

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 4 – Pricing

864. These sections set the framework for setting prices for health care services provided for the purposes of the NHS.

Section 115 - Price payable by commissioners for NHS services

865. This section makes provision about how prices are to be determined for the provision of health care services for the purposes of the NHS. *Subsection (1)* makes provision for prices to be set out in a national tariff (national prices) and *subsection (2)* provides that where a service is not included in the national tariff, the price payable is to be determined in accordance with any rules set out in the tariff to cover such circumstances.

866. The commissioners with an interest in pricing under this Chapter are those arranging for the provisions of health care services for the NHS which are the NHS Commissioning Board, CCGs, and the Secretary of State where section 13Z2 (failure by the Board to discharge any of its functions) of the NHS Act applies. The Secretary of State's power under section 13Z2 applies where the Commissioning Board is failing or has failed to discharge, or to properly discharge, any of its functions.

Section 116 - The national tariff

867. This section requires Monitor to publish “the national tariff”, a document that makes provision about pricing of health care services for the purposes of the NHS. *Subsection (1)* provides that the national tariff must:

- specify the health care services to which it applies. The tariff would include ‘currencies’ (i.e. the service specification which may include one or more component health care services) that would be used as the basis for pricing and payments;
- specify the methodology (or methodologies) that had been employed by Monitor for determining the prices payable under the national tariff (which may be different for different descriptions of services). The methodology would include the input data as well as the process of calculation for determining the prices payable under the national tariff;
- specify the prices payable for those services, subject to any adjustments that may be provided for under this Chapter;
- specify a methodology to be used by Monitor when considering agreements under section 124 or applications under section 125 for the local modification of prices payable under the national tariff.

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868. *Subsections (2), (4)(b), (4)(c) and (6)* make provision for rules which may be included in the national tariff providing for:
- providers and commissioners to agree to vary the prices payable under the national tariff or the specification of a health care service specified in the national tariff (*subsection (2)*). The intent is to enable flexibility to be provided within the national tariff, for example, to support innovation in service delivery, integration of services, or unbundling of services to enable components of care to be delivered and paid for separately, where this would be in patients' best interests. Where such variations are agreed, the commissioner is required by *subsection (3)* to keep and publish a written statement of all such variations;
 - determining prices payable for services not specified in the national tariff, (local price setting rules) where the prices payable would otherwise, in the absence of such rules, be agreed locally between commissioners and providers (*subsection (4)(b)*);
 - the determination of which 'currency' (see paragraph 832 above) applies where a service is specified in more than one way under the national tariff, or under any local price setting rules (*subsection (6)*); and
 - governing the making of payments to the provider (*subsection (4)(c)*).
869. *Subsection (5)* provides that local price setting rules under subsection (4)(b) may also include the specification of currencies for health care services which are not specified under subsection (1)(a). This provision would allow standard currencies to be specified at a national level, where the prices are to be determined locally. This would support expansion in the range of services covered by the national tariff over time, where this would be in patients' best interests.
870. *Subsection (4)(a)* provides that the national tariff may also specify variations to the national prices for a service based on the circumstances in which that service is provided or any other factors relevant to providing that service, for example, to take account of whether the service is provided in a hospital setting or in a patient's home, or to take account of clinical complexity.
871. *Subsection (7)* provides that the national tariff may include guidance on: the application of any rules included in the national tariff (except rules on making payments to providers); the discharge of the duty under subsection (3) to publish variations agreed between the provider and commissioner under any such rules; and, the application of variations in the national tariff made in accordance with subsection (4) (a). Commissioners must have regard to any guidance provided.
872. *Subsection (8)* provides that the national tariff may specify different prices payable, or variations of the prices payable, for a specified health care service (or services of a specified description) to different types of provider. However, the different prices payable, or variations of the prices payable, could not be based on whether the provider is in the public or private sector or any other aspect of the status of the provider (*subsection (10)*). For example, a differential price could be specified for providers in central London due to the additional costs of land and buildings but the prices payable cannot be based on whether the provider is public or private sector. Prices specified in the national tariff would not be able to include prices for public health services.
873. *Subsection (12)* provides that the national tariff has effect for the period specified in the tariff or until a new edition of the tariff takes effect.
874. *Subsection (13)* requires Monitor to have regard to the mandate set by the Secretary of State (published under section 13A (mandate to the Board) of the NHS Act) when carrying out its pricing functions under this Chapter.

