



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

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Contents

	<i>Page</i>
Introduction	4
Background.....	4
CC process	5
CC's determination.....	5
Time frame.....	6
Monitor's reference	6
Objector representations	6
Monitor's reply.....	6
Third party involvement	7
Other documentation.....	7
Evidence and administrative deadlines	7
Costs.....	8
Administrative matters.....	8
General time frame considerations.....	8
Annex A: Statutory deadlines under the Act.....	10

Introduction

1. This brief procedural Guide has been prepared to assist parties¹ involved in determinations on references to the Competition Commission (CC) from Monitor, the sector regulator for health care services in England, on the method Monitor proposes to use for determining the national prices for specified National Health Service (NHS) health care services in the national tariff. Comments in this Guide are not intended to bind the CC in its conduct of particular cases.
2. The Guide provides a commentary on the published procedural rules for national tariff methodology references: *National Tariff Methodology Reference Rules under the Health and Social Care Act 2012 (CC21)*.
3. Those Rules apply only to references under section 120 of the Health and Social Care Act 2012 (the Act), ie relating to the method Monitor proposes to use for determining the national prices of the specified NHS health care services. They do not apply to other regulatory references that can be made to the CC under the Act (for example, under section 101 dealing with licence modifications). The CC is not proposing to publish separate procedural rules or guidance on the handling of references under these other functions, but this is a matter for the Competition and Markets Authority (CMA) to consider (see paragraph 4).
4. The Rules and Guide refer to the CC throughout. On 1 April 2014 the functions of the CC, will be transferred to the CMA.² Subject to their adoption by the CMA Board, the Rules and Guide will be kept under review, in the light of the CMA's developing practice and case experience.
5. This Guide should be read in conjunction with the Act and the Rules, as well as with reference to the CC's Rules of Procedure³ with which CC groups must comply.

Background

6. The Act established Monitor as the sector regulator for health care services in England.⁴ Monitor and NHS England⁵ have assumed responsibility for determining pricing for NHS health care services from 2014/15. The Act sets out the process that Monitor must follow to publish the national tariff for NHS health care services.⁶ Before publishing the national tariff Monitor must consult on various aspects of the national tariff, including the method or methods⁷ it proposes to use for determining the national prices of specified NHS health care services.⁸ If a sufficient number of the clinical commissioning groups or relevant providers object to Monitor's method, Monitor is not permitted to publish the national tariff.⁹ In that situation, Monitor must either reconsider the method and re-consult on revised proposals or refer the proposed method to the CC under section 120 of the Act.

¹ The parties are Monitor and the objectors to the method Monitor proposes to use for determining national prices for specified NHS services.

² The CMA will be established under the Enterprise and Regulatory Reform Act 2013 as the UK's economy-wide competition authority.

³ [Competition Commission Rules of Procedure, CC1, 2006](#).

⁴ See: www.legislation.gov.uk/ukpga/2012/7/notes/contents.

⁵ Previously known as the NHS Commissioning Board.

⁶ See sections 116 to 120 of the Act.

⁷ In this document, 'method' is used to refer to the method or methods.

⁸ Monitor's statutory consultation for The National Tariff 2014/15 is available [here](#).

⁹ See section 120 of the Act and the National Health Service (Licensing and Pricing) Regulations 2013 (SI 2013/2214).

CC process

CC's determination

7. When Monitor makes a reference to the CC under section 120 of the Act, the CC must determine whether the method proposed by Monitor is appropriate.¹⁰ The CC may determine that the method proposed under section 118(3)(b) of the Act 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 to which Monitor must have regard in carrying out those of its functions to which the determination relates;
 - (b) that the decision was based, wholly or partly, on an error of fact;
 - (c) that the decision was wrong in law.¹¹
8. If the CC determines that the method proposed is appropriate, Monitor may use that method for the purposes of the national tariff.¹²
9. If the CC determines that the method proposed is not appropriate, it must remit the matter to Monitor for reconsideration and decision in accordance with such directions as the CC may give.¹³ The Act provides for a process under which Monitor must make such changes to the method as it considers necessary, having regard to the reasons specified in the CC's determination.¹⁴ The CC must review and, if necessary, reject the changes it considers are not necessary in consequence of its determination on the reference.¹⁵ In these circumstances the CC must itself make such changes to the method as it considers necessary.¹⁶
10. In carrying out the determination, the CC must have regard, to the same extent as is required of Monitor, to the matters which Monitor must have regard to in carrying out the functions to which the determination relates.¹⁷ The matters to which Monitor must have regard are set out in legislation specifying Monitor's duties when exercising its functions (either generally or specifically in relation to pricing), including in particular sections 2, 6, 116 and 119 of the Act. The CC 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 to the Act.¹⁸
11. The CC may have regard to any matter that Monitor was not able to have regard to in the case to which the determination relates, but the CC must not have regard to any matter which Monitor would not have been entitled to have regard to in that case had it had the opportunity to do so.¹⁹

¹⁰ Section 120(4) of the Act.

