

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 2 – Competition

702. This Chapter provides Monitor with powers to protect and promote patients' interests, by preventing anti-competitive behaviour, by providers, that would harm patients interests'; and by enforcing requirements imposed on commissioners of NHS health care services under regulations made under section 75. Nothing in this Chapter provides power for Monitor to promote competition as an end in itself.
703. To enable Monitor to tackle abuses and restrictions that act against patient interests, these sections give it concurrent powers with the Office of Fair Trading ('the OFT') under the Competition Act 1998 ('the 1998 Act'). This could be used, for example, to allow Monitor to investigate practices by undertakings that might restrict, distort or prevent competition, such as actions to exclude competitors from providing services or agreements to restrict patient choice. It also provides for Monitor to have concurrent functions with the OFT under Part 4 of the Enterprise Act 2002 to refer features of markets for further investigation by the Competition Commission.
704. This Chapter also makes provision about mergers involving NHS foundation trusts and co-operation between Monitor and the OFT.

Section 72 - Functions under the Competition Act 1998

705. This section provides Monitor with concurrent functions with the OFT under Part 1 of the 1998 Act in relation to the provision of health care services in England.
706. Chapter 1 of Part 1 of the 1998 Act prohibits undertakings from reaching certain agreements and decisions and carrying out concerted practices that prevent, restrict or distort competition. For example, it may prohibit organisations from reaching agreements to limit patient choice or apportioning healthcare markets, except where an exemption or exclusion applies. However, it permits beneficial co-operation, for example where the benefits to patients outweigh any disadvantages, in the form of agreements which contribute to improving the production or distribution of goods and services or promoting technical or economic progress, while allowing consumers (i.e. patients) a fair share of the resulting benefit, and which do not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
707. Chapter 2 of Part 1 of the 1998 Act prohibits undertakings from abusing a dominant position in a market. For example, it prohibits organisations with a dominant position from: imposing unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers (i.e. patients); applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them

*These notes refer to the Health and Social Care Act 2012
(c.7) which received Royal Assent on 27 March 2012*

at a competitive disadvantage; or making the conclusion of contracts subject to supplementary obligations unrelated to the contract.

708. Since 2004 the UK has been required to apply EU competition law when applying national competition law. The prohibitions under Chapter 1 and Chapter 2 of the 1998 Act are modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit agreements that prevent, restrict or distort competition, and prohibit abuse of a dominant position.
709. The 1998 Act is generally applied and enforced by the OFT. The OFT is currently responsible for applying and enforcing the Act in relation to health care services.
710. Under the Act, Monitor has concurrent powers with the OFT to conduct investigations where it has reasonable grounds for suspecting that the prohibitions – under either UK or EU law – have been infringed in the provision of health care services in England.
711. Using the concurrent powers, Monitor can also provide remedies for breaches of the prohibitions. It can issue directions to undertakings to bring an infringement to an end and issue fines. For example, Monitor might direct an undertaking to change its conduct, such as ceasing an arrangement that restricted the ability of commissioners to redesign components of services and thereby restricted competition to the detriment of patients and taxpayers. Any revenue from fines would be paid into the consolidated fund.
712. There are some functions of the OFT under the 1998 Act which Monitor does not share. For example, the OFT is responsible for issuing guidance on appropriate levels of penalties for infringements of the prohibitions in the 1998 Act and for making procedural rules to be followed under that Act. Monitor cannot exercise these functions, because the OFT is responsible for issuing this type of guidance and making regulations on the application of the 1998 Act for the economy as a whole. This arrangement is designed to secure consistent application of that Act. However, Monitor is still required to issue advice and information about the application and enforcement of the 1998 Act in relation to health care services.

Section 73 - Functions under Part 4 of the Enterprise Act 2002

713. This section gives Monitor concurrent functions with the OFT under Part 4 of the Enterprise Act 2002 ('the 2002 Act'), in respect of the provision of health care services in England. These powers enable Monitor to make market investigation references (see below) to the Competition Commission.
714. Monitor can make a market investigation reference to the Competition Commission if it has reasonable grounds for suspecting that any features of a market prevent, restrict or distort competition. For example, Monitor might refer a market to the Competition Commission if there are barriers to entry which require more detailed investigation.
715. After receiving a market investigation reference the Competition Commission must investigate and publish a report within two years. If it decides that there is an adverse effect on competition and resulting detrimental effects on consumers (i.e. patients), it also decides whether any action should be taken to remedy this.
716. *Subsection (4)* contains provision requiring Monitor and the OFT to consult each other before exercising their concurrent functions under the 2002 Act for the first time. *Subsection (5)* is designed to avoid duplication by prohibiting both Monitor and the OFT from exercising these functions if the other has already done so in relation to a particular matter.
717. This section also applies section 117 of the 2002 Act so that Monitor is included (insofar as this is relevant to its functions under this section), in the list of persons and bodies to whom it is an offence to knowingly or recklessly supply false or misleading information. Sanctions available to the courts in respect of this offence are set out in section 117 of that Act.

