



House of Commons
Committee of Public Accounts

The dismantled National Programme for IT in the NHS

Nineteenth Report of Session 2013–14

*Report, together with formal minutes, oral and
written evidence*

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Committee of Public Accounts

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/pac. A list of Reports of the Committee in the present Parliament is at the back of this volume. Additional written evidence may be published on the internet only.

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The current staff of the Committee is Adrian Jenner (Clerk), Claire Cozens (Committee Specialist), Sonia Draper (Senior Committee Assistant), Ian Blair and James McQuade (Committee Assistants) and Alex Paterson (Media Officer).

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Summary

Although the National Programme for IT in the NHS (the National Programme) has been dismantled, it in effect remains in place with separate component programmes which continue to incur significant costs. The Department of Health (the Department) has been negotiating with CSC for around two years to re-set the contract to provide the Lorenzo care records system to trusts in the North, Midlands and East of England. Its negotiating position is weak. The Department's statement on the benefits expected from the National Programme showed that most of the benefits are yet to be delivered. There is a risk that some of these benefits may never materialise. Unless the Department acts on the lessons of the failed National Programme it is unlikely to deliver the new vision of a paperless NHS by 2018.

Conclusions and recommendations

1. Launched in 2002, the National Programme was designed to reform the way that the NHS in England uses information. While some parts of the National Programme were delivered successfully, other important elements encountered significant difficulties. In particular, there were delays in developing and deploying the detailed care records systems. Following three reports on the National Programme by both the National Audit Office and this Committee, and a review by the Major Projects Authority, the Government announced in September 2011 that it would dismantle the National Programme but keep the component parts in place with separate management and accountability structures. That process has now taken place. In June 2013, the Department published a statement on the benefits to date and in future from the programmes that made up the National Programme.
2. **The public purse is continuing to pay the price for failures by the Department and its contractors.** The Department's original contracts with CSC totalled £3.1 billion for the delivery of care records systems to 220 trusts in the North, Midlands and East. In 2011, the Department decided to renegotiate the contracts with CSC due to delays in developing and deploying the Lorenzo system. However, despite CSC's poor performance, the Department's negotiating position is weak because it could not meet its own contractual obligation to make available 160 trusts in the North and Midlands to take the new system. Despite two years of negotiations the full re-setting of the contract is yet to be agreed with CSC, but the Department estimates that the contract is still likely to cost about £2.2 billion, including £572 million for the Lorenzo care records system, assuming just 22 trusts take the system. This cost should have been less had the Department not undermined its negotiating position by being unable to honour its side of the deal.

Recommendation: *The Department must manage the re-set contract with CSC robustly, so that its negotiating position is protected for the future.*

3. **The full cost of the National Programme is still not certain.** The Department's most recent statement reported a total forecast cost of £9.8 billion. However, this figure did not include the future costs associated with the Department's contract with CSC for the Lorenzo care records system or the potential future costs arising from the Department terminating Fujitsu's contract for care records systems in the South of England, where arbitration is still on-going. These costs are likely to be significant. For example, the Department's legal costs in relation to the termination of Fujitsu's contract have totalled £31.5 million over the last four years.

Recommendation: *Given the scale of the sums involved, the Department should report to Parliament details of all the additional costs of the National Programme, including legal costs, as soon as they are known.*

4. **The benefits to date from the National Programme are extremely disappointing.** The Department's benefits statement reported estimated benefits to March 2012 of £3.7 billion, just half of the costs incurred to this point. The benefits include financial savings, efficiency gains and wider benefits to society (for example, where patients

spend less time chasing referrals). However, two-thirds of the £10.7 billion of total forecast benefits were still to be realised in March 2012. For three programmes, including the care records programmes in London and the South, nearly all (98%) of the total estimated benefits were future benefits. The Department acknowledged that insufficient attention has been paid to securing benefits. The risk of benefits not being realised has increased with the transfer of responsibility for benefit realisation to NHS trusts and NHS foundation trusts from April 2013.

Recommendation: *The Department should set out how it will support local trusts to secure benefits, and should track and report benefits achieved in the coming period.*

5. **It is important that Parliament is updated about what has been delivered for the billions of pounds that have been invested in the National Programme.** The systems deployed through the National Programme will continue to be used for years to come. The end-of-life dates for the various systems extend well into the future, to 2024 in the case of the care records programme in the North, Midlands and East. We welcome the Department's assurance that it intends to continue to monitor the costs and benefits of all the programmes that were formerly part of the National Programme.

Recommendation: *The Department should provide the Committee with an annual update of the costs and benefits of the programmes previously managed under the National Programme.*

6. **After the sorry history of the National Programme, we are sceptical that the Department can deliver its vision of a paperless NHS by 2018.** We have reported previously on the shortcomings of the National Programme, which included poor negotiating capability, resulting in deals which were poor value for money and weak programme management and oversight. There were also failures to understand the complexity of the tasks, to recognise the difficulties of persuading NHS trusts to take new systems that had been procured nationally, and to get people to operate the systems effectively even when they were adopted. Making the NHS paperless will involve further significant investment in IT and business transformation. However, the Department has not even set aside a specific budget for this purpose. As with the National Programme, it will be important to balance the need for standardisation across the NHS with the desire for local ownership and flexibility. The first 'milestone' towards the ambition of a paperless NHS is for GP referrals to be paperless by 2015.

Recommendation: *If the Department is to deliver a paperless NHS, it needs to draw on the lessons from the National Programme and develop a clear plan, including estimates of costs and benefits and a realistic timetable.*

1 The costs of the programmes previously managed under the National Programme

1. Launched in 2002, the National Programme for IT in the NHS (the National Programme) was designed to reform the way that the NHS in England uses information. The vision of the Department of Health (the Department) was to implement modern information technologies to improve the way the NHS delivers services, and ultimately enhance the quality of patient care. The National Programme comprised a number of component programmes including a broadband network, electronic appointment booking and prescription services, and local care records systems.¹

2. Previous reports on the National Programme by both the National Audit Office and this Committee found that, while some parts of the National Programme were delivered successfully, other important elements encountered significant difficulties.² In particular, there were delays in developing and deploying the detailed care records systems.³ Following these reports and a review by the Major Projects Authority, the Government announced in September 2011 that the National Programme would be dismantled into its separate component parts.⁴

3. In June 2013 the Department published its benefits statement which set out the benefits it expects to be realised from the programmes previously managed under the National Programme⁵. On the basis of the Comptroller and Auditor General's published review of the benefits statement and a separate note on NHS care records systems in the North, Midlands and East (Lorenzo), we took evidence from the Department of Health and the former Chief Executive of the NHS about the current position on the dismantled National Programme.⁶

1 C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 1

2 National Audit Office, *The National Programme for IT in the NHS*, HC 1173 Session 2005-06, June 2006;

National Audit Office, *The National Programme for IT in the NHS: progress since 2006*, HC 484 Session 2007-08, May 2008;

National Audit Office, *The National Programme for IT in the NHS: an update on the delivery of detailed care records systems*, HC 888 Session 2010-12, May 2011;

Committee of Public Accounts, Department of Health: *The National Programme for IT in the NHS*, 20th report of session 2006-07, HC 390, March 2007;

Committee of public Accounts, *The National Programme for IT in the NHS: progress since 2006*, 2nd report of session 2008-09, HC 153, January 2009;

Committee of Public Accounts, *The National Programme for IT in the NHS: an update on the delivery of detailed care records systems*, 45th report of session 2010-12, HC1070, July 2011.

3 *The National Programme for IT in the NHS: an update on the delivery of detailed care records systems*, National Audit Office, HC 888 Session 2010-12, May 2011; *The National Programme for IT in the NHS: an update on the delivery of detailed care records systems*, 45th report of session 2010-12, HC1070, July 2011.

4 Q 1, C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 2

5 C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*

6 Ev 26

4. Although the Department told us that the National Programme had been dismantled, the component programmes are all continuing, the existing contracts are being honoured and significant costs are still being incurred.⁷ The only change from the National Programme that the Department could tell us about was that new governance arrangements were now in place.⁸

5. The benefits statement reported that the costs of these programmes was £7.3 billion to March 2012, and estimated that the final costs would be £9.8 billion.⁹ However, the estimate of the final total cost does not include the future costs associated with the Department's contract with CSC to supply the Lorenzo care records system to acute trusts, mental health trusts and community services in the North, Midlands and East of England.¹⁰ The Department's current estimate of the likely cost of the Lorenzo system is £572 million.¹¹

6. The contract with CSC—signed in 2003—was originally worth a total of £3.1 billion.¹² However, ten years on, CSC has still not delivered the necessary software and not a single trust has a fully functioning Lorenzo care records system. The extraordinary lack of progress on Lorenzo is illustrated by the Department's statement during the course of our hearing that, at what it describes as the 'key site' of Morecambe Bay, the Lorenzo system is working fully "with the exception of the parts of the software that have not been fully delivered".¹³

7. In 2011, following the delays in developing and deploying the Lorenzo care records system, the Department decided to renegotiate the contract with CSC. In February 2013 the Department expected the contract negotiations with CSC to be completed by the end of March 2013. However, the negotiations were still continuing at the time of our hearing in June 2013.¹⁴

8. Despite the delays and CSC's failure to deliver, the Department's negotiating position with CSC is weak.¹⁵ Under the contract, CSC had the exclusive right to supply systems to 160 trusts in the North and Midlands. However, the Department could not meet its contractual obligation to make 160 trusts available to CSC to deploy the care records system. The Department therefore judged that terminating the contract would not have offered good value for money because, potentially, under legal challenge it would have had

7 Qq 2, 13-18

8 Qq 2-12

9 C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, Figure 1

10 C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 33

11 Ev 26

12 Qq 22

13 Qq 47-49

14 Q 75; Ev 27

15 Qq 96-97

to pay CSC the full value of the contract. Despite CSC's poor performance, the Department could not enforce the contract because of its failure to honour its side of the deal.¹⁶

9. In August 2012, the Department struck a new, legally binding interim agreement with CSC, as a precursor to the full re-setting of the contract.¹⁷ The Department agreed to pay CSC compensation of £100 million for removing CSC's exclusive right to supply care records systems in the North and Midlands.¹⁸ Nevertheless, trusts in these regions and in the East that wish to take the Lorenzo system continue to have access to funding from the Department. No funding is available for trusts in the North, Midlands and East that choose to deploy systems from other suppliers.¹⁹

10. The available funding covers the cost of the Lorenzo system itself and five years of service costs, typically worth over £9 million per trust, plus implementation support, worth up to £3.1 million per trust.²⁰ The Department estimates it will spend £572 million in total, assuming that 22 trusts take the Lorenzo system. This represents just a tenth of the 220 trusts in the North, Midlands and East.²¹

11. The benefits statement published in June 2013 also excludes the potential future costs relating to the termination of the Department's contract with Fujitsu to provide care records systems in the South of England. This contract was terminated in 2008, but the dispute is still on-going. The Department is currently in arbitration with Fujitsu, with both parties seeking compensation. The Department told us that the parties will be making closing statements at the end of June 2013, and that it will probably be a further six months before the outcome of the arbitration is known.²² Over the last four years, the Department's legal costs in relation to the termination of Fujitsu's contract and the re-setting of the CSC contract have totalled £31.5 million and £2.9 million respectively.²³

16 Q 53

17 Qq 83-87; Ev 27

18 Qq 94-95, 111-112

19 Q 58-59; Ev 27

20 Qq 58, 63-68; Ev 27

21 Qq 64, 69, 80; Ev 26

22 Q 115, C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 34

23 Qq 129, 133

2 Realising the benefits of the programmes previously managed under the National Programme

12. The Department's benefits statement for the programmes previously managed under the National Programme reported estimated benefits of £3.7 billion to March 2012. This amounts to half the value of the costs incurred to the same point. The benefits include financial savings, efficiency gains and wider benefits to society (for example, where patients spend less time chasing referrals).²⁴

13. The benefits statement reported total forecast benefits of £10.7 billion to the end-of-life of the systems. The end-of-life dates for the various systems extend well into the future, to 2024 in the case of the care records programme in the North, Midlands and East. This means two-thirds of the benefits (£7 billion) were still to be realised at March 2012.²⁵ For three programmes, including the care records programmes in London and the South, 98% of the total estimated benefits were future benefits.²⁶ The benefits statement does not include any future benefits that may arise from the Lorenzo care records system in the North, Midlands and East.²⁷

14. The Department told us that, although the National Programme has been dismantled and the component programmes are being managed separately, it is not proposing to stop monitoring the benefits. The Department acknowledged that, although it has provided guidance to trusts, there has not been sufficient drive either from the centre or at local level to take ownership of the benefits from the various component programmes. The Department stressed that, in order to drive benefits, local NHS staff need to be convinced of the value of business transformation, and this needs leadership from the top of organisations. However, it is not clear that this is happening.²⁸

15. There are considerable risks to realising the future benefits. For example, there may be further delays to the deployment of systems, meaning the benefits may be realised later than expected or may not be realised at all. In addition, the transfer of responsibility for the realisation of benefits from strategic health authorities and primary care trusts to NHS trusts and NHS foundation trusts from April 2013 is likely to increase the risks.²⁹ To support trusts in this new role, the Department and the Health and Social Care Information Centre have agreed to appoint a specific 'benefits lead' for each of the local

24 C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 36, Figure 1

25 C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, Figure 1, paras 44-45

26 Q 214, C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 45

27 C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 8

28 Qq 212-214, 224-225

29 Q 226, C&AG's memorandum, *Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS*, para 49-50

care records programmes. In addition, the Department told us that the team within the Health and Social Care Information Centre that provides support to trusts on realising benefits is to be strengthened. The Department acknowledged that sharing best practice will be fundamental to the realisation of benefits and told us that it needs to capitalise on the informal networks that already exist for this purpose.³⁰

16. The Secretary of State for Health has set the NHS the challenge of being paperless by 2018. The first target towards achieving this ambition is for GP referrals to be paperless by 2015. The Department intends that consistent information standards will apply across the NHS so that a patient's records can be shared between, for example, GPs and hospitals. The Department has set up an 'informatics services commissioning group' to bring the health system together to take such issues forward.³¹ However, the Department has not set aside a specific budget for making the NHS paperless.³²

30 Q 226-227

31 Q 246-248

32 Q 252

Formal Minutes

Monday 15 July 2013

Members present:

Mrs Margaret Hodge, in the Chair

Mr Richard Bacon
Stephen Barclay
Chris Heaton-Harris
Meg Hillier
Mr Stewart Jackson

Fiona Mactaggart
Austin Mitchell
Nick Smith
Justin Tomlinson

Draft Report (*The dismantled National Programme for IT in the NHS*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 16 read and agreed to.

Conclusions and recommendations agreed to.

Summary agreed to.

