

Decision of the European Ombudsman closing the inquiry into complaint 208/2015/PD concerning conflicts of interests in a Commission expert group on electromagnetic field

Decision

Case 208/2015/PD - Opened on 06/03/2015 - Decision on 18/04/2017 - Institution concerned European Commission (No maladministration found) |

The case concerned alleged conflicts of interests concerning members of a Commission working group tasked with reviewing the science on the effects that electromagnetic fields may have on health. The complaint to the Ombudsman alleged that the Commission had not examined properly whether the scientists in the working group had conflicts of interests.

The Ombudsman inquired into the issue. She was satisfied that the Commission had examined the matter properly and that the scientists had no conflicting interests. Thus, there was no maladministration by the Commission. However, the Ombudsman found that the Commission's procedures could be improved and made some suggestions for improvement.

The background to the complaint

1. The complainant is a Spanish NGO (the "Asociación Vallisoletana de Afectad@s por las Antenas de Telecomunicaciones" or "AVAATE") that campaigns against the installation of antennas emitting electromagnetic fields and other devices such as mobile telephones because of concerns it has as regards their impact on health. Electromagnetic fields radiate from many common devices, such as micro-wave ovens, mobile telephony masts, refrigerators, and mobile telephones.

2. Council Recommendation 1999/519 of 12 July 1999 on the limitation of exposure of the general public to electromagnetic fields lays down basic restrictions and reference levels for the exposure of the public to electromagnetic fields. The Recommendation also obliges the Commission to keep the matter under review. To lift that task the Commission has recourse to its Scientific Committee on Emerging and Newly Identified Health Risks ("SCENIHR"). In this context, in 2012, SCENIHR set up a working group of scientists to **analyse published scientific studies on the potential health effects of exposure to electromagnetic fields** .



3. The complainant contacted the European Commission in September 2014 about concerns it had that some members of the working group had conflicts of interests. It argued that the persons concerned received funding from or worked for telecommunication companies.

4. In its reply to the complainant, the Commission outlined how it addressed possible conflicts of interest concerning members of a working group. According to the Commission, the fact that a member of a working group had declared an “interest” to the Commission did not necessarily imply that the person had a “conflict of interests”. A conflict of interests, the Commission said, “exists **only** when a member of the working group benefits personally from the results of the work of the group” (emphasis added). Moreover, the Commission assured the association that it was not for the individual experts to self-assess whether they were in a “conflict of interest”. Rather, it was for the Commission's staff to carry out that assessment.

5. The complainant considered the Commission's reply to be unsatisfactory. It turned to the Ombudsman in January 2015 to complain that the Commission had not dealt properly with its concerns.

6. By way of further background information, the work of the working group resulted in the adoption of an opinion by SCENIHR in January 2015. [1] The working group was then dissolved. The subject matter of the present inquiry does not relate to the content of that opinion.

The inquiry

7. The Ombudsman opened an inquiry. The object of the Ombudsman's inquiry was the following:

The Commission failed adequately to examine the conflict of interest issues regarding several members of the working group on the effects of electromagnetic fields.

8. Two matters were of particular concern to the Ombudsman when opening the inquiry. First, the Commission's reply to the complainant seemed to be based on a restrictive definition of the notion of “conflict of interest”. The reply seemed to consider that such conflicts can only occur when the experts in question draw “personal benefits” from the public task they are entrusted with. In the second place, the reply seemed to rule out the possibility of a “conflict of interest” on the ground that the assessment of such matters lies with the Commission's services and is not left to the experts themselves. While the Ombudsman recognised the importance of ensuring that it is the Commission (and not the person concerned) that assesses if there is a conflict of interests, the Commission must still be able to show that the assessment it carries out is thorough, performed on a case-by-case basis and properly documented.

9. The Ombudsman asked for the Commission's reply on the matter. The Ombudsman also inspected the Commission's file and sent the complainant a copy of the inspection report. The complainant lodged comments on the Commission's reply and on the inspection report.



