



**Cooperation and Competition Panel**

**Advertising Response to Consultation Document**

**04 October 2010**

# ADVERTISING & MISLEADING INFORMATION DISPUTE APPEALS GUIDELINES

## Introduction

In 2009 the Cooperation and Competition Panel (CCP) undertook a three-month public consultation on its interim draft guidelines. The guidelines set out how the CCP exercises its responsibilities under the Principles and Rules for Cooperation and Competition (Principles and Rules).

The CCP had intended to publish a revised set of guidelines in autumn 2009, following the outcome of the initial consultation. However, this was postponed at the request of the Department of Health (DH) in order that any changes arising from the DH's review of the PCT Procurement Guide and Principles and Rules could be taken into account.

Following publication of the *Procurement Guide for Commissioners of NHS-funded Services* and the revised *Principles and Rules* on the 30 July 2010, the CCP amended its guidelines to reflect changes in DH policy. The draft guidelines, incorporating a number of changes resulting from comments arising from the earlier consultation, were reissued for a further period of consultation over the summer of 2010.

Following the completion of the consultation period the CCP has carefully considered the responses and has today published revised guidelines to come into effect immediately in line with the new Principles and Rules.

**4<sup>th</sup> October 2010**

## Summary of responses

1. The CCP received a total of 14 responses which commented specifically on the Draft Interim Guidance on Advertising & Misleading Information Dispute Appeals and Referrals (Draft Guidelines). The CCP welcomes the input provided by respondents including PCTs, SHAs, private law firms, medical bodies, royal colleges, unions and representative bodies. The feedback has been used to test the reliability and veracity of the Draft Guidelines and has helped shape improvements to the document to ensure it is as sound and useful as possible. **Please note, in order to ensure consistency with the initial consultation process, this document should be read in conjunction with the original version of the Principle and Rules. These can be found on the CCP website here: <http://www.ccp-panel.org.uk/reports-and-guidance/consultations.html>**
2. This response document outlines the major issues raised by respondents in respect of each of the questions asked by the CCP in its consultation on the Draft Guidelines. It explains how the CCP has addressed such issues in the revised Advertising Guidelines (Revised Guidelines) for example: taken the suggestion forward; analysed and decided against the suggestion; or changed the wording in the Revised Guidelines to address the issue.

3. Overall, the main issues arising from the responses where multiple respondents raised questions or concerns about the CCP's proposed approach were the following:
  - that the Draft Guidelines did not spell out clearly enough when it would be appropriate for the CCP to consider a dispute instead of the OFT or the ASA;
  - that more detail was needed on the CCP's proposed substantive approach to assessing advertising and misleading information disputes;
  - whether there was scope for greater flexibility regarding participation of third parties in the appeals process; and
  - whether there was scope for greater flexibility regarding the 3 month limitation period proposed for appeals.
4. This document should be read in conjunction with the Draft and Revised Guidelines. This summary document is not exhaustive in relation to all issues raised in the responses we have received, and exclusion of a particular issue from this summary does not mean that we have not considered the issue.

#### **Specific issues raised in response to individual questions**

5. Specific issues raised by respondents in relation to individual questions are set out below. Where respondents have commented on specific paragraphs in the Draft Guidance, we have referred to those also. The CCP's response is set out in italics.

#### **Sections 1 & 2: The CCP's role in relation to promotional activity and the policy and legal framework.**

*Question 1: Does this section provide sufficient context to the Panel's consideration of advertising matters?*

6. **Informal advice:** one respondent queried whether the CCP would offer informal advice on advertising matters in the same way it intends to for conduct or merger matters.  
*The CCP will provide non-binding informal advice on advertising matters in the same way that it does for conduct and merger matters. This is indicated in the Revised Guidelines at paragraphs [1.11 – 1.15]. However, the CCP will only provide informal advice on advertising and misleading information matters where this will not compromise its function as an appeal body. Therefore it will not, for example, provide advice on matters which are already subject to dispute resolution proceedings at the local (PCT/SHA) level. Informal advice will represent a staff view only*
7. **Difference between contestability and competition** – Paragraph 1.2: one respondent suggested that expand we Footnote 2 to explain the difference between contestability and competition. *We have included some additional text to explain the difference between a contestable market and a competitive market.*
8. **Examples of advertising disputes** – Paragraph 1.8: one respondent suggested that some hypothetical examples of disputes should be included. *We agree that it would be helpful to include some hypothetical examples of the potential nature of disputes and we have done so at [paragraph 1.8].*

