

CONSULTATION

COOPERATION AND COMPETITION PANEL GUIDANCE DOCUMENTS

Merger Inquiries

Conduct Inquiries

Procurement Dispute Appeals

Advertising & Misleading Information Dispute Appeals

Published: 30 January 2009

Consultation closing date: 30 April 2009



CO-OPERATION & COMPETITION PANEL
FOR NHS-FUNDED SERVICES

Target Audience	This consultation is targeted at those involved in, and affected by, the provision of NHS-funded healthcare services. This includes commissioners of health services, NHS and other health service providers, GPs and patients. We also welcome comments from other interested parties.
Duration	The consultation period begins on 30 January 2009 and will end at close of business on 30 April 2009. This period of 13 weeks is in accordance with the criteria set out in the <i>Code of Practice for Consultation</i> ¹ .
How to Respond	<p>We are keen to hear the views of all interested parties on our draft interim guidelines for each of Merger Inquiries, Conduct Inquiries, Advertising and Misleading Information Dispute Appeals and Procurement Dispute Appeals.</p> <p>Please send your response to the Panel either:</p> <p><i>in writing to:</i></p> <p>Interim Guidelines Consultation Cooperation and Competition Panel 1 Horse Guards Road SW1A 2HQ London, UK</p> <p><i>or, by email to:</i> consultations@ccpanel.gsi.gov.uk</p>
Your details	<p>Please include:</p> <ul style="list-style-type: none"> • contact details for any follow-up (eg name, company, phone number, email address); and • any special requests regarding publishing and sharing your response (see Confidentiality below). <p>If responding electronically using the consultation <i>pro forma</i> template provided on the Panel's website, please remember to rename the electronic document so that the respondent is easily identifiable.</p> <p>Representative bodies may wish to give a summary of the views of people and organisations they represent, and where relevant how they consulted in reaching their conclusions.</p>
Confidentiality	<p>Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004 (EIR).</p> <p>If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with</p>

¹ HM Government: *Code of Practice on Consultation*. For more information, please see: www.berr.gov.uk.

	<p>obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information that you have provided to be confidential.</p> <p>If we receive a request for disclosure of the information you have flagged as confidential, we will take full account of your request, but we cannot give an assurance that confidentiality can be maintained. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Panel.</p> <p>The Panel will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.</p>
<p>Additional avenues to provide views</p>	<p>We may conduct events in London where the subject of this consultation will be discussed. The Panel will provide further details on its website if it intends to conduct consultation forums.</p>
<p>Next steps</p>	<p>The Panel intends to publish a summary of responses to this consultation and indicated actions no later than August 2009.</p>

Code of Practice on Consultation

The Panel's public consultations are carried out in accordance with the Government's latest *Code of Practice on Consultation*² (Consultation Code) which came into effect in July 2008. This helps guide the Panel as to how to consult openly, inclusively and responsively.

The Panel adheres to the seven consultation criteria outlined in the Consultation Code, namely:

Criterion 1: When to consult
Formal consultation should take place at a stage when there is scope to influence the policy outcome.
Criterion 2: Duration of consultation exercises
Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
Criterion 3: Clarity of scope and impact
Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
Criterion 4: Accessibility of consultation exercises
Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
Criterion 5: The burden of consultation
Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
Criterion 6: Responsiveness of consultation exercises
Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
Criterion 7: Capacity to consult
Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

² See: <http://www.berr.gov.uk/files/file44364.pdf>

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1. The Cooperation and Competition Panel

- 1.1. The Cooperation and Competition Panel (Panel) is a newly created, independent, non-statutory, advisory body tasked with advising Strategic Health Authorities (SHA), the Department of Health (DH) and Monitor³, on resolving disputes relating to cooperation and competition in NHS-funded healthcare services.
- 1.2. The Panel is sponsored by DH and Monitor and administers the Principles and Rules for Cooperation and Competition (Principles and Rules). The Principles and Rules were published in April 2008 by DH as part of the *NHS 2008-09 Operating Framework*. The aim of the Principles and Rules is to ensure seamless services for patients; foster patient choice, transparency and fairness; encourage competition for NHS-funded services; and establish the ground rules for mergers and other transactions involving an NHS body.
- 1.3. More specifically, the Panel is responsible for considering complaints and reviewing cases associated with:
 - the procurement of clinical services;
 - advertising and promotion of NHS-funded services;
 - the competitive conduct of commissioners and providers of healthcare services; and
 - mergers, joint ventures or acquisitions of healthcare providers where an NHS body is involved.
- 1.4. The Panel has produced four interim guideline documents that address these four areas of responsibilities under the Principles and Rules, and it is these interim guideline documents that form the basis of this consultation process. The purpose of the interim guidelines is to explain the processes and methodologies by which the Panel will administer the Principles and Rules. These documents, provided at Annexes 1 to 4 of this document, are namely:
 - (i) Draft interim guidance on merger inquiries;
 - (ii) Draft interim guidance on conduct inquiries;
 - (iii) Draft interim guidance on procurement dispute appeals; and
 - (iv) Draft interim guidance on advertising and misleading information dispute appeals.

