

Consultation on Cooperation and Competition Panel Guidance Documents – RCN Response

Executive Summary

1. The Cooperation and Competition Panel is a new independent, arms length, agency with a remit to provide advice to the Department of Health, Monitor and Strategic Health Authorities in England on whether there are breaches of the Principles and Rules of Co-operation and Competition. In essence, to provide guidance, when cases are referred to it, on whether fair competition is occurring.
2. Key points of the RCN response are:
 - a) The Panel guidance focuses upon competition. The RCN asks what work will be done on co operation?
 - b) The regulatory landscape is already busy and there is a need for greater clarity in the areas that the Panel covers that are distinct and separate to other regulators (such as the Office of Fair Trading).
 - c) The proposed guidance is relatively technical and it may be useful to provide a more accessible question and answer set of documents for those providers who do not have access to economic expertise.
 - d) There is some scope for inconsistency in approaches to dealing with cases which stem from separate processes which may be applied by PCTs, SHAs, the Panel and OFT. Consistency is likely to be important to provide a credible fair playing field.
 - e) The recommendations that the Panel makes will be for others' to implement. It is thus unclear the degree of influence that the Panel will actually have on competition.
 - f) The role of tariff is not entirely clear, and there is a need to clarify the use of tariff where tariff prices exist in the Panel's considerations.

Introduction and context

3. The Royal College of Nursing (RCN) is the UK's largest professional association and trade union for nurses, with over 390,000 members. The RCN works locally, nationally and internationally to promote high standards of care and the interests of patients and nurses, and of nursing as a profession. We welcome this opportunity to respond to the above document.
4. The Cooperation and Competition Panel is a new independent non-statutory, advisory organisation set up to reflect the growing use of cooperation and competition in the NHS in England. The Panel has the job of investigating and advising the Department of Health and Monitor and Strategic Health Authorities on potential breaches of the Principles and Rules of Co-operation and Competition (and note that these principles are relatively new and the DH will be consulting on these during 2009).¹
5. The Panel can investigate under the following 4 main areas:
 - Merger inquiries (where 2 or more providers propose to join together);
 - Conduct inquiries (where 1 or more provider may be accused of inappropriate conduct);
 - Procurement dispute appeals (where 1 or more commissioning organisation may be accused of not meeting best practice in relation to procurement)
 - Advertising and misleading information dispute appeals (where 1 or more provider may be accused of breaching advertising rules and/or providing misleading information).
6. **The RCN notes that these are all about competition. The RCN therefore asks what work the Panel will be doing on the issue of co operation?**
7. The Panel notes that its approach to competition is “grounded in the established principles of economic and competition analysis. However, in applying these principles, the CCP ensures that it takes account of the special features of the healthcare sector, such as it being free at the point of service for patients, the not for profit nature of many organisations providing healthcare services and the help many patients need to make informed choices between service providers.”²
8. The Consultation document also highlights that the Panel must work alongside a large number of stakeholders and organisations as set out in Box 1.

Box 1: Stakeholders and Organisations the CCP works with

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| • Patients and the public | • Monitor (as regulator of Foundation Trusts) |
| • Primary Care Trusts (Commissioners) | • Transactions Board |
| • Providers (NHS, commercial, voluntary, social enterprises etc) | • Overview and Scrutiny Committees |
| • Strategic Health Authorities | • Care Quality Commission |
| • Department of Health | • Advertising Standards Agency |
| | • Office of Fair Trading |

¹ <http://www.ccp-panel.org.uk/about-the-ccp/index.html>

² <http://www.ccp-panel.org.uk/about-the-ccp/index.html>

9. The RCN observes that the regulatory landscape is somewhat busy already, and that the Panel is an additional player which may, to a degree, duplicate elements of other regulators remits. This seems to be case specifically in relation to OFT where the CCP notes itself that “[OFT] has specific responsibility for advising on competition issues concerning the independent sector providers of NHS care.”³ This then links into later work that could be completed by the Competition Commission and wider European legislation.
10. It would be **helpful for there to be clarification as to when providers (which could include sole traders and social enterprises) should consult the Panel or OFT, and similarly whether they are likely to be subject to investigation by the Panel or the OFT, or perhaps even both.** This adds a layer of potential confusion to those running and/or working within providers.
11. The RCN also notes that the guidance notes are somewhat technical referring to economic concepts which may, for some, providers be confusing. The RCN would like to see **more simplified question and answers document that would be accessible for all providers (potentially smaller providers, and sole traders particularly, may not have access to expertise in economics).**
12. All the detailed interim guidance notes also note that the Panel will (in the majority of instances, exceptions relate to concerns of collusive behaviour, and proposed mergers) only consider a case where the local PCT and SHA processes have been exhausted and failed to achieve a satisfactory outcome for all parties involved. The RCN therefore notes that there may be three main sources for potential inconsistencies in the implementation of regulation of competition:
 - a) Those that relate to differences arising from separate PCT approaches.
 - b) Those that relate to differences arising from separate SHA approaches.
 - c) Those that relate to differences arising from OFT and Panel views (if the same cases are heard by both agencies).
13. These potential inconsistencies will be most obvious to any provider who operates in more than 1 SHA area. It is important that providers perceive a fair playing field and thus it would be desirable to avoid inconsistencies.
14. The RCN notes that some of its members are either involved in or considering setting up new ventures. **Many of these will be small firms, and may also be social enterprises. This situation maybe further reinforced by the Right to Request as set out by the DH. Such individuals will need to know when they could approach the Panel as opposed to the SHA or other agencies.**
15. **This is important to ensure that competition grows in a considered and appropriately regulated manner at the grass roots level** where expertise on economics (and other areas) is not likely to be significant and/or present at all.
16. This is particularly so where Practice level commissioning and provision presents a challenge given the tensions that exist between the dual role a GP has in both commissioning and providing services to the local population.

³ CCP, Consultation document, p11

17. As such we believe the CCP may have an important role in supporting SHAs and other actors in developing local health and social care markets in a way which supports and develops the unique and socially important functions of the NHS.
18. The RCN also notes that in relation to guidance on the assessment of conduct little mention is made in relation to national structures such as the PbR tariff, the National Contract and so on. **It would be helpful for the guidance to make it clear how national frameworks interact with the desire to create a competitive environment in health and social care.**
19. The RCN also notes that **it is not clear the degree of influence that any resulting recommendations made by the Panel will actually have.** Its recommendations will be for others' to implement.

Royal College of Nursing, April 2009