Examination of conflicts of interest issues regarding members of the working group

Arguments presented to the Ombudsman

10. The complainant stated that most members of the working group had ties to the telecommunications industry. It argued that they had, in some way or other, received funding from or worked for organisations or firms in the telecommunications sector. According to the complainant, this information transpired from the declarations of interest that the members of the working group had made, or from information it had obtained from the Internet. Therefore, the complainant stated, the independence of the working group was impaired and so was its work. In the view of the complainant, the Commission had failed to assess properly these conflicts of interest.

11. In its opinion the Commission explained the mechanisms in place to select working group members and to ensure that there is no conflict of interest. The working group is chaired by a member of SCENIHR. The members are selected from a pool of scientific advisors, established after a public call for interest, or a database of experts - the database is open to everyone who would like to apply. If no expert with the needed profile can be found in the pool or the database, then an expert may be recruited following a specific public call for interest. The experts of the working groups have to submit a declaration of interest. They can only be appointed if the Commission does not identify that they have a conflict of interest. Once the work of the working group has given rise to a so-called “preliminary opinion” to be used as a basis for a public consultation, the names of the experts, as well as their declarations of interest, are published in the Register of Commission Expert Groups and on the website of the responsible DG of the Commission, DG SANTE. By not making their names public until after the preliminary opinion has been drafted, the Commission prevents third parties from trying to influence the experts’ scientific assessment. At the same time, releasing the names ensures transparency at the critical point in time when the preliminary opinion is released and used for a public consultation.

12. In this case, the Commission stated, it examined the experts’ declarations of interest when the working group was set up in 2012. Moreover, the Commission stated that it conducted a renewed examination of conflicts of interests in the first half of 2014. This re-examination occurred because the Commission received, when the preliminary opinion was released for public consultation in early 2014, several complaints concerning alleged conflicts of interests regarding the members of the working group. The re-examination did not lead to any change in the Commission’s original assessment as regards the absence of conflicts of interest. The Commission also drew attention to the distinction between declarable interest and an interest that leads to a conflict; it is for the scientists to declare interests, no matter whether they believe themselves that there is conflict or not; it is for the Commission to assess whether there is a conflict of interest. `

13. The final opinion was adopted in January 2015 after the public consultation.



14. As to the Ombudsman's first concern, the Commission stated that the criteria and the information relevant for the assessment of conflicts of interest are set out in paragraph 21 of the applicable Rules of Procedure and in particular Annex II to the Rules of Procedure. [2] Annex II provides specific guidance on a number of aspects relevant for the assessment of independence and contains the form for the declaration of interest. Annex II covers not only activities through which the scientist may draw personal benefits, such as employment, consultancy and investments. The Annex covers also other activities, links, or circumstances, such as: Point 6 Research – *any current or future influence on the definition of research priorities, the drafting of research programmes or the selection of research projects and current funding of research in relation to matter or work financed by a private or public entity, including grants, rents, sponsorships and fellowships*; point 8 Other membership or affiliation – *any membership or affiliation other than the above which can be perceived as an interest in the field of activity of a Committee* ; and point 10 Other - *any interest other than the above which can be perceived as a potential source of conflict in an activity included in the committee's remit*.

15. In reply to the Ombudsman's second concern, which was whether experts self-assessed if they were in a conflict of interests or whether the Commission carried out that assessment, the Commission stated that the assessment of conflicts of interests is not performed by the scientist in question. Rather, it was conducted by the Commission staff and then by the peers, that is, the chair and the other members. The process is, the Commission stated, well-documented.

16. The Commission also set out, in detail, an analysis of the specific arguments put forward by the complainant as regards why, in the complainant's view, certain members of the working group had conflicts of interest.

17. As regards the concerns of the complainant that certain members provided consultancy services for telecommunication companies, the Commission did not exclude that such work could give rise to conflicts of interest. It first stated that consultancy/advice is defined in the Rules of Procedure as "any paid or unpaid, past, present or future activity in which the expert or his dependent collaborators provides technical or scientific advice or services in domains of relevance for the work of the Scientific Committee". It added, however, that in the specific cases raised by the complainant, no conflict of interest was identified for any member of the working group:

18. In three cases raised by the complainant, the consultancy services provided by the experts to private companies related to a different subject than the SCENIHR Opinion: the consultancy services related to measurements of electromagnetic fields, workers' protection [3] , or a report on possible psychological mechanisms for the symptoms attributed to wind turbines. In contrast, the SCENIHR Opinion relates to the assessment of possible health effects of electromagnetic fields, carried out in the form of a meta-analysis of primary scientific studies published in peer-reviewed journals. Therefore, that interest was considered not to constitute a conflict because it is not directly related to the subject matter of the SCENIHR Opinion.