Resolved, That the Report be the Nineteenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Wednesday 17 July at 2.00 pm]

Witnesses

Wednesday 12 June 2013	<i>Page</i>
Sir David Nicholson , Chief Executive, NHS in England, Charlie Massey , Director General of External Relations, and Tim Donohoe , Senior Responsible Owner for Local Service Providers, Department of Health	Ev 1

List of printed written evidence

1	Department of Health	Ev 21:Ev 23:Ev 26
2	HM Treasury	Ev 26
3	National Audit Office	Ev 26

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2013–14

First Report	Ministry of Defence: Equipment Plan 2012-2022 and Major Projects Report 2012	HC 53
Second Report	Early Action: landscape review	HC 133
Third Report	Department for Communities and Local Government: Financial sustainability of local authorities	HC 134
Fourth Report	HM Revenue & Customs: tax credits error and fraud	HC 135
Fifth Report	Department for Work and Pensions: Responding to change in jobcentres	HC 136
Sixth Report	Cabinet Office: Improving government procurement and the impact of government's ICT savings initiative	HC 137
Seventh Report	Charity Commission: the Cup Trust and tax avoidance	HC 138
Eighth Report	Regulating Consumer Credit	HC 165
Ninth Report	Tax Avoidance – Google	HC 112
Tenth Report	Serious Fraud Office – redundancy and severance arrangements	HC 360
Eleventh Report	Department of Health: managing hospital consultants	HC 358
Twelfth Report	Department for Education: Capital funding for new school places	HC 359
Thirteenth Report	Civil Service Reform	HC 473
Fourteenth Report	Integration across government and Whole-Place Community Budgets	HC 472
Fifteenth Report	The provision of the out-of-hours GP service in Cornwall	HC 471
Sixteenth Report	FiRe Control	HC 110
Seventeenth Report	Administering the Equitable Life Payment Scheme	HC 111
Eighteenth Report	Carrier Strike: the 2012 reversion decision	HC 113

Oral evidence

Taken before the Committee of Public Accounts on Wednesday 12 June 2013

Members present:

Margaret Hodge (Chair)

Mr Richard Bacon
Stephen Barclay
Guto Bebb
Jackie Doyle-Price
Chris Heaton-Harris

Meg Hillier
Mr Stewart Jackson
Ian Swales
Justin Tomlinson

Amyas Morse, Comptroller and Auditor General, National Audit Office, **Gabrielle Cohen**, Assistant Auditor General, NAO, **Laura Brackwell**, Director, NAO, and **Marius Gallaher**, Alternate Treasury Officer of Accounts, HM Treasury, were in attendance.

REPORT BY THE COMPTROLLER AND AUDITOR GENERAL

Review of the final benefits statement for programmes previously managed under the National Programme for IT in the NHS

Examination of Witnesses

Witnesses: **Sir David Nicholson**, Chief Executive, NHS in England, **Charlie Massey**, Director General of External Relations, Department of Health, and **Tim Donohoe**, Senior Responsible Owner for Local Service Providers, Department of Health, gave evidence.

Q1 Chair: We are going to start talking about NPfIT, and when Steve Barclay comes at the end, we will move on to the issues around gagging clauses. There was a big announcement in September 2011 that you were closing the NPfIT programme.

Sir David Nicholson: Yes.

Q2 Chair: That was not true.

Sir David Nicholson: Well, the Government announced that NPfIT, as a nationally organised programme, was being taken apart and different governance was being put in place to run it. So there is no mechanism at the moment that brings it all together.

Q3 Chair: All you changed were the deckchairs on the Titanic—all the existing programmes continued. It was a PR exercise to say you had closed it.

Sir David Nicholson: It certainly was not a PR exercise. We took account of what the Committee said—

Q4 Chair: What changed, if it was not a PR exercise?

Sir David Nicholson: The governance arrangements changed. So there are separate senior responsible officers for each of the individual programmes. We have been going through each of those individual—

Q5 Mr Bacon: Do you mean the National Local Ownership Programme, when you say the senior responsible owners? I remember a point at which loads of senior responsible owners were created across the whole country. Instead of having one, which hitherto had been you, there were going to be dozens

of them. Is that what you are referring to? It was called NLOP.

Sir David Nicholson: No.

Q6 Mr Bacon: That is not what you are referring to—the one that Tony Collins described as “No Longer Our Problem”.

Sir David Nicholson: No, that wasn’t what I was referring to.

Q7 Mr Bacon: Which governance changes were you referring to?

Sir David Nicholson: So you have a senior responsible officer for each of the major programmes, rather than what you described there, which was when we tried to organise it geographically to make the strategic health authority chief executives accountable for what happened.

Q8 Chair: With the greatest respect, changing the governance arrangement is not closing a programme.

Sir David Nicholson: But as a precursor—

Chair: To what?

Sir David Nicholson:—to moving the responsibilities for the different bits of the programme, and then to reviewing each section of the programme to see how best it was taken forward.

Q9 Mr Bacon: But is it not correct that the press release that the Chair referred to from September 2011 also said that all existing contracts will be honoured?

Sir David Nicholson: Yes.

Q10 Mr Bacon: So in what sense was it closing the programme?

12 June 2013 NHS and Department of Health

Tim Donohoe: Perhaps I can help. The intention was that we would no longer manage the national programme—

Chair: Do you mind speaking up? I am really sorry.

Tim Donohoe: The intention was that we would no longer manage the national programme as a single entity and instead, look at each component programme. As those contracts came up for renewal, we would look at the intent of the service that was being delivered. For example, on things like the network infrastructure, it seems apparent that we will need that provision into the future, but it does not have to be—

Q11 Mr Bacon: Are you talking about N3 broadband?

Tim Donohoe: Yes, indeed. When those contracts come up for renewal, they go through an entirely different process now. The environment around them has changed, in the sense that there is a presumption against approval of contracts with a whole-life cost of over £100 million. In terms of the IT strategy for Government, the Cabinet Office have looked at a range of things like commodity procurement. As these strands of the former NPfIT come up for renewal they will be looked at in a different light.

Q12 Chair: What did the press release actually say? The press release said you were closing the programme.

Tim Donohoe: I believe it said we were accelerating the dismantling of the programme. The initial step in that was to stop seeing it as a single entity and to start to look at the justification for carrying on with individual parts.

Q13 Chair: Okay. I hear what you say. I think that the impression you were trying to give was that you were closing the programme. In effect, all you were doing was what I call a “deckchairs on the Titanic” exercise: you were shifting the way you were running it but keeping all that expenditure going.

Tim Donohoe: Well, large parts of that expenditure were driven by contracts that we had with suppliers, so there would have been an issue with getting out of those contracts very quickly.

Q14 Chair: Well, the impression that was given to the public was that you were going to get out of some of those contracts.

Tim Donohoe: And as I have said, as those contracts come up for renewal, they are being scrutinised in a different way, going forward. What I am saying is that each of these component programmes should be viewed as an independent strand of activity and justified—or not—on the basis of what it is delivering to the service.

For example, on something like the local service provider contracts, which are the thing that people associate most closely with the national programme for IT—

Mr Bacon: Say that again? The low cost—

Tim Donohoe: The local service provider contracts.

Chair: You are going to have to speak up or speak into your mic.

Tim Donohoe: In the case of those programmes, policy has changed. There is an emphasis on trusts taking responsibility for procurement of their own systems, going forward, so our issues now are about exiting those programmes. For example, the BT and CSC contracts assumed a single end date. There seems to have been an assumption in the original contracts that, when they expired, they would be replaced on a like-for-like basis by a similar contract. What we now have is a set of issues around getting out of that.

Q15 Mr Bacon: Who made that assumption?

Tim Donohoe: I think it is just implicit in the structure of the original contracts. The fact that everything in the BT contract in London and the south, for example, service provision effectively ends in October 2015. Now, trusts in London and the south are undertaking procurements—

Q16 Mr Bacon: What about the contracts where the service provision never really started? It can't really end when it hasn't really started, can it?

Tim Donohoe: Clearly, services are being delivered through these contracts; whether they are being delivered to the extent that was originally envisaged is obviously debatable.

Q17 Mr Bacon: Do you really think so? Do you think it is a matter for debate whether they are being delivered to the extent originally suggested in the contract? Is it not merely a plain fact that they are not being? Do you really, honestly think there is debate about that?

Tim Donohoe: In that sense, no.

Q18 Mr Bacon: Then why did you say that you thought that there was?

Tim Donohoe: Well, the point I was trying to make was that there are services being delivered through these contracts, to whatever extent, that the NHS is reliant on—things like GP systems and hospital systems. They have not been delivered to the extent that was originally envisaged, as you rightly pointed out, but that does not mean that there is no provision through those contracts; therefore getting away from them poses challenges, both in the sense that we need new commercial arrangements in place, for which we are relying on the trusts, and in that we need to look at the technical aspects of moving from one system to another, which cannot happen overnight at the end of the contract.

Q19 Chair: I will start on the CSC contract. How much was the original contract with CSC?

Tim Donohoe: At 2012 prices, the original contract would have been about £3.8 billion.

Chair: £3.8 billion?

Tim Donohoe: Yes.

Q20 Chair: What do you mean by 2012 prices—is there an RPI inflation thing in there as well?

Tim Donohoe: Indeed, yes.

Chair: RPI inflation?

Tim Donohoe: Yes to 2012.

12 June 2013 NHS and Department of Health

Q21 Mr Bacon: When you say the original contract you don't mean the original contract as in the first contract. Originally they only had one contract, which was worth about £1 billion.

Tim Donohoe: I am sorry.

Mr Bacon: They ended up with three contracts, worth about £3 billion. Is it that you are saying is now worth £3.8 billion?

Tim Donohoe: Yes, that is right.

Q22 Mr Bacon: So what was the original value of the original contract?

Tim Donohoe: That would have been £3.1 billion at 2006–07 prices, when the contracts were let or novated from Accenture to CSC.

Q23 Chair: And there is an RPI-indexed clause in there, so that everything you spend over time is uprated according to the RPI?

Tim Donohoe: There are two issues. We have tried, for example, when we talk about the benefits statement, to maintain comparability to the work that the NAO have done—

Q24 Chair: Can you just answer the question? Is there an RPI clause in your contract with CSC, which means every time it goes a bit later you pay more on the retail prices index?

Charlie Massey: I don't think that is what Tim is saying. I think Tim is saying, in terms of ensuring that the numbers that we talk about, we have a consistent basis for talking about them, rather than that being part of the contract itself.

Q25 Mr Bacon: Assuming, which is obviously a massively heroic assumption, with absolutely no chance of being brought into reality, that CSC were able to deliver what was said in the contract, and have a system for an acute hospital, Lorenzo, that works properly, and it was now deployed all over their three local service provider areas—I know that is plainly ludicrous, but bear with me and indulge me for a second, and imagine that that is the case—what is the amount of money, in those albeit ludicrous circumstances, that would have been paid to CSC? Is it £3.1 billion or is it £3.8 billion? That is really what is driving the Chair's question. Do they get even more, because of inflation, or do they get £3.1 billion? Which is it?

Tim Donohoe: With respect, it is not an either/or position, because the nature of the deployments would have meant that they are spread over time. Therefore, what I was trying to indicate is that if we pay for things in current prices the money is effectively worth less than it was at the time the contracts were let. So that is what we recognise—

Chair: What are you paying them? What is the cash?

Q26 Mr Bacon: We like to deal in real pounds, shillings and pence, rather than funny money. What I want to know is, in my hypothetical question, assuming they had successfully deployed everything, what is the amount of cash that you would have paid across to them?

Tim Donohoe: For example, in the letter I sent you in order to indicate the Lorenzo deal, that was in 2012 prices, and that represents what we will pay, but will be subject to further indexation.

Q27 Chair: When they bill you—

Mr Bacon: Sorry, I am waiting for an answer to my first question. How much cash would you have paid them if they had delivered everything they were supposed to in the contracts, for the three LSPs?

Tim Donohoe: If it had all been delivered in 2006–07, when the contracts were effectively let, it would have been £3.1 billion.

Q28 Mr Bacon: Yes. Contractually it was supposed to be delivered by December 2005, wasn't it, really? The whole thing was two years and nine months from April 2003. That is what it said in the contract. Obviously, that is way off. Are you saying that because it is later than that they are getting more cash: when they count up the used tenners and get to the end of the line there will be more of them than there would have been?

Tim Donohoe: No, in the sense that their costs are increasing—

Q29 Mr Bacon: Hang on; what they then have to pay out because of their costs is a separate question. I am a very simple person. I want in and I want out. I am not talking about out. I am not talking about CSC's costs. I am talking about a very simple proposition, which is how much money are you, the NHS—whether you call it Connecting for Health, or whatever you call it—paying them? How much would you be paying them if they had delivered everything?

Tim Donohoe: We pay for current services at current prices.

Q30 Chair: So there is an RPI indexed element in the contract that you are paying for—we are paying for, actually: not you but we.

Tim Donohoe: I cannot say with certainty whether there is such a clause.

Q31 Mr Bacon: But you are basically saying that inflation matters in this contract: that because it is late, and taking longer, the total amount of money that they will get will be greater than it otherwise would have been. Yes or no?

Tim Donohoe: No, in the sense that we have now renegotiated—

Q32 Mr Bacon: You say “No, in the sense that”; you keep on qualifying everything. I am just trying to find out: it sounded to me like you were saying if they had delivered everything contractually they were supposed to on time, which was the end of December 2005, they would have been paid an amount of money. What I am asking is, given that that plainly didn't happen, what if they were to deliver everything they were supposed to in the contract by a later point in time? We are only a mere eight years late, now, from that point, and very little has been delivered by CSC, as far as I can see, and you are still negotiating. We had a brief in February that said the negotiations would be

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complete by the end of March. It is now June and the negotiations are still going on, aren't they? Correct?

Tim Donohoe: They are, although—

Q33 Mr Bacon: Right, so there has not a lot been delivered, and the negotiations are still going on. I am just trying to get to the point: forget your negotiations for a minute and assume that they were able, miraculously, to pull down from the ether some acute hospital software that worked, everyone loved it and wanted it and everyone rolled over and got their tummies tickled, and that that was deployed now rather than back at the end of '05. What is the amount of cash that they would receive? Would that be more than they would have received at the end of 2005?

Tim Donohoe: Yes, it is a higher number.

Q34 Mr Bacon: By how much?

Tim Donohoe: If you are talking about the entirety of the original contract compared with current prices, it is about £700,000.

Q35 Mr Bacon: £700 million, you mean.

Tim Donohoe: Sorry—£700 million.

Mr Bacon: That is mind-blowing.

Q36 Chair: May I ask a second question, because it has gone from £3.1 billion to £3.8 billion. How much cash has CSC received from us so far?

Tim Donohoe: The total spent to date is about £1.1 billion.

Q37 Chair: They have received £1.1 billion?

Tim Donohoe: Yes.

Q38 Mr Bacon: Can you just remind us, apart from Lorenzo, the acute hospital system that was their main offering in this—the one that, in their 2005 report, they said was available from 2004—what else are they supposed to be providing for which you have been paying them money?

Tim Donohoe: They are delivering in excess of 2,500 systems that include, for example, about 1,800 GP practice systems.

Q39 Chair: With patient records, or with what?

Tim Donohoe: Yes, in the sense that—

Q40 Q40 Chair: So that is the Lorenzo system, isn't it?

Tim Donohoe: No, this is a different system: it is something called TPP SystemOne.

Q41 Mr Bacon: Is this stuff that they now have available because they bought iSOFT?

Tim Donohoe: No.

Q42 Mr Bacon: Because iSOFT supplied stuff to GP practices long before the national programme came along.

Tim Donohoe: Indeed. Since CSC acquired iSOFT, they have a stock of systems related to iSOFT. But TPP are a separate company; they are a subcontractor to CSC under these arrangements.

