

Review of the Competition Commission's policy on conflict of interest

Foreword by the Chairman of the Review Committee

The Competition Commission (CC) is committed to the highest standards of governance in all that it does. Among the core values of the CC are independence, integrity and impartiality.

An important part of any system of governance is the policies and procedures for identifying and responding to actual or potential conflicts of interest. Our report is intended to support the CC's values in the area of conflicts of interest and thereby to help to reinforce the CC's undoubted reputation for the integrity and legitimacy of its conclusions and decisions.

The committee met seven times. Our work was informed by written submissions from 11 external organizations and by advice from Council members and from members and staff of the CC (we name those organizations and individuals at [Annex B](#)).

This report makes 17 recommendations on changes to the CC's policies on conflicts and the way in which conflicts are handled. The recommendations cover a more integrated statement of policy, greater clarity in the definition and identification of conflicts, enhanced communication and training for the Council, members and staff of the CC, clearer accountability for policy and implementation and stronger assurance arrangements.

It would be wise to assume that, in an increasingly litigious world, there will be more challenges to the CC's judgements than previously. The recommendations in our report will create an orderly and documented trail from policy, through recording of interests to individual decisions. This will help the CC to resist such challenges in the future.

Taken together, we think that these recommendations will enable the CC to be in the first rank of governance in the area of conflicts of interest. We commend our report to the CC and recommend early action to implement it. This will require commitment by the Council and strong and effective executive action delivered at pace.

I would like to thank my colleagues on the committee, Dame Barbara Mills DBE, QC and Sir Francis Jacobs, KCMG, QC, for bringing their experience and insights to our work. I would also like to thank the Chairman and the Chief Executive of the CC, Peter Freeman and David Saunders, and also Tony Gooch and Simon Jones from the CC for their help and support during our review.

Dr Brian Woods-Scawen CBE, DL, FCA
14 October 2010

Terms of reference

On 29 January 2010, the Chairman of the CC asked an independent panel to examine the CC's rules and practices in relation to possible conflicts of interest of its members.

The panel consisted of Dr Brian Woods-Scawen DL CBE FCA (Chairman), Dame Barbara Mills DBE, QC and Professor Sir Francis Jacobs KCMG, QC. (Their CVs are outlined at [Annex A](#)). The panel was chosen with a view to providing a rigorous examination of the subject in full knowledge of the context of the CC's activities but from an independent point of view.

The panel was asked specifically to:

- '(1) consider the CC's rules and guidance governing its Members' conflicts of interest;
- (2) examine the CC's procedures and practice in dealing with conflicts of interest on:
- a) the appointment of Members to the CC;
 - b) the appointment of Members to Inquiry Groups;
 - c) the monitoring, managing and reviewing of Inquiry Group Members' conflicts of interest during the course of Inquiries;
- (3) review the CC's practice on disclosure of interests;
- (4) include in its examination any matters reasonably ancillary to the above, and consider how the CC's rules and practices are communicated to Members, staff, parties to inquiries and the general public;
- (5) prepare a Report to the CC Council containing its findings and recommendations for such changes to the CC's current rules and practices as it considers appropriate.

It is intended that the report be published.'

The report

1. Fundamental principles

1.1 Members of the CC and the CC's staff are public office holders as defined by the First Report of the Committee on Standards on Public Life albeit that they have very different roles and responsibilities outside the CC. While they are acting on behalf of the CC, they are therefore required to behave in accordance with the Seven Principles of Public Life.

1.2 Observance of the Seven Principles is essential if the CC is to maintain the confidence of its stakeholders—the Government, Parliament, industry, parties to or affected by an inquiry and the public. Some or all of the Seven Principles, which are listed below, may at times be relevant to conflicts of interest:

Selflessness: Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity: Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties.

Objectivity: In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability: Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness: Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty: Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership: Holders of public office should promote and support these principles by leadership and example.

- 1.3 Compliance with the Seven Principles in any public organization starts with a commitment on the part of the governing body. In the case of the CC, this is the Council, which should confirm its commitment at regular intervals and communicate this commitment to all members and staff of the CC.

Recommendation 1.1: the Council of the CC should confirm its commitment to the Seven Principles of Public Life annually, communicate this commitment to members and staff, and state its commitment in the CC's Annual Report.

