



Cooperation and Competition Panel

Rules of Procedure

Introduction

1. The Cooperation and Competition Panel (CCP) has been established by the Secretary of State for Health (the Secretary of State) to advise the Secretary of State (and his delegated authorities) and Monitor (the independent regulator of NHS Foundation Trusts) on competition issues arising from the application of the Principles and Rules of Cooperation and Competition (PRCC) which apply to all Primary Care Trust (PCT) contracted / funded services in England. The Secretary of State, acting through the Commissioning and System Management Directorate (System Management and New Enterprise Division) of the Department of Health and Monitor are the joint sponsors of the CCP (the Sponsors).
2. This document sets out the Rules of Procedure for the CCP. These comprise two parts. Part A of the Rules of Procedure may only be amended with the approval of the CCP's Sponsors (the Department of Health and Monitor) following a CCP recommendation arising from consultation with interested parties. Part B of the Rules of Procedure may be amended by the CCP Chairman.
3. This document should be read in conjunction with the Memorandum of Understanding (MoU) between the Sponsors and the CCP. In the event of any conflict between these two documents, the requirements of the Memorandum of Understanding take precedent over the Rules of Procedure.

PART A**Case handling**

4. There are three ways in which cases may arise for consideration by the CCP.
 - a. First, a procurement or advertising case has been considered by a Strategic Health Authority (SHA) and that SHA has referred the matter to the CCP for consideration or a party which has attempted resolution directly with the PCT using the dispute resolution procedure of the relevant SHA has appealed the SHA's decision to the CCP (Appeal).
 - b. Second, the case involves a merger or conduct falling to be considered under the PRCC as described more fully in paragraph [5] below (Reserved Matter).
 - c. Third, a request is made to the CCP by one of the Sponsors to review a general issue arising under the relevant principles in the PRCC which is broader than a single specific case (Non-case Specific Matter).

5. The following matters have been reserved to the CCP:
 - a. competition issues arising from mergers, acquisitions, joint ventures or vertical integration (together, mergers) involving NHS Trusts, Foundation Trusts and PCT provided services (ie matters arising under Principles 9 and 10 of the PRCC); and
 - b. complaints about conduct by NHS-funded healthcare commissioners or service providers where such conduct may give rise to an adverse effect on patients or taxpayers and to which the PRCC apply (hereafter referred to as 'conduct inquiries' – see further paragraph 9 below). Conduct inquiries may arise, *inter alia*, under PRCC:
 - Principle 1 whereby, in order to create world-class clinical services and a world-class NHS, commissioners must commission services from the best providers,
 - Principle 2 whereby providers and commissioners must cooperate to ensure that the patient experience is of a seamless health service, regardless of organisational boundaries, and to ensure service continuity and sustainability,
 - Principle 4 prohibiting providers, referrers and commissioners of NHS services from restricting choice via collusive behaviour or any other action,

- Principle 6 prohibiting NHS-funded healthcare providers from discriminating against or disadvantaging particular patients or commissioners,
- Principle 7 prohibiting commissioners from contracting with NHS-funded healthcare providers whose pricing strategy constitutes predatory pricing or is otherwise not consistent with general competition law principles, and
- Principle 8 which requires that financial intervention in the system must be transparent and fair.

Case acceptance

6. The CCP must consider whether an Appeal or a Reserved Matter meets its acceptance criteria. The acceptance criteria are:
 - a. The subject matter of the Appeal or Reserved Matter comes within the ambit of the PRCC.
 - b. The CCP is the most appropriate body to consider or resolve the issue (i.e. over other regulators including the Office of Fair Trading (OFT) and the Advertising Standards Authority (ASA)). In certain circumstances, e.g. mergers, both the OFT and the CCP may want to examine specific issues.
 - c. The party requesting advice or making a complaint provides all necessary information in order to enable the CCP to decide whether the acceptance criteria are met and to carry out an initial analysis of key issues.
 - d. No legal proceedings have commenced in relation to the relevant Appeal or Reserved Matter.