Section 117 – The national tariff: further provision

875. This section provides that the specification of a health care service in the national tariff or as determined by local price setting rules can take any form, including describing a service:
- by reference to one or more of its individual components;
 - as a “bundle” of services constituting a course of treatment; or
 - as a group of services.
876. *Subsection (2)* provides that where the service is specified in the national tariff by reference to its components, the tariff must specify the prices payable for each component. If two or more services are bundled, the tariff must determine the prices payable for the bundle as a whole. Where services are grouped, the tariff would determine the single price for the provision of any service listed in the group (in other words, the same price would apply to each service listed).
877. *Subsection (3)* provides that where a service is specified under local price setting rules, the national tariff may include rules to determine the price for each component or bundle, or the price that would apply to each service specified within a defined group of services.
878. *Subsection (4)* provides for Monitor to direct a commissioner to reverse actions taken where the commissioner agrees to pay a price other than the price payable under the national tariff. Under *subsection (5)* Monitor may direct the commissioner to take steps to prevent recurrence of a failure to comply with rules in the national tariff (for varying a service specification or price, for local price setting, as to payments, or for determining which specification should apply where a service is specified in different ways), or to restore the position to what it would have been had the failure not occurred.

Section 118 - Consultation on proposals for the national tariff

879. The national tariff must include certain elements and *subsections (7), (8) and (9)* require that Monitor and the NHS Commissioning Board agree those elements. The proposals for these elements must be included in a notice published and sent to all commissioners, relevant providers and other persons considered appropriate (*subsection (1)*). The elements are:
- the health care services to which the national tariff would apply, including the ‘currencies’ or units of services for which there are prices specified in the national tariff;
 - the methodology (or methodologies) for determining the prices payable for those services, which would include the input data and the processes of calculation for determining the prices payable under the national tariff;
 - the prices payable for those services, including any provision for adjustments that Monitor and the NHS Commissioning Board have agreed should be applicable;
 - the methodology to be used by Monitor when considering an agreement for a price modification under section 124 or an application for a price modification under section 125.
880. The national tariff may also include other elements. If they are included *subsections (10), (11) and (12)* require that Monitor and the NHS Commissioning Board must also agree those elements and that the proposals for them must be included in the notice published under *subsection (1)*. These could be:
- variations on the prices payable and any associated guidance;

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- rules under which providers and commissioners could agree to vary the prices payable under the national tariff and any associated guidance;
 - rules for determining prices payable locally for services not specified in the national tariff and any associated; and
 - rules for determining which ‘currency’ (see paragraph 832 above) applies where a service is specified in more than one way, either for the purposes of determining the prices payable under the national tariff, or under any rules for the purposes of determining the prices payable for services where such prices are to be determined locally, and associated guidance.
881. If agreement cannot be reached between Monitor and the NHS Commissioning Board in respect of any of the components of the national tariff to be published under this section, those matters will be determined by independent arbitration .
882. Once agreement has been reached, Monitor must notify all commissioners, relevant providers and others it considers appropriate (for example providers not currently providing NHS services) of the proposed national tariff and the proposals for the components as required or otherwise provided for in this section. The proposals must also be published (*subsection (2)*). There must be a 28-day consultation period, during which objections could be made (*subsection (13)*).

Section 119 - Consultation: further provision

883. *Subsection (1)* of this section places a duty on Monitor and the NHS Commissioning Board, in ensuring that the prices set under the previous section represent fair reimbursement for providers of services, to have regard to the differential costs incurred by providers who treat different types of patient and differences between providers with respect to the range of services they provide. The effect of this is to require Monitor and the Board to make provision for adjustments in the prices payable under the national tariff, or within the rules for determining the prices payable locally, to take account of variations in clinical complexity.
884. *Subsections (2) and (3)* of this section state that when developing standard currencies or units of service to be included in the national tariff for determining the prices payable, or in any rules governing local prices, the Board and Monitor must act with a view to securing standardisation of currencies across England.
885. *Subsection (4)* provides that when the Board and Monitor are developing standard currencies or units of service for determining the prices payable, they must consider whether such standardisation will have any significant adverse impact on the provision of health care services for the NHS.

Section 120 - Responses to consultation

886. This section sets out the process for commissioners and relevant providers to challenge the methodology (or methodologies) proposed for determining the prices payable under the national tariff. Where an objection is made, Monitor may confirm the national tariff only if either: the conditions in *subsection (2)* of this section are met or, if they are not met, following a reference to the Competition Commission. The Competition Commission would be required to determine if the methodology is appropriate having regard to Monitor’s duties under this Act and in accordance with the provisions of this Chapter.
887. The conditions in *subsection (2)* are that the percentage of commissioners or relevant providers who object to the pricing methodology (the objection percentage), or, as may be prescribed in regulations made by the Secretary of State, the percentage of relevant providers weighted by their share of supply (the share of supply percentage) who

objected to the pricing methodology, are both less than the prescribed percentages. The regulations may include provision about the method for determining share of supply.

