



**Cooperation and Competition Panel**

**General Questions - Response to Consultation Document**

**04 October 2010**

## MAIN THEMES AND RESPONSE TO GENERAL QUESTIONS

### 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 58 responses which commented specifically on the General Questions regarding the four draft interim guidelines<sup>1</sup>. 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 documents to ensure they are 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 document describes the major recurring themes that have arisen, both in relation to the General Questions set out in the consultation and in the responses to the individual guidance documents, and sets out the CCP's response. It also goes on to address specific issues raised in relation to the General Questions and how the CCP has addressed these in the revised guideline documents. For example: taken the suggestion forward or analysed and decided against the

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<sup>1</sup> Namely Mergers, Conduct, Procurement Disputes and Advertising and Misleading Information.

suggestion. However, this document does not attempt to be exhaustive in relation to all the issues raised in the responses received, and the exclusion of a particular issue from this document does not imply that we have not considered it.

3. This document should be read in conjunction with the guidelines published on and their accompanying response documents. The CCP's responses are set out below in italics.

### **General Themes**

4. This section discusses the main themes that were common to each of the individual guidance documents as well as the responses to the General Questions.

### ***Evidence in support of benefits of competition***

5. Numerous respondents argued that there is no correlation between competition and quality and questioned whether it was appropriate to seek to introduce competition into the health service in England. Respondents queried the robustness of the evidence base which supported the benefits of employing competition in healthcare. Many respondents argued that competition would be detrimental to the NHS<sup>2</sup> because it would necessarily result in service fragmentation.
6. *The CCP welcomes discussion and debate on the relationship between competition and outcomes for patients and taxpayers. However, it is not the role of the CCP to establish healthcare policy, but rather to carry out the functions assigned to it by the Department of Health and Monitor. Healthcare policy is set by the Government, acting through the Department of Health.*
7. *Choice, co-operation and competition are all central elements of the NHS reform programme in England, which aims to deliver a range of benefits for patients and taxpayers, including:*
  - *Improving quality and safety in service provision;*
  - *Improving health and well being;*
  - *Improving standards of, and reduced inequalities in, access and outcomes;*
  - *Informed patients - with a 'voice and choice';*
  - *Greater confidence in the NHS; and*
  - *Better value for money.*
8. *With particular regard to the role of competition in the NHS, the CCP's view is that competition has delivered significant benefits in other sectors, and has the potential to do so in the healthcare sector. The CCP's view is that the quality of healthcare services provided to patients is capable of being improved through increased patient choice. The CCP recognises that the health sector has*

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<sup>2</sup> Throughout this document reference to the NHS is used to describe the NHS in England.

*its own unique complexities that differentiate it from other sectors. In particular, the NHS has at its core three fundamental principles, the importance of which outweigh all other considerations. Those principles are that the NHS meets the needs of everyone; that it is free at the point of delivery and that it be based on clinical need and not ability to pay. Nevertheless, it is the CCP's view that it is possible to retain the important differences which exist between the health sector and other sectors while at the same time using competition to support the delivery of high quality care for patients and value for money for taxpayers.*

### **Cooperation vs. competition**

9. A number of respondents commented that the draft guidelines placed more emphasis on issues pertaining to competition than those concerning cooperation. They asked how the CCP proposes to enforce the requirement on providers and commissioners to cooperate (now contained in Principle 4) and asked if the CCP would actively “police” cooperation.
10. *Principle 2 says “Commissioners and providers must cooperate to improve services and deliver seamless and sustainable care to patients.”*
11. *The CCP's view is that Principle 4 is quite narrow in scope and would be engaged, for example, when information about a patient is not shared between service providers along the patient pathway but , as currently stated, does not impose an obligation on providers of the same type of service to work together to raise standards of patient care.*
12. *Consequently, the CCP will investigate breaches of the duty to cooperate to ensure that the patient experience is of a seamless health service, but it will not performance manage providers and commissioners since this is the role of SHAs and PCTs.*

