

# **2016/17 National Tariff Payment System: A consultation notice**

## **Annex A2: Objecting to the method for determining national prices**

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## Annex A2: Objecting to the Method

1. The purpose of this annex is to provide guidance on the process by which clinical commissioning groups (CCGs) and ‘relevant providers’ (see 3.1.1 of Part A of the 2016/17 National Tariff Payment System: A Consultation Notice for a definition) can object to the method for determining national prices proposed for the ‘2016/17 National Tariff Payment System’, as set out in this notice. In this annex, we:
  - a. describe what constitutes the proposed method and therefore what might be objected to
  - b. explain which CCGs and providers can object to the proposed method
  - c. detail how CCGs and relevant providers can submit their objections to the proposed method
  - d. explain the process for a reference to the Competition and Markets Authority (CMA)
  - e. set out the proposed timetable for publication of the ‘2016/17 National Tariff Payment System’.

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

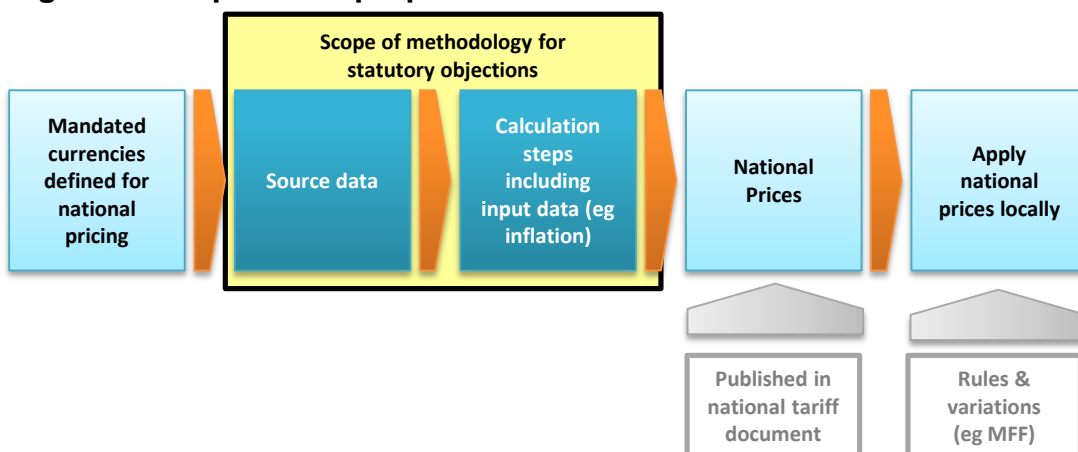
2. The proposals for the ‘2016/17 National Tariff Payment System’ contained in this consultation notice are subject to a statutory consultation process. Stakeholders can comment and give their views on any of the proposals.
3. Section 120 of the Health and Social Care Act 2012 (the 2012 Act) sets out a process for commissioners and relevant providers to challenge the method or methods proposed for determining the national prices to be specified in the national tariff.<sup>1</sup> This process applies only to the proposed method(s) for determining national prices, and not to other proposals in the consultation notice. The ‘method’ is the data, methodology and calculations used to arrive at the proposed set of national prices, but not the prices themselves.

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

4. Further, the method is separate from and does not include:
  - a. the proposed national variations
  - b. the rules, methods and principles that we propose to govern local variations, local modifications or local price setting.
5. National variations, which include the market forces factor (MFF), top-up payments for specialised services and the marginal rate for emergency admissions, apply to national prices but are not part of the method for determining those prices. CCGs and providers may comment on the proposals for the variations in their response to the consultation, but any objections to the variations in those responses do not count for the purpose of the statutory objection process described below.
6. Figure 1 illustrates the scope of the proposed method for determining national prices in the '2016/17 National Tariff Payment System'.

**Figure 1: Scope of the proposed method**



7. Our proposed method for calculating 2016/17 prices for services that currently have a national price under the '2014/15 National Tariff Payment System' has several elements that are described in detail in Section 7 of Part A of the consultation notice. For ease of reference, in the rest of this annex, references to 'the method' include all the proposed methods set out in Section 7 of the consultation notice.

## Objecting to national variations

The 2012 Act does not permit statutory objections to national variations such as the marginal rate rule and the market forces factor. In this box we explain why.

Section 120 of the 2012 Act sets out the statutory objections process. In particular, it states that if Monitor receives more than a prescribed percentage of objections from either CCGs or relevant providers 'to a method it proposes under section 118(3)(b)', Monitor may not publish the final national tariff unless it has made a reference to the CMA. In those circumstances Monitor would also have the option of amending the proposals and re-consulting under section 118 of the 2012 Act.

It follows that the statutory objection process is limited to proposals under section 118(3)(b). Section 118(3)(b) states that the notice published by Monitor must include 'the method or methods it proposes to use for determining the national prices of the specified services'.