Appeals

7. The Appeal must be made within 25 working days of the relevant SHA decision being made. Moreover, the dispute must not be trivial, vexatious or an abuse of the CCP's procedures. The CCP will only accept an Appeal on the merits of a case, in connection with the outcome of a decision by the relevant SHA or the proposed remedy associated with that decision. Although the appellant may also raise procedural concerns during such an Appeal, these will not constitute sufficient grounds to form the sole basis of an Appeal.

Reserved Matters

8. A Merger is between NHS-funded healthcare providers and the turnover of the combined entity exceeds: (i) £70 million in the case of acute and mental health trusts; (ii) £35 million in the case of community service providers such as PCT provider arms; or (iii) £15 million in the case of primary care providers such as GP practices.
9. Where a complaint relates to conduct to which the PRCC apply, complainants should use all reasonable endeavours to engage with parties at a local level, including appropriate engagement with the relevant SHA(s), prior to referring the matter to the CCP. In providing strategic leadership and ensuring local systems operate effectively, SHAs have an important role to play. Complaints regarding potentially collusive behaviour should be referred directly to the CCP. The dispute must not be trivial, vexatious or an abuse of the CCP's procedures.

Notice of Acceptance

10. After satisfying itself that a matter meets its acceptance criteria, the CCP will indicate its acceptance of the case through publishing a Notice of Acceptance and details of the case on its website within 10 working days. The CCP will also write to the parties, copying the relevant Sponsor, notifying them of the process and timescales that it intends to follow. In the event that an Appeal or Reserved Matter does not meet the acceptance criteria, the CCP will write to the relevant parties, copying the relevant Sponsor, setting out the reasons why the acceptance criteria are not satisfied.

Provision of information

11. The CCP will publish guidelines on the information that parties should submit to the CCP for its consideration in relation to Appeals or Reserved Matters. The CCP will refer to these guidelines in deciding whether all necessary information has been provided to the CCP in order for it to decide whether the acceptance criteria are met and to carry out an initial analysis of key issues.
12. The CCP can request additional information from the parties as necessary.
13. Any individuals connected to an Appeal or Reserved Matter under investigation should ensure they are available to provide further evidence as required.

Timescales for different type of case*Appeals*

14. The CCP is expected to reach a decision and publish its advice and recommendations to the Sponsors (and delegated authorities where relevant) within 40 working days of publishing the Notice of Acceptance. The CCP may request an extension consistent with the relevant provisions of these Rules of Procedure. During an Appeal, the CCP may suspend the timetable where the appellant has not complied with an information request by the CCP.

Mergers

15. The CCP will operate a two-phase process for investigating mergers. In Phase 1, the CCP will conduct an initial assessment. In Phase 2, it will conduct an in-depth assessment. If, following its Phase 1 assessment, the CCP decides that there is not a realistic prospect that a merger will result in a material adverse effect on patients or taxpayers, it will advise its Sponsors and the parties to that effect. If the CCP decides that there is a realistic prospect that a merger will result in a material adverse effect on patients or taxpayers it will initiate an in-depth Phase 2 investigation if its concerns cannot be addressed.

16. The Phase 1 assessment will be undertaken within 40 working days of publication of a Notice of Acceptance. If the CCP decides that a Phase 2 investigation is required, the CCP will complete its investigation within 80 working days. This 80 working day period is additional to the 40 working day period allowed for the Phase 1 assessment.

17. Both in a Phase 1 and in a Phase 2 investigation the CCP may request an extension of the review period consistent with the relevant provisions of these Rules of Procedure.

18. During a merger investigation, the CCP may suspend the timetable for either Phase 1 or Phase 2 where the merging parties have not complied with an information request by the CCP.

19. Prior to a merger being referred to the CCP for formal assessment, a party may seek informal guidance from the CCP on a proposed merger to assist in the planning and consideration of the prospective merger. The informal guidance offered to parties is

non-binding on the CCP, the Sponsors, any other authority or regulator, or the courts. It is open to the CCP to reach a different view during any subsequent formal assessment of that merger.

