

Draft Guidance on Enforcement of the National Tariff

13 June 2013



Contents

Foreword	2
1. Introduction.....	3
What this guidance is about.....	3
The regulators involved and their powers	3
About this document.....	4
How to respond to this consultation	5
2. Scope of the guidance	6
What this guidance covers.....	6
What this guidance does not cover	6
3. Powers available and discretion to use them	8
4. Monitor’s general approach to enforcement	10
5. General approach to enforcement of the National Tariff	11
6. Summary of approach to enforcing the National Tariff.....	13
7. Common aspects of our approach to enforcing the National Tariff	14
Prioritisation framework	14
Information gathering.....	14
Informal action.....	14
Decision-making for National Tariff enforcement cases	14
8. How Monitor may enforce the National Tariff with commissioners.....	15
Powers	15
Approach.....	15
9. How Monitor may enforce the National Tariff with licensed providers.....	18
Powers	18
Approach.....	18
10 How Monitor and the NHS Trust Development Authority (NHS TDA) may enforce the National Tariff with NHS trusts	19
Powers	19
Approach.....	19
Consultation questions.....	21
Annex 1 Monitor’s National Tariff powers.....	22
Annex 2 Powers to enforce the National Tariff	25
National Tariff requirements on commissioners	25
NHS England powers regarding commissioners.....	25
National Tariff licence conditions for licensed providers.....	26
National Tariff requirements on NHS trusts.....	26

Foreword

Monitor and NHS England have responsibility for designing the new NHS payment system, taking over this responsibility from the Department of Health. We intend to publish the consultation notice on the proposed National Tariff (for 2014/15) in autumn 2013. This will replace the annual *Payment by Results Guidance* set by the Department of Health for NHS health care services (*PbR Guidance*).

The National Tariff will set out the NHS health care services which are to have a national price set by the tariff, the prices for those services and the method for determining those prices. The Tariff will also set out permitted variations from national prices, and the rules for local variations and for local price-setting for other services.

The Health and Social Care Act 2012 requires that the price payable for NHS health care services is to be in accordance with the National Tariff. Compliance with the National Tariff will be written into standard contracts for NHS services.

Monitor, the NHS Trust Development Authority (NHS TDA) and the NHS Commissioning Board (known as NHS England) have different powers to take action when there is a failure to comply with the National Tariff. Monitor is responsible for enforcing compliance with the National Tariff against licensed providers and commissioners (Clinical Commissioning Group (CCGs and NHS England). The NHS Trust Development Authority is responsible for enforcing compliance with the National Tariff against NHS trusts. NHS England does not have specific powers to enforce the National Tariff but it has powers to take action where a CCG is failing to discharge its duties properly.

This document sets out our proposed approach to enforcing the National Tariff, in consultation with the sector. In developing this approach, we have been mindful of evidence that commissioners and providers in many areas have had difficulty complying with NHS payment rules in the past, and that those rules have not been strictly enforced. Our aim is to make the rules governing price negotiation clearer and more flexible, so that commissioners and providers can negotiate the best available services for local patients and also remain compliant with the National Tariff.

Taking this into account, the National Tariff will include local payment variation rules that will permit local innovation in new payment approaches. Complying with the local payment variation rules will constitute compliance with the National Tariff.

Monitor intends to conduct price regulation in a manner that is as predictable and transparent as possible and to support providers and commissioners in complying with the National Tariff. Monitor aims to fulfil this intention in how we develop and establishes the National Tariff and through our approach to enforcing the National Tariff.

We welcome your views on how we propose to enforce the National Tariff to ensure that the system we develop is practical and effective. Following this non-statutory consultation we will finalise this guidance for publication later this year, alongside the National Tariff.

1. Introduction

What this guidance is about

This draft guidance is on the general approach that Monitor proposes to take to enforce compliance with the National Tariff by licensed health care providers and commissioners, including both the NHS Commissioning Board (known as NHS England) and CCGs. The NHS Trust Development Authority (NHS TDA) proposes to take this general approach in order to enforce compliance with the National Tariff by NHS trusts. We are publishing this non-statutory consultation to invite views on our proposals, to ensure they are practical and effective. Following this non-statutory consultation we will finalise this guidance for publication later this year.

This draft guidance explains:

- how Monitor may enforce the National Tariff with licensees and commissioners;
- how the NHS TDA, in conjunction with Monitor, may enforce the National Tariff with NHS trusts; and
- what NHS England may do where a commissioner does not comply with the National Tariff and/or does not comply with Monitor's direction to comply with the National Tariff.

Monitor intends to conduct price regulation in a manner that is predictable and transparent and to be supportive of providers and commissioners as they seek to comply with the National Tariff. Monitor aims to fulfil these intentions both in the way we develop and then establish the National Tariff and in our subsequent approach to enforcing the National Tariff.

In writing this draft guidance, we have tried to be as clear as possible, using straightforward language and avoiding quoting sections of the Act where possible. This means, though, that where we have not used the exact wording of the Act, statutory wording takes precedence over our interpretation of it.