19. In the remaining "consultancy" cases raised by the complainant, the experts carried out the work as employees of a public body (a university or a research institute). It was public bodies,



and not the experts themselves, which had research contracts with the telecommunication companies.

20. As regards the concerns of the complainant that certain members participated in scientific “projects” funded by industry, the Commission noted that the funding was provided by a private company to national public organisations, or to an international institutions recognised by the World Health Organization. In no case did any expert participate in his or her own private capacity in research funded by industry.

21. One case raised by the complainant even involved a large research project funded by the 7th Framework Program of the Commission’s Directorate General for Research and Innovation. The project was coordinated by the International Agency for Research on Cancer, and involved several research institutes, such as the Danish Cancer Society, the University of Tampere, Istituto Superiore di Sanita, the Karolinska Institute, Université Claude-Bernard Lyon, Universität Mainz, the Norwegian Radiation Protection Agency, University of Leeds, London School of Hygiene and Tropical Medicine and Tel-Hashomer (Israel). Industry, as well as NGOs, are allowed to be partners in EU-funded projects.

22. Two other cases mentioned in the complaint concerned small research projects carried out in a Member State’s research institute where the experts were employed. Those projects were commissioned by a private company. However, according to the Commission, the work of the experts constituted an “institutional duty”. Moreover, both research projects date back more than five years, which, the Commission stated, is the limit identified in the Rules of Procedure.

23. Another case raised by the complainant involved a large international cohort study on long term mobile phone use and health carried out by an international consortium of five European countries (namely, the United Kingdom, Denmark, Sweden, Finland, and the Netherlands). Each of the participating countries launched their own prospective cohort study on mobile phone and health risks associated with electromagnetic fields. Depending on the country, funding comes from national research institutions with or without contributions from the industry. In this case, the industry provides exposure data (through operator traffic records) in order to better estimate the use of mobile phones. Also in this case the main partners of the project were universities or research institutes in Member States.

24. As regards shares held by an expert in a telecommunications company, the specific case raised by the complainant was discussed with the relevant expert. The amount of shares owned by the expert was negligible, and therefore it was considered not to have any influence on his personal financial situation, that could give rise to a conflict of interest.

The Ombudsman's assessment

25. The development of public policy by the Commission in technically complex areas requires the scientific input of experts. The advice that the Commission obtains from SCENIHR, including from the working groups set up by SCENIHR, must be independent advice. Such independent



advice allows the Commission to adopt policies which are both technically sound and which benefit from a high degree of legitimacy. Public trust in the policies eventually developed, and the legitimacy of such policies in the eyes of the public, will be weakened if the independence of those experts is questioned. This is all the more important where the underlying scientific issues are related to the health and safety of citizens. It is therefore important for the public body concerned to ensure that the experts called upon to give independent advice do not have conflicts of interests which might affect their ability to give impartial and complete scientific advice. This might be the case, for example, if the experts had an interest in the commercial success of a company operating in the sector concerned.

26. Even if a conflict of interest does not exist, public trust in the public policies will be damaged if there is a perception in the eyes of the public that conflicts of interest exist. It is thus also important, in terms of building public trust and legitimacy, that any perception of a conflict of interest is also dealt with. When assessing the issue of conflicts of interest, the Commission must take into consideration that in general, neither its services nor citizens are in a position to challenge the soundness of scientific advice; trust in the advice is therefore primordial. Moreover, the Commission must have in mind that in general, citizens may not know all the information available to the Commission or they may not be able to get timely access to it; trust in the Commission's assessment is therefore primordial.

27. In this case the reply that the Commission gave initially to the complainant's concerns was inappropriate. It was so because it left the reader with the impression that the Commission had a unduly narrow view of what may be a conflict of interest, namely that the Commission would find a conflict of interest only if the experts derived personal benefits from performing the public task they were entrusted with. Understandably the complainant found the reply unsatisfactory.