2. The CC's policies

- 2.1 The reputation of the CC is based on its independence, integrity and impartiality as well as on the thoroughness of its investigation and the quality of its decision making. The CC's decision making must always be based on rigorous investigation, fair treatment of the evidence, and informed judgement. The members, Council and staff of the CC must not allow their judgement to be influenced by any outside interest, be it personal, financial or organizational. Nor should the members, Council or staff of the CC act on behalf of the CC where they have any outside interest that might fairly be perceived to compromise their independence and integrity. Matters of perception and appearance are capable of having a significant impact on the CC and its reputation.
- 2.2 It would, however, frustrate the public interest if the CC's policy on members, staff and their outside interests were unnecessarily to deter well-qualified people from serving the CC. The CC's policy on outside interests must not interfere unnecessarily with the efficient operation of the CC.
- 2.3 The CC's policies are the framework within which decisions about appointments to inquiries and other activities of the CC must be made. However, those policies must be applied with judgement. Each case must be considered in the context of the CC's policies but the practical application to individual circumstances must be considered on its merits.

Recommendation 2.1: the CC's policies on conflicts of interest—updated as necessary—should be approved annually by the Council. The policies should be clearly based on the CC's objectives of independence, integrity and impartiality. The CC's policies must always be applied to individual circumstances with judgement.

3. Overall recommendations

- 3.1 The requirements of independence and impartiality have developed rapidly. They may well continue to develop. Public and stakeholder expectations are changing. For all organizations, policies and procedures in the area of governance are now

expected to be more formally recorded and communicated. This is therefore an opportune time to bring together and restate the CC's policies and procedures in relation to conflicts of interest.

Recommendation 3.1: the CC's policies and procedures relating to conflicts of interest should now be:

- **formally restated in a single document;**
- **communicated widely and systematically, including through further training for members and staff; and**
- **assured in a more structured manner.**

4. The nature of conflicts of interest

- 4.1 Any relationship which challenges, or which might reasonably be perceived to challenge, the independence and integrity of the CC's work constitutes a conflict of interest. The CC and its members must be impartial, and must appear impartial. The CC will not appear impartial if a fair-minded and informed observer, having considered the facts, could reasonably conclude that there was a real possibility that the CC was biased. The importance of the *appearance* of impartiality cannot be overstated. If the CC does not appear impartial the consequences can be as serious as if the CC were not in fact impartial. The outside interests of a single member of an Inquiry Group could in some circumstances be judged to jeopardize the impartiality of the entire group.
- 4.2 Sources of conflicts will normally be financial, organizational, or personal, but may stem from other sources of actual or apparent predisposition including prejudgement of the issues. Because conflicts of interest can arise in a number of different ways it is important that all matters that may even potentially give rise to a conflict are disclosed to the CC and assessed by the CC in the framework of its policies. This will help to ensure that the validity and legitimacy of the CC's conclusions and decisions are more readily accepted by those affected.
- 4.3 In any situation, the CC should first identify possible conflicts of interest, then consider whether such conflicts could reasonably give rise to challenge to the CC's independence, integrity and impartiality and, if so, consider remedies which are appropriate and proportionate. We deal with each of these steps in turn.

Financial interests

- 4.4 The most likely way in which financial interests will give rise to conflicts is through the ownership of assets, investments or sources of income the value of which may be affected by an inquiry. Financial interests can also give rise to a conflict of interest where they are represented by liabilities to parties who may be affected by an inquiry.
- 4.5 There are three important exemptions where we consider that assets or liabilities would not normally represent a conflict of interest:
- for assets or liabilities which are not material to the organization *or* to the individual *and* that are less than a fixed amount (a guideline, and no more than that, might be 5 per cent of equity in a company and less than 5 per cent of an individual's gross assets and less than £10,000);

- for assets held in collective investment schemes where the investor has no control over individual investment decisions and has no ownership of the underlying investments (but not for assets held directly by discretionary managers or blind trusts); and
- for goods and 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).

Organizational relationships

4.6 Relationships between a member and organizations which are or may be affected by the work of the CC may give rise to a conflict. The most likely organizational relationships that will have to be considered are:

- directorships or equivalent positions with high level responsibility for governance and performance;
- elected positions in government at local or national level;
- senior paid or unpaid roles with charities and not-for-profit organizations; and
- consultancy or advisory roles, whether remunerated or not.