Monitor published *Enforcement Guidance*¹ on our enforcement powers under sections 105 and 106 of the Health and Social Care Act 2012 (the Act). That Guidance sets out the specific enforcement powers Monitor may use to ensure that all licensed providers comply with their licence conditions. This followed an eight-week statutory consultation with stakeholders on our proposals. The licence conditions include a condition requiring licensed providers to comply with the National Tariff. Monitor's *Enforcement Guidance* is used as a basis for this guidance on how Monitor and the NHS TDA propose to enforce compliance with the National Tariff.

The regulators involved and their powers

The Health and Social Care Act 2012 (the Act) changed the way providers of NHS health care services are regulated, and changed Monitor's duties and powers. Monitor's primary duty is to protect and promote the interests of patients by promoting the provision of health services which is economic, efficient and effective, and which maintains or improves the quality of services.

Further information on Monitor's new role can be found on Monitor's website:

www.monitor.gov.uk

¹ <http://www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7>

The Act established new commissioning arrangements for the NHS in England. From April 2013, while NHS England undertakes some commissioning, most commissioning is the responsibility of CCGs. CCGs are funded, supported and assured by NHS England.

National prices are currently set by the Department of Health and this will continue until the responsibility for the National Tariff transfers to Monitor, which will happen when we publish the first National Tariff. The Act gives Monitor and NHS England responsibility to establish the National Tariff for NHS health care services. The National Tariff will set out the NHS health care services that are to have a national price set by the tariff, the prices for those services and the method for determining those prices. The Tariff will also set out permitted variations from national prices, and the rules for local variations and for local price setting for other services. The Act defines the National Tariff as a document published by Monitor in accordance with section 116 of the Act.

The Act requires that the price payable for NHS health care services is to be determined in accordance with the National Tariff (once published). Compliance with the National Tariff will be written into standard contracts for NHS services. Monitor and the NHS TDA have powers to enforce compliance with the National Tariff. NHS England does not have specific powers to enforce the National Tariff – it has powers under the National Health Services Act 2006 to take action where a CCG is failing to discharge its duties properly.

The NHS TDA is a Special Health Authority, established on 1 June 2012 by an order made under section 28 of the National Health Service Act 2006 (Statutory Instrument 2012 No. 901). The NHS TDA's functions are to oversee the performance of NHS trusts in England to deliver high quality care, including assurance on clinical quality, governance and management of risk in those trusts. It assists them to become sustainable organisations able to apply for authorisation as foundation trusts. The NHS TDA also has functions in connection with the appointment of chairs and non-executive members to NHS trusts and the appointment of trustees for NHS charities, where the Secretary of State has a power to appoint.

About this document

Section 2 explains what the guidance covers and the general approach to enforcement of the National Tariff proposed by Monitor and the NHS TDA.

Section 3 sets out the powers available to enforce compliance with the National Tariff, and explains the discretion over whether to act or not in relation to the powers.

Section 4 notes Monitor's powers to enforce the licence conditions in the provider licence, and explains how we will apply a cost benefit prioritisation framework in deciding when to pursue action, similar to the approach in the *Enforcement Guidance*².

Section 5 proposes seven principles which, in addition to our general duties and the exercise of our functions under sections 62 and 66 of the Act, will underpin our approach to enforcement of the National Tariff.

Section 6 summarises how we intend to approach applying the powers available to us.

Section 7 covers aspects of our proposed approach to enforcing the National Tariff that are common to all parties we may take enforcement action against.

² www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7

Section 8, 9 and 10 outline our proposed approach to enforcing the National Tariff with commissioners, licensed providers and NHS trusts.

How to respond to this consultation

We welcome all responses to this consultation. We have asked a number of questions in each section of the document and a complete list of all questions appears on page 22. We very much welcome any comments that you wish to make on our proposals. When you are considering your comments, we should be grateful if you would consider responding to our specific consultation questions.

Please submit your responses to the questions and any other comments that you have by **5pm on Tuesday, 9 July 2013**. You can find a response form on our website at www.monitor.gov.uk/pricing.

Confidentiality

If you would like your name or the name of your organisation to be kept confidential and excluded from the published summary of responses or other published documents, you can request this on the response form. If you send your response by email or post, please do not forget to tell us if you wish your name, or the name of your organisation, to be withheld from any published documents.

If you would like any part of your response - instead of or as well as your identity - to be kept confidential, please let us know and make it obvious by marking in your response which parts we should keep confidential. An automatic computer-generated confidentiality statement will not count for this purpose. As we are a public body subject to, for example, the Freedom of Information Act 2000, we cannot guarantee that we will not be obliged to release your response or name even if you say it is confidential.

What we will do next

We hope and expect that we will receive a lot of responses to this consultation, so we do not intend to write back to everyone who contacts us. However we will read and consider all responses and, when we publish the final guidance, explain how your comments and views influenced our approach.

You can sign up to receive emails when we publish other engagement and consultation publications at www.monitor.gov.uk/news-updates/sign-our-news-updates.

2. Scope of the guidance

What this guidance covers

This guidance is designed to provide information about how Monitor and the NHS TDA generally expect to go about enforcing the National Tariff. However, there may be circumstances when it is appropriate to depart from this guidance in order to protect and promote the interests of patients.

