



**RCN Policy and International Department
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Monitor and the NHS Provider License England

RCN Policy and International Department
020 7647 3723
policycontacts@rcn.org.uk
www.rcn.org.uk/policy

Introduction

From the 1st April 2013, Monitor formally took on their new responsibilities¹ as set out in the Health and Social Care Act 2012. This briefing sets out more details on the license that covers Foundation Trusts (FTs) and from 2014 will cover other providers too.

New Monitor

Monitor used to only regulate FTs, but is now the sector regulator. This includes the primary responsibility to protect and promote the interests of patients. In addition, Monitor also has the responsibility to:

- license providers of NHS-funded services;
- prevent anti-competitive behaviour that is against the interests of patients;
- support the continuity of services;
- enable integrated care; and
- regulate prices for NHS-funded services.

The license

The NHS provider license is intended to be the main tool that Monitor will use to regulate providers of NHS services.² Currently the license applies to FTs (without a need for a formal application, instead FTs have essentially been passported through into the new license regime) but in future (from April 2014) it will also apply to other providers. The Department of Health is proposing that providers with less than £10 million NHS income will be exempt from holding the license.³

The license is set out in modular form with seven main parts, some which include more than one condition. The table below provides an overview.

¹ Monitor, Press release: Monitor emphasises continuity of regulatory regime as it takes on new powers, 2nd April 2013 <http://www.monitor-nhsft.gov.uk/home/news-events-publications/latest-press-releases/monitor-emphasises-continuity-regulatory-regime->

² Monitor, The new NHS provider license, 14th February 2013

[http://www.monitor-](http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishLicenceDoc14February.pdf)

[nhsft.gov.uk/sites/default/files/publications/ToPublishLicenceDoc14February.pdf](http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishLicenceDoc14February.pdf)

³ <http://socialcarebulletin.dh.gov.uk/2013/03/04/departments-of-health-proposals-for-exemptions-from-monitors-licence/>

Table 1: An overview of the NHS provider license

Modules of the license	Scope	Comments
Licensing criteria (pre-qualification criteria for the issuing of a license, they are also ongoing requirements)		
1. A provider must hold a CQC registration (Providers who are exempt from holding a CQC registration are also likely to be exempt from holding an NHS provider license subject to final regulations from the DH ⁴)	All providers	Helps bring in quality but remains to be seen whether this will differentiate at all between providers who are at risk of not complying with ongoing registration requirements at CQC
2. Confirm that governors and Directors (or equivalent) are fit and proper persons (i.e. without recent criminal convictions, director disqualifications or bankrupt)	All providers	
Section 1: General conditions		
1. Provision of information (providers obliged to provide information that Monitor needs to license)	All providers	Could include new information requirements
2. Publication of information (providers obliged to publish information, as set out by Monitor)	All providers	Could include new publication requirements
3. Payment of fees to Monitor (providers must pay fees, if Monitor charges in the future)	All providers	No decision has been made on charging
4. Fit and proper persons (as 2. in licensing criteria although Monitor can make an exception)	All providers	Exceptions would be made only in 'very exceptional circumstances' Exceptions cannot apply to FTs Monitor will keep under review the potential to add into the license a code of conduct
5. Monitor guidance (providers to have regard to Monitors guidance)	All providers	Not all guidance has been published yet
6. Systems for compliance with license conditions and related obligations (providers need to take precautions against the risk of failing to comply with the license and other requirements)	All providers	No formal compliance officer is required
7. Registration with CQC (as 2. in licensing criteria)	All providers	
8. Patient eligibility and selection criteria (providers must set and publish transparent eligibility and selection criteria)	All providers	May contribute to minimizing the impact of 'cherry picking' ⁵

⁴ <http://socialcarebulletin.dh.gov.uk/2013/03/04/department-of-health-proposals-for-exemptions-from-monitors-licence/>

