

## Guidance on outside interests

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### Introduction

1. This guidance explains how the Competition Commission (CC) handles potential conflicts of interest arising from the outside interests of its members,<sup>1</sup> staff and external advisers. It gives effect to the findings of the Woods-Scawen Review.<sup>2</sup> It may be revised from time to time to reflect experience of its application.
2. The CC expects its members and staff to behave in accordance with the Seven Principles of Public Life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership,<sup>3</sup> and its approach to dealing with the outside interests of members and staff is founded on these principles.
3. Members and members of staff have a key role in preventing conflicts of interest by disclosing potentially relevant outside interests to the CC as soon as possible and in a comprehensive way. This obligation of disclosure is relevant both at the outset of and during the course of an inquiry<sup>4</sup> so that the CC is always in a position to make fully informed decisions about how to handle any conflicts or potential conflicts. They should follow the principle *if in doubt, disclose to the CC*. Members and staff are supported in considering outside interests by the CC Planning team and may raise

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<sup>1</sup>Members' include the non-executive members of the CC Council.

<sup>2</sup>[www.competition-commission.org.uk/our\\_role/analysis/101207\\_final\\_report\\_on\\_policy\\_on\\_conflicts.pdf](http://www.competition-commission.org.uk/our_role/analysis/101207_final_report_on_policy_on_conflicts.pdf).

<sup>3</sup>The seven principles are set out in full in the Report of the Woods-Scawen Review in paragraph 1.2.

<sup>4</sup>In this guidance references to an 'inquiry' are to any CC proceedings to consider matters that are referred or appealed to the CC.

any questions they have concerning their outside interests with them or directly with the Compliance Officer.<sup>5</sup>

4. Once a disclosure is made by either a member or member of staff, within the CC it is the responsibility of the Chairman, advised by the Chief Executive and Compliance Officer, to decide how to handle potential conflicts of interest. He or she will aim to ensure that the CC acts prudently to protect its reputation for independence, integrity and impartiality. But not all outside interests will preclude participation in a particular inquiry. The Chairman and the Chairman's advisers will look at all potential conflicts proportionately, not allowing remote concerns to interfere unnecessarily with the effective performance of the CC's functions. They will exercise their judgement, considering each case on its merits having regard to the particular circumstances.

### ***The general approach of the CC to handling conflicts of interest***

5. The CC must *be*, and *be seen to be*, impartial. This is an essential ingredient of the public confidence enjoyed by the CC. The outside interests of members, staff and advisers can threaten that impartiality because they create the possibility of bias, of apparent bias, or of insufficient independence in the CC and its decision-making.
6. A conflict may arise whenever an outside interest might influence, or be perceived to be capable of influencing, a person's judgement. Some outside interests will create a clear conflict. Others will not do so but may nonetheless prompt the CC to take some action on a prudential basis.
7. Some potential conflicts can be identified at the outset of an inquiry; others may only become apparent as an inquiry develops, and circumstances change (eg because of the involvement of a new party, or a change in the personal circumstances of a member). Members, staff and advisers must be alert to the risk of conflicts arising at all times and review the position from time to time during an inquiry. They must comply with the spirit, as well as the letter, of this guidance and if they are in any doubt as to the propriety of an outside interest, or as to the compatibility of a relationship with membership of the CC or their participation in a particular inquiry, should disclose all the relevant facts to the CC. While members, staff and advisers are in the best position to identify whether they have an outside interest, they are not in the best position to judge its consequences for the CC.
8. The CC will not appoint a member to an inquiry where it believes there is a risk of actual bias. However, in addition, the CC will have regard to appearances. It must not only be impartial in fact but must be *seen* to be impartial. 'Apparent' bias—the perception of bias—can be as much a basis for a challenge to a decision of the CC as actual bias. The test for apparent bias the courts apply is 'whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility' of bias.<sup>6</sup> The CC will apply this test to ensure that an undue concern for appearances is not allowed to interfere unnecessarily with the functioning of the CC.
9. In this guidance an outside interest that normally requires the CC to take some prudential action on it, such as preventing the participation of a member or member of staff in an inquiry or disclosing the interest to a person affected by an inquiry, is described as a 'disqualifying interest'.