Q43 Chair: Can you give this Committee this assurance: you started off at £3.1 billion, which actually would be £3.8 billion. You have paid them £1.1 billion so far and you now intend to pay them, in effect, another £0.5 billion?

Tim Donohoe: To the end of the contract, for the entire set of systems and services that they will deliver, we estimate that the lifetime cost will be about £2.2 billion.

Q44 Mr Bacon: On top of the £1.1 billion that you have already paid them, or in total?

Tim Donohoe: No, in total. To the end of the contract.

Q45 Chair: So you intend to pay them another £1 billion?

Tim Donohoe: Yes, including the figures that I indicated in the letter yesterday.

Q46 Chair: And that £1 billion is going on the patient records system, the Lorenzo system?

Tim Donohoe: No, the only money that will be spent on the Lorenzo system is what I outlined in the letter: the figure of just over £0.5 billion. Everything else is the TPP system—

Q47 Chair: Okay, so £0.5 billion on the Lorenzo system—Richard is the great expert on this. Out of that, how many hospital trusts have got the Lorenzo patient record system in place today where it is working and functioning fully?

Mr Bacon: We are not talking about three people in the podiatry department, but across one major acute hospital.

Tim Donohoe: The key site is Morecambe Bay, where the software—

Mr Bacon: That is the one where Gordon Hextall told me several years ago that it had been deployed, isn't it? But it turned out that it hadn't.

Q48 Chair: Is it working fully there now?

Tim Donohoe: Effectively, yes. Everything that has been deployed there—

Q49 Chair: Effectively yes? Yes or no?

Tim Donohoe: Yes, it is, with the exception of the parts of the software that have not yet been fully delivered.

Q50 Mr Bacon: Can you explain—I am really fascinated by this. How did you end up, as the NHS, contracting with an organisation in—well, we know that the contracting period was from February 2002 until October 2003 and that all the contracts were in place by then, so it was 10 years ago that the contracts were in place. You bought this non-existent software off paper descriptions—years ago, I did not know what vapourware meant, but now I know that it means that it has not been written yet—from a company that said fairly shortly afterwards that it would be available from 2004 and that it was getting enormous traction, great acclaim across the health care sector and that everybody loved it. Here we are 10 years later, and you are still waiting for it to be written. How did we end up in a position where we contracted with such a

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company, and didn't have a way out, or a way to say, "I'm sorry, guv. You've had many, many chances, and you've completely failed. It's hasta la vista"? How did we get into a situation where we couldn't say that?

Tim Donohoe: Decisions were taken originally to enter into this agreement, and over time the software has not been delivered. That is obvious to everyone. Over time, the contract has been reset a couple of times. Effectively the elapsed time to deliver the software did not put us in a position where we had a strong negotiating angle with CSC. Therefore, we got to a position where—

Q51 Chair: Say that again. We didn't have a strong negotiating—

Tim Donohoe: No, a strong negotiating position because of the contract resets that had been done previously.

Q52 Mr Bacon: You strengthened their hand and weakened your hand?

Tim Donohoe: No. When the MPA had conducted their review of NPfIT in 2011, the Department was already in the middle of negotiation to agree a memorandum of understanding with CSC. After the discussions with the MPA it became apparent that that was not a good value for money proposition and there was more to be achieved. It was at that point that we started negotiating towards the agreement.

Q53 Chair: I don't understand a word of what you are saying there; sorry.

Tim Donohoe: What I am saying is that we have sought over time to reduce our contractual exposure with CSC. We were faced with a position about a year ago where the existing contract had effectively broken down. CSC had the exclusive right to supply systems to 160 trusts. They knew that we could not name 160 trusts and we knew that they could not deliver 160 trusts, so effectively we were in a position where the contract was heading for dispute. Looking at our options at that time, it was clear that options around terminating the contract, either in full or just the Lorenzo part of it, would not have offered good value for money because—

Q54 Mr Bacon: You would have had to pay them the full value of the contract for their having delivered nothing.

Tim Donohoe: Potentially, yes.

Q55 Mr Bacon: Which says a great deal about your contract management, does it not? The only reason why that could possibly be the case is if you ended up in court and they had their clever intellectual property silks sitting there, and you were to say, "You dreadful CSC, you haven't done this, that and the other. You haven't done X, Y and Z or P, Q and R. In fact, there is a laundry list thousands of pages long of stuff you haven't done." The problem would be that they would turn round to you and say, "Ah, Mr and Mrs NHS, there is a slight problem there. The reason we didn't do X, Y and Z is because you didn't do A, B and C, and the reason we didn't do P, Q and R

is because you didn't do D, E and F." That's right, isn't it?

Tim Donohoe: Yes. I would not disagree with that.

Charlie Massey: One of the key elements of the interim agreements was that CSC took a write-down of nearly £1 billion, and we removed the exclusivity of those 161 trusts.

Q56 Mr Bacon: Well, have you? There is still a presupposition that they will get money out of the NHS, and their competitors who provide software that works and hospitals want to buy won't.

Tim Donohoe: Well, look, we are not saying that had we started from a clean sheet this is the deal that anybody would have wanted. This deal has been done in the context of an emerging dispute.

Q57 Chair: You are going to spend another half a billion pounds with this rotten company providing a hopeless system. How much are you putting in of our money to bribe trusts to buy this system?

Tim Donohoe: We are not bribing trusts.

Q58 Chair: You are providing money to trusts to do deals with CSC. Ipswich, £9.6 million, I think I am right in saying. Hull and East Yorkshire, how much? You are giving trusts money to buy the Lorenzo system from CSC.

Tim Donohoe: Would it be helpful if I explained the structure of the interim agreement and what is on offer to trusts?

Q59 Mr Bacon: It probably would, but could we be clear about one thing? If a trust wants to go to Cerner, Care Cast, McKesson or whoever they want to go to, you don't give money—I am talking about within the CSC local provider areas—but if they go to CSC, you do give money. That is correct, isn't it?

Tim Donohoe: That is absolutely correct.

Q60 Mr Bacon: So the Chair is right when she says there is a bung on offer, but only if they buy the CSC product. That's right, isn't it?

Tim Donohoe: No.

Q61 Mr Bacon: "Bung" is a terribly tendentious word, and not very technical. I will replace it with "money". That is correct, isn't it?

Tim Donohoe: The fact that money is on offer is correct.

Q62 Mr Bacon: And that it is not on offer to others.

Tim Donohoe: That is correct, but I would point you to the fact that before this interim agreement, the previous iteration of this contract meant that that is the case for 160 trusts minimum, and an assumption that 220 trusts—

Q63 Chair: How much are you expecting to put on top of the contract, which will be money you give trusts to engage with CSC to buy the Lorenzo system?

Tim Donohoe: We have indicated to trusts that they can get up to £3.1 million to cover local trust activities and integration with other systems.

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Q64 Chair: How many trusts do you expect to take advantage of that?

Tim Donohoe: We have said that we will make the money available to the first 22 trusts, or until the money—

Q65 Chair: So when Ipswich says that it got £9.6 million from you, signed off by you in April—you can tell me whether I am right about £9.6 million; it might be £13.6 million: £4 million for implementation and deployment support and £9.6 million for service changes and deployment—how much did Ipswich get?

Tim Donohoe: I cannot bring the precise figure to mind. If I can give you the breakdown of how that figure will be made up—

Q66 Chair: Could it be in the region of £9.6 million to £13 million, rather than the £3-point-something million?

Tim Donohoe: Yes, but the £3.1 million is an element of that. What I think we are missing here are the system and service charges—the cost of deploying the system and the service charges for five years. That can vary between about £8.9 million—

Q67 Chair: So is it £3 million a year? Just plain English. I don't understand. Ipswich is getting more than the £3 million you originally said to us was what they would each get.

Tim Donohoe: The £3.1 million is an average funding on top of the system and service charges. The system and service charges will vary depending on what configuration of the software a trust takes.

Q68 Chair: So they get more than the £3.1 million, and they also get the service charges.

Tim Donohoe: Yes.

Q69 Chair: So what budget have you got in the Department of Health or whichever bit of the NHS to support, help and provide money to trusts to buy this rotten system?

Tim Donohoe: The letter I sent you gives a breakdown, which is our entire forecast spend on the system as at now, assuming that 22 trusts take the software. I would stress again that we are not forcing trusts to take the software.

Q70 Chair: I understand. What is the breakdown? Is that in the letter you sent me?

Tim Donohoe: Yes. The letter is our entire predicted spend on the Lorenzo system should 22 trusts choose to take it.

Chair: I am going to put that in the public domain, because I don't see why not. That is nearly £600 million.

Q71 Ian Swales: What does it tell us about the real benefits of this system, if you have to pay trusts to take it and then provide ongoing funding? Surely, if an IT system is any good at all, the trusts will reap massive benefits and would clearly want such a system. The fact that you are having to give them

extra money suggests that the benefits are possibly illusory.

Tim Donohoe: We are asking trusts to produce business cases that have to be approved at trust board level and then approved by the DH centrally, asking for a return on investment of about 2.4 to 1. The money that is spent on each of these systems has to be cost-justified in that way.

Q72 Ian Swales: When you say return on investment, what investment are you talking about? Are you talking about their share of the entire programme? You are giving them money, aren't you?

Tim Donohoe: I am talking about the totality of cost for each implementation of Lorenzo—the central funding that the Department supplies and any local funding that the trusts put in to cover their additional costs. In most cases, £3.1 million might not even be half of the costs needed to deploy the system.

Q73 Ian Swales: If I am on a trust board, what is my investment decision? What have I got on each side of the page? My costs are what?

Tim Donohoe: Each business case has to take into account the central costs, and the return of investment is after those costs have been taken into account. Where trusts do, for example, a 10-year business case, we have asked them to put in the costs of re-procurement when the five years of service that is paid for by the central—

Q74 Ian Swales: Sorry, which central costs? The costs where you actually give them the money?

Tim Donohoe: Yes. We give them the deployment charge, service charges for five years and the additional funding, should they require it.

Q75 Chair: May I ask one final question? You did not stop the programme, but you made a public announcement in September 2011. We are now in June 2013, and you still have not completed the renegotiations with CSC. What on earth are you up to?

Tim Donohoe: We have agreed all matters of substance with CSC now.

Q76 Chair: It has taken you two years—it is crackers!

Tim Donohoe: Indeed it has, but in moving towards the final iteration of this contract—

Q77 Chair: Why has it taken you so long? It is always wonderful that when people appear before this Committee something is about to be signed. The truth is that we are almost two years on and it has not been signed.

Mr Bacon: Do you think that if you wait long enough, I will leave the Committee and we will all forget about it?

Tim Donohoe: No; I don't imagine that will happen at all. We have secured additional—

Q78 Chair: Why has it taken two years?

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Tim Donohoe: Because it has been a very hard negotiation. We have got a good deal for the taxpayer. We have got the company to take—

Q79 Chair: I am not sure that you have got a good deal for the taxpayer, spending another billion quid on a system that, according to the best evidence that Richard has been able to collect, does not really work. **Charlie Massey:** May I come in on that briefly? It is quite important to understand the counterfactual. When we were looking at renegotiating the agreement with CSC, we were faced with a potential exposure of over £1 billion if we just walked away from the contract altogether.

Q80 Chair: No; £2 billion—£3.8 billion and you had spent a billion.

Charlie Massey: So where we are now is an interim agreement that creates an exposure of just over half a billion pounds, as per Tim's letter to you, for which we will be funding those up-front costs that you described in terms of those 22 trusts. So we are in a much better position than we might have been. In terms of the deal—

Q81 Mr Bacon: May I stop you there? Actually, the counterfactual that you really want to look at is what would have happened had you let "Information for Health," which started in 1998, keep going. Lots of trusts were doing quite good work and making serious progress, which they needed to make because their old systems were falling over. It is correct, is it not, that they were told to put their work on hold because they were going to have NPfIT instead, and that as a result, many hospitals got into a desperate position because they had actually stopped their work due to being told that they essentially had to because of this great new behemoth, "Connecting for Health"? Had they been able to keep on going with that, we would have been in a much better position and we would have spent much less money. That is correct, isn't it?

Sir David Nicholson: It is worth pointing out here—I am not an apologist for what happened—

Q82 Mr Bacon: Instead of Mr Massey waving his arms, can I just get an answer to my question?

Charlie Massey: I don't know the answer to that; it was before my time, so I could not give you an answer about that counterfactual.

Chair: I would simply say to you that it is a lousy deal and I still do not understand why it would take you two years to negotiate a lousy compromise. That is what I don't get.

Q83 Stephen Barclay: Sir David, did you personally negotiate the reset agreement with CSC last year?

Sir David Nicholson: No.

Q84 Stephen Barclay: Who was it who signed that?

Sir David Nicholson: Katie Davis will have signed that.

Q85 Stephen Barclay: So the reset agreement last year was signed by Katie Davis.

Sir David Nicholson: According to Tim.

Tim Donohoe: Yes.

Q86 Stephen Barclay: Could you clarify when it was signed?

Tim Donohoe: I believe that it was signed on 31 August last year.

Q87 Stephen Barclay: On 31 August last year. When did Katie Davis leave?

Tim Donohoe: The same day.

Q88 Stephen Barclay: The same day?

Tim Donohoe: Yes.

Q89 Stephen Barclay: So this major reset was signed by Katie Davis on the same day that she left.

Tim Donohoe: Yes.

Q90 Stephen Barclay: Okay. It is interesting that that was her last act. Given that it was her last act as she was leaving, presumably, Sir David, as the accounting officer and senior responsible owner, you were briefed on that?

Sir David Nicholson: Yes, I would have been briefed at the time.

Q91 Stephen Barclay: CSC's delivery of Lorenzo has been woefully late against the original and, indeed, every subsequent plan. I think that that is a fair summation—would you accept that?

Sir David Nicholson: That's fair.

Q92 Stephen Barclay: Okay, and is it also fair to say that, as accounting officer, you would not see it as your role to reward failure? That would be inappropriate.

Sir David Nicholson: The most important thing in these circumstances is to get the systems on the ground and get good value for the taxpayer.

Q93 Stephen Barclay: Did you have to pay any compensation payment to CSC upon reset of the contract?

Tim Donohoe: Yes, we did, as indicated in the letter.

Q94 Stephen Barclay: So could you clarify what that payment was?

Tim Donohoe: We agreed with CSC a payment of £100 million, which effectively bought us out of our commitment to provide 160 trusts with the Lorenzo system. There was a further payment of £10 million, which was in recognition of changes to the software that had been requested by the NHS, but had not been formally agreed with CSC.

Q95 Stephen Barclay: So we have a supplier who has been woefully late against the original plan and every subsequent plan, who has clearly failed to meet their obligations, and yet you pay them over £100 million. Why did you have to pay a contractor that had clearly failed over £100 million?

Sir David Nicholson: We have already covered this, but certainly, as far as those arrangements are concerned, the contract that has been in existence for some years gave a volume and a number of

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organisations' commitment that we wanted to get out of, because we did not believe we could deliver our side of that particular bargain. Don't forget that in the case of Fujitsu, we cancelled the contract against poor performance, so it is not that we are frightened to cancel a contract if we think it is the right thing to do, but we are still engaged in long-term legal debate and discussion with them that could go on for quite a while.