Modules of the license	Scope	Comments
9. Application of section 5 (if a provider delivers services designated by Commissioners as Commissioner Requested services then the Continuity of Services Conditions apply – see Section 5)	All providers	All mandatory services delivered by FTs are automatically classified as CRS Guidance has been published to help Commissioners designate services ⁶
Section 2: Pricing conditions		
1. Recording of information (e.g. about their costs)	Providers delivering services covered by National Tariff	This will underpin future fixed prices for an increasing amount of care. It will need to capture acuity and nursing input to ensure appropriate prices to cover the costs of delivering safe, high quality, compassionate care Guidance has been published on costing ⁷
2. Provision of information (requirement to submit information to Monitor, including scope for sub-contractors to provide information direct to Monitor)	Providers delivering services covered by National Tariff	
3. Assurance report on submissions to Monitor (to improve accuracy)	Providers delivering services covered by National Tariff	There is a recognized difficulty of inaccurate data which affects the quality of price setting and this is aimed at improving cost submissions over time
4. Compliance with National Tariff (obligation to charge in line with National Tariff expected to come into force for 2014/15 Tariff)	Providers delivering services covered by National Tariff	However, tariff does not cover all care, so there is still scope for local variation
5. Constructive engagement concerning local tariff modifications (to encourage local agreement rather than applying to Monitor for a modification)	Providers delivering services covered by National Tariff	There may be good reasons for variation but this should not be a way to 'hide' price competition
Section 3: Choice and competition		
1. Patient choice (obliges providers to make information available and act in a fair way)	All providers	May in the future cover provision of

⁵ Where some providers can pick out the 'easy' and 'less expensive' cases on a systematic basis, leaving others to provide care to the complex and more expensive cases with the potential to destabilise services.

⁶ Monitor, Guidance for commissioners on ensuring the continuity of health care services, 28th March 2013 <http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishFinalCRSGuidance28March13.pdf>

⁷ Monitor, Approved costing guidance, 21st February 2013, <http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishApprovedCostingGuidance21February2013.pdf>

Modules of the license	Scope	Comments
both for choice as set out in NHS Constitution and as set out locally by Commissioners)		impartial advice
2. Competition oversight (prevents providers to enter or maintain agreements or other conduct that prevents, restricts or distorts competition to the extent that it is against the interest of health care users)	All providers	This is aimed at covering the situation where providers are not legally 'undertakings' which would then place them under the scope of the Competition Act 1998 Monitor is consulting on their guidance; both their guidance for providers ⁸ and in future their guidance for commissioners Much depends on how this works in practice
Section 4: Integrated care		
Licensee shall not do anything that could reasonably be regarded as detrimental to enabling integrated care (includes a patient interest test)	All providers	Delivery of integrated care expected to be driven by commissioners and providers locally Monitor to support this, particularly via pricing
Section 5: Continuity of services (where Commissioners designate services as Commissioner Requested Services)		
1. Continuing provision of Commissioner Requested Services (prevents providers from stopping to provide CRS or changing the way they are provided without agreement of Commissioners)	Providers delivering Commissioner Requested Services	
2. Restriction of disposal of assets (providers must keep a register of relevant assets used to deliver CRS and must seek Monitors consent to dispose of them)	Providers delivering Commissioner Requested Services	
3. Monitor risk rating (providers to have due regard to adequate standards of corporate governance and financial management)	Providers delivering Commissioner Requested Services	Monitor has consulted on their proposed approach ⁹

⁸ <http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishCCPRelevantCustomerBenefitsInHealthCare27March13.pdf>
<http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishCCPMarketInvestigationReferences27March13.pdf>
<http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishCCPGuidanceonCA98March13.pdf>
<http://www.monitor-nhsft.gov.uk/sites/default/files/publications/Guidance%20on%20choice%20and%20competition%20licence%20conditions.doc.pdf>

⁹ Monitor, Draft Risk Assessment Framework: consultation document
<http://www.monitor-nhsft.gov.uk/sites/default/files/ToPublishDraftRAFConsultationDocandDraftRAF10Jan13.pdf>

Modules of the license	Scope	Comments
4. Undertaking from the ultimate controller (requirement to have a legally enforceable agreement with their 'ultimate controller' to stop ultimate controllers from taking action, which would cause providers to breach the license. An ultimate controller is anybody that could instruct the licensee to carry out particular actions, such as a parent company of a subsidiary company)	Providers delivering Commissioner Requested Services	
5. Risk pool levy (if required, providers will need to contribute towards a risk pool to pay for vital services if a provider fails)	Providers delivering Commissioner Requested Services	Details not yet set out on the pool and levies
6. Cooperation in the event of financial distress (provider must cooperate with Monitor if it is in financial distress)	Providers delivering Commissioner Requested Services	
7. Availability of resources (providers have to act in a way that secures access to the resources needed to operate CRS)	Providers delivering Commissioner Requested Services	
Section 6: NHS Foundation Trust conditions		
1. Information to update the register of NHS Foundation Trusts (FTs need to provide documentation to Monitor)	FTs only	
2. Payment to Monitor in respect of registration and related costs (if Monitor collects fees in the future)	FTs only	
3. Provision of information to advisory panel (a panel to respond to governors queries will require information)	FTs only	
4. NHS Foundation Trust governance arrangements (continues Monitor oversight of governance of FTs)	FTs only	

Enforcement

Monitor has set out in guidance its approach to enforcement.¹⁰ However, because the license is new and the NHS is going through significant change, including responding to the Francis Inquiry, what matters is how Monitor will act as this could act as deterrent or enabler with regard to changes in how services are delivered.

