

## Enforcement of the National Tariff



## **About Monitor**

Monitor is the sector regulator for health services in England. Our job is to protect and promote the interests of patients by ensuring that the whole sector works for their benefit.

For example, we make sure that NHS foundation trusts (whether providing acute, ambulance, mental health or community services) are run well, so they can continue delivering good quality services for patients in the future. To do this, we work particularly closely with the Care Quality Commission, the quality and safety regulator. When it establishes that a foundation trust is failing to provide good quality care, we take remedial action to ensure the problem is fixed.

We also set prices for NHS services, tackle anti-competitive practices that are against the interests of patients, help commissioners ensure essential local services continue if providers get into serious difficulty, and enable better integration of care so services are less fragmented and easier to access.

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## Foreword

NHS England and Monitor are responsible for designing the new NHS payment system, taking over this task from the Department of Health (DH). Today we are publishing the *2014/15 National Tariff Payment System*, which will replace the annual *Payment by Results Guidance* set by the DH for NHS health care services (PbR Guidance).

The national tariff sets out the NHS health care services which have a national price, the prices for those services and the method for determining those prices. The national tariff also sets out national variations from national prices, rules for local variations and local modifications, and for local price-setting for services with no national price.

The Health and Social Care Act 2012 (the 2012 Act) requires that the price payable for NHS health care services must 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) each have different powers to take action when there is a failure to comply with the national tariff. Monitor is responsible for enforcing compliance by licensed providers (NHS foundation trusts and from 1 April 2014 many private providers) and commissioners (clinical commissioning groups and NHS England). The NHS Trust Development Authority is responsible for enforcing compliance by NHS trusts. NHS England does not have specific powers to enforce the national tariff but can take action where a clinical commissioning group (CCG) is failing to discharge its duties properly.

This document sets out our approach to enforcing the national tariff. In developing this approach, we have been mindful of the 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 while remaining compliant with the national tariff.

Taking this into account, the national tariff includes local variation rules that permit local innovation in payment approaches. Complying with the local variation rules will constitute compliance with the national tariff. We will conduct price regulation in a manner that is predictable and transparent in order to support providers and commissioners in complying with the national tariff.

## 1. Introduction

### What this guidance is about

This guidance describes our general approach to enforcing 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 TDA will also take this general approach in order to enforce compliance by NHS trusts. This guidance has been finalised after a non-statutory consultation which invited views on our proposals, in particular on whether they were likely to be practical and effective. The responses we received during this non-statutory consultation were summarised in Annex 1B of the *2014/15 National Tariff Payment System: A Consultation Notice* (which Monitor published on 3 October 2013).

This 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.

We will conduct price regulation in a manner that is predictable and transparent, and is supportive of providers and commissioners as they seek to comply with the national tariff. This has informed both the way in which we have developed the national tariff and our approach to enforcing it.

In writing this guidance, we have tried to be as clear as possible, using straightforward language and avoiding quoting sections of the 2012 Act where possible. This means, though, that where we have not used the exact wording of the 2012 Act, statutory wording takes precedence over our interpretation.

Monitor published [Enforcement Guidance](#)<sup>1</sup> on our enforcement powers under sections 105 and 106 of the 2012 Act in March 2013. This followed an eight-week statutory consultation with stakeholders on our proposals. Our *Enforcement Guidance* sets out the specific enforcement powers we can use to ensure that all licensed providers comply with their licence conditions. The licence conditions include requiring licensed providers to comply with the national tariff. Our *Enforcement Guidance* was used as a basis for this guidance on how Monitor and the NHS TDA will enforce compliance with the national tariff.

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

## Regulators involved and their powers

The 2012 Act changed the way providers of NHS health care services are regulated, and changed Monitor's duties and powers. Our primary duty is to protect and promote the interests of patients by ensuring that the whole sector works for their benefit; this means promoting the provision of health services which is economic, efficient and effective, and which maintains or improves the quality of those services. Further information on our role can be found at [www.monitor.gov.uk](http://www.monitor.gov.uk).

The 2012 Act also 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.

The 2012 Act gives Monitor and NHS England responsibility to establish the national tariff for NHS health care services. Previously, national prices were set by the DH and this will continue until the new statutory national tariff comes into force. The national tariff sets out which NHS health care services are to have a national price, the prices for those services and the method for determining those prices. The tariff also sets out national variations from national prices, the rules for local variations and local modifications, and for local price setting for services without a national price. The 'national tariff' is the name given by the 2012 Act to the document published by Monitor under section 116 of the 2012 Act (see Annex 1).