### **Quality vs. Cost**

13. Some respondents were concerned that there was insufficient emphasis on quality factors within the guidelines and too much focus on financial considerations. *Issues of quality, access and finance will each be taken into consideration by the CCP where relevant in undertaking our evidence-based costs and benefits analyses. The CCP will therefore approach each of these issues on a case-by-case basis as appropriate. More generally, quality is particularly relevant to our analysis when it is the way in which healthcare service providers compete: if a particular transaction or example of conduct results in a reduction in the quality of services provided to patients, this would be regarded as a significant cost.*

### **Applying a competition analysis to the healthcare sector**

14. A number of respondents shared the view that the terminology and methodology used and referred to in the guidelines demonstrated a lack of understanding of the healthcare sector. In particular, there was some concern about the level of knowledge of the community healthcare sector. *In order to address a range of these concerns we have amended the guidelines to better reflect our familiarity with the NHS and the health sector more generally. It should be noted, however, that the CCP is required to apply recognised and tested methodologies in carrying out our analyses. Accordingly, this will necessarily refer to terminology and involve a manner of*

*approach that some healthcare organisations may not be experienced in. . The CCP, both through the process of this consultation and more broadly through ongoing engagement with the NHS, is keen to ensure a constructive, shared understanding of the frameworks and developing context in which all parties must operate.*

### **Nature of competition in the healthcare sector**

15. In respect of the nature of competition a number of respondents suggested that price competition is not relevant because patients do not pay directly for NHS-funded services and because NHS-funded services are largely provided at a fixed tariff. As such, these respondents felt that competition on service quality was more appropriate than price.
16. *The CCP's analysis will focus on quality rather than price when appropriate. We note that many services are provided at a fixed tariff and for these services price may not be the relevant competitive variable. There is, however, scope for price competition for services that are not provided at a fixed tariff. Mental health and community healthcare services are not usually provided at a fixed tariff and these types of services account for a significant proportion of NHS-funded healthcare services. There are also other services which are not provided at a fixed tariff, e.g. exceptional, high-cost or non-routine treatments such as radiotherapy, interventional radiology, diagnostic imaging, rehabilitation, renal dialysis, critical care, and specialist palliative care. Whilst it is true that patients do not pay for NHS treatments, a payment is still made for the provision of services, usually by PCTs, and this will be relevant to our analysis. Accordingly, in many cases, both price and quality are likely to be relevant to the CCP's analysis.*

### **Referrals from the CCP to the Office of Fair Trading**

17. One respondent asked whether and at what point the CCP will refer cases to the OFT. *The roles of the CCP and OFT are largely complementary. Both organisations have published a set of working arrangements<sup>3</sup> explaining their respective roles. The CCP does not enforce competition law, i.e. the Competition Act 1998 and Articles 81 and 82 of the EC Treaty. The CCP 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.*

### **Specific issues raised in response to the General Questions**

18. We set out below the specific issues raised by respondents in relation to the General Questions regarding our Draft Guidelines.

#### **Question 1: Are the documents sufficiently clear and understandable in terms of:**

**1(i) how and what the CCP is assessing in order to efficiently administer each of the Principles and Rules?**

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<sup>3</sup> <http://ccpanel.org.uk/content/Working-arrangements-between-OFT-CCP.pdf>