Joint working

Monitor will not be able to conduct all its activities in isolation. Monitor will have to work with:

- CQC
- NHS England, where they will need to work together on pricing and contracts

The Co-operation and Competition Panel (CCP) is now a part Monitor (the new Competition Directorate) to help on competition issues.

The RCN has previously been concerned about a focus on finance over quality and it remains an issue that requires close work between Monitor and CQC. We also want to ensure that there is clarity over respective roles.

Plans for the future

Monitor may make changes to the license over time. Any changes will be subject to consultation and if enough providers object, then the Competition Commission will need to consider the changes being proposed.

What will it mean for nurses?

The way in which Monitor implements their new responsibilities may also affect nurses:

- The **prices that are set need to include sufficient resourcing for quality nursing** input. The RCN has already raised this issue with Monitor and the RCN hopes to build on our early engagement with Monitor over time. That work is supported by members who can tell us their experiences in patient level costing.
- **Monitor could approve or block service changes.** The view of Monitor to service changes, whether a merger or a different form of collaboration, will affect what can be done in practice. If Monitor is concerned about a negative impact on competition it could block change, conversely Monitor could be really supportive where Monitor is convinced that there is a sound, patient focused, case for change. This could affect those nurses who currently work for providers and how their roles may change as services are changed in the future.
- **Monitor can enable integration.** Nurses play a crucial role in the patient pathway and can support patients as they move between health and social care. Monitor can be an enabler to such changes (whilst also balancing this against competition issues).

Some are concerned about the new responsibilities for Monitor and how well Monitor will manage some of the tensions. For example:

¹⁰ Monitor, Enforcement Guidance, March 2013
http://www.rcn.org.uk/newsevents/government/uk/section_75_regulations

- How **Monitor will manage both setting prices and a failure regime, including a fund to allow continuation of essential services**. The tension comes from the fact that the prices themselves are an important factor in the overall sustainability of an organisation (albeit not the only factor, given the absence of a price for all activity, and the success or otherwise of the provider in 'attracting' patients given patient choice). Monitor will also need to be mindful of the risk of cherry picking, as will others such as the National Commissioning Board.
- How **Monitor will be able to support integration**, which could mean larger providers as organisations merge, **whilst also protecting against anti-competitive behaviour** (which may be more likely to occur the fewer organisations are delivering care). Of course, integrated care may not mean mergers but mergers have been an option pursued in the NHS in the past.

The RCN has also previously raised concerns about price competition and we are pleased to note that this not formally part of Monitor's responsibilities and has been ruled out by Ministers. We also previously raised concerns about a rush to FT status and are pleased to note that there is no longer a fixed timetable. We had been concerned about a lowering of the bar for FT status, particularly given previous sad experience in FTs such as Mid Staffordshire.

Nurses already have various types of engagement and involvement with Monitor. For example, the compliance framework for FT's includes infection control indicators, which forms the responsibilities of several nurses involved in infection control both from the commissioning and provider perspective. This is likely to continue.

More broadly, Monitor can help play an early role and minimize the scope for legal challenge relating to EU competition law. Much rests of how Monitor goes about their new responsibilities in practice.

There are also long standing concerns about FTs, for example RCN members have been concerned about a lack of transparency in some FTs. These issues may well remain in the future.

Tell us what you think

This briefing is intended to provide a brief review of the changes planned for Monitor and the Policy and International Department would like to receive comments/feedback from as many members as possible on this important issue, please email policycontacts@rcn.org.uk

Further resources

RCN, Policy Briefing 18/12 New Monitor in England, July 2012

http://www.rcn.org.uk/data/assets/pdf_file/0011/465653/18.12_New_Monitor_in_England.pdf

Monitor, The new NHS provider license, 14th February 2013

<http://www.monitor-nhsft.gov.uk/sites/default/files/publications/ToPublishLicenceDoc14February.pdf>