

COMPETITION DISPUTE RESOLUTION PROCESS

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EXECUTIVE SUMMARY

The information in this document sets out the Competition Dispute Resolution Process of the PCT

The introduction by the Department of Health (DH) of the promotion of choice and competition in the consultation paper "The future regulation in health and social care" made the Primary Care Trust (PCT) as commissioners responsible for ensuring that different types of provider are not treated unfairly, either when they are invited to bid for procurements or through choice arrangements. The role of the Strategic Health Authority (SHA) is to ensure that the PCT's decisions are fair, transparent and well informed and the PCT board must have appropriate governance arrangements that avoid potential or perceived conflicts of interest arising from the PCT responsibility for NHS Trusts or PCT provision and commissioning functions.

Recognising that there may still be times when competition issues cannot be resolved locally, the Government is introducing an expert national co-operation and competition panel to provide independent advice to the Secretary of State and Monitor. The national co-operation and competition panel will consider issues only when action to resolve matters locally has been exhausted. To this end the PCTs are required to set up and run a Competition Dispute Resolution Process and Competition Dispute Resolution Panel to manage disputes at a local level before they are referred to the national co-operation and competition panel.

The PCT Competition Dispute Resolution Process will adhere to the core system management principles and the panel will hear complaints and disputes which, are thought by the complainant to contravene any of the 10 principles and rules of cooperation and competition (Appendix1).

The South Central (SC) SHA Competition Dispute Resolution Process will be a process that complainants can pursue if they disagree with the decision following the PCT Competition Dispute Resolution Process. The SHA will only consider complaints that have been through the PCT Competition Dispute Resolution Process, or those that come to the SHA as a result of a complaint about a PCT.

The Process described within this document adheres to the Department of Health guidance for entry into the Competition Dispute Resolution Process and the timescales that the PCT should follow to ensure national consistency.

1: BACKGROUND

The NHS Operating Framework (November 2007) describes the Principles and Rules of Cooperation and Competition. Furthermore, Annex D of the Operating Framework provides a context for when a cooperation and competition panel should be utilised, by describing the actions expected of a PCT in their application of the principles and rules of cooperation and competition.

The framework for managing choice, cooperation and competition was published in May 2008 and identified that a cooperation and competition panel had to be operational by October 2008, when the PCT is required to have processes in place to identify, hear and resolve disputes relating to the principles and rules.

2: PURPOSE

- 2.1 The National Co-operation and Competition Panel is a point of last resort when the local NHS system has failed to achieve resolution of a dispute. Recognising that there will be occasions when a referral to the panel is needed, the system that the PCT has in place for managing these disputes needs to be robust and transparent because the first test that the national co-operation and competition panel will employ is whether the dispute is valid or could have been resolved elsewhere in the system. In order to avoid disputes reaching the PCT, SHA and the national panel, the PCT are ensuring that the principles of cooperation and competition are applied at every level.
- 2.2 It is important that where possible, disputes are resolved locally. The government is committed to a bottom-up, self-improving means of regulation. However, system managers should be aware that the highest level disputes can reach is the European Court. It is likely that if a dispute has reached this point, all local and national process have failed to reach a resolution.
- 2.3 Ideally, the majority of cases will be dealt with at the local NHS level, preventing the need for upward referral. Therefore the Competition Dispute Resolution Process that is implemented needs to be consistent with the national approach (for onward referrals to be consistent), but also owned and organised locally.
- 2.4 Providers and other potential complainants need to know that they have recourse whenever they have a complaint relating to principles and rules of cooperation and competition. By having a local NHS, published Competition Dispute Resolution Process, those organisations know that they have a forum and means of registering these complaints. Failure of the PCT and the SHA to provide or operate an effective Competition Dispute Resolution Process could in itself be cause for complaint. Providers need confidence that they are operating on a level playing field, so transparency is key, both of the process and of the decisions.
- 2.5 The summary of the Competition Dispute Resolution Process objectives are contained in Appendix 2.