So we made an assessment about getting out of the deal. We acknowledged the fact that over many years CSC had provided a number of very effective interim systems, and had developed and implemented a series of both primary care mental health and community systems that were very effective over the time. We consulted and were involved in cross-Government work with both the Cabinet Office—the Major Projects Authority—and the Treasury, and we thought that this was the right and best deal that we could get.

Q96 Stephen Barclay: Sure. But, Sir David, that is a very long answer for saying your contractual position was weak.

Sir David Nicholson: Well, our contractual position was what it was. It was what was signed up in 2002 and 2003.

Q97 Stephen Barclay: Indeed, but think of the consequence. We have a supplier who, you accept, was woefully late. Therefore, one would assume you could exit the contract. The reason you could not exit the contract was because your commercial position was unclear.

Sir David Nicholson: No, it was not unclear. If you look at the history of the national programme for IT that we have discussed on a number of occasions in the Public Accounts Committee, we have essentially, over the last few years, been trying to make the best deal that we can for taxpayers and patients out of a set of contracts that were not ideal and that were set in a very different time for the NHS.

Q98 Stephen Barclay: The reality is, is it not, that you failed to manage the NHS's obligations under the contract, and as a consequence of that we have had to pay a failed supplier over £100 million.

Sir David Nicholson: No, I do not accept that at all.

Q99 Stephen Barclay: Well, why are we paying over £100 million to a contractor that has failed?

Sir David Nicholson: First of all—

Mr Bacon: Actually, Mr Donohoe did accept it just a minute ago when I made exactly this point. They will say, "We didn't do X, Y and Z, because you didn't do A, B and C", and Mr Donohoe said, as I think the record will show, "I do not disagree with that".

Sir David Nicholson: I am sorry; let me finish the answer. They were not completely failed. They have delivered a whole number of services for us over that period, and we paid them for it. Many hospitals in the area—in the North, Midlands and East—depend on the services that this organisation has provided over that period. What was clear was that it was unlikely that we would be able to serve up 160 organisations in the way that was originally expected in the contract,

which, in my view, could never have been delivered for that time. So we took a judgment, in the best interests of taxpayers and patients, to make that deal at that particular time. You may not agree with it. You may think it is the wrong deal. All I can say is that we worked with the Cabinet Office, the Major Projects Authority and the Treasury to oversee all of that, and our judgment was that this was the best deal for the taxpayer.

Q100 Stephen Barclay: The reality is that you were the senior responsible owner for managing the NHS meeting its obligations under the contract. The failure to do so made your position commercially weak. That is why you were not able to enforce the contract against a supplier that had failed to meet its obligations. That therefore ties this £100 million directly to the fact that you did not manage the people under your responsibility in meeting those obligations.

Sir David Nicholson: No, those people are not under my responsibility. A large proportion of those organisations are foundation trusts. The whole organisation of the NHS was changed after the contract was signed.

Q101 Chair: What year was the contract signed?

Tim Donohoe: The original contract was signed in 2003.

Q102 Chair: Where were you at that point?

Sir David Nicholson: I was working in Birmingham and the black country.

Q103 Chair: When did you take over responsibility for the contract?

Sir David Nicholson: In September 2006.

Q104 Chair: May I ask two questions, and then I will go to Jackie? You said in response to Stephen that there are still legal discussions being held. Does that mean there is a potential further liability on top of the £110 million that could emerge?

Tim Donohoe: No. What we are seeking to do is conclude the reset of the contract.

Q105 Chair: So what are the legal discussions?

Tim Donohoe: Well, just those that are necessary to conclude the contract. Effectively, the contract was a legally binding agreement that was entered into in August last year. That has to be enacted into a contract. As was pointed out earlier, CSC effectively has three contracts, in the north, the midlands and the east. They are being consolidated into a single contract as a stepping stone to us moving away from these arrangements in the future.

Q106 Stephen Barclay: But that exclusivity, which only applied to two of the three, applied only if they were not in breach of the contract.

Tim Donohoe: As I think I said earlier, we took advice on our position. As we have just been discussing, it was felt that our options around termination of whole or part of the contract would not represent good value for money.

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Q107 Stephen Barclay: Because you had not met your own obligations. CSC was not producing a working product, was it?

Tim Donohoe: No, it has taken much longer than—

Q108 Stephen Barclay: No. So you have a supplier that you have paid a huge amount of money to that is not producing a working product. That supplier is therefore in breach of contract. You are unable to enforce the breach of contract because, quite understandably, they say, “Sir David has not managed the people, as the senior responsible owner, so the NHS has not met its side of the contract.” It is therefore messy and, as a consequence of that failure of management, the taxpayer has had to pay more than £100 million to a failed supplier. That is the nub of it, is it not?

Tim Donohoe: You have to realise that at the time we did the negotiation, it was seen that CSC had strong grounds for being able to claim from a legal point of view that it had delivered the core elements of the system.

Mr Bacon: Oh really?

Q109 Stephen Barclay: Why did they have such strong grounds?

Tim Donohoe: Because the care management functionality or release 1.9, as it is known, was operating in three trusts.

Q110 Mr Bacon: They had to get to four trusts, didn’t they, and Christine Connelly, the then chief information officer, gave them deadline after deadline. There was an absolute drop dead deadline of March 2010, and they sailed through that without delivering to four trusts, and nothing happened. I am surprised that you say that they could show that they had met their legal obligations. It does not sound in accordance with my memory of it at all, to be honest.

Tim Donohoe: Our advice was that it was a sufficiently unclear point for us to take a risk on.

Q111 Chair: May I just ask one question? What on earth in the remaining expenditure are we going to give them success payments for? There are £100 million of potential success payments.

Tim Donohoe: They are milestones associated with particular deliveries, first of types and elements of functionality and so on.

Chair: Another new set of milestones after how many years?

Mr Bacon: It is 10 years.

Q112 Chair: So after 10 years of failing to deliver a product on time, we are now potentially going to give them £100 million of so-called success payments.

Tim Donohoe: I think I have to take you back to what I said at the beginning. We took advice in association with colleagues in the Cabinet Office and the Major Projects Authority; we looked at the range of options available to us, and doing this deal was clearly seen as being the best value-for-money option.

Q113 Stephen Barclay: Because you had got yourself into a mess. It was the best deal at that time.

The advice may have been perfectly valid, given the mess that you had got yourself into, but my point is that it was a failure of management for the NHS to have got itself in that mess with its supplier.

Mr Bacon: Nodding does not appear in our records. Can you just say yes if you agree with Mr Barclay?

Tim Donohoe: It was a complex situation and the reason, as I have said, that the potential for dispute was there was because CSC would be able to claim things about how the NHS and the Department had conducted themselves, and we would have been claiming things about how CSC had conducted itself. In that context, the outcome was not felt to be sufficiently certain to take the risk of getting into a further legal dispute, as we had done with Fujitsu.

Sir David Nicholson: To be fair, our experience had been that when we cancelled the contract with Fujitsu, the advice we were given at that time was that it would be fine, but of course several years later, we are still involved in detailed legal—

Q114 Mr Bacon: The fact of the matter is that Fujitsu said at the time that they were very happy to fulfil the existing contract, but you did not want them to. The reason you did not want them to was the same reason that we have had all the failure elsewhere: the contracts were let in an enormous hurry, in total secrecy, bound up with huge confidentiality clauses, and it was only after they were all signed—quite rapidly after—that people became aware that the contracts would not deliver what was required.

Sir David Nicholson: Obviously, I cannot comment on that, because it is the subject of significant legal debate.

Q115 Jackie Doyle-Price: I want to unpick a bit more about Fujitsu, because I suspect that it is possibly why we are in the mess that we are in with other contractors. You terminated the contract with Fujitsu in 2008, but the dispute is still ongoing. Can you give us more information as to where we are on that?

Tim Donohoe: If it would be helpful, I can do that. We cannot really talk too much about the position, because it is subject to formal arbitration proceedings. The evidence-gathering session of those proceedings has now ended and the parties will be making closing statements to the arbitration panel at the end of this month. There will then probably be something in the order of six months before we hear the outcome of that arbitration.

Q116 Jackie Doyle-Price: On that basis, it really would not be helpful to speculate on whether there might be any ongoing costs.

Tim Donohoe: Indeed not.

Q117 Jackie Doyle-Price: Can you confirm something? You terminated the contract with Fujitsu—an £896 million contract, for which it received £151 million.

Tim Donohoe: Yes, I think that is the figure.

Q118 Jackie Doyle-Price: Okay, so subject to arbitration, it could still be quite a substantial figure.

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Tim Donohoe: That will be a matter for the arbitration panel to rule on.

Q119 Jackie Doyle-Price: Sir David, you said quite clearly earlier that, as far as you were concerned, this could never have been delivered, which is quite an admission given how much money has been spent on it. Can I unpick why you reached that conclusion? I will be quite provocative about why that was from my perspective. Essentially, the NHS is an organisation that delivers its services through a network of independent providers, be they GPs, foundation trusts or so on, so all the NHS is is a payments mechanism and a cheque book. In your view, can the NHS ever procure anything that would have to be written across the whole structure?

Sir David Nicholson: That is quite a big question. Before 2003—in 1998, as it happens—I was running a hospital. Think about the computer systems that developed earlier. We had an extensive new system in the hospital that I was responsible for, but it had built up over many years, with many clinicians. It was a basic patient administration system, but many clinicians—gastroenterologists and so on—all created their own systems and connected it to the base system, so over the years, we built up this extraordinary conglomeration of systems. The National Programme for IT offered to take all that away and replace it with something standard, which will probably be less than you have now. In those circumstances, to me it is pretty obvious to work out that the reaction is difficult—people go, “Why on earth would we do that?” The idea of ruthless standardisation—that you can enforce a set of things on the NHS—has proved illusory. It has proved to be something that you are not able to do.

Q120 Jackie Doyle-Price: Because you can’t. The NHS can’t.

Sir David Nicholson: Because the NHS is not an organisation, but a set of organisations that have their own legal and statutory responsibilities, their own history and their own way of operating. You can get them to work together. You can bring things together and you can work co-operatively across it, but managing change of that nature from the top centrally is simply not possible in something as complex as this. The history of this programme over the past few years has been about trying to get the best out of what was there for the organisation as it is, as opposed to what you might hope it was.

Q121 Jackie Doyle-Price: So essentially, the NHS overall as an organisation was bearing the risk for a project that had to be delivered through other organisations.

Sir David Nicholson: Yes, and do not forget what was happening at the time, of course. I take Mr Bacon’s point that the counterfactual should have been that we should have let people get on and do it. We were not having a great response with that, either—there were lots of computer scandals around before 2003 for the NHS—trying to bring things together to procure something in that way. We have been trying to make the best of that job since.

Q122 Jackie Doyle-Price: Recognising that relationship with your providers and what has happened with the Fujitsu termination, has that made you a lot more risk averse about pressing any legal advantage with other contractors?

Sir David Nicholson: You can’t ignore it. You absolutely can’t ignore it. Our judgment was to take advice. We did not try to do it on our own; we did it with the rest of Government. Obviously Governments are involved in this across the board. We tried to get the best advice that we possibly could. We made the judgment that this was the best option available in the circumstances.

Q123 Mr Bacon: I have a couple of quick questions. You may not be able to answer them all now. If not, perhaps you could write to the Committee. Do the total costs included in the review of the final benefit statement include local costs?

Tim Donohoe: Yes, they do.

Q124 Mr Bacon: They include all local costs from trusts right across the country, do they?

Tim Donohoe: The local costs are estimated based on a survey that was done of SHA finance directors at the time of the statement.

Q125 Mr Bacon: I am talking about the trusts themselves, the trust-side deployment costs. Are they included?

Tim Donohoe: I will have to check.

Q126 Mr Bacon: The SHAs are one thing. I’m talking about the level of each hospital.

Tim Donohoe: No, but the SHAs worked with the trusts to derive what costs there were in the system.

Sir David Nicholson: So the costs of the local deployment are included but they are not detailed costs built up from actuals of individual trusts. They are more surveys that SHA finance directors did to get an idea of what it was.

Q127 Mr Bacon: So they were basically estimates. I am not trying to ask a leading question.

Sir David Nicholson: They were the best estimates at the time of what the costs were.

Q128 Mr Bacon: What is the true cost of the exit of the Cerner sites?

Tim Donohoe: I am sorry—I don’t understand.

Q129 Mr Bacon: The sites that are no longer using Cerner. Do you know? Perhaps you could write to us about that. You mentioned the Fujitsu legal case. I think they were reported in the newspapers at the time as threatening to sue you. Ms Doyle-Price said £896 million, I think. They were reported in the papers as threatening to sue you for £700 million and then there was negotiation. It has been going on for a very long time. What are the total legal costs for that for the taxpayer?

Tim Donohoe: I believe over the past four years, specifically in relation to Fujitsu, it has been £31.5 million.

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Q130 Mr Bacon: £31.5 million of legal costs, so far.
Tim Donohoe: Yes.

Q131 Mr Bacon: To which law firms?

Tim Donohoe: Principally to DLA Piper, but there may be other firms associated.

Sir David Nicholson: Can we give you a note on it?

Q132 Mr Bacon: Yes, please. It makes me think, as I often do, that I should have been a lawyer.

Ian Swales: On the same note, can we have how much on CSC or any other legal costs?

Q133 Chair: How much on CSC so far?

Tim Donohoe: On CSC over the same period I think it is about £2.9 million, but I will confirm that.

Q134 Mr Bacon: When we met Richard Granger in June 2006, I asked him what the central administrative costs of CfH would be and he said £1,500 million. I have no sense of what actually happened, of what the central costs outturn has been so far. Can you give us an idea of that?

Tim Donohoe: No.

Q135 Mr Bacon: It was a fairly fruity number then. I would just like to know what has happened since.

Tim Donohoe: Indeed. We will have to look at back at what Mr Granger said.

Q136 Mr Bacon: It was 26 June 2006. It was when we had the first hearing on the first National Audit Office Report.

Given all this experience and given, plainly, that what is required for success is a very close interaction between the hospital and the supplier, and that the entire incubus of the national programme and all the local service providers just got in the way of that necessary close interaction, why is there increasing pressure from the new information centre for centralisation, after everything that you have learned?

Sir David Nicholson: I didn't know there was.

Q137 Mr Bacon: You don't know that there is? You don't know that to be the case? This is what I am told, but—

Charlie Massey: Increasing centralisation in what respect? Sorry, I am the sponsor for the information centre. I am not sure that I would recognise that phrase myself.

Q138 Mr Bacon: Increasing pressure in terms of what you buy, and standardisation and centralisation.

Charlie Massey: In terms of the information centre, I think that what has happened before has been that they have been commissioned to do lots of things by lots of different players in the system. What we are trying to do now, through the creation of an informatics services commissioning group, is to ensure that the system as a whole—all of the bodies, including NHS England—can be more strategic in terms of their commissioning from the information centre as a delivery partner. I would not describe that as the information centre therefore becoming more centralised. I would talk about it in terms of the

information centre being able to be more coherent in its planning, to deliver better value for all those customers across the system.

Q139 Mr Bacon: I am sorry; I should have read your CV, but I didn't. How long have you been with the NHS?

Charlie Massey: I am the director general for external relations. I started in May last year.

Chair: You are not an IT expert—you are a PR expert.

Q140 Mr Bacon: You are a PR guy. Nothing wrong with that—I worked in public relations. Very good business.

Charlie Massey: Terrific, terrific.