888. This section also gives effect to Schedule 12, which makes provision about the procedure for references by Monitor to the Competition Commission, in circumstances where the objection percentage and/or the share of supply percentage, as may be prescribed, were met and about how the Commission should handle any such references.

Schedule 12 - Procedure on references under section 120

889. This Schedule provides that, in making a reference to the Competition Commission, Monitor must outline its reasons for the proposed pricing methodology. Monitor also has to include the reasons for considering that there are no grounds for the Commission to determine that the proposed methodology is inappropriate. The grounds on which the Commission could make such a determination are set out in section 121(4). Monitor must send a copy of any reference to the NHS Commissioning Board and to those persons (i.e. relevant providers or CCGs) who had objected to the proposed methodology (paragraph 1(2)). Those persons can make representations to the Competition Commission about Monitor's reference, within 10 days of receiving the copy of the reference. A person who makes a representation must provide Monitor with a copy. Monitor may reply to the representations, within 10 days of receiving its copy; and, if it chooses to do so, must send the person a copy of that reply (paragraph 2).
890. On receipt of a reference, the Chairman of the Commission is required to select a group to consider the reference, make a determination and give any directions to Monitor to give effect to the determination (sub-paragraph (1) of paragraph 3). Sub-paragraphs (2) to (6) of paragraph 3 make provision about the constitution of the group, including that it must comprise three members of the Commission. Sub-paragraph (7) provides that a decision of the group will only be effective if all members are present when the decision is made and two of the three members are in favour of the decision.
891. The Competition Commission may make rules on the procedure to be followed in making determinations on references (paragraph 11). In particular, this could include time limits for oral evidence. Any rules must be published.
892. [Paragraph 4](#) makes provision about the timetable for references. The group must make a determination within 30 working days of the last date on which Monitor is entitled to respond to the objectors.
893. The group may extend the deadline by not more than 20 working days and not more than once. The Competition Commission would have to notify the extension to Monitor, the NHS Commissioning Board and those persons who had objected.
894. [Paragraph 5](#) provides that the group may disregard:
- any representations from a person not raised by that person in the original consultation; and/or
 - any matter Monitor raises in a reply to a representation from a person that is not included in the original reference, if it considered this necessary to secure a determination within the permitted timescales.
895. [Paragraphs 6 to 8](#) make provision to enable the Commission to require information in order to help it make its determination. The information could take the form of documents, evidence at oral hearings or written statements. Paragraphs 9 and 10 make provision relating to evidence, including provision about default. A failure to provide information or the provision of false information is to be regarded as a contempt of court. However, no person could be compelled to provide information that it could not be compelled to under civil proceedings in the High Court.

896. Under paragraph 12, the unsuccessful party must pay the costs the Competition Commission incurs in making a determination on a reference. If the Commission determines that the proposed pricing methodology should be changed, Monitor must pay the Commission's costs. If the Commission determines that the proposed methodology may be implemented without changes, those persons who had objected may be named as those required to pay the Commission's costs. This provision is intended to deter persons from objecting unless they have good reason to do so and to help ensure that Monitor makes sensible and appropriate proposals for pricing methodologies.

Section 121 - Determination on reference under section 120

897. This section provides that in making a determination on the pricing methodology, the Competition Commission must have regard to the matters to which Monitor must have regard in carrying out those of its functions to which the determination relates.
898. In reaching its determination, the Commission must have regard to any representations made to it by relevant providers or commissioners who had objected to the methodology, under the procedure set out in paragraph 2 of Schedule 12. The Commission may also consider matters that Monitor was not able to take into account, provided the nature of them was such that Monitor would have been entitled to take them into account had it had the opportunity. This provision would enable the Commission to take account of new information that was not available to Monitor when it proposed the pricing methodology, but which was relevant.
899. If the Commission determines that Monitor has set the pricing methodology appropriately, Monitor can use that method.
900. The Commission could determine that Monitor had not set the pricing methodology appropriately only in the circumstances set out in *subsection (4)*. Those circumstances are that Monitor has failed to have regard to matters relating to pricing methodology to which it is required to have regard; or that the decision is based on an error of fact or wrong in law. Where any of these apply, the Commission must refer the methodology back to Monitor for re-consideration, with the reasons for its decision. The Commission would be required to notify its determination to Monitor, the NHS Commissioning Board and those relevant providers or commissioners who made representations to it; and to publish it, excluding any commercial information that could damage an undertaking's interests or information relating to the private affairs of an individual that could harm that person's interests.

Section 122 - Changes following determination on reference under section 120

901. Where the Competition Commission refers a proposed pricing methodology back to Monitor, Monitor must make any changes it considered necessary to address the issues raised in the Competition Commission's determination. Monitor must notify the Competition Commission and the NHS Commissioning Board of the changes it proposes to make and its reasons for them.

