

# **Code of practice for Panel members and specialist reference group members**

## **Introduction**

1. The functions of the Cooperation and Competition Panel ("the Panel") are to carry out investigations and offer recommendations or advice to the Secretary of State for Health (and his delegated authorities) and Monitor (the independent regulator of NHS Foundation Trusts) in connection with matters which arise for consideration by the Panel. Such matters may arise as follows:

- First, the case has been considered by a Strategic Health Authority ("SHA") and that SHA has referred the matter to the Panel for consideration or a party affected by the SHA's decision has appealed the SHA's decision to the Panel (hereafter referred to as "appeal");
- Second, the case involves a "reserved matter" to be considered by the Panel without a prior decision by an SHA. Reserved matters include proposed mergers and complaints about alleged anti-competitive conduct by NHS-funded healthcare providers; or
- Third, a request is made to the Panel by one of the Sponsors to review a competition issue which is broader than a single specific case.

2. The Panel's Rules of Procedure make provision about the performance of the Panel's functions. With limited exceptions the Panel's functions must be performed through a group of panel members selected by the Chairman of the Panel ("Chairman").

3. This Code of Practice applies to panel members and specialist reference group members ("Members").

## **Objectives of this Code**

4. Panel recommendations and advice can have considerable financial implications for parties. Moreover, acting in an investigation will involve Members having business secrets and other confidential information, and will often involve Members having market sensitive information. It is therefore essential that the Panel maintains its reputation for fairness, independence, complete integrity and rigorous analysis.

## **General**

5. Members must observe the highest standards of impartiality, integrity and objectivity in the performance of their functions.

6. Members must not use information obtained in the course of their functions for personal gain, nor seek to use the opportunity of public service to promote their private interests. Moreover, they must observe the Panel's guidance on acceptance of gifts and hospitality (Annex 2). Members must discuss with the Chairman if they are uncertain whether it is appropriate to accept gifts and hospitality.

7. The Panel must maintain its independence and impartiality. The requirements of independence and impartiality are different in principle. The provisions set out in paragraphs 8 to 14 below impose obligations on Members that are intended to assist the Panel to meet the requirements of independence. The obligations imposed on Members in relation to impartiality are set out in the Panel's "Guidance on Conflicts of Interest" (Annex 1). Members should note that no code or guidance can anticipate or set out all the circumstances in which the independence or impartiality of the Panel can be brought into question. Consequently, if notwithstanding this Code and the Guidance Members are in any doubt as to whether their activities might pose a risk to the Panel they should advise the Chairman of their concerns.

## **Requirements to ensure the independence of the Panel**

8. The Panel will maintain and publish on its website a register of Members' interests. The register will identify each Member, and list each Member's current offices, employment, appointments, consultancies and any other similar outside interests. Shareholdings and similar interests are covered by the Guidance on Conflicts of Interest. The register must be comprehensive and up to date, and it is the responsibility of every Member to ensure that sufficient information is provided to the Chairman to enable the register to be maintained. The requisite information should be provided by the Member in connection with an existing interest, whenever a Member pursues a new interest, or whenever there is a change in an existing interest. At the start of an investigation, the attention of the parties to the investigation will be drawn to the register of Members' interests.

9. All Members should ensure that in the pursuit of their outside interests they do not compromise the independence of the Panel. The Chairman should be notified if a Member has any concerns.

10. The pursuit by a Member of an outside interest that might compromise the independence of the Panel is a matter that the Chairman is obliged to take into account when considering the composition of any group, and when selecting a Member to chair a group. It is also a matter that the Chairman is obliged to take into account when considering whether it is appropriate for a Member to remain a member of a group. In considering the composition of a group, the Chairman will take account of the sufficiency of the disclosure made by a Member as to the nature of any outside interest, as well as the nature of any undertaking provided by the Member or a third party to the Panel.

11. A risk to the Panel's independence may follow from the pursuit by a Member of an outside interest (whether paid or unpaid) which involves the provision of advice or other services on healthcare issues.

