



N A B A R R O

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Competition and Markets Authority
Victoria House
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London
WC1B 4AD

13 March 2017

Our ref: BQ/CKM/H2700/00086

Dear Mr Akhgar

Notice of intention to vary the Private Healthcare Market Investigation Order 2014 (the "Order") and to bring Article 22 of the Order into force

1. We are writing on behalf of HCA International Limited ("HCA") in relation to the CMA's Notice of intention of 28 February 2017 and, in particular, Article 22 of the Order (as it is proposed to be varied). HCA's comments are as follows.

Article 22.4(c) – statement of services resulting from "unforeseeable complications"

2. HCA requests the CMA to reconsider the point in relation to Article 22.4(c) regarding the requirement to list services resulting from unforeseeable complications. It is difficult to see how a consultant can reasonably be expected to disclose a complete list of treatments which might result from unforeseeable complications, which by definition cannot be foreseen. This is in the realm of 'unknown unknowns'.
3. HCA would suggest that what the patient requires is to understand what further tests or treatments could typically arise. The second line of Article 22.4(c) should therefore read: "such as those resulting from complications which are reasonably foreseeable."

Article 22.6 – timing for supply of Article 22.3 and Article 22.4 information

Information supplied prior to outpatient consultation (Article 22.3)

4. Under Article 22.6, consultants must supply patients with information "at the same time as the outpatient appointment is confirmed with the patient". In many cases, an appointment may be 'booked' over the telephone or email with the consultant's secretary and then be confirmed in writing shortly thereafter.
5. To avoid confusion over the precise moment information under Article 22.3 must be supplied, HCA suggests adding "in writing" after the word "confirmed" in Article 22.6.

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6. Alternatively, HCA suggests guidance is added to the revised Explanatory Memorandum which provides that the information under Article 22.3:
 - (i) must be given to the patient by the consultant in writing shortly after the appointment is confirmed; and
 - (ii) is not expected to be provided by a consultant's secretary when the time of the appointment is booked by telephone or email.

Information supplied prior to further tests/treatments (Article 22.4)

7. HCA understands under Article 22.6 that information – in relation to further tests and treatment – must be supplied as follows:
 - (i) in non-emergency cases the patient must receive the information under Article 22.4:
 - a. within two-working days following that patient's outpatient consultation, or
 - b. prior to any surgery,whichever is sooner.
 - (ii) in emergency cases, the consultant need not provide written advice relating to Article 22.4, but instead give such advice orally in accordance with Article 22.5.
8. HCA would be grateful for the CMA's confirmation of this interpretation, given it is important for consultants to know exactly when and how (i.e. in writing or orally) the Order requires a patient to receive the information under Article 22.4, so as to manage the flow of information to the patient at what is likely to be a particularly stressful time. The wording as it stands is ambiguous.
9. Provided the above interpretation of Article 22.6 is correct, HCA would suggest the following amendments to Articles 22.5 and 22.6 to clarify the timing of when information under Article 22.4 – in respect of both non-emergency and emergency cases – must be given to a patient:
 - (i) add "(i.e. emergency cases)" after the word "consultation" in Article 22.5;
 - (ii) add "(under Article 22.5)" after "in case of emergency" in Article 22.6 in order to link the two provisions together;
 - (iii) remove "final (pre-treatment)" and add "which advises of the relevant further tests or treatment" after "outpatient consultation"; and
 - (iv) add "," before "or prior to surgery" to show that "prior to surgery" is clearly a separate sub-clause.
10. For ease of reference, we provide HCA's suggested amendments in a redrafted example of Articles 22.5 and 22.6 at paragraph 14 below.

Article 22.5 – emergency cases – provision of information orally

11. HCA notes that circumstances may arise where the case is an "emergency", but the further tests or treatment cannot, for certain unforeseen reasons, be administered / provided until the



next working day. However, in this limited time, the consultant is unlikely to have been able to provide the patient with the relevant Article 22.4 information in writing.

12. HCA would therefore recommend that the CMA replaces "on the same day as" with the words "within one working day of" in Article 22.5. Additionally or alternatively, it would be helpful for the CMA to clarify in its revised Explanatory Memorandum that in such circumstances a private hospital operator, in carrying out its compliance duty under Article 22.7, should not treat the provision of information orally as a serious breach of the Order.
13. Again, for ease of reference, we have included HCA's suggested amendment in the redrafted example of Articles 22.5 and 22.6 at paragraph 14 below.

Articles 22.5 and 22.6 – redraft

14. Combining the drafting suggestions made in paragraphs 9 and 12 above, HCA would recommend redrafting Articles 22.5 and 22.6 as follows:

22.5 For tests or treatment given within one working day of ~~on the same day as~~ the consultation (i.e. emergency cases), the information specified in article 22.4 may be given orally rather than in writing.

22.6 Consultants shall supply patients with information in accordance with article 22.3 at the same time as the outpatient consultation appointment is confirmed with the patient, and other than in case of emergency (under Article 22.5) shall supply patients with information in accordance with article 22.4 either within the two working days following the ~~final (pre-treatment)~~ outpatient consultation which advises of the relevant further tests or treatment, or prior to surgery, whichever is sooner.

Article 22.7 – timing for commencing duty to monitor compliance with Article 22.4

15. HCA welcomes the CMA's proposed variations to the Order to postpone the timing for supplying patients with information prior to outpatient consultations and prior to any further tests or treatment. However, HCA requires clarification from the CMA on the deadline private hospital operators must commence monitoring consultant compliance under Article 22.7.
16. HCA assumes that that duty commences on 28 February 2018, at the same time the duty under Article 22.4 arises.
17. For HCA to devise and implement a form for patients to sign and a programme to monitor consultants' compliance under Article 22.7, HCA will need sufficient lead time and allocate resources appropriately. It would therefore be helpful if the CMA could confirm HCA's interpretation of Article 22.7.

Article 22.3(b) – meaning of "financial interests"

18. HCA assumes the meaning of "financial interests" in Article 22.3(b) does not extend beyond the form of financial interests which must be disclosed under Article 19.1.



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19. It would be helpful if the CMA could confirm HCA's interpretation of the Order, or, if necessary, clarify in its revised Explanatory Memorandum the additional financial information that a consultant must provide to patients.

Should the CMA require any further explanation regarding the issues above, please let us know.

Yours sincerely

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