The 2012 Act requires that the price payable for NHS health care services is to be determined in accordance with the national tariff. Compliance with the national tariff will also 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 tariff but under the National Health Service Act 2006 it can take action where a CCG is failing to discharge its duties properly.

The NHS TDA is a Special Health Authority (SHA), established on 1 June 2012 by an order made under section 28 of the National Health Service Act 2006<sup>2</sup>. The NHS TDA is responsible for overseeing the performance of NHS trusts in England in delivering high quality care, including assurance on clinical quality, governance and management of risk. It assists them to become sustainable organisations able to apply for authorisation as NHS foundation trusts. The NHS TDA also has responsibilities 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 designed by Monitor and the NHS TDA.

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<sup>2</sup> The National Health Service Trust Development Authority (Establishment and Constitution) Order 2012 (Statutory Instrument 2012 No. 901)

Section 3 sets out the powers available to enforce compliance with the national tariff, and explains the discretion over whether to act or not.

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 our [Enforcement Guidance](#).

Section 5 outlines seven principles which, in addition to our general duties and the exercise of our functions under sections 62 and 66 of the 2012 Act, will underpin our approach to enforcing the national tariff.

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

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

Section 8, 9 and 10 outline our approach to enforcing the national tariff with commissioners, licensed providers and NHS trusts respectively.

## 2. Scope of the guidance

### What this guidance covers

This guidance is designed to provide information about how Monitor and the NHS TDA expect, in general, to enforce 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.

We recognise that the national tariff, developed by ourselves and NHS England, marks a change in approach to regulating prices for NHS services. Our approach to enforcing 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 DH's *PbR Guidance*. While it currently allows for pricing adjustments to be made if they are in compliance with the flexibilities section of the PbR Guidance (Section 13), there is limited awareness of and low use of the flexibilities<sup>3</sup>. With NHS England, we have reviewed the existing flexibilities guidance to develop local variation rules that permit and support local innovation in payment approaches within clear parameters. These rules are included in the national tariff.

The local variation rules will allow providers and commissioners to vary national currencies or prices in certain circumstances where this protects and promotes the interests of patients. Providers and commissioners who are compliant with the local variation rules will be not in breach of the national tariff in that regard. To oversee the use of local variations and build up an evidence base of local practice, we must be informed when local variations are used (this is explained further in the national tariff).

The national tariff also explains the process for commissioners and providers to agree a local modification to a nationally determined price, and what to do if commissioners and providers have been unable to agree a local modification. Where a local modification is approved or granted by Monitor – whether it is based on (i) agreement between the commissioner and provider or (ii) an application to Monitor by a provider when agreement with the commissioner could not be reached – paying for services in accordance with the approved local modification constitutes compliance with the national tariff.

We want to facilitate compliance with the national tariff; to assist providers and commissioners we are putting in place a dedicated team to offer informal advice and to respond to their queries.

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

### What this guidance does not cover

The NHS TDA has had the power to enforce its accountability framework with NHS trusts since 1 April 2013. This included compliance with the *PbR Guidance* set by the DH for NHS health care services through the pricing licence conditions, mirrored in the NHS TDA's accountability framework (not covered here). From the date the *2014/15 National Tariff Payment System* comes into force, we will work together with the NHS TDA to enforce the national tariff as explained in this guidance.

NHS England has had powers in relation to the proper exercise of functions by CCGs since 1 April 2013. This includes requiring CCGs to use the NHS Standard Contract, which stipulates payment in accordance with the current *PbR Guidance* for NHS health care services set by the DH, and taking action where a CCG has failed to exercise a function or not exercised it 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 tariff. However, the exercise of NHS England's powers is not covered by this guidance.

Monitor is able to enforce compliance with the national tariff by commissioners, using its direction-making powers under the 2012 Act, as explained in this guidance. We will also work with NHS England to consider what action it might take where a CCG fails to comply with the national tariff and/or fails to comply with a direction from Monitor.

### 3. Powers available and discretion to use them

Section 115 of the 2012 Act states that when a national price is specified for an NHS service in the national tariff, the price payable for that service must be the national price, subject to any applicable variation or modification. If a national price is not specified for an NHS service, the price payable is determined in accordance with the rules for local price-setting in the national tariff. 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.

