

Cyngor Sir Powys County Council and Cyngor Sir Ceredigion County Council

Advice on Interests – Economic Strategy Group Confidential

Purpose and Contents of Report

1. This report explores how best to address the anticipated conflicts of interest for members of the Growing Mid Wales Economic Strategy Group, specifically:-
 - 1.1. the interests that members may need to declare when dealing with the next stage of their work and
 - 1.2. whether these requirements for declarations of interests (and possible withdrawal from the meetings) lead to the need to revisit the purpose and operation of the Group and/or the way in which grant applications are assessed as part of the Growth Deal.
2. This report recognises that the input and engagement of private sector stakeholders into the development and securing of the Growth Deal is hugely valuable and is a key expectation of both Governments. Private sector support is seen as being vitally important to ensure the right mix of interventions are supported by regional governance - to deliver meaningful economic impact and results. However, it is also essential that the governance arrangements recognise that there is a risk for the private sector members, and for the two councils, if conflicts of interest are not recognised and addressed.

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3. I am a self-employed consultant, advising authorities across England and Wales. I specialise in training for elected members and senior officers, particularly on issues relating to governance, decision-making, standards of conduct and operating at the political interface.
4. Prior to setting up my business three years ago, I practised as a lawyer for 30+ years, working in house in local government and advising councils as a partner in a national law firm.

5. I now operate as a governance advisor, not a lawyer, and I do not hold a practising certificate. My advice here does not constitute legal advice on which you can rely – you will need your lawyers to review and advise on any legal issues.
6. The report contains the following sections:-
 - Background
 - Detailed activities of the ESG
 - Project Validation Review Concerns
 - Code of Conduct and Declaration of Interests
 - Risks in relation to Conflicts of Interests
 - Options and Conclusions

Background

7. I have been provided with and read the following documents:-
 - 7.1. The role and terms of reference for the Growing Mid Wales Economic Strategy Group (“ESG”)
 - 7.2. The Members’ Declaration for the ESG
 - 7.3. A written briefing for the ESG meeting on 10 September 2020
 - 7.4. The Project Validation Review report of the Welsh Government dated 6 October 2020
 - 7.5. Notes of a meeting of the ESG on 4 November 2019
 - 7.6. The Action Plan re PVR recommendations dated 30 November 2020
 - 7.7. A written briefing for the ESG meeting on 7 December 2020.
8. My understanding of the overall position is as follows:-
 - 8.1. The ESG is a group of business leaders from across Mid Wales (Powys and Ceredigion) which has been formally constituted via the Inter-Authority Agreement between Powys and Ceredigion, signed in November 2019.
 - 8.2. As such the ESG is not a statutory body, nor a legal entity, but a body voluntarily created by the two councils to assist them to deliver the Mid Wales Growth Deal.
 - 8.3. The ESG reports to the Growing Mid Wales Joint Committee which has been set up between the two councils (“the Board”).

8.4. The ESG is described as an “advisory, support and advocacy mechanism” for the Growth Deal with a specific role to:-

- Provide a business voice on the Growth Deal to the Board and champion the projects to be included within the Growth Deal
- Aid collaboration and communication within the private sector and to Authorities and other public funding bodies
- Represent local business views to shape future strategy and influence policy relevant to economic growth and business benefit at Mid Wales level
- Make recommendations to the Board

9. The responsibilities of the ESG are expressed to be as follows:-

9.1. The key role of the ESG is to represent the collective business interests in Mid Wales by bringing together business interests affecting the Growth Deal in a single forum.

9.2. The priorities of the ESG reflect existing local policy frameworks, specifically those relating to the Growth Deal and emerging economic plan and the ESG plays a significant role in contributing to, advising on, and advocating the Growth Deal.

10. The Chair of the ESG has a “deciding” vote on the ESG and also has “voting status” on the Board.

Detailed Activities of the ESG

11. I have not seen full details of the work carried/meetings held out to date by the ESG (and I do not need to have done so for the purposes of this advice). I anticipate that activities will have been impacted by the pandemic, but I understand that the ESG has been involved in the Growth Deal as follows:-

12. An initial meeting of the ESG was held on 4 November 2019 when Fiona Stewart was appointed as Chair and Steve Hughson was appointed as Vice-Chair.