Monitor recognises that the National Tariff, which is being developed by Monitor and NHS England, will mark a change in approach to regulating prices for NHS services. Our approach to enforcement of the National Tariff will evolve over time as evidence improves about the role of the payment system in supporting the design and delivery of services that protect and promote the interests of patients.

Monitor is aware that recently there may have been limited compliance with the *PbR Guidance*. While the *PbR Guidance* currently allows for payment modifications to be made if they are in compliance with the flexibilities guidance, there is limited awareness and low use of the flexibilities³. Monitor and NHS England have been reviewing the existing flexibilities guidance to develop local payment variation rules that permit and support local innovation in payment approaches within clear parameters. The National Tariff will include these local payment variation rules.

The local payment variations rules will allow providers and commissioners to vary national currencies or prices in certain circumstances where this protects and promotes the interests of patients. Complying with the local payment variation rules will be complying with the National Tariff. To oversee the use of local payment variations and build the evidence of local practice, Monitor may request to be informed or to approve the local payment variations – this will be explained in the National Tariff.

The National Tariff will also explain the process for commissioners and providers to agree a local modification to a price specified by the Tariff and what to do where commissioners and providers have been unable to agree a local modification. Where a local modification is approved by Monitor - whether it is based on agreement between the commissioner and provider or is based on an application to Monitor by a provider when such agreement with the commissioner could not be reached - paying for services in accordance with the approved local modification will constitute compliance with the National Tariff.

Monitor wants to facilitate compliance with the National Tariff. To assist providers and commissioners we have put in place processes to offer informal advice and to respond to queries on the National Tariff made by commissioners and providers. This will be explained when Monitor publishes the National Tariff.

What this guidance does not cover

The NHS TDA has the power to enforce its accountability framework with NHS trusts from 1 April 2013. This includes compliance with the current *PbR Guidance* set by the Department of Health for NHS health care services through the pricing licence conditions that are mirrored in the NHS TDA's accountability framework. This is not covered in this guidance. Once the

³ Source: Research by NHS Institute for Innovation, which was commissioned by DH's Innovation Health and Wealth workstream

National Tariff, which Monitor publishes, comes into effect, Monitor and the NHS TDA will work together to enforce the National Tariff as explained in this guidance.

NHS England has powers in relation to the exercise of functions by CCGs from 1 April 2013. This includes requiring CCGs to use the NHS Standard Contract, which requires payment in accordance with the current *PbR Guidance* for NHS health care services set by the Department of Health, and taking action where a CCG has failed to exercise a function or not exercised a function properly. Compliance with the National Tariff is a key part of a CCG exercising its commissioning functions properly – CCGs are required to agree prices for services in accordance with the National Tariff. This is not covered in this guidance. Once the National Tariff, which Monitor publishes, comes into effect, Monitor will enforce the National Tariff with commissioners using its direction-making powers under the Act, as explained in this guidance. We will also work with NHS England to consider what action NHS England might take where a CCG fails to comply with the National Tariff and/or fails to comply with a direction Monitor makes regarding compliance with the National Tariff.

3. Powers available and discretion to use them

Section 115 of the Act states that the price payable for a health care service specified in the National Tariff is to be based on the price specified in the National Tariff for that service. If a health care service is not specified in the National Tariff, the price payable is to be determined in accordance with the rules in the National Tariff for that service. Monitor and the NHS TDA have powers to enforce compliance with the National Tariff. In respect of all of the powers there is discretion over whether to act or not.

Where we choose to act, we can decide to do so formally or informally. Informal enforcement action may include letters, phone calls, education and workshops.

The formal powers available are summarised in Table 1 below.

Table 1 on the National Tariff enforcement powers shows how Monitor, the NHS TDA and NHS England intend to apply the powers available to them.

Who must comply with the National Tariff	Who enforces it	Threshold for action	Comment
Commissioners (CCGs and NHS England)	Monitor	Monitor may take action if there has been breach of the National Tariff	Monitor may direct corrective action but not impose a financial penalty or revoke a CCG's authorisation. NHS England may take further action
Licensed Providers	Monitor	Monitor or the NHS TDA may take action if Monitor suspects or is satisfied that there has been a breach of the National Tariff. (The NHS TDA seeks to reflect Monitor's approach to enforcement in their accountability framework for NHS trusts.)	Monitor must apply <i>Enforcement Guidance</i>
NHS trusts	NHS TDA		Monitor may investigate and the NHS TDA may take action
Providers who are exempt ⁴ (<i>de minimis</i>)		Monitor may take action if there has been breach of the National Tariff	Monitor may take enforcement action against commissioners who contract with exempt providers

Monitor's enforcement powers under the Act are:

- under Section 117, Monitor may take action if a commissioner does not comply with the National Tariff.

⁴ The Department of Health proposes that exempt providers are NHS trusts, primary care providers, and small independent secondary health care providers who are below the proposed *de minimis* turnover threshold of £10 million a year.

- under Sections 105 and 106, Monitor may use its specific enforcement powers to ensure that all licensed providers comply with the National Tariff. The use of these powers is explained in Monitor's published *Enforcement Guidance*⁵.

