

To: The Board

For meeting on: 30 July 2014

Agenda item: 5

Report by: Kate Moore, Executive Director of Legal Services

Report on: Functional Conflicts and Balancing Competing Regulatory Interests Policy

Summary

1. The Board is asked to approve the 'Functional Conflicts and Balancing Competing Regulatory Interests Policy' which is attached as the annex to this paper.
2. The context for the policy is the statutory requirement of Monitor to manage and resolve conflicts between its various functions and the design of Monitor's governance structure which, for good reasons, does not embrace full separation of decision-making.
3. A short summary of the basic architecture of the policy is set out below:
 - a) a distinction is drawn between (i) 'functional conflicts', that is, those situations which by virtue of the Health and Social Care Act 2012 constitute an actual or perceived conflict and so must be treated as such; that is, when exercising its competition and pricing functions, Monitor must ignore the functions it has with regard to imposing additional licence conditions on NHS foundation trusts and (ii) situations which are in reality not conflicts but operational manifestations of the overlap between different Monitor functions: these will be addressed and resolved by Monitor legitimately and reasonably balancing competing interests;
 - b) fundamental to the management and resolution of both (i) and (ii) above is directorate autonomy in proposing and taking regulatory actions and decisions;
 - c) documentation supporting proposed decisions must be transparent as to the nature of shared information and how this has not unduly or at all influenced the recommendations made;

- d) the executive may escalate contentious, novel or particularly complex matters involving actual or perceived functional conflicts/balancing of competing regulatory interests to the non-executive members of the Board, and/or seek the non-binding view as to its handling from an external and independent party, such as Queen's Counsel;
- e) to help discharge the statutory publication requirements of Monitor, and facilitate appropriate management and oversight, reporting procedures are also established;
- f) training will be offered to Directorates; and
- g) the policy will be reviewed annually.

Kate Moore
Executive Director of Legal Services

Public Sector Equality Duty:

Monitor has a duty under the Equality Act 2010 (the Act) to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between people from different groups. In relation to the issues set out in this paper, consideration has been given to the impact that the recommendations might have on these requirements and on the nine protected groups identified by the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, gender and sexual orientation). It is anticipated that the recommendations of this paper are not likely to have any particular impact upon the requirements of or the protected groups identified by the Act.

Exempt information:

None of this report is exempt from publication under the Freedom of Information Act 2000.

Annex

FUNCTIONAL CONFLICTS AND BALANCING COMPETING REGULATORY INTERESTS POLICY

Purpose

1. Monitor exercises a range of functions, including a number specific to NHS foundation trusts, and its staff may be involved in more than one function relating to the same trust or provider, or work closely with colleagues who exercise a different function. This creates the risk of an actual or perceived functional conflict, whereby one Monitor directorate might prefer or adopt a particular course of action or decision which conflicts, either actually or potentially, with the functions and decision-making of a different directorate. This risk is recognised as a matter of law and specific provision is made in the legislation setting out Monitor's role.
2. Monitor must manage this risk appropriately and transparently, maintain its regulatory integrity and impartiality and observe public law principles of fairness, rationality and relevance. To do so, Monitor has developed this Conflicts of Interest Policy.

Legislative Background

3. Section 67 of the Health and Social Care Act 2012 ('the Act') imposes legal duties on Monitor in respect of functional conflicts.
4. Broadly, section 67 of the Act requires Monitor to be vigilant in the exercise of its functions for the possibility of either an actual or a perceived conflict between its NHS foundation trust specific functions and all of its other functions, and to take action to resolve any such conflict.
5. Monitor is required (under s.67(2)) to take action to safeguard against both an actual conflict and the perception of a conflict between its:
 - (i) *regulation of foundation trusts* (under Chapter 5 of Part 2 of the National Health Service Act 2006 which addresses the: (a) authorisation; (b) financial matters; (c) functions; and (d) mergers, acquisitions and separations; of foundation trusts); and/or
 - (ii) *enforcement action in relation to foundation trusts* (its imposition and the removal of additional licence conditions under sections 111 and 113 of the Act); and/or
 - (iii) *duties in respect of the accounts of foundation trusts* (under paragraph 17 of Schedule 8 to the Act); and
 - (iv) *exercise of any of its other functions (e.g. duty to enable integrated care, and preventing anti-competitive behaviour in the provision of healthcare services).*

6. Specifically, the Act states that when Monitor is exercising its competition or pricing functions it must “*ignore*” its functions in respect of the imposition of additional licence conditions under section 111 or their removal under section 113 (s.67(3)).
7. To reflect the way in which the Act is written, this policy draws a distinction between: (i) those situations where Monitor has on the one hand imposed additional licence conditions on a provider and is also exercising its competition and/or pricing functions in relation to the same trust (per paragraph 6 above) and (ii) those situations which whilst they may appear to constitute a conflict, are in reality but an overlap of different Monitor functions (per paragraph 5 above) and which will be addressed by Monitor legitimately and reasonably balancing potentially competing interests. This policy terms matters falling under (i) “functional conflicts” and those falling under (ii) as the “balancing of competing regulatory interests”.
8. To ensure that Monitor discharges its legal obligations under section 67, this policy explains Monitor’s approach in both types of situation. If there is any doubt about what is required and what action should be taken, staff should seek advice from Legal Services.