9. **Interaction between the CCP and the ASA** – Parts 1 & 2: one respondent indicated that this section should contain a discussion about the interaction which will be necessary between the CCP and ASA. *We agree that that it might be helpful to point out at an early stage in the Guidance that the CCP’s remit in advertising and misleading information disputes sits alongside the ASA. We have included some additional text at paragraph [1.7] to explain the scope of the CCP’s role. See also our response to Question 6 below.*

## **Section 2: Administrative framework for consideration of Advertising and Misleading Information Dispute Appeals and Referrals by the CCP**

*Question 2: Are the Principles and Rules relevant to advertising matters identified sufficiently clearly?*

10. **NHS contract** –Table 2, item 4: one respondent noted that item 4 of Table 2 should include a link to relevant clauses of the NHS contract for clarity. *Enforcement of the NHS contract is not part of the CCP’s role (see the Revised Guidelines, footnote [11]), therefore we have not referred to the clauses of the contract in the Revised Guidelines.*
11. **Rules of other professional regulatory bodies** – Table 2, item 5: one respondent suggested that the Principles & Rules should refer to the rules of relevant professional bodies. *The CCP is not consulting on the content of the Principles and Rules themselves. The Principles and Rules are a matter for the Department of Health. However, we note that Principle 5, Rule 1 refers to the NHS Code of Promotion. The Code of Promotion states under its General Principles (point 2) that “Promotional activity must respect the ethical guidance and professional codes of conduct of clinicians and other health professionals”. Thus, guidance on promotional activity set out in rules of professional bodies is captured by the Principles and Rules.*

*Question 3: 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?*

12. A number of respondents indicated that they would like to see the Draft Guidelines address which Code of Practice rules are with the CCP’s remit. *We have provided additional detail on which Code of Practice rules will be administered by the CCP at Table 1 of the Revised Guidelines. See further the response to question 6 below.*

*Question 4: Should the Panel provide greater detail about its likely substantive approach to reviewing advertising referrals and appeals?*

13. **Substantive approach:** The majority of respondents were keen for greater detail to be included on the CCP’s likely substantive approach. *We have included additional text on the CCP’s proposed approach to assessing advertising referrals and appeals under the heading “The CCP’s substantive approach to considering breaches of the Principles and Rules”.*

We note that many of the NHS-specific parts of the Code that the CCP will oversee will involve an examination of the facts at hand against the rules set out in the Code, e.g.:

- Rule 45 of the Code prohibits 'product placement' by providers – so the role of the CCP will be to assess whether product placement has actually taken place.
- Rule 39 of the Code provides that testimonials from children may only be used if the consent of their parent/guardian is given – so the role of the CCP will be to assess whether that consent was in fact given.

14. It is difficult to distil a set of general principles about the application of many of the provisions of the Code as they are not linked by common wording or concepts. However, there are a number of Code rules which indirectly refer to the public's likely perception of activity. For example:

- Rule 9 states that promotional activity should be appropriate for the intended audience.
- Rules 13 indicates that providers must not engage in promotional activity that undermines the reputation of the NHS, its logos or trademarks, or which undermines public confidence in the NHS;
- Rule 14 indicates that no promotional activity should be undertaken that undermines the reputation of any individual providers, clinicians or other health professionals.
- Rule 26 refers to the potential effect on the reputation of the NHS of disproportionate expenditure on promotional activity.
- Rule 29 states that where providers sponsor healthcare materials, this must be made clear.

15. The CCP's substantive approach in this respect will be informed by analogous regimes for protection of consumers from misleading advertising in the general economy. Under the Control of Misleading Advertisements Regulations 1988 (as amended) an advertisement is misleading 'if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote' (Reg. 2(2)). The CCP will take a similar approach to assessing promotional activity. The CCP will:

- identify the audience to whom the presentation is addressed;
- determine how the average member of the target audience would be likely to interpret the promotion ( including identifying whether the target audience has any particular features in terms of e.g. age or disability, that needs to be considered);
- determine whether it would affect the behaviour of the target audience in using NHS funded-services.

16. Our description of our intended approach in the Revised Guidelines is limited by the fact that it is not yet informed by practice. We would expect to develop the new section on our substantive approach

further once we have had the opportunity to obtain practical experience in dealing with advertising referrals and appeals.