The NHS TDA may issue directions to an NHS trust that has failed to comply with the requirements relating to the tariff imposed under the NHS TDA's accountability framework for NHS trusts⁶. The NHS TDA's enforcement powers are explained in *Delivering High Quality Care for Patients – The Accountability Framework for NHS trusts*, published on 8 April 2013⁷.

While NHS England does not have specific powers to enforce the National Tariff, it does have the ability to exercise formal powers of intervention where it believes a CCG is failing or is at risk of failing to discharge its functions properly. The support and intervention framework is set out in NHS England's *CCG Assurance Framework 2013/14 (outline proposal and interim arrangements)*⁸ which was published on 7 May 2013. Where a CCG fails to comply with the National Tariff or with Monitor's directions to bring about compliance, NHS England may consider this in the context of the CCG Assurance Framework.

More detail on Monitor's powers are explained in sections 8 to 10.

⁵ www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7

⁶ The NHS TDA has a duty under the National Health Service Trust Development Authority Directions 2013, to ensure that English NHS trusts comply with conditions equivalent to the conditions of licences issued by Monitor, as the NHS TDA considers appropriate.

⁷ www.ntda.nhs.uk/wp-content/uploads/2012/04/framework_050413_web.pdf

⁸ www.england.nhs.uk/wp-content/uploads/2013/05/ccg-af.pdf

4. Monitor's general approach to enforcement

The Act requires that Monitor issues licences for providers of NHS services, subject to certain exemptions, and it gives Monitor powers to enforce the conditions within the licence and other regulatory requirements. The *Enforcement Guidance*⁹, which has been the subject of an earlier consultation, explains these enforcement powers and how Monitor will use them.

We plan to follow the general approach in the enforcement guidance in our approach to enforcing the National Tariff with commissioners and NHS trusts.

The enforcement guidance explains:

- the different enforcement powers that Monitor has;
- how Monitor is likely to decide whether to take action (the prioritisation framework), and what kind of action Monitor might decide to take;
- the factors Monitor will take into account when deciding which, if any, requirements to impose or what, if any, undertakings Monitor will accept;
- the matters Monitor may take into account when imposing a variable monetary penalty;
- the processes that Monitor will follow if Monitor decides to formally investigate a potential breach. This includes the procedures for gathering information, the information that parties may receive about the investigation process, and the opportunity for the affected parties to make representations;
- the decision-making procedures that Monitor will follow; and
- the rights of appeal that exist if the affected party wishes to contest a Monitor enforcement decision.

To gather information about a case where there may be non-compliance, Monitor may use our information gathering powers under section 104 of the Act to gather information from commissioners (NHS England and CCGs) and providers (whether licensed or not). The use of these powers is explained in the *Enforcement Guidance*.

Throughout this *Draft Guidance on Enforcement of the National Tariff*, we refer to relevant aspects of the *Enforcement Guidance*. We have not repeated them in here avoid unnecessarily lengthening this guidance.

⁹ www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7

5. General approach to enforcement of the National Tariff

In developing our approach to enforcing the National Tariff, Monitor proposes seven principles which, in addition to our general duties and the exercise of our functions under sections 62 and 66 of the Act, will underpin our approach to enforcement of the National Tariff.

1. Monitor will act to protect and promote the interests of patients

Monitor's main duty is to ensure that the enforcement actions we take enable us to achieve our main duty to protect and promote the interests of patients by promoting the provision of NHS health care services which is economic, efficient and effective, and maintains or improves the quality of the services.

2. The Act says that the prices for services must be consistent with the National Tariff

If a health care service is specified in the National Tariff, the price payable for that NHS service is the national price set out in the National Tariff, subject to any variations provided for in the Tariff. If a health care service is not specified in the National Tariff, the price payable for that NHS service is a price determined in accordance with the rules in the National Tariff. Providers and commissioners are also compliant if they agree a price in accordance with a local modification to the National Tariff price approved by Monitor, or in accordance with the rules for local payment variations. These will be explained in the National Tariff.

3. Monitor will facilitate compliance by encouraging appropriate use of the available local payment variations to national prices and currencies in the National Tariff

NHS England and Monitor are developing rules for local payment variations to the National Tariff. These rules will be part of the National Tariff and will be included in the National Tariff. The rules on local payment variations are designed to allow providers and commissioners to vary national currencies or prices in certain circumstances where this promotes value for patients. Complying with the local payment variation rules will be complying with the National Tariff.

4. Monitor will encourage transparency about current payment practices

Monitor is aware that in some localities additional/supplementary payments are made outside of the *PbR Guidance*. There may be circumstances where an efficient provider cannot deliver services sustainably at national prices. To address this, Monitor is developing rules for agreeing local modifications to the National Tariff and rules for local payment variations to the National Tariff. Monitor wants to encourage transparency about current payment practices in order to allow national prices to be developed that reflect the complexities in the provision of care.

5. Monitor plans to publish decisions we have made to promote understanding of our enforcement approach

Monitor is required to publish most decisions we make regarding enforcement action, as detailed in the *Enforcement Guidance*¹⁰. Monitor and the NHS TDA plan to publish the decisions we make and actions we take to enforce the National Tariff. Doing so should promote understanding of how to comply with National Tariff.