19. Generally respondents found the draft interim guidelines clear and easy to understand in terms of how and what the CCP is assessing in order to efficiently administer each of the Principles and Rules.
20. **Clarity around reserved matters:** Two respondents suggested that greater clarity was required around what matters were reserved directly for consideration by the CCP. *This suggestion has been taken forward in the body of the individual guidelines through additional clarity around the appropriate case pathway in each instance. Additionally, the CCP has also inserted a quick reference case pathway flow chart in each of the individual guidance documents to assist parties in determining whether a matter is reserved for the CCP or requires engagement at a lower level.*
21. **Overlap in matters:** One respondent highlighted the fact that procurement or advertising complaints may involve conduct issues. *The CCP is aware that there is some overlap between the different types of potential matters. Parties should use the route that is most suitable to their complaint, having regard to the guidance documents and the acceptance criteria. The CCP is willing to assist parties requiring guidance as to the most appropriate avenue for complaint.*
22. **Principles and Rules not explained:** Another respondent commented that Principle 7, Rule 2<sup>4</sup>; Principle 6, Rule 3<sup>5</sup> and Principle 8, Rule 1<sup>6</sup>, are not fully explained in any of the draft interim guidelines. *Principle 7, Rule 2 regarding non-tariff pricing falls within the Conduct guidelines. However, the CCP notes that it is unlikely such cases will be directed to the CCP as providers and commissioners are likely to enforce this directly through contractual provisions in the NHS Contract. However, the CCP will have regard to these cases and the NHS Contract where relevant and necessary.*
23. *Principle 6, Rule 3 is covered more generally under Principle 6 of the Conduct guidelines relating to discriminatory treatment. Similarly, Principle 8, Rule 1 is covered more generally under Principle 8 regarding financial intervention. The CCP recognises that more detailed guidance would be beneficial and further details and examples regarding both discriminatory treatment and financial intervention will be provided once the CCP has had the benefit of conducting cases in these areas.*
24. **Clarity on Principles and Rules:** One respondent commented that the Principles and Rules themselves are not clear in all respects. *The relevant respondent did not raise specific concerns with respect to any individual Principle or Rule. However, we would note that amending the Principles and Rules themselves is not within our remit. The Principles and Rules have been drafted by the Department of Health. In this regard, we note that the Department of Health is currently in the process of reviewing the Principles and Rules.*

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<sup>4</sup> Commissioners and providers must adhere to the provisions for determining a non-tariff price contained in the NHS Contract (Clause 7.2).

<sup>5</sup> Providers should not discriminate against or disadvantage particular patients or commissioners (Payment by Results Code of Conduct, March 2007).

<sup>6</sup> Rules on financial intervention are set out in the 2008/09 Operating Framework and are binding on all PCTs and SHAs.

25. **Tensions between Principles and Rules:** One respondent noted the tension between some of the Principles and Rules. For example, the requirement to provide a seamless service and award to suppliers who are best placed to meet patient needs may conflict with fostering competition and patient choice in a situation where there is a dominant provider in a rural area and any new entrant would face high barriers to setting up a service. *The CCP recognises that there may be tensions between the Principles and Rules that arise in particular circumstances and will be mindful of this when conducting their assessments. Ultimately, the CCP will judge whether, in the circumstances, the prevailing matter under consideration is, on balance, in the best interests of patients and taxpayers.*

**1(ii) what information would be required of a party in dealing with the CCP in its assessment of each of the Principles and Rules?**

26. The majority of respondents found the Draft Guidelines clear and easy to understand in terms of what information would be required of a party dealing with the CCP in its assessment of each of the Principles and Rules.

27. **Competence of PCTs:** One respondent commented that the competence of PCTs in commissioning services and supervising service delivery is not addressed by the Principles and Rules. *Performance management of PCTs, including ensuring compliance with the Principles and Rules, is the responsibility of Strategic Health Authorities (SHAs). The purpose of the CCP's interim guidelines is to assist organisations to understand how the CCP will assess compliance with the Principles and Rules. The CCP's main function is to advise the Department of Health, Monitor and SHAs regarding breaches of compliance. The CCP is willing, however, to assist PCTs and other stakeholders in understanding their obligations under the Principles and Rules through the provision of informal advice.*

**Question 2: Is it clear which guidance document addresses each of the Principles and Rules? If not, how could this be clarified?**

28. Although most of the respondents were of the opinion that this is clear, a small number suggested that the guidance documents needed more clarity. Moreover, a small number of respondents noted that some of the Principles and Rules are hard to categorise. *We have taken respondents comments into consideration and have made clearer the relationship between each of the Principles and Rules and the guidance that is relevant.*

**29. Question 3: Are there any substantive aspects of the guidance documents (such as economic or legal analysis) which could be improved and if so, how?**

