

# ***2014/15 National Tariff Payment System: A Consultation Notice***

## **Annex 5B: Objecting to the method**

**3 October 2013**

## 1 Annex 5B: Objecting to the method

The purpose of this annex is to provide guidance on the process by which Clinical Commissioning Groups (CCGs) and “relevant providers” can object to the method for determining national prices proposed for the *2014/15 National Tariff Payment System*, as set out in this notice. In this annex, we:

- describe what constitutes the proposed method and therefore what might be objected to;
- explain which CCGs and providers can object to the proposed method;
- detail how CCGs and “relevant providers” can submit their objections to the proposed method;
- explain the process for a reference to the Competition Commission (CC); and
- set out the possible timetables for publication of the *2014/15 National Tariff Payment System*.

### 1.1 Scope: what constitutes the ‘method’

The proposals for the *2014/15 National Tariff Payment System*, as set out in this notice, are subject to a statutory consultation process. Stakeholders can comment and give their views on any aspect of the proposals. In addition, however, particular provision is made for commissioners and “relevant providers” to challenge the method or methods proposed for determining national prices under the national tariff.

The 2012 Act makes clear that not all of our proposals for the *2014/15 National Tariff Payment System* can be objected to under this formal process. Specifically, only the “method or methods [Monitor] proposes to use for determining the national prices” of health care services can be formally objected to<sup>1</sup>.

The ‘method’ is the data, methodology and calculations used to arrive at the proposed set of national prices, but not the prices themselves.

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<sup>1</sup> The 2012 Act, sections 118(3)(b) and 120(1).

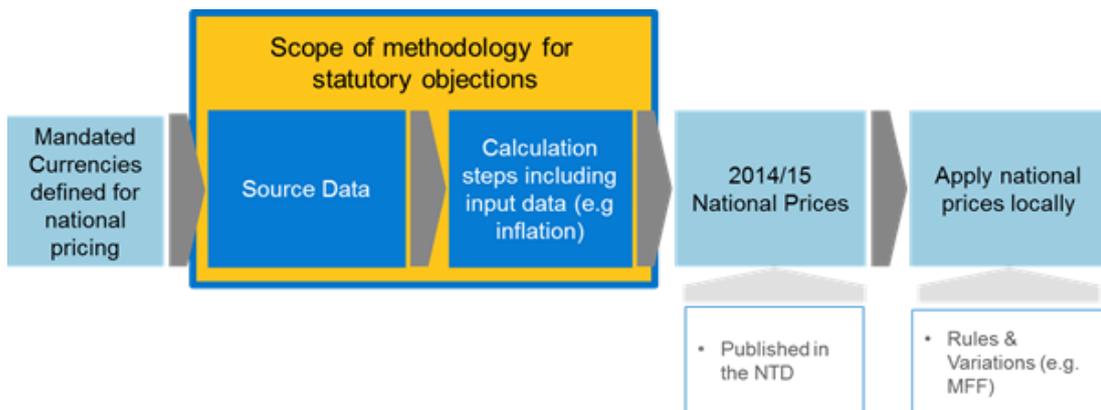
Further, the ‘method’ is separate from and does not include either:

- the proposed national variations; nor
- the rules, methods and principles that we propose to govern local variations, local modifications or local price setting.

In relation to the national variations, these are to be applied to the national prices in the circumstances specified in the national tariff. Such variations are not part of the method for determining those national prices. The national variations include application of the Market Forces Factor (MFF), specialist top-ups and the marginal rate for emergency admissions. CCGs and providers may comment on the proposals for those variations in their response to the consultation, but any objections in those responses do not count for the purpose of the statutory objection process described below.

Figure 5B-1 below illustrates the scope of the proposed method for determining national prices in the *2014/15 National Tariff Payment System*.