¹⁰ <http://www.monit.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7>

6. Monitor will not resolve contract disputes – the parties must use the appropriate mechanisms

While Monitor, the NHS TDA and NHS England will offer education and support to encourage compliance with the National Tariff, we will not generally become involved in contract disputes. If there is a dispute about a contract for NHS health care services between a provider and a commissioner, the parties need to use whatever dispute resolution process is included in the contract and, if necessary, any legal process to resolve that.¹¹

7. Monitor will prioritise enforcement work in order to make the best use of resources

Monitor has limited resources, so we will need to prioritise our enforcement work in order to make the best use of them. The prioritisation framework in the *Enforcement Guidance*¹² describes how Monitor will prioritise enforcement action against licensees in order to make the best use of finite resources. Similarly, Monitor proposes to apply the principles of the prioritisation framework to all decisions relating to the National Tariff enforcement action, whether such action be against a licensee or any other party.

Consultation question 1:

Do you support Monitor's proposed principles to underpin how Monitor will enforce the National Tariff? Can you suggest further or alternative principles to inform Monitor's enforcement of the National Tariff?

¹¹ NHS TDA and NHS England may on occasions run a dispute resolution process. However, this is seen as an exceptional action and the expectation is that both parties will work together to resolve any disputes without referral to the NHS TDA and NHS England.

¹² www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7

6. Summary of approach to enforcing the National Tariff

Table 2 on the **approach to enforcing the National Tariff** summarises how Monitor intends to approach applying the powers available to us. More detail on our proposed approach is explained in the following sections.

Applies to	Threshold to act	Actions available to enforce the National Tariff	Proposed prioritisation and case procedures
Commissioners (CCGs and NHS England) and exempt providers (other than NHS trusts)	Non-compliance with the National Tariff	Monitor may direct commissioner to take steps to <ul style="list-style-type: none"> • Ensure failure does not continue • Ensure position is restored We may want NHS England to act if our direction is not followed	Propose that we follow the prioritisation framework, case initiation, investigation and case updates procedures in the <i>Enforcement Guidance</i>
Licensees	Suspect or are satisfied there has been non-compliance	Monitor may <ul style="list-style-type: none"> • Agree an enforcement undertaking with a licensee • Impose a discretionary requirement on a licensee • Impose an additional licence condition on an FT • Revoke a licence 	We will follow the prioritisation framework and case procedures in the <i>Enforcement Guidance</i>
NHS Trust		TDA may take action. The Monitor/NHS TDA partnership agreement specifies that Monitor will investigate and the NHS TDA will enforce compliance with the National Tariff	Propose that we follow the prioritisation framework, case initiation, investigation and case updates procedures in the <i>Enforcement Guidance</i> , liaising with the NHS TDA on proposed actions

7. Common aspects of our approach to enforcing the National Tariff

This section covers aspects of our proposed approach to enforcing the National Tariff that are common to how we intend to apply the powers to all parties against which we take enforcement action.

Prioritisation framework

The prioritisation framework in the *Enforcement Guidance* describes how Monitor will prioritise enforcement work in order to make the best use of resources. We propose to use the principles of this framework as a basis for how we prioritise action to enforce compliance with the National Tariff against commissioners and NHS trusts. The NHS TDA has agreed to this approach when it uses its own powers.

Consultation question 2:

Do you support Monitor's proposal to apply the prioritisation framework to all decisions about whether or not to pursue action to enforce the National Tariff?

Information gathering

To gather information about a case where there may be non-compliance, Monitor may gather information from the NHS TDA, NHS England and/or use our information gathering powers under section 104 of the Act to gather information from commissioners (NHS England and CCGs) and providers, whether licensed or not.

The NHS TDA may request information required to carry out its functions from an NHS trust under the National Health Service Trust Development Authority Directions 2013, section 4 (m).

Informal action

Informal action is action that does not involve using our formal enforcement powers. Even when a matter could be addressed by using formal enforcement powers, we may consider it appropriate to deal with it informally and give providers and commissioners an opportunity to address any issues without a formal investigation. The *Enforcement Guidance* sets out an approach for deciding whether to take formal or informal action. We will use this approach when deciding whether to take formal or informal action when enforcing compliance with the National Tariff by licensed providers.

We propose to adopt the principles of this approach when we decide whether to use informal powers when enforcing compliance with the National Tariff by commissioners and NHS trusts. The NHS TDA has agreed to this approach when it uses its own powers.

Decision-making for National Tariff enforcement cases

This decision-making process Monitor proposes to follow when making decisions about action we take against providers and commissioners will follow the principles of the decision-making process set out in Monitor's *Enforcement Guidance*¹³.

¹³ www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7

8. How Monitor may enforce the National Tariff with commissioners

This section sets out the powers and our proposed approach to enforcing the National Tariff with commissioners.

Powers

The Act gives Monitor enforcement powers against commissioners under sections 117(4) and (5) of the Act. Monitor may use these powers where:

- if there is a national price specified in the National Tariff, a commissioner agrees a price for the service other than a price determined in accordance with Tariff on the basis of that national price;
- a commissioner fails to comply with the rules set out in the National Tariff for varying this price; or
- a commissioner fails to comply with the rules for local price-setting.