³ Monitor is the independent regulator of NHS Foundation Trusts. The Panel will advise Monitor in cases which involve NHS Foundation Trusts.

2. Executive Summary

- 2.1. The Panel has produced four interim guidance documents on which it wishes to consult, namely Merger Inquiries; Conduct Inquiries; Procurement Dispute Appeals; and Advertising & Misleading Information Dispute Appeals guidelines.
- 2.2. The purpose of the guideline documents is to explain the processes by which the Panel will investigate or review breaches of the Principles and Rules, the analytical methodologies it will employ and the information it requires from parties that come before it.
- 2.3. Our main aim in consulting on these guidance documents is to ensure that:
 - (i) the processes by which we operate to administer the Principles and Rules are fair, inclusive, clear, thorough and not cumbersome;
 - (ii) the analytical approach we use in each case to test for breaches of the Principles and Rules is sound, comprehensive and clear;
 - (iii) the guideline documents are understandable and thorough (ie cover all relevant matters insofar as these can be identified); and
 - (iv) the guideline documents clearly identify what the Panel is seeking to understand in its assessments and consequently what information is required from parties in their dealings with the Panel.
- 2.4. We invite comments on the draft guidelines to determine if the documents meet these aims and, if not, how you believe they could be improved. This includes identifying omissions and, as the case may be, unnecessary content, as well as suggestions for enhancing the quality of the documents.
- 2.5. General questions regarding all of the guidance documents, which we seek responses to, are provided in section 9. The Panel also invites comments on the questions specific to each guideline document which are set out in the body of the individual guideline documents attached at Annexes 1 to 4.
- 2.6. The consultation process will run from 30 January 2009 until 30 April 2009.
- 2.7. The feedback gained through the consultation process will be used to shape the guidance documents and in particular it will assist the Panel in:
 - developing effective solutions to issues raised regarding the documents;
 - identifying the full range of interested parties relevant to the documents;
 - minimising the risk of unexpected consequences arising from the application of the guidance documents; and
 - reaching the widest source of information possible and thus improving the quality of the guidance documents.
- 2.8. We note that both the Panel and the Principles and Rules have only been recently introduced. Furthermore, DH has signalled its intention to consult on the Principles and Rules in 2009. Therefore, the Panel is describing these guideline documents as 'interim' guidelines with the knowledge that they are likely to require further revision within 12-24 months to reflect experience gained by the Panel and to take into account any changes in the Principles and Rules, and DH policy more generally.

3. Background

- 3.1. There has been extensive Government investment in the NHS since 2000. This involved substantial levels of investment in funding new hospitals, modernised GP premises and increased NHS staff to include more consultants, GPs, nurses and therapists. This has resulted in improved access to care, including reducing waiting times within the NHS.
- 3.2. Recognition that more could be done to make services more responsive to patient needs encouraged further changes to the NHS in England to put patients in control.⁴ These changes included creating an open system and offering patient choice.
- 3.3. During the same period of investment and improvement, the NHS has moved from a system model based on tight control of the means of provision, towards an open system with a defined purchaser/provider split. The NHS is also moving towards a more competitive (or contestable⁵) model in the procurement of health services. Competition, including through service contestability, encourages innovation, quality and responsiveness to patient needs.
- 3.4. A further key reform has been the introduction and extension of patient choice. For routine elective services, patients now have the right to choose⁶ any willing and registered provider of these services regardless of the physical proximity or type of provider.⁷ Choice is fundamental to the delivery of a truly patient-centred NHS. Empowering people to choose the services that best suit them will lead to improved health and well being, and the reduction of health inequalities.
- 3.5. As well as creating an open system and offering patient choice, the NHS has also introduced changes in other areas: payments increasingly follow patients, such that providers compete on the quality of services they offer to best meet the needs of patients. Furthermore, stronger commissioners increasingly reflect the needs and wants of patients and the public within their financial budget. Additionally, the NHS is developing stronger quality regulation through the newly formed *Care Quality Commission*⁸.
- 3.6. There are also more types of provider in the NHS than ever before. The increase in the number of competing providers is encouraging innovation, quality and responsiveness to patient needs. Previously, most NHS services had a single type of provider: partnership-owned general practices, PCT-run community services or NHS trusts. In addition to a growing number of autonomous NHS foundation trusts, the independent sector (including social enterprises and third sector organisations) is also increasingly involved in the provision of services. Moving to a plurality of providers has allowed independent sector treatment centres to deliver care for NHS patients.

⁴The Next Stage Review led by over 2000 clinicians and professionals working in health and social care, aimed to help local patients, staff and the public to make improvements specific to their local NHS. Each NHS region produced its' own vision, which reflected the needs and characteristics of their local communities.

