

# Health and Social Care Act

After fourteen months of intense political scrutiny, the Health and Social Care Act 2012 (HSCA 2012) received Royal Assent on 27 March 2012, marking the most extensive reorganisation of the National Health Service (the NHS) in England since its inception. Arguably one of its most controversial aspects is the introduction of significant competition reforms in the healthcare sector.

## Overview of the competition reforms

Whilst shying away from the fully-fledged market-based healthcare system originally envisaged by the Secretary of State for Health, HSCA 2012 introduces a number of competition reforms in the healthcare sector. Principal amongst these are the increased powers of the sector regulator – Monitor.

Like other sector regulators such as OFCOM and OFGEM, Monitor is accorded concurrent competition powers with the Office of Fair Trading (OFT).

Other reforms introduced by HSCA 2012 include according Monitor specific powers in relation to procurement; responsibility for licensing healthcare providers and for setting pricing tariffs for NHS services.

The merger control rules under the Enterprise Act 2002 (EA 2002) are clarified to expressly include mergers between Foundation Trusts or between Foundation Trusts and other “businesses”.

Initial proposals to impose a primary duty on Monitor to promote

competition were watered down, with the focus now being placed on making sure competition is fair and that it operates in the interests of patients. This is reflected in Monitor's general duty to exercise its functions with a view to preventing anti-competitive behaviour which is against the interests of patients.



## Concurrent competition powers

One of the most significant changes brought about by HSCA 2012 is the grant to Monitor of concurrent powers in the healthcare sector under the Competition Act 1998 (CA 1998) and Part 4 of the EA 2002. Like the OFT, Monitor will be able to conduct market investigations, and review suspected anti-competitive behaviour and abuses of dominance under both English and EU law. Its CA 1998 powers mean that Monitor will be able to conduct “dawn raids” at business and domestic premises; require the provision of specified documents and

## Key issues

- Increased role of Monitor as sector regulator, responsible for licensing all healthcare providers
- OFT and Monitor to have concurrent powers to apply competition law in healthcare sector
- OFT to review mergers between NHS Foundation Trusts or between NHS Foundation Trusts and other “businesses”

information; apply for director disqualification orders and impose fines of up to 10% of an organisation's total turnover.

Unlike the OFT however, Monitor will not be able to bring a criminal case against individuals suspected of anti-competitive behaviour.

The OFT has shown increasing interest in the healthcare sector of late – for example, its referral of the private healthcare market to the Competition Commission and its investigation into information exchange between eight NHS Hospital Trusts.

It will therefore be interesting to see whether it is the OFT or Monitor that

## Monitor's competition powers

	General power	Specific powers
Competition Act	Investigate anti-competitive agreements and abuses of dominance	<ul style="list-style-type: none"> <li>■ Conduct 'dawn raids' of business and domestic premises</li> <li>■ Require the provision of specified documents or information</li> <li>■ Impose fines up to 10% of turnover</li> <li>■ Apply for director disqualification orders</li> </ul>
Merger Review	FT to FT, or FT and another 'business' fall within OFT remit	<ul style="list-style-type: none"> <li>■ Refer merger to the Competition Commission for in-depth review</li> <li>■ Accept remedies in lieu of a CC reference</li> </ul>
Other	Undertake market studies	<ul style="list-style-type: none"> <li>■ Refer market to Competition Commission for in-depth review</li> <li>■ Accept remedies in lieu of CC reference</li> <li>■ Make recommendations to Government</li> </ul>

takes the lead on competition enforcement in the healthcare sector.

Other important questions for the exercise of competition powers in the healthcare sector are:

- what NHS bodies are considered to be "undertakings" for CA 1998 purposes;
- whether Monitor prefers to deal with competition issues using its licensing or CA 1998 powers (see further Licensing powers, below); and
- the willingness of the OFT and Monitor to impose sanctions such as fines on NHS entities for competition breaches.

### Mergers involving Foundation Trusts

HSCA 2012 is intended to streamline

the review of NHS mergers in order to help meet the Government's target deadline of April 2014 for the conversion of all NHS trusts to Foundation Trust status.

HSCA 2012 clarifies that mergers between Foundation Trusts or between Foundation Trusts and other "businesses" fall within the 'normal' merger control regime and are reviewable by the OFT.