Where this occurs, Monitor may direct the commissioner to ensure that the failure does not continue or recur; and/or to ensure that the position is (where possible) restored to what it would have been if: (i) the commissioner had agreed to pay the price payable under the National Tariff; or (ii) the failure to comply with the National Tariff rules had not occurred.

NHS England can exercise its formal powers of intervention where it believes a CCG is failing or is at risk of failing to discharge its functions properly. The support and intervention framework is set out in NHS England's *CCG Assurance Framework 2013/14 (outline proposal and interim arrangements)*¹⁴, which was published on 7 May 2013. Where a CCG fails to comply with the National Tariff or with Monitor's directions to bring about compliance, NHS England may consider this in the context of the CCG Assurance Framework.

Monitor also has powers under the NHS Procurement, Patient Choice and Competition Regulations 2013¹⁵. These Regulations impose requirements on commissioners to ensure that they adhere to good practice in relation to procurement, protect the right of patients to make choices and do not engage in anti-competitive behaviour. If, when investigating potential non-compliance with the National Tariff for NHS health care services, we become aware that there may be an issue related to how those services were procured, we may consider taking action under those Regulations. Substantive guidance on how we expect to enforce and apply these Regulations was published for consultation on 20 May 2013 at www.monitor-nhsft.gov.uk/home/news-events-publications/consultations/consultations-and-engagement-monitors-role-sector-regula-6.

Approach

Monitor proposes to use the 'prioritisation framework', the 'case initiation', 'investigation' and 'case update' procedures in the *Enforcement Guidance*¹⁶ to investigate possible non-compliance with the National Tariff by commissioners.

If Monitor finds that a commissioner has agreed a price for a service with a national price other than as permitted by the National Tariff or has failed to comply with the local payment variation

¹⁴ <http://www.england.nhs.uk/wp-content/uploads/2013/05/ccg-af.pdf>

¹⁵ <http://www.legislation.gov.uk/ukxi/2013/500/contents/made>

¹⁶ <http://www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7>

or local price-setting rules set out in the National Tariff, we may take informal action (as explained in section 7) or formal action to direct a commissioner to correct the situation.

Proposed process for communicating proposed and final decisions

Notice of a proposed direction

If Monitor intends to make a direction to a commissioner, we intend to first issue the commissioner with a notice of a proposed direction, which will explain:

- the proposal to make a direction;
- the grounds for making the direction - a statement of the evidence and reasoning behind the proposal;
- the circumstances (if any) in which Monitor may not impose the direction; and
- the period for the commissioner to make representations to Monitor on its proposal.

Where Monitor is considering imposing a direction, we may seek views on whether they are appropriate. Seeking views may range from formal and extensive public engagement to more informal, brief engagement with third parties. The decision on whether to seek views will be made on a case-by-case basis. In deciding whether to seek views we will consider all relevant matters, including whether it is in the interests of health care service users to take action quickly, for example, where there is a concern about patient safety, as well as any benefits of wider engagement.

After seeking views, Monitor would decide whether the proposed direction should be made in the original or a modified form.

Making representations to Monitor

On receiving a notice of a proposed direction, Monitor proposes that the relevant parties will be invited to submit representations to Monitor in writing and in person within a specified period.

Final notice of direction

After the end of the notice period for making representations, Monitor proposes that we decide whether to make the direction, with or without alteration.

If Monitor decides to make the direction, we will issue a further notice, known as a 'final notice of direction'. The final notice will contain the following information:

- the direction Monitor has decided to make;
- the reasons for making the direction; and
- the consequences of failing to comply with the direction.

Although not required by the Act to do so, we expect that we will always publish final notices unless the circumstances of the case make this inappropriate. Where appropriate, we will consider the need to obtain confirmation of factual accuracy prior to publication.

Other actions

NHS England may also act if there is non-compliance by a CCG with the National Tariff or if a direction Monitor makes is not followed by a CCG. NHS England will consider this within its CCG Assurance Framework.

Monitor may also consider taking enforcement action with the relevant provider(s) at the same time.

There are no rights of appeal in the Act on enforcement decisions Monitor makes against commissioners.

Consultation question 3:

Do you support Monitor's proposal to apply the principles of the 'prioritisation framework', 'case initiation', 'investigation', and 'case update' procedures in the *Enforcement Guidance* when we investigate a commissioner's non-compliance with the National Tariff? Are there other processes that you consider it would be helpful for Monitor to include in this guidance?

9. How Monitor may enforce the National Tariff with licensed providers

This section summarises our enforcement powers and how we will enforce the National Tariff with licensees. More detail is contained in the *Enforcement Guidance*, which was the subject of an earlier consultation¹⁷.

Powers

Monitor has enforcement powers under sections 105 and 106 of the Act. Section 111 of the Act gives Monitor additional powers to take action where the governance of an NHS foundation trust is such that it is failing, or will fail, to comply with one or more of the conditions in its licence. Section 89 of the Act gives Monitor the power to revoke a provider's licence if Monitor is satisfied that the provider has failed to comply with a licence condition. These enforcement powers can be used if a licensed provider does not comply with its licence conditions.