⁵In economics a contestable market is one in which an incumbent faces strong competitive constraints from potential competitors because low barriers to entry and exit constrain an incumbent's ability to take advantage of their position. In the context of this document, however, we use the term 'contestability' to refer more generally to services where a commissioner may have the option of contracting with alternative service providers.

⁶Choice is exercised at the point at which a patient requires a referral for their first, consultant-led outpatient appointment.

⁷This right has now been enshrined within the NHS Constitution (Department of Health, January 2009).

⁸ For more information, please see www.cqc.org.uk

- 3.7. Competition and choice are powerful levers to drive up service quality, deliver better value and reduce inequalities. Yet they can only be effective if there are clear, enforceable rules guiding and governing behaviour within the healthcare system.
- 3.8. In the past, those responsible for determining the nature of provision and funding of care made decisions without a clear set of rules. With only one type of provider, no choice or competition rules were required. In this environment of greater choice, increased contestability and competition driving improvements in services, there is a greater need to ensure rules and guidance exist to encourage competition and the effective operation of markets.
- 3.9. Relationships between providers and NHS commissioners are now based on legally binding contracts. Furthermore, UK and European legislation increasingly play a role in influencing how the state, the NHS and other organisations should behave. Expectations of transparency, proportionality, fairness and non-discrimination are (rightly) higher, as is the likelihood of challenge if these requirements are not met.
- 3.10. To address these changes, the Department of Health has published the Principles and Rules as part of the *NHS Operating Framework 2008/09 – 2010/11*. Their purpose is to ensure fair and transparent cooperation and competition so as to make the best use of resources, enable innovation, and provide essential safeguards for the interests of patients, taxpayers, and the reputation of the NHS. They apply equally to all established NHS, social enterprise and third sector organisations as well as the independent sector, practice-based commissioners and primary care.
- 3.11. The Principles and Rules are structured around 10 overarching principles, each underpinned by a public interest rationale, alongside a description of rules and expected actions/behaviours of commissioners and providers operating within the system. The main themes include:
- Procurement and contracting;
 - Safeguarding the choice offer to patients and carers;
 - Managing promotional activities;
 - Managing payment and financial regimes;
 - Dealing with conduct by service providers or others that has the potential to undermine effective competition;
 - Corporate transactions (such as mergers and acquisitions, or corporate joint ventures); and
 - Market development and management.
- 3.12. In December 2007, the Secretary of State made a commitment to establish a non-statutory advisory body to provide independent advice on cooperation and competition issues arising from the application of the Principles and Rules that could not be resolved locally. This has resulted in the establishment of the Panel.
- 3.13. Consequently, the Panel's role is to ensure that the Principles and Rules in the provision of NHS-funded services are adhered to in order to support the delivery of high quality care for patients and value for money for taxpayers. It

investigates potential breaches of the Principles and Rules, and makes independent recommendations to SHAs, DH and Monitor on how such breaches should be resolved. It also reviews proposed mergers, and advises on the wider development of cooperation and competition within the NHS. The DH delegates the responsibility to SHAs to implement the recommendations from the Panel in terms of actions for PCTs or NHS Trusts, whilst Monitor is responsible in case of NHS Foundation Trusts.

3.14. In carrying out its responsibilities, the Panel works with all parts of the NHS, the independent sector and others to drive improvements in service delivery. In particular, the Panel works closely with the following stakeholders to ensure expedient, quality decision-making in relation to the Principles and Rules as outlined in the guidance documents. All of these stakeholders are important stewards of choice and competition in the NHS and have a key role to play in the application and resolution of issues arising out of the Principles and Rules:

- **Patients and the public** hold organisations to account for the way NHS services are delivered through exercising patient choice in elective care and also providing feedback on experiences. The public also hold the Government to account for their stewardship of health services, to ensure the taxpayer gets good value for money.
- **Primary care trusts**, as NHS commissioners, decide whether and how to procure health services from the providers that are best placed to deliver according to the needs of their populations. They do this through transparent and non-discriminatory procurement, formal tendering and market testing. They cooperate with providers to offer seamless healthcare and ensure continuity and sustainability through effective contract monitoring. Commissioners have a responsibility to foster patient choice and make accurate information available to patients so they can effectively exercise this choice.
- **Providers of NHS funded services**, chosen by the patient at the point of referral, or commissioned by PCTs, seek to offer the highest quality of care by achieving the safest outcomes, most effective treatments and better experiences for patients. They must conduct themselves so as to support effective patient choice and competition through appropriate cooperation with NHS commissioners and other services providers as well as by avoiding behaviour that may undermine competitive processes.
- **Strategic Health Authorities (SHAs)** exercise strategic, competitive and comparative oversight by holding PCTs and NHS trusts to account. They have a key role to play in managing disputes at a local level, including complaints about payment regimes, commissioning rules and procurement, commissioner behaviour in fostering choice and involvement in addressing competitive conduct. SHAs co-design the system rules with DH and work with PCTs to develop the provider market, ensuring the local health system acts in patient's interests. SHAs (with DH) ultimately decide whether and how to implement the Panel's recommendations.
- **Department of Health (DH)** sets the rules and policy on choice and competition and holds SHAs to account for effectively managing the implementation of the policy at a local level. DH (with SHAs) ultimately decide whether and how to implement the Panel's recommendations. It jointly sponsors the Panel with Monitor.