3. SCOPE

- 3.1 In scope: the PCT Competition Dispute Resolution Process will consider:
 - Issues directly arising from the principles, actions/behaviours and rules set out in the principles and rules for cooperation and competition
 - Issues that have a direct impact on the Principles and Rules

- 3.2 Out of scope: the PCT Competition Dispute Resolution Process will exclude:
- Contractual disputes of a commissioning nature between a PCT and independent provider
 - Non-competition issues
 - Matters where jurisdiction falls within the Office of Fair Trading statutory duties (“undertakings”)

The principles of the Competition Dispute Resolution Process are contained within Appendix 3.

4. PROCESS

4.1 Under system management and the principles and rules of cooperation and competition, there will be new and potentially far more complex, reputation damaging and higher profile disputes for the NHS to resolve. As such, a process that adheres to the system management principles (Appendix 3), but with an NHS focus and ownership is required and is detailed in 4.4.

4.2 The PCT Competition Dispute Resolution Process is outputs based, with the minimum requirement for acceptance into the national co-operation and competition panel forming the end of the process. The PCT process must:

- Have a clear, non-discriminatory entry point
- Be able to appropriately identify any and all principles and rules of cooperation and competition complaints in the first instance
- React appropriately
- Triage correctly
- As far as is possible, investigate and or resolve the complaint

If the complaint cannot be resolved, then the output of this Competition Dispute Resolution Process will allow any senior recipient organisation or body (e.g. SHA, national co-operation and competition Panel, Office of Fair Trading etc) to grasp the nature of complaint and ideally have sufficient information to provide a judgement.

4.3. The Complaint Process

Full details of the complaint process are contained in 4 together with

- A process flow diagram (5)
- A diagrammatic representation of the PCT and SHA Competition Dispute Resolution Process (6)

4.4 The stages are:

a) Receipt of Complaint:

The PCT website will contain a link to the Complaints Competition Dispute Resolution web pages, where this process and the complaints proforma will be available.

The website will also contain additional information on what is in and what is out of scope for the PCT Competition Dispute Resolution Process and a self assessment section where complainants can assure themselves that they have a reasonable complaint before completing the relevant proforma.

The PCT will receive complaints electronically via the web proforma.

On submission the completed proforma will be automatically forwarded to the PCT case manager whose responsibility it will be to carry out an initial check to ensure that:

- There are sufficient grounds for acceptance into the Competition Dispute Resolution Process
- There is full and frank disclosure of information
- Due process has been followed

b) Triage (5 working days)

Once the case manager has completed an initial assessment and has ensured that the complaint meets the PCT acceptance criteria, the complainant will be sent a formal acknowledgment letter (Appendix 8).

c) Panel Stage (15 working days)

The case manager will present all the received information to the Competition Dispute Resolution Panel chair who assesses the complaint. It is the responsibility of the case manager to ensure that all information surrounding the complaint is available to the chair and the panel. Information for the panel will be available at least 3 working days prior to any panel dates.

The Competition Dispute Resolution Panel chair will make an assessment of the type of complaint; decide on which panel members need to be involved. (Appendix 9) and what if any additional information / evidence is required. If the Chair feels the issue is a “reserved matter”, they will seek expert advice and refer the issue directly to the national co-operation and competition panel.

The panel chosen for the case will discuss the case and decide if the evidence provided is sufficient in order to reach a decision. In certain circumstances, they may commission an investigation to try and gather sufficient and impartial evidence. The panel will review the case and consider both sides of the complaint.

Once a decision has been reached, both parties will be written to. If the panel are unable to reach a decision the matter will be referred to the SHA co-operation and competition panel.

The panel dates for the year will be published on the PCT website together with the cut-off dates for submissions. Complaints should be submitted a minimum of 20 working days prior to the published panel date. Those received after this deadline can still expect to be triaged within five working days but will be carried forward to the next panel.

5. SUCCESS FACTORS

- 5.1 The critical success for this process will be a low number of disputes with a high percentage of complaints being resolved by the NHS. Due to the nature of this process it will be reviewed on an annual basis or as a result of any material change of circumstance or following any guidance from the national competition and cooperation panel to ensure it is achieving this goal.

