Cooperation and Competition Panel

Conduct Response to Consultation Document

04 October 2010

UNCLASSIFIED

INTERIM CONDUCT 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 changes resulting from comments in response to 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.

4th October 2010

Summary of responses

1. In response to its consultation in January 2009, the CCP received a total of 30 responses which commented specifically on the Draft Interim Guidelines (Draft Guidelines). The CCP welcomes the input provided by respondents including SHAs, PCTs, medical bodies, royal colleges, trade unions, law firms, representative bodies and individual members of the public. 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.ccpanel.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 in January 2009. It explains how the CCP has addressed such issues in the Conduct Guidelines (the Guidelines), for example: taken the suggestion forward; analysed and decided against the suggestion; or changed wording in the Guidelines to address the issue. However, it does not attempt to be exhaustive in relation to all the issues raised in the responses we have received, and the exclusion of a particular issue from this document does not mean that we have not considered the issue.

3. This document should be read in conjunction with the Draft Guidelines and the Guidelines.

Specific issues raised in response to individual questions

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

Question 1: Does this section provide sufficient context to the Panel's consideration of conduct matters? [Section 2 – Page 5]

5. The majority of respondents were happy with this section and the context provided within the document. However, there were a few suggestions put forward by respondents.

6. **Patient and public involvement** - Some respondents highlighted that there could be more mention of patient and public involvement within the guidelines. *The CCP sees patients and the public as crucial stakeholders within the work that it does; the involvement of Local Involvement Networks and other patient organisations has been clarified in paragraph 6.10 of the Guidelines..*

7. **Role of PCTs in commissioning elective services** - One respondent was concerned that paragraphs 2.3 and 2.4 when taken together seemed to imply that PCTs do not commission routine elective services, which is not the case. *The CCP has removed the text 'for other services' in the old paragraph 2.4 to dispel the implication that that patient choice alone dictates routine elective service provision and PCTs are not involved.*

8. **Role of the OFT** - One respondent queried whether and at what stage the CCP would refer matters to the OFT. *The roles of the* CCP *and OFT are largely complementary. Both organisations have published a set of working arrangements*[1] *explaining their respective roles. The CCP does not enforce competition law, i.e. the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union. The CCP will inform the OFT of a suspected serious breach of the Chapter I prohibition under the Competition Act 1998 or Article 101 of the EC Treaty. The CCP has addressed this query by providing more detail regarding referrals to the OFT under the section 4 of the Guidelines.*

Question 2: Are the acceptance criteria sufficiently clear? [Section 3 - Page 7]

9. Overall, the majority of respondents were content with the acceptance criteria.

10. **Difference between collusion and anti-competitive behaviour**: A number of respondents were concerned that the distinction between collusion and anti-competitive behaviour was not clearly defined and thought it would prudent to do so, given the different processes to be followed in each instance. *The CCP has provided detailed explanations of conduct that constitutes collusion and anti-competitive behaviour in the Draft Guidelines from paragraph 7.58 – 7.65. It is also relevant to note that under the new Principles and Rules for Cooperation and Competition that come into force in October 2010, responsibility for the duty to cooperate lies with boards and is overseen by SHAs and the regulators, not the CCP (see Principle 4).*
11. **Definition of 'appropriate engagement' -** A number of respondents wanted clarity regarding acceptance criteria (vi) around what constituted appropriate engagement with a relevant SHA before bringing a complaint of anti-competitive conduct to the CCP. *The CCP has clarified that it expect that complainant "to have engaged with the party with whom the dispute has arisen and*

[1] http://ccpanel.org.uk/content/Working-arrangements-between-OFT-CCP.pdf

the relevant SHA". This wording reflects the fact that there is no particular form or process for this engagement.

12. ***Complainants and complainees*** - *Numerous resp*ondents had queries in relation to who could complain, and equally who could be the subject of a complaint. *In order to address this, the CCP has included new text in the Guidelines which explains who can complain (paragraph 2.3) or be the subject of a complaint (paragraph 2.2).*

Question 3: Should anything be added or excluded from the Panel's acceptance criteria and if so, why? [Section 3 – Page 7]

13. A large majority of respondents believed that the acceptance criteria did not need anything added or removed. The CCP analysed the small minority of suggestions for additions or removals but considered that they did not raise any substantive issues and have chosen to keep the current acceptance criteria. A number of the criteria have now also been clarified (for example when the CCP considers that there are legal proceedings and when a dispute may be trivial, vexatious or an abuse of the CCP's procedures.