- **Monitor**, as the independent regulator of foundation trusts, is responsible for executing the Panel's recommendations in respect of NHS Foundation Trust(s) as the independent regulator. Monitor jointly sponsors the Panel with DH.
- **Transactions Board** reviews, where required, transactions involving NHS organisations (excluding NHS Foundation Trusts) and in some cases is responsible for approving them. Such transactions include acquisitions, divestments or disposals, demergers, joint ventures, franchises and statutory mergers. The Board provides a simple and clear point of access to DH and has been set up to provide a transparent and defined process for the Secretary of State regarding health approvals.
- **Overview and Scrutiny Committees (OSCs)** take on the role of scrutinising the NHS and are statutory consultees on major change. They bring democratic accountability into healthcare decisions by making the NHS more publicly accountable and responsive to local communities. OSCs have a right of referral to the Secretary of State to contest substantial changes to health services on the grounds of both inadequate consultation or on the merits of a proposal.
- **Care Quality Commission** established by the Health Act 2008, offers a single coherent set of national safety and quality requirements for all providers of health and adult social care services (both independent sector and publicly owned bodies), and takes enforcement action if providers fail to meet required levels of safety and quality.
- **Advertising Standards Authority (ASA)** administers advertising codes, which apply to all advertisements in broadcast and non-broadcast media, including sales promotions and direct marketing. PCTs and providers of NHS services must have regard for the ASA codes, which are supplemented by a Code of Practice for Promotion. This code sets out additional NHS-specific rules that are outside the ASA's remit.
- **Office of Fair Trading (OFT)** is responsible for making markets work well for consumers, by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive. It has specific responsibility for advising on competition issues concerning the independent sector providers of NHS health care.

4. The Panel's Guidance Documents

- 4.1. The Panel has produced interim guidelines in relation to the way in which it undertakes its responsibilities under the Principles and Rules. Each of the Panel's guidance documents serves to address specific Principles and Rules such that all 10 principles are covered by the four documents. The Panel's individual guidance documents aim to clearly define the role of the Panel, its processes and methodology, and also its interrelationship with other organisations in achieving its aims.
- 4.2. The Panel's main aim in consulting on these guidance documents is to ensure that:
 - (i) the processes by which it operates to administer the Principles and Rules are fair, inclusive, clear, thorough and not cumbersome;
 - (ii) the analytical approach it uses in each case to test for breaches of the Principles and Rules is sound, comprehensive and clear;
 - (iii) the guideline documents are understandable and thorough (ie cover all relevant matters insofar as these can be identified); and
 - (iv) the guideline documents clearly identify what the Panel is seeking to understand in its assessments and consequently what information is required from parties in their dealings with the Panel.
- 4.3. The Panel invites comments on the draft guidelines to determine if the documents meet these aims and, if not, how the documents could be improved. This includes identifying omissions and, as the case may be, unnecessary content, as well as suggestions for enhancing the quality of the documents.
- 4.4. The Panel particularly invites views from commissioners of health services, public and private health service providers and GPs. It welcomes comments from other interested parties.
- 4.5. The following sections briefly discuss each of the individual guideline documents. The documents themselves are annexed as follows:
 - (i) Draft interim guidance on merger inquiries;
 - (ii) Draft interim guidance on conduct inquiries;
 - (iii) Draft interim guidance on advertising and misleading information dispute appeals; and
 - (iv) Draft interim guidance on procurement dispute appeals.

5. Merger Inquiries

- 5.1. Mergers (including vertical mergers along the patient pathway) have an important role in the NHS in delivering high quality care for all through improving clinical standards or cost efficiencies, for example, or as a possible solution for unsustainable providers and for NHS Trusts that are unable to meet the requirements to be authorised as Foundation Trusts. However, where patient choice and competition are reduced mergers may have an adverse effect on patients and/or taxpayers.
- 5.2. The Panel is responsible for reviewing proposed mergers, which meet minimum value thresholds, to ensure that these transactions comply with the Principles and Rules. It will assess whether proposed mergers are in patients' and taxpayers' best interests and there remains sufficient choice and competition to ensure high quality standards of care and value for money.
- 5.3. The role of the panel in investigating proposed mergers is to advise SHAs, DH and Monitor (in relation to FTs) on issues of compliance with the Principles and Rules and make recommendations as to how any breaches could be remedied. This will involve assessing the impact on choice and competition across the range of services affected by the merger and the likelihood and extent of any adverse impact on patients and taxpayers.
- 5.4. The Panel invites comments on the guidance relating to Merger Inquiries by way of response to the specific questions set out alongside the guidelines in Annex 1.