**Figure 5B-1: Scope of the proposed method**



Our proposed method for calculating 2014/15 prices for services which currently have a national price under the Payment by Results (PbR) system has a number of elements:

- The starting point for the calculation – the 2013/14 national prices.
- Upward adjustments to reflect various factors which produce cost pressures, such as:
  - pay;
  - general inflation; and

- contributions to the Clinical Negligence Scheme for Trusts (CNST).
- A downward adjustment to reflect the improved efficiency expected of providers.
- The series of calculations that arise from these factors.
- The data which will be used as input to those calculations.

Our proposed method is described in detail in Section 5. Please note that in addition to this main method, the section also specifies the proposed methods for determining the prices of services to be specified for the first time as services subject to a national price. For ease of reference, in the rest of this annex, we refer to “the method” to include all the proposed methods set out in Section 5 of the consultation notice..

### **The ability to object to national variations**

During the engagement process we received a number of questions asking whether national variations to prices (such as the marginal rate rule and the Market Forces Factor) could be objected to by providers and commissioners. Our view is that the 2012 Act does not permit statutory objections to national variations such as the marginal rate rule and the Market Forces Factor. In this box we explain why this is the case.

The 2012 Act makes it quite clear that the ability for commissioners and relevant providers to object is limited to some, but not all, parts of the national tariff “notice” (which is the entirety of the main document and annexes). This is set out in section 120 of the 2012 Act, which describes the statutory objections process. In particular, it states that if Monitor receives more than a certain percentage of objections from either clinical commissioning groups or relevant providers “to a method it proposes under section 118(3)(b)” then Monitor may not publish the final national tariff unless it makes a reference to the Competition Commission. As set out elsewhere in the document, at this point, Monitor also has the option to amend the proposals and reissue a consultation notice for a further round of consultation.

Therefore, it is only those parts of the national tariff referred to in section 118(3)(b) that may be objected to. Section 118(3)(b) itself states that the notice published by Monitor must include “the method or methods it proposes to use for determining the national prices of the specified services”. Therefore, as we have stated elsewhere, it is only this method or methods that might be objected to by relevant providers or clinical commissioning groups.

The corollary of this is that proposals published under provisions other than Section 118(3) **cannot** be objected to. This includes section 118(5)(a), which states that Monitor may publish rules for variations to the national prices. It is under this provision of the 2012 Act that we have published our national variations to prices as set out in Section 6 of this document, which includes both our rules for the marginal rate and for the Market Forces Factor. These rules are not part of the method, as they apply only after the national price has been determined (as per section 118(3)(b) of the 2012 Act) and only in certain circumstances. For example, the marginal rate rule only applies to the national prices paid to specific providers when certain criteria are met – it does not apply to the method for determining the national price for the service.

Of course, while the national variations cannot be objected to formally, we welcome feedback on our proposals set out in this document these will be addressed as part of our longer term work in this area.

## 1.2 Who can object to the method?

The 2012 Act specifies that it is only objections to the method from Clinical Commissioning Groups (CCGs) and “relevant providers” that count for the purposes of the statutory objection process<sup>2</sup>. This means it is only those objections which determine whether Monitor can proceed to publish without further consultation or a reference to the Competition Commission.

There are two categories of “relevant provider”:

- Licence holders – for the consultation on the *2014/15 National Tariff Payment System*, this means all NHS foundation trusts (other providers of NHS services will be licence holders only from April 2014); and
- Other “relevant providers” as specified in the National Health Service (Licensing and Pricing) Regulations 2013<sup>3</sup>. The effect of those regulations is that a person is a relevant provider if they provide an NHS service<sup>4</sup> for which there is a national price proposed in this consultation notice<sup>5</sup>. This refers to current providers of the service.

The definition of “relevant provider” includes all NHS trusts currently providing services which would be subject to a proposed national price.

Other commissioners and providers can respond to the consultation and voice their objections to the proposals, but those objections will not be included in the statutory objection process. Specifically objections from:

- prospective providers who intend to provide a service for which there is a national price next year, but who do not currently provide that service; and
- the NHS England teams responsible for commissioning specialised services – those teams are within the body of NHS England and are not CCGs.