There are five licence conditions directly related to pricing, one of which requires compliance with the National Tariff. Other pricing licence conditions are related to recording and providing Monitor with information to support price regulation, and engagement with commissioners on any proposed local modifications to a national price¹⁸. These powers mean that Monitor can take action if we suspect or are satisfied that there has been a breach of the National Tariff.

Approach

Monitor may take informal action or formal enforcement action against licensees. The formal action Monitor may take is to:

- agree an enforcement undertaking with a licensee;
- impose a discretionary requirement on a licensee (including a financial penalty);
- impose an additional licence condition on a foundation trust; and
- revoke a licence.

These powers, along with the prioritisation framework and case procedures Monitor will follow, are explained in the *Enforcement Guidance*.

Monitor may also consider taking enforcement action with the relevant commissioner(s) at the same time.

There are rights of appeal to the First-Tier Tribunal on some of the enforcement decisions we make against licensed providers (section 107 of the Act). These are explained in the *Enforcement Guidance*.

¹⁷ <http://www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7>

¹⁸ *The New NHS Provider Licence* at <http://www.monitor-nhsft.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-8>

10 How Monitor and the NHS TDA may enforce the National Tariff with NHS trusts

This section summarises the enforcement powers and how Monitor and the NHS TDA propose to use our enforcement powers with NHS trusts.

Powers

The NHS TDA's oversight regime for NHS trusts mirrors many of the provider licence conditions, including those related to pricing. This oversight regime results from the NHS TDA's duty under the National Health Service Trust Development Authority Directions 2013 to ensure that English NHS trusts comply with conditions equivalent to the conditions of licences issued by Monitor, as the NHS TDA considers appropriate. The NHS TDA complies with this duty by setting out the conditions in "relevant standards" (eg, in its accountability framework) and by giving directions to individual NHS trusts where necessary.

The NHS TDA's enforcement powers are explained in *Delivering High Quality Care for Patients – The Accountability Framework for NHS Trusts* published on 8 April 2013¹⁹.

The Partnership Agreement between the NHS TDA and Monitor explains that the NHS TDA may take action if Monitor suspects or is satisfied that there has been a breach of the National Tariff. Monitor will advise the NHS TDA if we suspect or are satisfied that there has been a breach of the National Tariff by an NHS Trust.

The NHS TDA intends to use its powers to apply a similar enforcement approach to Monitor, although some actions are not available. One example is that NHS trusts do not hold licences so the NHS TDA cannot revoke an NHS trust's licence.

Approach

The NHS TDA may take informal action or formal action against NHS trusts, as outlined in section 7.

The NHS TDA and Monitor propose to use the 'prioritisation framework', the 'case initiation' 'investigation' and 'case update' procedures in the *Enforcement Guidance*²⁰ to investigate possible non-compliance with the National Tariff. Monitor will liaise with the NHS TDA when Monitor:

- decides to investigate an NHS trust;
- suspects or is satisfied that there has been a breach of the National Tariff by an NHS Trust;
- progresses a longer running case or concludes an investigation; and
- recommends action for the NHS TDA to take.

Communicating proposed and final decisions

The NHS TDA proposed process for how and when it will communicate proposed and final decisions to the relevant NHS trust is contained in the NHS TDA's *Delivering High Quality Care for Patients – The Accountability Framework for NHS Trusts*.

¹⁹ www.ntda.nhs.uk/wp-content/uploads/2012/04/framework_050413_web.pdf

²⁰ <http://www.monitor.gov.uk/home/news-events-publications/our-publications/browse-category/guidance-health-care-providers-and-co-7>

Publishing actions

Monitor proposes publishing the actions NHS TDA takes which are based on our recommendations. Publishing our recommendations is designed to promote understanding of the enforcement approach and so educate and facilitate compliance with the National Tariff.

Other actions

Monitor may also consider taking enforcement action against the relevant commissioner(s) at the same time.

There are no rights of appeal on enforcement decisions the NHS TDA makes against NHS trusts.

Consultation question 4:

Do you support Monitor's and the NHS TDA's proposals to apply the principles of the 'prioritisation framework', 'case initiation', 'investigation' and 'case update' procedures in the *Enforcement Guidance* when we investigate NHS trusts' non-compliance with the National Tariff? Are there other processes that you consider would be helpful for Monitor and the NHS TDA to include in this guidance?

Consultation questions

Q1: Do you support Monitor's proposed principles to underpin how Monitor will enforce the National Tariff? Can you suggest further or alternative principles to inform Monitor's enforcement of the National Tariff?

Q2: Do you support Monitor's proposal to apply the prioritisation framework to all decisions about whether or not to pursue action to enforce the National Tariff?

Q3: Do you support Monitor's proposal to apply the principles of the 'prioritisation framework', 'case initiation', 'investigation', and 'case update' procedures in the *Enforcement Guidance* when we investigate a commissioner's non-compliance with the National Tariff? Are there other processes that you consider it would be helpful for Monitor to include in this guidance?