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<sup>5</sup>See paragraph 48.

<sup>6</sup>[www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/magill-1.htm](http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/magill-1.htm)

## ***Interests of members***

10. The most common ways in which the CC's impartiality can be put at risk can be categorized under four headings:
  - (a) financial interests;
  - (b) organizational relationships;
  - (c) personal relationships; and
  - (d) prejudgement.

## ***Financial interests***

11. Where a member (or a person they have a personal relationship with referred to in paragraph 24 below) has a financial relationship with or interest in ('a financial interest' in) a person<sup>7</sup> whose interests may be affected by a possible CC decision, the CC needs to consider whether the relationship or interest is a disqualifying interest.
12. Such persons will include companies which are the subject of an inquiry as well as companies which are likely to take a significant part in proceedings before the CC, such as main competitors, suppliers or customers. However, they may also include other companies in an industry where, for example, the value of their shares is likely to be affected by a CC decision. In deciding what companies are relevant for this purpose, the CC may have regard to the extent of a company's participation in a matter before it was referred to the CC and any indication as to its likely participation before the CC, as well as the likely impact that the decision to be taken by the CC will have on a financial interest.
13. Financial interests will generally arise from the ownership of assets (or other investments or sources of income) such as shares (whether bearing a right to vote or not), stock or debentures and options and similar rights. However, they may also arise from liabilities to a person.
14. Financial interests in a company that may be subject to an undertaking or Order of the CC in consequence of an inquiry or with a close interest in the outcome of an inquiry will normally be considered a disqualifying interest that will prevent participation in the inquiry. In such a case, for a person to participate in the inquiry the interest must generally be sold.
15. However, where the person in whom the interest is held is likely to be less closely affected by the outcome of the inquiry, the CC may not require sale. While such an interest may be a disqualifying interest, it may be that any risk or concern can be dealt with by other action, such as disclosure.
16. Where a financial interest belongs to a person with whom a member has a personal relationship identified in paragraph 24 below, the CC will have regard to the nature of the personal relationship, in deciding whether the interest is a disqualifying interest, and, if it is, what action must be taken.

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<sup>7</sup>The persons referred to include natural and legal persons, including companies and their affiliates, partnerships and other enterprises.

17. Where assets are held by discretionary managers or in a trust, the CC will adopt a prudent approach in deciding whether they should be treated as disqualifying interests. Relevant matters may include the duties to which a trustee or manager is subject and the degree of knowledge a person has or may acquire of the particular assets held by a trust or manager.
18. Where assets are held by a member as trustee for or otherwise on behalf of another person, the CC will normally treat them as if they were assets of the member.

*Interests which are unlikely to cause concern*

19. The CC will not normally consider as giving rise to disqualifying interests:
  - (a) assets whose value is too low to be material;
  - (b) goods and/or services bought on the open market on normal commercial terms available to other buyers (eg banking or insurance services, telephone services, travel and tangible assets purchased on normal terms on the open market); and
  - (c) assets held in collective investment schemes<sup>8</sup> where the investor has no control over individual investment decisions and has no ownership of the underlying investments.

*Organizational relationships*

20. Organizational relationships between a member and organizations which are or may be affected by the work of the CC (including the public authorities who may refer matters to the CC) are normally regarded as a disqualifying interest. The most likely such relationships are:
  - (a) directorships or equivalent positions with high-level responsibility for governance and performance;
  - (b) elected positions in government at local or national level;
  - (c) senior paid or unpaid roles with charities and not-for-profit organizations; and
  - (d) consultancy or advisory roles, whether remunerated or not.
21. The provision of advisory or other services on competition and/or economic regulation issues potentially relevant to the activities of the CC is normally considered a disqualifying interest.
22. Ordinary membership of charities or not-for-profit organizations where no role in governance or management is undertaken is not normally considered a disqualifying interest (although some activities by ordinary members, such as lobbying on matters of national interest or debate relevant to an inquiry, may raise concerns).
23. The significance of organizational relationships diminishes over time. Normally organizational conflicts are regarded as spent after two years. In the absence of complicating factors, members who were formerly partners in firms providing professional services to any party to an inquiry are not considered to have a disqualifying

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<sup>8</sup>For example, unit trusts, investment trusts, unit linked policies, pension schemes, or stocks and shares ISAs.

interest if two years have elapsed since they left the firm, provided that they have no continuing financial interest in or relationship with the firm.