Section 123 - Power to veto changes proposed under section 122

902. Within 28 days of receiving notification under section 122 of Monitor's proposed changes, the Commission can direct Monitor not to implement some or all of those changes. When issuing such a direction, the Commission must give notice of the terms of the direction and the reasons for it, and make the necessary changes to the pricing methodology itself. This power of veto is to give the Commission the opportunity, where it considered this necessary, to prevent Monitor from making changes that do not deal adequately with the Commission's determination on a reference.
903. The Commission could apply to the Secretary of State for an extension of the 28-day period by 14 days.

904. Before making the changes to the pricing methodology, the Commission would have to notify Monitor and the NHS Commissioning Board of those changes including the Commission's reasons for the changes it proposes to make (*subsection (7)*). It must provide a period of at least 28 days for representations (*subsection (8)*).
905. If the Competition Commission does not issue a direction to Monitor under this section, section 122(3) requires Monitor to make the changes it has proposed.

Section 124 - Local modifications of prices of services: agreements

906. This section specifies the process for a provider of a health care service for the purposes of the NHS and the relevant commissioner to agree a modification of prices payable in accordance with the national tariff (*subsection (1)*). This may be necessary where an efficient provider cannot recover their costs at the prices determined in accordance with the tariff, for example, due to the services required by commissioners being of relatively small scale such as may be the case where a provider is required to sustain provision of Accident and Emergency or maternity services in a relatively less populated area of the country. Monitor may approve any such modification if, applying the methodology agreed with the NHS Commissioning Board and published in the national tariff under subsection 116(1)(d), it is satisfied that it would be uneconomic for the provider to provide the service (*subsection (5)*). Monitor can require evidence in support of an application for a modification (*subsection (4)*).
907. Where Monitor approves an application, it must notify the Secretary of State and those CCGs, providers and others whom it considers appropriate, as well as publishing details of the modification and the date on which it takes effect (*subsections (6) to (8)*).
908. The Secretary of State may direct that an agreement is to be of no effect, if the Secretary of State thinks that the agreement might breach EU obligations (for instance, state aid rules) (*subsection (9)*).

Section 125 - Local modifications of prices of services: applications

909. This section deals with situations in which agreement to a local modification under section 124 is sought by a provider but not agreed with the commissioner(s). In such circumstances, the provider in question may make an application to Monitor for a modification of the prices payable in accordance with the national tariff, which must be supported by such evidence as Monitor may require (*subsections (1) and (2)*). If Monitor decided it would be uneconomic for the provider to continue to provide the services as required by the commissioner(s) without modification of the prices payable, Monitor can grant the application and determine the modification to the price that would apply (*subsection (3)*). In considering an application for such a modification, Monitor must apply the methodology agreed with the NHS Commissioning Board and published in the national tariff under subsection 116(1)(d) and can require evidence in support of an application for a modification. Monitor would have to give notice of any such decision in accordance with *subsections (6) to (8)*.
910. The Secretary of State may direct that a modification contained in an application under this section is to be of no effect, if the Secretary of State thinks that the modification might breach EU obligations (for instance, state aid rules) (*subsection (9)*).

Section 126 – Applications under section 125: notification of commissioners

911. This section provides for action to be taken by Monitor where it has identified significant risk to the continuity of NHS services as part of its consideration of an application for modification of the prices payable under the national tariff (*subsections (1)*). It obliges Monitor to notify the NHS Commissioning Board and certain CCGs where it has identified such risks and is satisfied that this was attributable to the way in which services were configured.

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912. *Subsection (3)* requires Monitor to notify the NHS Commissioning Board and such CCGs as Monitor considers appropriate where:
- a) a provider of NHS health care services applies to Monitor for a modification to the tariff price, under section 126 (where the provider has previously been unable to agree a modification with the commissioner of the health care services in question), and
 - b) Monitor is satisfied that an unsustainable configuration of certain health care services is putting services subject to a licence condition under section 97(1)(i), (j) or (k) (for the purpose of ensuring the continuity of those services) at significant risk.
913. *Subsection (4)* requires Monitor to publish an annual list of the notifications it has sent to commissioners regarding unsustainable service configurations and a summary of its reasoning in each case.
914. *Subsection (5)* requires the Board and CCGs to have regard to any such notification received when arranging for the continued provision of NHS health care services. It would be for commissioners to decide what action to take to address any unsustainable configuration of services, in consultation with Local Health and Well-being Boards.

Section 127 - Correction of mistakes

915. If a mistake in the national tariff means that it does not reflect what Monitor and the NHS Commissioning Board have agreed (or what has been determined by arbitration), corrections may be made. Monitor must notify all commissioners, licence holders and other persons as it considers appropriate of the mistake and the correction and specify the date on which the correction would take effect (which could be before the notification).