12. In the circumstances outlined in paragraph 11, the Chairman will assess the risk to the Panel's independence posed by the Member's pursuit of the interest in question. The Chairman will then consider whether any such risk can be alleviated by the provision of an undertaking by the Member and/or any third party. Where it is the view of the Chairman that the pursuit of an outside interest by a Member may give rise to a risk to the independence of the Panel, the Chairman will normally expect the Member to provide him with an undertaking. An undertaking might include an obligation upon the Member not to discuss an investigation with another Member or a third party, not to attend certain meetings and social events of the Panel, not to disclose the working methods of the Panel, and a positive obligation to keep the Chairman advised of developments in the outside interest relevant to the independence and impartiality of the Panel. In some circumstances an undertaking given by a Member might include an obligation upon the Member to cease to pursue the outside interest if it is related to an investigation or other matter before the Panel. Prospective group chairmen may be required to provide undertakings that are more extensive than those provided by other Members. The Chairman may also fix a date or event at which time the position of the Member is to be reviewed.

13. Members are advised that work of a competition or economic regulation nature in connection with the provision of healthcare services, where its subject matter falls or may fall within the provisions in the documents which govern the Panel's activities (primarily the Panel's Terms of Reference, the Memorandum of Understanding between the Panel and its Sponsors, and Rules of Procedure), is normally considered to create a risk to the independence of the Panel.

14. Members are expected to act in a way which will not give rise to a risk that the appropriateness of their continued participation in any group will be called into question. The obligations in paragraphs 8 to 14 are personal to the Members and do not extend to others in a Member's firm or company.

## **Insider dealing etc.**

15. During its investigations the Panel is likely to receive considerable information. The provisions of the Criminal Justice Act 1993 relating to insider dealing impose duties not to disclose information obtained except in specified circumstances or for specified purposes. Members must comply with these rules.

16. The Criminal Justice Act 1993 also lays down rules about dealing in securities, and encouraging others to deal, when in possession of market sensitive information about those securities. Members must comply with these rules.

## **Travel and subsistence claims**

17. Members must comply with the Panel's rules on claiming travel and subsistence expenses.

## **Acting in an investigation**

18. Unless the Chairman appoints a group to conduct an investigation, investigations shall be conducted by the full Panel. When approached by the Chairman about working in an investigation, a Member must disclose any potential conflict of interest in accordance with the Panel's Guidance on Conflicts of Interest.

19. The Panel's Terms of Reference, Memorandum of Understanding between the Panel and its Sponsors, and Rules of Procedure ("the terms of reference") specify the functions of the Panel in connection with an investigation. Members conducting an investigation (hereinafter referred to as the "group") are responsible for the conduct of the investigation and the conclusions set out in the recommendations or advice to the relevant Sponsor/s. In particular they are responsible for ensuring that:

- i. they operate within the powers conferred by the terms of reference;
- ii. they perform the duties imposed on the Panel by the terms of reference; and
- iii. they act in accordance with all applicable laws, including administrative law.

The staff of the Panel, which includes its legal advisers, provide assistance to the group.

20. A group must follow the Panel's Rules of Procedure. If at any time a group encounters a situation that is not provided for in the Rules of Procedure, the group may determine its own procedures. However, before doing so, the group must consult the Chairman and have regard to any guidance issued by the Chairman.

21. Members must perform their duties with all due diligence.

22. Members acting in an investigation must ensure that the group:

- i. makes thorough, soundly based and fair assessments;
- ii. produces clear and well-argued recommendations or advice.

23. In order to minimise the burden on the parties to an investigation, and to ensure that any adverse effects identified may be remedied as quickly as possible, Members must use their best endeavours to meet the timetable set for the investigation.

24. In order for Members to be able to perform their functions effectively, they have to be able to discuss issues arising under an investigation freely, take initial positions and where appropriate change their minds. They must therefore be able to express views within the group openly, without fear that those views will be disclosed to the public, otherwise than in

the recommendations or advice provided to the Sponsors. Members must not refer to discussions which have taken place between Members of the group outside the Panel.

25. If any Member has concerns about the propriety of any proposed action he/she should initially raise the matter with the chairman of the group. If the Member remains concerned he/she should raise the matter with the Chairman.

26. Any contact with the media about an investigation should be conducted by the Chairman or the chairman of the relevant group (or other Member of the group nominated by the group for that purpose). Members should not discuss with the media in other circumstances any investigation or any matter arising from an investigation, or disclose to the media any information material to any investigation. They should inform the Chairman of any approach by the media about any investigation.

27. Members should not discuss on-going investigations or matters arising from them, with any person outside the Panel, other than in the course of a Panel hearing or meeting.

28. The function of the Panel is to provide recommendations or advice to the Sponsors on the matters which come before it. Members should state the conclusions of their investigation in the recommendations or advice. Save at the invitation of or with the permission of the Chairman, Members should not, whether before or after publication, comment on the conclusions in the recommendations or advice or on matters arising from them.