¹¹ Section 121(4) of the Act.

¹² Section 121(5) of the Act.

¹³ Section 121(6) and (7) of the Act.

¹⁴ Section 122(1) of the Act.

¹⁵ Sections 122 and 123 of the Act provide for this process in more detail.

¹⁶ Section 123(5) of the Act.

¹⁷ Section 121(1) of the Act.

¹⁸ Section 121(2) of the Act.

¹⁹ Section 121(3) of the Act.

Time frame

12. The Act and the Rules prescribe the time frames within which various steps in the CC process must be completed. The time frames prescribed under the Act are at [Annex A](#) and some detail on the key milestones is set out below.
13. The CC must make its determination on a reference before the end of the period of 30 working days following the last day for the making by Monitor of a reply in accordance with paragraph 2 of Schedule 12 to the Act.²⁰ This time period can be extended by the CC by not more than 20 working days should the CC determine that there are good reasons for departing from the normal requirements.²¹

Monitor's reference

14. When Monitor sends the reference under section 120(1)(b) of the Act to the CC it must include its reasons for proposing the method to which the reference relates and its representations as to why the grounds in section 121(4) of the Act (see paragraph 7 above) do not apply. The CC expects that where objectors²² have argued to Monitor that any of these grounds apply, Monitor will specifically address these arguments in the reference.
15. Monitor must send a copy of the reference to the NHS England and to each objector.²³
16. The CC expects Monitor to make any other representations and send all documentation it considers relevant at the time of making the reference.

Objector representations

17. Objectors are entitled under paragraph 2(1) of Schedule 12 to the Act to make representations on the matters specified in Monitor's reference. Objectors must make representations to the CC within ten working days beginning with the day on which the objector receives a copy of the reference from Monitor and must give Monitor a copy of its representations.²⁴

Monitor's reply

18. Monitor is entitled under paragraph 2(3) of Schedule 12 to the Act to reply to representations made by objectors. Monitor must make any reply to the CC within ten working days beginning with the day on which it receives the copy of the relevant representations.²⁵
19. Monitor must send a copy of any reply it makes under paragraph 2(3) of Schedule 12 to the Act to the objector who made the relevant representations.²⁶

²⁰ Paragraph 4(1) of Schedule 12 to the Act.

²¹ Paragraph 4(2) of Schedule 12 to the Act.

²² Objector is defined in paragraph 1(4) of Schedule 12 to the Act. In summary, objector means each clinical commissioning group and each relevant provider who objected to the method proposed by Monitor.

²³ Paragraph 1(2) of Schedule 12 to the Act.

²⁴ Paragraph 2(2) of Schedule 12 to the Act.

²⁵ Paragraph 2(3) of Schedule 12 to the Act.

²⁶ Paragraph 2(4) of Schedule 12 to the Act.

Third party involvement

20. Although the Act does not set up a specific framework for the involvement of persons other than Monitor and objectors in the CC process, the CC expects that in some cases clinical commissioning groups or relevant providers who did not object to the method proposed by Monitor, or NHS England,²⁷ or other persons may wish to make submissions that would assist the CC to reach its determination.
21. The CC will determine, on a case-by-case basis, whether it wishes to invite representations or seek evidence from any particular third party. However, because of the strict statutory time limits imposed on the CC, it is important that:
 - (a) any person that wishes to make submissions to the CC following a reference advises the CC at the earliest opportunity that it is expecting to do so; and
 - (b) any such submissions:
 - (i) are made to the CC within ten working days of the publication of the reference by the CC on its website; and
 - (ii) identify any sensitive information that they contain, so that the CC can disclose them to the parties, and publish them on the CC website.
22. Although the CC may seek clarification of any such submissions, or further evidence from these persons, in the light of the tight timescale for references, such persons should not expect to have any further opportunity to participate in the reference after making their representations.

Other documentation

23. The CC encourages participants to provide the CC with a coherent and readily comprehensible explanation of any technical issues relevant to the reference. As part of this explanation, the CC should if necessary be provided with a glossary of technical terms. In order to provide a single set of technical terms, the glossary should be agreed among the parties if possible and should as far as possible be consistent with the usage of technical terms by Monitor and others prior to Monitor's reference. Where there is disagreement between the parties to the reference about the use of a term, that disagreement should be stated and the competing understandings set out concisely.