While section 118 of the 2012 Act provides that Monitor must (or may) specify a number of other matters in the notice, these are not subject to the objection process. These include national variations under section 118(5)(a) of the 2012 Act, which are applied to national prices but are not part of the method for determining those prices.

Of course, while the national variations cannot be objected to formally under the statutory objection process, we welcome feedback on all our proposals.

### 1.2. Who can object to the method?

8. The 2012 Act specifies that it is only objections to the method from CCGs and relevant providers that count for the purposes of the statutory objection process.<sup>2</sup> This means only these objections can determine whether Monitor can proceed to publish without further consultation or a reference to the CMA.
9. There are two categories of relevant provider:
  - a. Licence holders. For the consultation on the '2016/17 National Tariff Payment System', this includes all NHS foundation trusts and many independent sector providers of NHS services.
  - b. Other relevant providers as specified in the NHS (Licensing and Pricing) Regulations 2013.<sup>3</sup> The effect of those regulations is that a person is a relevant provider if they provide an NHS service for which there is a national price proposed in this consultation notice. This refers to current providers of the service. The definition of relevant provider includes all NHS trusts

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

<sup>3</sup> S.I. 2013/2214; see regulation 6. The Regulations are available at [www.legislation.gov.uk/uksi/2013/2214/pdfs/ukxi\\_20132214\\_en.pdf](http://www.legislation.gov.uk/uksi/2013/2214/pdfs/ukxi_20132214_en.pdf).

currently providing services that would be subject to a proposed national price.

10. Other commissioners and providers can respond to the consultation and voice their objections to the proposals, but those objections will not be included in the statutory objection process. This includes objections from:
  - a. prospective providers who intend to provide a service for which there is a national price next year, but who do not currently provide that service
  - b. the NHS England teams responsible for commissioning specialised services – those teams are within the body of NHS England and are not CCGs.

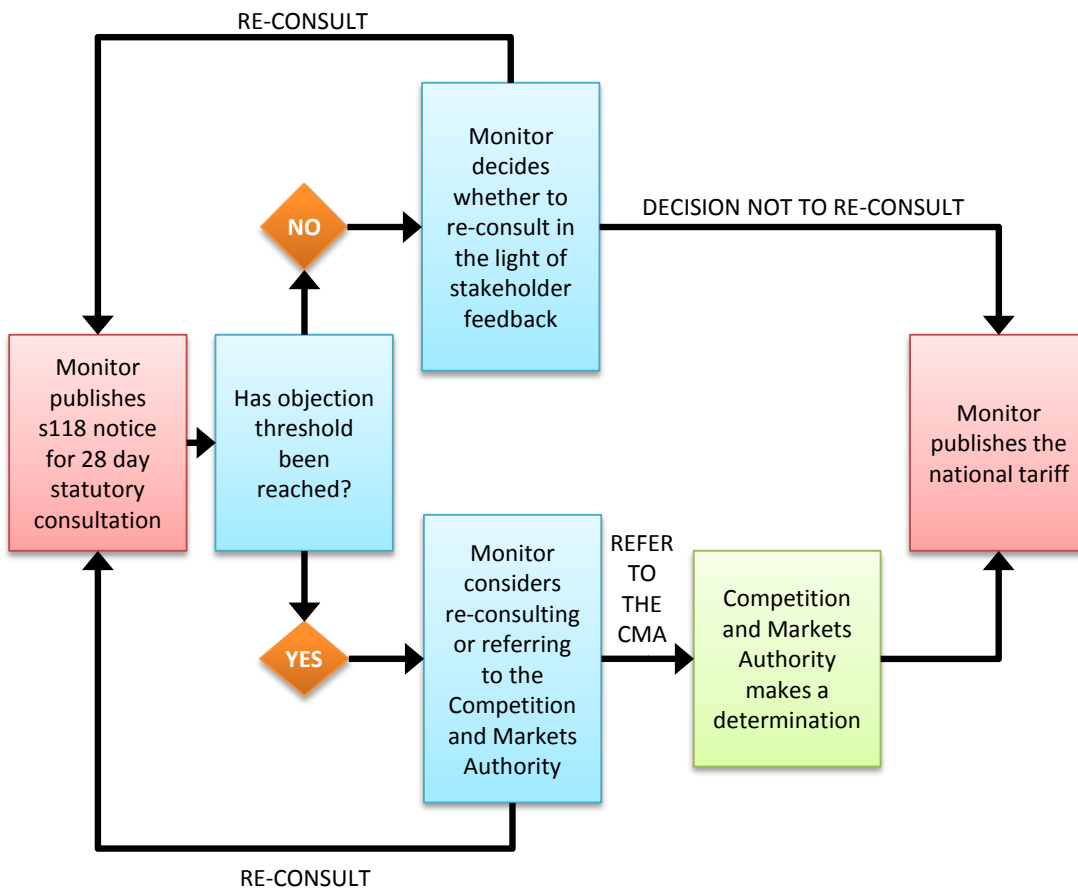
### **1.3. The process for objecting to the method**

