



# Health and Social Care Act 2012

## 2012 CHAPTER 7

### PART 3

#### REGULATION OF HEALTH AND ADULT SOCIAL CARE SERVICES

### CHAPTER 4

#### PRICING

#### **115 Price payable by commissioners for NHS services**

- (1) If a health care service is specified in the national tariff (as to which, see section 116), the price payable for the provision of that service for the purposes of the NHS is (subject to sections 124 and 125) such price as is determined in accordance with the national tariff on the basis of the price (referred to in this Chapter as “the national price”) specified in the national tariff for that service.
- (2) If a health care service is not specified in the national tariff, the price payable for the provision of that service for the purposes of the NHS is such price as is determined in accordance with the rules provided for in the national tariff for that purpose.

#### **116 The national tariff**

- (1) Monitor must publish a document, to be known as “the national tariff”, which specifies—
  - (a) certain health care services which are or may be provided for the purposes of the NHS,
  - (b) the method used for determining the national prices of those services,
  - (c) the national price of each of those services, and
  - (d) the method used for deciding whether to approve an agreement under section 124 and for determining an application under section 125 (local modifications of prices).

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- (2) The national tariff may provide for rules under which the commissioner of a health care service specified in the national tariff and the providers of that service may agree to vary—
  - (a) the specification of the service under subsection (1)(a), or
  - (b) the national price of the service.
- (3) Where a variation is agreed in accordance with rules provided for under subsection (2), the commissioner of the service in question must maintain and publish a written statement of—
  - (a) the variation, and
  - (b) such other variations as have already been agreed in accordance with rules provided for under that subsection in the case of that service.
- (4) The national tariff may also—
  - (a) specify variations to the national price for a service by reference to circumstances in which the service is provided or other factors relevant to the provision of the service,
  - (b) provide for rules for determining the price payable for the provision for the purposes of the NHS of health care services which are not specified under subsection (1)(a), and
  - (c) provide for rules relating to the making of payments to the provider of a health care service for the provision of that service.
- (5) Rules provided for under subsection (4)(b) may specify health care services which are not specified under subsection (1)(a).
- (6) The national tariff may also provide for rules for determining, where a health care service is specified in more than one way under subsection (1)(a) or in more than one way in rules provided for under subsection (4)(b), which specification of the service is to apply in any particular case or cases of any particular description.
- (7) The national tariff may include guidance as to—
  - (a) the application of the method specified under subsection (1)(d),
  - (b) the application of rules provided for under subsection (2), (4)(b) or (6),
  - (c) the discharge of the duty imposed by subsection (3), or
  - (d) the application of variations specified under subsection (4)(a),and a commissioner of a health care service for the purposes of the NHS must have regard to guidance under this subsection.
- (8) Different methods may be specified under subsection (1)(b) for different descriptions of health care service.
- (9) The national tariff may, in the case of a specified health care service or health care services of a specified description, specify different national prices or different variations under subsection (4)(a) in relation to different descriptions of provider.
- (10) A description for the purposes of subsection (9) may not be framed by reference to—
  - (a) whether the provider is in the public or (as the case may be) private sector, or
  - (b) some other aspect of the status of the provider.
- (11) The national tariff may not specify a national price for a health care service provided pursuant to the public health functions of the Secretary of State, or of a local authority, under the National Health Service Act 2006.

- (12) The national tariff has effect for such period as is specified in the national tariff (or, where a new edition of the national tariff takes effect before the end of that period, until that new edition takes effect).
- (13) In exercising its functions under this Chapter, Monitor must (in addition to the matters specified in section 66) have regard to the objectives and requirements for the time being specified in the mandate published under section 13A of the National Health Service Act 2006.

