

Cooperation & Competition Panel (CCP): Terms of Reference (May 2008)

Scope

The Cooperation and Competition Panel (The Panel) is being established by the Secretary of State to provide advice to the Department, **SHAs (as enforcement bodies)** and Monitor **(as relevant and necessary for NHS Foundation Trusts)** on competition issues in relation to the application of the Principles and Rules of Cooperation and Competition (PRCC) which apply to all PCT contracted/funded health and social care services. The PRCC were published by the Department of Health (DH) alongside the Operating Framework 07/08 (Annex D)* and will be amended from time to time, as required.

*NB: Not enclosed with this submission

Classification

An interim Panel will be set up for a period of up to 24 months before establishing a non-departmental public body from April 2010.

Core functions of the Panel

The Panel will:

1. Establish transparent Rules of Procedure for its operations. From time to time, these rules should be reviewed, including consultation with relevant stakeholders. Any changes to the rules of procedure should be published on the Panels website;
2. Receive reserved matters under the PRCC and will hear any appeals to decisions that any other body has taken on PRCC matters.
3. Conduct a thorough evidence based assessment of the issues associated with the case. This should include hearing evidence from relevant and interested parties. The Panel should seek expert advice – including legal, economic, clinical, commercial and consumer advice as appropriate;
4. Where an appeal is raised, the Panel should review both the evidence and decision taken by the other relevant body. This may include the Panel holding hearings with interested parties;
5. Following completion of a case or an appeal the Panel should provide independent advice to the SHAs **(as enforcement bodies)**, the Department and, as relevant and necessary, to Monitor **on specific cases relating to the Principles and Rules for Cooperation and Competition which have been referred to the Panel and are within its terms of reference which have not been resolved locally ,where the Panel's recommendation(s) in respect of a NHS Foundation Trust(s) would need to be executed through Monitor's compliance regime.** This advice shall be published on its website and should provide an evidence based recommendation to the enforcing body based on an assessment against of the case or appeal against the PRCC;
6. Prior to the development of case or appeal examples, the Panel will develop detailed guidance with practical examples to illustrate to the system how it will operate the PRCC. As case or appeal examples develop this guidance to the system should be updated following consultation with both the DH and Monitor;

7. Consider complaints about potential breaches of the DH Promotion Code where these relate to issues which fall outside the remit of the Advertising Standards Authority; and
8. Provide feedback to the DH when it periodically reviews the PRCC and other System Management Products (Procurement Guide, Promotion Code, Transactions Manual, Market making tool etc)

Ways of working

The Panel will:

- a) Develop its Rules of Procedure to ensure that it abides with the principles of better regulation including transparency, proportionality, objectivity and consistency;
- b) Follow a documented procedure (to be agreed with the sponsor unit (see below)) on receipt of referral to decide whether to accept or refuse a case. This will include transparent publication of the status of a case received.
- c) Ensure through seeking advice and working with other regulators that it is the competent body to hear any case or appeal.
- d) Follow a fair and transparent process that does not unduly discriminate between parties to the case or appeal.
- e) Obtain views of relevant and interested stakeholders as appropriate whilst respecting confidentiality and commercial / reputational sensitivities.
- f) Acquire where appropriate clinical advice, market intelligence and competition evidence to ensure advice is based on accurate and verifiable information;
- g) Act in accordance with both the Memorandum of Understanding (MoU) between the Panel and the Secretary of State and the MoU between the Panel and Monitor. These MoUs will include the rules associated with referral of cases or appeals;
- h) Act in accordance with the Concordat or case handling principles [**DN**: names to be reviewed upon agreement/development] between the Panel and other regulators (including the Office of Fair Trading (OFT) and the Advertising Standards Authority (ASA)). The Panel should obtain expert opinion from other regulators/arms length bodies as appropriate;
- i) Ensure an appropriate level and range of expertise to support its advice. This should include legal, economic and clinical support;
- j) Provide appropriate supporting evidence for any advice (the Panel will need to take appropriate advice on commercial in confidence and Freedom of Information).
- k) Be aware of, and seek to act in accordance with, the regulatory constraints upon, and requirements of, the stakeholders.
- l) The Panel will publish an **Annual Report** including information on their role and achievements (impact of their policies and actions).

Publication of referrals received, accepted and refused

On receipt of the referral and appropriate documentation, members of the Panel secretariat will carry out an **initial assessment** to assess its suitability for Panel consideration. The Panel will publish on its website:

- a brief summary of the referral it receives for initial assessment (subject, referrer, parties to the dispute, date of receipt and status, e.g. *pending, in progress*);

- details of referrals that the Panel accepts for consideration (subject, referrer, parties to the dispute, date of receipt and status);
- details of referrals the Panel refuses to accept including the transparent publication of the rationale for refusal (not meeting **acceptance criteria** (see below)).

Acceptance criteria

- The content of the dispute is covered by the PRCC.
- There is a full and frank disclosure of all relevant and applicable information. This does not preclude the panel **from** asking for further information as it requires. Furthermore, any individuals connected to the complaint are on hand to provide further evidence / testimony as required.
- The dispute has, where appropriate, been through a demonstrated genuine attempt of local disputes resolution process with PCT, SHA involvement.
- The Panel is most appropriate to resolve the issue (ie, over the other regulators including OFT, ASA).
- No legal proceedings have commenced.
- The issue is a "reserved matter" under the PRCC, as defined in the Panel's Rules of Procedure (to be published on the Panel's website). As such, it is appropriate that the Panel resolves the issue instead of the SHA.
- The dispute is not trivial, vexatious or an abuse of the Panel's procedures.

Duty of Cooperation

The Panel will have a duty to co-operate and co-ordinate with other arms length bodies and regulators. These relationships will be governed by concordats that will establish agreed ways of working / terms of engagement with:

Office of Fair Trading (OFT)	The OFT is a non-ministerial government department established by statute in 1973. The OFT is the UK's consumer and competition authority whose mission is to make markets work well for consumers. The OFT will have a keen interest in the Panel's operations and on some issues will have overlapping interests, e.g. investigating any non-compliance with Competition Act 1998. The OFT and the Panel will need to work together to encourage commissioners and providers to comply with the PRCC and all existing law (<i>Consumer Act, Competition Act, Enterprise Act</i>). The Panel will need to maintain consistency with the approach of the OFT when managing disputes and therefore the OFT will be a key advisory body.
Advertising Standards Authority (ASA)	The ASA is the UK self-regulatory body for all advertising wherever it appears. The Panel will consider complaints about NHS promotional activity that is covered by the NHS Promotion Code, but falls outside the remit of the ASA. The ASA and the Panel will need to work together to determine the disputes managed by both bodies and to maintain high standards in advertising to provide consumer trust in advertising and maintain a level playing field for advertisers.

Accountability/Reporting

The Department of Health & Monitor sponsor unit

The Department of Health and Monitor will establish a joint sponsor team for the Panel. The independence of the Panel is important to the Department and Monitor and therefore governance arrangements will be designed to deliver financial, operational and physical ring fencing.

Before the Panel becomes operational and at the beginning of each financial year, the Chair of the Panel in consultation with the sponsors will determine priorities and key performance measures for the Panel.

Conflicts of interest

In common with other public roles, the Panel will be required to have in place arrangements under which anyone working for the Panel (Chair, Director, experts, secondees or contracted advisors etc) ensure they abide by the rules adopted by public bodies in relation to private interest and possible conflict with public duty; the disclosure of official information; and political activities. They should not misuse their official position or information acquired in their official duties to further their private interests or those of others and should ensure that any possible conflicts of interest are identified at an early stage and that appropriate action is taken to resolve them.