### *Personal relationships*

24. Personal relationships may be disqualifying interests where there is a real risk that they will affect an individual's judgement. Close relationships, such as with spouses, civil or cohabiting partners, and minor children, are normally regarded as giving rise to the possibility of a disqualifying interest. However, other relationships may also do so: for example, those with adult children (particularly those living at home or financially dependent); and those with close friends or individuals where there is a close financial link.

### *Prejudgement*

25. It is important that members approach decision-taking on behalf of the CC with an open mind. Their ability to consider a particular case might be compromised or might appear to be compromised, for example, if they had written an article or made a speech expressing strong views about a particular merger or market, or, in an extreme case, had expressed strong opinions about a particular type of evidence or methodology.
26. The CC will consider any evidence of prejudgement that would give rise to a reasonable concern on the part of an informed observer as to a person's impartiality and independence on a case by case basis. However, prejudgement will not lightly be inferred. The important question is not whether a member may have an initial view on a particular issue, but whether he or she will bring an open mind to bear in inquiry work for the CC. The fact that a member may have taken part in a previous inquiry in the same sector or involving the same party will not normally be regarded as giving rise to a risk of prejudgement.

### **Handling members' interests**

27. In making decisions as to the membership of an inquiry group, the Chairman will have regard to all the circumstances including the need to safeguard the CC's independence and integrity.
28. The Compliance Officer will consider all potential conflicts that are brought to his attention on a case-by-case basis before making recommendations, in tandem with the Chief Executive, to the Chairman.
29. During the conduct of an inquiry, the Chairman of the inquiry group is responsible for ensuring that the outside interests of members are monitored and that any new issues that may arise during an inquiry (for example, from a change in a member's situation or a change in the interests affected by an inquiry) are brought to the attention of the Chairman and his or her advisers to consider whether, and if so what, action should be taken.
30. Each case is considered by the CC on its merits in the light of all the circumstances. It is not possible to prescribe the CC's response given the complexities and variety of individual cases. The circumstances and consequences of outside interests are varied, and the way in which an inquiry may develop is unpredictable. The CC will use its judgement and an appropriate degree of caution when deciding how to handle potential conflicts of interest in each case.

31. In some cases it may decide that an outside interest is sufficiently minor that it warrants no action at all. However, where the outside interest amounts to a disqualifying interest, the CC has a number of options.
32. It may decide that an outside interest must be disposed of or severed if the member is to participate in the inquiry.
33. Where the outside interest is less significant, it may decide to address it by disclosure. Where the CC makes a disclosure about the outside interests of a member it wishes to appoint to an inquiry, it will normally make a declaration that it is satisfied that the outside interest will not actually affect the impartiality of the CC.
34. In such cases, the CC will consider any representations that are made to the CC about the proposed appointment in the particular circumstances of the case.
35. In cases where the outside interest and risk of apparent bias is more significant, the CC may nevertheless sometimes consider it appropriate to deal with the matter by disclosure, for example where it is considered important that a member is appointed to an inquiry because of the particular expertise of the relevant member. In such cases, the CC may seek to obtain formal agreement to the appointment from parties to the inquiry and may enter into discussions with them about the level of comfort that the CC can provide about the outside interest. Where it does so and objections to the appointment are made, the CC will decide how to proceed. It may in some cases appoint a member in the face of objections, depending upon all the circumstances of the case.

### **Interests of staff**

36. The CC will consider the risk of conflicts arising from the outside interests of members of staff advising an inquiry in the same way as members (see paragraphs 10 to 35 above). However, members of staff are in a different position to members. They are not the decision-makers in inquiries. When the outside interests of staff are being considered, their role, and in particular the degree of influence they could exert on an inquiry group, will be relevant factors in determining what action, if any, should be taken. Their roles are varied; while some may enable them to influence the thinking and decisions of members, others—for example, those working within administrative support teams, acting in a purely supervisory capacity or just providing services—do not give them such influence.
37. Members of staff must also have regard to the risk of conflicts of interest arising when conducting procurement exercises on behalf of the CC, and when considering external employment, appointments or consultancy work. The need to consider the risk of conflicts arising is one of the reasons why the CC requires staff to obtain its prior consent to external employment, appointments or consultancy work.
38. When the CC is taking decisions in staff cases, the advice of the Chief Executive carries considerable weight.

