

MANAGING CONFLICT OF INTEREST IN SANCO

Introduction

In the last few years, increasing attention has focused on how the European institutions manage stakeholders who seek to influence policy-making and people who provide expert advice within the institutions. The European Commission (EC) has responded by developing policies about who it should consult and how, reflected in two policy initiatives: the White Paper on Governance 2001 ('who' it should consult) and secondly, the European Transparency initiative, which is about managing the 'how' of the Commission's interaction with stakeholders, particularly in seeking to ensure openness and transparency.

On conflict of interest, the Commission has published a study on rules and standards of professional ethics for holders of public office in the EU institutions¹. This study includes a section on conflicts of interest and examines how they are handled in different administrative contexts. What still remains unclear is how the Commission tackles or should tackle conflicts of interest for external advisors who are neither Commission staff, nor Commission service providers, nor Commission holders of public office.

DG SANCO undertook a process of its own to understand what stakeholders need in this respect to ensure improved interaction in policy-making, and discussed the issue with the Stakeholder Dialogue Group. This paper contains the reflections of that discussion directed at developing a SANCO approach to 'mitigate' potential conflicts of interest accusations in the policy-making field on the premise that:

- It is custom for EC work to appoint advisors, either in personal or professional capacity, to provide advice on its activities. The EC does not generally have in-house experts.
- Appointments are usually made in a transparent and open manner through an open selection procedure with a clear remit for the role of the advisor.
- Appointed advisors are by definition experienced people who have currently or in the past held other occupations which may be considered 'conflictual'. As such, it is expected that these individuals will have disclosed all their activities.
- EC staff have committed to rules of good conduct in the management of conflicts of interest.²
- The EC does not have the discretion to determine individuals' conflict of interest, and is therefore vulnerable to judiciary discretion.

Conflict of interest: Policy-making perspective

Today, conflicts of interest among external experts and advisors are a given. Few of them have no institutional, financial, professional, or personal conflicts that represent real or perceived threats to the organisation to which s/he is providing advice.

EU policy-makers look to external expert advice to help support, evidence and evaluate their potential policy choices. To be useful, such advice must be objective and free from bias caused by conflicts between the advisor's obligations to the institution s/he is advising. It is essential that external experts are free from financial self-interest when performing their duties as advisors; that they have no parallel loyalty to another organisation; that they are not burdened with competing personal or professional agendas or compromising personal or professional relationships. Divided loyalties and self-interests of any kind create the danger of skewed advice. Such a threat robs the entire advisory process of meaning, and hurts the institution's integrity.

From a policy-making perspective, a conflict of interest arises where an individual advising the Commission has professional or personal connections which motivate him/her to exploit their

¹ http://ec.europa.eu/dgs/policy_advisers/publications/docs/hpo_professional_ethics_en.pdf

² Article 16 Staff Regulations : <http://www.cc.cec/statut/pdf/20070501/en.pdf>

relationship with the Commission for personal or professional benefit. Depending upon the rules of a particular organisation, the existence of a conflict of interest may not, in itself, be evidence of wrongdoing. In fact, for many professionals it is virtually impossible to avoid having conflicts of interest at given points in time.

Relationships of interest – whether potential or apparent – are ubiquitous and exist almost by definition. They require the obligation of their systematic declaration as they are a threat to the advisor's effectiveness. The distinction between denied or undeclared interests from any situation of "conflict" is irrelevant. Denying that a conflict exists because one did not act improperly does not eliminate the conflict. A conflict of interest exists even if no improper act results from it.

One way to understand this is to use the term "conflict of roles". A person with two roles - an individual who advises the energy industry, but is also a Commission adviser, for example, may experience situations where these two roles conflict. Having two roles is not illegal, but the differing roles will certainly provide an incentive for improper acts in some circumstances.³ Another aspect is the perception of a conflict of interest: real and potential conflicts of interest are the stuff of media attacks on the institutions and on the individuals who advise them. Significantly, it was a widely reported NGO attack which led the EC to publish the list of advisors that it consults⁴. In the process, the reputations of many individuals with a long record of public service were undermined through allegations of conflicts of interest.

Conflict of interest and the European Commission

Conflicts of interest in the public sector have become a major matter of concern at EU level. At a time when the European institutions are embracing transparency and participatory mechanisms, the EC is coming under ever closer public scrutiny. Gaps or grey areas in the management of conflicts by the EC could not only lead to embarrassing situations for the institution. They risk eroding public trust in the entire policy-making process, undermining the legitimacy of the EC and, ultimately, damaging the democratic ethos on which the EU is founded.

The crux of the matter is not whether conflicts will arise, but how the EC will handle them when they do. Without trust in the institutions that are charged with managing conflicts of interest, the quality of deliberative decision-making in our society will diminish.

That is why the establishment and adherence to a clear-cut explicit EC policy on potential and existing conflict of interest and the accompanying rules of conduct for advisors is imperative. Identifying and checking for a conflict of interest situation need to be routine steps in any interaction with external parties, whether these are individuals recruited as external experts or are selected to act in their personal capacity.

Ultimately, it is up to the Commission to put such policies in place that will maximise the degree to which the external advice it receives is objective and unimpeded by self-interests and divided loyalties. Ethical standards should come from the top down. High hierarchy should state its intolerance to external allegations of conflicts of interest breaches, and aim to prevent such situations at all costs.

