



Cabinet Office

Guidance for Directors of companies fully or partly owned by the public sector

January 2016

© Crown copyright 2016
Produced by Cabinet Office

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or email: psi@nationalarchives.gsi.gov.uk

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

Alternative format versions of this report are available on request from FED@cabinetoffice.gov.uk.

Contents

About this guidance	4
Who should read this Guidance?	4
Director's responsibilities and duties	5
All company Directors	5
Directors appointed by a public sector body	5
Conflicts of interest	7
Liabilities and Indemnity protection	9
Directors' Liabilities	9
Indemnity protection	9
Other resources	10

About this guidance

This guidance paper is to help Directors of companies owned by the public sector (e.g. joint venture companies), in full or in part, to understand their duties and responsibilities, including identifying and managing conflicts of interest. It should be read in the context of other documents that cover aspects of public sector governance and ethical guidelines including but not limited to:

- [Managing Public Money](#) (MPM) (specifically the principles and standards set out in section 1.1 of the MPM)
- [Code of Conduct for Board Members of Public Bodies](#)
- [Guidance on Probity and Conflicts of Interest for Public Appointments](#)
- [The Civil Service Code](#)

Who should read this Guidance?

All Directors of companies fully or partly owned by the public sector.

"Director" is defined, under section 250 of the [Companies Act 2006](#), to include any person occupying the position of director, by whatever name called, which includes de facto directors (i.e. not formally appointed but carry out all the duties of and makes decisions as a director) and shadow directors (i.e. anyone who is directly 'calling the shots' at a company or an area within the company).

Director's responsibilities and duties

All company Directors

Notwithstanding civil service and public sector responsibilities, all Directors of companies have legal responsibilities, as defined under the Companies Act 2006, and under a wide variety of other laws and regulations such as insolvency and health and safety legislation.

The general duties of directors are set out in Chapter 2 of Part 10 of the Companies Act 2006:-

- to act within powers in accordance with the company's constitution and to use those powers only for the purposes for which they were conferred
- to promote the success of the company for the benefit of its members as a whole
- to exercise independent judgement
- to exercise reasonable care, skill and diligence
- to avoid conflicts, or possible conflicts between interests as a Director and the interests of the company
- not to accept benefits from third parties, if they may be regarded as likely to give rise to a conflict of interest
- to declare any direct or indirect interest in a proposed transaction or arrangement.

Directors appointed by a public sector body

Directors appointed by a public sector body have the same responsibilities as any other director under the Companies Act 2006. They must also continue to act in accordance with other applicable legislation, relevant civil service and public sector guidelines, including around managing public money and standards for conduct in public life.

It is worth noting that a civil servant's responsibilities to the relevant Government Department can place demands on him / her as director that make it unrealistic to expect the same degree of independence as one can expect from a director that is not a civil servant. This can sometimes create apparent or real conflicts of interest between the priorities of the relevant Government Department and of the Company in question.

These potential conflicts should be explored and resolved when the respective Company is established and when individual Directors are appointed, including making sure there is effective governance in place .. This may include seeking advice from e.g. Her Majesty's Treasury (HMT), Cabinet Office (CO), The Shareholder Executive (ShEx) and external advice. In line with the MPM guidance of this type of conflict, Directors of public bodies which are constituted as a company should take care that fulfilling these personal responsibilities does not conflict with their duties as a board member of a public body.

Useful contacts:

Cabinet Office (Commercial Models): Thomas Vogt-Skard (Tel 07920 703092)

Useful resources include:

- [Managing Public Money](#) (HMT)
- [Code of Conduct for Board Members of Public Bodies](#) (CO)
- [Guidance on Probity and Conflicts of Interest for Public Appointments](#) DCMS
- [The Civil Service Code](#) (Civil Service)

Conflicts of interest

All Directors have a legal duty to avoid conflicts of interest.

Section 175 of the [Companies Act 2006](#) sets out the directors' duty to avoid conflicts of interest; Section 175(1) of the same states that: "A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company."...