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<sup>2</sup> 2012 Act, section 120(1).

<sup>3</sup> S.I. 2013/2214; see regulation 6. The Regulations are available [here](#).

<sup>4</sup> Our proposals for services to be subject to a proposed national price are set out in Section 4, which includes some new services.

<sup>5</sup> In addition, a person is a “relevant provider” for the purposes of the “share of supply percentage” only if they provide services which have a current national price in the PbR tariff, as well as a proposed price in this consultation notice.

### 1.3 The process for objecting to the method

The 2012 Act provides that Monitor may not publish the final national tariff (without further consultation or a reference to the Competition Commission) if:

- the proportion of CCGs objecting to the method is more than the “prescribed percentage”;
- the proportion of “relevant providers” objecting to the method is more than the “prescribed percentage”; or
- the proportion of relevant providers objecting to the method, weighted by their “share of supply”, is more than the “prescribed percentage”.

The percentages, and the method for calculating share of supply, have been prescribed in regulations made by the Secretary of State and approved by Parliament<sup>6</sup>. The relevant “prescribed percentage” in each case is 51%.

This means that if:

- the percentage of CCGs objecting to the method is greater than, or equal to, 51%;
- the percentage of “relevant providers” objecting to the method is greater than, or equal to, 51%; or
- the percentage *share of tariff income* received by objectors for the financial year 1 April 2012 to 31 March 2013 is greater than, or equal to, 51% of total tariff income for that year,

then Monitor must either change its method and re-consult or make a reference to the Competition Commission for its determination.

Figure 5B-2 below summarises the process for determining whether to publish the national tariff, re-consult, or make a referral to the Competition Commission.

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<sup>6</sup> See regulation 5 of the National Health Service (Licensing and Pricing) Regulations 2013 (S.I. 2013/2214).

**Figure 5B-2: Publish, re-consult and referral cycle – a summary**

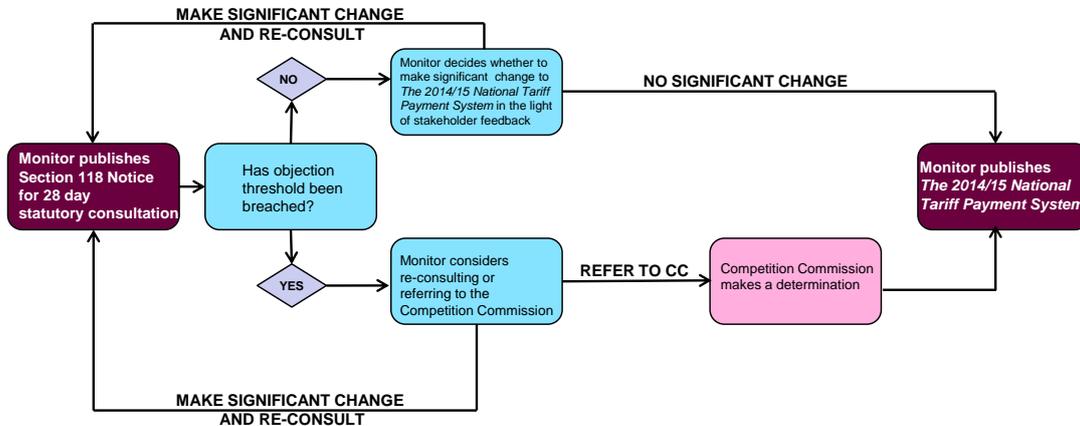


Figure 5B-2 illustrates the possible outcomes after statutory consultation:

- If none of the objection thresholds have been met, and Monitor decides in the light of evaluating stakeholder feedback, that there is no requirement to make significant change to the proposed method for determining national prices, then Monitor will publish the *2014/15 National Tariff Payment System*; or
- If none of the objection thresholds have been met, and Monitor decides in the light of evaluating stakeholder feedback, that there is a requirement to make significant change to the proposed method for determining national prices, then Monitor will issue a revised Section 118 Notice and re-consult for 28 days; or
- If one or more of the objection thresholds has been met, and Monitor decides to make significant change to the proposed method in the light of the objection(s) and/or stakeholder feedback, Monitor will issue a revised consultation notice and re-consult for 28 days; or
- If one or more of the objection thresholds has been met, Monitor can make a direct reference to the Competition Commission for their determination. Monitor will publish the *2014/15 National Tariff Payment System* in line with the Competition Commission’s determination.