Managing functional conflicts (within s.67(3))

9. The imposition or removal of additional licence conditions is a matter of public record. Further, for good reasons, the basic design of Monitor’s decision-making process does not embrace full separation of decision making. This means that Monitor’s executive committees have pan-functional directorate membership and/or attendance. Consequently, further information relevant to the imposition/removal of additional licence conditions will be widely known. Therefore, the autonomy of directorates is the guiding principle that will be employed in such circumstances.
10. The autonomy of a directorate must at all times be respected by staff from other directorates, who should not seek to bring influence – either explicit or implicit – to bear on the decision-making process of another directorate or in any other way seek to detract from or compromise another directorate’s autonomy.
11. However, this principle does not mean that when directorates are exercising competition or pricing functions, their staff cannot be aware of information relating to the imposition or removal of additional licence conditions which overlap with those competition or pricing functions (as set above, in reality that information would be in the public domain and shared in Monitor’s executive committees). What it does mean is:
 - (i) Provider Regulation – or, indeed, any other directorate - cannot seek to influence the decision of another directorate exercising Monitor’s competition or pricing functions in order, for example, to achieve a decision that it considers best fits with the exercise of Monitor’s functions relating to additional licence conditions under sections 111 and 113 of the Act; and

- (ii) information about the imposition or removal of additional licence conditions must be disregarded in the decision-making process of the competition or pricing function, with such decision being made independently of any specific known facts relating to Monitor's functions under sections 111 and 113 of the Act.
- 12. In order to be transparent and so mitigate any perception of inter-directorate collusion in arriving at the decision relating to a competition or pricing function, the paper containing the recommended decision must clearly state the extent of information known to that directorate about the overlapping additional licence conditions. In addition, it must contain a clear statement that this information has not in any way influenced the decision ultimately reached. The arguments presented within the paper must also be constructed in such a way that the decision proposed can be justified without reference to a section 111 additional licence condition, either existing or potentially impending, or to the removal of such under section 113.
- 13. Notwithstanding the reliance upon directorate autonomy as detailed above, in the event that Monitor is put on notice of a challenge, legal or otherwise, to its handling of a functional conflict, and/or itself considers the matter exceptionally high risk or novel, it may decide to remit the matter to the non-executive directors of the Board to take any required decision. Such a course of action may form part of the recommendation of the paper being put to the initial decision-making body or that body may decide to remit the matter to the Board's non-executive directors of its own volition. Additionally, as a further protection against any such challenge, at any point in the decision-making process, from the drafting of the initial recommendation onwards, Monitor may seek the non-binding view of an external and independent party, for example, a Queen's Counsel.

Balancing competing regulatory interests (not within s.67(3))

- 14. Any matter that does not fall within subsection 67(3) of the Act will not be treated by Monitor as a functional conflict, even though it may be perceived as one.
- 15. Such a situation might occur, for example, where it is determined that the most appropriate, patient-focussed solution for an NHS foundation trust in serious difficulties (with say a Continuity of Service Risk Rating of 2 or 1, and a Governance Rating of red) is the statutory acquisition of that trust by another foundation trust. As a significant statutory transaction under Monitor's Risk Assessment Framework, part of Monitor's role as performed by Provider Appraisal would be to provide an indicative transaction risk rating to both trusts prior to them making a joint application to Monitor for approval of the transaction, in the event all necessary steps had been taken by the two trusts. In such circumstances, the preference of Provider Regulation is likely to be for the indicative risk rating by Provider Appraisal to be such so that the boards of the two trusts consider that the transaction should proceed.
- 16. At face value, such a situation might appear to be a conflict between the functions of Provider Regulation and Provider Appraisal. However, this overlap between two of Monitor's functions is not in reality a conflict but, rather, a

situation which requires Monitor to legitimately and reasonably engage in the balancing of competing regulatory interests so that the interests of patients are best served.

17. The guiding principle for Monitor when it is called upon to conduct such a balancing of competing regulatory interests is one of deciding what is in the best interests of patients. This approach accords with the general requirement imposed by subsection 67(1) of the Act, which provides that:

'In a case where Monitor considers that any of its general duties conflict with each other, it must secure that the conflict is resolved in the manner it considers best.'

This overriding duty is expanded on at paragraph 688 of the Explanatory Notes to the Act, which states that Monitor's guiding principle in resolving such conflicts is:

'...its overarching duty to "protect and promote patients' interests" by promoting healthcare services which (a) is economic, efficient and effective, and (b) maintains or improves the quality of services.'