29. Members must have due regard for efficiency, effectiveness and economy, in relation to an investigation.

30. Members should exercise all due care in protecting business secrets or other confidential information and papers containing such information obtained in the course of the investigation.

31. Once an investigation is complete no Member of the group which dealt with it should accept an assignment in connection with the provision or commissioning of healthcare services in the UK involving any of the parties, or join a team seeking business with them in connection with the provision [or commissioning] of healthcare services in the UK, for at least twelve months. If the possibility of such an assignment arises the Member concerned should consult the Chairman with a view to ensuring that a sufficient period has expired to avoid the Member appearing to be gaining a private advantage from Panel membership. This restriction does not extend to others in a Member's firm or company.

## **Annex 1**

### **Guidance on Conflicts of interest**

**Panel members should remind themselves of the content of this guidance when invited to serve on an investigation**

#### **Introduction**

1. This guidance applies to panel members and specialist reference group members of the Cooperation and Competition Panel ("the Panel") appointed to act in connection with an appeal, a reserved matter, or a broader competition issue which arises for consideration and investigation by the Panel. A conflict of private interest (or duty) and public duty arises where a member has any interest which might influence, or be perceived as being capable of influencing, his or her judgement even unconsciously. While in practice a member's judgement may not be influenced by a direct pecuniary interest, in law such an interest, however small, disqualifies the member from acting. Moreover interests which can in law disqualify a member are not limited to direct pecuniary interests though the member concerned may be confident that his or her judgement would not be affected. An example would be a live business relationship with one of the parties to an investigation, such as a contract to supply a service. However, the Panel is not only concerned with the possibility of the Panel's recommendations or advice in connection with an investigation being challenged in court on the grounds of conflict of interest, embarrassing as such a case would be to the Panel and the member involved. The Panel must also be seen to be above suspicion.

2. Given the range of matters relating to the provision of NHS-funded healthcare services which may arise for consideration by the Panel it has not proved possible to set out rules determining the circumstances in which a member will or will not be appointed to a group or required to step down from a group. Each case must be decided on the facts. Accordingly, the procedure to be adopted by the Panel is that a member should disclose his or her interests which might give rise to a conflict to the Chairman of the Panel ("Chairman"), who where necessary will seek legal advice on the matter.

3. Appropriate guidance on conflicts of interest will also be issued to Panel staff and consultants.

#### **Requirement to disclose interests**

4. Members should disclose to the Chairman any interest which might give rise to a conflict when the prospect of their serving on a group dealing with a particular investigation is first raised. Similarly, any such interest that emerges during the course of an investigation should be disclosed immediately. Such an interest may, but will not necessarily, result in the member not being appointed to the group or standing down if already appointed. Examples of the types of interest which should be disclosed are set out below.

#### **Disclosable interests**

5. Most commonly a conflict will arise through an existing or recent financial, business, personal or family involvement with (a) a provider of healthcare services or any other entity which is the subject of an investigation; (b) a provider of healthcare services or another entity which is closely involved in an investigation e.g. a competitor, customer or supplier of the parties which are the subject of an investigation; or (c) a provider of healthcare services or another entity the value of whose shares may be affected by the outcome of the investigation. (The terms "provider of healthcare services" and "entity" should be understood to include any provider or entity within the same group (that is, under common ownership or control), a "one-man" business, a partnership, etc.)

6. A member should disclose an interest if he or she, his or her spouse/partner, dependent children, or any person whose financial affairs affect the member:

- has a shareholding in, or ownership (whether full or partial) of;
- is a director of;
- is employed by; or
- has close business or other links with;

a provider of healthcare services or another entity in category (a), (b) or (c) described in paragraph 5 (bearing in mind that a business link also needs to cover links which a member's employer or partnership may have).

7. A member should also disclose an interest if he or she has a close relationship with a person whose affairs may be affected by the investigation.

8. A member should disclose an interest where he or she is responsible for the management of investments, where the investments concerned include shares in a company in category (a), (b) or (c) described in paragraph 5.