Question 4: What are your views on the Panel's approach to informal advice? [Section 5 – Page 11]

14. An overwhelming majority of respondents supported the CCP's informal advice process. The informal advice process is now detailed in Appendix 3.

15. **Timelines for providing information for informal advice** - One respondent queried why the requirement of providing information to the CCP 10 days beforehand in order to receive informal advice differed from the 5 day requirement for mergers informal advice. *The CCP has no harmonised the informal advice process across all matters (conduct, mergers, procurement and advertising) and there is no longer any time limit for providing information. Based on its experience to date with providing informal advice, it is generally able to turn around advice relatively quickly and is generally able to accommodate the timeframe within which the parties are operating.*

16. **Content matter covered by informal advice** - One respondent queried whether the informal advice would extend to jurisdictional as well as substantive issues. *The CCP has confirmed that it is willing to provide informal advice about any aspects of the application of the Principles and Rules.*

17. **Possibility of inconsistent advice** - Some respondents raised concerns about the possibility of inconsistent advice being provided at different levels by SHAs and the CCP. *The CCP is ultimately responsible for applying the Principles and Rules and is working closely with SHAs to ensure that they are applied in a consistent manner. In the first instance, the CCP encourages parties to use its informal advice route in order to directly to discuss any potential conduct concerns. Informal advice is not subject to the CCP's acceptance criteria and hence there is no requirement that parties engage with SHAs before approaching the CCP. In the event that a matter is escalated to the CCP from an SHA's local process, the advice of the CCP will take precedence.*

18. **Form of informal advice** - One respondent suggested that the CCP provide written informal advice in all instances to ensure that such advice cannot be misconstrued. *The CCP believes that the informal nature of the advice being provided should allow parties the flexibility to seek advice*

in the form most suitable and convenient. To date, the CCP has responded to numerous requests for informal advice by phone, email and in person and wishes to maintain this flexibility.

19. **Disclosure of informal advice to Sponsors** - A small number of respondents suggested it was not clear who would make informal advice available to DH / Monitor. *The CCP has clarified in its Revised Guidelines that it will maintain confidentiality and not make any informal advice available to Sponsors, but that parties in receipt of informal advice may do so with the express prior consent of the CCP.*

20. **Disclosure of informal advice to SHAs** - Additionally, one respondent suggested that informal advice should be provided to the relevant SHA. *The CCP again maintains that informal advice is provided on a confidential basis and as such, will not be provided to any other party as is clarified in the Guidelines.*

Question 5: Is the Panel's process for conduct complaints sufficiently clear and fair? [Section 5 – Page 11]

21. **Focus on NHS-specific features** - A major point of feedback suggested that the Draft Guidelines were drafted in such a way that they did not adequately recognise the specific features of NHS services such as tariff pricing in the context of predatory pricing, or the general focus on price as opposed to quality. *The CCP has amended the Draft Guidelines in order address some of these concerns and to refer more specifically to the health sector. The Guidelines now benefit from the use of language and examples that are more familiar and relevant to the NHS. It should be noted, however, that the CCP needs to apply recognised and tested methodologies in carrying out its analyses. Accordingly, the CCP sometimes needsto refer to terminology that some healthcare organisations may not yet be familiar with.*

22. **Non case-specific conduct inquiries -** One respondent was concerned that there should be details in the Guidelines of the process for non case-specific conduct inquiries (e.g. the current consultant non-contracted hours study). *The CCP has considered this request and decided against including a set process in the Guidelines. This is because these studies are conducted at the request of the Department of Health and/or Monitor and the terms of the studies will be determined on a case-by-case basis. As such, the timing and process may differ in each case and hence a set process is unlikely to be flexible enough to accommodate such circumstances.*

23. **Reserved matters:** One respondent was concerned that the Draft Guidelines were not clear regarding whether financial intervention or discrimination were considered reserved matters to be referred directly to the CCP. *Reserved matters are those which come directly to the CCP (once the parties have raised the matter with the party that is the subject of the complaint and the relevant SHA). Conduct matters (including those relating to financial intervention) and mergers are "reserved matters". This contrasts with procurement and advertising matters which generally come to the CCP on appeal following local dispute resolution processes. This has been clarified in paragraph 1.4 of the Guidelines. In addition, paragraph 7.13 of the Guidelines explains how the CCP expects to determine whether a matter should be categorised as a conduct case or a procurement appeal.*

24. **Confidentiality prior to Notice of Acceptance**: One respondent suggested it would be helpful for the CCP to clarify whether complaints would be kept confidential unless and until a Notice of