4.7 There should be exemptions for:

- ordinary membership of charities and not-for-profit organizations where there is no role in governance or management (though the nature of the activities of some organizations such as those actively engaged in lobbying on matters of national interest or debate relevant to an inquiry may mean that even ordinary membership is problematic); and
- organizational conflicts that are regarded as spent. Normally, organizational conflicts will be regarded as spent after two years. Specifically, in the absence of complicating factors, it is unlikely that members who were formerly partners in firms providing professional services to the CC or parties to an inquiry will be considered to have a connection to that firm once they have ceased to be a partner for two years, assuming that they have no continuing financial relationship with the firm.

Personal relationships

4.8 Relationships with persons who may be affected personally or professionally by the work of the CC may give rise to a conflict where the relationship may or may be perceived to affect the member's judgement. A member's judgement is most likely to be impaired or perceived to be impaired through relationships with:

- close family members and in particular spouses, civil or cohabiting partners, and minor children. Other relationships may also be relevant, for example adult children living at home or who are financially dependent; and
- individuals with whom there is a close relationship of a different sort, such as close friendship or financial links where in either case those individuals may be affected by the work of the CC.

Prejudgement

- 4.9 There may be instances where a CC member or staff member has or appears to have prejudged the outcome of an inquiry. Circumstances in which prejudgement might arise would include those in which an article had been written or speech made expressing strong views about a particular merger or market, or if a member or staff member had previously expressed strong views about a particular type of evidence or methodology. (But chairmanship or membership of a previous inquiry should not in itself be sufficient to debar a member from serving on a new inquiry in the same sector on the grounds that he or she has thereby prejudged the issues.)
- 4.10 It is not possible to give specific guidance about all circumstances in which pre-judgement may arise. However, prejudgement is likely to arise only where the expression of opinion is such that it might reasonably be regarded as precluding the member or member of staff from impartially addressing the matter before the CC, and is not lightly to be inferred.

Recommendation 4.1: any financial interest with a party who may be affected by an inquiry and not covered by the exemptions listed in paragraph 4.5 above should normally be regarded as a conflict of interest.

Recommendation 4.2: organizational relationships described in paragraph 4.6 above should normally be regarded as a conflict of interest subject to the exceptions noted in paragraph 4.7.

Recommendation 4.3: personal relationships described in paragraph 4.8 above should normally be regarded as a conflict of interest.

Recommendation 4.4: evidence of prejudgement which might give rise to reasonable concern on the part of an informed observer as to the member's impartiality and independence should normally be regarded as a conflict of interest.

5. Disclosure of interests

Who is affected by conflicts?

- 5.1 The CC's policies on outside interests will apply to members and staff in different ways. The following list identifies the major groups to whom the policies will apply at different times and in different degrees:
- Council members.
 - Members of the Senior Management Team.
 - Members engaged on a particular inquiry. Members not engaged on an inquiry are not (except in exceptional circumstances) in a position to influence or determine the policy or decision making of the CC. Restrictions should normally bite on appointment to an Inquiry Group and then during the period of the inquiry. Conflicts have also to be considered where members of groups such as the Remedies Standing Group (RSG) take decisions on behalf of the CC.
 - Staff heavily involved on a particular inquiry during that inquiry.

- Consultants, advisers or other external experts engaged on an inquiry or on the work of the CC. This will normally be limited to those actually engaged on the work and only for the duration of their involvement with the inquiry.