For a Director who is a public servant, a conflict of interest might occur where e.g.:

- there are conflicts between different professional duties ("professional conflicts of interest"). For example where a Director is a member of two boards, or where a Director has competing loyalties to their public sector employer and the commercial venture to which they have been appointed director; or
- there are conflicts between Director duties and private interests, for example a financial or family interest ("personal conflicts of interest").

Conflicts of interest can be actual, potential or perceived.

- Actual - there is a real conflict between duties and interests.
- Potential - there could be a conflict between duties and interests.
- Perceived - a third party could form the view that there is a conflict between duties and interests.

It is impossible to define all instances of a conflict of interest, so in many cases a reasonable degree of openness and judgment is required by Directors to assess the nature and extent of a conflict of interest.

Under s175(4) of the [Companies Act 2006](#) the duty to avoid conflicts of interest is not infringed—

- if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest;
or
- if the matter has been authorised by the directors.

The duty to avoid conflicts of interest will continue to apply after a person ceases to be a director as regards the exploitation of any property, information or opportunity of which he became aware when he was a director.

All conflicts of interest must be disclosed to the board of Directors (excluding the director affected). If you are unsure whether you have a conflict of interest it is always better to disclose it to your board and consider seeking independent legal advice. Directors who are public servants should also disclose the matter to their line manager.

There will be situations, determined on a case by case basis, in which conflicts of interest can be managed. For example, there may be scope within the organisation's constitutional documents (in its current form or as properly amended) to:

- reserve certain issues to be decided by specific participants only, rather than the entire board
- impose a restriction on directors from voting on issues where they may have a conflicting interest
- expressly allow a director to vote on a matter in which they have a conflicting interest, provided that the nature and extent of the conflict is fully disclosed to the board

A failure to acknowledge and manage a conflict of interest could cause a significant reputational risk, may result in disqualification and have financial consequences for the Director. Moreover, some conflicts can also have criminal implications. Remember, if you think you might have a conflict of interest, always disclose it and consider seeking independent legal advice.

Liabilities and Indemnity protection

Directors' Liabilities

Chapter 7 of Part 10 of the [Companies Act 2006](#) deals with directors' liabilities.

The directors' duties are owed to the company, so shareholders or third parties will normally only have a cause of action against the company, not against individual directors, where directors breach their duties.

However, directors may also incur personal liabilities, both civil and criminal, for their acts or omissions in directing the company. It is beyond the scope of this guidance to list all the various matters for which directors can be held to be liable but Directors can be exposed to numerous claims for personal liability arising from wrongdoing while managing the company. For example, a director may incur liability:

- To the company for breach of the director's general duties under the [Companies Act 2006](#) or for wrongful trading under the Insolvency Act 1986;
- To third parties, such as an investor for misrepresentation;
- To employees for discrimination under the Equality Act 2010;
- Under legislation imposing personal liability on directors, such as health and safety legislation, environmental legislation, the Financial Services and Markets Act 2000, the Corporate Manslaughter and Corporate Homicide Act 2007 and the Bribery Act 2010; and
- For costs incurred in defending civil, criminal or regulatory proceedings.

Indemnity protection

Where there is a publicly owned company, Government will decide on a case by case basis, with regard to the [Companies Act 2006](#) whether it will offer any kind of indemnity to Directors. Under section 232(1) of the [Companies Act 2006](#), any provision that purports to exempt a director (to any extent) from any liability that would otherwise attach to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.

Paragraph A5.4.19 of the MPM guidance provides additional clarification of the Government's position on indemnifying Directors; setting out that it is common for departments to give certain kinds of indemnity to civil servants involved in legal proceedings or formal enquiries as a consequence of their employment, perhaps by acting as a board member of a company. Please refer to the MPM guidance for more information.

Other resources

Some other resources that Directors may wish to consult include:

- The National Audit Office has published a report on [managing conflicts of interest in the public sector](#).
- Training courses for civil servants that are company directors are available both from [Civil Service Learning](#) (CSL) and suitable training for company directors is also available from the [Institute of Directors](#) (IoD).
- [UK Corporate Governance Code](#).