30. A number of respondents asked us to clarify the following items.

31. **Legal analysis:** A respondent suggested that the guidelines should include our legal analysis, while another asked for more specific guidance. *The Revised Guidelines describe our guiding principles and legal and economic methodology in undertaking our substantive analysis in the course of merger and conduct investigations, as well as procurement and advertising appeals.*

*We would expect our legal and economic analysis to become clearer when we publish our first cases.*

32. **EU legislation:** A respondent asked that we set out EU legislation on advertising and procurement. *The CCP does not have jurisdiction to apply EU law and, accordingly, we do not consider that we should set this out. Our remit is to consider whether advertising and procurement matters are consistent with the Principles and Rules.*
33. **Relationship between CCP and the OFT:** A respondent asked us to clarify whether we would have jurisdiction in cases involving at least one non-NHS entity, and the considerations taken into account before making a referral to the OFT, ASA or any other law enforcement authority. *Regarding the OFT, these matters are addressed in the Working Arrangements between the OFT and the CCP (see <http://www.ccp-panel.org.uk/content/Working-arrangements-between-OFT-CCP.pdf>). In summary, we have jurisdiction to consider mergers and conduct cases involving entities offering NHS-funded healthcare services, regardless of whether they are NHS organisations, independent service providers or third sector providers. Moreover, we may do so where only one entity provides NHS-funded healthcare services. However, it is possible that the provision of certain NHS-funded healthcare services may fall within the Enterprise Act, the Competition Act, the EC Treaty and/or the EC Merger Regulation, and to the extent that they do so, the OFT has the power to examine them. In such a case both the OFT and the CCP will have jurisdiction to review the NHS-funded aspects of a merger or conduct. The best way to approach this will be decided on a case by case basis, although if the matter involves NHS organisations the presumption will be that the CCP will investigate. To the extent that an organisation provides both NHS-funded and non-NHS funded services, the CCP's remit is only over the NHS-funded part of service provision (even if the non-NHS funded services are provided by an NHS organisation). The OFT has jurisdiction over the provision of non-NHS funded services, regardless of whether they are provided by NHS organisations (e.g. private patient units) or by independent or third sector service providers. Regarding the ASA or other law enforcement authorities, this will also be determined on a case-by-case basis.*
34. **Presumption that CCP will favour independent providers:** A respondent expressed a concern that the CCP's unspoken policy would be to promote the commissioning of services away from NHS entities to private healthcare service providers. *This is not correct. The CCP members and staff are professionals who conduct themselves with integrity, impartiality and honesty and who carry out an objective, rigorous and evidence based assessment of each matter before them. The Department of Health has already taken a policy decision to allow non-NHS entities to tender for the provision of certain NHS-funded services in order to increase patient choice and improve quality. Our aim is to ensure that the procurement of services and subsequent service provision by both NHS entities and non-NHS entities does not breach the Principles and Rules and does not give rise to adverse effects on patients or taxpayers.*
35. **Complaints by PCTs:** Another respondent asked us to clarify that PCTs may complain to the CCP in relation to different matters. *We have now clarified in the Revised Conduct, Advertising and*

*Procurement Guidelines that we accept complaints from all interested parties, including PCTs. There is no complaints procedure under the Merger Guidelines.*

36. **Summaries:** Given the detailed and technical nature of the Guidelines, a respondent asked us to provide summaries. *The CCP is not inclined to produce summaries of the guidelines at this early stage. Instead it strongly encourages parties to familiarise themselves with the details of the guidance documents in order to ensure compliance. The CCP is, of course, willing to provide guidance to parties through the provision of informal advice to assist with understanding of the Principles and Rules. The CCP may consider publishing summaries at a later stage.*
37. **Stakeholders:** A respondent noted that we did not include NHS frontline staff, i.e. doctors and nurses, as stakeholders. *The list of stakeholders is not exhaustive and it includes, among others, doctors, nurses and all NHS health professionals.*