6. Conduct Inquiries

- 6.1. The Panel is responsible for investigating conduct that could breach the competition provisions of the Principles and Rules and have an adverse effect on patients and/or taxpayers. Such conduct includes, amongst other things, collusive behaviour, predatory pricing and behaviour that may exclude competing service providers.
- 6.2. Furthermore, the conduct guidelines also cover Principles and Rules relating to financial intervention in NHS-funded services to sure that these are transparent and fair, and do not afford a competitive advantage to individual service providers.
- 6.3. Competition in markets has numerous beneficial effects: innovation and productivity may increase, so increasing the quality and, more generally, the diversity of choice available as service providers respond to the preferences of their patients and commissioners. As set out in the *Framework for Managing Choice and Competition*⁹, choice and competition in the NHS can be expected to:
 - improve quality and safety in service provision;
 - improve health and well being;
 - improve standards and reduce inequalities in access and outcomes;
 - lead to better informed patients;
 - generate greater confidence in the NHS; and
 - provide better value for money.
- 6.4. As a result, there is a need to ensure that the conduct of commissioners and service providers supports effective cooperation and competition and does not adversely affect patients or taxpayers.
- 6.5. The Panel invites comments on the guidance relating to Conduct Inquiries by way of response to the specific questions set out alongside the guidelines in Annex 2.

⁹ For more information, please see:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084779

7. Advertising and Misleading Information Dispute Appeals

- 7.1. For patients to exercise choice effectively, they need to have accurate information about services available to them. Consequently, providers of NHS services may wish to make information available to patients and the public, as well as to referring clinicians, about the services that they provide. The publication of such information on the quality of services increases transparency, and provides an incentive for service improvement.
- 7.2. The dissemination of information about health services options is being encouraged through NHS Choices¹⁰ and by allowing NHS providers to promote and advertise their services. In order to support this high-quality information, it is important that there are rules governing the types of promotional material that providers of NHS services produce.
- 7.3. The *Code of Practice for the Promotion of NHS Services*¹¹ (Code of Practice for Promotion) therefore sets out rules that providers of NHS-funded services must follow when promoting their services. These rules are intended to ensure that material is accurate and fair; and to protect patients, the public and referring clinicians from offensive or misleading material. They are also intended to ensure that promotional material does not damage the reputation of the NHS.
- 7.4. The Panel is responsible for hearing appeals against decisions taken by PCTs and SHAs where an attempt to resolve an issue regarding promotional activity at a local level has been unsuccessful. Complaints regarding breaches of the Code of Practice for Promotion are likely to be raised by the public, healthcare providers and others with a sufficient interest.
- 7.5. The Panel invites comments on the guidance relating to Advertising and Misleading Information Dispute Appeals by way of response to the specific questions set out alongside the guidelines in Annex 3.

¹⁰A website established by the NHS which is designed to help people make choices about their health and lifestyle, as well as give information on the various health services that are available to them. For further information, see: www.nhs.uk.

¹¹See: http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_063280.

8. Procurement Dispute Appeals

- 8.1. PCTs, as commissioners of NHS services, are responsible for assessing the health and care needs of their communities and procuring services from the provider(s) best able to meet these needs.
- 8.2. The use of procurement processes is an important means by which commissioners can choose between alternative service providers and ensure that they are obtaining the best possible services for patients as well as the best value for money for taxpayers. This is often referred to, in the context of the NHS, as service contestability. It is an important part of the overall framework for cooperation, choice and competition in the NHS and complements the patient choice model that is used, for example, in routine elective services.
- 8.3. Decisions as to when and how to tender for services are a matter for PCTs, having regard to the Principles and Rules, and the guidance provided by the PCT Procurement Guide.
- 8.4. The *PCT Procurement Guide for Health Services*¹² (Procurement Guide) is intended to support NHS commissioners in their decision-making as to whether and how to procure health services through formal tendering and market-testing exercises. It sets out the policy and regulatory context for procurement and provides advice on how to operate within the requirements of good procurement practice, including issues to consider when developing a procurement strategy.
- 8.5. The Panel is responsible for hearing appeals from decisions of PCTs and SHAs where attempts to resolve the procurement issue at a local level have been unsuccessful. Complaints about procurement decisions (including decisions not to procure) can be raised by healthcare providers and other interested parties. Ultimately, the Panel will need to be satisfied that contracting authorities have consulted and complied with both the Principles and Rules and the Procurement Guidance as a basis for the decisions they have made.
- 8.6. The Panel invites comments on the guidance relating to Procurement Dispute Appeals by way of response to the specific questions set out alongside the guidelines in Annex 4.

