



Health and Social Care Act 2012

2012 CHAPTER 7

PART 3

REGULATION OF HEALTH AND ADULT SOCIAL CARE SERVICES

CHAPTER 2

COMPETITION

72 Functions under the Competition Act 1998

- (1) The functions referred to in subsection (2) are concurrent functions of Monitor and the Office of Fair Trading.
- (2) The functions are those that the Office of Fair Trading has under Part 1 of the Competition Act 1998, other than sections 31D(1) to (6), 38(1) to (6) and 51, so far as relating to any of the following which concern the provision of health care services in England—
 - (a) agreements, decisions or concerted practices of the kind mentioned in section 2(1) of that Act (anti-competitive practices),
 - (b) conduct of the kind mentioned in section 18(1) of that Act (abuse of dominant position),
 - (c) agreements, decisions or concerted practices of the kind mentioned in Article 101 of the Treaty on the Functioning of the European Union (anti-competitive practices),
 - (d) conduct which amounts to abuse of the kind mentioned in Article 102 of that Treaty (abuse of dominant position).
- (3) So far as necessary for the purposes of subsections (1) and (2), references in Part 1 of the Competition Act 1998 to the Office of Fair Trading are to be read as including references to Monitor, except in sections 31D(1) to (6), 38(1) to (6), 51, 52(6) and (8) and 54.

73 Functions under Part 4 of the Enterprise Act 2002

- (1) The functions referred to in subsection (2) are concurrent functions of Monitor and the Office of Fair Trading.
- (2) The functions are those that the Office of Fair Trading has under Part 4 of the Enterprise Act 2002 (market investigations), other than sections 166 and 171, so far as relating to activities which concern the provision of health care services in England.
- (3) So far as necessary for the purposes of subsections (1) and (2), references in Part 4 of the Enterprise Act 2002 to the Office of Fair Trading (including references in provisions of that Act applied by that Part) are to be read as including references to Monitor, except in sections 166 and 171.
- (4) Before the Office of Fair Trading or Monitor first exercises functions which are exercisable concurrently by virtue of this section, it must consult the other.
- (5) Neither the Office of Fair Trading nor Monitor may exercise in relation to any matter functions which are exercisable concurrently by virtue of this section if functions which are so exercisable have been exercised in relation to that matter by the other.
- (6) Section 117 of the Enterprise Act 2002 (offences of supplying false or misleading information) as applied by section 180 of that Act is to have effect so far as relating to functions exercisable by Monitor by virtue of this section as if the references in section 117(1)(a) and (2) to the Office of Fair Trading included references to Monitor.

74 Competition functions: supplementary

- (1) No objection may be taken to anything done by or in relation to Monitor under the Competition Act 1998 or Part 4 of the Enterprise Act 2002 on the ground that it should have been done by or in relation to the Office of Fair Trading.
- (2) Subject to subsection (3), sections 62 and 66 (general duties of Monitor) do not apply in relation to anything done by Monitor in the carrying out of its functions by virtue of section 72 or 73.
- (3) In the carrying out of any functions by virtue of section 72 or 73, Monitor may nevertheless have regard to any of the matters in respect of which a duty is imposed by section 62 or 66 if it is a matter to which the Office of Fair Trading is entitled to have regard in the carrying out of those functions.
- (4) In section 9E of the Company Directors Disqualification Act 1986 (specified regulators in cases of disqualification for competition infringements), in subsection (2) after paragraph (e) insert “;
 - (f) Monitor.”
- (5) In section 54 of the Competition Act 1998, in subsection (1) (definition of “regulator” for the purposes of Part 1 of that Act)—
 - (a) omit the “and” preceding paragraph (g), and
 - (b) after that paragraph insert “; and
 - (h) Monitor.”
- (6) In section 136 of the Enterprise Act 2002 (investigations and reports on market investigation references)—

Status: This is the original version (as it was originally enacted).