13. The ESG received written briefings on progress of the Growth Deal in January and September 2020.

14. In the September 2020 briefing, the following was stated about the role of the ESG:-

“As outlined in the Terms of Reference, the group in itself is not a decision-making body. It plays a strategic role that oversees Portfolio and Programme development and delivery at a high-level. It will not make funding decisions or technical/operational decisions on individual projects. Its role is to provide strategic advice on the programme of investments – ensuring that there is collective agreement and advice flowing to the Joint Committee.

However, as the Portfolio develops, Programmes are structured, and projects start to be identified – there will be occasions where Members may feel there will be a potential for a conflict of interest”.

15. The ESG met on 7 December 2020. The briefing for that meeting envisaged the next stage of activity for the ESG being “to help sense-check and advise on the broad ambition for the Deal”. The briefing states

“It (the ESG) is not a decision-making body, and its role is not to scrutinise independent project business cases. Its role is more strategic in ensuring that the investments ultimately combine to the optimal mix of investments that can meet the targets set out of increasing regional employment and productivity growth and champion and support the Deal in leveraging further investment”.

16. My understanding is that there is an intention for the ESG to meet in September 2021 to review applications for projects which are being developed as candidates for funding and to make recommendations to the Board who will then make the final decisions.

17. The exact role of the ESG in reviewing these applications is expressed in varying ways in the papers I have seen. But I understand that the current plan is for the ESG to assess a number of projects at a meeting of the group. This will involve the consideration of the merits of different proposals and whether or not they will go forward with a recommendation for approval by the Board. My understanding is that approval will not result in grant funding being automatically allocated to those “successful” projects; rather, they will be included in the portfolio of projects which show the credibility and strength of the Growth proposal. But it is clear that approval of a project by the ESG and its reference on to the Board will strengthen its chances of being ultimately supported by funding and going ahead.

18. The ESG’s currently anticipated role in assessing these projects therefore directly engages the issue of whether any of its members (who may be connected in various ways with individual proposals) need to declare interests and withdraw from the meeting (and more fundamentally, whether the proposed role of the ESG is sustainable in this form). This is addressed in subsequent sections of this report.

Project Validation Review Concerns

19. The Project Validation Review (“PVR”) in October 2020 identified some concerns about the role of the private sector stakeholders in the governance arrangements for the Growth Deal. They concluded that:-

“It is clear there needs to be a comprehensive review of private sector input into the process going forward to ensure that it plays a clear role as the MWGD transitions from development to delivery.

The next phase of MWGD development would benefit from greater and more in-depth specific sector knowledge aligned to the eight diverse thematic segments. The MWGD should consider the restructuring and reconstitution of the private sector advisory support to reflect the MWGD Strategy and its thematic grouping. We believe no one group can cover the spectrum of the strategy and nor could any small number of individuals be expected to volunteer to such a demanding role.

The individual thematic sector groups could produce regular sector insight briefings and recommendations and the chair of each group form a Stakeholder Advisory Board.

The role of the private sector needs clarification and communication as the Deal moves from development to delivery. The strategic role of the group needs to be defined and communicated clearly in relation to the delivery of the Deal so that there is sufficient expertise and input to help inform the process.

Ultimately, this is a question to be addressed as Governance arrangements are evolved from development to delivery”.

20. Their **Recommendation 3** is as follows:-

“The SROs should review the private sector input, and the future requirements aligned to the MWGD Strategy, as we move phases from Vision to Delivery”

21. This identifies that the move from the strategic development of the deal towards consideration of specifics, highlights the importance of acknowledging and dealing with conflicts of interest amongst decision-makers and stakeholders.

22. The next section of the report looks at the arrangements for the registration and declaration of interests by members of the ESG.

Code of Conduct and Declaration of Interests

23. Members of the ESG were asked to sign up to a “Members’ Declaration”. I have not seen any signed copies, but I am working on the understanding that all members did sign the declaration and completed the attached register of interests.

24. The Members’ Declaration requires that members:-

“Declare any personal or financial interests that could arise in conflict with the business of the ESG and will be expected to conduct themselves in accordance with the seven principles of public life”.