## **117 The national tariff: further provision**

- (1) The ways in which a health care service may be specified in the national tariff under section 116(1)(a), or in rules provided for in the national tariff under section 116(4)(b), include in particular—
  - (a) specifying it by reference to its components,
  - (b) specifying it as a service (a “bundle”) that comprises two or more health care services which together constitute a form of treatment,
  - (c) specifying it as a service in a group of standardised services.
- (2) In the case of a service specified in the national tariff under section 116(1)(a), the national tariff must—
  - (a) if the service is specified in accordance with subsection (1)(a), specify a national price for each component of the service;
  - (b) if it is specified in accordance with subsection (1)(b), specify a national price for the bundle;
  - (c) if it is specified in accordance with subsection (1)(c), specify a single price as the national price for each service in the group.
- (3) In the case of a service specified in rules provided for in the national tariff under section 116(4)(b), the rules may—
  - (a) if the service is specified in accordance with subsection (1)(a), make provision for determining the price payable for each component of the service;
  - (b) if it is specified in accordance with subsection (1)(b), make provision for determining the price payable for the bundle;
  - (c) if it is specified in accordance with subsection (1)(c), make provision for determining the price payable for each service in the group.
- (4) Where the commissioner of a health care service for the purposes of the NHS agrees to pay a price for the provision of the service other than the price that is payable by virtue of this Chapter, Monitor may direct the commissioner to take such steps within such period as Monitor may specify to secure that the position is, so far as practicable, restored to what it would have been if the commissioner had agreed to pay the price payable by virtue of this Chapter.
- (5) Where the commissioner of a health care service fails to comply with rules provided for under section 116(2), (4) or (6), Monitor may direct the commissioner to take such steps within such period as Monitor may specify—
  - (a) to secure that the failure does not continue or recur;
  - (b) to secure that the position is, so far as practicable, restored to what it would have been if the failure was not occurring or had not occurred.

## **118 Consultation on proposals for the national tariff**

- (1) Before publishing the national tariff, Monitor must send a notice to—
  - (a) each clinical commissioning group,
  - (b) each relevant provider, and
  - (c) such other persons as it considers appropriate.
- (2) Monitor must also publish the notice.
- (3) The notice must specify—
  - (a) the health care services which Monitor proposes to specify in the national tariff,
  - (b) the method or methods it proposes to use for determining the national prices of those services,
  - (c) the prices, determined in each case by using the applicable method specified under paragraph (b), that Monitor proposes as the national prices of those services, and
  - (d) the method it proposes to use for deciding whether to approve an agreement under section 124 and for determining an application under section 125 (local modifications of national prices).
- (4) The notice may specify such rules as Monitor proposes to provide for in the national tariff under which the commissioner of a health care service and a provider of the service would be entitled to vary—
  - (a) the specification of the service in the national tariff, or
  - (b) the national price of the service.
- (5) The notice may also specify—
  - (a) such variations (by reference to circumstances in which a service is provided or other factors relevant to its provision) as Monitor proposes to specify to the prices that it proposes as the national prices,
  - (b) such rules as Monitor proposes to provide for in the national tariff for determining the price payable for the provision for the purposes of the NHS of health care services not specified for the purposes of subsection (3)(a), and
  - (c) such rules as Monitor proposes to provide for in the national tariff for determining, where a health care service is specified in more than one way for the purposes of subsection (3)(a) or in more than one way in rules specified for the purposes of paragraph (b), which specification of the service is to apply in any particular case or cases of any particular description.
- (6) The notice may include such guidance as Monitor proposes to provide for in the national tariff as to—
  - (a) the application of the method specified for the purposes of subsection (3)(d);
  - (b) the application of rules specified for the purposes of subsection (4) or (5)(b) or (c);
  - (c) the application of variations specified for the purposes of subsection (5)(a).
- (7) The health care services specified for the purposes of subsection (3)(a) are only such services as the National Health Service Commissioning Board considers should be so specified and—
  - (a) as the Board and Monitor agree will be so specified, or