External experts however, are not devoid of personal responsibility to be sensitive about situations that represent potential or actual conflicts of interest. Completing a conflict of interest declaration describing all situations and affiliations that might be conflictual with the advisory role should be the first step towards the identification of a conflict of interest.

Ethics versus Politics

The debate on conflict of interest is ethical but is carried out in a political context. It is useful to separate the ethical considerations from the political ones. As the political context will always change, a conflicts policy based on the ethical context will be more robust over time. For example,

³ Definition of 'conflict of interest' taken from www.Wikipedia.org

⁴ Commission list of Special Advisors: http://ec.europa.eu/commission_barroso/pdf/special_advisers_fr.pdf

to avoid a conflict in the political context it is sufficient to declare it. In the ethical context only recusal can provide a solution to actual conflict.

Mitigating conflicts of interest

It is inevitable that the external experts selected to provide advice to the EC are experienced and active individuals, and as such have multiple interests, areas of involvement and affiliations. It is entirely up to the EC to decide how to prevent situations of conflict as much as possible, but once they occur, to manage them in a firm and consistent manner.

Transparency and disclosure

Disclosure and transparency throughout are critical for preventing conflicts of interest. Determining a conflict often lies in the individual's subjective realm, and depends on personal good judgement. Openness and transparency must cover both procedures and individuals. Decisions on the resolution of situations of conflict of interest must be shared between the institution and the individual but the final responsibility rests with the institution's leadership.

When an advisor identifies a conflict, s/he must disclose it well in advance of any discussion or action in which the conflict is a factor, and again at the time of the discussion. Following that disclosure, it is the institution's rules that will decide the outcome, whether this be removal, recusal, etc.

Clear mandates and clear procedures

- External experts acting as advisors to the EC services need to know the extent of their involvement and the limits of their mandate. That is a prerequisite to help them evaluate if a potential or actual conflict of interest exists. Mandates must be kept short and focused. Regular turnover should be an integral element of efforts to prevent and manage conflicts of interest
- Clear pre-established procedures regarding conflicts of interest raise awareness among individuals and identify penalisations should potential or existing conflicts not declared.
- Individuals need to be carefully considered and correctly managed. A declared conflict of interest must be considered as a conflict of interest proper that would preclude any further advisory relations between the EC and the expert in the respective context.
- In the case of "revolving doors", a cooling-off period should enable individuals to regain their independence.

Binding rules

- As the potential for conflicts of interest is latent when reaching out to third parties, the EC can pre-empt and avoid conflicts of interest by being applying binding rules governing the management of conflict of interests.
- Individuals must be obliged to subscribe and adhere to a specific code of ethics. Compliance should be obligatory if a code is to be respectable and credible.

Removal

The simplest way to handle conflicts of interest is to avoid them altogether. For example, someone who is known to work for an organisation with a 'vested interest' on a particular policy issue and is appointed advisor, should simply not be appointed. In certain member states, politicians are required to remove themselves from any interest before being appointed.

Recusal

In all cases the Commission will need to establish a process to handle potential conflict of interest and especially allegations thereof. Usually, the institutions are silent (and officials embarrassed) when media stories allege conflicts of interest. Individuals are left to manage the unfolding torrent of publicity alone. Ultimately, it is the institutions that suffer most – partly due to their silence, which suggests complicity.

Those with a conflict of interest are expected to abstain themselves from decisions where such a conflict exists and absent themselves when decisions are being deliberated where their conflict is a factor. In legal situations, judges and lawyers are obliged to recuse themselves from a situation of conflict of interest. In a policy context this may be less clear, particularly if the person in question does not consider that as an 'expert' they would be in a conflict situation. Such clear practices and their consistent application should ensure the credibility of the institutions in the face of public attack over conflict of interest.

Managing individuals acting in personal capacity

- It is essential to clarify what is meant under "appointment in personal capacity". There is a fine line to draw between an organisation's interests and the individuals working for it but who are engaged *ad personam* in other bodies.
- The workplace of *ad personam* advisors must be declared.
- Acting in one's personal capacity should not be confused with neutrality. When meeting policy-makers to shape policy, there is no conflict of interest as one represents one of many perspectives.
- With regard to acting in personal capacity, the issue of perception can undermine the amount of fairness one can exercise in determining conflict of interest, and result in the exclusion of good experts. The solution could be in case-by-case analysis at the decision-maker's discretion.

Code of ethics

Codes of ethics can help to minimise problems with conflicts of interest because they can spell out the extent to which such conflicts should be avoided, and what the parties should do (disclosure, recusal, etc). Thus, experts cannot claim that they were unaware that their improper behaviour was unethical. Awareness of the consequences and the threat of action (e.g. removal of an expert) can help to prevent unacceptable conflicts. Codes of ethics cannot cover all possible situations though, and some governments have created special bodies to review these questions⁵.

In a speech⁶ to the Institute of Business Ethics, Sir Nigel Wicks, Chair, Committee on Standards in Public Life, makes the following point:

"Although the dividing line between private life and public responsibilities can never be definite and clear, there is a moral threshold which is crossed both by those who assume power to change the lives of many men through public action and by those who undertake to represent in a public role the will and interests of many other men. A new responsibility, and even a new kind of responsibility, and new moral conflicts, present themselves."

⁵ For more detail on how each country manages codes of ethics for holders of public offices
http://ec.europa.eu/dgs/policy_advisers/publications/docs/hpo_professional_ethics_en.pdf

⁶ http://www.public-standards.gov.uk/publications/speeches_and_summaries/2002/ethics_in_public_life.aspx