Monitor
Making the health sector work for patients

Functional conflicts and balancing competing regulatory interests policy

As the health sector regulator we perform a range of functions and this has the potential to generate conflict between the decisions made by colleagues within a directorate or between different directorates. Two types of conflict are recognised: functional conflicts (eg between our competition or pricing functions and those relating to imposing additional licence conditions) and those where competing regulatory interests need to be balanced (eg when deciding what solution to a foundation trust in serious difficulties is in the best interests of patients). To maintain our regulatory integrity and impartiality, we must be transparent in recognising conflict of both types, both real and perceived, and how we resolve it, as described in this policy.

Purpose

1. Monitor performs a range of functions and its staff may be involved with 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 when one Monitor directorate prefers or adopts a different course of action or decision from that of another directorate. This risk is recognised as a matter of law and specific provision is made in the legislation setting out Monitor's role.

2. We must manage this risk appropriately and transparently, maintain our regulatory integrity and impartiality, and observe public law principles of fairness, rationality and relevance. To do so, we have developed this functional conflicts and balancing competing regulatory interests policy.

Legislative background

3. Section 67 of the Health and Social Care Act 2012 ('the Act') imposes legal duties on us in respect of functional conflicts.

4. Broadly, it requires us to be vigilant in the exercise of our functions for the possibility of an actual or a perceived conflict between our NHS foundation trust-specific functions and all of our other functions, and to take action to resolve any such conflict.

5. We are required (under s.67(2)) to take action to safeguard against actual conflict and the perception of conflict between our:

    - *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

- *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

- *duties in respect of the accounts of foundation trusts* (under paragraph 17 of Schedule 8 to the Act) and

- *exercise of any of its other functions (eg duty to enable integrated care; preventing anti-competitive behaviour in the provision of healthcare services).*

6. Specifically, the Act states that when we exercise our competition or pricing functions, we must "ignore" our role in imposing additional licence conditions under section 111 or their removal under section 113 (s.67(3)).

7. To reflect the way the Act is written, this policy draws a distinction between:

   - **"functional conflicts"**: those situations where we have imposed additional licence conditions on a provider but are also exercising competition and/or pricing functions in relation to the same trust (see paragraph 6) and

   - **"balancing of competing regulatory interests"**: those situations where what appears to be a conflict of interest is in fact just an overlap of our different functions (see paragraph 5); we address these by legitimately and reasonably balancing potentially competing interests.

8. To ensure we discharge our legal obligations under section 67, this policy document sets out and explains our approach in both types of situation. **If you are in any doubt about what is required and what action should be taken, you should seek advice from Legal Services.**

Managing functional conflicts (within s67(3))

9. The imposition or removal of additional licence conditions is a matter of public record. Further, for good reasons, the basic design of our decision-making process does not embrace full separation of decision-making. This means that our 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 most common approach to handling conflicts – using information barriers (sometimes called 'Chinese walls') – is not appropriate. Therefore, the autonomy of directorates is the guiding principle that will be employed in such circumstances.

10. You must at all times respect the autonomy of other directorates, and not seek to influence – explicitly or implicitly – the decision-making process of another directorate or in any other way seek to or detract from or compromise another directorate's autonomy.

11. This principle does not mean that when your directorate exercises competition or pricing functions, you must not know of information relating to the imposition or removal of additional licence conditions which overlap with those competition or pricing functions; in reality that information will be in the public domain and shared in our executive committees.

What the principle does mean is:

- Provider Regulation – or, indeed, any other directorate – must not seek to influence the decision of another directorate exercising our competition or pricing functions in order, for example, to achieve the decision that it considers best fits with the exercise of our functions relating to additional licence conditions under sections 111 and 113 of the Act, and
- 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 our functions under sections 111 and 113 of the Act.

12. For transparency and to mitigate any perception of inter-directorate collusion in making a decision relating to a competition or pricing function, the document containing the recommended decision must clearly state what each directorate knew about the overlapping additional licence conditions. In addition, there must be a clear statement that this shared knowledge has not in any way influenced the decision reached. The arguments presented within the paper must also be constructed to justify the decision proposed without reference to a section 111 additional licence condition, either existing or potentially impending, or to the removal of such under section 113.

13. Despite the reliance on directorate autonomy as detailed above, if we are told of a challenge, legal or otherwise, to our handling of a functional conflict, and/or we consider a matter to be of exceptionally high risk or novel, any decision required may be referred to the non-executive directors of the board. This course of action may be recommended in the paper put to the initial decision-making body or that body may decide to refer the matter to the board's non-executive directors of its own volition. Additionally, as a further protection against any challenge, at any point in the decision-making process, from the drafting of the initial recommendation onwards, we may seek the non-binding view of an external and independent party, eg a Queen's Counsel.