11. The 2012 Act provides that Monitor may not publish the final national tariff (without a reference to the CMA) unless:
  - a. the proportion of CCGs objecting to the method is less than the prescribed percentage
  - b. the proportion of relevant providers objecting to the method is less than the prescribed percentage.
12. The percentages have been prescribed in regulations.<sup>4</sup> The relevant prescribed percentage in each case is 66%.
13. This means that Monitor must either reconsult or make a reference to the CMA for its determination if either:
  - a. the percentage of CCGs objecting to the method is greater than, or equal to, 66%
  - b. the percentage of relevant providers objecting to the method is greater than, or equal to, 66%.
14. Figure 2 illustrates the process for determining whether to publish the national tariff, reconsult, or make a referral to the CMA.

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<sup>4</sup> See regulation 5 of the National Health Service (Licensing and Pricing) Regulations 2013 (SI 2013/2214), as amended by the National Health Service (Licensing and Pricing) (Amendment) Regulations 2015 (S.I.2015/2018).

**Figure 2: Publish, reconsult and referral cycle**



15. Figure 2 further illustrates the possible outcomes after statutory consultation:
- a. If none of the objection thresholds have been reached, and Monitor decides, after consideration of stakeholder feedback, that there is no requirement to make a significant change to the proposed method for determining national prices, Monitor will publish the ‘2016/17 National Tariff Payment System’.
  - b. If none of the objection thresholds have been reached, and Monitor decides, after consideration of stakeholder feedback, that there is a requirement to make a significant change to the proposed method for determining national prices which requires further consultation, Monitor will issue a revised consultation notice and reconsult for 28 days.
  - c. If one or more of the objection thresholds have been reached, and Monitor decides to reconsult, Monitor will issue a revised consultation notice and reconsult for 28 days.
  - d. If one or more of the objection thresholds have been reached, Monitor can make a reference to the CMA for their determination. Monitor would make changes to the method to address the issues raised in the determination

and, subject to the CMA's power to veto proposed changes, publish the '2016/17 National Tariff Payment System'.

16. If Monitor issues a revised consultation notice for another 28-day period, this further consultation will be subject to the same rules – that is, CCGs and relevant providers could object to the proposed method, and all stakeholders can submit their views on the proposals. This process would continue until:
  - a. the proportion of objections reduces to a level at which none of the objection thresholds are met
  - b. the CMA upholds Monitor's method
  - c. changes are made to the method, in accordance with the CMA's determination.
17. The '2016/17 National Tariff Payment System' cannot be published until one of these three outcomes are achieved.
18. In summary, if neither of the objection thresholds are reached, Monitor will, subject to consideration of the other responses to the consultation, publish the '2016/17 National Tariff Payment System', using the method as stated in this notice. If either percentage is greater than or equal to 66%, Monitor may either adjust its methodology and reconsult or make a referral to the CMA for its determination.
19. Objections to the method should be made by the CCG or relevant provider, not by individual units or departments of those bodies. An objection should be an objection agreed by that legal entity, rather than be the sole view of an individual or team within it. It is the responsibility of individual CCGs and relevant providers to ensure proper internal processes for deciding to make an objection (for example, a process of obtaining agreement of members, governing bodies or the board).
20. CCGs and relevant providers should provide reasons for their objection to the method. A failure to do so does not invalidate the objection, but if the reasons are not raised at this stage, they may be subsequently disregarded by the CMA when it determines any reference.<sup>5</sup>
21. Should a CCG or relevant provider decide to object to the method proposed for the '2016/17 National Tariff Payment System', the organisation's objection can be registered in a web-based response form at: <https://www.research.net/r/16-17Consultation>.

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



22. Further comments on the consultation notice can be emailed to:  
[pricing@monitor.gov.uk](mailto:pricing@monitor.gov.uk).
23. Irrespective of the number of separate objections from a CCG or relevant provider, for the purposes of calculating the objection percentages (as set out above), each legal entity will be counted only once.
24. Monitor will aim to confirm receipt of any objections it receives.