18. Returning to the example provided at paragraph 14 above, Provider Appraisal should complete its assessment of the applicant NHS trust as normal. At the end of the assessment, if the trust would have gained foundation trust status anyway, there is no balancing exercise to be undertaken. Similarly, nor is there if the application is a clear failure and is rejected by Monitor. If, however, the result of the assessment is borderline, then Provider Regulation's preference that the applicant be granted foundation trust status becomes live. In these circumstances Monitor will need to balance the public's interest in: (i) an NHS trust only being granted foundation trust status if it is successful when measured against all assessment criteria; against (ii) the public's interest in the existing foundation trust being restored to financial viability by virtue of a merger that requires the NHS trust's application to be successful. This is a perfectly legitimate and legal balancing exercise which may hinge, for example, on whether there are any other ways by which the existing foundation trust can be restored to ongoing solvency and/or how easily/swiftly the NHS trust's weaknesses can be addressed.
19. In assessing where the correct balance of interest lies, it is perfectly acceptable for information to be shared between directorates. This is because communication between the different directorates of Monitor in such circumstances is not only permissible but desirable, so that all relevant factors can be taken into account by the person making the initial decision in order to arrive at an informed view of where the balance of public interest lies.
20. Nevertheless, the principle of the autonomy of directorates still applies in order to ensure that whilst there can and should be legitimate communication between directorates where their functions overlap in these circumstances, the assessment of where the balance of public interest lies resides solely with the directorate making the decision. Whatever the ultimate decision that is reached, it should be based on what is most in the public interest, and this decision and

the weight attached to all factors in arriving at it must be transparent and explicitly detailed in the paper making the recommendation.

21. Again, though, to the extent that it may become necessary in any particular circumstances, the decision-making committee concerned may decide to remit a matter to the non-executive directors of the Board to consider the balancing of competing regulatory interests and to take any required decision which may flow from that consideration, just as it may do in respect of subsection 67(3) functional conflicts, as detailed at paragraph 12 above. Monitor may also seek the non-binding view of an independent adjudicator (again, as detailed at paragraph 12 above) in order to seek independent assurance of its recommendation/decision and the integrity of the governance process behind such recommendation/decision.

The reporting of functional conflicts

22. Monitor must publish how it has resolved particular conflicts and explain in its annual report how it has complied with its duty as set out in paragraph 5 above. To help facilitate these requirements, a reporting mechanism needs to be established. Therefore, where an actual or perceived functional conflict is identified by a Directorate in Monitor the relevant Executive Director shall ensure that the Conflicts Manager is notified as promptly as possible. Such notification shall, at least in the first year of this policy, extend to all matters where there could be any suggestion of a conflict, e.g. where a competition or pricing decision is to be made in respect of a foundation trust which is subject to - or likely to be subject to - regulatory action under section 111. However, if after the first year - when we are in a better position to form a more considered view of such matters - it is felt that such an all-encompassing level of notification is unnecessary, this aspect of the policy may be revised.
23. The Chief of Staff shall be the Conflicts Manager.
24. The Conflicts Manager shall maintain a register of such actual or perceived functional conflicts.
25. Each new entry to the register shall be reported at the subsequent Executive Committee meeting.
26. Where potentially competing regulatory interests are being legitimately and reasonably balanced by Monitor in the normal course of its business, no formal reporting to the Conflicts Manager is considered necessary. This will be kept under review.

The publication of conflict resolution information

27. Where Monitor has resolved a conflict between its general duties (which are defined as those detailed in sections 62 and 66 of the Act) in a case that is likely to have a significant impact on people who provide or use NHS health care

services or on the general public in England or any part of England, or where the case involves a major change in either Monitor's activities or the standard conditions of licences, or where Monitor considers that the case is otherwise of unusual importance, Monitor must publish a statement which sets out the manner of the conflict, the manner in which it was resolved and the reasons for deciding to resolve it in that manner. (This is set out in s.67(4).) Monitor must do so as soon as is reasonably practicable after making its resolution decision, and its website is the most appropriate medium.

28. Therefore, each time Monitor reaches a decision on a functional conflict (within the ambit of s.67(3)) or has had to balance competing regulatory interests, Monitor must promptly and publicly explain (e.g. by way of its website) what it has done to secure appropriate resolution.

29. Monitor is required (by s.67(8)) to make a statement in every annual report of:

- (a) the steps it has taken to comply with its duty set out in paragraph 5 above (under subsection 67(2)), and
- (b) a summary of how it has resolved any conflicts of the type for which it is required to publish a statement (per paragraphs 26 and 27 above).

This statement will form part of the Annual Governance Statement in Monitor's Annual Report & Accounts.

Scope

30. This policy applies to all full-time and part-time employees on a substantive or fixed-term contract and to associated persons such as secondees, agency staff contractors and others employed under a contract of service.

31. It addresses only actual or perceived functional conflicts and does not cover personal conflicts of interest, which are addressed in the Rules of Procedure and the Code of Ethical Practice.

Other Policies

32. This policy should be read in conjunction with other relevant Monitor policies, including the Rules of Procedure and the Code of Ethical Practice.

Review

33. This policy will be reviewed on an annual basis.