5.3.4

CONFLICT OF INTEREST

A conflict of interest (***COI***) is a situation in which two or more parties have competing interests which may, actually or potentially, improperly influence a decision-making process and make it difficult for those involved to fulfil their duties fairly. In general terms, a COI exists where the interests of two parties collide, so that satisfying one is at the expense of the other.

In the context of Board work, a COI is a situation in which a Board member's personal, financial or other interests interfere, or could interfere, with their duty to act in the best interests of the company, thus compromising, or appearing to compromise, their ability to make impartial decisions on the company's behalf.

A conflict of interest typically arises when personal interests are placed above those of the company, and it usually materialises in the decision-making process. It may involve one party being able to take a decision affecting another, or holding or having access to information about another, where the decision or the information can benefit or harm the deciding or receiving party or a person related to it, and generally carries a risk of violating the rights of the other party.

Conflicts of interest are not in themselves illegal or prohibited. To ensure that they do not lead to corrupt practices, which may be subject to investigation and prosecution with serious legal, financial and reputational consequences, they must be disclosed, prevented, mitigated or managed.

Types of conflict of interest

A COI can be (i) actual, (ii) potential or (iii) perceived, and can arise in a wide variety of ways:

Actual COI: the person is influenced by a conflict of interest

An actual COI is a situation in which the circumstances clearly constitute a conflict: a Board member or another person related to the company faces a real and existing conflict of interest. For instance, the following situations constitute an actual COI:

- Serving on the Board of the company while also serving on the Board of a competitor or of a service provider of the company;
- The company entering into a transaction with a Board member or their related party;
- Hiring or supervising a relative, spouse, cohabitee or close friend;

- Using company assets for private benefit;
- Close personal relationships influencing decisions taken as part of the Board role;
- Using confidential information obtained in the role for one's own benefit.

Potential COI: the person could be influenced by a conflict of interest

A potential COI is a situation that does not yet constitute a conflict but where there is a reasonable possibility of an actual or apparent conflict arising. For instance:

- A person serves on the Boards of two companies that have no business relationship; a COI may arise if the two companies plan to do business together;
- Serving on several Boards, within or outside the group, which takes up a significant amount of time and raises the question whether the person can fulfil all of their duties and, if not, which will be prioritised;
- A Board member is a former official of a public authority; a COI could arise if the company becomes subject to an investigation by that authority;
- A Board member of company A also serves on the Board of company B, a client of company A; a COI could arise if company B were to file a complaint against company A.

Perceived COI: the person could appear to be influenced by a conflict of interest

A perceived conflict is a situation in which a person appears to have a COI even though this is not the case. For instance, the company hires a new employee who has the same surname as the CEO although they are not related.

Managing conflicts of interest

In performing their duties, Board members must act fairly and reasonably and be loyal to the company, without preference for the interests of any shareholder or group of shareholders, even if the Board member was nominated and appointed by that shareholder or group.

Proper management of conflicts of interest involves at least the following:

1. **Effective COI policy and processes.** The Board is responsible for ensuring that the company has effective procedures to identify, evaluate, prevent and mitigate conflicts of interest. The Board should approve the COI policy, regularly revise it and oversee its implementation. The policy should be reviewed at least every three years and whenever it becomes apparent that the processes it establishes are not effective.