Recording and registering interests

- 5.2 The relationships and interests that members and staff have that may represent a conflict should be recorded and in some cases publicly registered:
- Organizational interests should be collected from the Council, members and members of the Senior Management Team and published on the CC's Register of Outside Interests.
 - Financial and organizational interests of members appointed to an inquiry should be confirmed prior to their appointment.
 - The CC should maintain but not publish a register of members' organizational, personal and significant financial outside interests for planning purposes.
 - A formal log of all staff working on an inquiry and therefore subject to conflicts policy should be maintained. Staff working on an inquiry should be reminded of the CC's policies on conflicts when joining the inquiry team.
 - Consultants and other experts or advisers working on an inquiry should be required to confirm that they comply with the CC's policy on conflicts.
 - Firms acting on behalf of the CC on an inquiry should be asked to confirm that they are not also advising any other party on matters relating to the inquiry.
- 5.3 All Council members, inquiry members and staff should be reminded of the need to be alert to personal relationships which might be considered a conflict and should be under standing instructions to report them at the earliest moment.
- 5.4 While members and members of staff are in the best position to identify whether they may have a relationship which might be regarded as a conflict, they are not in the best position to judge its consequences for the CC. Even relationships which might seem remote, tentative or trivial could give rise to challenge and so it is important that all possible relationships or interests are disclosed. The principle of 'if in doubt, disclose' should be applied.

Recommendation 5.1: the CC's policies should identify the different types of circumstances which could give rise to conflicts of interest. The policies should also require all members and members of staff to be alert to the possibility of conflicts at all times.

Recommendation 5.2: the CC's policies should be clear as to the extent to which each group of members and staff is affected at any one time.

Recommendation 5.3: the CC should maintain a public register of the organizational interests of members of Council, members, and members of the Senior Management Team.

Recommendation 5.4: the CC should ensure that all consultants or other experts working for the CC comply with the CC's policies on conflicts.

6. Remedies

- 6.1 Where a member has an interest or relationship that presents a real risk to the impartiality of the CC, the CC must consider what action should be taken. It is not possible to prescribe the CC's response given the complexities of individual cases. Remedies must be proportionate but also ensure that the work of the CC is not brought under well-founded challenge.
- 6.2 Remedies can include divestment of financial interests, standing down from an inquiry or the work of the CC in relation to an inquiry, or standing down from involvement with other parties. It is for the CC to determine the appropriate remedy in each case, having regard to all the circumstances and in the light of the paramount need to safeguard the CC's independence and integrity.
- 6.3 The CC may decide to disclose the relationship or in some circumstances may seek a formal waiver from interested parties. In considering whether or not to disclose or to seek a waiver, the CC has three options:
- where the CC judges a relationship to be minor, it can follow its own judgement and decide not to disclose;
 - where there is a borderline question of conflict or apparent bias, or where there is a relationship or connection that, while not actually approximating to conflict or apparent bias, may be such that the CC prefers to draw it expressly to the attention of parties to an inquiry. In these cases, simple disclosure of the connection should suffice;
 - in a small number of cases, it may be considered important that a member is appointed to an inquiry even though there is a real risk of conflict or apparent or perceived bias. In such cases the CC should not only disclose the connection or relationship but should also provide parties to the inquiry with a reasonable opportunity to make representations to the CC about the appointment and, in some cases, to request parties to provide a waiver of objection.
- 6.4 The CC should not disclose or seek waiver where there is any risk of actual bias and should not seek to appoint a member if that is the case.
- 6.5 In cases where the CC has disclosed a relationship and sought a waiver, but either no waiver is forthcoming or adverse representations are received, the CC must decide whether the member should nonetheless be appointed. If the CC concludes in the face of objections that the appointment of a particular member to an inquiry is important and does not give rise to an unacceptable risk of a well-founded challenge to the CC's independence, integrity and impartiality, the CC may decide to appoint the member.
- 6.6 The responsibility for determining the response to any actual or perceived conflict, including the remedies to be sought where appropriate, rests with the Chairman of the CC acting within the framework of the CC's policies. In making his or her determination, the Chairman should have regard to the advice of the Compliance Officer (whose remit is described more fully in [Section 7](#) below).
- 6.7 We encourage the CC, having identified all relevant facts and carefully considered remedies, to be resolute in the application of its decisions.
- 6.8 Any issue of actual or perceived conflict should be promptly drawn to the attention of the Chairman and the Compliance Officer.

- 6.9 The Chairman should have responsibility for applying the CC's policies in cases of difficulty or for waiving the policies in particular cases where this is necessary for the effectiveness of the CC's operations, provided in all cases that the independence and integrity of the CC are not put at risk. In every case, there should be a written record of the decisions and the reasons for them. Difficult cases or instances where the Chairman waives the CC's policies should be reported to the Council so that the Council can keep the policies under review in the light of practical experience.

Recommendation 6.1: the CC's policies should define the possible remedies available where actual or perceived conflict might be present.