6. APPEALS

6.1 Appeals can be made at a number of stages in the process:

- Complainants can appeal to the SHA following a PCT decision
- Complainants can appeal to the national co-operation and competition panel following the PCT decision

The SHA will identify appeals quickly and deal with them effectively. The appeals process is identified (Appendix 9).

7. RISKS AND MITIGATION

7.1 The PCT has mitigated its own risks by agreeing with the DH, SHA and other PCTs the principles that:

- The objectives of the Competition Dispute Resolution Panel will include explicit reference to the 10 principles and rules of cooperation and competition
- The principles by which the Competition Dispute Resolution Panel operates is in line with all the other PCTs and the SHA
- The stages within the process and timescales by which the complainant can expect a response has been agreed with all the other PCT s. (the form, triage, panel, appeals and timescales)
- The rules of procedure and thresholds for PCT and SHA involvement

Appendix 1

10 Principles and Rules of Cooperation and Competition

Principle 1 - Commissioners should commission services from the providers who are best placed to deliver the needs of their patients and populations.

Principle 2 - Providers and commissioners must cooperate to ensure that the patient experience is of a seamless health service, regardless of organisational boundaries, and to ensure service continuity and sustainability.

Principle 3 - Commissioning and procurement should be transparent and non-discriminatory.

Principle 4 - Commissioners and providers should foster patient choice and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare.

Principle 5 - Appropriate promotional activity is encouraged as long as it remains consistent with patients' best interests and the brand and reputation of the NHS.

Principle 6 - Providers must not discriminate against patients and must promote equality.

Principle 7 - Payment regimes must be transparent and fair.

Principle 8 - Financial intervention in the system must be transparent and fair.

Principle 9 - Mergers, acquisitions, de-mergers and joint ventures are acceptable and permissible when demonstrated to be in patient and taxpayers' best interests and there remains sufficient choice and competition to ensure high quality standards of care and value for money.

Principle 10 - Vertical integration is permissible when demonstrated to be in patient and taxpayers' best interests and protects the primacy of the GP gatekeeper function; and there remains sufficient choice and competition to ensure high quality standards of care and value for money.

Appendix 2

Objectives of the PCT Competition Dispute Resolution Process:

- To resolve competition disputes transparently, fairly and consistently
- To provide confidence to all parties that the process is fair and transparent, enhancing willingness to participate in the market
- To mitigate risks and protect the reputation of the NHS
- To be compliant with acceptance criteria of the national cooperation and competition panel
- To prevent where possible legal challenge / external referral processes

Appendix 3

The Principles of the Competition Dispute Resolution Process

In designing and following Competition Dispute Resolution Process, the PCT has considered the application of the following core system management principles:

Transparency. Any process that is intended to resolve disputes must be transparent. This includes publishing the process in advance, communicating progress to all relevant stakeholders, declarations of interests, and publication of how the process results in decisions. To ensure stakeholder buy in, stakeholders (including potential parties to any potential dispute) must be included and informed of what the process is and how it has been developed. The PCT may publish the results of all, some or none of the complaints successfully handled

Publishing the results of successfully managed disputes will give a clear signal to providers as to what is acceptable and what is not. This in turn will:

- Increase consistency across the PCTs and SHA
- Reduce the possibility of disputes arising from different interpretations and provide the national co-operation and competition panel with visibility of complaints that are being seen and resolved at PCT level

Objectivity. As this process is to resolve disputes, it will be based wherever possible on objective information and criteria. The way in which it is developed and who has developed it must be kept as a public record for audit purposes.

Proportionality. The process will be fit for purpose, able to reflect the demands placed on it either by workload or by type of complaint. The local process will be capable of withstanding public scrutiny. Providers should only begin a formal dispute process on issues of material importance. The resources used to deal with each dispute must be proportional to the significance of the dispute.

Non-discriminatory. The Competition Dispute Resolution Process will not favour parts of the NHS over other parts of the NHS, NHS providers over non-NHS providers, commissioners over providers.

Accountability. The PCT Board is accountable through the executive function for the process and outcome of the dispute process.