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- (b) in default of agreement, as are determined by arbitration as being services that will be so specified.
- (8) A method specified for the purposes of subsection (3)(b) or (d) is only such method, and such guidance on the application of the method specified for the purposes of subsection (3)(d) as is included for the purposes of subsection (6) is only such guidance, as Monitor considers should be so specified and included and—
- (a) as Monitor and the Board agree will be so specified and included, or
  - (b) in default of agreement, as is determined by arbitration as being the method that will be so specified and the guidance that will be so included.
- (9) The prices specified for the purposes of subsection (3)(c) are only such prices as Monitor considers should be so specified and—
- (a) as Monitor and the Board agree will be so specified, or
  - (b) in default of agreement, as are determined by arbitration as being the prices that will be so specified.
- (10) Such variations as are specified for the purposes of subsection (5)(a), and such guidance on the application of those variations as is included for the purposes of subsection (6), are only such variations and such guidance as Monitor considers should be so specified and included and—
- (a) as Monitor and the Board agree will be so specified and included, or
  - (b) in default of agreement, as are determined by arbitration as being the variations that will be so specified and the guidance that will be so included.
- (11) Such rules as are specified for the purposes of subsection (4) or (5)(c), and such guidance on those rules as is included for the purposes of subsection (6), are only such rules and such guidance as the National Health Service Commissioning Board considers should be so specified and included and—
- (a) as the Board and Monitor agree will be so specified and included, or
  - (b) in default of agreement, as are determined by arbitration as being the rules that will be so specified and the guidance that will be so included.
- (12) Such rules as are specified for the purposes of subsection (5)(b), and such guidance on those rules as is included for the purposes of subsection (6), are only such rules and such guidance as Monitor considers should be so specified and included and—
- (a) as Monitor and the Board agree will be so specified and included, or
  - (b) in default of agreement, as are determined by arbitration as being the rules that will be so specified and the guidance that will be so included.
- (13) A notice under this section must specify when the consultation period in relation to the proposals ends; and for that purpose, the consultation period is the period of 28 days beginning with the day after that on which the notice is published under subsection (2).
- (14) In this section, a “relevant provider” is—
- (a) a licence holder, or
  - (b) such other person, of such description as may be prescribed, as provides health care services for the purposes of the NHS.

## **119 Consultation: further provision**

- (1) For the purpose of securing that the prices payable for the provision of health care services for the purposes of the NHS are such as to result in a fair level of pay for

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providers of the services, the National Health Service Commissioning Board and Monitor must, in exercising functions under section 118, have regard to—

- (a) differences in the costs incurred in providing health care services for the purposes of the NHS to persons of different descriptions, and
  - (b) differences between providers with respect to the range of health care services that they provide for those purposes.
- (2) In exercising functions under section 118(7), the Board and Monitor must act with a view to securing the standardisation throughout England of the specification of health care services in the national tariff under section 116(1)(a).
  - (3) In exercising functions under section 118(12), Monitor and the Board must act with a view to securing the standardisation throughout England of the specification of health care services in rules provided for in the national tariff under section 116(4)(b).
  - (4) In carrying out the duty under subsection (2) or (3), the Board and Monitor must have regard to whether, or to what extent, standardisation is likely to have a significant adverse impact on the provision of health care services for the purposes of the NHS.

## **120 Responses to consultation**

- (1) If Monitor receives objections from one or more clinical commissioning groups or relevant providers to a method it proposes under section 118(3)(b), Monitor may not publish the national tariff unless—
  - (a) the conditions in subsection (2) are met, or
  - (b) where those conditions are not met, Monitor has made a reference to the Competition Commission.
- (2) The conditions referred to in subsection (1)(a) are that—
  - (a) the objection percentage for clinical commissioning groups is less than the prescribed percentage,
  - (b) the objection percentage for relevant providers is less than the prescribed percentage, and
  - (c) the share of supply percentage is less than such percentage as may be prescribed.
- (3) In subsection (2)—
  - (a) the “objection percentage” is the proportion (expressed as a percentage) of clinical commissioning groups or (as the case may be) relevant providers who objected to the proposed method, and
  - (b) the “share of supply percentage” is the proportion (expressed as a percentage) of relevant providers who objected to the proposed method, weighted according to their share of the supply in England of such services as may be prescribed.
- (4) A reference under subsection (1)(b) must require the Competition Commission to determine whether the method proposed under section 118(3)(b) is appropriate.
- (5) The functions of the Competition Commission with respect to a reference under this section are not to be regarded as general functions of its for the purposes of Part 2 of Schedule 7 to the Competition Act 1998; instead, Schedule 12 to this Act (procedure on a reference under this section) has effect.

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- (6) Regulations prescribing a percentage for the purposes of subsection (2)(c) may include provision prescribing the method used for determining a relevant provider's share of the supply in England of the services concerned.
- (7) In this section and section 121 and Schedule 12, "relevant provider" has the meaning given in section 118(14).

