

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 2 – Competition

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.