#### **1.4. The procedure for reference to the Competition and Markets Authority**

25. The procedure Monitor would follow when referring the method to the CMA, should any one of the objection thresholds be reached, is set out in the 2012 Act.<sup>6</sup> In addition, in February 2014 rules and guidance were published by the Competition Commission, which provide further details of the procedure to be followed.<sup>7</sup> The following paragraphs provide a brief summary of the procedure.
26. Section 121(4) of the 2012 Act sets out the grounds on which the CMA may determine that the proposed method is not suitable. Monitor's reference must include its reasons for proposing the method and its representations as to why those grounds do not apply. A copy of the reference will be sent to the objectors, who will have an opportunity to make representations to the CMA.<sup>8</sup> The representations must be submitted within 10 working days of receiving the reference. Those representations should include:
  - a. the reasons that the objector considers Monitor's decision on the method was wrong, on the basis of one of the grounds set out in section 121(4) of the 2012 Act
  - b. any changes to the method the objector considers appropriate
  - c. any supporting documents.
27. Third parties may also have an opportunity to submit representations within 10 days of the publication of the reference on the CMA website.
28. Monitor will have an opportunity to make a written reply to any representations.
29. All participants in the process will be encouraged to provide the CMA with a coherent and comprehensible explanation of any technical issues.

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<sup>6</sup> See sections 120 to 123 of the 2012 Act and schedule 12 to the 2012 Act.

<sup>7</sup> See the National Tariff Methodology Reference Rules under the Health and Social Care Act 2012 (CC21) and the National Tariff Methodology Reference Rules under the Health and Social Care Act 2012 (CC22). Although published by the Commission, they have been adopted by the CMA and are available at [www.gov.uk/government/collections/cma-regulatory-appeals-and-references-guidance](http://www.gov.uk/government/collections/cma-regulatory-appeals-and-references-guidance)

<sup>8</sup> See schedule 12 to the 2012 Act.

30. A group appointed by the chair of the CMA will determine the reference, based on Monitor's submissions, the objectors' representations and any other evidence submitted to or gathered by the CMA (for example, submissions made by interested third parties).
31. The CMA must determine the reference within 30 working days.<sup>9</sup> The CMA expects to set an administrative timetable designed to enable the CMA and the parties to conduct a satisfactory reference process within the statutory timescale. The CMA is entitled to disregard any matter raised by an objector in their representations that was not raised at the time of their original response to Monitor.<sup>10</sup>
32. The CMA must order the payment of its costs at the end of the process. If the CMA decides the method is suitable, objectors will be required to meet the costs incurred by the CMA, and they may also be ordered to pay some of Monitor's costs. If the CMA decide the method is not suitable, Monitor will be required to pay the CMA's costs, and may be ordered to pay some of the objectors' costs.

## **1.5. The timetable**

33. Below, we set out our expected timetable for publication of the '2016/17 National Tariff Payment System', if:
  - a. none of the objection thresholds are met
  - b. any of the objection thresholds are met, and consequently Monitor needs to either reconsult or make a reference to the CMA.

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

34. The statutory consultation period of 28 days ends on 10 March 2016, after which Monitor will calculate the objection and share of supply percentages. If none of the objection thresholds are reached, and subject to consideration of other consultation responses, Monitor would aim to publish the '2016/17 National Tariff Payment System' document in March 2016.

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

35. If the proportion of objections is 66% or greater for either objections threshold, Monitor will either:
  - revise the method in light of the objections and reconsult
  - make a reference to the CMA.

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<sup>9</sup> This may be extended by 20 working days.

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

36. In the latter case, for some of the steps that would need to be taken the 2012 Act specifies the number of days for completion. For other steps, the 2012 Act does not specify a time period. This means it is difficult, at this stage, for us to be prescriptive or definitive about the likely timetable.
37. Notwithstanding the above, for guidance, the table below sets out the main steps (and associated timeframes, where known) in the event that Monitor refers the method to the CMA.

**Table 1: Main steps under a referral to the Competition and Markets Authority**

Step	Number of days prescribed by the 2012 Act	Date(s)
Monitor issues section 118 Notice	N/A	11 February 2016
Statutory consultation period	28 (consecutive, working and non-working) days	Start: 12 February 2016 End: 10 March 2016
Monitor determines whether objections are below/above objection thresholds set out in the regulations	Not specified in the Act	Unknown at this stage
Monitor sends a reference to the CMA	N/A	Unknown at this stage
Monitor informs objectors of the reference to the CMA	N/A	Same time as the notice is submitted to the CMA
Objectors submit their representations to the CMA and Monitor	10 (working) days	Unknown at this stage
Monitor responds to objectors representations and sends a copy of the response to objectors and the CMA	10 (working) days	Unknown at this stage
The CMA determines reference (including any oral hearing and written submissions)	30 (working) days	Unknown at this stage
The CMA extends the period for determining the reference	Up to 20 additional (working) days. These are in addition to the 30-day period, which the CMA can add, if required.	Unknown at this stage

Based on the above, if there is a CMA reference, publication of the ‘2016/17 National Tariff Payment System’ is likely to be significantly delayed.

38. In the event that the ‘2016/17 National Tariff Payment System’ cannot be published before 1 April 2016, the prices, methods and rules in the ‘2014/15 National Tariff Payment System’ would continue in force until the new national tariff came into effect.