One area of potential uncertainty is whether any mergers between a Foundation Trust and an NHS Trust could be reviewable by the OFT on the basis that – in some circumstances – an NHS Trust might fall within the definition of a "business" under the EA 2002.

If the OFT decides to review a proposed merger involving an NHS Foundation Trust, it must notify

Monitor as soon as reasonably practicable. Monitor, in turn, is obliged to advise the OFT on the anticipated benefits the proposed merger may have for patients. Where the OFT thinks a merger might result in a loss of competition it can nevertheless clear the merger if it believes that the loss of competition is outweighed by relevant patient benefits. How the OFT will approach the issue of patient benefits remains to be seen. The OFT has traditionally been highly sceptical regarding efficiency arguments put forward by merging parties in other sectors.

### Licensing powers

All providers of NHS healthcare services will need to be licensed by Monitor under HSCA 2012 unless covered by an exemption. Monitor will be able to impose conditions on providers for the purposes of (amongst other things) regulating prices and preventing anti-competitive behaviour which is against the interests of patients. If a licence holder objects to the imposition or modification of a licence condition, Monitor may refer the matter to the Competition Commission.



Monitor has recently consulted on the first version of the NHS provider licence and has proposed the introduction of a competition oversight condition. This condition would prohibit licensees from entering into anti-competitive agreements or engaging in anti-competitive conduct,

to the extent that it is against the interests of healthcare users.

Monitor will therefore be able to take action against anti-competitive conduct both through enforcing the licence and through use of its CA 1998 powers.

### Pricing decisions

The HSCA 2012 requires Monitor to publish a national tariff setting the price payable for the provision of services for the purposes of the NHS. The services specified and their pricing will need to be agreed with the NHS Commissioning Board (which will have primary responsibility for determining the services for pricing). Where sufficient clinical commissioning groups or providers object to the methods proposed to be used to determine prices, Monitor cannot publish the national tariff unless the matter has been referred to the Competition Commission for review.

### Procurement

Under HSCA 2012, the Secretary of State can make regulations imposing requirements on the NHS Commissioning Board and clinical commissioning groups to ensure good practices are adopted in relation to procurement and the protection of patient choice and to prevent anti-competitive behaviour. In particular, competitive tendering for the provision of services may be required. The Department of Health has recently consulted on proposals for regulations under this power, including a draft requirement prohibiting commissioners from entering agreements or taking other actions which restrict competition to the extent that this is against the interests of people who use services.

### Timing and next steps

Many of the provisions of HSCA 2012 are already in force. Monitor was established in July 2012 and its executive team took up their posts in November. The merger provisions also came into force in July and the OFT announced its review of its first Foundation Trust merger on 22 October 2012.

Monitor's licensing regime is anticipated to come into effect in April 2013 for Foundation Trusts, extending to other healthcare providers in April 2014, with Monitor's concurrent competition powers also anticipated to commence in April 2013.

### Comment

HSCA 2012 introduces a number of radical changes to the public healthcare system in England, both structural and substantive in nature. One fundamental uncertainty relates to whether NHS Trusts should be considered as 'undertakings' for the purposes of CA 1998 and 'businesses' for the purposes of the EA 2002 merger control provisions.

Another key area of interest will be the relationship between Monitor and the OFT.

In the merger context, the OFT will need to accommodate Monitor's view of the benefits a merger will bring to patients, but is likely to be slow to "credit" any such benefits against any loss of competition unless they are shown to be merger specific and are substantiated with compelling evidence.

The balance of enforcement of CA 1998 between the OFT and Monitor will also be a key issue. Monitor has the sector-expertise, but has a much broader mandate to promote the provision of healthcare services in an

integrated way – will Monitor be able to act as an effective safeguard against the disproportionate application of competition law in the healthcare sector?

There is clearly a risk of confusion and unpredictability on the scope of competition law in the NHS. Strong guidance and clear competition compliance training will be needed to help healthcare providers navigate their way safely through this regulatory uncertainty.

### Contacts



**Alastair Mordaunt**  
Partner  
T: +44 207 006 4966  
E: [alastair.mordaunt@cliffordchance.com](mailto:alastair.mordaunt@cliffordchance.com)



**Richard Blewett**  
Senior Associate  
T: +32 2 533 5977  
E: [richard.blewett@cliffordchance.com](mailto:richard.blewett@cliffordchance.com)

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance LLP 2012

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

---

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh\* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.