¹² See: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084778

9. General questions

- 9.1. In achieving the aims of this consultation, the Panel has a number of general questions relevant to all of the guidance documents. Therefore, we invite your comments in relation to one or more of the guidance documents from the following perspective:
1. Are the documents sufficiently clear and understandable in terms of:
 - (i) How and what the Panel is assessing in order to effectively administer each of the Principles and Rules; and
 - (ii) What information would be required of a party in dealing with the Panel in its assessment of each of the Principles and Rules.
 2. Is it clear which guidance document addresses each of the Principles and Rules? If not, how could this be clarified?
 3. Are there any substantive aspects of the guidance documents (such as economic or legal analysis) which could be improved and if so, how?
 4. Are there any procedural aspects of the guidance documents which could be improved and if so, how?
 5. Do the guidance documents have any significant omissions; if so what?
 6. Does the guidance cover all relevant matters, insofar as these can be identified; if not, what additional material should be included?
- 9.2. These general questions are also included in the consultation proforma template response.

10. How to Respond

10.1. The Panel has prepared a proforma response template to assist in responding to this consultation. A copy of the response template follows is attached at Annexure 6 and an electronic version can also be found on the Panel's website at www.ccp-panel.org.uk.

10.2. If you plan on responding via email using the electronic template, please be sure to rename the document with your party's name so that we can clearly identify who is responding.

Address and deadline for responses

10.3. Responses to this consultation must reach us by 5 pm on 30 April 2009 and should be sent via one of the following methods:

In writing to:

Interim Guidelines Consultation
Cooperation and Competition Panel
1 Horse Guards Road
SW1A2HQ
London, UK

By email to: consultations@ccpanel.gsi.gov.uk

Next steps

10.4. The Panel will publish a summary of responses to this consultation - and indicated actions - as soon as is practical; this is not likely to be more than 12 weeks after the closing date of this consultation. This summary will be available on the Panel's website at www.ccp-panel.org.uk.

Confidential Information

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the FOIA, the DPA and the EIR).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential.

If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Panel.

The Panel will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

[Annexes 1-4 are published separately on the CCP website]

Annex 5: Stakeholder List

- Academy of Medical Royal Colleges
- ACEVO
- Advertising Standards Authority
- Allied Health Professions Federation
- Association of Directors of Adult Social Services
- British Medical Association
- General Dental Council
- General Medical Council
- General Optical Council
- Health Professionals Council
- Independent Healthcare Advisory Service
- Local Government Association
- NAVCA - National Association for Voluntary Community Action
- NCVO - National Council of Voluntary Organisations
- NHS Alliance
- NHS Confederation Foundation Trust Network
- NHS Confederation PCT Network
- Foundation Trusts (individual)
- NHS Trusts (individual)
- Office of Fair Trading
- PCT Network Board
- Primary Care Trusts (individual)
- Royal College of General Practitioners
- Royal College of Midwives
- Royal College of Nursing
- Royal College of Physicians
- Royal College of Surgeons
- Strategic Health Authorities

**CO-OPERATION AND COMPETITION PANEL
DRAFT INTERIM GUIDELINES
CONSULTATION PROFORMA RESPONSE TEMPLATE**

Please note that the deadline for response is 30 April 2009.

Please return responses to Interim Guidelines Consultation, Cooperation and Competition Panel, 1 Horse Guards Road, SW1A 2HQ, London, UK or by email to: consultations@ccpanel.gsi.gov.uk.

Respondent Details (Please provide details of a single point of contact for your response)

Title	Mr / Mrs / Miss / Ms / Dr / Professor / Other
Full Name	
Organisation	
Your Role	
Address (including postcode)	
Email Address	
Phone Contact	

If you are replying on behalf of a group of respondents or organisations, please complete the following information:

Organisations represented within this response	
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Response details

Date of response:	Closing date: 30 April 2009 at 5pm
<p>Confidentiality: Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).</p> <p>If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information that you have provided to be confidential. If we receive a request for disclosure of the information we will take full account of your request, but we cannot give an assurance that confidentiality can be maintained. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.</p> <p>The Department will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.</p>	

GENERAL QUESTIONS [FOUND IN SECTION 9 – CONSULTATION ON CCP GUIDANCE DOCUMENTS]

	Question	Response
1.	Are the documents sufficiently clear and understandable in terms of:	
1(i)	how and what the Panel is assessing in order to effectively administer each of the Principles and Rules; and	
1(ii)	what information would be required of a party in dealing with the Panel in its assessment of each of the Principles and Rules.	
2.	Is it clear which guidance document addresses each of the Principles and Rules? If not, how could this be clarified?	
3.	Are there any substantive aspects of the guidance documents (such as economic or legal analysis) which could be improved and if so, how?	

4.	Are there any procedural aspects of the guidance documents which could be improved and if so, how?	
5.	Do the guidance documents have any significant omissions; if so what?	
6.	Does the guidance cover all relevant matters, insofar as these can be identified; if not, what additional material should be included?	