Conduct disputes

20. The CCP will operate a two-phase process for undertaking conduct inquiries. In Phase 1, having accepted a case as fulfilling its acceptance criteria, the CCP will assess whether it should advise that a conduct complaint arising under the PRCC should be dismissed, or whether to initiate an in-depth Phase 2 investigation. The Phase 1 assessment will be undertaken within 30 working days of publication of a Notice of Acceptance. If the CCP decides that a Phase 2 investigation is required, the CCP will complete its investigation within 70 working days. This 70 working day period is incremental from the 30 working day period required for the Phase 1 investigation.
21. Both in a Phase 1 and in a Phase 2 investigation the CCP may request an extension of the review period consistent with the relevant provisions of these Rules of Procedure.
22. During a conduct inquiry, the CCP may suspend the timetable for either Phase 1 or Phase 2 where the relevant parties have not responded to or complied with an information request by the CCP.
23. A party may seek informal guidance from the CCP on whether the agreement is likely to be considered to be inconsistent with the PRCC. This can occur before the parties enter into an agreement, or if after having entered into such an agreement, it becomes apparent that it may be inconsistent with the PRCC. A party to an agreement entered into before the CCP begins its operation may also seek informal guidance. The informal guidance offered to parties will not constitute a decision and will not be legally binding on the CCP, the Sponsors, any other authority or regulator, or the courts.

Extensions

24. In connection with both Appeals and Reserved Matters, the CCP may request from the relevant Sponsor an extension to the period allowed for it to consider a case. In making a request for an extension, the CCP must set out the reasons as to why an extension is required and inform all relevant parties.
25. The CCP must provide the relevant Sponsor with sufficient notice to ensure that it is able to take a timely decision on whether an extension is merited, and must set a reasonable deadline for the Sponsors to respond to such a request, in general such a period not to be longer than 5 working days following the request. In the event that the relevant Sponsor does not meet this deadline, the CCP will assume that the extension has been granted.
26. The relevant Sponsor should respond to the CCP's request in writing indicating its willingness or its refusal to grant an extension, including its reasons for refusing an extension. This response will be published on the CCP's website.

Setting aside a CCP investigation

27. Where after the CCP has issued a Notice of Acceptance, there is a material change in the circumstances under consideration, for example the commencement of legal proceedings in relation to an Appeal or Reserved Matter, or it becomes apparent that another authority or regulator would be better placed to consider a matter, the CCP may set aside its investigation without providing advice or recommendations to the relevant Sponsor. However, in certain circumstances, e.g. mergers, both the OFT and the CCP may want to examine specific issues.
28. Where the CCP sets aside an investigation, the CCP will publish a notice to this effect on its website, which includes the reasons for setting aside the investigation. The CCP will also write to the parties, copying the relevant Sponsor, informing them of its actions.

Hearings

29. The CCP may request a hearing with parties during its consideration of Appeals or Reserved Matters. The CCP must give parties at least five working days' notice of a planned hearing. In the event that a party refuses to attend a hearing or is unable to

do so, the CCP will publish the details of the party's refusal or non-attendance on its website and will notify the relevant Sponsor.

30. Hearings will generally be conducted individually with parties in private. A transcript of the hearing will be taken, the accuracy of which will subsequently be confirmed with the parties. A non-confidential summary of the hearing will usually be published on the CCP's website.
31. A party may be accompanied by legal or other advisers to a hearing. In such cases, parties must inform the CCP at least two working days in advance of a hearing of attendees.
32. The relevant Sponsor and third parties may be invited to attend hearings at the CCP's discretion. The CCP may also hold an open public hearing if it considers this to be appropriate.

Additional information requests

33. Both in connection with Appeals and Reserved Matters, the CCP can request information from the parties or any other party. Moreover, the CCP may request that the Sponsors gather information on the CCP's behalf, consistent with the Better Regulation Executive (BRE)¹ principles of good regulation.