9. The terms "shareholding" and "shares" should be understood to include:

- shares, whether bearing a right to vote or not;
- stock or debentures; and
- options and similar rights;

in each case whatever the value of the holding and whether held as trustee or beneficially (for example under a family trust or a Personal Equity Plan). Holdings in unit trusts, investment trusts, unit linked policies, pension schemes or similar arrangements under which the investor has interests in a large number of enterprises would not normally give rise to a conflict of interest unless any company involved in the arrangements were itself affected by the relevant investigation. However, if the trust or arrangement specialises in investing in healthcare or if the member believes that there is a real possibility of the value of his/her investment being affected by the outcome of the investigation, the interest should be disclosed to the Chairman.

10. A member's interest as an individual patient (as opposed to as a business customer) would not need to be disclosed in normal circumstances where most individuals are potential patients. If, however, the member is in a small group of patients his or her interest should be disclosed. This might be the case if, for example, a member, his/her spouse or child, has a rare disease and as a result would require the healthcare services offered by a healthcare provider which is the subject of an investigation. Members should also disclose the fact of their being a patient of a local or regional healthcare provider which might be affected by the outcome of an investigation.

11. All such interests should be disclosed to the Chairman. Members should speak to the Chairman if they have any doubts as to whether or not they have an interest which may give rise to a conflict and should be disclosed.

### **Action to resolve a conflict of interest**

12. To the extent that this is relevant, in some circumstances it may suffice for an interest which gives rise to a conflict to be disposed of in the period between the matter being raised with the Panel and the appointment of the group, subject to the approval of the Chairman. Moreover, in some circumstances it may be sufficient simply to inform the parties involved in an investigation of the interest (be it a shareholding or other interest). However, where the interest in question is that of a member (as opposed to that of a related person), a more appropriate course of action may be for the member to dispose of or otherwise terminate the interest, or, if the member has already been appointed to the group, to resign from the group,

unless the interest is *de minimis*. Interests that are *de minimis* will normally be dealt with by disclosure. Generally, subject to periodic review, an interest will be considered to be *de minimis* where its value at the time that the appointment is made is not greater than [£500]. Where an interest has been disclosed, members are requested to advise the Chairman of material changes in the value of the interest.

13. More substantial interests are, however, likely to preclude a member from being appointed to a group or will require him or her to step down from a group. Depending on the specific circumstances in a given case, examples of interests falling into this category may include the following (this is not an exhaustive list):

- A member is or was formerly the chairman, Chief Executive Officer, executive or non-executive director, employee or shareholder of a party which is the subject of an investigation, or an entity which is part of the same group.
- A member is or was the chairman, Chief Executive Officer, executive or non-executive director, employee or shareholder of a healthcare provider or another entity that intends to give evidence during an investigation.
- A member is or was formerly the chairman, Chief Executive Officer, executive or non-executive director, employee or shareholder of a healthcare provider or another entity that might have an interest in the outcome of an investigation.
- A member is or was the chairman, Chief Executive Officer, executive or non-executive director, employee or shareholder of a healthcare provider or another entity that carries out work for, or supplies services/products to, a party which is the subject of an investigation (for example, it is a healthcare provider that has been commissioned to provide certain healthcare services to a party that is the subject of an investigation or it is an entity that supplies medical equipment to such a party).
- A member works or used to work for, or is/was a close colleague, of the chairman or Chief Executive Officer of a party that is the subject of an investigation or has an interest in the outcome of an investigation.
- A member is or was the chairman, Chief Executive Officer, executive or non-executive director, employee or shareholder of a healthcare provider or another entity which is negotiating for a research contract with a party which is the subject of an investigation.
- The same may apply where the above examples relate to a member's spouse/partner, dependent children, or a person whose financial affairs affect the member.

### **Private interests and public duties**

14. The principles set out in paragraphs 1 and 2 above apply throughout an investigation. Where a member is appointed to a particular group, he or she should avoid getting into a position where his or her private interests conflict with his or her public duties. For example, neither the member nor his firm or partnership should enter into a business relationship with the parties to an investigation during the course of an investigation.

### **Insider Dealing**

15. Members are reminded that dealing (or encouraging another to deal) in securities while in possession of relevant price-sensitive information acquired through membership of the Panel (or disclosing such information) is potentially a criminal offence under section 52 of the Criminal Justice Act 1993.

## Annex 2

### Guidance on accepting gifts and hospitality

#### Gifts and Hospitality

1. All Panel members must take great care over accepting offers of gifts, hospitality and entertainment that are in any way linked (currently or prospectively) to the Panel's business. This is to avoid anyone being put in a position where there is potential or actual conflict of interest, or which might be construed in that light.
2. The guiding principle is that a member must not accept gifts, hospitality or other benefits of any kind from a third party, which might be seen to compromise his or her personal and professional integrity. Corruptly soliciting or receiving any gift or favour is a criminal offence.
3. In practice, the range of potential situations, to which this guidance applies, is so wide that judgement can be difficult. The sections below should help to provide guidance where issues are not clear-cut. If a member is unsure about whether to accept a gift, hospitality or entertainment, he or she should seek advice from the Chairman.