25. These seven principles are the Nolan Principles which apply to all aspects of operating in public life and are as follows:-

- Selflessness
- Integrity

- Objectivity
- Accountability
- Openness
- Honesty
- Leadership

26. The Register of Interests which is attached to the Declaration is based on the model code/register used by all Welsh authorities. It requires registration of pecuniary interests (of the member and their partner/spouse) and also of personal interests (which cover involvement in other public bodies). The final requirement of the register is to declare:-

“Any other interest which I hold which might reasonably be likely to be perceived as affecting my conduct or influencing my action in relation to my role”

27. The heading of the Register refers to **Personal and Prejudicial Interests**. This is wording taken from the model code of conduct for Welsh councils. In the model code, a test is set out to assess when a personal interest moves into the category of a prejudicial interest. This is as follows:-

“Where you have a personal interest in any business of your authority you also have a prejudicial interest in that business if the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice your judgement of the public interest”.

28. If someone has a prejudicial interest under the Model Code of Conduct for Welsh Councils, they must withdraw from the room, chamber or place where a meeting considering the business is being held, not seek to influence any decision about that business and not make any oral representations about that business.

29. Councillors are able to apply for dispensations in certain circumstances to allow them to speak and/or vote if they have a prejudicial interest. Councillors can also take advantage of any public speaking rights where these exist. But neither of these circumstances would, in my view, apply to the ESG members.

30. The ESG code, whilst referring to personal and prejudicial interests in the heading, does not explicitly contain this test. But, in my view, it is a useful tool to use in assessing whether any particular interest is of such a nature that it should lead to an ESG member withdrawing from a meeting.

31. There is nothing in the Members’ Declaration itself which sets out how members are to assess if a registered interest might affect their participation in ESG business (other than requiring them to apply the Nolan principles). But this is addressed in the “Terms of Reference” document as follows:-

Para 7.3 Members of the ESG are required to declare any personal or financial interests in any business of the ESG at the commencement of the meeting. The Chair

of the ESG will decide if this will lead to members' exclusion from the item in question, the whole meeting or withdrawal from the ESG (temporarily or permanently).

Para 7.4 As the Chair of the ESG's role includes an advisory role to the Board, the ESG members will be expected to conduct themselves in accordance with the "seven principles of public life" as set out by the Committee Standards in Public Life (Nolan Committee)".

32. The question of potential conflicts of interest was addressed in the Written Briefing to the ESG meeting on 10 September 2020. This recognised the potential for conflicts of interest to arise and referred to the second legal agreement which would be required. In particular:-

"As part of the development of this governance model and the second legal agreement (IAA2) a Conflict of Interest Protocol will be developed. This will ensure there is a clear protocol by which Members of all groupings (Board, Management Group, ESG etc) are clear on how potential prejudicial or personal interests are identified, recorded and managed. This is required as the nature of the Growth Deal becomes clearer, so that both internally and externally there is confidence of transparency and robustness in the structures we have established for delivering projects alongside the commissioning (assurance, approvals & scrutiny)".

33. The September paper also addressed the specific issue of potential conflicts of interest for members of the ESG. It recognised that, as projects started to be identified, there could be occasions where members might feel there was a potential for conflict of interest. The paper stated:-

"To manage this process in the interim, the Secretariat will request that Members list their interest on record. This will be done via a form to be completed (communicated separately over August).

At each meeting of the ESG thereafter, Members should consider if the discussion is likely to go past a point at which they feel there may be a conflict. The Secretariat will be on hand to advise Members on individual cases if the need arises".

34. I presume that the reference to "the interim" referred to the anticipated development of a Conflicts of Interest Protocol" to address interests in more detail. I am not aware that such a protocol has yet been developed.

35. In the Written Briefing for the ESG on 7 December 2020, a question was also raised about members' interests as follows:-

Q:	To address issues relating to conflict of interest will ESG members applying for Mid Wales Growth funding attend meetings where their proposal or similar proposals are being discussed or will this only be the case where it is at the point of the agreement or not?
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A:	<p>This was briefed in the September briefing. It is also referred to generally in the Terms of Reference of the Group.</p> <p>The ESG is public group, advising on public funding. It is consisted of members from the private sector. The process established is exactly the same as both Local Authorities would follow in managing declarations of interest with any council business.</p> <p>Members need to complete a Declarations of Interest form. This is held on record by the Monitoring Officer and will need to be updated regularly. It is the Members’ responsibility to ensure this record of interests is updated when their circumstances change.</p> <p>At each meeting, it is the Members’ responsibility to review the agenda and papers – and if a potential conflict arises, it should be made known to the secretariat (council officers) at the earliest opportunity. Officers will then advise the Chair as to the appropriate method of conducting the business of the meeting. It may be that the Member leaves for the item – or for the whole meeting, depending on the conflict.</p>
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36. At the first meeting of the ESG, the importance of the registration and declaration of interests was stressed by the officers in attendance. The comment was as follows:-

“The importance of highlighting interests properly were (sic) emphasized, with Members reminded of potential criminal proceedings if such interests are not declared at the outset”.