Q141 Mr Bacon: Tell people the truth—you will always be right.

Charlie Massey: Within my brief, I have—

Q142 Chair: Are you a PR guy?

Charlie Massey: No, I'm not a PR guy.

Q143 Mr Bacon: Have you ever worked for a PR agency?

Charlie Massey: I haven't ever worked for a PR agency; I'm not sure if I should be flattered by your asking me. My responsibilities are for work force policy—including education, training and pay—and the sponsorship of Health Education England, and also for information policy. From this April, I have taken on the role of informatics accountable officer. I am also the sponsor for the Health and Social Care Information Centre. So I have a range of responsibilities, which include communications within the Department of Health.

Q144 Mr Bacon: You have PR people who work for you?

Charlie Massey: I have some—

Q145 Mr Bacon: This is very reassuring, Mr Massey.

Sir David Nicholson: May I say that what I wasn't saying there was that everything national was bad and everything local was good? I say that because what I think the other lesson in the programme is that there are some things that work really well nationally. I think that some of the infrastructure stuff has delivered pretty well nationally.

Q146 Mr Bacon: As a former Stalinist, Sir David, I would be very surprised if you did not acknowledge that some national things are still better.

Sir David Nicholson: I don't know whether to thank you or not.

Mr Bacon: Or was it a different bit of the Communist party? I cannot remember.

Q147 Stephen Barclay: Sir David, could you confirm that—as I understand *Private Eye* will be reporting in its next edition—a current president of a royal college has been on the receiving end of a judicial mediation?

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Sir David Nicholson: I can't confirm either what *Private Eye* is going to write or anything about a royal college president. I have no knowledge—

Q148 Stephen Barclay: So you wouldn't know? Okay. Did you personally clear the statement issued by the Department of Health last night in terms of judicial mediation?

Sir David Nicholson: I don't work for the Department of Health and I certainly didn't clear any statements that were made in relation to that—

Q149 Stephen Barclay: Indeed. So did they show it to you? It just seems odd that that statement would go out without you seeing it.

Sir David Nicholson: I didn't see it. I was busy preparing myself for what I thought was a Public Accounts Committee on the national programme for IT.

May I just say something? A whole lot of stuff has been said this morning, and written about, and from my perspective I think it is worth saying that I think I have been to this Public Accounts Committee over 30 times in my career, which is probably a record for someone sitting on this side. I have done—

Q150 Stephen Barclay: So many successes—that's why, Sir David.

Sir David Nicholson: I have done numerous Health Committees. I take my responsibilities to Parliament really, really seriously, and I spend a lot of time preparing myself to do it. So when I come and speak to you, I prepare as well as I can and I am absolutely at all times completely honest in what I do. If I make inaccuracies or whatever in any of those, I try to put them right as soon as I discover them. I can absolutely refute that I have ever been involved in any kind of cover-up in relation to the expenditure that has been identified. I have been absolutely honest and truthful with this Committee, as I always am with all the parliamentary Committees.

It is worth mentioning that compromise agreements, at whatever level, are used widely in the NHS, the private sector and other parts of the public sector. That does not necessarily mean that someone has been stopped from speaking about patient safety, and to connect the two all the time is erroneous and wrong. Throughout my career in the NHS and what I have done, particularly the job that I do now, I have always supported people who stood out against the system. Supporting people who speak out is a very important part of being a health professional, and a leader in the NHS.

I have done a whole series of things. I wrote to the service twice in 2007 and 2012, setting out the importance of whistleblowing, and how we need to protect people who do it. I have been involved, and have very worked quickly to close the loophole in relation to judicial mediation, which was raised at the last Public Accounts Committee. That loophole is now closed, so we have a good grip on what happens in the future. That was our absolute priority. I made arrangements to strengthen the NHS constitution in relation to whistleblowing. I helped set up the whistleblowing helpline. We had the largest staff

survey in the world to ensure that we can measure how openness and transparency works in the NHS—all those things. To connect me with some kind of cover-up is entirely and utterly inappropriate. I completely refute it.

Q151 Stephen Barclay: Can we go back to the facts?

Sir David Nicholson: They are facts.

Q152 Stephen Barclay: There are a fair few assertions.

Sir David Nicholson: No, no, I am sorry, but I did not go around the media expressing my views about all these things before the meeting. It is appropriate that I talk to the Public Accounts Committee about them. All sorts of stuff has been said this morning, which is completely untrue.

Q153 Stephen Barclay: Let us go back to your last appearance. At your last appearance, we specifically asked you, at Q165, to write to NHS trusts. You have not done so. That is correct, is it not?

Sir David Nicholson: That particular Public Accounts Committee was towards the middle of March. You wrote to me on 27 March asking me for progress.

Q154 Stephen Barclay: It is a simple yes or no. You were asked to write. You said, "As soon as possible". That was in March. Have you done so? Yes or no?

Sir David Nicholson: I am just trying to explain the context in which we have been working. As you know, the context is the biggest set of changes that the NHS has ever been through. Indeed, more than half of the organisations that I could have written to were being abolished as we spoke. We took the judgment that the most important thing was to close the loopholes, and that is precisely what we have done.

Q155 Stephen Barclay: That had already been announced. With respect, Sir David, that is very misleading. According to the answer from Dr Poulter, the Health Minister, in reply to my parliamentary question, closing the loophole was issued the week before your hearing. To suggest that you have not been able to comply with your undertaking to Parliament because of that is very misleading, because you were aware of that ministerial answer when you gave the undertaking. You have got the timings wrong.

Sir David Nicholson: No.

Charlie Massey: The Department wrote on 17 April because, after 1 April, it became something that would be more appropriate for the Department to write on. The Department wrote on 17 April—I can share the letter with Members, if that is helpful—talking about the need to ensure that gagging clauses are not involved in any compromise agreement, and to ensure that that applied to judicial mediations as well.

Q156 Mr Bacon: Can you just repeat that?

Charlie Massey: I can share the letter if that is helpful but, basically, it talks about compromise agreements, gagging clauses and the Public Interest Disclosure Act, to make it very clear that, in any compromise

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agreement, the Public Interest Disclosure Act would essentially be the predominant factor and that staff should always feel free to speak up in the public interest. It also referred to judicial mediation payments.

Q157 Mr Bacon: What did you say about gagging clauses? You used the phrase, but I didn't hear what you said about it.

Charlie Massey: It says: "It is particularly important that the existence of a confidentiality clause does not in any way gag, either intentionally or unintentionally, any individual who may wish to raise concerns in the public interest."

Q158 Chair: Did you in that letter also ask for the information that Stephen Barclay saw?

Sir David Nicholson: The point I was trying to get to was that on 1 April my responsibilities changed, hence it was appropriate that the Department of Health wrote to organisations rather than me. That is the point.

Q159 Stephen Barclay: The point in the statement from the Department last night said it was not a higher priority. What I was trying to understand is why you saw your role as being to decide the priorities of Parliament.

Sir David Nicholson: Operationally, I was trying to put it into place before I changed jobs, hence—

Q160 Stephen Barclay: You have given an undertaking that the Committee had said this was a priority. We had asked you to do something and you had agreed to do it as soon as possible. Why didn't you write back to the Committee and say you weren't doing it?

Sir David Nicholson: No, I had actually offered, and—

Q161 Stephen Barclay: Why didn't you write back and tell us?

Sir David Nicholson: Well, I didn't. Perhaps I should have done.

Q162 Stephen Barclay: Are you really saying that managers cannot do more than one thing at once?

Sir David Nicholson: No, of course not.

Q163 Stephen Barclay: Did you not pass it on to someone else to deal with if you were moving into a new role?

Sir David Nicholson: I passed it on to the Department of Health, which took responsibility for the work from 1 April.

Q164 Stephen Barclay: It is an abdication of responsibility, isn't it?

Sir David Nicholson: No, it is not.

Q165 Stephen Barclay: You are not in a position to tell the Committee today how many of the payments have been made, are you? You don't know.

Sir David Nicholson: My responsibility changed on 1 April.

Q166 Stephen Barclay: Sure, but who did you pass it on to? Why do we still not know how many of the payments have been made? Do you know? Sir David, do you know how many of the payments have been made, and what the total number is?

Sir David Nicholson: As I said, my responsibilities changed on 1 April.

Q167 Stephen Barclay: Who did you ask in the Department whether they had done it?

Sir David Nicholson: They went to the Department of Health, and the letter was sent out by the Department of Health after 1 April.

Charlie Massey: That letter was sent out in terms of the prospective position. The question you asked was about what historically had been the case. The Department sat down and talked to HR directors throughout the NHS. What those HR directors were saying to the Department was that there had been substantial reorganisation over the last 15 years, so they could not be confident that employers had up-to-date information that distinguished between whether someone had left because they had retired, been made redundant or been dismissed, so any exercise would be partial, costly to perform and inaccurate in terms of what it concluded.

I haven't seen the material that you have obviously received through your freedom of information request, and I would be happy to engage with that, but that was the set of discussions that took place on the back of that discussion in this Committee.

Q168 Chair: So on the back of that you decided not to meet the information request from this Committee without telling us.

Charlie Massey: Those were the discussions that took place.

Q169 Chair: But you are telling us now that there was a request for information from this Committee. You wrote to all the hospitals, or the trusts. They said it was too difficult to collect—surprise, surprise—with so many reorganisations, and you then decided unilaterally not to try to collect it, but you never thought that it might be courteous to tell us, and impertinent not to tell us.

Charlie Massey: I understand that, but those discussions did not happen in a split instance in March. They have been ongoing between March and now.

Q170 Chair: For heaven's sake, Steve Barclay makes it absolutely clear at almost every Committee that this is an important issue to him. You have had discussions between then and now, and it is only because he gets answers to FOI requests that you suddenly wake up and give a public explanation of what you had determined privately.

Charlie Massey: My understanding is that those discussions have been happening right up to the present time.

Q171 Chair: If I may say so, Mr Massey, this is another instance of, "We are just about to come to a

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decision because we are appearing before the Committee”.

Q172 Stephen Barclay: Can we deal with a specific, Sir David? Have your officials, at any time under your watch, given advice to health trusts that judicial mediation payments do not need to be declared to the Treasury?

Sir David Nicholson: We were operating under an assumption that that was the rule and that judicial mediation was not required to go to the Treasury.

Q173 Stephen Barclay: You accept that that assumption was incorrect.

Sir David Nicholson: It was certainly confirmed in writing to us by the Treasury in 2011, so I can confirm that those were the arrangements that we were working under.

Q174 Stephen Barclay: Do you accept that these payments are discretionary? Yes or no. Either they are discretionary or they are not. Are judicial mediation payments discretionary, or are they ordered by the court?

Sir David Nicholson: They are payments that come out of that mediation. They can either be through the court or not.

Q175 Stephen Barclay: Are judicial mediation payments discretionary?

Sir David Nicholson: They do not have to be.

Q176 Stephen Barclay: They are voluntarily entered into by the trust?

Sir David Nicholson: They are.

Q177 Stephen Barclay: So as arrangements voluntarily entered into by the trust, they would fall within managing public money as special severance payments?

Sir David Nicholson: Yes. All I can do is refer you to the letter that the Treasury wrote to us confirming the arrangements and that they did not require them.

Q178 Chair: Is that right?

Sir David Nicholson: I have the letter.

Q179 Chair: Can we hear from the Treasury? Is that right?

Marius Gallaher: I think there was confusion prior to April this year about what judicial mediation actually meant. The emphasis—

Q180 Chair: So you didn't understand it?

Marius Gallaher: The view taken at the time was that it was judicial and it got the stamp of a judge, but the key word was mediation. It did not in fact have the stamp of a judge, so it was just pure mediation, perhaps using the good offices of judicial experts.

Sir David Nicholson: I have the letter from the Treasury that sets out the position.

Chair: It is pretty gob-smacking that the Treasury did not understand that mediation meant that you agreed things outside the court. I think most of us around the table would have got that.

Q181 Stephen Barclay: The Department's argument is that the Treasury did not know its own policy.

Sir David Nicholson: We got a letter from the Treasury setting out the position and we were following that.

Q182 Stephen Barclay: But you have accepted that these payments were entered into voluntarily. Voluntary arrangements fall within the definition of special severance, and special severance has to be referred to the Department and to the Treasury. Those are the rules.

Sir David Nicholson: That is not what the Treasury told us when we asked for the rules, so we were operating on that—

Q183 Stephen Barclay: It was a nice wheeze to get around the system.

Sir David Nicholson: It is not a wheeze at all. It is a straightforward thing to do. We could have done it.

Q184 Stephen Barclay: Does it not concern you, Sir David, that there is an inherent conflict of interest in a trust making these payments without referring to you, as the accounting officer in your Department, or to the Treasury? Isn't there a conflict of interest?

Sir David Nicholson: These are individual employers. That is the thing about the NHS. It comprises hundreds of individual employers with their own statutory responsibilities, their own employment responsibilities and their own ability to make decisions about employment practices.

Q185 Stephen Barclay: Is there a conflict of interest in a hospital trust making a payment to someone who has a dispute against the trust? Is that not an inherent conflict of interest? The complaint is against a body that is using taxpayer money to settle the complaint.

Sir David Nicholson: That assumes that no compromise agreement should ever be made.

Q186 Stephen Barclay: No, that is why they have to be sanctioned. That is why they are signed off by the Treasury. That is why the rules are in place.

Sir David Nicholson: Exactly.

Q187 Stephen Barclay: The rules even state: “Legal advice that a particular severance payment appears to offer good value for the employer may not be conclusive”. That is the whole reason why we have this control in place, and you are the accounting officer.

Sir David Nicholson: And we were working within the rules.

Q188 Mr Jackson: Can I go back to the Treasury? I find it astonishing that the Chief Secretary to the Treasury can announce a policy about these payments a year ago, or maybe more, and the Treasury does not understand what they mean. For all practical purposes, the Treasury is unable to use its legal expertise to give guidance to the biggest spending Department, particularly definitive legal advice on the appropriateness or otherwise of these severance payments and judicial mediation. The Department

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before us has some serious questions to answer, but I think the Treasury does too, because I do not understand how that can be the case. Who was advising the Chief Secretary to take this position without having properly thought through the consequences in the advice that was subsequently to be given to Departments, in particular to the Department of Health?

Marius Gallaher: I think the advice given to the Department of Health at the time was incorrect. Judicial mediation was a new and relatively novel process for looking at such cases. However, the Treasury has to see all cases that we regard as above the contract or outside statutory requirements, and it primarily looks at whether they secure value for money for the taxpayer before anything is spent beyond the statutory or contractual requirement. We do not normally look at the particulars of a gagging clause. There is advice in *Managing Public Money* that says that you should not entertain gagging clauses that preclude employees or former employees from speaking out in the public interest.

Q189 Stephen Barclay: That is set out in statute. PIDA says that—it is already there. That is a statement of the obvious. The point is that the gagging clauses, as we have discussed repeatedly on this Committee—Richard, I think you have discussed it in previous Parliaments—have a chilling effect. That is the point. They are not legally enforceable, because of PIDA, but they have a chilling effect. We saw that with the Walker case, where a legal letter was sent to Mr Walker, even though I suspect it would not have been enforceable against him if he was raising legitimate patient safety concerns.

