



# National Tariff Methodology Reference Rules under the Health and Social Care Act 2012

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## 1. Introduction, citation and commencement

- 1.1 These Rules are made in exercise of the powers conferred on the Competition Commission (CC) by paragraph 11(1) of Schedule 12 to the Health and Social Care Act 2012<sup>1</sup> for the purpose of regulating the procedure for determinations on references under section 120 of that Act.
- 1.2 Before making these Rules the CC consulted such persons as it considered appropriate. No objections were raised to the procedural rules.
- 1.3 These Rules are to be known as the ‘National Tariff Methodology Reference Rules’.
- 1.4 These Rules will have effect from 12 February 2014.

## 2. Interpretation and application

- 2.1 In these Rules:
- 2.2 **‘the Act’** means the Health and Social Care Act 2012;
  - (a) **‘the CC’** means the Competition Commission;
  - (b) **‘electronic communication’** has the same meaning as in the Electronic Communications Act 2000;<sup>2</sup>
  - (c) **‘objector’** means:
    - (i) in relation to a reference where the condition in section 120(2)(a) of the Act is not met, each clinical commissioning group and each relevant provider who objected to the proposed method to which the reference relates; and
    - (ii) in relation to a reference made where the condition in section 120(2)(b) or (c) of the Act is not met, each relevant provider who objected to that proposed method;<sup>3</sup>
  - (d) **‘parties’** means Monitor and objectors who make representations to the CC under paragraph 2(1) of the Schedule;
  - (e) **‘reference’** means a reference to the CC under section 120 of the Act;
  - (f) **‘the Schedule’** means Schedule 12 to the Act;
  - (g) **‘statement of truth’** means, in relation to a document, a statement that the person producing the document believes the matters stated as facts in the document to be true;
  - (h) **‘sensitive information’** means information which is either:
    - (i) commercial information, the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;  
or

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<sup>1</sup> 2012 c.7.

<sup>2</sup> See section 148 of the Act and section 15(1) of the Electronic Communications Act 2000 c.7.

<sup>3</sup> See paragraph 1(4) of the Schedule.

- (ii) information relating to the private affairs of an individual, the disclosure of which would, or might, significantly harm that person's interests;<sup>4</sup> and
  - (f) 'working day' means any day other than:
    - (i) a Saturday or a Sunday;
    - (ii) Christmas Day or Good Friday; or
    - (iii) a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971.<sup>5</sup>
- 2.3 These Rules are supplementary to the provisions of the Act. In the event of any conflict between the Rules and the Act, the latter will prevail.

### 3. Overriding objective

- 3.1 The overriding objective of these Rules is to enable the CC to dispose of references fairly and efficiently within the time periods prescribed by the Act and under these Rules. The CC will apply these Rules so as to give effect to the overriding objective.
- 3.2 Parties must assist the CC to further the overriding objective.

### 4. Reference

- 4.1 To make a reference to the CC, Monitor must send a reference marked National Tariff Methodology Reference, to the CC.
- 4.2 Monitor must specify in its reference:<sup>6</sup>
- (a) its reasons for proposing the method to which the reference relates; and
  - (b) its representations as to why the following grounds do not apply:
    - (i) that it failed to have regard to the matters to which it must have regard in carrying out those of its functions to which the determination relates;
    - (ii) that the decision was based, wholly or partly, on an error of fact;
    - (iii) that the decision was wrong in law.
- 4.3 Monitor must include with its reference:
- (a) particulars of any other documents or information which it contends that the CC should have regard to in determining the reference;
  - (b) the name and address of any of its legal representatives;
  - (c) an address in the UK, together with an address for electronic communications, for the purpose of serving notices and other documents on it; and

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<sup>4</sup> See section 121(10) of the Act.

<sup>5</sup> 1971, c.80; see paragraph 2(5) of the Schedule.

<sup>6</sup> See paragraph 1(1) of the Schedule.

(d) in a case where it considers that the material referred to in this Rule contains sensitive information, a version of the material with any sensitive information redacted, in a form suitable for publication on the CC's website.

## 5. Representations by objectors

5.1 Under paragraphs 1(2) and 1(3) of the Schedule Monitor must give notice and a copy of the reference to each objector.