37. Although the provisions of the Members’ Declaration and of the Terms of Reference are quite broad, in my opinion the requirements for members of the ESG to register and declare relevant interests are robust and appropriate for a body of this nature. They (coupled with the Nolan Principles) provide a strong framework to use when assessing if members of the ESG have interests they need to register and/or declare.

Risks in relation to conflicts of interest

38. If the ESG is involved in issues where participating members make decisions despite conflicts of interest, there are a number of potential risks/consequences as follows:-

- Overall risk to the Project
- Personal risks to the members themselves – legal and reputational
- Risks to the authorities – legal and reputational

39. It should be clearly stated that I am not aware of any concerns whatsoever about the integrity of the members of the ESG or about their awareness of their obligation to disclose interests where required. But it is good practice (1) to ensure that no member is

placed in a difficult position in relation to potential interests and (2) to ensure that the overall governance arrangements for the project are as robust as possible.

Overall risk to the Project

40. If the governance arrangements for the project are not considered fit for purpose, or there is any concern about impropriety in the way in which the Growth Deal is being progressed, there could be a risk that the Project itself is not supported by Government. The PVR recommendations emphasize the importance of good governance.

Risks to the members

41. In relation to risks to the members themselves, members of the ESG are not (as far as I am aware) co-opted members of either council. They are therefore not subject to the council's code of conduct nor to the jurisdiction of the Public Service Ombudsman Wales. So a complaint about a breach of the ESG Code could not be progressed. (You may want to check this with council lawyers).
42. However, members are subject to the general law and, if they flagrantly participate in decisions to give themselves or friends/family/associates financial benefits from public money, they could risk legal action in the form of a prosecution for misconduct in public office, civil action on the basis of misfeasance on public office or civil action for breach of trust/fiduciary duty. Such proceedings/actions are very rare, but it is important that the members understand these risks.
43. Even if no legal action was taken, individual members who acted without recognising the conflicts of interest would risk reputational criticism which could affect them (and their businesses).

Risks to the Councils

44. On the basis that it is the two authorities (through the Board) who will be making the operative decisions on grant funding (albeit taking account of the recommendations of the ESG) any challenge to the decisions is likely to be brought against the councils. The basis of such a challenge (if members of the ESG have been inappropriately involved in considering issues where they have conflicts of interest) could be that the decision was taken unlawfully either because of a breach of procedure (the ESG members had not adhered to their code) or, more likely, that the decision was tainted by bias.
45. Bias can be argued where a decision-maker is not impartial/objective in coming to a decision. Even though the decision-maker may in fact be scrupulously impartial, the *appearance of bias* can itself call into question the legitimacy of the decision-making process. In general, the rule against bias looks to the appearance or risk of bias rather than bias in fact, in order to ensure that justice should not only be done but should manifestly and undoubtedly be seen to be done.

46. The risk of a legal challenge to the council's decisions based on bias/apparent bias by the members of the ESG in making recommendations is probably low (provided that the councils' decisions themselves through the Board are robust) but should obviously be avoided if possible.
47. In addition to the legal risk to the councils of being involved in a tainted process of grant allocation, there is a clear risk of reputational damage. The decisions made and the identity of the ESG members involved in the process will be in the public domain and there could well be negative press and public reaction to any intimation of bias/lack of probity. This could impact on the councils' reputation with key stakeholders including the two governments, the wider business community and taxpayers.