## **121 Determination on reference under section 120**

- (1) In carrying out a determination on a reference under section 120, the Competition Commission must have regard, to the same extent as is required of Monitor, to the matters to which Monitor must have regard in carrying out the functions of its to which the determination relates.
- (2) In carrying out the determination, the Competition Commission must also have regard to such representations as are made to it by clinical commissioning groups or relevant providers who made objections to Monitor in accordance with paragraph 2 of Schedule 12 about the method proposed under section 118(3)(b).
- (3) In carrying out the determination, the Competition Commission—
  - (a) may also have regard to matters to which Monitor was not able to have regard in the case to which the determination relates, but
  - (b) must not, in the exercise of the power under paragraph (a), have regard to a matter to which Monitor would not have been entitled to have regard in that case had it had the opportunity to do so.
- (4) The Commission may determine that the method proposed under section 118(3)(b) is not appropriate only if it is satisfied that Monitor's decision to propose the method was wrong on one or more of the following grounds—
  - (a) that Monitor failed to have regard to the matters referred to in subsection (1),
  - (b) that the decision was based, wholly or partly, on an error of fact,
  - (c) that the decision was wrong in law.
- (5) Where the Commission determines that the method proposed under section 118(3)(b) is appropriate, Monitor may use that method for the purposes of the national tariff accordingly.
- (6) Where the Commission determines that the method proposed under section 118(3)(b) is not appropriate, it must remit the matter to Monitor for reconsideration and decision in accordance with such directions as the Commission may give.
- (7) A direction under subsection (6) may, in particular, require Monitor to make such changes to the method in question as are specified in the direction.
- (8) A determination on a reference under section 120—
  - (a) must be contained in an order made by the Commission,
  - (b) must set out the reasons for the determination, and
  - (c) takes effect at the time specified in the order or determined in accordance with provision made in the order.
- (9) The Commission must give notice of a determination on a reference under section 120 to—
  - (a) Monitor,

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- (b) the National Health Service Commissioning Board, and
  - (c) such clinical commissioning groups or relevant providers as made representations in accordance with paragraph 2 of Schedule 12.
- (10) The Commission must also publish the determination; but it must exclude from what it publishes information which it is satisfied is—
- (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;
  - (b) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm that person’s interests.

## **122 Changes following determination on reference under section 120**

- (1) Where the Competition Commission remits a matter to Monitor under subsection (6) of section 121, Monitor must make such changes to the method to which the matter relates as it considers necessary, having regard to the reasons specified for the purposes of subsection (8)(b) of that section.
- (2) Monitor must give the Competition Commission and the National Health Service Commissioning Board a notice specifying—
  - (a) the changes it proposes to make, and
  - (b) its reasons for proposing to make them.
- (3) Monitor must make the changes specified in the notice unless it is given a direction under section 123 before the end of the period of 28 days beginning with the day after that on which it gave the notice.
- (4) If Monitor is given a direction under that section before the end of that period, it must make such of the changes as are not specified in the direction.

## **123 Power to veto changes proposed under section 122**

- (1) The Competition Commission may, within the period of 28 days beginning with the day after that on which it is given a notice under section 122, direct Monitor—
  - (a) not to make the changes specified in the notice, or
  - (b) not to make such of those changes as may be specified in the direction.
- (2) Monitor must comply with a direction under this section.
- (3) The Secretary of State may, within that period and on the application of the Commission, direct that the period for giving a direction under this section (and, accordingly, the period referred to in section 122(3)) is to be extended by 14 days.
- (4) The Competition Commission may give a direction under this section only in respect of such of the changes specified in the notice under section 122 as it considers are not necessary in consequence of its determination on the reference.
- (5) If the Commission gives a direction under this section, it—
  - (a) must give notice specifying the changes proposed by Monitor, the terms of the direction and the reasons for giving it, and
  - (b) must itself make such changes to the method to which the reference relates as it considers necessary in consequence of its determination on the reference.



- (6) In exercising its function under subsection (5)(b), the Commission must have regard to the matters to which Monitor must have regard when determining the method to which the reference relates.
- (7) Before making changes under subsection (5)(b), the Commission must give notice to Monitor and the National Health Service Commissioning Board specifying—
  - (a) the changes it proposes to make,
  - (b) its reasons for proposing to make them, and
  - (c) the period within which representations on the proposed changes may be made.
- (8) The period specified for the purposes of subsection (7)(c) must not be less than 28 days beginning with the day on which the notice is given.