5.2 Under paragraph 2(1) of the Schedule if an objector wishes to make representations to the CC on the matters specified in the reference, they must do so by sending them to the CC before the end of the period of ten working days<sup>7</sup> beginning with the day on which the objector receives the notice referred to in Rule 5.1.<sup>8</sup>

5.3 Objectors must include in their representations:

(a) the reasons why they consider that Monitor's decision was wrong on one or more of the following grounds:<sup>9</sup>

- (i) that Monitor failed to have regard to the matters to which Monitor must have regard in carrying out those of its functions to which the determination relates;
- (ii) that the decision was based, wholly or partly, on an error of fact;
- (iii) that the decision was wrong in law;

(b) particulars of what changes (if any) to the method in question the objector considers the CC should direct be made;

(c) any documents they contend the CC should have regard to in determining the reference;

(d) the name and address of any legal representatives of the objector;

(e) a statement as to whether the objector is willing to be served with notices and other documents by electronic communication, and if so, an address suitable for that purpose, and if not, an address in the UK for that purpose; and

(f) in a case where they consider that the representations or documents contain sensitive information, a version of the representations or documents with any sensitive information redacted that is in a form suitable for publication on the CC's website.

5.4 The objector must send a copy of the representations to Monitor at the same time as, or as soon as reasonably practicable after, sending its representations to the CC.<sup>10</sup>

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<sup>7</sup> Paragraph 2(1) of the Schedule.

<sup>8</sup> Paragraph 2(1) of the Schedule.

<sup>9</sup> Section 121(4) of the Act.

<sup>10</sup> Paragraph 2(2) of the Schedule.

## 6. Monitor's reply

- 6.1 If Monitor wishes to reply to an objector's representations, it must do so before the end of the period of ten working days beginning with the day on which Monitor receives the copy referred to in Rule 5.4.<sup>11</sup>
- 6.2 Monitor must send a copy of its reply to the objector who made the representations.<sup>12</sup>

## 7. Publication on the CC's website

- 7.1 The CC may publish on its website, as soon as reasonably practicable after receipt, non-confidential versions of:<sup>13</sup>
- (a) the reference and any supporting documents it considers suitable for publication; and
  - (b) any other material which, in the view of the CC, it is necessary to publish for the purposes of the overriding objective.<sup>14</sup>
- 7.2 The CC must, in accordance with section 121(10) of the Act, publish a non-confidential version of the CC's determination on the reference on its website.

## 8. Administrative timetable

- 8.1 The CC must set an administrative timetable which makes provision for the major stages of the reference.
- 8.2 The administrative timetable may, in particular, include arrangements for the following:
- (a) considering and notifying possible directions;
  - (b) considering submissions and representations;
  - (c) clarifying and verifying information;
  - (d) holding reference management conferences;
  - (e) holding hearings; and
  - (f) publishing the CC's determination.

These stages need not necessarily take place in the order in which they are mentioned in this Rule.

- 8.3 Once the administrative timetable has been drawn up, the CC will publish it on the CC's website.
- 8.4 If, at any point during the course of the determination of the reference, the CC has reason to believe that the administrative timetable will not be met for any reason or shall be revised in the light of the representations by the parties, then the CC may

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<sup>11</sup> Paragraph 2(3) of the Schedule.

<sup>12</sup> Paragraph 2(4) of the Schedule.

<sup>13</sup> See Rules 4.3(d) and 5.3(f) on providing redacted versions of submissions to the CC.

<sup>14</sup> Rule 3.1.

prepare a revised timetable to which the publication requirements contained in Rule 8.3 will apply.

## 9. Procedure and directions

- 9.1 Subject to the provisions of the Act and these Rules, the CC may determine its own procedure.
- 9.2 The CC may at any time on application or of its own motion give such directions as it considers necessary for the conduct of the reference.
- 9.3 The matters on which the CC may give directions include:
- (a) the holding of reference management conferences;
  - (b) the conduct of hearings;
  - (c) the making of further submissions;
  - (d) further evidence that may be required;
  - (e) the appointment and instruction of experts, whether by the CC or by the parties, and the manner in which expert evidence is to be given;
  - (f) the submission of witness statements or expert reports;
  - (g) the examination or cross-examination of witnesses;
  - (h) the fixing of time limits in respect of any aspect of the reference;
  - (i) the disclosure or the production of documents, or classes of documents, between the parties or other persons, including directions as to the treatment of sensitive information;
  - (j) the hearing of a person who is not a party where it is proposed to give a notice or direction in relation to that person; and
  - (k) such other matters as appear to the CC to be necessary to meet the overriding objective.
- 9.4 The CC must give written notice of its directions.
- 9.5 The CC may at any time:
- (a) put questions to the parties;
  - (b) invite the parties to make written or oral submissions on particular matters;
  - (c) direct the parties to provide information or particulars and direct them to produce documents relating to the reference; and
  - (d) require the parties to attend meetings or hearings.