- (a) in subsection (7) (meaning of “relevant sectoral enactment”), at the end insert—
 - “(i) in relation to Monitor, section 73 of the Health and Social Care Act 2012.”,
 - (b) in subsection (8) (meaning of “relevant sectoral regulator”), for “Communications or” substitute “Communications,”, and
 - (c) in that subsection, after “Utility Regulation” insert “or Monitor”.
- (7) In section 168 of that Act (regulated markets)—
- (a) in subsection (3) (meaning of “relevant action”), after paragraph (o) insert—
 - “(p) modifying the conditions of a licence issued under section 87 of the Health and Social Care Act 2012.”,
 - (b) in subsection (4) (meaning of “relevant statutory functions”), after paragraph (q) insert—
 - “(r) in relation to any licence issued under section 87 of the Health and Social Care Act 2012, the duties of Monitor under sections 62 and 66 of that Act.”, and
 - (c) in subsection (5) (meaning of “sectoral regulator”), after paragraph (i) insert—
 - “(ia) Monitor.”.

75 Requirements as to procurement, patient choice and competition

- (1) Regulations may impose requirements on the National Health Service Commissioning Board and clinical commissioning groups for the purpose of securing that, in commissioning health care services for the purposes of the NHS, they—
 - (a) adhere to good practice in relation to procurement;
 - (b) protect and promote the right of patients to make choices with respect to treatment or other health care services provided for the purposes of the NHS;
 - (c) do not engage in anti-competitive behaviour which is against the interests of people who use such services.
- (2) Requirements imposed by regulations under this section apply to an arrangement for the provision of goods and services only if the value of the consideration attributable to the services is greater than that attributable to the goods.
- (3) Regulations under this section may, in particular, impose requirements relating to—
 - (a) competitive tendering for the provision of services;
 - (b) the management of conflicts between the interests involved in commissioning services and the interests involved in providing them.
- (4) The regulations may provide for the requirements imposed, or such of them as are prescribed, not to apply in relation to arrangements of a prescribed description.

76 Requirements under section 75: investigations, declarations and directions

- (1) Regulations under section 75 may confer on Monitor—
 - (a) a power to investigate a complaint that the National Health Service Commissioning Board or a clinical commissioning group has failed to comply with a requirement imposed by the regulations;

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- (b) a power to investigate on its own initiative whether the Board or a clinical commissioning group has failed to comply with a requirement imposed by virtue of section 75(1)(c);
 - (c) a power to require the Board or a clinical commissioning group to provide it with such information as Monitor may specify for the purposes of an investigation it carries out by virtue of paragraph (a) or (b);
 - (d) a power to require the Board or a clinical commissioning group to provide an explanation of such information as it provides by virtue of paragraph (c).
- (2) A power conferred by virtue of subsection (1)(a) is exercisable only where Monitor considers that the person making the complaint has sufficient interest in the arrangement to which the complaint relates.
- (3) Regulations under section 75 may confer on Monitor a power to declare that an arrangement for the provision of health care services for the purposes of the NHS is ineffective.
- (4) A power conferred by virtue of subsection (3) is exercisable only in prescribed circumstances and subject to prescribed restrictions and only where Monitor is satisfied that—
 - (a) the National Health Service Commissioning Board or a clinical commissioning group has failed to comply with a requirement of regulations under section 75, and
 - (b) the failure is sufficiently serious.
- (5) On a declaration being made by virtue of subsection (3), the arrangement is void; but that does not affect—
 - (a) the validity of anything done pursuant to the arrangement,
 - (b) any right acquired or liability incurred under the arrangement, or
 - (c) any proceedings or remedy in respect of such a right or liability.
- (6) Regulations under section 75 may confer on Monitor a power to direct the National Health Service Commissioning Board or a clinical commissioning group—
 - (a) to put in place measures for the purpose of preventing failures to comply with requirements imposed by the regulations or mitigating the effect of such failures;
 - (b) to remedy a failure to comply with such a requirement;
 - (c) not to exercise in a prescribed manner prescribed functions in relation to arrangements for the provision of health care services;
 - (d) to vary or withdraw an invitation to tender for the provision of health care services;
 - (e) to vary an arrangement for the provision of health care services made in consequence of putting the provision of the services out to tender.
- (7) A failure to comply with a requirement imposed by regulations under section 75 which causes loss or damage is actionable, except in so far as the regulations restrict the right to bring such an action.
- (8) Regulations under section 75 may—
 - (a) provide for a specified defence to such an action;
 - (b) prevent a person who has brought such an action under the Public Contracts Regulations 2006 (S.I. 2006/5) from bringing such an action under the

regulations under section 75 in respect of the whole or part of the same loss or damage.