Conclusions and Options

48. I have applied the terms of the Members' Declaration (including the Nolan Principles) and the Terms of Reference of the ESG to the likely position of members of the ESG at their September meeting. In doing so I have used the test for "prejudicial interests" as explained in para 27 above. I am working on the basis that the proposed Conflicts of Interest Policy has not yet been developed.
49. In my view, there are a number of obvious circumstances in which a member of the ESG would need to declare an interest and withdraw from the meeting, including where the project/funding application being discussed:-
- Had been made by them, their partner or the business of them or their partner
 - Had been made by a body named in their register of personal/prejudicial interests
 - Had been made by a close personal associate or their business
 - Had been made by a competitor or someone in the same business/market whose success (or failure) might reasonably be regarded as affecting the member, their partner or close personal associate
 - Could particularly affect the financial position or well-being of the member, their partner or a close personal associate.
50. In addition, to considering if members have an interest in any individual application, if the success or failure of any one project/application has an impact on the others (for example because of a finite financial envelope or a limit on the number of projects per market etc) it is arguable that any member with an interest under para 50 above, has an interest in the whole item and should therefore withdraw from any discussion on the topic.
51. If a sensible application of the ESG Code leads to a conclusion that there will be a significant number of declarations of conflicts of interest (and withdrawals from the meeting), this must raise the fundamental question of whether the inherent conflicts are so profound that it is not tenable for the ESG to continue in its current form/with its current remit.

52. It is appreciated that ESG members are expecting to have an opportunity to get involved in the assessment of individual projects but, in my view, there is real risk with a continuation of this process. There are two scenarios, both of which carry risk:-

- (1) Members do not accept or recognise that they have conflicts and do not declare them/withdraw from the discussion. This would lead to a risk that the process is criticised, discredited and potentially challenged with reputational damage to them and to the councils (and the whole Growth Deal) or
- (2) Members do recognise the conflicts and declare all the required interests. This could lead to an unsatisfactory meeting with reduced numbers of members (who will inevitably have less knowledge about the subject matter of the projects) having to make decisions. There could also be a risk of the meeting not being quorate at certain points.

53. Given the risks, in my view, these are the potential options, listing the least risky first.

Option One

- Take the opportunity now to fundamentally review the approach to private sector engagement in the Growth Deal, and therefore the role/existence of the ESG. The PVR recommendations appear to require this in any event. This would enable explicit recognition of the conflicts inherent in local private sector representatives having a role in the assessment of individual projects. It would recognise that the Growth Deal is moving from vision/strategy to delivery, and that this is the time to re-set the governance arrangements.
- The downside is that changing the remit of the ESG could attract criticism and it might alienate business support and key stakeholders. Different means of ensuring that expert business/market knowledge is built into the process would have to be found to ensure that the quality of the ultimate decision did not suffer. This is the safest option in terms of protecting the ESG members and the councils against criticism of the governance arrangements and accusations of conflicts/bias.

Option Two

- Retain the ESG as a strategic group for the moment but recognise that it should not have a role in the forthcoming assessment of individual projects/applications. This would probably not be well received by the members who, I understand, are looking forward to getting into detail at their next meeting, and they could withdraw their support. But it would protect them (and the councils) against accusations of bias etc. The Chair and Vice Chair could be fully briefed on the inherent conflicts and would hopefully then support the approach. An alternative means of dealing with the assessment of the projects in September would have to be found. This could involve officers reporting direct to the Board, perhaps informed by business views from independent sources with no interest in the specific projects.

Option Three

- If the numbers allow this, set up a sub-group of the ESG comprised of members who do not have interests to declare, give them delegated power to come to conclusions and to make recommendations straight on to the Board. This retains the expertise and goodwill of the business members but mitigates against the risk of members making decisions on issues where they have financial/personal interests.
- The downside of this approach is that the ESG would be represented by a limited number of people who are unlikely to have direct expertise on the projects being considered.

Option Four

- Continue with the planned ESG meeting in September but mitigate the risks of this approach by
 - (1) applying the ESG Code scrupulously, recognising that this will mean a number of members declaring interests and leaving for quite a few applications, or for the whole meeting
 - (2) Emphasizing that the ESG is not decision-making, but is simply passing on its views to the Board and
 - (3) Ensuring an objective, officer-led report to the Board.

The declaration of a number of interests could lead to a somewhat fragmented meeting or, at worst, a loss of quorum. It might also put an onerous responsibility on a few members which might attract criticism and risk a narrow viewpoint of the merits of the projects. But it would retain the integrity of the ESG concept and utilise the business expertise for which the members were selected.

54. If Option Three or Four is pursued, there would be merit in organising training for the members of the ESG or the new sub-group, focusing on their roles/responsibilities, the provisions of the Code/the principles and when they need to declare interests.

55. Whatever option is pursued, there would also be merit in moving ahead with the drafting of the proposed Conflicts of Interest Protocol to support the next stage of the Governance arrangements.

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