Publication of evidence

34. The CCP should during the course of a case publish on its website non-confidential versions of submissions and evidence provided to the CCP.

Advice and recommendations

35. On completing a case, the CCP will provide the relevant Sponsor, and delegated authorities where relevant², with its advice and, if relevant, recommendations. The CCP will consult with the Sponsors within the first 3 months of its operations to establish a standard format for its advice.
36. All advice by the CCP must contain the following:

¹ www.berr.gov.uk

² This will include the relevant Strategic Health Authority in all Appeals and Reserved Matters involving a PCT or NHS Trust.

- a. a description of the process the CCP has followed during the case and confirmation that the process is consistent with the CCP's Rules of Procedure or, if, in exceptional circumstances the process is not consistent, explain why;
- b. a description of the evidence provided to the CCP and the analysis undertaken by the CCP;
- c. the CCP's advice and the reasons for that advice; and
- d. recommendations by the CCP as to the action, if any, that should be taken by the relevant Sponsor, including, in the case of a proposed remedy, the CCP's assessment of the remedy's consistency with the principles of better regulation

Sponsor requests for advice on a Non-case Specific Matter from the CCP

37. Where a request is made to the CCP by one of its Sponsors for advice on a Non-case Specific Matter, the CCP will publish the terms of the request on its website and the timetable for responding to the request that has been agreed with the relevant Sponsor.
38. The CCP may request information from parties and hold hearings to gather information and evidence for the purpose of formulating its advice. The CCP's response to the request will take the form of a report containing advice and, if relevant, recommendations, that will be provided to the relevant Sponsor and published on the CCP's website.

Transparency

39. The CCP will not publish any business secrets or other confidential information provided to it for the purpose of its investigations but will inform the OFT of a suspected serious breach of the Chapter I prohibition under the Competition Act 1998 or Article 81 of the EC Treaty. In publishing any information, the CCP will consult with the relevant parties to identify information that may be considered to be confidential and which should be excised from the published version of its advice. To the extent that the CCP's reasoning in any decision relies on confidential information, the CCP will make this information available to the relevant Sponsor, subject to the

Sponsor confirming that it shall treat such information as confidential and that it shall use the relevant information only for the purposes of its decision.

40. The CCP's website will contain:
- a. The CCP's Terms of Reference, Rules of Procedure, the Memorandum of Understanding between the CCP, the Department of Health and Monitor, any agreements between the CCP and other regulatory bodies relating to the CCP's work, and any guidance issued by the CCP on its approach to cases.
 - b. Details of the CCP's membership and of any reference groups established to support the CCP together with disclosures by members of any interests relevant to the work of the CCP.
 - c. The CCP's Annual Plan and any reports required by the Sponsors as detailed in the Memorandum of Understanding between the Sponsors and the CCP.
 - d. Details of cases currently under investigation by the CCP, including a brief summary of the subject, parties to the dispute, date of acceptance, and an administrative timetable for the case, including indicative timescales for the delivery of its advice and recommendations.
 - e. Non-confidential versions of the CCP's advice and recommendations to the Secretary of State and Monitor.

Information gathering by the CCP

41. The CCP will seek to establish working arrangements and relationships to gather information from the following:
- a. the NHS Information Centre for health and social care; and
 - b. the Care Quality Commission

42. The CCP will include as part of its Annual Report an assessment of its ability to gather information including whether it has been unable to access the information it required through the MoUs and other methods of information gathering.