Formal powers available are summarised in Table 1 below.

**Table 1: How Monitor, the NHS TDA and NHS England will apply the national tariff enforcement 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 a 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 against a CCG.
Licensed providers	Monitor	Monitor or the NHS TDA may take action if we suspect or are 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 will apply its <i>Enforcement Guidance</i>
NHS trusts	NHS TDA		Monitor may investigate and the NHS TDA may take action
Providers, who are exempt from licence requirements (other than NHS trusts) <sup>4</sup>		Monitor may take action if there has been a breach of the national tariff, but only against the commissioner	Monitor may take enforcement action against commissioners who contract with exempt providers

Monitor's enforcement powers under the 2012 Act are (see Annex 2 for more detail):

- under Section 117, we may take action if a commissioner does not comply with the national tariff; and
- under Sections 105 and 106, we 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 our [Enforcement Guidance](#).

Our powers are explained in more detail in sections 8 to 10.

<sup>4</sup> The legislation (National Health Service (Licence Exemptions, etc.) Regulations 2013 (S.I. 2013 No. 2677) exempts various providers from the requirement to hold a licence, including NHS trusts, providers of primary medical or dental services, providers of services which do not require CQC registration and providers whose applicable turnover is below £10 million a year.

The NHS TDA may issue directions to an NHS trust that has failed to comply with the tariff requirements imposed under the NHS TDA's accountability framework<sup>5</sup>. The NHS TDA's enforcement powers are explained in [Delivering High Quality Care for Patients – The Accountability Framework for NHS Trust Boards](#), published on 8 April 2013.

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. Its support and intervention framework is set out in NHS England's [CCG Assurance Framework 2013/14 \(outline proposal and interim arrangements\)](#), published on 7 May 2013. Where a CCG fails to comply with the national tariff or with Monitor's direction to bring about compliance, NHS England may consider this in the context of the CCG Assurance Framework.

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<sup>5</sup> 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.

## 4. Monitor's general approach to enforcement

The 2012 Act requires that Monitor issues licences for providers of NHS services, subject to certain exemptions, and gives us powers to enforce the conditions within the licence and other regulatory requirements. Our [Enforcement Guidance](#), which was published after a period of consultation, explains these enforcement powers and how we use them.

We will follow the general approach set out in the *Enforcement Guidance* as we seek to enforce the national tariff with commissioners and licensed providers.

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 find out more about a case where there may be non-compliance, Monitor may use powers granted under section 104 of the 2012 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 document, we refer to relevant aspects of the *Enforcement Guidance*; we have not repeated them in here to avoid unnecessarily lengthening it.)

## 5. General approach to enforcement of the national tariff

The approach we have developed to enforce the national tariff consists of seven principles. These principles, in addition to our general duties under sections 62 and 66 of the 2012 Act, underpin our approach to enforcing the national tariff.

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

Our primary aim is to ensure that any enforcement actions we take help us to fulfil 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 services.

### 2. The 2012 Act says that the prices for services must be consistent with the national tariff

If the price of an NHS health care service is specified in the national tariff, this must be the price payable for service, 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 determined in accordance with the rules in the national tariff.

Providers and commissioners are compliant with the national tariff if they agree a price in accordance with a local modification to the nationally determined price approved by Monitor, or in accordance with the rules for local variations. These are explained in the national tariff.

### 3. Monitor will facilitate compliance by encouraging appropriate use of the permitted local variations to national prices and currencies in the national tariff

We have worked jointly with NHS England to develop rules for local variations, included in the national tariff. The rules on local variations are designed to allow providers and commissioners to vary national currencies and prices in certain circumstances where this promotes better value for patients. Complying with the local variation rules will constitute compliance with the national tariff.

### 4. Monitor will encourage transparency about current payment practices

We are aware that, in some localities, additional/supplementary payments are made outside of the *PbR Guidance*. Monitor wants to encourage transparency about current payment practices in order to allow national prices to be developed that reflect the complexities of the provision of care. There may be circumstances where an efficient provider cannot deliver services sustainably at nationally determined prices. To address this, we have developed rules for local modifications to be made to the national tariff. There may also be circumstances where an alternative service delivery model or payment approach, which would increase value for patients, requires a change to national prices or currencies. Monitor has therefore developed rules for agreeing local variations in these situations, including a requirement for us to be informed when a local variation is used.