That is the issue, and we have debated it time and again on this Committee. That is why Parliament asked for a full list of how many payments there were, so we could assess the quantum—the scale—of the problem. You gave an undertaking, Sir David, to do it, and you decided that you would decide the priorities of Parliament. You did not even have the courtesy to write back to the Committee and tell us about what is self-evidently a potential conflict of interest within hospital trusts. That is the nub of it. That is what has happened.

Sir David Nicholson: The first thing is that I completely acknowledge the comment you make about the potential chilling effect of compromise agreements and confidentiality clauses within that. That is why we have completely focused our attention, over the last few months, with trade unions, professional bodies, professional regulators, the public and with organisations to make sure that everyone understands that you cannot gag NHS staff who want to speak out about patient safety and issues in the public interest. We have done everything that we can do to do that. We have now put in a set of processes where we can monitor if it ever happens, and take action if necessary.

In the specific circumstances that you talk about, I am afraid that we are going through the biggest set of reorganisational changes ever in the history of the NHS. Responsibilities and accountabilities are moving as we speak, and in those circumstances, another part

of the system is responsible, after 1 April, for doing what you have just described.

Q190 Chair: You say that gagging is unacceptable in the NHS. We had a hearing recently on the out-of-hours services in Cornwall provided by Serco. It is absolutely clear—we have not yet published our Report—from the evidence we got that people employed by Serco, but working in the NHS and paid for out of the NHS, were being gagged in their ability to reveal information about what was happening under that contract.

Sir David Nicholson: Yes. I watched the particular Public Accounts Committee sitting that you described. One thing I have done is write to all clinical commissioning groups that are my responsibility in my new job, not only saying that gagging is not acceptable for them, but that they need to take steps to ensure that, in the providers that they use, appropriate policies are developed there as well—taking exactly that point.

Q191 Chair: But how on earth are you monitoring it, given that I have had further letters on private providers delivering NHS services, where there is a suggestion, yet to be proven, that the private provider is not providing what they should and what they say they are? So how the hell are you monitoring it?

Sir David Nicholson: I understand, and clearly, writing out and saying, “You need to do it”, is not enough. What we are looking at are the elements in the national standard contract that all CCGs use with providers to ensure that it is built into the contractual arrangements.

Charlie Massey: May I just—

Q192 Chair: Goodness knows what you will do in the future. From the evidence that the Committee took on Cornwall, Serco lied 250 times—I remember this clearly—about whether or not they had done visits and answered phone calls, which they had not done. There was nothing to close the contract, let alone even fine them for lying.

Charlie Massey: May I add something, in terms of the things we are planning to do? The Secretary of State, Jeremy Hunt, is absolutely determined to ensure that people can speak up on matters of public interest. So in addition to the contract—

Q193 Chair: You cannot stop Serco sacking them.

Charlie Massey: The things that the Department is absolutely taking forward include working with the Care Quality Commission on how it sets about its inspection to take account of policies, leadership and governance in provider organisations. In our response to the Robert Francis public inquiry, we have also talked about introducing a statutory duty of candour. We are also considering introducing criminal sanctions. So we are absolutely determined to embed the culture that enables people to speak up, throughout, including for providers.

Q194 Mr Bacon: May I ask about “Use of confidentiality and clawback clauses in connection with termination of a contract of employment”? Is the

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guidance that was issued in 2004 on this whole area extant? Is that the most recent guidance?

Charlie Massey: I doubt it. I can't imagine it hasn't been updated since 2004, but I'm—

Sir David Nicholson: I wrote out in 2007 and 2012, and NHS—

Q195 Mr Bacon: This had a review date in 2007, so that would apply to it.

Sir David Nicholson: And NHS employers have just written out with new guidance for the service on this.

Q196 Mr Bacon: Would it not just be the easiest thing to say that confidentiality clauses have no place in NHS employment contracts or in termination agreements?

Sir David Nicholson: The problem we have with that is that there are some circumstances where, for example, patient confidentiality is an issue in the dispute that has arisen by the individuals in an organisation—

Q197 Mr Bacon: But you can deal with that. If you go on to the Health and Care Professions Council website, you can see judgments against practitioners who are regulated by that body in which it says "Person A" and "Person B". That does not stop you publishing the whole thing. They publish it. What's the problem?

Sir David Nicholson: The problem is a blanket approach to it. All the advice that we have is that a blanket approach would not work and would—

Q198 Mr Bacon: You say "All the advice". I am always suspicious of that phrase, but I am looking at the guidance that was issued in 1999. This is 1999/138 and 1999/140, which I am looking at now. I will read it to you: "Confidentiality clauses have no place in NHS employment contracts. Any settlement on termination must be available for proper public scrutiny. Alan Milburn, the previous Minister of State for Health"—this tells you how long ago it was—"has written to Chairs of health authorities and NHS Trusts making clear that there is no place for them in NHS contracts"—I think he means the confidentiality clauses, rather than the chairs. "Alan Langlands, Chief Executive of the NHS"—again, this is pre-Crisp—"has assured the Public Accounts Committee that gagging clauses directly contravene NHS Executive Policy."

That guidance was replaced in 2004 by HSC 2004/001—this guidance here—which was issued by Sir Nigel Crisp. I will read you what it says: "This Circular reflects the commitment given by Sir Nigel Crisp, in his capacity as Accounting Officer to the Public Accounts Committee Hearing on 14 January 2002 to strengthen"—I emphasise that word advisedly—"and clarify the existing guidance"—that was this—"concerning these issues". It turns out that this guidance, which supersedes this in respect of confidentiality clauses, says: "It is not contrary to Department of Health policy...to use confidentiality clauses in contracts of employment". So, far from strengthening it, it actually weakened it. That is in paragraph 11. It repeats that sentence in paragraph 13.

So you've been all over the shop on this. I would be very grateful if you could send us a complete set of all the guidance that has been issued on the use of confidentiality clauses, going back to 1999 and from then onwards, so that we have a complete set in one place and can read them all in sequence. Can you do that for us?

Sir David Nicholson: I am very happy to do that. Can I just say this? I understand the National Audit Office are doing a Report—a review—on all of this—

Q199 Mr Bacon: They certainly are, and it is something I have been talking to them about for quite a long time.

Sir David Nicholson: Have they picked that up in this, or is it—

Chair: You will be asked to reappear.

Mr Bacon: We would like the thing that you have just committed to giving us for this Report, but I am sure we will be looking at it again when we look at the next Report.

Chair: Right. Two more on this and then I'm going to go back just to one or two things on NPfIT.

Amyas Morse: We have a Report coming out on the 20th of this month—we are publishing it on the 20th of this month—and of course it looks more widely than health. It is fair to say that many parts of Government find it difficult to lay their hands on the information required. In fairness to the Department of Health, it is fair to say that other Departments have found difficulty in marshalling this information as well. However, we have a reasonable amount. I feel that what we will see in that Report is that there are difficult interests at work. If you are leaving an employment and you want to be re-employed in the same sector, you are quite interested in not having any bad words being said about you as you go forward. That is fair comment.

Chair: That is for another day. We are looking forward to seeing you for that evidence session on 3 July. From what I hear you have a busy week that week, Sir David.

Q200 Mr Jackson: Can I ask that we have a note from the Treasury as to the legal advice that they gave the Department of Health prior to Dr Poulter's written answer on 12 March? It is important that we understand the reasons why the Department of Health took the decision that they did.

I have two quick questions. Six trusts have refused to divulge information in respect of any severance payments related to judicial mediation. What sanction do you have to force them to comply with what is, after all, a legitimate freedom of information request, of which Mr Barclay has already made mentioned?

Sir David Nicholson: Obviously, I am not aware of the individual details. Are they foundation trusts or NHS trusts?

Q201 Stephen Barclay: I can provide a list.

Sir David Nicholson: If they are NHS trusts the National Health Service Trust Development Authority has the ability to do that.

Q202 Chair: And if they are foundation trusts?

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Sir David Nicholson: I think it is Monitor, but whether Monitor have got the power to make them divulge, I do not know.

Q203 Stephen Barclay: Does it not surprise you that there is a refusal by some trusts to disclose how much they paid out?

Sir David Nicholson: It is extraordinary.

Stephen Barclay: It is extraordinary that they would refuse?

Sir David Nicholson: Yes. I find it extraordinary that they would.

Q204 Mr Jackson: The other thing is, looking at other trusts, such as ambulance trusts, are you as an imperative going to have as policy a review of these payments in other trusts? We quite rightly focus on acute hospital trusts, but there are other trusts within the national health service where this may have happened up to March; clearly it is ultra vires post March 2013. That is an important point. Perhaps if you can't answer that directly now, we can have a note on that.

My final point is a constitutional one. Without labouring the point too much, having undertaken to provide the information, it is unsatisfactory in the extreme that we are debating this as a result of answers to a freedom of information request rather than a straightforward answer, which I thought was an imperative following your last appearance before this Committee. You should have been on the front foot in giving us this information, but we are only debating it because of a freedom of information request. That is deeply unsatisfactory, and at the very least quite discourteous to this Committee.

Charlie Massey: On behalf of the Department of Health, I appreciate those comments. I would be very happy to write to the Committee to set out exactly what we have done on the back of Mr Barclay's other question. I am happy to take forward the question with Monitor and the NHS Trust Development Authority about practical arrangements going forward. I am alarmed by the use of the word "refused" in terms of those requests, rather than necessarily—

Q205 Chair: What are you going to write and tell us that you haven't told us today?

Charlie Massey: I would hope to be able to give you more detail.

Q206 Mr Bacon: Could you just finish that previous sentence—rather than necessarily?

Charlie Massey: I would be alarmed if what people were saying was that they refused to provide the information. My understanding is that some trusts that have said that it is physically difficult or impossible to find the information because of their incomplete records. That is a very different point from point-blank refusal. I would like to understand—

Q207 Stephen Barclay: The Department's own guidance requires them to keep a record of such payments, does it not?

Charlie Massey: Yes.

Q208 Mr Bacon: The BBC is quite good at this, we found recently—making payments and then not keeping records for whether they were authorised or not. You haven't had any transfers from the BBC to the NHS recently, have you?

Charlie Massey: No.

Q209 Chair: So what are you going to write to us?

Charlie Massey: When?

Q210 Chair: What are we going to get that is more than you have told us now?

Charlie Massey: I will write to tell you about the conversation that we have been having. It will be as I have described in terms of our conversations with HR directors, but I might be able to shine a bit more light on some of the particular issues we have encountered that led us to conclude that what we would come back with would be partial or incomplete. That may be different in the context of what Mr Barclay received through his freedom of information request. I haven't seen the material, and it might help us to push that further. I don't know, but we would have to pick it up.

Q211 Chair: At the very least, it would be an explanation of why you have also not responded to a clear request from the Committee for information.

Charlie Massey indicated assent.

Q212 Chair: You are looking at the NPfIT in its totality. You have an absurd figure. You are expecting benefits by the time we are all dead of £10.7 billion, which looks to be plucked out of the air. Why on earth aren't you monitoring on such a huge programme whether or not the benefits that you now assert will, in fact, be delivered? I do not know whether to direct that question to you, Mr Massey, or you, Mr Donohoe. Who do you work for, Mr Donohoe—the Department?

Tim Donohoe: I work for Mr Massey, for the Department, yes.

Q213 Chair: You are both Department, aren't you?

Tim Donohoe: Yes.

Chair: It is not good enough to say bluntly, "We are giving up monitoring".

Q214 Mr Bacon: The fascinating thing is that you are not going to monitor whether you get the benefits or not. The care record was the absolute heart of this, as we know. All the other stuff was add-ons, basically, compared with the importance of the care record. Page 17 of the chart at figure 4 says at the top, "The percentage of total estimated benefits still to be realised". In the case of the care record, 98% of the benefits are still to be realised—and you are not going to monitor it? Hello?

Tim Donohoe: Let me make it absolutely clear to the Committee that we are not proposing to stop monitoring the benefits of this programme. The significance of it being called the final benefit statement was the decision taken about a year ago that it would be the final presentation of information as a single portfolio of programmes. I said earlier that the intention now is to strengthen the activity around benefits realisation, especially in my new area of the

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local service provider contracts and to drive additional value out of the contracts in their remaining life.

Q215 Chair: That is heartening. If we look at this again in a year's time, the Committee will be able to get an update of all the strands of the programme both of money spent and benefits gained.

Tim Donohoe: Yes.

Q216 Chair: Good. That clears something up. Do you have a figure for the benefits to March 2012? They are estimated under table 1.

Tim Donohoe: No. There is work going on—

Q217 Chair: This is March 2012—

Tim Donohoe: Indeed. I apologise to the Committee that we do not yet have that figure. I will present it as soon as it is available.

Q218 Mr Bacon: We have only been asking for the statement of benefits for about three or four years.

Q219 Chair: When are we getting it?

Tim Donohoe: We are working through to validate because we do not want to put in the public domain information that is incorrect.

Q220 Chair: When?

Tim Donohoe: I think that we are probably three months away from being able to publish. We have been publishing figures through the Government's major project portfolio reporting, which takes place quarterly.

Q221 Mr Bacon: They are validated, are they?

Tim Donohoe: They are not validated in the same way that we have worked through this statement with NAO colleagues but, for the most part, they are using the same methodology. We are trying to improve the statement. We are learning from what has been done and trying to turn it into a repeatable process so that we can provide something that is much closer to a real time view of what is happening.

Q222 Chair: We are talking about year end March 2012. We have now gone beyond year end March 2013. When will we get a statement showing costs and benefits for March 2013?

Tim Donohoe: If it were acceptable, I would like to write to you once I have had a chance to assess where we are in that process.

Q223 Chair: I don't know about "once you have had a chance", I would like it before we publish our Report please.

Tim Donohoe: Indeed.

Q224 Chair: It is not acceptable to find that, in respect of 2011–12, we are only going to get the benefit statement in effect in September 2013.

Tim Donohoe: No. To be clear, I think we will try and present the most up-to-date picture to the end of March 2013. One of the things that is very clear to me, having looked through this work, is that we have not had sufficient focus on this area, and certainly I

will be taking a number of steps around the local service provider programmes—where, as you pointed out, Mr Bacon, 98% of the benefit still remains to be realised—to have a strategy that we agree with the trusts for focusing specifically on benefits realisation in the remaining life of the contracts.

Q225 Ian Swales: The Report is quite specific in having concerns about whether you will even be able to monitor benefits in the future, given that you are putting all this out to local areas. In terms of exploitation and also monitoring, paragraphs 49 and 50 of the Report are quite clear that there are concerns about that. Can you give the Committee some assurance that we will see the benefits realisation programme out there locally and that you will actually know what is going on?

Tim Donohoe: Guidance has been given to trusts historically. The issue is that there has not been sufficient drive either from the centre or at local level to take ownership of the benefits. To me it is a cultural issue. If this is seen as a top-down programme, which we talked about earlier, there is very little incentive for staff at local level to give a return to the centre, on some dry basis in terms of numbers, about a few seconds' improvement in a process of whatever the measure might be. What we need to crack this and to drive benefit from these contracts is for local teams to be absolutely brought into business transformation. They should not be seen as IT projects. They need to be led from the top of organisations and they need to have the buy-in of staff across the organisation who need to see the value of what is being done.

Q226 Ian Swales: I do understand that, but I do not think the Report—paragraph 49—is feeling good about your doing that. It expresses concerns about your devolving this. As so often when we have hearings with the NHS, I am guessing that you are going to sit here at some future date and say, "We don't know what the benefits are. We don't collect the data." That is typically what happens with NHS data.