Acceptance is published. *The CCP has taken forward this suggestion; paragraph 6.2 clarifies that once it has decided to accept a complaint it will inform the complainant and the party that is the subject of the complaint; it will then publish a notice of acceptance on its website..*

25. **Threshold for disclosure of confidential information**: One respondent was concerned that the threshold for disclosing confidential information 'where reasonably necessary to facilitate the CCP in the **exercise** of its functions and to allow transparency' was too low a threshold which may deter prospective parties from approaching the CCP. *The CCP has amended its Revised Guidelines such that it will not publish any business secrets or other confidential information provided to it for the purpose of its investigations (unless compelled by law or the Courts), but will inform the OFT of a suspected serious breach of the Chapter I prohibition under the Competition Act 1998 or Article 101 of the EC Treaty. 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 (paragraph 6.23 of the Guidelines)*

26. **Protection of whistleblowers**: One respondent was concerned that the CCP had no formal process for handling and protecting whistleblowers and should do more to protect whistle blowing employees. *The CCP has stated in its Draft Guidelines that it will consider requests for keeping the identity of the complainant confidential where there is a strong reason for doing so.This is clarified in paragraph 6.5.*

Question 6: Does the Panel's process for conduct complaints allow parties sufficient opportunity to present their case? [Section 5 – Page 11]

27. A large majority of respondents were in agreement that the CCP process allowed parties sufficient opportunity to present their case.

28. **Information gathering from third parties**: A few respondents misconstrued the Draft Guidelines as suggesting that the CCP would rely only on notices on its website to invite submissions from third parties (see paragraph 5.14 of the Drat Guidelines). *The Guidelines therefore make clearer that this is not the case and that the CCP will, in addition to using its website to invite submissions, actively seek comments from interested parties which it believes could assist in an investigation.*

Question 7: Are the timeframes for conducting the complaints process sufficient? [Section 5 – Page 11]

29. There was general consensus that the time frames suggested seemed sufficient, but also that this could only really be tested through application.

30. **Length of hearings**: There was a slight concern around the length of hearings, in particular in relation to the associated costs. *Based on the CCP's experience to date it is not necessary in all cases to hold a hearing. The Guidelines have therefore been amended to reflect this (paragraph 6.12 and 6.19).*

31. **Commencement of Phase Two**: One respondent was concerned that it was not clear in paragraph 5.12 of the Draft Guidelines when the 70 day working period commenced for the

Phase 2 investigation. *The Guidelines make clear that there is an 80 working day period for Phase II (this harmonises the Phase II timelines for merger and conduct cases) and that this commences when the CCP announces on its website that it will be proceeding to a Phase 2 investigation.*

Question 8: Should third parties be afforded greater involvement in the Panel's process for investigation of conduct complaints in terms of providing submissions to the Panel and attendance at hearings? [Section 5 - Page 11]

32. Respondents were quite evenly divided into three main viewpoints in relation to this question. One group agreed with the current approach the CCP was suggesting whilst the other two groups were either in favour of more third party involvement, or against it. *The CCP has therefore decided to maintain the current approach in the Revised Guidelines. Namely third party involvement will be at the CCP's discretion and this will afford the CCP flexibility to allow third parties more involvement where necessary (paragraphs 6.7 – 6.13).*

Question 9: What are your views on the Panel's test, namely assessing conduct based on any adverse effects on patients and taxpayers? [Section 6 – Page 21]

33. There was substantial input in relation to this question with many respondents agreeing with the CCP's test based on adverse effects on patients and taxpayers. However, some of the concerns and suggestions raised are discussed.

34. **Assessment of adverse effects:** Some respondents were of the view that the adverse effects of patients (AEP) and adverse effect on taxpayers (AET) tests introduce a level of complexity that is perhaps not needed in the assessment of conduct inquiries, suggesting that the key issue is restricting patient choice. *The CCP recognises that a restriction of patient choice is key, however, the CCP will, when appropriate analyse the effect of such a restriction by balancing the costs to patients and taxpayers of the restriction against any benefits to patients and taxpayers. Such an analysis will allow the CCP to consider NHS-specific factors such as patient safety.*