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

We plan to publish most decisions we make regarding enforcement action, as detailed in the [Enforcement Guidance](#). In line with this general policy, Monitor and the NHS TDA will publish the decisions we make and actions we take to enforce the national tariff. Doing so should promote understanding of how to remain compliant.

## **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, legal processes to resolve it.<sup>6</sup>

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

We have limited resources, so we will prioritise our enforcement work in order to make the best use of them. The prioritisation framework in the *Enforcement Guidance* describes how we will do this in order to make the best use of finite resources. We will apply the principles of the prioritisation framework to all decisions relating to national tariff enforcement action, whether such action is against a licensee or any other party.

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<sup>6</sup> 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 that both parties will work together to resolve any disputes without referral to the NHS TDA and NHS England.

## 6. Summary of approach to enforcing the national tariff

**Table 2: Summary of how Monitor will apply the national tariff enforcement powers available to us**

Applies to	Threshold to act	Actions available to enforce the national tariff	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"> <li>ensure failure to comply does not continue</li> <li>ensure position is restored.</li> </ul> We may want NHS England to act if our direction is not followed	We will follow the prioritisation framework and case procedures in our <i>Enforcement Guidance</i>
Licensees	Suspect or are satisfied there has been non-compliance	Monitor may: <ul style="list-style-type: none"> <li>agree an enforcement undertaking with a licensee;</li> <li>impose a discretionary requirement on a licensee;</li> <li>impose an additional licence condition on an NHS foundation trust; and/or</li> <li>revoke a licence</li> </ul>	We will follow the prioritisation framework and case procedures in our <i>Enforcement Guidance</i>
NHS trusts		NHS TDA may take action. The Monitor/NHS TDA partnership agreement specifies that we will investigate and the NHS TDA will enforce compliance with the national tariff	We will follow the prioritisation framework and case procedures in our <i>Enforcement Guidance</i> , liaising with the NHS TDA on planned enforcement actions

More detail on our approach is explained in the following sections.

In the framework of NHS legislation, NHS foundation trusts, NHS trusts and commissioners are treated differently with regard to enforcement. Within those constraints, Monitor will seek to maintain a consistent regulatory approach in substance, while tailoring its enforcement approach in the light of the differences between the organisations in the system and the available powers in the legislation.

The NHS TDA will mirror our enforcement approach with licensed providers in its oversight regime of NHS trusts. We will continue to work closely with the NHS TDA to ensure consistency in enforcement between NHS trusts and licensees, and similarly with NHS England with regard to commissioners.

More information on how we will work together with other regulatory bodies can be found in the partnership agreements between [Monitor and the NHS TDA](#) and between [Monitor and NHS England](#).

## 7. Common aspects of our approach to enforcing the national tariff

This section covers aspects of our approach to enforcing the national tariff that are common to all parties against which we may take enforcement action.

### Prioritisation framework

We will use the principles of the prioritisation framework in the [Enforcement Guidance](#) as the basis for how we prioritise action to enforce compliance with the national tariff against commissioners and NHS trusts. The NHS TDA has agreed to also use this approach when it exercises its own powers.

### Information gathering

In a case where there may be non-compliance, Monitor may gain intelligence from the NHS TDA, NHS England and/or use our information gathering powers under section 104 of the 2012 Act to obtain information from commissioners (NHS England and CCGs) and providers (whether licensed or not).

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

### Informal action

Informal action does not involve use of our formal enforcement powers. Even when a matter could be addressed 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. We have described informal actions in the *Enforcement Guidance* as being one or more of the following actions:

- providing guidance or working with the relevant parties to support them in maintaining or restoring compliance. For example, this may include the use of agreed action plans containing specific milestones and deadlines;
- issuing an advisory letter to explain the relevant parties' obligations and what action may be advisable to maintain compliance; and
- issuing a warning letter which sets out Monitor's concerns, and notifying the relevant parties that if they do not take action we may commence 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 enforcing compliance with the national tariff by licensed providers.

We will also adopt the principles of this approach when we decide whether to use informal action to enforce compliance with the national tariff by commissioners and NHS

trusts. The NHS TDA has also agreed that these principles will inform its approach to using formal or informal action in relation to NHS trusts.