Tim Donohoe: I take your point. What I would say is that I have been in discussion with the Health and Social Care Information Centre, which is where the team that has driven this from the centre reside, and I have agreed with them that we will appoint a specific benefits lead for each of the local service provider programmes and, in addition, strengthen the team within the information centre so that they can in turn work with the trusts to ensure that the focus on this is increased.

Q227 Ian Swales: Will you be sharing best practice, because that is the other hobby horse that we have? Because the centre has this strange mixture of hands-on and hands-off, we often feel that best practice is not shared. So if somewhere is doing very well on benefits, how will the information get to somewhere else that is doing badly with the same system?

Tim Donohoe: You are absolutely right. That is absolutely fundamental to trying to make it succeed. I have been talking to chief execs in trusts and looking at their experience of the programme and their views on how we can do this better. It is clear that there are

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lots of informal networks that are already looking at things around best practice, and we need to capitalise on that.

Q228 Stephen Barclay: May I just ask about Choose and Book, Sir David? If I understand correctly, it was advertised in the OJEU notice as a five-year-contract with two one-year extensions.

Sir David Nicholson: Recently?

Q229 Stephen Barclay: It was let in 2003 on a five-year contract with two one-year extensions. Is that correct?

Sir David Nicholson: I have no reason to believe that what you are saying is wrong. I have not got the data in front of me.

Q230 Stephen Barclay: That contract expired in June 2011, but you have since extended it. Did you take legal advice on the legality of that decision to extend it?

Sir David Nicholson: I am sure we did.

Q231 Stephen Barclay: You say you are sure. You are the senior responsible owner.

Sir David Nicholson: I do not have that information to hand.

Q232 Stephen Barclay: And that legal advice did not warn you that there was a risk of challenge to the legality of those extensions?

Sir David Nicholson: There is always a risk with challenge in those circumstances. We have announced today a consultation process to renew the arrangements around choose and Book and go through the procurement process.

Q233 Stephen Barclay: But just to be clear, in essence you had a contract of seven years' duration—five years plus one plus one. Because you had not prepared for the point at which that contract expired, you had to extend it, and there is a legal risk associated with doing so. That is correct, is it not?

Sir David Nicholson: I have no way of commenting on what you are saying—

Q234 Stephen Barclay: You smile as if—

Sir David Nicholson: No, you are asking me a set of legal questions that I can't answer as the legal—

Q235 Stephen Barclay: You are the senior responsible owner. With respect, the issue is whether legal advice was taken on the legality of extending a major contract on your watch. We as Back Benchers constantly hear Ministers say to us, "We would love to do what you're suggesting, but EU law is extremely inconvenient and we really do have to adhere to EU law." You are the senior responsible owner. I am asking you whether, if the OJEU notice covers a seven-year period that expired in June 2011 and you are still running the same contract, to what extent are you compliant with that OJEU notice? Are you compliant or not, and did you have any legal advice warning you against the extension?

Sir David Nicholson: We would have taken legal advice, and that legal advice would have set out the risks of what we were doing. We took the judgment, in the light of that, given the services that were operating and the way we were trying to rethink how the service would work in the future, that it was a sensible thing to carry on, and that is what we have done.

Q236 Stephen Barclay: Are you still, as of today, extending that contract that expired in June 2011, or have you procured a new service?

Sir David Nicholson: No, we have not procured a new service.

Q237 Stephen Barclay: So this contract expired in June 2011. In essence, you did not prepare for it expiring. You have just extended it and, even as of today, we do not have a new service procured.

Sir David Nicholson: Today, we are launching a consultation on the kind of service that is appropriate going forward.

Q238 Stephen Barclay: Isn't it this lack of leadership and preparation that then undermines the commercial negotiating position of the Department?

Sir David Nicholson: No.

Q239 Stephen Barclay: Should you not have prepared for the contract expiring? You had seven years when you knew that the deadline was seven years. That was the tender, so you had seven years. You used the two extensions that you had. Why did you not prepare for it expiring? Why have we still not got a new service in place today, three years on?

Tim Donohoe: Perhaps I can help. Legal advice was taken. My recollection of it, which I would like to confirm to the Committee in writing, is that if we were performing a market consultation, there was a risk of challenge, but it was partly mitigated by clearly indicating to the market that there was a future intention to procure that service or another service of a similar kind.

Q240 Stephen Barclay: So you accept—let's be clear about this—that because you did not prepare back in 2010 for the contract expiring, you accepted a legal risk of challenge to the legality of those extensions. That was the legal advice that you got, yes?

Tim Donohoe: That is my recollection, but I will confirm that.

Q241 Mr Bacon: Mr Donohoe, may I quickly ask you this? When did you start working for Connecting for Health?

Tim Donohoe: I have occupied various roles in the organisation. I started originally in 2003.

Q242 Mr Bacon: What month?

Tim Donohoe: I think that formally it was in May. I worked—

Q243 Mr Bacon: Were you a consultant to them before that?

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Tim Donohoe: I worked as a contractor for, I think, four months.

Q244 Mr Bacon: Was that from late '02 or early '03?

Tim Donohoe: I believe it was early '03.

Q245 Mr Bacon: Your CV does not have any dates in it. Could you send us a more detailed CV, with dates—that would be very helpful—and including which private sector experience you had?

Tim Donohoe: Yes.

Q246 Chair: My final question is about the future. We now have a commitment from the Department of Health to go paperless by 2018. Is that right?

Charlie Massey: 2018 for—

Chair: Going paperless. That is the Secretary of State's commitment.

Charlie Massey: Yes, the Secretary of State set a challenge—

Q247 Chair: And he has set a whole range of what I would call targets to achieve that 2018 deadline.

Charlie Massey: He has set a challenge of going paperless by 2018, and that challenge is reflected in NHS England's planning guidance, "Everyone Counts", which sets out some of the milestones—paperless referrals by 2015, for example, being the first stage on that journey.

Q248 Chair: I call those targets, but we will call them milestones if you prefer—terminology hides reality. And he is going to mandate national standards, but expect them to be delivered locally.

Charlie Massey: In terms of the arrangements we have set up now, we have set up an informatics services commissioning group. That brings the system together, as I mentioned briefly earlier. Within that, there is an information standards group. The idea is that we can have consistent information standards that will apply across the board that will then enable records to be shared between primary and secondary care. That is very much part of it.

Q249 Chair: Okay. So if I live in the Lake District and I fall ill on holiday in Cornwall, they can communicate from Cornwall in a paperless way with my GP and hospital in the Lake District?

Charlie Massey: The example that the Secretary of State sometimes gives is that if someone has a fall and an ambulance turns up, the ambulance driver is able to access your primary and secondary care records, and there and then will be able to tell whether there are relatives nearby who will understand your conditions, and therefore provide better patient care.

Q250 Mr Bacon: How will they be able to tell whether they are accurate and up to date?

Chair: This is NPfIT mark whatever—20.

Tim Donohoe: For example, the summary care record is in early implementation—the ability to share information across the NHS. It carries a time-stamped record that indicates to the clinician viewing the record that it was produced at a particular time. That

doesn't get over the issue that there may have been events subsequent to that record—

Q251 Mr Bacon: But we know, don't we, that the clinicians are not really that interested in the summary care record? It doesn't really help them.

Tim Donohoe: I think signs regarding the summary care record are quite encouraging. The number of views over the past year has tripled to something like 6,500 a week.

Q252 Ian Swales: Can I ask one, what I am sure will be more than a \$64,000, question? Have you done any estimate of the IT cost required on top of what we already have here to get to the Secretary of State's target in 2018? Has anyone estimated what that will cost? It is not going to happen through what you have already planned, is it?

Charlie Massey: Going forward, we do not have a specific budget set aside, so the informatics services commissioning group needs to take decisions across the system on prospective spend. That will be linked to the vision, so that we are able to achieve transparency and participation, but will also ensure that we have affordability and value for money.

Ian Swales: My real question is: are you either overtly or covertly going to be letting another huge contract in the period between now and 2018 for IT?

Chair: They are advertising the national framework contract, which is worth up to £1.2 billion. My general comment is that this sounds to me like the next disaster waiting to happen. If you look even just at Rotherham, they have just started. If you have national standards, they have to change their systems to meet the national standards, and it becomes chaotic. You may talk about it being delivered in a different way, but I would say to you that we will come back to this, but I think it is another national scandal that we will be considering over the years.

Q253 Stephen Barclay: Sir David, did you or anyone else employ any third parties on short-term contracts to support you in preparing for today's hearing?

Sir David Nicholson: Did I—

Stephen Barclay: Were any people outside the NHS hired—contractors or consultants—to help you prepare with today's hearing?

Tim Donohoe: Yes. I hired someone to assist me, who has assisted in previous hearings.

Q254 Stephen Barclay: Could we get a note with a breakdown of what sort of daily rate they are on?

Tim Donohoe: I cannot recall the figure, but I will write to you on that.

Stephen Barclay: Ballpark?

Tim Donohoe: I am sorry, but I cannot recall.

Q255 Stephen Barclay: If you hired them, it seems a bit strange that you do not know how much you are paying them at. So you hired some people to come in to help coach you?

Tim Donohoe: One person, and not to coach; just to assist with the preparation.

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Q256 Stephen Barclay: Right. Could we have a detailed note of any payments made to people outside the NHS as part of preparing, coaching or whatever it may have been, ahead of today's hearing?

Tim Donohoe: Yes, indeed.

Chair: Sorry. We just wondered whether it was Tim Yeo. Thanks very much indeed.

Written evidence from the Department of Health

When I gave evidence to the committee earlier this month, I undertook to write to you on a number of matters which arose during the hearing.

FOLLOW UP TO 18TH MARCH QUESTIONS 165 AND 187

At the 12th June hearing, members asked about the request made to Sir David Nicholson at the 18th March hearing about action to ensure that all NHS staff and ex staff were aware that any confidentiality agreements they may have signed did not prevent them from raising matters of public concern. He was also asked to seek to establish the number and costs of any payments made to staff following the judicial mediation dispute resolution procedure.

Following the 18th March hearing, Mr Barclay wrote to Sir David on the 27 March seeking a progress report on the action taken. Sir David responded to Mr Barclay on 18 April setting out the action taken and explaining the difficulties in contacting ex employees and in securing accurate and complete information about such payments. I apologise that this correspondence was not copied to you as it should have been, and I enclose copies of these letters at Annex A. [Not Printed]

JUDICIAL MEDIATION—BACKGROUND AND TREASURY APPROVAL

Having reviewed the documentation I have considered what more could be done to establish the number of payments that may have been made by NHS employers following judicial mediation.

It is important to recognise that a dispute settled under judicial mediation does not necessarily mean that the case involved a potential whistleblower. Judicial mediation is widely used across both the private and public sectors as an alternative means to resolve a dispute before formal Tribunal proceedings are instigated. Whilst on some matters of principle it may be better to proceed to Tribunal even if this risks higher costs to the employer, in general terms judicial mediation may offer a means of settling disputes at reduced cost. It is the employment judge who identifies if a case is suitable for judicial mediation. The claimant can choose not to go down this route or if they do, they can choose not to accept the settlement offered and proceed to Tribunal.

Following a pilot scheme introduced by the Tribunal Service in Newcastle, Birmingham and central London in 2006, the new procedure of judicial mediation to settle disputes was rolled out to the whole of England and Wales from 1 January 2009. Following queries to the Department of Health from NHS organisations on the need for Treasury approval for such settlements, the Treasury confirmed in an email to the Department of Health dated 4 August 2010 and formally in a letter dated 15 August 2011 (attached at Annex B [Not printed]), that Treasury approval for payments proposed following the judicial mediation process were not required.

It is important to note that business cases submitted to the Department do not necessarily state that a case will be settled through judicial mediation. NHS employers seek approval to make a non-contractual payment. If approved Treasury set the agreed upper limit. The employer will then follow whatever dispute resolution procedure they agree with the claimant, bearing in mind that suitable cases for judicial mediation are identified by an employment judge.

At the Health Select Committee hearing on 5 March 2013, Sir David was questioned on the judicial mediation process and in particular the case of the former chief executive of the United Lincolnshire NHS Trust, Gary Walker, whose settlement was agreed following judicial mediation in late 2011. Sir David agreed to find out if judicial mediation could present a potential loophole in the scrutiny of special severance payments.

The Department of Health then reviewed the advice from the Treasury and were of the view that any non-contractual payments made under judicial mediation were not made under a court order and therefore should require Treasury approval. This view was put to the Treasury which re-considered and confirmed on 11 March 2013 that they may have given judicial mediation greater status than it deserved and that Treasury approval would now be required for all non-contractual payments made under these arrangements.

Compromise agreements and their content are not normally seen by either the Department or the Treasury as they are confidential between the parties concerned. Generally it would not be appropriate for the Department to dictate to employers what should be included within any particular compromise agreement for any particular case. However, we are deeply concerned that some confidentiality clauses used within compromise agreements by employers may have a "chilling effect" on individuals and inhibit staff from speaking up on patient safety issues and other matters of public concern. In response to this concern the Secretary of State for Health made clear in February 2013 that in future compromise agreements should include an explicit clause which made it

clear that nothing in the agreement would prevent an individual from making a protected disclosure if they wished to do so.

In addition, the Treasury agreed to the form used by NHS employers, when submitting special (non-contractual) severance business cases, to be changed to include a section requiring confirmation that the explicit clause has been included in any compromise agreement used. In April 2013 NHS Employers issued guidance on compromise agreements and the use of confidentiality clauses and suggested an explicit clause that could be used by employers when drawing up such agreements.

HISTORIC DATA ON JUDICIAL MEDIATION PAYMENTS

There would be considerable difficulties involved in contacting ex employees who may have signed a compromise agreement following judicial mediation and with securing information, including details of compromise agreements, on *all* non-contractual payments made following judicial mediation over the period from when judicial mediation was introduced to March of this year.

Auditors do require NHS organisations to retain information on non-contractual payments. This should include the cost and either the approval letter or email from the Treasury or if it was a payment made under judicial mediation or a court order. Confidential documentation such as the compromise agreement is not normally retained by the Accounts team. Without the accompanying compromise agreements it would not be possible to ascertain whether the agreements contained any clauses which contravened the Public Interest Disclosures Act or more likely any clauses that could have a “chilling effect”. This may be retained by the Human Resources Department and a copy kept by their legal advisers. Where HR or Accounts Departments did not retain copies of the compromise agreements they could in theory ask their legal advisers for a copy.

However, even if all the compromise agreements could be tracked down and an examination of their content carried out to establish what clauses were used, it would not be possible to contact all the employees concerned to say that they can make a protected disclosure if they want to because once an employee has left employment, their former employer would not keep forwarding addresses.

The NHS has gone through significant re-organisation with many employers being abolished, merged or split since judicial mediation was introduced as a pilot in 2006 and formally since 2009. We tested the likely practicalities of establishing this information and in contacting ex employees through conversations with some HR Directors. That reinforced the conclusion that such a request would be unlikely to produce complete data with regard to the numbers of judicial mediation cases and would not result in employers being able to contact all ex employees who left under such arrangements.