17. **Assessment of benefits to taxpayers:** one respondent noted that the CCP should indicate whether it will differentiate between short term and long term policy goals when commenting on the appropriateness and scale of promotional activities: *The Principles and Rules do not directly require the CCP to examine the value to the taxpayer of promotional activity per se. Rule 25 of the Code requires the CCP to look at whether expenditure on promotion could affect the reputation of the NHS, which may involve some weighing of the benefits to patients inherent in the promotional activity against the cost to taxpayers.*

*Question 5: Should the Code of Practice be attached to the Advertising Guidelines?*

18. Respondents agreed that it should. In response to concerns raised by a number of respondents that the Code of Practice could change over time, resulting in discrepancies between the version attached to the Guidance and the current version of the Code we have included a hyperlink to the Code rather than attaching it as an annex at [paragraph 1.7].

### **Section 3: Acceptance criteria for referrals and appeals**

*Question 6: Are the acceptance criteria sufficiently clear and fair?*

19. **Who can refer disputes** – old paragraphs 2.7 and 4.1: One respondent noted that a discrepancy arose between paragraph 2.7, which states that only SHAs can refer disputes after local dispute resolution procedures have been exhausted, and paragraph 4.1, which states that SHAs or PCTs can refer disputes after local dispute resolution procedures have been exhausted. *We have now clarified that either an SHA or a PCT can make a referral (consistent with the Enforcement section of the Code), but that an appeal can only be made from a decision of an SHA (consistent with our Rules of Procedure).*
20. **Most appropriate body to consider or resolve the issue** – old paragraph 3.2(vi): a number of respondents indicated that further guidance was required on how parties could demonstrate that the CCP was the most appropriate body to consider the matter (as opposed to other regulators such as ASA and the OFT). *It is for the CCP to decide whether or not it is the most appropriate body to consider the matter, and as such the party making the referral or appeal does not need to provide evidence of this. We have included some additional text at [paragraph 3.2(iv)] which indicates that the CCP will usually be the most appropriate body to consider the dispute if it relates to the provisions of the Code which are overseen by the CCP.*

21. **Disputes which are trivial, vexatious or an abuse of process** – old paragraph 3.2(vii). A number of respondents indicated that further guidance was required on this criterion. *After further consideration, the CCP has decided that this criterion should apply only to appeals and not to referrals. This is because the CCP expects that SHAs/PCTs will exercise appropriate discretion when referring matters to the CCP. This change is reflected at [paragraph 3.2(vi)] of the Revised Guidelines. The Revised Guidelines have also been amended to clarify the meaning of ‘trivial, vexatious or an abuse of the CCP’s processes’:*

- Trivial: means that the appeal relates to only part of the SHA’s decision, and because of this, the appeal would not materially change the outcome of that decision.
- Vexatious/an abuse of the CCP’s processes: this could include an appeal which is made where, for instance:
  - *the appellant has made several appeals regarding the same or very similar subject matter; or*
  - *the appellant attempts to mislead the CCP, for instance by providing false or misleading information in its submission.*

This criterion is likely to be subject to further revision and clarification as the CCP develops its experience in dealing with advertising disputes.

22. **Three month time limit for considering disputes** – old paragraph 3.2(vii): one respondent indicated that they thought that the 3 month timeframe for making complaints from the appearance of the original promotion might be too short in cases where the promotion which is the subject of the dispute is, for instance, an inducement to commissioners which might not be evident to third parties for some time. *We agree that a three month timeframe may be too short in these circumstances. However, we think that a timeframe for bringing complaints is appropriate in most cases, in order that promoters have some level of certainty as to whether their promotion is likely to be disputed, and in order to encourage parties to bring complaints to their local SHA/PCT in a timely way so as to maximise the effectiveness of the Principles & Rules . In order to balance these considerations, we have indicated in the Revised Guidelines at [paragraph 3.2], that the CCP may in exceptional circumstances choose to accept the matter on referral or appeal notwithstanding that the complaint was not made within three months, if it believes that the matter warrants consideration on public policy grounds. The appellant or referring body must provide evidence to the CCP of why the dispute warrants special consideration. We will publish our reasons for accepting the case in the Notice of Acceptance.*

*Question 7: Should anything additional be included in the Panel’s acceptance criteria? Should anything be excluded from the selection criteria?*