ANNEX 1: MERGER INQUIRIES INTERIM GUIDELINES

	Question	Response
1.	<p>Are the acceptance criteria sufficiently clear?</p> <p>[SECTION 3 – PAGE 8]</p>	
2.	<p>Should anything be added or excluded from the Panel’s acceptance criteria and if so, why?</p> <p>[SECTION 3 – PAGE 8]</p>	
3.	<p>Is the planned informal review process useful? If not, what improvements would you suggest?</p> <p>[SECTION 4 – PAGE 13]</p>	
4.	<p>Is the planned decision-making process for formal merger reviews sufficiently clear?</p> <p>[SECTION 4 – PAGE 13]</p>	

5.	<p>Does the formal merger process afford merging parties sufficient opportunity to present their views to the Panel and to respond to the Panel’s analysis and reasoning?</p> <p>[SECTION 4 – PAGE 13]</p>	
6.	<p>Does the formal merger process afford other parties sufficient opportunity to present their views to the Panel and to respond to the Panel’s analysis and reasoning?</p> <p>[SECTION 4 – PAGE 13]</p>	
7.	<p>Does the proposed formal review process facilitate expedient reviews of non-complex mergers (during Phase One) while also providing sufficient time for complex mergers to be subject to an appropriate review (during Phase Two)?</p> <p>[SECTION 4 – PAGE 13]</p>	
8.	<p>Is the statement regarding the notification thresholds sufficiently clear?</p> <p>[SECTION 4 – PAGE 13]</p>	

9.	<p>Do the notification thresholds strike a good balance between limiting the Panel's reviews to material transactions while at the same time capturing smaller transactions that may give rise to concerns?</p> <p>[SECTION 4 – PAGE 13]</p>	
10.	<p>Is the proposed methodology for the analysis of mergers between healthcare service providers sufficiently clear?</p> <p>[SECTION 5 – PAGE 27]</p>	
11.	<p>Is the proposed methodology for the analysis of mergers under the AEP/AET test sound?</p> <p>[SECTION 5 – PAGE 27]</p>	
12.	<p>Should the assessment of a merger's effect on patients or taxpayers take into account any other factors that are not included in the draft guidelines?</p> <p>[SECTION 5 – PAGE 27]</p>	
13.	<p>Are there any issues specific to the healthcare sector that should be specifically addressed within the guidelines which are currently not?</p> <p>[SECTION 5 – PAGE 27]</p>	

14.	<p>Do you have any views on the substantive content of this section regarding Panel advice and recommendations to the relevant Sponsor?</p> <p>[SECTION 6 – PAGE 29]</p>	
15.	<p>Is the guidance on submission content sufficiently clear and useful?</p> <p>[SECTION 7 – PAGE 33]</p>	
16.	<p>Is the guidance on the content of submissions absent of any substantive issues or information that would assist in the preparation of submissions and if so, what?</p> <p>[SECTION 7 – PAGE 33]</p>	

ANNEX 2: CONDUCT INQUIRIES INTERIM GUIDELINES

	Question	Response
1.	<p>Does this section provide sufficient context to the Panel’s consideration of conduct matters?</p> <p>[SECTION 2 – PAGE 5]</p>	
2.	<p>Are the acceptance criteria sufficiently clear?</p> <p>[SECTION 3 – PAGE 7]</p>	
3.	<p>Should anything be added or excluded from the Panel’s acceptance criteria and if so, why?</p> <p>[SECTION 3 – PAGE 7]</p>	
4.	<p>What are your views on the Panel’s approach to informal advice?</p> <p>[SECTION 5 – PAGE 11]</p>	

5.	<p>Is the Panel's process for conduct complaints sufficiently clear and fair?</p> <p>[SECTION 5 – PAGE 11]</p>	
6.	<p>Does the Panel's process for conduct complaints allow parties sufficient opportunity to present their case?</p> <p>[SECTION 5 – PAGE 11]</p>	
7.	<p>Are the timeframes for conducting the complaints process sufficient?</p> <p>[SECTION 5 – PAGE 11]</p>	
8.	<p>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?</p> <p>[SECTION 5 – PAGE 11]</p>	

9.	<p>What are your views on the Panel’s test, namely assessing conduct based on any adverse effects on patients and taxpayers?</p> <p>[SECTION 6 –PAGE 21]</p>	
10.	<p>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?</p> <p>[SECTION 6 –PAGE 21]</p>	
11.	<p>Are there any types of conduct that should be expressly addressed in these guidelines which are currently not?</p> <p>[SECTION 6 –PAGE 21]</p>	
12.	<p>What are your views on the Panel’s approach to assessing conduct breaches by focusing on their effects as opposed to intention?</p> <p>[SECTION 6 –PAGE 21]</p>	