718. There are some functions under Part 4 of the 2002 Act which Monitor does not share. Specifically section 166, which requires the OFT to keep a register of undertakings, and section 171, which requires the OFT to publish guidance about market investigation references. This duty is to remain with the OFT so that guidance is consistent across different sectors.

Section 74 - Competition functions: supplementary

719. This section makes a number of supplementary provisions relating to Monitor's competition functions.
720. *Subsection (1)* states that the concurrent nature of Monitor's powers means that there can be no valid objection that its actions under these powers should have been carried out by the OFT.
721. *Subsections (2) and (3)* make provision about the relationship between Monitor's competition functions and its general duties. Chapter 1 of this Part makes provision about Monitor's general duties and matters to which Monitor must have regard in exercising its functions. Subsection (2) provides that those duties and matters do not apply where Monitor is carrying out its concurrent competition functions under Chapter 2, unless they are matters to which the OFT can also have regard. For example, whilst Monitor and the OFT may both have regard to patients' interests in relation to the provision of healthcare services for the purposes of the NHS, the OFT would not always have regard to considerations relating to promoting research into matters relevant to the NHS. This provision is to avoid inconsistency in the application of competition law, depending on which regulator is exercising the function in a particular instance.
722. *Subsection (4)* adds Monitor to the list of regulators in the Company Directors Disqualification Act 1986 with powers to apply to a court to make a company director disqualification order, where the director's organisation had committed a breach of competition law. The Company Directors Disqualification Act 1986 specifies the issues courts should consider when assessing whether to issue a disqualification order against a director following a breach of competition law.
723. The OFT already has the power to apply to a court to disqualify directors in the health care sector and other industries where there has been a breach of the 1998 Act.
724. *Subsections (5) to (7)* amend the 1998 Act and the 2002 Act to include Monitor in provisions of those Acts which are relevant to Monitor's concurrent powers.

Section 75 – Requirements as to procurement, patient choice and competition

725. This section enables the Secretary of State to make regulations imposing requirements on the NHS Commissioning Board and CCGs in order to ensure good practice in relation to procurement, to ensure the protection and promotion of patients' rights to make choices regarding their NHS treatment and to prevent anti-competitive behaviour by commissioners with regard to health care services. This may include requirements on the use of competitive tendering by commissioners and on securing services without competition (in which case the requirements which would apply would depend on the decision by the commissioner as to which approach would be in patients' best interests). The regulations could also include requirements to manage potential conflicts between the interests involved in commissioning services and the interests involved in providing them (*subsection (3)*). Where a contract is for goods and services, *subsection (2)* provides that the regulations will only apply where the value of the part of the contract for services is greater than the value of the goods. This is intended to ensure that the regulations only capture contracts that are primarily for services rather than goods.
726. *Subsection (4)* allows for regulations to provide for exemptions in relation to particular arrangements.

Section 76 – Requirements under section 75: investigations, declarations and directions

727. This section makes provision for what may be included in regulations made under the previous section about Monitor's powers to investigate and remedy breaches of the regulations. Monitor could be given the power to investigate a breach of any of the requirements in the regulations following a complaint by an interested party and to initiate an investigation where it has reasonable grounds to suspect that there has been a breach of the requirements in the regulations not to engage in anti-competitive behaviour. It could also be given powers to require commissioners to provide information and explanations of that information during an investigation.
728. *Subsections (3) to (5)* make provision for the regulations to confer on Monitor powers to declare, in specified circumstances, that an arrangement for the provision of services is ineffective (that is, to declare a contract void). *Subsection (4)* provides that those powers are only be exercisable in circumstances where there has been a sufficiently serious breach of the regulations. Where Monitor deems a particular arrangement for service provision to be ineffective, it would be void, but this would not affect any right acquired or liability incurred under the existing arrangements for service provision.
729. *Subsection (6)* provides that regulations may give Monitor a further power to direct the NHS Commissioning Board or a CCG to take action to address a breach of the regulations. This could include requiring the commissioner to take steps to prevent or mitigate failures, to comply with the regulations or to remedy any such breach, to modify a tendering process or vary an arrangement for the provision of services which was made as a result of a tendering process, or not to exercise such functions in such a manner as may be prescribed in the regulations.
730. *Subsections (7) and (8)* make provision about actions brought for a failure to comply with the regulations. In the event of loss or damage caused by a failure to comply with a requirement imposed by the regulations, a person affected would be able to bring an action, unless the regulations restricted this. Regulations may also provide for a specified defence to such an action.
731. There may be circumstances in which it is possible for a person to bring an action under both the regulations made under the previous section and the Public Contracts Regulations 2006 (S.I. 2006/5). In those circumstances, any person bringing an action under the Public Contracts Regulations 2006 is precluded from bringing an action under regulations made under the previous section in relation to the same matter.

