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Interim Guidelines Consultation  
Cooperation and Competition Panel  
1 Horseguards Road  
London  
SW1A 2HQ

30 April 2009

Dear Sir/Madam,

#### **CONSULTATION**

It came to our notice this week that you were undertaking a consultation on guidance documents. Having downloaded them, we were surprised to see that we, as the largest NHS trade union with our 470,000 members in health were not included in the stakeholder/circulation list, albeit two other unions – the RCM and RCN were included – assuming appendix 5 is correct.

This is particularly disappointing as we have been working in partnership with the Department of Health and NHS Employers on allied policies such as 'Transforming Community Services'.

It has not been possible for us to make detailed comments on the draft guidance documents in the short time available but we would offer the following general comments and points.

1. The focus of all the documents is about promoting competition between healthcare providers. Whilst we disagree with this approach, we recognise that government policy to improve healthcare services includes competition as a tool.
2. However the emphasis in these documents is upon an ideology that competition is a desirable end in itself that in all cases will bring benefits. We would challenge this as we believe it is quite possible that NHS organisations can and indeed do deliver improved healthcare services through service reviews, mergers, partnership working and greater collaboration between commissioners and providers.
3. Any reasonable person reading these guidelines would, in our view reach a conclusion that anything less than a full-blown procurement programme is likely to fail your panel's tests for competition.
4. Specifically, we do not agree that it is the panel's role to offer 'informal merger advice to parties'. The panel is setting up a quasi-judicial (and in our view over-bureaucratic) process to adjudicate on mergers and it cannot be right that the panel prejudice this

process by giving informal advice. Given the point 9 below, it seems likely that this will be little more than an opportunity for the panel to deter merger but without the more transparent process outlined on the page 14 flow chart.

5. From the beginning of the guidance, there is reference to the aim of the Principles and Rules aiming to create a seamless service. We believe that the decisions of the panel under these guidelines are likely to have the opposite effect of fragmenting the provision of healthcare through unnecessary competition.
6. Our understanding is that currently public services cannot be referred to the Office of Fair Trading (OFT) or the Competition Commission, while EU procurement rules demonstrate that health services are better provided by putting patient care before competition. We find it extremely worrying that this is not reflected in the guidance from the panel, where the emphasis appears to be on creating competition with little reference to the benefits of greater cooperation.
7. In paragraph 4.15 the guidance states that the panel will invite comments from a range of parties, including third parties. However, there is no mention of trade unions that represent staff interests in these matters. Whilst staff concerns may not be of paramount importance to the panel, a decision that fails to take into account staff interests can lead to catastrophic impacts on the ability of providers to deliver services.
8. Section 5 on 'Assessment of the effects of a merger' covers definitions of a market. These assume a theoretical and pure market model that does not exist and is highly unlikely to exist in UK health economies.
9. By setting the bar as low as 25% of 'market share' (paragraph 5.26), the panel is effectively ruling out mergers in every case. Is there a district in the country where two PCT provider arms or an acute Trust would constitute less than 25%? Even if this is not its intention, the message it is sending out is mergers are not going to get approved so do not consider this option.
10. An example of the messages being sent out by these draft guidelines is contained in Paragraph 5.29 where it states, '*The main effect of a horizontal merger is to remove an independent alternative provider of services to patients.*' The document states this as the *main* effect. There is nothing here about improved cooperation between clinicians or economies to be achieved by integrating services, or greater capacity to meet the health needs of local communities. It is clear that the panel is being asked to judge merger plans purely in terms of maximising competition rather than for the benefits to patients.
11. In our view, the disproportionate emphasis on competition and markets throughout these draft guidelines is such that a more appropriate name would be the 'Competition Panel'. As there is so little reference to 'cooperation' in these documents, it is inappropriate and misleading to use the word to describe the work of the panel.
12. We are concerned that the guidelines on 'conduct' provide a route for 'anyone' to make a complaint. In our view this is opening the door to all sorts of people with unresolved (in their terms) grievances to gain fresh oxygen, to allow disgruntled potential providers to frustrate the improvement of healthcare and to allow those ideologically opposed to the principle of public provision to undermine NHS provision.
13. Similar concerns arise from the Procurement Appeals guidelines. This again may provide a route for all sorts of disgruntled people or bodies without a genuine complaint to manipulate an appeals mechanism even where the tender process has clearly followed EU regulations.

14. Finally, we would be grateful if you would ensure that we are directly consulted on any further proposals on the developing role of the panel.

Yours sincerely,

Mike Jackson  
**Senior National Officer**

cc. Nic Greenfield, Director of Workforce Department of Health

cc. Bob Ricketts, Director of System Management and New Enterprise Department of Health