### ***Interests of advisers and consultants***

39. During the course of an inquiry, the CC may instruct consultants and other external advisers to assist with aspects of its investigation. The roles played by consultants and advisers may vary considerably, and the appropriate approach to their outside interests will be determined according to their role in the inquiry. However, where

consultants act as the equivalent to members of staff, their outside interests will be assessed as if they were members of staff.

40. Where the CC is considering whether to instruct a consulting firm to advise it on a particular issue, the CC will take account of the interests of both the staff of the consulting firm and of the firm itself. In considering the interests of the firm, the CC will take account of all relevant matters, which may include:
- (a) the present and future clients of the firm (in so far as they can be ascertained), the nature of the work for those clients, and the extent to which the firm is independent of parties which may be affected by the inquiry;
  - (b) the degree to which the staff of the firm engaged on behalf of the CC are protected from improper influence (for example, by being ring-fenced from other staff of the firm);
  - (c) any professional conduct rules which apply to the firm and its staff; the record of the consulting firm in providing impartial advice to the CC; and
  - (d) the nature of the project to be undertaken; its importance in the deliberations of the CC.

### ***Interests of members of internal working groups, Council, Audit and Remuneration Committees***

41. Where working groups of the CC exercise or advise on the exercise of functions of the CC in particular cases, the CC will adopt the same approach to handling conflicts issues as in other inquiry cases.<sup>9</sup> However, in general, the Council of the CC, the Audit and Remuneration Committees and internal working groups do not exercise the inquiry functions of the CC. Nevertheless, members or staff participating in their activities may in certain situations have, or become aware of, outside interests which might affect their ability to take part fairly and properly in particular activities of these committees or groups, for example where they are closely connected with a person the committee is considering appointing as an external contractor to carry out a specific piece of work.
42. If they consider they may have such an interest, it must be disclosed to the CC as soon as possible for consideration as to what, if any, action should be taken. While the matter is being considered, it will usually be appropriate for the person concerned to withdraw from the meeting for the discussion on the relevant item, and for this to be recorded in the minutes.

## **Public records**

### ***The Register of Interests***

43. The Register of Interests is a public document recording the organizational interests of all members. It is updated from time to time and annually.

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<sup>9</sup>For example, where remedies are being considered in a particular case by the Remedies Standing Group.

### ***Appointments of members***

44. When members are appointed to an inquiry group, their organizational (but not their financial) interests will be included in the public announcement of the membership.

### ***Audit***

45. The CC carries out an annual audit of the conduct of the CC's conflicts of interest policies and a report is published in its Annual Report.

### **Internal procedures**

#### ***The Planning team***

46. Members and members of staff who are approached to work on an inquiry should disclose outside interests to the Planning team; during the course of an inquiry, they should disclose any further interests that they become aware of to the relevant Inquiry Chairman or Inquiry Director.
47. At the commencement of each inquiry and at regular points during the inquiry, the members and staff working on the inquiry will be reminded of the need to be alert to the risk of potential conflicts of interest arising and to review the information about outside interests they have disclosed to the CC from time to time as the inquiry progresses.

#### ***The Compliance Officer***

48. A Compliance Officer within the CC is responsible for ensuring that the CC's policies on conflicts of interest are applied and enforced on a day-to-day basis. If a member or member of staff is in any doubt about the significance of an outside interest at any time, he or she may consult the Compliance Officer, who will advise on appropriate action.

#### ***Insider dealing***

49. This guidance is concerned with conflicts of interest arising from outside interests. However, members and staff should note that it is not intended to provide guidance on all matters relating to their CC activities. For example, it does not cover the risk of insider dealing. Members and staff are reminded that dealing (or encouraging another to deal) in securities while in possession of relevant price-sensitive information acquired through membership of the CC (or disclosing such information) is potentially a criminal offence.

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