Subsidiarity. Decisions should be made by the lowest competent authority. The SHA, will delegate to PCTs wherever possible, and will only become involved if:

- A PCT is cited in a dispute
- There is a dispute that crosses SHA boundaries
- The complexity of the dispute is such that the SHA needs to manage it.

Consistency. Formulation and implementation of policy will be internally coherent and consistently applied across the SHA. It is important to achieve consistency when dealing with providers who operate at a national level (being cognisant of other SHA decisions) however there may be scope for decisions to vary at a local level due to individual competition circumstances.

No double jeopardy. The process will ensure, where possible, that providers will not be held to account for the same issue, by more than one institution (e.g. system manager, regulator, government department). The SHA will consider involvement of the Independent Review Panel, Monitor, or the Care Quality Commission as necessary. Providers will be required to inform the SHA about, and the nature of, any engagement with other bodies.

Appendix 4

Stage One The Complaint Process

All complaints must be made in the first instance by means of an electronic form **(a)** available from the PCT website.

At this website users can access additional information, in particular:

- What is in and out of scope for the Competition Dispute Resolution Process
- Ways to resolve disputes without recourse to the complaints process
- Guidelines on what constitutes a complaint
- Timescales for the process
- Details of the process itself
- Panel dates for the year

When a complaint is to be made, the electronic form is filled in by the user and any additional information is given along with the complaint. The idea of using an electronic form is that it ensures that complaints are received in the same format and that all the relevant information is available to the panel in a consistent manner. Complainants will also be able to contact the PCT for advice on completion of the form.

This stage will focus on the grounds for acceptance into the Competition Dispute Resolution Process, which will be that:

- The content of the dispute is covered by the principles and rules of cooperation and competition
- There is full and frank disclosure of all relevant and applicable information
 - NB This does not preclude the panel from asking for further information as it requires. Furthermore, any individuals connected to the complaint will be required to provide further evidence / testimony as required
- The panel is best placed to resolve the issue (i.e. over the other regulators including Office or Fair trading Advertising Standards Agency)
- No legal proceedings have commenced
- The issue is not a 'reserved matter' under the principles and rules of cooperation and competition, as defined in the panels Rules of Procedure
- The dispute is not trivial, vexatious or an abuse of the PCT s procedures
- There is adequate time for the panel to review the complaint appropriately, for example, if there are time-critical issues

Timing

The panel dates for the year will be published on the PCT website together with the cut-off dates for submissions. Complaints should be submitted a minimum of 20 working days prior to the published panel date. Those received after this deadline can still expect to be triaged within five working days but will be carried forward to the next panel.

Stage Two Stage Triage (Completion 5 working days after receipt of complaint)

Once the complaint is received, a further assessment is made of what level of complaint this is.

1. Does it fulfil the principles and rules of cooperation and competition principles **(b)** and if so, which principle(s)?
2. Is there sufficient back-up / evidence to the complaint **(c)**?

If the answers are yes, then the complaint passes to next stage. If “no” then the complaint is dismissed and returned to the complainant with reasons why it did not proceed. Or alternatively returned with suggestions as to what additional information would be required for it to progress. **(d)**.

There is an appeals process – if necessary, at any stage, a complainant can appeal directly to the SHA co-operation and competition panel if they think they have been unfairly treated **(e)**.

During the Triage phase the PCT will be able to call on expert advice to inform the triage process and if necessary the case manager will contact the complainant to check information.

If the complaint is to progress within the system, after passing all rudimentary checks, a letter is generated to all parties in the dispute with a contact number and case reference **(f)**.

The complaint then is processed through the Competition Dispute Resolution Panel referring to the principles and rules of cooperation and competition rules to allow judgement of the complaint. However, certain situations may require a fast-track straight to the national co-operation and competition panel.

All information and evidence will be available at least 3 days before the panel sits.

PANEL STAGE (Meets on published dates)

At this stage, the case manager will present all the information that has been received to the Competition Dispute Resolution Panel Chair **(g)** who informally assesses the complaint. If an informal solution is possible, the Dispute Resolution Panel chair may bring the parties into the PCT Offices and attempt to resolve the issue **(h)**. It is expected that if the complaint is a genuine breach of the principles and rules of cooperation and competition then this will not be appropriate.

To avoid any conflict of interest and in doing so unnecessary complaints about the panel itself, the PCT Competition Dispute Resolution Panel will consist of:

Panel

The panel will consist of three members. An Executive Director and a Non-Executive Director, one of whom will chair the panel. The third member will be drawn from a neighbouring PCT and Expert Advisors will be called as and when necessary to advise the Panel.

The Competition Dispute Resolution Panel chair makes an assessment of the type of complaint and will decide on which (if any) expert panel members need to be involved. (Appendix 7) If the Chair and Panel feel the issue may be a “reserved matter”, they will seek expert advice and refer the issue directly to the national co-operation and competition panel.

The PCT panel chosen for this case will discuss the case and decide if the evidence provided is sufficient in order to reach a decision. In certain circumstances, they may commission an investigation **(i)** to try and gather sufficient and impartial evidence.

At this stage parties to the dispute will be able to submit any additional evidence.

The panel will then review the case (j), and consider both sides of the complaint. If they uphold the complaint, (k) they will write to both parties with the rationale for the decision and the expectations for both parties in resolving the dispute along with an action plan to ensure resolution is observed. Similarly, if the case is rejected, (l) the parties will be informed of the reasons why. Finally, if the panel cannot reach a decision (m), this could be for one of two reasons;

1. The decision is beyond the scope of the Competition Dispute Resolution Process Panel – in which case, the Terms of Reference for the Competition Dispute Resolution Process Panel will be to refer on to the SHA co-operation and competition panel.
2. There is insufficient evidence for the panel to reach a decision, which may prompt further investigation to report back to the next panel with its findings.

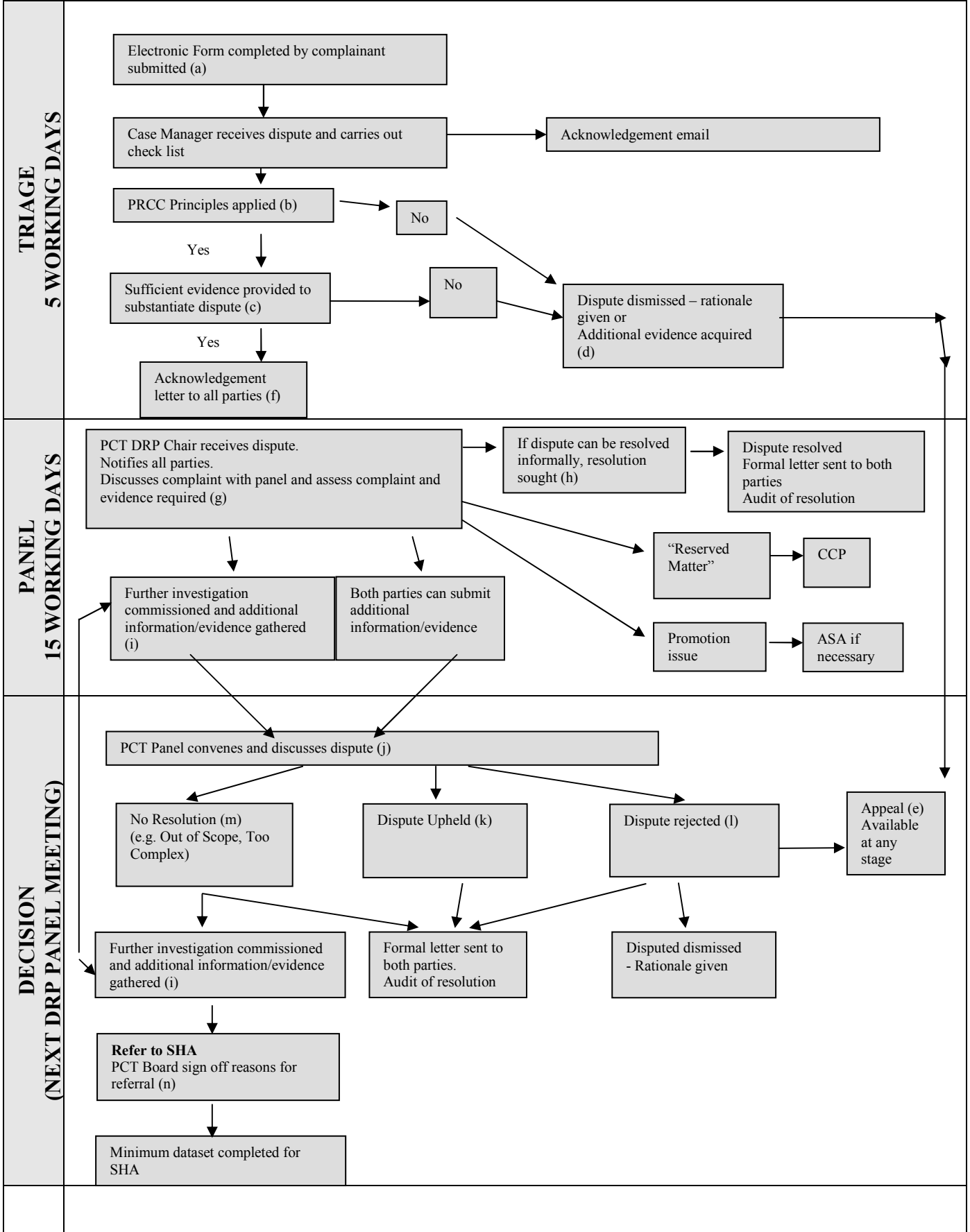
If the panel cannot resolve the complaint because the complaint is beyond their scope, the Panel will recommend to the PCT Chief Executive that the complaint be referred to the SHA co-operation and competition panel (n).