#### **124 Local modifications of prices: agreements**

- (1) The commissioner and the provider of a health care service may agree that the price payable to the provider for the provision of the service for the purposes of the NHS in such circumstances or areas as may be determined in accordance with the agreement is the price determined in accordance with the national tariff for that service as modified in accordance with the agreement.
- (2) An agreement under this section must specify the date on which the modification is to take effect; and a date specified for that purpose may be earlier than the date of the agreement (but not earlier than the date on which the national tariff took effect).
- (3) An agreement under this section has effect only if it is approved by Monitor.
- (4) An agreement submitted for approval under subsection (3) must be supported by such evidence as Monitor may require.
- (5) Monitor may approve an agreement under this section only if, having applied the method specified under section 116(1)(d), it is satisfied that, without a modification to the price determined in accordance with the national tariff for that service, it would be uneconomic for the provider to provide the service for the purposes of the NHS.
- (6) Where an agreement is approved under subsection (3), Monitor must send a notice to the Secretary of State and such clinical commissioning groups, providers and other persons as it considers appropriate.
- (7) Monitor must also publish the notice.
- (8) The notice must specify—
  - (a) the modification, and
  - (b) the date on which it takes effect.
- (9) If the Secretary of State considers that the modification gives or may give rise (or, where it has yet to take effect, would or might give rise) to liability for breach of an EU obligation, the Secretary of State may give a direction to that effect; and the modification is (or is to be) of no effect in so far as it is subject to the direction.

## **125 Local modifications of prices: applications**

- (1) Monitor may, on an application by a provider of a health care service who has failed to reach an agreement under section 124 with the commissioner, decide that the price payable to the provider for the provision of the service for the purposes of the NHS in such circumstances or areas as Monitor may determine is to be the price determined in accordance with the national tariff for that service as modified in such way as Monitor may determine.
- (2) An application under this section must be supported by such evidence as Monitor may require.
- (3) Monitor may grant an application under this section only if, having applied the method under section 116(1)(d), it is satisfied that, without a modification to the price determined in accordance with the national tariff for that service, it would be uneconomic for the provider to provide the service for the purposes of the NHS.
- (4) Subsections (5) to (8) apply where Monitor grants an application under this section.
- (5) The decision by Monitor on the application takes effect on such date as Monitor may determine; and a date determined for that purpose may be earlier than the date of the decision (but not earlier than the date on which the national tariff took effect).
- (6) Monitor must send a notice of the decision to the Secretary of State and such clinical commissioning groups, providers and other persons as it considers appropriate.
- (7) Monitor must also publish the notice.
- (8) The notice must specify—
  - (a) the modification, and
  - (b) the date on which it takes effect.
- (9) If the Secretary of State considers that the modification gives or may give rise (or, where it has yet to take effect, would or might give rise) to liability for breach of an EU obligation, the Secretary of State may give a direction to that effect; and the modification is (or is to be) of no effect in so far as it is subject to the direction.

## **126 Applications under section 125: notification of commissioners**

- (1) This section applies where Monitor—
  - (a) receives an application under section 125, and
  - (b) is satisfied that the continued provision for the purposes of the NHS of health care services to which a condition in the applicant's licence under section 97(1)(i), (j) or (k) applies is being put at significant risk by the configuration of certain health care services provided for those purposes.
- (2) In subsection (1), a reference to the provision of services is a reference to their provision by the applicant or any other provider.
- (3) Monitor must as soon as reasonably practicable notify the National Health Service Commissioning Board and such clinical commissioning groups as Monitor considers appropriate—
  - (a) of its receipt of the application, and
  - (b) of its reasons for being satisfied as mentioned in subsection (1)(b).

- (4) Monitor must publish for each financial year a list of the notifications under this section that it has given during that year; and the list must include for each notification a summary of Monitor’s reasons for being satisfied as mentioned in subsection (1)(b).
- (5) The Board and clinical commissioning groups, having received a notification under this section, must have regard to it in arranging for the provision of health care services for the purposes of the NHS.

## **127 Correction of mistakes**

- (1) This section applies where the national tariff contains information that does not accord with—
  - (a) what Monitor and the National Health Service Commissioning Board agreed on the matter concerned, or
  - (b) where the matter was determined by arbitration, what was determined.
- (2) Monitor must send a notice to—
  - (a) each clinical commissioning group,
  - (b) each relevant provider, and
  - (c) such other persons as Monitor considers appropriate.
- (3) Monitor must also publish the notice.
- (4) The notice must specify—
  - (a) the information that does not accord with what was agreed or determined,
  - (b) the correction required to make the information so accord, and
  - (c) the date on which the correction is to take effect.
- (5) A date specified for the purposes of subsection (4)(c) may be earlier than the date of the notice.
- (6) In this section, “relevant provider” has the meaning given in section 118(14).