

## **Preventing and Managing Potential or Actual Conflicts of Interest in the Agency for the Cooperation of Energy Regulators**

A note by the Director for discussion in the Administrative Board

Integrity is important in all strands of life, but it becomes essential in public functions. In the regulatory practice, the highest level of integrity is required to ensure the quality and credibility of the regulatory action. Conflicts of interest, actual or perceived, may put integrity of the decision-making process into question and therefore should be avoided and, where this is not possible, effectively managed.

The European Parliament has recently re-emphasised and is placing particular attention on the issue of conflicts of interest, also in the case of EU Agencies.

In the case of ACER, conflicts of interest may arise with:

- Agency staff members;
- Members and alternates of the Administrative Board;
- Members and alternates of the Board of Regulators;
- Members and alternates of the Board of Appeal.

In the case of *staff members*, the provisions of the Staff Regulations (SR) and of the Conditions of Employment of Other Servants (CEOS) seem to provide sufficient guarantee with respect to conflicts of interest.

In particular:

- Article 12 specifies that “an official wishing to engage in an outside activity, whether paid or unpaid, or to carry out any assignment outside the Communities, shall first obtain the permission of the Appointing Authority. Permission shall be refused only if the activity or assignment in question is such as to interfere with the performance of the official's duties or is incompatible with the interests of the institution”.
- Article 13 specifies that “If the spouse of an official is in gainful employment, the official shall inform the appointing authority of his institution. Should the nature of the employment prove to be incompatible with that of the official and if the official is unable to give an undertaking that it will cease within a specified period, the appointing authority shall, after consulting the Joint Committee, decide whether the official shall continue in his post or be transferred to another post”.
- Article 15 specifies that: “1. An official who intends to stand for public office shall notify the Appointing Authority. The Appointing Authority shall decide, in the light of the interests of the service, whether the official concerned:
  - (a) should be required to apply for leave on personal grounds, or
  - (b) should be granted annual leave, or
  - (c) may be authorised to discharge his duties on a part-time basis, or
  - (d) may continue to discharge his duties as before.

2. An official elected or appointed to public office shall immediately inform the Appointing Authority. The Appointing Authority shall, having regard to the interests of the service, the importance of the office, the duties it entails and the remuneration and reimbursement of expenses incurred in carrying out those duties, take one of the decisions referred to in paragraph 1. If the official is required to take leave on personal grounds or is authorised to discharge his duties on a part-time basis, the period of such leave or part-time working shall correspond to the official's term of office".

- Finally, article 16 specifies that: "Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof. If that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the Appointing Authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit".

The Agency will monitor the effectiveness of these provisions in preventing situations of conflict of interests affecting its staff and will adopt specific rules if necessary.

In the case of the members of the **Board of Regulators**, the ACER Regulation specifies that "the Board of Regulators shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity" (art. 14(5)). However, each of its members represents one NRA and its interest. Therefore, the representation of national interests in the Board of Regulators and the conflicts which may arise with respect to the interest of the EU as a whole are in the nature of the Board itself. In this respect, it is noticeable that the ACER Regulation does not contain any provision on the exclusion from voting in the Board of Regulators of members who may find themselves, on the reason of the NRAs they represent, in a situation of "institutional" conflict of interest. Finally, national provisions and safeguards typically applicable to senior members of NRAs should prevent any conflict of interest, beyond those related to the position of the institutions they represent, to arise. In fact, members of the Board of Regulators are not required to make any declaration of interests.

The case of the **Administrative Board** and the **Board of Appeal** is more complex, as their members are not appointed explicitly to represent an institution, but rather to act independently and in the public interest. This is explicitly stated in the ACER Regulation:

- "The members of the Administrative Board shall undertake to act independently and objectively in the public interest, without seeking or following any political instructions" (art. 12(7)).
- "The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions" (art. 18(3)), "Members of the Board of Appeal shall not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal" (art. 18(4)) and "The members of the Board of Appeal shall undertake to act independently and in the public interest" (art. 18(7)).

In the case of both Boards, members are required annually to make a declaration of commitments and a written declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence.

The issue is therefore how to process these declarations and, in particular, how to deal with any general or specific situation emerging from the declarations which may entail a potential or actual conflict of interest.

In this respect, the following procedure is proposed, applicable to both the Administrative Board and the Board of Appeal:

- The annual declarations of the members of a Board, collected by the secretary of the Board, are sent to the Chair and to the Vice-Chair of the Board, and to the Director.
- Where a declaration gives rise to a situation of actual, possible, or even perceived, conflict of interest, the Chair may decide, in consultation with the relevant member and the Director, to inform the appointing institution stating the nature of the problem. The declaration of the Chair is handled by the Vice-Chair in a similar way.
- In assessing the declarations rendered by the Board members, the Chair or the Vice-Chair, as the case may be, should consider that any situation of a member which already existed at the time of his/her appointment as member of a Board, which the appointing institution was or should have been aware of at the time of the appointment and which was declared in the first declaration rendered by the member is deemed not to entail any conflict of interest. This shall not relieve the member from the obligation of declaring the interest which is giving rise to the situation under consideration.
- In case the Director is not satisfied with the way in which a situation is handled, he/she will inform the Chair or Vice-Chair of the Board, as the case may be. If, even after this communication, the Director still considers that the situation is not being handled adequately, he/she will inform the Administrative Board at the next meeting and have his/her concerns noted in the minutes.

In the case of the Board of Appeal, the procedure proposed above is clearly without prejudice to the provisions in art. 18(4) of the ACER Regulation quoted above [Members of the Board of Appeal shall not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal].