

Response from Competition Panel of the East of England SHA

10 July 2009

I am writing to express the views of the Competition Panel of the East of England SHA on the Notice of Possible Recommendations recently published as part of your review of the use of NHS consultants' non-contracted hours. We are commenting at the request of the East of England SHA, having had the opportunity to discuss the issues with them.

In line with the East of England's initial response in May to the issues raised by this review, we have considered the possible recommendations from the perspective of ensuring that adequate choice and competition exist within the NHS system. To achieve this objective it is highly important to ensure that all provider organisations have the ability to secure clinical resource in a reasonable manner in order to treat NHS patients. As a general principle, we would therefore tend to view any direct or indirect pressure applied by employers on NHS clinicians to prevent them giving their non-contracted hours to competing bodies as anti-competitive.

Subject to the comments below, we support option 7c. in your Notice of Possible Recommendations, which prevents employing trusts from restricting the use of consultants' non-contracted hours for diagnosing and treating patients of other NHS-funded services, but allows restrictions aimed at preventing consultants having more strategic or financial involvement with competitors. This option appears to strike a fair balance between allowing use of non-contracted hours for clinical activities whilst protecting employing trusts' legitimate commercial interests through, for example, not allowing their employees to be directly involved in preparing tenders for NHS funded work in direct competition with them.

Our comments on 7c are:

- The wording of sub-paragraph (i) should be amended to make clear that this is a prohibition on consultants having *executive* management roles with competitors, ie we do not believe that the same limitations should be placed on non-executive directorships, although consultants should obviously declare any such directorships to their employers. We recognise that employing trusts may have concerns over their consultants acting as non-executive directors for potential competitors, but believe that the wider benefit (to the NHS and independent sector) of having senior clinical involvement on boards would outweigh this. Company law provisions on managing conflicts of interests would in any event require any consultant holding a non executive directorship to declare any interest in, and usually refrain from voting on, any contract between the competitor and his or her employer.
- The exception in sub-paragraph (iii) should have some 'de minimis' provision so as not to catch minor interests which are not likely to confer any significant influence or financial benefit, eg minority shareholdings in listed companies.

I would be happy to discuss these comments in more detail if that would be useful, and look forward to seeing the CCP's conclusions on this issue.

Annette Howlett

Chair, Competition Panel NHS East of England