Prioritisation

43. Consistent with the terms of the MoU, the CCP will be allocated a budget based on its anticipated case load.

44. It may, however, be necessary for the CCP to prioritise the entire workload in the event that the case load is greater than the available resources. In these circumstances the CCP should have regard to the following principles:
- a. Impact. The CCP should consider the effect on patients and taxpayers associated with taking forward a case;
 - b. Strategic significance. The CCP should consider the wider learning that might occur in the system through taking forward a case;
 - c. Risks. This will include assessing the likelihood of a successful outcome; and
 - d. Resources. The CCP should consider the resource implications of taking forward different cases.
45. In the exceptional event that the CCP is unable to take a case forward due to a lack of resources, this must be clearly stated to the Sponsors and the relevant parties. Moreover, this will be published on the CCP's website.
46. Sponsors' requests for advice from the CCP shall be a lower priority than work on cases. In the event that the CCP cannot meet a request for advice this must be communicated to the relevant Sponsor at the earliest opportunity.
47. The CCP should include in its Annual Report the number of cases that it was unable to take forward due to resource constraints.

Complaints regarding process

48. In the event of a complaint regarding the CCP procedures and/or the CCP's adherence to these procedures, parties should write to the CCP setting out the grounds for the complaint.
49. The CCP will acknowledge receipt of the complaint within two working days. The CCP will endeavour to respond within 10 working days of receipt of the complaint informing the complainant/s and the relevant Sponsor of the outcome of the complaint. In the event that it is not possible to respond fully within this timeframe, the CCP will write to the complainant/s and the relevant Sponsor to update them on its progress within ten working days of receipt of the complaint.

Review of the Rules of Procedure

50. The CCP should conduct a formal review of both the form and scope of the Rules of Procedure after one year of its operation.

PART B

Composition of the CCP

1. The CCP will consist of the Chairman of the CCP (Chairman), the Director of the CCP (Director), and the members of the CCP appointed by the Chairman (together, Members).
2. The Members will be assisted in their functions by the CCP staff. The CCP staff will be managed by the Director on behalf of the Members and in accordance with their strategic direction.

Role of CCP Members and staff

3. The Members are responsible for approving the CCP's annual Business Plan and Annual Report.
4. The Director is responsible for the management of CCP resources, including the recruitment and management of CCP staff. The Director will report regularly to the rest of the CCP on the management of CCP resources.
5. The Members may delegate certain of their functions to either the Chairman or Director or both.
6. Ultimate decision taking power in connection with the advice provided by the CCP to the Sponsors will rest with the Members, unless they delegate their power to the Chairman and Director in accordance with paragraph [5].
7. The day-to-day activities of the CCP in connection with Appeals or Reserved Matters or Non-case Specific Matters will be undertaken by the CCP staff.

CCP Members meetings

8. The Members will meet at least once each month, or otherwise as determined by the Chairman, to consider CCP cases and other business.
9. At least three Members must attend a CCP meeting for such a meeting to achieve a quorum. Members may attend in person or by telephone or video link.

CCP consideration of cases

10. Each case will normally be considered by all of the Members (subject to the exclusion of individual Members if there is a conflict of interest).
11. The Chairman may, where appropriate, appoint a group of Members (Group) to consider an individual case. A Group must consist of at least three Members, one of whom may be the Chairman. The Chairman will appoint a member of the Group as its chair.
12. CCP and Group decisions will be made by simple majority. Each Member participating in an investigation will have one vote on any question to be decided and the Chairman (in the case of a CCP decision) or the appointed chair (in the case of a Group decision) will have a casting vote. A Member dissenting from the majority may include a statement setting out the reasons for his or her dissent in the CCP's final advice and recommendations.
13. The Chairman may, either at the invitation of the chair of a Group or if he considers it appropriate to do so, attend meetings or otherwise take part in the proceedings of a Group for the purpose of offering it advice about the exercise of its functions. The Chairman may not vote or have any statement of his dissent from a conclusion of the Group included in the Group's advice (unless the Chairman is also chairman of the Group).
14. If, during the proceedings of a Group:
 - a. a member of the Group ceases to be a member of the CCP; or
 - b. the Chairman is satisfied that a member of the Group will be unable for a substantial period to perform his or her duties as a member of the Group;
or
 - c. it appears to the Chairman that because of a particular interest of a member of the Group it is inappropriate for him or her to remain in the Group;the Chairman may appoint a replacement.
15. If, at any time, the CCP encounters a situation which is not provided for in these Rules of Procedure, then it shall determine its own procedure.