Recommendation 6.2: the CC's policies should make clear the responsibility of the Council for the approval of the CC's policies and the responsibility of the Chairman of the CC for making decisions in relation to individual cases, having regard to advice from the Compliance Officer.

7. The Compliance Officer

- 7.1 The Council should appoint a Compliance Officer with responsibility for ensuring that the CC's policies are applied and enforced on a day-to-day basis. The Compliance Officer should be responsible for:
- ensuring that policies are approved by the Council;
 - putting in place arrangements for appropriate and regular training and communications in conflicts policies, including the induction of new Council members, members and staff;
 - maintaining the registers of interests; and
 - advising the Chairman on the discharge of his or her responsibility to respond to individual cases of actual or perceived bias or conflicts of interest which are identified.
- 7.2 The Compliance Officer role can be combined with another role in the organization but should be held by a senior and respected member of staff.
- 7.3 The Compliance Officer should report to the Chairman. He or she should prepare an annual report to Council on the policies and their application, including any recommendations as to changes in policy.
- 7.4 Where disclosures are made, especially immediately before an inquiry, the Compliance Officer should where appropriate verify these disclosures through oral discussions with the member or member of staff concerned. A written record of these discussions should be maintained and the member or member of staff concerned should be asked to agree and sign the record.
- 7.5 The Compliance Officer should be authorized to investigate any actual or suspected breaches of the CC's policies on conflicts.
- 7.6 The appointment and dismissal of the Compliance Officer should be the responsibility of the Council on the recommendation of the Chairman.

Recommendation 7.1: a Compliance Officer should be appointed with the roles and responsibilities set out above.

8. **Communication and training**

- 8.1 The CC's policies are likely to be ineffective unless they are communicated widely throughout the organization and training is given.
- 8.2 The importance of the CC's policies on conflicts should be emphasized to candidate Council members, members and prospective members of staff before they are appointed. The commitment of the Council to these policies should be emphasized and it should be made clear that any breach will be regarded with the utmost seriousness.
- 8.3 Existing policy is spread across three documents. It should be rewritten as a single document, including appropriate illustrations, and approved by Council. The Woods-Scawen review group stands ready to review the revised guidance to ensure it is in line with the recommendations in this report and to assist with a stock-take of experience after one year if that would assist the CC.
- 8.4 It is important that the Council, members and members of staff have training in the policies of the CC on conflicts and that training is updated from time to time. This will require the development of a training programme and supporting materials.
- 8.5 Training is best given by leaders of the CC rather than contracted out in order to show personal commitment on the part of the CC's leadership.
- 8.6 Training should be given to the Council, members and staff on induction and regularly refreshed.
- 8.7 Training should also be given to prospective inquiry team members so that they can be reminded of the CC's policies before an inquiry commences.
- 8.8 The Chairman of each inquiry has a responsibility to ensure that the members on the inquiry team and staff working on an inquiry are regularly reminded of the CC's policies. This could be done in part by having a review of possible conflicts as a standing agenda item at each meeting of the inquiry team. It is vital that inquiry Chairmen and members on inquiry teams are vigilant about possible conflicts throughout an inquiry. The inquiry Chairman has a responsibility for identifying conflicts among the inquiry members during an inquiry and this responsibility should be made clear in the Chairman's appointment letter.

Recommendation 8.1: a communications and training programme should be developed and implemented by the Compliance Officer.

Recommendation 8.2: the responsibilities of the inquiry team Chairman for communicating and monitoring compliance with the CC's conflicts policy during the course of an inquiry should be made clear on appointment.

9. **Assurance**

- 9.1 In inquiry work, responsibility must clearly be established for the administration and implementation of conflicts policy prior to the appointment of a member to an Inquiry Group, and, equally importantly, during the inquiry.
- 9.2 Members and staff of the CC are responsible for disclosure to the CC of their outside interests.

- 9.3 Commitment to confidentiality and compliance with conflict policies should be made explicit in contracts of employment and appointment letters.
- 9.4 There should be annual written confirmation of compliance with the CC's policies from Council members, members and staff.
- 9.5 The CC's Annual Report should summarize the CC's policies on conflicts and should include a statement of compliance from the Chairman.
- 9.6 Compliance with conflicts policy should be subject to annual internal audit.

