

# Foundation Trust Network

## **FTN Response to Co-operation and Competition Panel Consultation Draft Interim Guidance on advertising and misleading information dispute appeals and referrals in the promotion of NHS-funded services**

### **I. General Comments on the Correspondence between the Guidelines and the Co-operation and Competition Rules**

#### **I.1 Proportionately limiting the Burden of Information Demands**

We note that there seems to be no impact assessment or gateway number attached to this consultation. There will be an issue about the way in which the information demands of the Competition Panel will dovetail in with information already supplied through other regulatory channels so that it does not necessarily exacerbate the bureaucratic burden of complaints. Foundation trusts would welcome a statement that, where possible, the competition panel will use existing sources of information and will co-ordinate with the Sponsors to make this possible. In addition, we would expect the Panel to sign up to the Concordat that the other regulators are a part of.

### **2. Answers to Specific Questions**

#### **2.1 Q1. Does this section provide sufficient context to the Panel's consideration of advertising matters?**

Yes. It may be useful to clarify in what circumstances an SHA could refer a complaint to the Panel – would this be once its own complaint process had been completed or where it is unsure as to its remit in a matter?

#### **2.2 Q2. Are the Principles and Rules relevant to advertising matters identified sufficiently clearly?**

Yes.

#### **2.3 Q3. Should the Advertising Guidelines provide guidance as to which Code of Practice rules fall within its remit or is this better addressed by the Code of Practice itself?**

It would be useful for the guidance to include the Code of Practice rules that are applicable.

#### **2.4 Q4. Should the Panel provide greater detail about its likely substantive approach to reviewing advertising referrals and appeals?**

Yes, this would be useful information.

#### **2.5 Q5. Should the Code of Practice be attached to the Advertising Guidelines?**

Yes.

**2.6 Q6. Are the acceptance criteria sufficiently clear and fair?**

There is a slight discrepancy in drafting – in point 2.7 (i) the document refers to complaints from SHAs and in point 3.1 and 4.2 to complaints referred from both PCTs and SHAs. Presumably, if local dispute processes are followed, only the SHA could refer a complaint to the Panel?

In relation to 3.2 (iv) there is concern in relation to the ability of PCTs and/or SHAs to know when the Panel is or is not the appropriate body to consider or resolve an issue, as they will be inexperienced in dealing with such matters. It may be useful to provide some guidance to assist with this?

In relation to 3.2 (vi) it may be helpful to provide some examples demonstrating cases that the Panel would consider as trivial or vexatious.

**2.7 Q7. Should anything be added or excluded from the Panel’s acceptance criteria and if so why?**

It would be useful to clarify what will happen where the dispute concerns a complaint against a PCT in relation to PCT-provided services.

**2.8 Q8. Is the Panel’s procedural process for each of appeals and referrals of advertising disputes sufficiently clear and fair?**

Yes. However, in relation to para 4.14 which states that concerns about process will not be sufficient grounds for an appeal, FTN would like to emphasise that this is an immature market. SHAs and PCTs will have had very little (if any) prior experience in dealing with advertising and promotion. It is therefore highly unlikely that they will have adequate systems and robust processes in place to deal with these complaints.

There is real concern that adjudications could be disproportionate and hence foundation trusts will want to challenge them. As a minimum, the Panel should make clear the need for PCTs and SHAs to have transparent processes in place to deal with complaints of this nature.

In relation to para 4.19 it would be useful for the Panel to indicate what it means by “sufficient interest” from third parties who wish to make a submission to an appeal.

**2.9 Q9. Do the processes allow parties sufficient opportunity to present their case?**

Yes.

**2.10 Q10. Are the timeframes for conducting the processes sufficient?**

Yes, although it may be necessary to allow some flexibility where there are complaints from a number of parties or in complex cases.

**2.11 Q11. Should third parties be afforded greater involvement in the Panel's referrals and appeals processes in terms of providing submissions to the Panel and attendance at hearings?**

Foundation Trusts think that FT Boards of Governors ought to be a specifically named party amongst the parties to be afforded greater involvement in the Panel's process for investigation.

There should be greater clarity about how the Panel will determine which 'third parties' will be approached where it decides it needs further particulars.

**2.12 Q17. Although this list is not intended to be exclusive, are there any other remedies that should be expressly mentioned in these Advertising Guidelines?**

In para 4.13 the guidance states that the Panel will not overturn a PCT or SHA decision on appeal; the remit is only to advise on the application of the Rules and Principles and whether a breach has occurred. Although it is hoped that the Panel's advice will be followed, it would be helpful for the Panel to clarify whether any action will be taken where the Panel's advice has not been followed and this has led to subsequent complaints and/or appeals from other parties about similar issues. Clearly, this could be considered vexatious on the part of the PCT or SHA, for not taking on board the Panel's advice.

There is concern regarding the "other" recommendations the Panel foresees using. FTN would not wish to see additional regulatory powers being conferred to PCTs or SHAs; enforcement action over foundation trusts should on the whole be via the contract.

Finally, it would also be helpful for the Panel to state its overall approach to complaints, appeals and enforcement in relation to PCT provided services, as there will clearly be a conflict of interest in situations where PCTs must deal with their own provider arms.