35. Some respondents said that the assessment of adverse effects on taxpayers would be hard to define. By way of example, one respondent said that the costs associated with competitive tendering could potentially increase short-term costs for the taxpayer, while the development of a more active competitive market with a greater number of providers should reduce costs in the longer term. *In applying the AET test, the CCP will focus on evidence of conduct which leads to increased costs in the system. The CCP recognises that in some cases it may be necessary to balance short-term costs and longer-term benefits but its analytical framework allows it to do this. The further into the future a benefit is likely to occur, the more uncertain it becomes. It is therefore unlikely that the CCP would take into consideration benefits which would be unlikely to occur in the foreseeable future, but each case will be assessed on its own facts.*

36. One respondent said that the test of adverse effects should be extended to the population as a whole and to local communities. *The CCP's assessment will focus on the services affected by the conduct in question and the geographic area in which those services are supplied. Where appropriate the assessment will take account of current and future patients. In some cases the conduct may affect the population as a whole and in the vast majority of cases the assessment will extend to local communities*.

37. One respondent said that by assessing the impact of conduct on patients and taxpayers there may be a risk that organisations undertaking the same or similar actions will be treated differently because of scale (people or money). The result would be that no action would be taken against small offenders. *The CCP notes this comment but proposes to assess each case on its merits. The CCP is unlikely to reach an adverse decision if there is no material net adverse effect on patient choice, but even the conduct of a small organisation can have a material adverse effect on patient choice if the services it provides account for a significant proportion of services provided in a particular area*.

38. **Breach of obligation to co-operate:** Some respondents commented that there is no reference to whether parties may make a complaint on the basis that cooperation has been breached. They asked how the CCP proposes to enforce the requirement on providers and commissioners to cooperate contained in Principle 2 and asked if the CCP would actively "police" cooperation.

39. *Principle 4 of the Principles and Rules that come into effect in October 2010 states that providers and commissioners must cooperate to improve services and deliver seamless and sustainable care to patients. Responsibility for the duty to cooperate lies with boards and is overseen by SHAs and the regulators. It therefore falls outside the remit of the CCP.*

40. **Burden on parties of gathering evidence**: One respondent expressed concern that the CCP's evidence-based approach to assessing conduct would require significant resources and time from the parties involved in order to provide the evidence. This could be a deterrent to parties lodging complaints or participating in the process. *The CCP is mindful of the need to ensure that parties should not be required to spend disproportionate amounts of time or money gathering evidence. The CCP is sourcing information which will assist in its inquiries through appropriate sources. In addition, the CCP does not expect parties to carry out detailed analysis themselves. It will accept raw data which parties have already collected and carry out its own analysis where possible.*

41. **Burden of proof**: One respondent asked what the burden of proof would be for the body allegedly breaching the rules to prove that it was in patient or taxpayer interests, or for the claimant to show that the breach was also bad for patients. *It is for the CCP to assess the effect of the conduct in question and ascertain whether it has adverse effects on patients and taxpayers. It is for the party carrying on the conduct to put forward evidence of relevant benefits.*

Question 10: What are your views on the Panel's approach to offsetting the benefits of conduct to patients and/or taxpayers against the adverse effects on patients and/or taxpayers? [Section 6 – Page 21]

42. Respondents were generally in favour of the concept of offsetting benefits against adverse effects. Some respondents were concerned about this approach as they believed it would undermine the validity of the Principles and Rules. Others thought it important to guard against any inequalities that may result from adverse effects to one group of patients being offset to another group. *The CCP has analysed all responses and decided to maintain the approach taken in the Draft Guidelines, but has provided more detail in relation to how it will offset certain benefits against certain adverse effects. Some specific comments are dealt with below.*

43. **NHS-specific examples:** Various respondents suggested that the examples given of conduct which would be likely to have an adverse effect on patients and taxpayers should be tailored more closely to the NHS as it currently stands. *We have addressed this in the Guidelines.*

44. **Instances of market power**: One respondent said that there were likely to be numerous examples across England where providers possess market power, asking how the CCP proposed to make recommendations to remedy these features. *The CCP recognises that there may be areas where there is only one provider of a service, especially in rural areas, where that provider could be regarded as possessing "market power", is relatively unconstrained by commissioners or other service providers. It is not market power in itself which is likely to give rise to concerns, but particular types of conduct by the organisation enjoying such power. As with other types of conduct case, the CCP would carry out an assessment of the conduct in question assessing the costs to patients and taxpayers and balancing this against any benefits to patients and taxpayers. In addition, the relevant section of the Guidelines now clarify that the CCP's analysis of unilateral conduct will focus on organisations that have a strong market position (rather than having market power).*