13.	<p>What are your views on the Panel's approach to assessing exclusionary conduct without necessarily having regard to dominance?</p> <p>[SECTION 6 –PAGE 21]</p>	
14.	<p>Do you believe the Panel's approach to assessing conduct is sound?</p> <p>[SECTION 6 –PAGE 21]</p>	
15.	<p>Is the Panel's approach to assessing discriminatory treatment of patients sufficiently clear and fair?</p> <p>[SECTION 6 – PAGE 23]</p>	
16.	<p>Is the Panel's approach to assessing financial intervention sufficiently clear and fair?</p> <p>[SECTION 6 – PAGE 23]</p>	

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]	
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ADVERTISING AND MISLEADING INFORMATION DISPUTE APPEALS INTERIM GUIDELINES

	Question	Response
1.	<p>Does this section provide sufficient context to the Panel’s consideration of advertising matters?</p> <p>[SECTION 2 – PAGE 7]</p>	
2.	<p>Are the Principles and Rules relevant to advertising matters identified sufficiently clearly?</p> <p>[SECTION 2 – PAGE 7]</p>	
3.	<p>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?</p> <p>[SECTION 2 – PAGE 7]</p>	
4.	<p>Should the Panel provide greater detail about its likely substantive approach to reviewing advertising referrals and appeals?</p> <p>[SECTION 2 – PAGE 7]</p>	

5.	<p>Should the Code of Practice be attached to the Advertising Guidelines?</p> <p>[SECTION 2 – PAGE 7]</p>	
6.	<p>Are the acceptance criteria sufficiently clear and fair?</p> <p>[SECTION 3 – PAGE 8]</p>	
7.	<p>Should anything additional be included in the Panel’s acceptance criteria? Should anything be excluded from the Panel’s acceptance criteria?</p> <p>[SECTION 3 – PAGE 8]</p>	
8.	<p>Is the Panel’s procedural process for each of appeals and referrals of advertising disputes sufficiently clear and fair?</p> <p>[SECTION 4 – PAGE 11]</p>	

9.	<p>Do the processes as outlined allow parties sufficient opportunity to present their case?</p> <p>[SECTION 4 – PAGE 11]</p>	
10.	<p>Are the timeframes for conducting the processes sufficient?</p> <p>[SECTION 4 – PAGE 11]</p>	
11.	<p>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?</p> <p>[SECTION 4 – PAGE 11]</p>	
12.	<p>Although this list is not intended to be exclusive, are there any other remedies that should be expressly mentioned in these Advertising Guidelines?</p> <p>[SECTION 5 – PAGE 12]</p>	

PROCUREMENT DISPUTE APPEALS INTERIM GUIDELINES

	Question	Response
1.	Does this section provide sufficient context to the Panel's consideration of procurement matters? [SECTION 2 – PAGE 6]	
2.	Are the Principles and Rules relevant to procurement matters identified sufficiently clearly? [SECTION 2 – PAGE 6]	
3.	Are the acceptance criteria clear? [SECTION 3 – PAGE 8]	
4.	Should anything additional be included in the Panel's acceptance criteria? Should anything be excluded from the Panel's acceptance criteria? [SECTION 3 – PAGE 8]	

5.	<p>Is the Panel's procedural process for appeals of procurement disputes sufficiently clear?</p> <p>[SECTION 4 – PAGE 10]</p>	
6.	<p>Does the appeals process as outlined allow parties sufficient opportunity to present their case?</p> <p>[SECTION 4 – PAGE 10]</p>	
7.	<p>Are the timeframes for conducting the appeals process sufficient?</p> <p>[SECTION 4 – PAGE 10]</p>	
8.	<p>Should third parties be afforded greater involvement in the Panel's appeals process (e.g. in terms of providing submissions to the Panel and attendance at hearings)?</p> <p>[SECTION 4 – PAGE 10]</p>	

9.	<p>Is the Panel right to seek to balance other benefits to patients and taxpayers against limitations on competition when assessing tender design?</p> <p>[SECTION 5 – PAGE 12]</p>	
10.	<p>Should the Panel be applying a different benchmark when assessing PCT decisions not to tender?</p> <p>[SECTION 5 – PAGE 12]</p>	
11.	<p>Although this list is not intended to be exclusive, are there any other recommendations that should be expressly mentioned in these Procurement Guidelines?</p> <p>[SECTION 6 – PAGE 13]</p>	

HOW TO RESPOND

The Panel has prepared this proforma consultation response template to assist in responding to this consultation. An electronic version can also be found on the Panel's website at www.ccpanel.org.uk.

Please complete the consultation response, either in its entirety or in relation to specific questions that you would like to provide comments on.

If you plan on responding via email using the electronic template provided, please be sure to rename the electronic document with your party's name so that we can clearly identify who is responding.

Responses to this consultation must reach us by **5 pm on 30 April 2009** and should be sent via one of the following methods:

In writing to:

Interim Guidelines Consultation
Cooperation and Competition Panel
1 Horse Guards Road
SW1A2HQ
London, UK

By email to: consultations@ccpanel.gsi.gov.uk