Recommendation 9.1: the Council should ensure that it has sufficient assurance as to compliance with the CC's policies. This will include annual confirmations from Council members, members and members of staff and reports from internal audit.

10. Finally

- 10.1 There must be visible and wholehearted leadership from the Council, Chairman and Chief Executive. The application of the CC's policies on conflicts must not be seen as a bureaucratic or unimportant process. It is fundamental to the effectiveness and reputation of the CC.
- 10.2 Members who lobby for appointment to a specific inquiry should be barred from appointment to that inquiry. The appointment of members to Inquiry Groups is a matter for the Chairman of the CC who will take several factors into account in making the decision including the risk posed by outside interests. While the Chairman must be free to discuss appointments with members, lobbying of the Chairman is inimical to prudent risk management.
- 10.3 Whilst processes and structures are important, the CC must also encourage the CC's members and staff to stand back and continuously ask themselves—is there anything that could give rise to challenge or embarrassment? Members and staff must always bear in mind that the appearance or public perception of a conflict can be just as serious as an actual conflict.
- 10.4 The CC's policies must be applied having regard to all the circumstances and consistently with the CC's objectives of independence, integrity and impartiality.

Full list of recommendations

Recommendation 1.1: the Council of the CC should confirm its commitment to the Seven Principles of Public Life annually, communicate this commitment to members and staff, and state its commitment in the CC's Annual Report.

Recommendation 2.1: the CC's policies on conflicts of interest—updated as necessary—should be approved annually by the Council. The policies should be clearly based on the CC's objectives of independence integrity and impartiality. The CC's policies must always be applied to individual circumstances with judgement.

Recommendation 3.1: the CC's policies and procedures relating to conflicts of interest should now be:

- **formally restated in a single document;**

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Recommendation 4.3: personal relationships described in paragraph 4.8 above should normally be regarded as a conflict of interest.

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Recommendation 7.1: a Compliance Officer should be appointed with the roles and responsibilities set out in paragraphs 7.1 to 7.6.

Recommendation 8.1: A communications and training programme should be developed and implemented by the Compliance Officer.

Recommendation 8.2: the responsibilities of the inquiry team Chairman for communicating and monitoring compliance with the CC's conflicts policy during the course of an inquiry should be made clear on appointment.

Recommendation 9.1: the Council should ensure that it has sufficient assurance as to compliance with the CC's policies. This will include annual confirmations from Council members, members and members of staff and reports from internal audit.

Biographies of review committee members

Dr Brian Woods-Scawen DL CBE FCA is a chartered accountant. He is a non-executive board member of a number of organizations in the public and private sectors, including the Department of Business, Innovation and Skills and the Legal Services Ombudsman. He is a member of Council and Treasurer of Warwick University. Brian was formerly a partner in PricewaterhouseCoopers and Chairman of the Supervisory Board. He will become a non-executive CC Council member on 1 August 2011.

Sir Francis Jacobs KCMG QC is Professor of Law at King's College London and Jean Monnet Professor. From October 1988 to January 2006 he was an Advocate General at the European Court of Justice. In November 2005 he was appointed to the Privy Council. He is President of Missing Children Europe.

Dame Barbara Mills DBE QC is a barrister who was in practice at the Bar for over 25 years. She was Director of the Serious Fraud Office from 1990 to 1992, Director of Public Prosecutions and Head of the Crown Prosecution Service from 1992 to 1997, and The Adjudicator for Her Majesty's Revenue & Customs and two other government departments from 1998 to 2009. She served as a member of the CC from September 2001 to September 2009.

Acknowledgements

The following organizations provided us with information on their policies and practices on conflicts of interest. We are most grateful to them.