45. **Benefits of vertically integrated pathways:** One respondent said that as part of the discussion of the potential for anti-competitive effects relating to vertical relationships between organisations at different stages of the patient pathway, it would be helpful if there was some discussion about the possible benefits of such integration and also some specific reference to the inclusion within the Principles and Rules about the primacy of the GP gatekeeper function. *The CCP notes these comments but emphasises that it is for the party carrying on the conduct to provide evidence on the benefits of particular conduct. The CCP recognises that GPs have a gatekeeper function and would take this into account in a case, if relevant.*

46. **Predatory pricing**: One respondent said that the discussion of predatory pricing should reflect the use of average cost tariffs in the NHS and the desire to move to best practice tariffs, and that by definition for many providers in individual procedures this will mean price is lower than costs. *The prices of some NHS services are regulated and their level is determined centrally by the Department of Health under the national tariff. For these services, it would not be predatory pricing if a provider's costs might exceed the fixed price. The CCP acknowledged the existence of fixed-tariff markets within the NHS in its Draft Guidelines, but has made this clearer in its Guidelines. The CCP notes that the national tariff does not YET apply to a significant proportion of services such as community services, mental health services, non-elective services, spot purchasing and local contracts.*

47. **Question 11: Are there any types of conduct that should be expressly addressed in these guidelines which are currently not? [Section 6 – Page 21]**

48. Some respondents felt that the Draft Guidelines should place more emphasis on conduct by GPs which would lead to less patient choice, (the primacy of the gatekeeper function) and the need for Chinese walls between GPs as providers and as commissioners. *This is a topical issue in the context of the government's policy on GP commissioning. The Guidelines provide further detail on the CCP's approach to disputes relating to commissioning, including the obligation to commission services in manner that does not unfairly disadvantage some potential providers.* **Principle 7, Rule 2**: One respondent noted that Principle 7, Rule 2 is not expressly covered by the Draft Guidelines. *In Principles and Rules that come in to effect in October 2010, Principle 3 deals*

with payment regimes and financial intervention. The Guidelines now provide more detail on how the CCP will assess matters under this principle (see paragraphs 7.23 – 7.39).

49. ***Overlap of conduct and procurement matters****: One respondent asked about the relationship between procurement cases and conduct cases, and, by way of example, queried whether resistance to putting services out to tender could constitute a conduct matter by* failing to foster patient choice. *The CCP acknowledges that there may be some overlap between conduct and procurement matters, in particular in relation to Principle 4 regarding fostering patient choice. The CCP will consider accepting cases via each avenue where appropriate. More detail on the factors that the CCP will take into account is set out in paragraph 7.13.*

50. **Potential cases involving awarding of procurement contracts**: Other types of conduct which respondents raised were awarding contracts to service providers where members of the commissioning services have close personal links with the bodies which have been awarded the contracts. Similarly, awarding contracts and changing services not to improve services, or for obvious financial savings, but to meet administrative targets, and further the personal needs of the commissioners. *The CCP notes these comments. In its view such conduct would fall to be examined under Principles 1, 5 and 6.*

Question 12: What are your views on the Panel's approach to assessing conduct breaches by focusing on their effects as opposed to intention? [Section 6 – Page 21]

51. There were mixed views in relation to this question with responses split for and against the proposed approach of focusing on effects only. One respondent argued that in an immature market, a lack of intention should offer a mitigation defence in terms of remedies that might be applied. *The CCP's role is to examine whether or not conduct is consistent with the Principles and Rules and intent is not strictly relevant, although it may be considered. Since the CCP has an advisory function and cannot impose fines or other penalties, the concept of a "defence" should be understood in that context. The CCP emphasises the ability of parties to seek informal advice from the CCP in relation to concerns about conduct. The CCP has considered submissions received and maintained the effects-based approach to assessing conduct breaches in the Revised Guidelines.*

Question 13: What are your views on the Panel's approach to assessing exclusionary conduct without necessarily having regard to dominance? [Section 6 – Page 21]

52. There was a slight majority in favour of the approach to assessing exclusionary conduct without having regard to dominance. *The CCP has decided to maintain its approach to assessing exclusionary conduct in the Guidelines and will not have regard to dominance when assessing such conduct.*

Question 14: Do you believe that the Panel's approach to assessing conduct is sound? [Section 6 – Page 21]

53. **Language**: Some respondents expressed concern that the language used in the Draft Guidelines was unfamiliar to the NHS. *The CCP considers it important that stakeholders understand the Guidelines, but this must be balanced with using language that best describes the economic concepts and theories being applied. The CCP has amended the wording in the Revised Guidelines*

where possible in order to address this concern. We have also added a glossary to assist readers to understand key terms.