**Question 4: Are there any procedural aspects of the guidance documents which could be improved and if so, how?**

38. The majority of the respondents were happy with the procedural aspects set out in the guidance documents.
39. **Flow chart:** One respondent suggested that, given some of the overlap between different matters, that the CCP provide a single procedural 'decision tree' to address conduct, procurement and advertising. *We have provided a flow chart for each of conduct, procurement and advertising and, given that the nature of these three matters is different, we do not consider that it is appropriate to provide a single flow chart to deal collectively with them.*
40. **Onerous provisions:** One respondent argued that some of the procedures may be more onerous than need be and, by way of example, referred to the mandatory nature of merger filings to the CCP, given that under the Enterprise Act there is a voluntary filing regime. *The CCP merger guidelines include minimum threshold requirements so that not all mergers need to come before the CCP. Furthermore, the CCP will review its merger notification thresholds in due course once it has had the benefit of case experience. More generally, the CCP has placed certain procedural requirements on parties to ensure fair and well-informed decisions are made regarding possible breaches of the Principles and Rules. However, the CCP may revisit the requirements once it has had the benefit of case experience.*
41. **Panel composition:** One respondent was disappointed that there is only one medically qualified CCP Member and that there should be more of a balance of medical and legal involvement. Furthermore, they suggested some patient involvement at the highest level. *We believe that the current CCP membership strikes a good balance between economists, legal practitioners and medical professionals. Furthermore, the CCP has established a Clinical Reference Group to provide specific advice on clinical issues. The CCP also recognises the importance of patient involvement in its work and is in the process of developing its approach to patient and public involvement building on the open, transparent and consultative manner in which the CCP conducts its work.*

**Question 5: Do the guidance documents have any significant omissions; if so, what?**

42. **Private healthcare providers:** A major theme coming through the responses both in connection with this question and more generally, was that the CCP has not offered any evidence that commissioning the provision of NHS-funded services to the private and independent sector is more beneficial than retaining them in the NHS in terms of either quality or cost and similarly not offered any evidence that competition is good and will result in the provision of better services. *We have addressed these comments in the section on general themes regarding NHS reform and the benefits of competition.*
43. **Examples:** A respondent asked that we provide more specific guidance on the type of scenarios that each of the Principles and Rules are designed to cover and address. *The CCP has attempted to provide as much detail as possible and expects likely scenarios to become clear after it has had the benefit of conducting and publishing its early cases.*
44. **Public consultation on private healthcare providers:** Numerous respondents suggested that the CCP should have consulted the public in relation to the use of private providers within the NHS. *Such a task is not within the remit of the CCP. The Department of Health has already taken a policy decision to allow non-NHS entities to tender for the provision of certain NHS-funded services for the purposes of increasing patient choice and ultimately improving quality. Our aim is to ensure that conduct by both NHS entities and non-NHS entities does not breach the Principles and Rules and does not give rise to adverse effects on patients or taxpayers.*

**Question 6: Does the guidance cover all relevant matters, insofar as these can be identified; if not, what additional material should be included?**

45. **Local factors:** A respondent was concerned that the CCP would not consider the importance of local knowledge and local needs in carrying out its analysis. *For the avoidance of doubt, the CCP will take into account such considerations where relevant. In each case the CCP will welcome submissions from interested individuals and organisations on the matter under scrutiny or on any other matter relevant to the CCP's assessment under the Principles and Rules of*
46. **Decisions of commissioners:** A respondent asked for evidence that commissioners take decisions on the basis of providing better quality, making cost savings and taking into account the local populations patient needs rather than meeting administrative targets regarding the provision of services outside the NHS. *We are unable to respond to this question on behalf of commissioners. However, we may carry out an investigation where the commissioning of services is considered to be in breach of the Principles and Rules.*
47. **Procurement guide:** One respondent was concerned that the procurement guidelines were not as detailed as, for example, the merger guidelines. The CCP has reviewed the procurement guidelines and provided as much detail as possible. However, it is likely that more detail will be provided once the CCP has had the benefit of case experience.