#### Gifts

4. A 'gift' is here defined as any item of cash or goods, or any service, which is provided for personal benefit at less than its commercial value.
5. Any acceptance of a gift needs to be justified. A member should think about the context in which the offer has been made, and the effect on his or her position. For example, whether the gift is likely, or could be seen as likely, to influence the member in the performance of his or her duties and powers as a member of the Panel. The onus is on the member to make sure that the acceptance of a gift will not be misconstrued.
6. Gifts should, in general, be refused, to avoid the appearance of improper acceptance. However, a member may accept gifts and benefits of a trivial or inexpensive nature. This would include items such as:
  - low value 'promotional' gifts (such as calendars, diaries or other small gifts up to the value of about [£10]) inscribed with the provider's name;
  - conventional personal gifts – such as flowers, fruit or confectionery of reasonable value – for someone who has been off work for a long time (for example, through sickness or the birth of a child);
  - Panel or staff gifts of low value, such as confectionery (up to approximately [£20]), intended to be shared by the Panel members and/or staff.
7. **A member should NOT accept:**
  - gifts on a larger scale than those described above;
  - goods or services provided by a business contact for personal benefit at nil or reduced cost;
  - payment by business contacts to subsidise social events (such as office parties).
8. **A member must:**
  - report immediately all offers of unreasonably generous gifts;
  - return promptly any unacceptable gifts, with a letter politely explaining the terms of this policy and stating that a Panel member is not allowed to accept them; and
  - dispose of any gift that cannot be returned (such as perishables) at the discretion of the Chairman. For example, such a gift might be shared between the members/staff or given to charity. In these cases the supplier should also be informed, in writing, of the Panel's action.
9. Where a business relationship has developed into personal friendship, which exists outside the business environment, personal gifts may be exchanged (on occasions such as birthdays, retirements, etc.). This is acceptable provided that the person giving the gift, and not their

employer, pays for any gift made to a member. A member may wish to discuss the position with the Chairman.

10. Similarly, the Panel's resources may not normally be used to make personal gifts to business contacts. However, if in exceptional circumstances it is proposed to make a gift, the [Business Performance & Improvement Team or Senior Civil Service Unit (if appropriate)] / [the Chairman] should approve in advance any proposal. It should be made clear that there is no element of inducement involved, and that the gift should not be reciprocated.

### **Hospitality**

11. A blanket ban on accepting or providing hospitality is neither practical nor desirable from a business point of view. However, there must be a real business benefit to providing or accepting hospitality, as public money must not be used to fund occasions such as social gatherings, retirement or office parties.

12. It will not be normal practice to 'do business over a meal' and this should be the exception rather than the norm.

### **Accepting Hospitality**

13. A member should accept hospitality only when this can be defended as being in the interests of the Panel's business – for example, because significant relationship-building is a business aim. It is particularly important to ensure transparency. A member must not be put in a position where his or her decision-making might be perceived to have been influenced.

14. The higher the individual's personal responsibility for a business relationship, the greater the level of care needed. A member is particularly vulnerable if he or she is involved in a particular investigation or inquiry, and hospitality should not be accepted where it is offered in the context of the relevant investigation or inquiry.

15. If a member is in any doubt about any offer of hospitality received, he or she should discuss this with the Chairman.

16. If a member finds his or herself in a position where he or she were not aware in advance that more lavish hospitality was to be provided, and to refuse would appear rude or cause embarrassment, a member may accept it. A member should, however, report it to the Chairman.

### **Entertainment**

17. Providing or accepting entertainment, such as tickets to major sporting or cultural events, is even more sensitive. It is not likely to be possible to justify acceptance of entertainment as a means of furthering the business of the Panel. Approval by the Chairman should always be sought in advance before providing or accepting any offer of this nature. Panel funds should never be used for providing entertainment.

18. Approval will not be provided under any circumstances for:

- tickets for any function or event at which the host (the person who issued the invitation) is not present;
- use of a business contact's property (such as a holiday home) for a member's personal use; and
- extension of business trips for personal purposes, paid for by a business contact.