Reserved Matters*Phase 1*

16. The Director has authority to decide whether a Reserved Matter meets the relevant acceptance criteria in paragraphs 6-10 of Part A of these Rules of Procedure. The Director may consult the Chairman or other Members if such a decision involves complex or sensitive issues.
17. During a Phase 1 merger investigation, if the CCP decides that there is a realistic prospect that a merger will result in a material adverse effect on patients or taxpayers it will initiate an in-depth Phase 2 investigation into the merger. Instead of initiating an in-depth Phase 2 investigation, the CCP may advise the relevant Sponsor to accept undertakings from the parties to remedy the material adverse effect on patients and taxpayers which it has identified. If undertakings cannot be agreed between the relevant Sponsor and the parties within 20 working days, the CCP will initiate an in-depth Phase 2 investigation into the merger.
18. If the CCP decides that there is not a realistic prospect that a merger will result in a material adverse effect on patients or taxpayers it will advise the relevant Sponsor to clear the merger.
19. The CCP's advice will be communicated in writing to the parties and the relevant Sponsor, if relevant setting out the CCP's reasons for deciding that that there is a realistic prospect that a merger will result in a material adverse effect on patients or taxpayers. A non-confidential version of the CCP's advice will be published on its website.
20. During a Phase 1 conduct investigation, if the CCP has reasonable grounds for suspecting that that the conduct in question is inconsistent with the PRCC in a material respect it will initiate an in-depth Phase 2 investigation into the conduct. Instead of initiating an in-depth Phase 2 investigation, the CCP may advise the relevant Sponsor to accept undertakings from the parties to remedy the conduct in question. If undertakings cannot be agreed between the relevant Sponsor and the parties within 20 working days, the CCP will initiate an in-depth Phase 2 investigation into the conduct.

21. If the CCP does not have reasonable grounds for suspecting that that the conduct in question is inconsistent with the PRCC in a material respect, it will advise the relevant Sponsor that no action should be taken on the basis of the complaint.
22. The CCP's advice will be communicated in writing to the parties and the relevant Sponsor, if relevant setting out the CCP's reasons for suspecting that that the conduct in question is inconsistent with the PRCC in a material respect. A non-confidential version of the CCP's advice will be published on its website.

Phase 2

23. During a Phase 2 investigation, the CCP may hold hearings with parties. Parties may be invited to provide further submissions on issues arising from the hearing.
24. Once the CCP has considered any evidence and submissions made to it, the CCP will take its final decision on whether a merger may be expected to result in a material adverse effect on patients or taxpayers or whether conduct is inconsistent with the PRCC, and whether remedies are appropriate and, if so, which remedies should be recommended.
25. The CCP will proceed to provide the parties and the relevant Sponsor with its advice and, if relevant, recommendations and publish a non-confidential version on its website.

Appeals

26. The Director has authority to decide whether an Appeal meets the relevant acceptance criteria in paragraphs 6-10 of Part A of these Rules of Procedure. The Director may consult the Chairman or CCP if such a decision involves complex or sensitive issues.
27. The CCP may hold hearings with parties. Parties may be invited to provide further submissions on issues arising from the hearing.
28. The CCP will take their decision on whether an Appeal should be upheld on the basis that the matter is inconsistent with the relevant provisions of the PRCC or dismissed on the basis that the matter is consistent with the relevant provisions of the PRCC. The CCP will proceed to provide the parties and the relevant

Sponsor with its advice and, if relevant, recommendations and publish a non-confidential version on its website.

Sponsor requests for Non-case Specific Matter or policy advice from the CCP

29. The process for conducting a Non-Case Specific Matter investigation or for providing policy advice will vary from case to case.
30. The CCP advice will be communicated to the relevant Sponsor and a non-confidential version will be published on the CCP's website.