77 Requirements under section 75: undertakings

- (1) Regulations under section 75 may confer on Monitor a power to accept an undertaking (referred to in this Chapter as a “section 77 undertaking”) from the National Health Service Commissioning Board or a clinical commissioning group to take such action of a kind mentioned in subsection (2) as is specified in the undertaking within such period as is so specified.
- (2) The specified action must be—
 - (a) action of a description given in paragraphs (a) to (e) of section 76(6), or
 - (b) action of such a description as may be prescribed.
- (3) Where Monitor accepts a section 77 undertaking then, unless the Board, or (as the case may be) the clinical commissioning group from whom the undertaking is accepted, has failed to comply with the undertaking or any part of it, Monitor may not—
 - (a) continue to carry out the investigation in question,
 - (b) make a declaration by virtue of subsection (3) of section 76 in relation to the arrangement in question, or
 - (c) give a direction by virtue of subsection (6) of that section in relation to the failure in question.
- (4) Where the Board, or (as the case may be) the clinical commissioning group from whom Monitor has accepted a section 77 undertaking, has failed to comply fully with the undertaking but has complied with part of it, Monitor must take the partial compliance into account in deciding whether to do something mentioned in paragraphs (a) to (c) of subsection (3).
- (5) Schedule 9 (which makes further provision about section 77 undertakings) has effect.

78 Guidance

- (1) Monitor must publish guidance about—
 - (a) compliance with requirements imposed by regulations under section 75;
 - (b) how it intends to exercise powers conferred on it by regulations under that section.
- (2) Before publishing guidance under subsection (1)(a) or (b), Monitor must consult—
 - (a) the National Health Service Commissioning Board, and
 - (b) such other persons as Monitor considers appropriate.
- (3) Before publishing guidance under subsection (1)(a) or (b), Monitor must obtain the approval of the Secretary of State.
- (4) Monitor may revise guidance under this section and, if it does so, must publish the guidance as revised.
- (5) Before publishing guidance revised under subsection (4), Monitor must consult the persons mentioned in subsection (2).

79 Mergers involving NHS foundation trusts

- (1) For the purposes of Part 3 of the Enterprise Act 2002 (completed and anticipated mergers), each of the following cases is to be treated as being (in so far as it would not otherwise be) a case in which two or more enterprises cease to be distinct enterprises.
- (2) The first case is where the activities of two or more NHS foundation trusts cease to be distinct activities.
- (3) The second case is where the activities of one or more NHS foundation trusts and the activities of one or more businesses cease to be distinct activities.
- (4) Where the Office of Fair Trading decides to carry out an investigation under Part 3 of the Enterprise Act 2002 of a matter involving an NHS foundation trust, it must as soon as reasonably practicable notify Monitor.
- (5) As soon as reasonably practicable after receiving a notification under subsection (4), Monitor must provide the Office of Fair Trading with advice on—
 - (a) the effect of the matter under investigation on benefits (in the form of those within section 30(1)(a) of the Enterprise Act 2002 (relevant customer benefits)) for people who use health care services provided for the purposes of the NHS, and
 - (b) such other matters relating to the matter under investigation as Monitor considers appropriate.
- (6) In subsections (2) and (3), a reference to the activities of an NHS foundation trust or a business includes a reference to part of its activities.
- (7) In this section, “enterprise” and “business” each have the same meaning as in Part 3 of the Enterprise Act 2002.

80 Co-operation with the Office of Fair Trading

- (1) Monitor and the Office of Fair Trading must co-operate with each other in the exercise of their respective functions under the Competition Act 1998 and the Enterprise Act 2002.
- (2) In particular each must give the other—
 - (a) such information in its possession as the other may require to enable it to exercise those functions,
 - (b) such other information in its possession as it considers would assist the other in exercising those functions, and
 - (c) such other assistance as the other may require to assist it in exercising those functions.