more clearly explained and signposted;

- providing clearer information about the basis for claims that link the use of certain treatment add-ons to successful treatment outcomes.

Contract terms

- introducing contracts and sets of terms for patients, where none had existed previously;

- amending their terms to better reflect patients' statutory rights under consumer law.

What action do you need to take?

13. It was not practical for the **CMA** to assess all UK clinics, so it based its review on a sample of clinics. Given the size of the sample, it is reasonable to assume that the compliance concerns found during the review apply to UK clinics more widely, and that, as a result, some further clinics will need to make changes to their practices and terms. Similarly, it was not practical for the **ASA** to assess all UK clinics' advertising, so it is also reasonable to assume that some of the **ASA's** advertising-related compliance concerns found during its review may apply to UK clinics more widely. As such, some further clinics will need to review their advertising and make changes in accordance with the **ASA's** Enforcement Notice.

14. Moreover, the **CMA** was not able to review all parts of a patient's journey with a clinic, such as the information that clinics provide during private consultations with patients. However, all clinics need to ensure they are complying with consumer law during all their interactions with patients.

15. In light of the findings set out in the **CMA**'s Report published today, it is strongly recommended that clinics review their information and practices. Alongside the Report, clinics should read the **CMA**'s Guidance, and the **ASA**'s Enforcement Notice, and take any corrective action necessary as a matter of priority. Clinics should not assume because the **CMA** and **ASA** have not written to them directly that their practices are compliant with consumer law and/ or the CAP Codes. Failure to comply with consumer law could result in the **CMA**, **ASA**, or others, taking enforcement action.

16. The **CMA** and **ASA** have shared findings from our respective reviews with the **HFEA** and the professional bodies working in the sector. The **CMA's** report also makes two recommendations to the **HFEA**.

17. The latest **HFEA** code of practice, revised in October 2021, states that clinics should have regard to **CMA** Guidance and should be aware of their obligations under consumer law. The code also says that clinics should ensure that the information provided on their website complies with the **ASA**'s CAP Codes and the **CMA**'s Guidance. The **HFEA** will continue to monitor compliance with the Human Fertilisation and Embryology Act 1990, Standard Licence Conditions and Special Directions via its routine inspections process and assess how the guidance in its Code of Practice is implemented.

Variation in cycle packages

18. The **CMA**'s review compared the headline package prices charged by a sample of London clinics for a cycle of IVF treatment, along with the treatments and services they include in, and exclude from, their cycle package price. This exercise revealed significant differences between what clinics include in their headline package price for a single cycle of IVF.

19. The **CMA** is concerned that this variation is likely to make it difficult for patients to easily and meaningfully compare clinics' prices. The new patient research commissioned by the **CMA** found that most patients buying fertility treatment for the first time carried out a shortlisting process, primarily online using clinic websites. This generally involved patients weighing up clinics' location, prices and success rates. The research also found that the stage at which price had the most impact on patients' decision-making was early on in their consumer journey, when they were researching and shortlisting clinics. This highlights the importance of clinics providing clear and comparable price information upfront, particularly on their websites.

20. The **CMA** plans to hold roundtable discussions with clinics, the **HFEA** and other key stakeholders in Autumn 2022 to explore the feasibility of developing a standard approach for what is included in the headline package price for a single cycle of IVF. To be clear this is about the presentation of price information to help patients compare clinics' prices. It is not about the prices clinics charge or any form of price regulation. The **CMA** will contact clinics again in the near future to provide further information about this work.

Further information

21. A copy of the findings report, the **CMA**'s Guidance and further information about the **CMA**'s work in this sector can be found on the **CMA**'s Self-funded IVF: consumer law guidance page.

22. A copy of the **ASA**'s Enforcement Notice can be found on the **ASA**'s Enforcement Notice – fertility treatments page.

23. If you are unsure of your consumer protection law obligations, you should consider seeking legal advice.

Yours faithfully

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Annex A: Role of each regulator

CMA

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.

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[4] and its Prioritisation Principles[5] in making the best use of the CMA's resources to produce outcomes for UK consumers.

The CMA shares its enforcement powers with other bodies, such as Trading Standards Services. The CMA also shares certain consumer functions with other agencies, such as the ASA. As part of its role, the CMA produces guidance for businesses to clarify their legal obligations and promote compliance.

More information on the CMA's consumer protection powers and functions is available the Consumer protection enforcement guidance: CMA58 page.

ASA

CAP writes and maintains The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code). The Advertising Standards Authority (ASA) is the UK's independent regulator that administers the Code. You can read about the UK advertising regulatory system here. It is not a voluntary system – all ASA upheld rulings are strictly enforced by a range of industry sanctions.

The UK government and courts recognise CAP and the ASA as the established means for regulating non-broadcast advertising. Ultimately, both CAP and the ASA are accepted by the Department for Business, Energy and Industrial Strategy, Trading Standards and the courts as the first line of control in protecting consumers and businesses from misleading advertising.

[4] See Consumer protection enforcement guidance: CMA58 page.
[5] CMA 16: Prioritisation principles for the CMA