It was with this in mind that we chose to ask all professional regulators and trades unions to contact their registrants and members to ensure that as many staff as possible were aware that no settlement agreement, including those made under judicial mediation, prevents them from speaking up in the public interest. This letter was sent by the Department on 17th April 2013.

To ensure we have covered every possibility of securing this information we have asked our lawyers to check with the Tribunals Service what information may be disclosed and to which bodies. It is possible that the National Audit Office could request some information. Pending this advice we will consider writing to the Secretary to the Tribunals who has responsibility for the administration of Employment Tribunals. Although judicial mediation settlements are private agreements and are not published (unlike Employment Tribunal judgments) it is possible that records are kept. However, our lawyers advise that we are unlikely to be given anything more than total numbers in any given period in any given Employment Tribunal region and the Department of Health as a third party would not be able to obtain information that identified either of the parties to a judicial mediation or the content of any compromise agreement that may have been used. It is also unclear if the Secretary to the Tribunals will be able to separately identify NHS cases. I will keep you informed of this request when we receive a response.

The Committee also asked for a chronology of guidance and Department of Health on initiatives on whistleblowing, compromise agreements and confidentiality clauses and this is attached as requested.

Charlie Massey

21 June 2013

Supplementary written evidence from the Department of Health

1. NOTE TO CLARIFY Q19–Q47

When the Accenture contracts were novated to CSC in 2006–07, the potential Contract Value of all three CSC contracts was £3.1 billion in 2006–07 prices. With inflation, the potential Contract Value would increase to £3.8 billion in March 2012 prices.

A price inflation mechanism was negotiated and agreed when the contracts were originally signed in 2003. This has been rolled forward through the contract restructuring processes.

The table below shows:

- The value of the previous (2008) contract with CSC (Column 1).
- The value of the 2012 Interim Agreement with CSC assuming 22 trusts (Column 2).
- The amount paid to CSC to March 2013 for both Lorenzo and non-Lorenzo products (Column 3).
- The currently anticipated amount of money still to be spent with CSC under the Interim Agreement for both Lorenzo and non-Lorenzo products. (Column 4).

TABLE SHOWING SPEND TO 31/03/2013 WITH CSC AND POTENTIAL FUTURE SPEND

	<i>1</i> <i>2008</i> <i>Contract</i>	<i>2</i> <i>2012 Interim</i> <i>Agreement</i>	<i>3</i> <i>Spend to</i> <i>31/03/13</i>	<i>4</i> <i>Still to be spent</i>
Planned Lorenzo spend	2,536			
Live Lorenzo estate at IA		35	33	2
New Lorenzo		518	135	383
In Patient Prescribing Medication Administration		19		19
Non-Lorenzo value	1,228	1,637	995	642
Total Contract Value	3,764	2,209		
Total Spend to date			1,163	
Total anticipated future spend				1,046

If the number of Trusts ultimately deploying Lorenzo under the Interim Agreement meets our assumptions (ie 22), we are forecasting that the total cost (capital and revenue included) to the taxpayer by the end of the contract service period at March 2012 prices will be £572 million for Lorenzo and £1,637 million for non-Lorenzo elements in the contract, making a total of £2,209 million.

From the start of the CSC contract to 31 March 2013, we have paid CSC £168 million for Lorenzo, covering deployment and service charges for Lorenzo Release 1.9, Lorenzo pilot charges and including the £100 million Compensation Payment that released the NHS from its obligation to name 160 trusts. We have also paid CSC £995 million for non-Lorenzo products, making a total paid to 31 March 2013 to CSC of £1,163 million.

The £995 million for non-Lorenzo products covers the deployments costs of, and service charges for, 2,665 interim products, deployed across 179 Trusts and over 1,800 GP practices in the North, Midlands and East. The products deployed include 1,870 TPP GP systems, 134 community systems, 128 child health systems, 89 out of hours systems, 80 prison systems, six ambulance systems, as well as 87 iPM PAS systems, 38 theatre systems, 29 A&E systems and nine maternity systems.

Financial Impact of Delays in Deployment

Where a deployment takes place later than planned, the cash price paid for that deployment will be higher due to price inflation which is allowed for in the contract.

However, the service charges for the period between the planned and actual date of deployment *would not be payable* and the service end date would not change. Therefore the total service charges which could be earned by CSC would be reduced following a delay in a deployment.

2. NOTE TO CLARIFY Q106

Prior to the Interim Agreement signed on 31 August 2012, CSC was the Authority's (Department of Health) exclusive supplier of the Core Services in the North East and in the North West and West Midlands of England during the term of the contracts.

This exclusivity could only be removed if there was an Event of Default (ie a right to terminate the contract). Since the legal advice provided to the Department was that an Event of Default was not provable, exclusivity could not be removed and would have been enforceable by CSC once product was available.

This "exclusivity of supplier" arrangement did not, however, extend to the East and East Midlands.

3. NOTE IN RESPONSE TO Q128–Q129

Since the termination of the Fujitsu contract in May 2008, only one Cerner site has exited from that Local Service Provider contract, namely Worthing and Southlands (WASH) which was merging with another Trust, Royal West Sussex (RWS).

In December 2008, the WASH Integration Programme Board decided to migrate from the Cerner solution to the existing software in use at RWS at that time.

Although we have not checked with the Trust, we estimate that WASH would have spent approximately £2.2 million locally for system migration. This cost was primarily for upgrading and relicensing patient administration systems (PAS) to that of the Trust with which it was merging.

We believe that the costs of migrating from the Local Service Provider procured Cerner PAS caused no significant excess local cost as WASH would have incurred local costs merging two different systems into one.

If we have not interpreted this question correctly, please advise us.

4. NOTE IN RESPONSE TO Q129–Q133

The total costs in respect of the Fujitsu legal case are £31,452 million. These have been paid to DLA Piper LLP. However, these costs include third party costs, such as those for counsel and expert witnesses, where invoices are routed through DLA Piper.

In addition, £3,113 million has been paid to Milbank Tweed Hadley & McCloy LLP for commercial support in the management of the Fujitsu LSP contract and in the transition of services from Fujitsu to the BT LSP contract between May 2008 and June 2009.

£2,639 million has also been paid to DLA Piper LLP in respect of legal support in re-negotiating the CSC contract and a further £2,702 million has been paid to DLA Piper LLP for legal support in respect of a range of other NPfIT contracts.

5. NOTE IN RESPONSE TO Q134–Q135

The central administrative costs for the programmes previously managed under the National Programme for IT is forecast to be £1.1 billion in 2004–05 prices until the end of the contracts. To March 2012, the actual spend was £893.4 million.

6. NOTE TO CLARIFY Q216–Q224

The Committee sought assurances as to when benefits information will be available for both March 2012 and March 2013.

The process to obtain and review this data has been discussed with the National Audit Office. Further discussions need to be held with the Health and Social Care Information Centre and NHS England, where the majority of Senior Responsible Owners (SROs) for projects which used to be part of the National Programme for IT now reside.

The Department will commit to publication of updated benefits data to March 2013 by the end of November 2013.

7. NOTE IN RESPONSE TO Q230

Legal advice on the procurement risk in relation to extending or varying the Choose and Book contract was received from DLA Piper on 22 February 2011 and on 28 May 2013.

The essence of the legal advice provided in February 2011 was that the contract allowed for a termination period under which the contract could be extended whilst transition to a replacement supplier was effected, provided the termination period was limited to two years and the service during the termination period did not extend beyond minimum and necessary maintenance. The Contract was, therefore, extended to 15 December 2013.

No challenges were made by third parties following the Authority's decision to extend.

The Authority has now commenced procurement of a replacement service for Choose and Book but that process may not be completed prior to 15 December 2013. As a result, further legal advice has been sought in May 2013 as to the likelihood of challenge by a third party as a result of the proposal to further extend the contract beyond 15 December 2013. The essence of the advice is that such an extension would be likely to represent a material change, thereby increasing the risk of challenge. This risk could be mitigated by:

- commencing a regulated procurement for a replacement service prior to the end of the extension period;
- limiting the period of such an extension to a period of one year; and

-
- where possible, reducing the scope of the Choose and Book service during this period and not undertaking any further development activity.

The Authority has followed the legal advice in respect of the mitigation actions set out above.

8. NOTE IN RESPONSE TO Q245

TIM DONOHOE—CURRICULUM VITAE

1993 TO PRESENT

APRIL 2013—PRESENT

Senior Responsible Owner for the Local Service Provider programmes, Department of Health

SEPT 2012—MARCH 2013

Director of Informatics, Department of Health

JULY 2009—AUGUST 2012

Director of Programmes and Operations, NHS Connecting for Health

2005–09

Group Programme Director (national applications and infrastructure), NHS Connecting for Health

2003–05

Programme Director, Electronic Prescription Service/ePrescribing, NHS Connecting for Health

2000–03

Independent contractor, working on a Benefits Agency project and then for the Department of Health in the four months prior to becoming an employee

1994–2000

Business Development Manager (and various other roles), CSL Group Ltd.

1993–94

Benefits Manager, London Borough of Croydon

9. NOTE IN RESPONSE TO Q256

The Committee sought details of payments made to people outside of NHS Connecting for Health/Health and Social Care Information Centre as part of preparing or coaching ahead of the 12 June 2013 hearing.

The support for preparation ahead of the hearing held on 12 June 2013 was provided through an existing work package with a consultancy firm at a cost of £29,566. This support took the form of collation and summarising of data and reports and the preparation of briefing material.

This consultancy firm has advised that, under the terms of their contract with the Health and Social Care Information Centre, disclosure of their day-rates will substantially prejudice the firm's commercial interests.

Sir David Nicholson did not employ any third parties on contract to prepare him for the 12 June hearing.

Stephen Mitchell

Deputy Director, Head of Accountability & Regulation

20 June 2013

Further supplementary written evidence from the Department of Health

In advance of the hearing on Wednesday, I thought it would be helpful to provide the Committee with an understanding of the costs associated with the CSC Interim Agreement dated August 2012. I am sorry that this information is rather late, but I felt that it would probably help to facilitate our discussion.

The costs below are based on an assumed scenario of 22 Trusts taking Lorenzo under this Agreement. In my view, this is likely to be close to the maximum that can be achieved in the remaining term of the contract.

£35m	Spend related to contractual commitments for delivery of software and services which existed prior to the Interim Agreement.
£100m	One-off compensation to CSC in respect of cancelling the contracted deployments to 160 trusts (thus removing CSC's exclusive right to supply systems).
£10m	One-off compensation to CSC in respect of requested changes to the software
£245m	Potential spend on 22 new Lorenzo deployments (assuming the maximum functionality is deployed and five years of service at every Trust)
£100m	Maximum spend on one-off contractual success payments
£490m	Potential spend with CSC
£82m	Potential future funding to support trusts in deploying Lorenzo (and which can be spent with any supplier)
£572m	Total potential spend

Tim Donohoe

SRO for the Local Services Provider Programmes

June 2013

Written evidence from HM Treasury

Q200 Mr Jackson: *Can I ask that we have a note from the Treasury as to the legal advice that they gave the Department of Health prior to Dr Poulter's written answer on 12 March? It is important that we understand the reasons why the Department of Health took the decision that they did.*

TREASURY RESPONSE

Guidance on special severance payments (ie payments outside contractual entitlements) when staff leave public service employment is contained in Managing Public Money Annex.4.13. It confirms that special severance payments are novel, contentious and potentially repercussive expenditure and require Treasury approval in advance.

JUDICIAL MEDIATION

Between September 2010 and March 2013, Treasury approval was not required for (Department of Health) special severance payments concluded through judicial mediation. This was on the mistaken understanding that judicial mediation was of comparable weight and status to an award by an employment tribunal. However, Treasury now accepts that judicial mediation is simply another form of mediation procedure, and that any payments so agreed remain non-contractual. Treasury approval for such payments is therefore required.

Treasury did not take specific legal advice in reaching its decision to exempt special severance payments reached through judicial mediation. Rather, its consideration was based on information accepted and discussed by officials in good faith at the time. Treasury does not seek legal advice on every issue.

19 June 2013

Written evidence from the National Audit Office

UPDATE NOTE ON NHS CARE RECORDS SYSTEMS IN THE NORTH, MIDLANDS AND EAST

1. Under the NHS National Programme for IT, the Department of Health contracted with CSC to deliver detailed care records systems in three parts of the country—the North, Midlands and East of England. The contracts totalled just over £3 billion in value. In accordance with these contracts, and those covering other geographical areas (originally with BT, Fujitsu and Accenture), the Department is responsible for paying contract charges and the systems are provided to trusts without charge.

2. The contracts involved CSC developing a new care records system called Lorenzo for use in acute trusts, mental health trusts and community health services. CSC had exclusive rights to provide care records systems in two of the three areas (the North and Midlands), covering 161 trusts. In total, 222 trusts were expected to take the Lorenzo system from CSC. There was an annual volume commitment in the contracts with CSC which meant the Department had to identify trusts to take the Lorenzo system as and when it was made available for deployment.

3. In 2011, the Department of Health decided to renegotiate the contracts with CSC due to the delays in developing and deploying the Lorenzo system (although CSC had deployed a considerable number of interim systems). On 31 August 2012, the Department struck a new legally binding interim agreement with CSC. The interim agreement amends the three existing contracts.

4. The interim agreement removes exclusivity so trusts are free to make their own decisions about which care records system they deploy. There is no longer a contractual commitment to provide CSC with a guaranteed level of business or revenue stream in relation to deployment of the Lorenzo system.

5. At its own cost, CSC is finalising the development of the Lorenzo system and will compete with other suppliers to secure NHS business. The Department considers there is still merit in the Lorenzo product. The scope has been renegotiated and now focuses on key elements of clinical functionality.

6. If trusts want to take Lorenzo, they have to put together a business case demonstrating value for money, for approval by their own Board and the Department of Health. Trusts which secure approval to proceed with Lorenzo will have access to central support and funding from the Department. This covers:

- the cost of the Lorenzo system itself plus five years of service costs. While different configurations of the system are available, this is typically worth a total of £9.9 million per trust; and
- implementation support, which covers local configuration and project support (including the trust's own responsibilities to provide staff etc to support the deployment), up to a maximum of £3.1 million per trust.

7. In addition to the funding from the Department, the interim agreement obliges CSC to offer a support payment of between £1 million and £1.2 million to each of the first nine trusts which decide to take the Lorenzo system.

8. To date, one trust (Derby Hospitals NHS Foundation Trust) has received approval to deploy Lorenzo under the interim agreement. Other trusts are currently developing business cases. The first four trusts to take Lorenzo under the interim agreement will test CSC's deployment approach.

9. The Department's aims in negotiating the new terms with CSC were to minimise the commitment to volume deployments, achieve better value for money, open up the market to other suppliers and improve choice for trusts. The market has been opened up in that exclusivity with CSC has been removed; however, CSC continues to occupy a favourable position in that trusts that take its Lorenzo system have access to central funding. This funding is not available to trusts that choose to take systems from other suppliers. However, the number of trusts that take the Lorenzo system will be limited by the deployment capacity of CSC and the remaining life of the contract (to July 2016).

10. The Department estimates it has saved about £1 billion from renegotiating the contract. It considers that terminating the contract altogether would have exposed it to considerable financial risk.

11. The Department is currently in the process of negotiating a full re-setting of the contract with CSC. This is scheduled to be completed by the end of March 2013, although there is a risk it may slip into the next financial year.

February 2013