### **Decision-making for national tariff enforcement cases**

When we are making decisions about what action to take against providers and commissioners in order to enforce the national tariff, we will follow the principles of the decision-making process set out in our *Enforcement Guidance*.

## 8. How Monitor can enforce the national tariff with commissioners

This section sets out the powers we have to enforce the national tariff with commissioners and our approach to doing so.

### Powers

Sections 117(4) and (5) of the 2012 Act give Monitor enforcement powers against commissioners. These powers can be used where:

- there is a nationally determined price (i.e. a national price specified in the national tariff, subject to any applicable variations), but a commissioner agrees a different 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.

In the first case, we can direct the commissioner to restore the position to what it would have been if the correct price had been paid (e.g. to recover overpaid funds).

In the second and third cases (failure to comply with the rules), we can direct the commissioner to take steps to ensure that:

- the failure does not continue or recur ;
- the position is, as far as practicable, restored to what it would have been if the commissioner had complied with the rules.

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. NHS England's support and intervention framework is set out in its [CCG Assurance Framework 2013/14 \(outline proposal and interim arrangements\)](#). 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 2013](#), which require commissioners to 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 relating 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](#).

## Approach

Monitor will use the ‘prioritisation framework’, ‘case initiation’, ‘investigation’ and ‘case update’ procedures detailed in our [Enforcement Guidance](#) to investigate possible non-compliance with the national tariff by commissioners.

If we find that a commissioner has agreed a price for a service with a national price other than that specified in the national tariff or has failed to comply with the tariff’s local variation or local price-setting rules, we may take informal action (as explained in section 7) or formal action to direct a commissioner to correct the situation.

## Process for communicating proposed and final decisions

### ***Notice of a proposed direction***

If we intend to direct a commissioner, we will 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 we may not impose the direction; and
- the period for the commissioner to make representations to us on this proposal.

Where Monitor is considering imposing a direction, we may seek views on whether this would be appropriate – this 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 do so, we will consider all relevant matters, including whether it is in the interests of patients 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, we will 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, the relevant parties are invited to submit representations to us in writing and in person within a specified period.

### ***Final notice of direction***

After the end of the period for making representations, we will decide whether to make the direction, with or without modification.

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 we have decided to make;

- the reasons for making the direction; and
- the consequences of failing to comply with the direction.

Although not required to do so by the 2012 Act, we will 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 is no right of appeal in the 2012 Act on enforcement decisions Monitor makes against commissioners.

## 9. How Monitor may enforce the national tariff with licensed providers

This section summarises our enforcement powers in relation to licensees and how we will use them in relation to the national tariff. More detail is contained in our [Enforcement Guidance](#).

### Powers

Monitor has enforcement powers under sections 105 and 106 of the 2012 Act. Section 111 of the 2012 Act gives us 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 2012 Act gives us the power to revoke a provider's licence if we are satisfied that the provider has failed to comply with a licence condition.

There are five licence<sup>7</sup> conditions directly related to pricing, one of which requires compliance with the national tariff (see Annex 2). Other pricing licence conditions relate to recording and providing Monitor with information<sup>8</sup> to support price regulation, and engagement with commissioners on proposed local modifications to a nationally-determined price.

These powers mean that we can take action if we suspect or are satisfied that there has been a breach of the national tariff.

### Approach

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

- accept an enforcement undertaking from 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 we will follow, are explained in our *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 2012 Act). These are also explained in the *Enforcement Guidance*.

<sup>7</sup> [The New NHS Provider Licence](#)

<sup>8</sup> The [Approved Costing Guidance](#) details requirements that providers of NHS-funded services will need to comply with to meet the pricing conditions of the NHS provider licence.

## 10. How Monitor and the NHS TDA may enforce the national tariff with NHS trusts

This section summarises Monitor's and the NHS TDA's enforcement powers and how we will use these with NHS trusts.

### Powers

The NHS TDA's enforcement powers are explained in [Delivering High Quality Care for Patients – The Accountability Framework for NHS Trust Boards](#). Its oversight regime for NHS trusts mirrors many of the provider licence conditions, including those related to pricing. Under the National Health Service Trust Development Authority Directions 2013, the NHS TDA has 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. The NHS TDA complies with this duty by setting out the conditions in 'relevant standards' (e.g. in its accountability framework) and by giving direction to individual NHS trusts where necessary. The [partnership agreement](#) between the NHS TDA and ourselves explains that the NHS TDA may take action against an NHS trust if Monitor advises that we suspect or are satisfied that there has been a breach of the national tariff.