54. **Vertically integrated patient pathways**: Some respondents were concerned that the Draft Guidelines suggested that vertically integrated service pathways inherently frustrate access to patients by other providers and are consequently negative. *The CCP recognises that there may be circumstances where an integrated model of care (such as the management of a long term conditions) involving cooperation is more preferable to unbundling the pathway of care. The provision of care through such integrated pathways is not itself likely to breach the Principles and Rules. However, if integrated care providers fail to offer patients the choice to be treated outside a particular pathway this could be seen as a breach. The CCP has addressed this concern by making this issue clearer through its additional section on cooperation in the Revised Guidelines at paragraph 7.43.*

Question 15: Is the Panel's approach to assessing discriminatory treatment of patients sufficiently clear and fair? [Section 6 - Page 21]

55. The large majority of respondents were in support of the proposed approach to assessing discriminatory conduct towards patients.

56. **Case scenarios**: Some respondents suggested that examples would assist with demonstrating how discrimination cases will arrive at the CCP and greater detail about the measures the CCP will use to assess discrimination. *The CCP notes that the diversity of possible cases makes it difficult to predict likely case scenarios. The CCP will consider providing some guidance on this issue once it has had the benefit of considering some cases dealing with discriminatory treatment of patients. As with other types of conduct cases, the CCP's work begins with a complaint by a party that there has been a breach of the relevant Principles and Rules.*

Question 16: Is the Panel's approach to assessing financial intervention sufficiently clear and fair? [Section 6 – Page 23]

57. A number of respondents suggested that the Draft Guidelines would benefit from examples to illustrate how the CCP's process of assessing financial intervention would work. As previously mentioned, further detail has been included in the Guidelines and the CCP will consider providing some guidance on this issue once it has had the benefit of considering some cases dealing with financial intervention.

58. **Inducements**: One respondent said that the issue of 'inducements' would be difficult to determine. It said that the CCP should have access to health industry advice and expertise on the issue of inducements and behaviour in this area as what may appear at first sight to be an inducement might in reality be a service innovation in the interests of patients. *The CCP appreciates that this is a complicated area and would seek evidence and expertise to assist in its understanding of the issues when investigating a complaint that financial intervention in the system had not been transparent and fair.*

59. **State aid**: Some respondents queried whether the issue of state aid would apply in relation to such financial intervention. *The CCP's remit extends to assessing whether such financial intervention is 'transparent and fair' in accordance with the Principles and Rules. Enforcement of state aid law is the responsibility of the European Commission*.

60. **PCT Provider Arms**: One respondent queried whether the issue of financial intervention applied to PCT provider arms. *The CCP considers that the Principles and Rules apply to all financial*

intervention, including assistance given to PCT provider arms and has made this clearer in the Guidelines.

Question 17: Although this list is not intended to be exclusive, are there any other recommendations that should be expressly mentioned in these conduct guidelines? [Section 7 – Page 25]

61. The majority of respondents were happy with the recommendations suggested in the Draft Guidelines, bearing in mind that the list was not exhaustive.

62. **Proportionality and Relevance of remedies**: A handful of respondents highlighted that recommendations must be proportionate and relevant. For example, any attempt at financial gain should be remedied though financial loss. Similarly, any attempt to adversely affect the reputation of the other parties should result in a loss of reputation, for example through negative publicity. *The CCP notes that remedies will depend on the individual case and that it may not necessarily impose a remedy that mirrors the intention of the offender. However, the CCP has highlighted in the Guidelines that it will have regard to the principle of proportionality and take into consideration relevant prior cases as useful precedents in determining remedies.*

63. **Role of CCP in relation to referrals to OFT/ASA**: One respondent suggested that it might be appropriate to give more clarity regarding the role of the Panel in relation to referrals to the OFT/ ASA or criminal law enforcement authorities in terms of whether its role will, in all cases, remain purely advisory to the Department of Health, Monitor and SHAs. *Both the CCP and OFT have published a set of working arrangements[2] explaining their respective roles. The CCP will inform the OFT of a suspected serious breach of the Chapter I prohibition under the Competition Act 1998 or Article 101 of the EC Treaty. The CCP considers that its involvement over and above informing the OFT would be highly dependent on the individual circumstances of each case and consequently that it any attempt to provide further guidance would be unsuitable.*

[2] http://ccpanel.org.uk/content/Working-arrangements-between-OFT-CCP.pdf