2. **Training.** The company should organise initial training (on induction) and regular refresher training on conflicts of interest for the Board and employees, so that everyone is reminded of their obligation to identify and manage them and new recruits are informed in a timely manner.
3. **Declaration of interests.** Board members, senior management and key personnel must (i) declare their related parties (close family members and entities in which they or their close family members have a material holding, votes or influence), other positions and employments held currently or during the last three to five years, and any other material interests and affiliations that could influence their independence of mind in performing their duties; and (ii) update this information regularly (quarterly or annually) and whenever changes occur.
4. **Declaration of a COI.** Where a COI may arise in a specific situation (for example, the company intends to sign a contract with an entity controlled by a Board member), the Board member must declare the existence and nature of the potential conflict to the Chair and the Board without delay upon becoming aware of it. Best practice is to declare it as soon as the member learns that the matter is on the Board's agenda and before the Board materials on the matter are distributed.
5. **Checking for a COI.** Management preparing an agenda item, and the corporate secretary checking the materials before the Board pack is distributed, should check against the declarations of interests whether a COI may exist and, if so, advise the Chair accordingly. At the beginning of each meeting the Chair asks whether any member may have a COI in respect of any agenda item.
6. **Decision on the existence of a COI.** Upon declaration or identification of a possible COI, the Board evaluates the nature and circumstances of the situation and the interests disclosed and decides whether a COI exists. If it does, the Board evaluates its materiality and decides on the measures to prevent, mitigate or manage it.
7. **Recusal.** A Board member who has a COI must recuse themselves from the consideration of, and voting on, the agenda item concerned. Recusal means that the information and Board materials on the matter are not shared with the member, that the member does not take part in its consideration (including leaving the meeting while it is discussed), so that the non-conflicted members can discuss it freely and without bias, and that the member does not vote on it.
8. **No influence on the decision.** The Board member must not seek to influence in any other way the decision on the matter in which they have a COI.
9. **Documentation.** The declaration, identification and evaluation of a COI, the decision on its existence and the measures taken to prevent, mitigate or

manage it should be documented. It is also recommended to draw up separate minutes recording the discussion and decision on a matter in which a Board member has a potential COI. Such minutes are reviewed, approved and signed by, and available to, the non-conflicted members; the conflicted member is informed of the decision and has access only to the resolution part of the separate minutes.

10. **COI register.** The company should keep an up-to-date register of conflicts of interest and the measures taken to manage them.
11. **Continuing COI.** *A* COI of a continuing rather than one-off nature, and the measures taken to manage it, should be regularly revisited, re-evaluated and, if necessary, adjusted to ensure that they remain sufficient and effective. A continuing COI may arise, for example, from a long-term service contract between the company and an entity controlled by a Board member's spouse. Where a continuing COI would require the member to recuse themselves from most of the matters discussed by the Board (for example, advising or serving on the Board of a competing business), this should be assessed before the appointment, and the person should not be appointed, since constant recusal would prevent them from performing their duties.

KEY TAKEAWAYS

A. A conflict of interest arises when a Board member's personal, financial or other interests interfere, or could interfere, with their duty to act in the best interests of the company. Conflicts may be actual, potential or perceived, and are not illegal in themselves, but must be disclosed and managed.

B. Board members act loyally to the company and without preference for any shareholder, including the one that nominated them.

C. Managing conflicts requires a Board-approved policy, training, declarations of interests by Board members and key personnel, prompt declaration of a conflict when it arises, checks by management and the corporate secretary before each meeting, and a Board decision on whether a conflict exists and how to manage it.

D. A conflicted member recuses themselves from the materials, discussion and vote and does not seek to influence the decision in any other way; the process and decision are documented, with separate minutes where appropriate, and recorded in a COI register.

E. Continuing conflicts are revisited regularly; a conflict that would require constant recusal should rule out the appointment in the first place.

QUESTIONS FOR THE BOARD

1. *Do we have a Board-approved conflict of interest policy, when was it last reviewed, and are Board members and key personnel trained on it?*
2. *Have all Board members and senior managers submitted declarations of interests, and are they updated regularly and when circumstances change?*
3. *How is each Board agenda checked for potential conflicts before the materials are distributed, and does the Chair ask about conflicts at the start of every meeting?*
4. *When a conflict was last declared, did the member recuse themselves fully, and was the decision documented and recorded in the COI register?*
5. *Do any Board members have continuing conflicts, and are the measures taken to manage them still sufficient?*
6. *Does any Board member act, or appear to act, in the interest of the shareholder that nominated them rather than of the company?*