Bar Standards Board
Cabinet Office
Chartered Institute of Arbitration (CI Arb)
Financial Services Authority (FSA)
General Medical Council
IDRS Ltd
Judicial Studies Board
Ofcom
Office of Fair Trading (OFT)
Office of Water Services (OFWAT)
Tribunals Service

Comments from the following individual CC members or members of the CC Council have also been most helpful in compiling this report

Laura Carstensen
Christopher Clarke
Peter Davis
Grey Denham
Roger Finbow
Peter Freeman
Diana Guy
Katherine Holmes
Tony Morris
Malcolm Nicholson
David Saunders
Dick Taylor
Fiona Woolf

The common law of bias

1. In English law the rules on bias and apparent bias are normally considered to be an aspect of 'natural justice'. They are treated as procedural requirements of judicial and administrative decision making—as part of the requirements of a 'fair' decision-making system. The purpose underlying the rules is to ensure that decisions are taken on their merits.
2. While the rules on bias and apparent bias were developed for the judiciary, there is no doubt that they apply to bodies discharging investigative and public law decision-making functions such as the CC.
3. The consequence of a breach of the rules on bias or apparent bias is normally the invalidation of the decision taken by the biased decision maker.

Taxonomy of bias in English law

4. The law on bias has three strands:
 - (i) The rule against *actual bias*. Actual bias means an inability to decide objectively, ie there is either actual prejudice or a real influence of partiality or prejudice. A decision taken where there is actual bias is necessarily invalid. Actual bias cannot be waived.
 - (ii) The first strand of the law of *apparent bias*: no person should be a judge in his own interest. The primary application of this rule is that a decision maker should not have a financial interest that can be affected by the decision to be taken. While not amounting to actual bias, such a conflict is said automatically to disqualify the decision maker.
 - (iii) The second strand of the law of *apparent bias*: where there is no actual bias and the decision maker is not the judge of his own interest, but there is nonetheless a connection between the decision maker and the decision to be taken (or the parties or the witnesses and so on). In these circumstances what has to be decided is whether the decision maker's connection with the decision is such that the decision maker cannot properly take that decision.
5. The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased.¹ The fair-minded observer is said to be neither complacent nor suspicious.

The application of the test for apparent bias in practice

6. The courts have emphasized that the application of the rules on apparent bias is highly dependent on the facts of the particular case. In *Locabail v Bayfield*² the Court of Appeal said:

¹Following the judgment in *Porter v Magill* [2002] 2 AC 357.

²[1999] AER 1279.

It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

7. Because the facts of each case are so important, and because of the importance of appearances, the courts have considerable latitude in deciding questions of apparent bias. The standard applied to different decision makers may therefore vary considerably according to their circumstances. However, to be of concern, the facts in issue must give rise to real and not merely fanciful doubts about the impartiality of the decision maker. As the decision of the Court of Appeal in *Competition Commission v BAA*³ has shown, apparent bias can arise in a member of the CC due to a change of

³[2010] EWCA Civ 1097.

circumstances in the course of an inquiry, and where important facts giving rise to apparent bias were unknown to the CC.

8. As noted above (paragraph 4(*i*)), actual bias is an inability to decide a case objectively, ie on its merits. The most likely reasons for bias are a predisposition on the part of the decision maker for a particular outcome, for a particular witness or piece of evidence, or for a particular party. The appearance of bias will normally arise in situations in which there is a real possibility that there may be such a predisposition. There are many reasons why a predisposition might arise. It might be a financial interest, a strongly held view, some conflicting association or allegiance, a previous involvement in the matter, or perhaps no more than personal friendship or hostility, or a family or commercial relationship.

The knowledge and interests of the decision maker, competing grounds of public interest, and waiver

9. Where there is a connection between a decision maker and someone whose interests are affected by the decision, it is not absolutely clear whether the decision maker must know that the decision may affect the connected person for there to be a finding of apparent bias.
10. Where a decision is taken by a number of decision makers, apparent bias affecting one decision maker may not contaminate the other decision makers. Much may turn on the facts, but this was the basis on which the Court of Appeal upheld the CC's appeal in *Competition Commission v BAA*.⁴
11. There is also uncertainty about the importance of competing grounds of public interest such as the necessary expertise of a lay tribunal.⁵
12. While apparent bias can be waived—ie the parties may agree that, notwithstanding apparent bias, the member should serve on the inquiry—important disclosure requirements have to be met for a waiver to be effective.

⁴Ibid.

⁵Two cases concerning expert medical tribunals—*Gillies(AP) v Secretary of State for Work and Pensions* [2006] UKHL 2 and *Nwabueze v GMC* [2001] WLR 1760—emphasize the importance of ensuring that tribunal members have the necessary expertise to make tribunal decisions.