If Monitor is required to issue a revised Section 118 Notice for another 28 day period, this further consultation will be subject to the same rules – i.e., CCGs and relevant providers could object to the proposed method, and all stakeholders can submit their views on the proposals. This process would continue to iterate until:

- the proportion of objections reduces to a level where none of the objection thresholds are met; or
- the Competition Commission upholds Monitor’s method; or
- changes are made to the method, in accordance with the Competition Commission’s determination.

The *2014/15 National Tariff Payment System* cannot be published until one of these three outcomes is achieved.

In summary, if all three of the objection percentages listed above are less than 51%, Monitor will, subject to consideration of the other responses to the consultation, publish the *2014/15 National Tariff Payment System*, using the method as stated in this notice. If any of the percentages are greater than or equal to 51%, Monitor may either adjust its methodology and re-consult or make a referral to the Competition Commission for its determination.

Objections to the method should be made by the CCG or “relevant provider”, not by individual units or departments of those bodies. An objection should be an objection of, and agreed by, that relevant legal entity, rather than the sole view of a single individual or team within the CCG or relevant provider. It is the responsibility of individual CCGs and relevant providers to ensure proper internal processes for making objections (for example, a process of obtaining agreement of members, governing bodies or the board).

CCGs and “relevant providers” should provide their reasons for their objection to the method. A failure to do so does not invalidate the objection – but if the reasons are not raised at this stage, they may be subsequently disregarded by the Competition Commission when it determines any reference<sup>7</sup>.

Should a CCG or “relevant provider” decide to object to the method proposed for the *2014/15 National Tariff Payment System*, the organisation’s objection can be registered in a web-based response form at [www.monitor.gov.uk/NT](http://www.monitor.gov.uk/NT)

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<sup>7</sup> See paragraph 5 of Schedule 12 to the 2012 Act.

If you wish to make other comments on the Section 118 Notice, these can be emailed to: [paymentsystem@monitor.gov.uk](mailto:paymentsystem@monitor.gov.uk)

Irrespective of the number of separate objections from a CCG or relevant provider, for the purposes of calculating the objection percentages as set out above, each legal entity will be counted only once.

Monitor will aim to confirm receipt of any objections it receives.

## 1.4 The procedure for reference to the Competition Commission

Monitor has consulted the Competition Commission (CC) on its proposed procedure for managing a reference. This section represents the CC's current thinking on how the process will be managed. The CC's proposals will be set out in full in its consultation document on the draft rules.

Should any one of the objection thresholds be reached and Monitor refers the method to the CC, the procedure for the reference is set out in the 2012 Act<sup>8</sup>. The CC will also publish rules of procedure. The following paragraphs provide a brief summary of the procedure.

A copy of the reference will be sent to the objectors, who will have an opportunity to make representations to the CC<sup>9</sup>. The representations must be submitted within 10 working days of receiving the reference. Subject to the CC's consultation on its draft rules and guidance, those representations should include:

- the reasons why the objector considers that Monitor's decision on the method was wrong, on the basis of one of the grounds set out in section 121(4) of the 2012 Act;
- any changes to the method the objector considers appropriate; and
- any supporting evidence and documents.

Monitor will have an opportunity to make a written reply to any representations. Both objectors and Monitor will be expected to provide prompt, clear and focussed submissions and coherent and comprehensible explanations of any technical issues.

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<sup>8</sup> See sections 120 to 123 of the 2012 Act and Schedule 12 to the 2012 Act.