## 10. Oral hearings<sup>15</sup>

- 10.1 The procedure at a hearing will be determined by the CC.
- 10.2 Hearings will be opened and directed by the Chair of the Group or by such other member of the CC as is appropriate.
- 10.3 If no previous direction has been made, at the start of the hearing the attendees will be directed as to the length of their oral submissions, the issues on which the CC wishes to concentrate at the hearing, and the order in which the CC wishes to hear the submissions.

## 11. The production of documents, calling witnesses and the production of written statements<sup>16</sup>

- 11.1 Where the CC requires a person to produce a document, to attend and give evidence or to produce a written statement pursuant to paragraphs 6, 7 and 8 of the Schedule, it may provide a copy of the notice to each party.
- 11.2 The CC must give notice to each objector who made representations in accordance with paragraph 2 of the Schedule of the time and place at which an oral hearing is to be held.<sup>17</sup>
- 11.3 The CC may specify in a notice requiring the production of a written statement issued pursuant to paragraph 8 of the Schedule, the time and place that the statement is to be produced and that it must be verified in accordance with a statement of truth.<sup>18</sup>

## 12. Costs<sup>19</sup>

- 12.1 Where the CC has determined a reference, the CC must make an order for the payment of the costs incurred by the CC in accordance with paragraph 12(1) to (4) of the Schedule.
- 12.2 Where the CC has determined a reference, the CC may also make an order in accordance with paragraph 12(5) of the Schedule requiring Monitor or an objector who made representations in accordance with paragraph 2 of the Schedule to make payments to the other in respect of costs incurred by the other in connection with the determination.
- 12.3 In deciding what order to make under Rule 12.2, the CC must have regard to all the circumstances, including:
  - (a) the conduct of the parties, including:

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<sup>15</sup> See paragraphs 7 and 10 of the Schedule in relation to oral hearings.

<sup>16</sup> See paragraphs 6, 7, 8, 9 and 10 of the Schedule. Paragraphs 6, 7 and 8 of the Schedule provide the CC with powers to issue notices to persons requiring the provision of documents, the attendance at hearings and the making of written statements. Where a person (a) fails to comply with a notice issued or other requirement imposed by these paragraphs; (b) in complying with a notice under paragraph 8, makes a statement that is false in any material particular; or (c) in providing information verified in accordance with a statement of truth required by these Rules, provides information that is false in a material particular, paragraph 9 of the Schedule provides that the High Court may punish the defaulter as if the person had been guilty of contempt of court.

<sup>17</sup> Paragraph 7(3) of the Schedule.

<sup>18</sup> Paragraph 8(3) of the Schedule.

<sup>19</sup> See paragraph 12 of the Schedule.

- (i) the extent to which each party has assisted the CC to meet the overriding objective;
  - (ii) whether it was reasonable for a party to raise, pursue or contest a particular issue; and
  - (iii) the manner in which a party has pursued its case or a particular aspect of its case;
- (b) whether a party has succeeded wholly or in part; and
- (c) the proportionality of the costs claimed.

### 13. Slip rule

- 13.1 Where any notice or directions of the CC contains a clerical error, or a slip or omission, that error, slip or omission may be corrected and a further notice or directions issued by any person who could have made the original notice or directions.

### 14. Sending of documents

- 14.1 Where a person sends a document to the CC which the person considers contains sensitive information, the document should be marked to identify sensitive information.
- 14.2 Sections 148 (service of documents) and 149 (electronic communications) of the Act shall apply to the service of documents referred to in these rules, and unless a person is notified otherwise, any document that is to be sent to the CC under the Act or these Rules may be sent by an electronic communication to: [appeals@cma.gov.uk](mailto:appeals@cma.gov.uk).



