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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), the Advertising Standards Authority (ASA) and the Human Fertilisation and Embryology Authority (HFEA)**

We are writing to draw to your attention the 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.

Today, following a public consultation, the **CMA** has published consumer law guidance for fertility clinics. This guidance is to help fertility clinics understand and comply with their existing obligations under consumer law. A copy of the guidance can be found on the CMA's webpages [here](#).

Alongside this, the **CMA** has published a guide and video for patients to help them understand their consumer rights when buying and undergoing fertility treatment (see the **CMA's** [webpages](#)).

The **ASA** has also today published an Enforcement Notice, which sets out what advertisers need to do to ensure their marketing claims for fertility treatments comply with the advertising codes<sup>1</sup> (see <https://www.asa.org.uk/resource/enforcement-notice-fertility-treatments.html>).

This work follows constructive engagement with the **HFEA**, professional and patient groups, clinic representatives and other stakeholders from across the sector, and reviews of clinic websites and published research, which highlighted a general lack of awareness about how consumer law and the advertising codes apply in the sector.

### **Co-ordinating our approach**

The **CMA**, **ASA** and **HFEA** each have different roles and powers.<sup>2</sup> Whilst the focus of this current work is on compliance with consumer law and the advertising codes, there is some overlap with the **HFEA's** regulatory requirements for licensed clinics, which are set out in the **HFEA's** Code of Practice (9th edition).

The **CMA**, **ASA** and **HFEA** have worked together to:

- ensure that clinics and other businesses active in the sector understand their legal obligations arising under consumer law and the advertising codes; and
- promote and help drive compliance across the fertility sector.

It is important to recognise that our powers are not the same<sup>3</sup> and compliance with one does not guarantee compliance with the other. You therefore need to ensure that you comply with each of consumer law, the advertising codes and the sector-specific regulatory requirements in your dealings with patients.

### **Why is compliance with consumer law and the advertising codes important?**

Fertility clinics provide an extremely important service for those struggling to have a baby and many patients have positive experiences of the clinics where they have treatment. But deciding to purchase fertility treatment is a significant decision, both financially and emotionally, and for many it will be a stressful and costly purchase.

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<sup>1</sup> In particular the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing ('the CAP code')

<sup>2</sup> Further information on our respective roles and powers is set out at Annex A.

<sup>3</sup> Further information on our respective roles and powers is set out at Annex A

Having identified a lack of awareness of existing obligations under consumer law and the advertising codes in the fertility sector, the **CMA** and **ASA** have produced compliance materials. Examples of the concerns identified to date include:

- Patients being unable to meaningfully compare clinics' prices
- Patients being faced with unexpected additional costs during treatment;
- Patients being presented with partial or misleading information about success rates;
- Patients not being properly informed of the limited evidence base for add-on treatments or the risks associated with certain add-on treatments;
- The use of contract terms that are potentially unfair.

Compliance is important for not only supporting patients but also in maintaining the reputation of the fertility sector and supporting open and fair competition amongst clinics.

### **What action do you need to take?**

To ensure you comply with consumer law and the advertising codes you should take the following steps:

- (a) Read the consumer law guidance and the Enforcement Notice and, where relevant, make any necessary changes to your marketing materials, practices and contracts as soon as possible to ensure that your clinic complies with consumer law and the advertising codes.
- (b) Consider a wider review of your internal procedures and processes in order to support your compliance with consumer law and the advertising codes (as applicable).
- (c) Make sure that all patient-facing staff, including clinical staff and all staff involved in producing patient-facing materials, understand these requirements and comply with them. You are legally responsible for the actions of your staff, who are acting in your name, or on your behalf, in their dealings with patients.

Whilst the **CMA's** consumer law guidance is principally for fertility clinics, UK consumer law applies more widely and also protects patients in their dealings with other businesses active in the fertility sector. The guidance includes some examples of commercial practices which may be relevant not only to clinics but also to other businesses working in the sector.