<sup>9</sup> See Schedule 12 to the 2012 Act.

A group appointed by the chair of the CC will determine the reference, based on Monitor's submissions, the objectors' representations and any other evidence submitted to or gathered by the CC (for example this may include submissions made by interested third parties).

The timeframes for determination of a reference are very compressed and the CC will be expecting a high degree of co-operation from all participants in the process. In addition, the CC is entitled to disregard any matters raised by an objector in their representations, if the objector did not raise at the time they submitted their original response to Monitor<sup>10</sup>.

The CC must order the payment of its costs at the end of the process. If the CC decides the method is appropriate, objectors will be required to meet the costs incurred by the CC, and they may also be ordered to pay some of Monitor's costs. If the CC decide the method is not appropriate, Monitor will be required to pay the CC's costs, and may be ordered to pay some of the objectors' costs

Further guidance on the procedures for a reference are to be set out in the CC's rules. A draft of these rules are expected to be published for consultation in October 2013.

## 1.5 The timetable

In our stakeholder engagement programme, we heard that commissioners and providers believe it would be helpful for Monitor to explain the timetable for publication of the *2014/15 National Tariff Payment System: A Consultation Notice* under various scenarios. Below, we set out our expectations for the timetable under:

- the scenario where none of the objection thresholds are met; and
- the scenario where any of the objection thresholds are met, and consequently Monitor needs to either re-consult or make a reference to the CC.

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<sup>10</sup> Similarly, the CC is entitled to disregard any matter raised by Monitor in its replies to objectors' representations, if not raised in Monitor's reference document.

### **1.5.1 Proposed timetable if none of the objection thresholds are met**

The statutory consultation period of 28 days ends on 31 October 2013, after which Monitor will calculate the objection and share of supply percentages. If none of the objection thresholds are reached, and subject to consideration of other consultation responses, Monitor would proceed to publish the *2014/15 National Tariff Payment System* document before the end of 2013.

### **1.5.2 Proposed timetable if any of the objection thresholds are met**

If the proportion of objections is equal to or above 51% on any of the three objections thresholds, Monitor will either:

- revise the method in the light of the objections and re-consult; or
- make a reference to the Competition Commission.

In the latter case, for some of the steps that would need to be taken the 2012 Act specifies the number of days for completion. For other steps, the 2012 Act does not specify the period for completion. This means it is difficult, at this stage, for us to be prescriptive or definitive about the likely future timetable.

Notwithstanding the above, for guidance, the table below sets out the main steps (and associated timeframes, where known) in the event that Monitor refers the method to the Competition Commission.

**Table 5B-1: Main steps under a referral to the CC**

Step	Number of days prescribed by the 2012 Act	Date(s)
Monitor issues section 118 Notice	N/A	3 October 2013
Statutory consultation period	28 (consecutive, working and non-working) days	Start: 4 October 2013 End: 31 October 2013
Monitor determines whether objections are below/above objection thresholds set out in the regulations]	Not specified within the Act	Unknown at this stage
Monitor sends a reference to the CC	N/A	Unknown at this stage
Monitor informs objectors of the reference to the CC	N/A	Unknown at this stage
Objectors submit their representations to the CC and Monitor	10 (working) days	Unknown at this stage
Monitor responds to objectors representations and sends a copy of the response to Objectors and the CC	10 (working) days	Unknown at this stage
The CC determines reference (including any oral hearing and written submissions)	30 (working) days	Unknown at this stage
The CC extends the period for determining the reference	Up to 20 additional (working) days  These are in addition to the 30 day period, which the Competition Commission can add, if required.	Unknown at this stage

Based on the above, if there is a CC reference, publication of the *2014/15 National Tariff Payment System* is likely to be delayed until spring 2014 or possibly later.

In the event that the *2014/15 National Tariff Payment System* cannot be published before 1 April 2014, Monitor, NHS England and the Department of Health would have to consider what NHS pricing arrangements should apply from that date. For example, a revised PbR tariff might be issued for an interim period.