

PRIVATE HEALTHCARE MARKET INVESTIGATION

Explanatory note to accompany the Private Healthcare Market Investigation (Variation and Commencement) Order 2017

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. The CMA has carefully considered the representations made in response to that consultation and Notice and has decided to bring article 22 of the Order

into force and to make the following variations to the Order in accordance with section 161(4) of the Act.

7. Nothing in this explanatory note is legally binding. In the event of a conflict between this explanatory note and any provision of the Order, the Order prevails.

Commencement

8. The Variation Order (and so the amendments made by the Variation Order) will come into force on the day the Variation Order is made. Article 22 in its amended form will come into force two months later. However, the specific duties and obligations created by article 22 will have effect as from the dates specified in the Order which are outlined below.

Duty on operators of private healthcare facilities to supply information to The Information Organisation (PHIN) (article 21)

9. Article 21.2(b) has been simplified to make it clear that the information supplied by operators of private healthcare facilities to PHIN in accordance with article 21 must include a National Health Service number for patients in England and Wales or the Isle of Man, a Community Health Index number for patients in Scotland, or a Health & Care number for patients in Northern Ireland. The relevant number, in itself, will be insufficient to identify the name of a patient, but any use made of this information must nevertheless comply with the requirements of the Data Protection Act 1998, in accordance with article 21.3 of the Order.

Duty on consultants to provide fee information to the Information Organisation (PHIN) (article 22.1)

10. Article 22.1 has been varied so that the duty of consultants to provide PHIN with regular information as to fees (both outpatient consultation fees and standard procedure fees) and standard terms and conditions applies from no later than **31 December 2018**.
11. In addition, article 22.1(b) has been varied to make it clear that, having regard to the performance information PHIN will publish under article 21 of the Order, PHIN is permitted to require information on a lower number of standard procedure fees than the 50 types of procedure most frequently undertaken by the relevant consultant.

Duty to provide private patients with information letters, prior to outpatient consultations, and prior to further tests or treatment (article 22.2)

12. Article 22.2(a) has been varied so that the duty to provide letters to patients prior to outpatient consultations setting out the estimated cost, potential conflicts of interest and other relevant information, arises as from **31 December 2017**.
13. Article 22.2(b) has been varied so that the duty to provide letters to private patients prior to further test or treatment, giving the reason for the relevant tests or treatment, an estimate of the cumulative cost and other relevant information, arises as from **28 February 2018**.
14. The Order is **not** intended to be interpreted as requiring such information to be supplied by means of a universal standard letter template, common to all hospital operators.
15. Hospital operators may choose to supply private patients with the specified information on behalf of consultants. In the case of a hospital sending letters to patients on behalf of consultants to meet the duties required by article 22.2(a) and 22.2(b) it will not be necessary for hospitals to obtain confirmation from patients that the letter has been issued.

Duty to provide private patients with information prior to further tests or treatment (article 22.4)

16. Article 22.4(c) requires consultants to provide patients with a statement of any services which have not been included in an estimate. The intention of the Order is that patients should be made aware of services that are included in cost estimates and those which are not. Examples of services for which the cost might not be included in an estimate could include:
 - (a) anaesthetic fees, in which case the patient should be told that these fees will be an additional cost and the level of costs will be determined by the anaesthetist; or
 - (b) fees that cannot be quantified prior to treatment (such as those that would be payable if unforeseeable complications were to arise).

Time elapsing between appointments/treatment and the duty to provide private patients with information letters (article 22.5 and 22.6)

17. The duty to provide private patients with information letters, prior to outpatient consultations, and prior to further tests or treatment, should **not** delay emergency consultation or emergency treatment. In the case of emergencies

any information which is required to be given may be provided orally prior to emergency consultation and/or emergency treatment. The requirement thereafter to provide patients with information in writing prior to any further tests or treatment will still apply.

18. If an outpatient consultation appointment is made via a phone call, information specified in article 22.3 must be provided to private patients within one working day.

Duty on operators of private healthcare facilities to ensure compliance (article 22.7)

19. Article 22.7 has been varied to make it clear that the responsibility of operators of private healthcare facilities to ensure that patients undergoing any procedure sign a form confirming that they have received the required information as to costs etc from their consultant, extends to all procedures – whether inpatient, day-case or outpatient procedure (including diagnostic scans and tests). This will make article 22.7 correspond more closely to paragraph 11.600 of the report. The action which operators must take, if there is evidence that a consultant has failed to provide the information required by article 22.4, will be ‘appropriate’ if it is likely to be effective in achieving compliance by the relevant consultant, while not being more onerous than is necessary to achieve that aim, and is the least onerous of available effective options.
20. A new article 22.8 clarifies that the article 22.7 duty does not apply to operators in the case of a private patient attending a consultation at premises, which are not part of the relevant operator’s facilities, and so long as the patient does not thereafter have treatment at the operator’s facilities pursuant to the consultation. This is in accordance with paragraph 11.623 of the report.
21. The duty on operators of private healthcare facilities to ensure compliance with article 22.3 takes effect on 31 December 2017.
22. The duty on operators of private healthcare facilities to ensure compliance with article 22.4 takes effect on 28 February 2018.

Duties of the Information Organisation (PHIN) (article 24)

23. Article 24.6 has been varied to make it clear that the duty on PHIN to publish information on its website extends both to performance information and fees information, in accordance with paragraph 11.601 of the report. The deadline by which information on consultants’ fees must be published has been changed to **30 April 2019**.