The Chair will sign off the panel decision and report the outcome to the PCT Executive Team. They will report any decisions and results to the next public board with the following information:

- 1) Confirmation that the complaint was compliant with the national co-operation and competition panel.
- 2) Confirmation that parties to the complaint have been informed of the decision.
- 3) Confirmation that all existing options have been exhausted (unresolved cases).
- 4) Details of any precedent that might have been set.

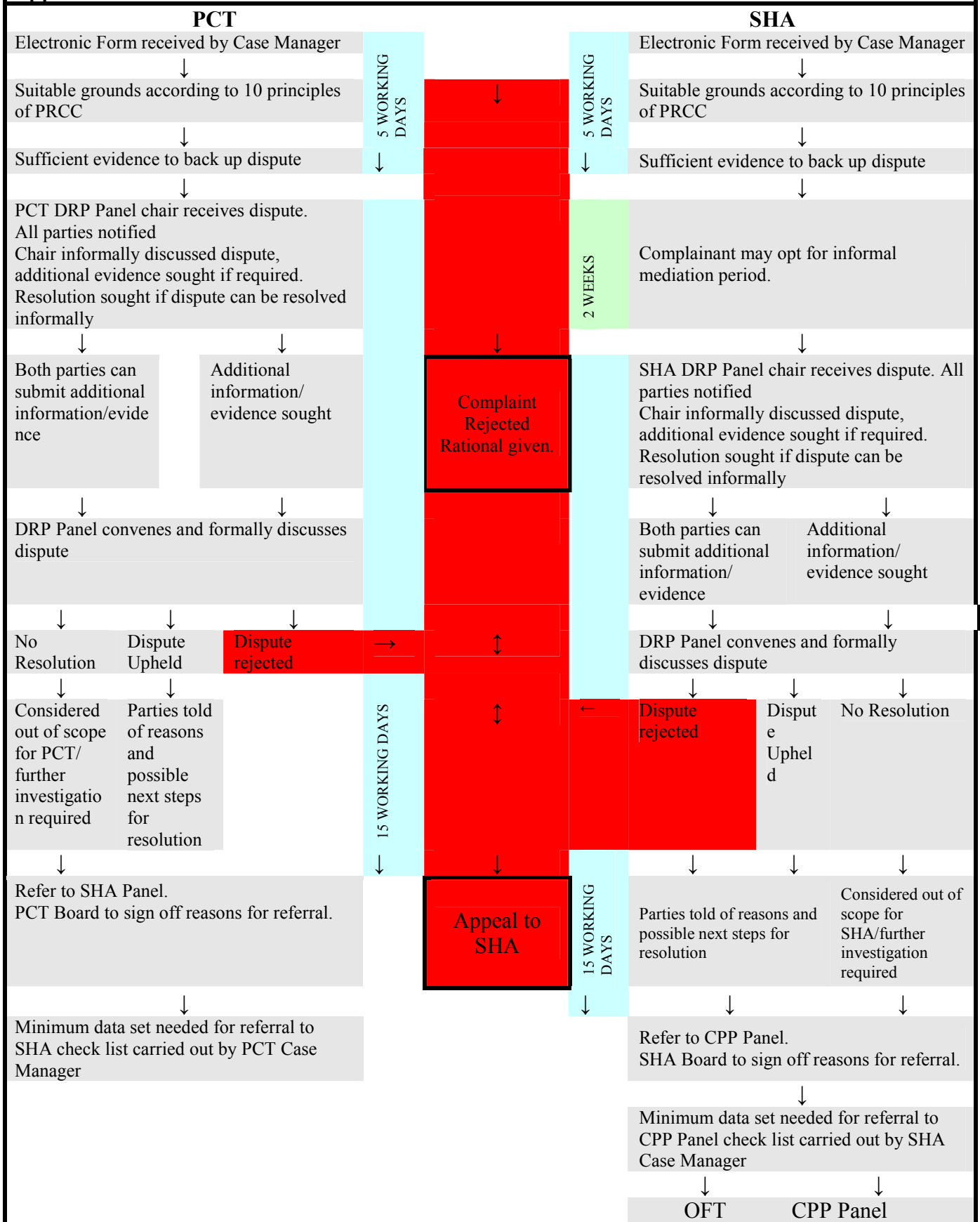
PCT DISPUTE RESOLUTION PROCESS

Appendix 5

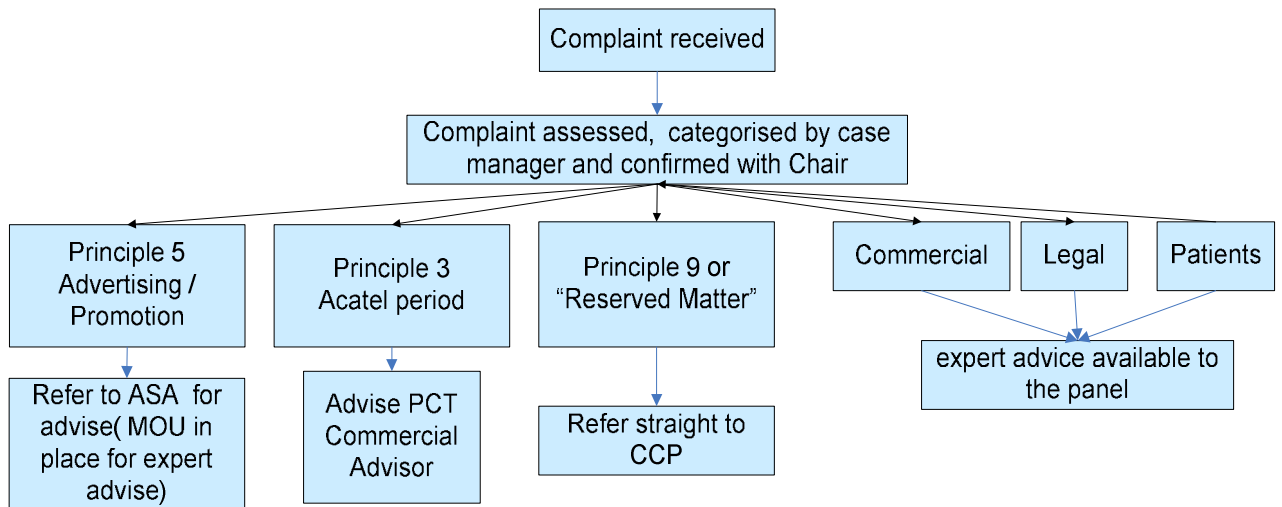


DISPUTE RESOLUTION PANEL PROCESS

Appendix 6



Appendix 7
Assessment of type of complaint



Appendix 8
Acknowledgement letter

PCT

Competition Dispute Resolution Case
Manager
Telephone
Direct Dial
Email:

COMPLAINT RECEIVED BY PCT

Dear (name of relevant party to the dispute)

A complaint has been received by the PCT regarding a perceived breach of the Principles and Rules for Cooperation and Competition. The complaint has been raised regarding the following dispute:

Mr (organisation X) has requested the intervention of the PCT following their request that are investigated for the following reason XXX.