If you work with other businesses active in the fertility sector, we recommend that you bring these compliance materials to their attention so they are aware of their legal obligations and to help promote compliance with consumer law across the sector.

## **Next steps**

The **CMA**, **HFEA** and **ASA** will continue to work together, to make the best use of our complementary powers, and to ensure a co-ordinated and consistent approach. This could include sharing information, where possible, to secure compliance with consumer law, the advertising codes and the **HFEA's** regulatory requirements.

Where we identify issues that cannot be addressed by our respective powers, or if we are not best placed to tackle such issues, we may refer information to other bodies where such matters fall within their remit.

In **December 2021** the **CMA** and **ASA** will begin a review to assess compliance with consumer protection law and the advertising codes across the sector.

As part of that compliance review, the **CMA** will analyse information from a range of sources, including from stakeholders such as patient representatives and clinic websites.

If a clinic, or any other business active in the sector, is found not to be complying with consumer law, the **CMA** and other bodies, such as local authority Trading Standards Services or the Department for Trade and Investment in Northern Ireland, can bring court proceedings to stop infringements and seek compensation on behalf of patients. Where serious infringements are identified the **CMA**, or another consumer enforcement partner, may decide to take action before the compliance review has concluded. This does not mean that enforcement action must, or will be, taken in every case and decisions will be subject to the **CMA's** prioritisation principles.<sup>4</sup>

The **ASA** will assess compliance with the Enforcement Notice and, where appropriate, take action against misleading advertisements that contravene its advertising codes. The vast majority of advertisers agree to comply with the advertising codes; for the small minority of advertisers who are either unable or unwilling to work with the **ASA**, some of the sanctions at their disposal can have

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<sup>4</sup> CMA 16: [Prioritisation principles for the CMA](#)

negative consequences. One of the ASA's most effective sanctions is bad publicity – an advertiser's reputation can be badly damaged if it is seen to be ignoring the rules designed to protect consumers. To that end, non-compliant advertisers may be featured on a dedicated section of the ASA website, and, if necessary, in an ASA advertisement appearing on an appropriate page of an internet search engine. The ultimate sanction is referral by the ASA to Trading Standards under the Consumer Protection from Unfair Trading Regulations 2008. More information about the full range of sanctions available to the ASA can be found [here](#).

The **HFEA** will continue to monitor compliance against the Human Fertilisation and Embryology Act 1990, Standard Licence Conditions and Special Directions via its routine inspections process and review how the guidance in its Code of Practice is implemented. Where breaches are identified, it will take steps to secure compliance. Non-compliances are currently published via inspection reports which are published on the Choose a Fertility Clinic section of the HFEA website. Complaints reported to the HFEA will be considered in line with the HFEA Complaints policy and may be referred to the ASA and CMA where they raise concerns about compliance with guidance published by either body.

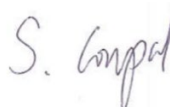
### **Further information**

Further information about the **CMA's** work in this sector can be found on the **CMA's** webpages [here](#).

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<sup>5</sup> and its Prioritisation Principles<sup>6</sup> 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 [here](#)

### 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.

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<sup>5</sup> See <https://www.gov.uk/government/publications/consumer-protection-enforcement-guidance-cma58>.

<sup>6</sup> CMA 16: [Prioritisation principles for the CMA](#)

## **HFEA**

The HFEA is the UK's independent regulator of fertility treatment and embryo research. Set up in 1991, the HFEA aims to ensure that everyone who steps into a fertility clinic, and everyone born as a result of treatment, receives high quality care

The responsibilities and functions of the HFEA are set out in the Human Fertilisation and Embryology Act 1990 (as amended).

The HFEA does not have any direct powers to enforce consumer law or the advertising codes, however, as mentioned above some of the HFEA's regulatory requirements for licensed clinics are also relevant to consumer law and the advertising codes. The HFEA also has a statutory duty to publish information on fertility treatments, which it does so via its website [www.hfea.gov.uk](http://www.hfea.gov.uk).