23. **Exception to the acceptance criteria:** One respondent suggested that it would be appropriate for the CCP to have a ‘catch all’ category allowing to accept disputes and appeals for public policy/strategic reasons at its discretion. *See our response to Question 6 (paragraph 14) above, in relation to the 3 month limitation period. The CCP does not think that it is appropriate to draw a wider ‘catch all’ category as either:*

- i. the acceptance criteria reflect the CCP’s Rules of Procedure; or

- ii. the remaining acceptance criteria are needed to help ensure effective case management <sup>1</sup>

#### Section 4: Process

*Question 8: Is the Panel's procedural process for each of the appeals and referrals of advertising disputes sufficiently clear and fair?*

24. **Working days or calendar days:** several respondents queried whether the timescales referred to in the Draft Guidelines were working days or calendar days. *We have now clarified that 'days' refers to 'working days' where relevant.*
25. **Draft recommendation should be sent to SHAs** – old paragraph 4.10: one respondent suggested that draft recommendations should be sent to SHAs. *We agree with this proposal and have clarified that relevant parts of the draft recommendation will be sent to the referring body [paragraph 4.11] in the case of a referral and the SHA whose decision has been appealed in the case of an appeal [paragraph 4.26].*
26. **Who will final recommendation be sent to** - old paragraph 4.11: one respondent queried whether final recommendation would be sent to all complainants, where there were multiple complaints to a dispute. *Here, we have sought to maintain the distinction between principal and other complaints that is introduced in [paragraph 4.11] "In multi-complaint cases where ostensibly the same complaint is made by different parties, only the first few and/or principal complainants are sent the draft recommendation.". We have specified at [paragraph 4.12] that this will also apply to the final recommendation.*
27. **Appeals on process** – old paragraph 4.19. A number of respondents commented that, as SHA dispute resolution procedures will not be very well developed at this early stage in the application of the Principles and Rules, it may not be appropriate to limit the CCP's remit to appeals on the substance of decisions. We think that, generally, appeals on the merits of decisions by SHAs will allow parties sufficient access to the CCPs dispute resolution procedures. This is on the basis that a party will be unlikely to appeal a decision where they do not have a complaint with the merits of the SHA's decision. Therefore, issues with local dispute resolution procedures will usually be caught within the CCP's current appeals process.

*Question 9: Do the processes as outlined allow the parties sufficient opportunity to present their case?*

28. Respondents thought that they did (subject to further possible review as cases pass through the system).

*Question 10: Are the timeframes for conducting the processes sufficient?*

29. On balance, respondents were happy with the timeframes.

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<sup>1</sup> All of the acceptance criteria are taken from the CCP's Rules of Procedure except for: the requirement that local dispute resolution procedures be exhausted before an appeal can be made (acceptance criterion (v)), and the requirement that an appellant must be party to the original dispute being appealed (acceptance criterion (viii)).

*Question 11: 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?*

30. **Third party participation in referrals:** One respondent suggested that greater third party input was needed for the referrals process (where third party input is not explicitly contemplated in the Draft Guidelines): *We have replicated the provisions in relation to third party participation in appeals in the Referrals section [at paragraph 4.8].*
31. **‘Sufficient interest’ of third parties** – old paragraph 4.19: a number of respondents said that they would like clarification on what ‘sufficient interest’ meant in relation to third parties seeking to make submissions or participate in hearings. *We have considered this and decided that it would be preferable to allow all third parties to make submissions without having to establish a ‘sufficient interest’. We have retained the criterion of sufficient interest in relation to third party attendance at hearings. The CCP will determine which parties have a sufficiently material level of interest at its discretion.*

## **Section 5: Remedies**

*Question 12: Although this list is not intended to be exclusive, are there any other remedies that should be expressly mentioned in these Advertising Guidelines*

32. **Suggested remedies** – paragraph 5.1: a number of respondents indicated that among the recommendations that the CCP should consider are requiring the promoter to publish a retraction/apology. *We have included a reference to this at [paragraph 5.1(iv)].*
33. **Enforcement** – one respondent raised a query about how PCTs would enforce the CCP’s recommendations against their own provider arm. *In these circumstances, SHAs would be expected to be involved in implementing the CCP’s recommendations to ensure that the issue is successfully resolved. The CCP however, is not able to enforce its recommendations.*