Mr X has included background correspondence (attached to the email accompanying this letter) which includes his view that the behaviour of Y by performing XX constitutes a breach of the *fourth principle* of Principles and Rules for Cooperation and Competition. (Applicable Principle inserted into the letter)

For reference, the fourth PRCC Principle reads “Commissioners and providers should foster patient choice and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare.”

As stated in the Operating Framework, a Competition Panel has been set up to handle disputes of this nature. The National Competition Panel requires that every effort is under taken to achieve local resolution in the first instance and as such the PCT is now obliged, as per the Operating Framework 2008/9 guidelines, to review this complaint and give advice and or take appropriate action.

This letter is written jointly to all parties to the dispute to ensure transparency and fairness. Attached as an Annex to this letter is the process the PCT will follow to seek resolution of the dispute. The Annex contains the actions that the PCT expects from all parties and in turn, what they can expect from the PCT

The process is described in Annex 1 and the timescales are tight to ensure a speedy resolution. It is in your interest to meet all the requirements of this process to ensure that the panel is in possession of all the facts. Please note deviation from the timescale or actions may result in your position being mis-represented when the PCT sits to review the dispute. A full description and further information can be found on the PCT website:

If you have any queries please contact the Competition Dispute Resolution Case Manager at the address above.

Yours sincerely
PCT Competition Dispute Resolution Chair

cc. the other parties to the dispute

**Annex 1 –
Process for Principles and Rules for Cooperation and Competition dispute resolution by
the PCT**

Stage 1 – Evidence Gathering and Validation

Background

The correspondence received by the PCT to date must be validated. Additionally, there may be other evidence / documentation / correspondence that a party may deem relevant for the PCT to consider.

Action Required (5 working days)

- **ACTION 1a**
All parties to confirm receipt of this letter and understanding of the process
- **ACTION 1b**
A short statement from each party containing a summary of their position in relation to this dispute, cross-referenced to Principles and Rules for Cooperation and Competition principles and other PCT guidance as appropriate. Documentation / correspondence (or other) used as evidence should be clearly referenced. (Please note, any documents received by the PCT may be subject to Freedom of Information Act disclosure)
- **ACTION 1c**
All parties to confirm the documentation attached to the email accompanying this letter are correct copies of actual correspondence
- **ACTION 1d**
All parties to provide full details of other organisations involved (including regulatory bodies (for example) that may be aware of the dispute)

Stage 2 – Evidence Review and Advice Given to Parties

Background

All documentation and evidence from Action 1 above will be reviewed by a team of suitably qualified PCT personnel, seeking independent / expert advice if required.

Action Required (15 working days)

- **ACTION 2a**
PCT to review all available evidence, applying Principles and Rules for Cooperation and Competition to the dispute
- **ACTION 2b**
PCT may, should it deem necessary, request a dialogue or seek attendance of a party (ies) to the dispute
- **ACTION 2c**
Following Actions 2a and 2b, the PCT will determine whether there is an actual / potential breach to Principles and Rules for Cooperation and Competition and will advise a proposed course of action

Stage 3 – Resolution of Dispute ensuring compliance of Principles and Rules for Cooperation and Competition

Background

Following issuance of advice, parties will be expected to work towards solution

Action Required (timescales as appropriate)

- **ACTION 3a –**
Parties to carry out the advice / actions suggested by the PCT to remedy, or avoid a breach of the Principles and Rules for Cooperation and Competition
- **ACTION 3b –**
The PCT will monitor compliance and ensure breach of the Principles and Rules for Cooperation and Competition does not occur

Appendix 9
Appeal Process against a PCT Decision