Q4: Do you support Monitor's and the NHS TDA's proposals to apply the principles of the 'prioritisation framework', 'case initiation', 'investigation' and 'case update' procedures in the *Enforcement Guidance* when we investigate NHS trusts' non-compliance with the National Tariff? Are there other processes that you consider would be helpful for Monitor and the NHS TDA to include in this guidance?

Annex 1 Monitor's National Tariff powers

Health and Social Care Act 2012 - Section 115 Price payable by commissioners for NHS services

- (1) If a health care service is 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 national tariff on the basis of the 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.

Health and Social Care Act 2012 - Section 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).
- (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.

Health and Social Care Act 2012 - Section 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.

Annex 2 Powers to Enforce the National Tariff

National Tariff requirements on commissioners

Health and Social Care Act 2012 - Section 117: The national tariff: further provision

- (4) Where the commissioner of an NHS health care service agrees to pay a price for the provision of the service other than the price that is payable in the National Tariff, 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 in the National Tariff.
- (5) Where the commissioner of a health care service fails to comply with these rules, 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.

NHS England powers regarding commissioners

Intervention powers

Under the powers in section 14Z21 of the National Health Service Act 2006, if NHS England is satisfied that a CCG is failing, has failed, or is at significant risk of failing to discharge a function (or discharge it properly), it may do the following:

- a. direct the CCG to discharge that function, in a specified manner and within a specified period;
- b. direct the CCG to cease to perform a function for a specified period;
- c. direct the accountable officer (AO) of the CCG to cease to perform a function for a specified period;
- d. terminate the appointment of the AO and appoint another person in their place;
- e. vary the constitution of the CCG, including varying its area, and adding or removing members from the CCG;
- f. dissolve the CCG.

Where NHS England directs the CCG or AO to cease to perform a function, NHS England may exercise that function on their behalf, or direct another CCG or the AO of another CCG to exercise that function, in such manner and for such period as specified. The National Health Service Act 2006 requires CCGs to co-operate with any CCG or AO, or NHS England, where they are exercising a function on the CCG's behalf as a result of NHS England's intervention.

Before NHS England can dissolve a CCG, it must consult the CCG, relevant local authorities (e.g. those who cover part or all of the CCG's area), and any other people NHS England considers appropriate, and then publish a report explaining its reasons for dissolution before exercising its power. The Secretary of State may make regulations governing the procedure NHS England must follow before exercising its powers of intervention. NHS England must publish guidance on how it proposes to exercise its powers of intervention.

Other relevant powers of NHS England in relation to CCGs

If NHS England has reason to believe that a CCG might have failed, might be failing or might fail to discharge a function (or discharge it properly), it may also:

- require a CCG to provide an explanation of any matter relating to its functions (eg, an explanation of how the group is proposing to exercise a function) (see section 14Z19 of the National Health Service Act 2006); and
- require a CCG or any member or employee, to provide the Board with information, documents, records, etc., that the Board considers necessary or expedient (see section 14Z18 of the National Health Service Act 2006).

National Tariff licence conditions for licensed providers

Licence Condition P4 – Compliance with the National Tariff

1. Except as approved in writing by Monitor, the Licensee shall only provide health care services for the purpose of the NHS at prices which comply with, or are determined in accordance with, the National Tariff published by Monitor, in accordance with section 116 of the 2012 Act.
2. Without prejudice to the generality of paragraph 1, except as approved in writing by Monitor, the Licensee shall comply with the rules, and apply the methods, concerning charging for the provision of health care services for the purposes of the NHS contained in the National Tariff published by Monitor in accordance with, section 116 of the 2012 Act, wherever applicable.

National Tariff requirements on NHS trusts

The NHS Trust Development Authority (NHS TDA) is a Special Health Authority, established on 1 June 2012 by an order made under section 28 of the National Health Service Act 2006 (Statutory Instrument 2012 No. 901).

The NHS TDA's duties under the National Health Service Trust Development Authority Directions 2013, include a duty to ensure that English NHS trusts comply with conditions equivalent to the conditions of licences issued by Monitor, as the NHS TDA considers appropriate.

Under that Direction, the NHS TDA has power to enforce its accountability framework with NHS trusts from 1 April 2013. This includes compliance with the current *PbR Guidance* set by the Department of Health for NHS health care services through the pricing licensing conditions that are mirrored in the NHS TDA's accountability framework.

The NHS TDA may enforce those conditions by giving directions to an NHS Trust that has failed to comply with the requirements relating to the tariff imposed under the NHS TDA's accountability framework for NHS trusts. The NHS TDA's enforcement powers are explained in [Delivering High Quality Care for Patients – The Accountability Framework for NHS Trusts](#) published on 8 April 2013.

Monitor, 4 Matthew Parker Street, London SW1H 9NP

Telephone: 020 7340 2400

Email: enquiries@monitor.gov.uk

Website: www.monitor.gov.uk

© Monitor (13 June 2013)

Publication code: IRCP 04/13

This publication can be made available in a number of other formats on request. Application for reproduction of any material in this publication should be made in writing to enquiries@monitor.gov.uk or to the address above.