COMPETITION APPEAL TRIBUNAL

NOTICE OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE NO. 1230/6/12/14

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the "Rules"), the Registrar gives notice of the receipt on 2 June 2014 of an application for review under section 179 of the Enterprise Act 2002 (the "Act"), by the Federation of Independent Practitioner Organisations (the "Applicant") of certain decisions of the Competition and Markets Authority (the "CMA") contained in a report published on 2 April 2014 entitled "Private healthcare market investigation: Final report" (the "Final Report"). The Applicant is represented by Watson, Farley & Williams LLP, 15 Appold Street, London EC2A 2HB (ref.: Emanuela Lecchi / Kristina Cavanna).

In the Notice of Application, the Applicant explains that it is representative of the majority of medical organisations in the UK and thus of their consultant members in private practice.

The Notice of Application identifies as relevant the following aspects of the Final Report, which contained wide-ranging conclusions and remedies in relation to adverse effects on competition found within the private healthcare market:

(i) The Final Report included the finding that there was insufficient competition between private consultants with regard to fees. The CMA concluded that this arose from insufficient publicly available information on consultants' fees, which prevented consumers from exercising effective choice. The remedy provided in the Final Report was a combination of measures to improve the public availability of such information (the "Fees Information Remedy").

(ii) The Final Report considered the potentially adverse effects on competition of the significant buyer power of Private Medical Insurers ("PMIs") in relation to consultants. The Final Report recognised that PMIs have and exercise substantial power to constrain consultants' fees and control over consumer choice but concluded that this did not give rise to any adverse effect on competition (the "PMI Decision").

The Applicant submits that both the Fees Information Remedy and the PMI Decision are unlawful and should be quashed, for the reasons summarised below.

(i) *Failure to grant a remedy*: the Fees Information Remedy proposed by the CMA cannot be effective to remedy insufficient competition between consultants in relation to fees and is therefore unlawful, being granted by the CMA in breach of its duty under section 138 of the Act to remedy adverse effects on competition. Insofar as the Fees Information Remedy is ineffective to achieve its aim, it is also disproportionate.

(ii) *The finding that top-up fees enabled consumer choice*: the PMI Decision was reached on the basis of the finding that consumer choice was not restricted by the practice of PMIs to direct policyholders to consultants whose fees were within the caps set by the PMIs because consumers could select consultants whose fees were above the caps and pay the top-up fees. That finding was factually erroneous and/or irrational in that it was reached in spite of the CMA's finding that the threat of derecognition by PMIs meant that the vast majority of consultants charged within the caps and did not offer services requiring top-up fees to be paid.

(iii) *The finding that consultants could compete below fee caps*: the PMI Decision was reached on the basis of the finding that, notwithstanding the fee caps widely imposed on consultants by PMIs, consultants could compete below the fee caps. That finding was irrational insofar as it was based on no probative evidence and/or amounted to a fundamental error of fact. Further, the PMI Decision was procedurally unfair as the finding had at no point been put to the Applicant (or any other representative medical organisation).

(iv) *The finding that the number of consultants had not fallen*: the PMI Decision was reached on the basis of the factually erroneous finding that the buyer power of the PMIs had not resulted in a reduction in the overall number of consultants. In fact, the number of consultants in private practice has reduced and there was cogent and accurate evidence before the CMA to support this. The PMI Decision was therefore unreasonable and/or irrational in that it was premised on an error of fact.

(v) *Failure to consider future fall in consultant numbers*: the PMI Decision was reached on the basis of a (mistaken) finding that the number of consultants had not fallen. The CMA failed to take into account the relevant consideration and/or irrationally failed to conduct any investigation into the issue of whether or not the number of consultants was likely to fall significantly in future.

(vi) *The finding that fee caps resulted in lower premiums*: that the PMI Decision was reached on the basis of the finding that the fee constraints imposed by PMIs would result in a benefit to consumers insofar as premiums would be reduced for policyholders. That finding was irrational and/or unreasonable in that it was not only based on no probative evidence but also reached in spite of contrary evidence submitted by parties to the CMA's investigation that premium levels had increased while consultants' fees had been driven down.

(vii) *The finding that insurers were interested in maintaining consultants in private practice*: the PMI Decision was reached on the basis of the assumption that it was in the interests of the PMIs to ensure that there were high-quality consultants in private practice. That assumption was based on no probative evidence and was made notwithstanding evidence to the contrary submitted by the PMIs themselves.

By way of relief, the Applicant asks the Tribunal to:

1. quash the PMI Decision and the Fees Information Remedy;

2. remit the PMI Decision and the Fees Information Remedy to the CMA for reconsideration; and

3. direct that the CMA reconsider the PMI Decision and the Fees Information Remedy in accordance with the Tribunal's ruling.

Any person who considers that he has sufficient interest in the outcome of proceedings may make a request for permission to intervene in the proceedings in accordance with rule 16 of the Rules. Any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribinal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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