The NHS TDA intends to use its powers to apply a similar enforcement approach to Monitor's, although some actions are not available. For example, revoking a licence is not an option as NHS trusts do not hold licences.

### Approach

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

Like Monitor, the NHS TDA will use the 'prioritisation framework', 'case initiation' 'investigation' and 'case update' procedures in the *Enforcement Guidance* to investigate possible non-compliance with the national tariff. Monitor will liaise with the NHS TDA when we:

- decide to investigate an NHS trust;
- suspect or are satisfied that there has been a breach of the national tariff by an NHS trust;
- progress a longer running case or conclude an investigation; and
- recommend action for the NHS TDA to take.

### Communicating proposed and final decisions

The NHS TDA process for how and when it will communicate proposed and final decisions to the relevant NHS trust is contained in [Delivering High Quality Care for Patients – The Accountability Framework for NHS Trust Boards](#).

## **Publishing actions**

Monitor will publish the actions NHS TDA takes which are based on our recommendations, unless this would not be appropriate. Publishing enforcement actions and recommendations is designed to promote understanding of our enforcement approach and in doing so aid compliance with the national tariff.

## **Other actions**

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

There is no right of appeal on enforcement decisions the NHS TDA makes against NHS trusts.

## Annex 1: The main national tariff provisions of the 2012 Act

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

### 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: Provisions in relation to enforcement of the national tariff

### Monitor's powers to direct commissioners

#### Health and Social Care Act 2012, section 117:

- (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 by virtue of this Chapter, Monitor may direct the commissioner to take such steps within such period as Monitor may specify to secure that the position is, so far as practicable, restored to what it would have been if the commissioner had agreed to pay the price payable by virtue of this Chapter.
- (5) Where the commissioner of a health care service fails to comply with rules provided for under section 116(2), (4) or (6),, Monitor may direct the commissioner to take such steps within such period as Monitor may specify:
  - (a) to secure that the failure does not continue or recur;
  - (b) to secure that the position is, so far as practicable, restored to what it would have been if the failure was not occurring or had not occurred.

### NHS England's 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 to discharge it properly), it may also:

- require a CCG to provide an explanation of any matter relating to its functions (e.g. 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).

### **Related 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.

### **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 Trust Boards\*](#) published on 8 April 2013.

## Annex 3: Glossary

Term	Description
<b>Clinical commissioning groups (CCGs)</b>	CCGs are groups of general practices that are responsible for commissioning local health services in England. They are overseen by NHS England at a national level. At a local level, Health and Wellbeing Boards (established by Local Authorities) ensure that the health care needs of local people are considered.
<b>CCG Assurance Framework</b>	A framework that enables NHS England to ensure that CCGs are delivering against their plans.
<b>Enforcement Guidance</b>	Monitor's enforcement guidance is a 2013 publication which explains the action that it can take to enforce compliance with the provider licence and other regulatory obligations on providers
<b>Licensed providers</b>	Providers of health care services for the purposes of the NHS who have been granted a Monitor licence. Monitor's provider licence is the main tool we use to regulate providers of NHS services. The licence contains obligations for providers of NHS services that allow Monitor to fulfil its new duties in relation to: setting prices for NHS-funded care in partnership with NHS England; enabling integrated care; preventing anti-competitive behaviour which is against the interests of patients; and supporting commissioners in maintaining service continuity.
<b>Local variations</b>	Commissioners and providers can use local variations to agree adjustments to prices or currencies. As such, local variations are the main mechanism through which commissioners and providers can design new payment approaches that better support the services required by patients.
<b>NHS England</b>	NHS England oversees the budget, planning, delivery and operation of the NHS in England as set out in the Health and Social Care Act 2012.
<b>NHS Trust Development Authority (NHS TDA)</b>	The NHS TDA is responsible for overseeing the performance management and governance of NHS trusts, including clinical quality, and managing their progress towards foundation trust status.
<b>NHS TDA's Accountability Framework for NHS Trust Boards</b>	A framework that supports NHS trusts in their progression towards achieving foundation trust status. It sets out how the NHS TDA will work with NHS trusts on a day-to-day basis, how they will assess the progress NHS trusts are making and how they will provide the development support each organisation needs.



Making the health sector  
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