Evidence and administrative deadlines

24. The CC must determine the reference within 30 working days from the last day for the making by Monitor of a reply to any objector's representations.²⁸ It expects to set an administrative timetable designed to enable the CC and the parties to conduct a satisfactory reference process within the short statutory timescale. The Act permits the CC to disregard certain matters in order to secure the making of the determination within the statutory period.²⁹ The matters are:

²⁷ See footnote 5.

²⁸ Paragraph 4(1) of Schedule 12 to the Act.

²⁹ Paragraph 5 of Schedule 12 to the Act.

- (a) all matters raised by an objector in representations under paragraph 2 of Schedule 12 to the Act that it did not raise at the time of Monitor's consultation under section 118 of the Act; and
 - (b) all matters raised by Monitor in replies under paragraph 2 of Schedule 12 that it did not include in the reference.
25. The CC expects that evidence used in determining the reference will normally be written evidence.

Costs

26. The CC must make an order requiring the payment of its own costs incurred in connection with the reference.³⁰ If the method is found to be appropriate, the CC will recover its costs from such objectors in such proportions as the CC specifies.³¹ If the method is found to be not appropriate, the CC will recover its costs from Monitor.³²
27. The CC may also order Monitor or an objector who made representations in accordance with paragraph 2 of Schedule 12 to the Act to make payments to the other in respect of costs incurred by the other in connection with the determination.³³
28. Where the CC makes an order for costs in favour of one or more of the parties, the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the reference. However, the CC will not normally allow any amount in respect of costs incurred before the beginning of the reference process.
29. The CC may make orders for costs at the time that it gives its determination. However, the CC may choose to reserve its position on costs and make a subsequent written order.

Administrative matters

30. The CC is an expert body whose decisions are taken by groups of its members who are appointed on the basis of experience, ability and background.³⁴
31. The Group will be supported by a staff team led by a Reference Director. Parties to the reference will have a contact in the staff team who will take enquiries and act as the main point of contact for the reference. Once a reference is made to the CC, the CC will publish the necessary contact details on a designated page on the CC's website.

General time frame considerations

32. The overall procedural framework is designed to enable the CC to conduct a satisfactory reference process within the time frames set out in the Act. These are very tight and the CC looks for a high degree of cooperation from parties and encourages prompt, clear and focused submissions from parties in its process.

³⁰ Paragraph 12(1) of Schedule 12 to the Act.

³¹ Paragraph 12(3) and (4) of Schedule 12 to the Act.

³² Paragraph 12(2) of Schedule 12 to the Act.

³³ Paragraph 12(5) of Schedule 12 to the Act.

³⁴ Paragraph 3(1), of Schedule 12 to the Act. Information about the CC's members is available [here](#).

33. The CC expects parties to send any evidence they consider relevant to its determination at the outset of the process. If the CC requires supplementary evidence later, it will request such evidence to be supplied. The CC may also seek to narrow the issues and points in dispute during the course of the reference. It will decide whether to do so in writing or at reference management conferences and hearings, depending on the issues raised in the reference. Parties are expected to cooperate with this process.
34. In the light of the extremely tight timescales for determining references, the CC will not have a policy of publishing a provisional determination and has not included a rule to this effect. However, the CC may nevertheless provide parties with details of its provisional thinking on some or all of the issues raised with it on a case-by-case basis, where it appears that to do so is practicable and likely to assist in the determination of the reference.

Statutory deadlines under the Act

Stage	<i>Time frame prescribed by the Act</i>
Monitor issues statutory consultation notice under section 118	28 (consecutive, working and non-working) days
Monitor determines whether objections are below/above objection thresholds set out in the regulations ¹	Not specified
Monitor sends a reference to the CC	Not specified
Monitor notifies objectors of the reference to the CC	Not specified
Objectors submit their representations to the CC and Monitor	10 (working) days beginning with the day on which the objector receives a copy of the reference from Monitor
Monitor replies to objector's representations and sends a copy of the response to objectors and the CC	10 (working) days beginning with the day on which Monitor receives the copy of the relevant representations
The CC determines the reference	30 (working) days from the last day for the making by Monitor of a reply to any objector's representations
The CC determines the reference (extension—if required)	20 (working) days

¹ See National Health Service (Licensing and Pricing) Regulations 2013 (SI 2013/2214).