Section 77 – Requirements under section 75: undertakings

732. This section allows regulations under section 75 to confer on Monitor a power to accept undertakings ('section 77 undertakings') in lieu of issuing a direction or declaring an arrangement ineffective under section 76. This enables commissioners who are in breach of the regulations to offer undertakings that would address the breach. The undertakings could be to take any of the actions described in paragraphs (a) to (e) of subsection (6) of section 76 or any other actions specified in the regulations.
733. Where Monitor accepts an undertaking, *subsection (3)* requires it to cease any investigation and any actions it was taking to bring about an end to the breach, unless the commissioner in question failed to comply with the undertaking. Where a commissioner has partly complied with an undertaking Monitor is required to take this into account when determining further action.
734. This section also gives effect to Schedule 9.

Schedule 9 – Requirements under section 75: undertakings

735. This Schedule provides further detail about the process for entering into section 77 undertakings. Monitor must consult people it considers appropriate on its procedure for

entering into section 77 undertakings and must publish this. Monitor must also publish any section 77 undertakings that it accepts, removing any commercial information that would harm business interests and information relating to a person's private affairs which might affect that person's personal interests. An undertaking can be varied by mutual agreement.

736. Monitor may determine that an undertaking has been complied with and issue a certificate of compliance accordingly. The person that has given the undertaking can also apply for a certificate of compliance, in such a form and manner as prescribed by Monitor, at any time, and Monitor must respond to such an application within 14 days.
737. Monitor may refuse to issue a certificate of compliance. A person whose application has been refused can complain to the First-tier Tribunal on the grounds that the decision is based on an error of fact, that it is wrong in law or that it is unfair or unreasonable. The First-tier Tribunal can confirm Monitor's decision or can direct that it does not have effect.
738. Where Monitor thinks that false or misleading information has been supplied, it can treat that as a failure to comply with the undertaking. If it treats it as a failure to comply, it must revoke any compliance certificate given to the person in question.

Section 78 - Guidance

739. This section requires Monitor to issue guidance on compliance with the regulations made under section 75 and on how Monitor intends to enforce those regulations. Monitor must consult the NHS Commissioning Board and others that it deems appropriate before publishing the guidance. It must also obtain the approval of the Secretary of State before publishing the first version of the guidance. When making subsequent revisions of its guidance it must consult with the NHS Commissioning Board and others that Monitor deems appropriate before publication. This and other requirements in the Act to publish guidance do not affect Monitor's ability to publish guidance on any other matter relating to any of its duties or functions.

Section 79 - Mergers involving NHS foundation trusts

740. This section applies Part 3 of the 2002 Act, which sets out the general merger control regime for enterprises in the UK, to NHS foundation trusts where it would otherwise be uncertain as to whether those provisions would apply to them. This section is intended to avoid legal uncertainty as to when the merger control regime in Part 3 of the 2002 Act would apply to mergers involving NHS foundation trusts. This provision allows for a single regime for merger control, which avoids duplication of the roles of Monitor and the OFT and eliminates risk of double-jeopardy. The OFT must notify Monitor of a merger situation involving one or more Foundation Trusts Monitor in turn must advise the OFT on the likely costs and benefits to patients which would arise. The OFT is obliged to consider the advice from Monitor as part of their general public law duties.

Section 80 - Co-operation with the Office of Fair Trading

741. This section requires Monitor and the OFT to co-operate in exercising their concurrent functions under the 1998 Act and the 2002 Act. In particular, they must share relevant information that would enable and assist the other to exercise its functions and provide such other assistance as the other may require.