28. However, the Ombudsman has, on the basis of the Commission's opinion and the inspection of the file, no doubts that the Commission in 2014 made a thorough reassessment of the conflicts of interest, which was not limited to the question whether the expert derived personal benefits from participating in the working group. The process is also well documented.

29. The Ombudsman is also satisfied that the Commission's conclusion that there were no conflicting interests is adequate and reasonable. As concerns in particular consultancy services, the Ombudsman notes that they were of extremely limited scope (in one case sitting on an advisory committee for two half days a year). The limited scope should have been mentioned explicitly by the Commission. The issue in a case like this is whether there are circumstances present that put in doubt the independence of the experts. The scope of the consultancy is a relevant factor in that assessment and should therefore have been mentioned by the Commission.

30. Moreover, the inquiry has showed that in some aspects there is scope for improvement. The Ombudsman shall now address those and thereafter make suggestions for improvement in the future.



31. In the first place, the Ombudsman believes that the process, although it is well documented, could be improved by a certain formalisation in the form of procedural rules. The Ombudsman shall here recall that procedural rules ultimately act as safeguards for reaching a right result on substance. Providing that the decision to be taken upon examination of the conflicts of interest should be laid down in a **formal document** and a **clear designation of the officer responsible** for taking the decision may be helpful tools in ensuring that the right conclusions are arrived at. Such procedural rules may enhance citizens' trust in the administration and may also be helpful for the services tasked with carrying out an assessment of conflicts of interests. Moreover, the Commission should consider **sharing its assessment with citizens, for instance by making it available on its website.**

32. In the second place, the Ombudsman has noted the Commission's statement that the names of experts in working groups as well as their declarations of interest are not published until a preliminary opinion is published; that is at a moment when the work of the working group is largely accomplished. The Commission holds that in this way any influence from third parties is avoided at the stage when the scientific assessments are made. This is indeed a valid concern.

33. However, the concern must be balanced against other concerns. Citizens' trust in the administration would be enhanced if they could know earlier who is on the working group and voice their concerns. Citizens may actually also bring to light information of which the Commission does not have knowledge, before the experts are engaged by the Commission. It appears more adequate that possible objections to members of the working group are dealt with at the beginning rather than at the end of the work of the group. Moreover, the Commission's current practice may unintentionally create a bias in the sense that there may be reluctance to find a conflict of interests at the end of the work of the working group. If it turns out, at the end of the existence of the working group and on the basis of information provided by citizens, that some scientists should rightly not have participated, the work may have been done in vain.

34. The Ombudsman notes that the names of the SCENIHR members and their declarations of interest are made public at an earlier stage, namely in the context of their appointment. [4] The Ombudsman fails to understand for which reasons that practice cannot apply to members of working groups. The Ombudsman has also noted that the practice of the WHO is to publish information of working group members before they are appointed, with a view to giving the public a possibility to voice objections. [5]

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There was no maladministration by the European Commission.



Suggestions for improvement

The Commission should consider introducing the following measures:

- (i) **The assessment of possible conflicts of interest and the reasons underpinning it should be laid down in a formal document that is available to the public;**
- (ii) **The officer(s) responsible for taking the decision on possible conflicts of interest should be clearly designated; and**
- (iii) **The names of the members of a working group like the one at issue in this case should be published before their appointment, allowing the wider public to raise the concerns it may have as regards conflicts of interest.**

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 18/04/2017

[1] "Final Opinion on Potential Health Effect of Exposure to Electromagnetic Fields", available at http://ec.europa.eu/health/scientific_committees/emerging/docs/scenihr_o_041.pdf [Link]

[2] The Rules of Procedure applicable at the time are available at https://ec.europa.eu/health/sites/health/files/scientific_committees/docs/rules_procedure_2013_en.pdf [Link].

[3] Issue covered by Directive 2013/35 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 83/191 and repealing Directive 2004/40, OJ 2013 L 179, p. 1.

[4] SCENIHR members are appointed in their personal capacity following a public call for expression of interest. The names of SCENIHR members are published in the Register of Commission Expert Groups and on the website of DG SANTE. The declarations of interest, among others, are also published on that website.

[5] See for instance <http://www.who.int/ipcs/events/2015/nanomaterials/en/> [Link].