Balancing competing regulatory interests (not within s67(3))

14. Any matter that does not fall within s.67(3) of the Act is not treated by us as a functional conflict, even though it may be perceived as one.

15. An example of such a situation is where it is determined that the most appropriate, patient-focused solution for an NHS foundation trust in serious difficulties (with say a continuity of service risk rating of 2 or 1, and a red governance rating) is the statutory acquisition of that trust by another foundation trust. As a significant statutory transaction under our risk assessment framework, part of our role as performed by Provider Appraisal is to give both trusts an indicative transaction risk rating before their joint application to us for approval of the transaction. In such circumstances, Provider Regulation is likely to prefer the indicative risk rating by Provider Appraisal to be such that the boards of the two trusts consider that the transaction should proceed.

16. This situation might appear to raise a conflict between the functions of Provider Regulation and Provider Appraisal. However, in reality it is a situation which requires us to legitimately and reasonably balance the competing regulatory interests so that patients' interests are best served.

17. Our guiding principle when called on to balance competing regulatory interests is to decide what is in the best interests of patients. This approach accords with the general requirement imposed by s.67(1) of the Act, which states 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 in paragraph 688 of the Explanatory Notes to the Act, which states that our 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 in paragraph 15, Provider Appraisal should complete its assessment of the applicant NHS trust as normal. If it decides the trust should be given foundation trust status or if we reject the application, no balancing exercise needs to be undertaken. If, however, the result of the assessment is borderline, then Provider Regulation's preference that the applicant be granted foundation trust status becomes an issue. In these circumstances we need to balance:

    - the public's interest in an NHS trust only being granted foundation trust status if it is successful when measured against all assessment criteria, and

    - 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 perfectly legitimate and legal balancing exercise 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 its 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. In such circumstances this communication is not only permissible but also desirable to allow the decision-making committee 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. This ensures that, while in these circumstances there can and should be legitimate communication between directorates with overlapping functions, the assessment of where the balance of public interest lies resides solely with the directorate making the decision. Whatever the ultimate decision, it should be based on what best serves the public interest and the weight attached to all factors influencing the decision must be transparent and explicitly detailed in the paper making the recommendation.

21. Again, in particular circumstances the decision-making committee may decide to refer a matter concerning the balancing of competing regulatory interests to the board's non-executive directors to consider, just as it may do in respect of s.67(3) functional conflicts, as detailed in paragraph 13. We may also seek the non-binding view of an independent adjudicator (again, as detailed in paragraph 13) for independent assurance of the recommendation/decision and the integrity of the governance process behind it.

Reporting functional conflicts

22. We must publish how we have resolved particular conflicts and explain in our annual report how we have complied with our duty as set out in paragraph 5. 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, the relevant executive director will ensure that the conflicts manager is notified as promptly as possible. Such notification will, at least in the first year of this policy, extend to all matters where there could be any suggestion of a conflict, eg 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 will be 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 will be the conflicts manager.

24. The conflicts manager will maintain a register of actual or perceived functional conflicts.

25. Each new entry to the register will be reported at the next executive committee meeting.

26. Where we legitimately and reasonably balance potentially competing regulatory interests in the normal course of our business, no formal reporting to the conflicts manager is considered necessary. This will be kept under review.

Publication of conflict resolution information

27. We must publish a statement which sets out the nature of the conflict in our general duties (detailed in sections 62 and 66 of the Act), the manner in which it was resolved and the reasons for deciding to resolve it in that manner (set out in s.67(4)) in the following circumstances:

    - a case that is likely to have a significant impact on people who provide or use NHS healthcare services or on the general public in England or any part of England

    - a case that involves a major change in either our activities or the standard conditions of licences

    - a case is otherwise considered to be of unusual importance.

    This statement must be published soon as is reasonably practicable after making our resolution decision; our website is the most appropriate medium.

28. Therefore, each time we reach a decision on a functional conflict (within the ambit of s.67(3)) or have had to balance competing regulatory interests, we must promptly and publicly explain (eg via our website) what we have done to secure appropriate resolution.

29. We are required (by s.67(8)) to state in every annual report:

- the steps we have taken to comply with our duty as set out in paragraph 5 (under s.67(2)) and
- a summary of how we have resolved conflicts of the type for which we must publish a statement (as per paragraphs 26 and 27 above).

This statement will form part of the Annual Governance Statement in our annual report and 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 policies, including the Rules of procedure and the Code of ethical practice.

Review

33. This policy will be reviewed annually.